

NO. 49055-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEPHANIE KEEN,

Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Ms. Keen was initially arrested for obstructing a law enforcement officer. At the time of her arrest, a purse was found near her on the floor. The officer never saw Ms. Keen holding the purse but assumed it belonged to her and took custody of the item. The officer searched the purse after placing Ms. Keen in back seat of his patrol car and found methamphetamine inside the purse.

The trial court denied the defense motion to suppress evidence and found the search of the purse to be a lawful search incident to arrest pursuant to *State v. Brock*, 184 Wn.2d 148, 355 P.3d 1118 (2015). The trial court erroneously found that *Brock* represented a change in law from *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013) and held that personal items transported to the jail with an arrested person are in the arrestee's actual possession and, therefore, subject to search even if the person did not have actual and exclusive possession of the item at or immediately preceding the time of their arrest. The *Brock* court, however, did not change the law regarding when an item can be considered part of an arrestee's person. *Brock* clearly held that "[t]he distinction as to whether a particular personal item constitutes part of the arrestee's person, as opposed to just part of the surrounding area, turns on whether the arrestee had 'actual and exclusive possession at or immediately preceding the time of arrest.'" *State v. Brock*,

184 Wn.2d 148, 154, 355 P.3d 1118 (2015) (quoting *State v. Byrd*, 178 Wn.2d 611, 623, 310 P.3d 793 (2013)).

Ms. Keen was not in actual and exclusive possession of the purse at or immediately preceding the time of her arrest. Therefore, the purse could not have been considered part of her person. Because the officer lacked lawful authority to search the purse, all evidence obtained from the unlawful search should have been suppressed.

Additionally, at the sentencing hearing, the trial court conducted an insufficient inquiry into Ms. Keen's present and future ability to pay before imposing discretionary legal financial obligations. Accordingly, if this conviction is not reversed based on the unlawful search of the purse, it is respectfully requested this Court remand the case to the trial court pursuant to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

II. ASSIGNMENTS OF ERROR

A. The trial court erred in denying Ms. Keen's motion to suppress evidence pursuant to CrR 3.6.

B. The trial court erred in entering finding of fact 1.30 appearing at CP 23 because substantial evidence did not support a factual finding that the officer searched the purse because he was going to take the purse with Ms. Keen to the hospital for a mental health check.

C. The trial court erred by conducting an insufficient inquiry into Ms. Keen's current and future ability to pay prior to imposing discretionary legal financial obligations at the sentencing hearing.

III. ISSUES PRESENTED

A. Washington courts have held that a warrantless search incident to arrest may be justified if the person arrested had actual and exclusive control of the personal item at or immediately preceding the time of arrest. Because Ms. Keen did not have actual and exclusive possession of the purse at or immediately preceding the time of her arrest, did the trial court err in denying the motion to suppress evidence?

B. Did the trial court err in finding that *State v. Brock*, 184 Wn.2d 148, 355 P.3d 1118 (2015) was a change in the law regarding the time of arrest rule? Did *Brock* overrule the holding in *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013)? Does *Brock* hold that personal items that will go to the jail with an arrestee are part of an arrestee's person and thus subject to a lawful search even if the arrestee constructively possessed the item?

C. If the trial court erred in denying the motion to suppress evidence and where no other evidence supported Ms. Keen's conviction, must her conviction be reversed and the charges dismissed with prejudice?

D. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court held trial courts must make an individualized inquiry into a defendant's current and future ability to pay before the court imposes discretionary legal financial obligations. Did the trial court make a sufficient inquiry into Ms. Keen's current and future ability to pay? If the trial court failed to make a sufficient inquiry, must the matter be remanded for a proper inquiry by the trial court?

IV. STATEMENT OF THE CASE

A. Procedural History

Ms. Keen was charged in Lewis County Superior Court No. 15-1-00532-21 with one count of possession of methamphetamine in violation of RCW 69.50.4013 and 69.50.206(d)(2) for conduct alleged to have occurred on September 26, 2015. CP 1-3. The defense filed a motion to suppress evidence and a hearing was held on February 3, 2016. CP 4-13. At the conclusion of the hearing, the trial court denied the defense motion to suppress. 2/3/16 RP 50.

After the denial of the defense motion to suppress, Ms. Keen opted to waive her right to a jury trial and requested a stipulated facts trial. 3/17/16 RP 2-3. After reviewing the stipulated facts, the trial court found Ms. Keen

“guilty beyond a reasonable doubt of possession of methamphetamine.”
3/18/16 RP 7.

B. Suppression Hearing

At the suppression hearing, the State presented the testimony of City of Centralia Officer Tracy Murphy. 2/3/16 RP 5. Officer Murphy testified that he was dispatched to the Chevron Station located at 1050 Harrison Avenue in Centralia on September 26, 2015. Dispatch informed the officer “Stephanie Keen was on the line reporting that someone was chasing her, a subject by the name of Allen, and was shooting at her.” 2/3/16 RP 5-6. While driving to the scene, the officer learned that “Ms. Keen had just been dealt with by the Lewis County Sheriff’s office and had been dropped off in Centralia . . . near the Chevron.” 2/3/13 RP 6. According to the officer, Ms. Keen had been dropped off by the sheriff’s office approximately seven minutes prior to his dispatch to the location. 2/3/16 RP 6.

The officer arrived on the scene and noted the business was operating normally. “I was expecting to see chaos, and everything was calm and appeared normal.” 2/3/16 RP 6-7. “[I]t was apparent that what she was reporting and what she was claiming was not the truth, was not what was going on.” 2/3/16 RP 19.

Officer Murphy spoke with the store clerk who told him that Ms. Keen “had ran into the men’s bathroom and locked herself in there.” 2/3/16

RP 8. The officer approached the men's bathroom and directed Ms. Keen to open the door. 2/3/16 RP 8. According to the officer, Ms. Keen refused.

The first time I asked her to open the door, she responded no, that she wouldn't open the door, and then I asked her a couple more times, and I told her, "This is the police. You need to open the door," a couple more times, and she still refused to open the door.

2/3/16 RP 9. The officer then asked the store clerk for a key to open the door. 2/3/16 RP 9.

The officer testified that he was unable to open the door with the store key. "So when I put the key in, as I was turning I could feel resistance on the inside as if somebody was holding onto the deadbolt throw, whatever you call it, the key on the inside. *** It just didn't work." 2/3/16 RP 9. Officer Murphy then used his multi-tool to open the door. "I could feel the resistance, and I could feel her right up next to the door, so I knew she was right there holding it. And I was able to overpower her and get the deadbolt open[.]" 2/3/16 RP 9-10. The officer testified he had to use force to actually enter the bathroom. "I attempted to push the door open, but she was – had her body up against it and was holding it closed." 2/3/16 RP 10. After a couple of attempts, Officer Murphy "shoved the door open". 2/3/16 RP 10.

Ms. Keen was immediately taken into custody once the officer entered the bathroom.

[A]s the door flew open and I followed after the door to go in, she was, you know, falling backwards, because I shoved the door open

pretty hard. So she goes falling, you know. Her arms are up, and she's getting shoved backwards by the door. I come right in, and I'm charging her, telling her to get on the ground just as I'm grabbing ahold of her, and she says, "Okay, okay." And once I got my hands on her, she just immediately went to the ground, where I was able to secure her in handcuffs.

2/3/16 RP 10. According to the officer, Ms. Keen told him to "look at the bullet holes in the wall, they were shooting at her through the wall." 2/3/16

RP 12. The officer noted there were no holes in the walls and nothing to indicate that somebody had been shooting at Ms. Keen. 2/3/16 RP 12.

Officer Murphy testified he arrested Ms. Keen because he had to use force to enter the bathroom. "I had to use force, so that ends up for me, yes, you're getting arrested." 2/3/16 RP 24. The officer further testified he intended to arrest Ms. Keen for obstruction prior to forcing the door open.

Yeah, at that point where I was forcing the door open and I was going in and, you know, I'm trying to turn the door and she's not letting me turn the door, at that point, I mean, I charged in there to get her under control because I knew she was getting arrested.

2/3/16 RP 25.

The officer noticed a purse on the ground in the bathroom near Ms. Keen. "There was a purse that I at the time assumed was hers, because it was on the ground right next to her when I was hooking her up, and a bottle of water." 2/3/16 RP 11. The officer testified the purse was "less than a foot" and "[w]ithin six inches probably" from Ms. Keen. 2/3/16 RP 11. He further testified the purse was on the ground. The officer never saw Ms.

Keen have the purse in her hands, on her person or around her shoulder.
2/3/16 RP 26.

The officer seized the purse and water bottle as he removed Ms. Keen from the bathroom. 2/3/16 RP 11. Ms. Keen was then taken outside and placed in the backseat of the officer's vehicle. 2/3/16 RP 13-14. The purse was placed on the trunk of the car. 2/3/16 RP 14. The officer searched Ms. Keen's purse and found suspected methamphetamine. 2/3/16 RP 15. He then advised Ms. Keen she was under arrest for possession of methamphetamine. 2/3/16 RP 15.

When asked why he took the purse from the bathroom, the officer testified:

Because she was being arrested, and it was her – I mean, I assumed it was her property. It was in the bathroom. She was the only one there. She's a female in a men's bathroom. I just – I assumed that the purse belonged to her.

2/3/16 RP 14. The officer further testified he intended to transport the purse to the jail along with Ms. Keen. "The purse was going with her. It was her property." 2/3/16 RP 14 The officer was then asked why he searched the purse. According to Officer Murphy, "I was looking for weapons, and then I wanted to get her ID. *** I wanted to positively identify her as the name that was presented, because I needed her information for the booking sheet, the arrest referral and citation." 2/3/16 RP 14.

The officer testified he frisked Ms. Keen while in the bathroom and did not find any weapons. 2/3/16 RP 30. The officer agreed Ms. Keen had no access to the purse once she was handcuffed in the bathroom. “So right. I have her. I have the purse. I escort her immediately out to my car, put her in the car, shut the door, open the purse.” 2/3/16 RP 30. Ms. Keen was handcuffed when she was escorted out of the bathroom and still in handcuffs when placed in the back of Officer Murphy’s car. 2/3/16 RP 32.

Officer Murphy testified he searched the purse incident to arrest. 2/3/16 RP 31. “I was going through and searching the purse. Like I said, initially what I was looking for was I wanted to get her ID, I wanted to get her – look for weapons. *** It’s going to be an incident-to-arrest search.” 2/3/16 RP 30-31. The officer never asked Ms. Keen to identify herself. 2/3/16 RP 32. When asked if the purse was searched for officer safety, the officer testified:

Well, it’s not just that. She’s going to jail. I can’t – the jail doesn’t accept it. I have to get any weapons out of that purse. *** So, I mean, yes, it’s an officer safety issue, but she’s in handcuffs in the back of my car. I have to search that purse and remove any contraband or anything that’s dangerous, illegal, because it can’t go to the jail.

2/3/16 RP 31.

The officer testified it was initially his plan to transport Ms. Keen to the hospital for a mental health evaluation.

When I arrested her, my impression was that she was under the influence of a drug, but there was also a possibility that she could have mental health issues, based on the information that I received from dispatch that the sheriff's office had dealt with her a few times in the past couple of days having hallucinations, paranoia, yet they found everything unfounded in their call logs.

2/3/16 RP 14-15. The officer further testified:

My plan was to transport her to the hospital for a mental health evaluation. If the mental health professional deemed that she was a danger and was going to be committed for the 72-hour hold, then she would have been referred for obstructing. If the mental health professional said no, she's fine, it's not a mental issue, it just makes sure that my case for obstructing is going to be – you know, that won't be an issue down the road.

2/3/16 RP 15. The officer never took Ms. Keen to the hospital for an evaluation, however, because “once I found the meth in her purse, it was obvious to me that it wasn't a mental issue, it was you know, her drug use that's causing the issue.” 2/3/16 RP 16. He then transported Ms. Keen to the jail. 2/3/16 RP 16. The purse was placed in Ms. Keen's property at the jail. 2/3/16 RP 16.

Once the testimony concluded, the State argued the search of the purse was lawful as a search incident to arrest.

The state submitted a brief back in November. *** So I argued both community caretaking and search incident to arrest, and I think after hearing Officer Murphy's testimony, we're really looking at a search incident to arrest here.

2/3/16 RP 33. The State then argued any personal items that go to the jail with an arrestee are considered part of their person and therefore subject to a lawful search.

And just before this incident occurred, the state Supreme Court decided *State v. Brock*, and in that particular case, there's a great deal of analysis, but personal items that go to the jail with an arrestee are considered part of the arrestee's person, and they are in the arrestee's possession, and officers just have authority to search what's going to go to the jail with an arrested person.

2/3/16 RP 33-34. The defense argued the search of the purse was not a lawful search incident to arrest. "The searches do not extend to all articles in an arrestee's constructive possession but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." 2/3/16 RP 42. During its rebuttal, the State argued that *Brock* represented a change in law from the Washington Supreme Court's prior decision in *State v. Byrd*.

So *Brock* by virtue of law makes that very, very close proximity, that purse that was with her, part of her person. That's what *Brock* changes. It says these items that would go with them are part of their person. The distinction is not whether they're six inches away. *** Clearly it's part of her person. Officer Murphy picked it up because he knew he was going to take that to the jail with the defendant. It was the defendant's purse, and it was part of her person under *Brock*.

2/3/16 RP 47-48. After hearing the testimony presented and argument from counsel, the trial court denied the defense motion to suppress evidence.

2/3/16 RP 49.

C. Trial Court's Denial of Motion to Suppress

Relying on the Washington Supreme Court's decision in *State v. Brock*, the trial court found the search of the purse justified as a search incident to arrest.

I find that there was probable cause here for the arrest. She was under arrest, and the search here, since these were items that were going with, under *Brock* clearly that applies to this case. Those are items that can be searched. *** I agree that *Brock* changed the law. It changed the standards for those searches. It was a significant change.

2/3/16 RP 49-50.

Findings of Fact and Conclusions of law were prepared by the State and presented to the trial court on March 18, 2016. CP 21-25; 3/18/16 RP 2-6. The defense objected to proposed finding of fact 1.30.

And then 1.30, I don't recall the testimony being that Officer Murphy searched the purse because he was going to take the purse with the defendant to the hospital for a mental health check. I know that he intended to do the things that are referenced in paragraph 1.30, he intended to take her to the hospital, he intended to look into whether there would be a hold, make a determination about booking. But the searching because of taking her there, I know the court concluded it was incident to arrest and there was some discussion in cross-examination about why he was searching, but I don't recall that he either testified to or that a conclusion was drawn that the search was related to him having to take her to the hospital.

3/18/16 RP 3-4. The Court responded to the defense objection.

Well, I guess the way that's worded, it could be a little bit I think the gist of this is that that was the route – he was going to do those things but ultimately it was ending up going to the jail, that

was one of the reasons he searched the purse, because she was going to be transported.

3/18/16 RP 4. The State concurred.

And that was my understanding as well. The way that I phrased it here, that Officer Murphy searched the purse because he was going to take the purse with the defendant, so there are really two parts: He searched it because he was taking the purse with the defendant, and then I continue on to explain where he was taking her and why.

3/18/16 RP 4. The Court then found that the proposed finding of fact as written was "accurate". 3/18/16 RP 5.

D. Sentencing Hearing

A sentencing hearing was held on May 25, 2016. As part of its recommendation, the State requested that the trial court impose non-mandatory costs including "\$1,200 attorney's fees, \$1,000 VUCSA fine, \$100 crime lab fee *** and \$1,000 jail costs." 5/25/16 RP 4. Prior to imposing the sentence, the trial court asked for information regarding Ms. Keen's "financial situation and employment". 5/25/16 RP 7.

COURT: All right. What about your client's financial situation and employment? I'll just ask you that. Is there any physical or emotional or other reason why you can't work and earn an income? Do you work?

KEEN: No, I'm not currently working. I was going through social security and that's done and I was just kind of waiting for this to wrap up before I –

COURT: What do you mean Social Security done? How was it done?

KEEN: I have decided not to pursue it.

COURT: Okay. So do you anticipate when you're done with all this going back to work?

KEEN: Absolutely.

COURT: Okay. All right.

5/25/16 RP 7. Defense counsel then requested that the court allow Ms. Keen to pay \$25 per month towards financial obligations. "So we'd ask for – I think she's able to pay and we'd ask for \$25 a month." 5/25/16 RP 7. The court then imposed a First Time Offender Waiver and ordered discretionary costs.

The financial obligations will be: \$500 crime victim assessment, \$200 filing fee, \$900 attorney fee, \$1000 VUCSA fine, \$100 lab fee, \$100 DNA fee. *** I'll find she has the ability to make payments based on her statement that she intends to work.

5/25/16 RP 8-9. Ms. Keen was ordered to make monthly payments of \$25 to begin 90 days from the date of her sentencing. 5/25/16 RP 9.

V. ARGUMENT AND AUTHORITIES

A. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE BECAUSE THE WARRANTLESS SEARCH OF THE PURSE CANNOT BE JUSTIFIED AS A SEARCH INCIDENT TO ARREST.

An appellate court reviews the lower court's conclusions of law *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

a. Warrantless searches are *per se* unconstitutional.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1960). The federal constitution, however, only establishes the minimum level of protection for individual rights. *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984).

"It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. *See State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999); *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). Indeed, the scope of the protections offered by article I, section 7 is "not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to

hold, safe from governmental trespass absent a warrant.'" *Parker*, 139 Wn.2d at 494 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

Warrantless searches and seizures are "per se" unreasonable under both the state and federal constitutions. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998); *State v. Chrisman*, 100 Wn.2d 814, 818, 676 P.2d 419 (1984); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct 2022 (1971). The Washington Supreme Court has warned that "[w]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so." *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989)(quoting *United States v. Impink*, 728 F.2d 1228, 1231 (9th Cir. 1984). A warrantless search is thus presumed unlawful unless the State proves that it falls within one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). This rule is a strict one. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The government bears the heavy burden of establishing an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

b. Search incident to arrest is a narrowly drawn exception to the warrant requirement.

A search incident to a lawful arrest is a recognized exception to the warrant requirement. *State v. Boursaw*, 94 Wn. App. 629, 632, 976 P.2d 130 (1999). The exception authorizes warrantless searches in two distinct circumstances. “The search incident to arrest embraces not one but two analytically distinct concepts under Fourth Amendment and article I, section 7 jurisprudence.” *State v. Byrd*, 178 Wn.2d 611, 617, 310 P.3d 793, 796 (2013); *State v. Brock*, 184 Wn.2d 148 154, 355 P.3d 1118 (2015).

The first circumstance is when “a search may be made of the area within the control of the arrestee.” *Byrd* at 617. (quoting *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467 (1973)). The only legitimate purpose of such a search is to look for weapons and to prevent the destruction of evidence. *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct 2034 (1969); *State v. McKenna*, 91 Wn. App. 554, 560-61, 958 P.2d 1017 (1998). To be lawful, such searches must be supported by articulable objective concerns for officer safety and evidence preservation. “A valid search . . . requires justification grounded in either officer safety or evidence preservation – there must be some articulable concern that the arrestee can access the item in order to draw a weapon or destroy evidence.” *State v. Brock*, 184 Wn.2d at 154; *State v. Byrd*, 178 Wn.2d at 617.

The second circumstance is when a warrantless search may be made of the person arrested and their personal effects by virtue of the lawful arrest. “Unlike items in the immediately surrounding area, the officer does not need to articulate any objective safety or evidence preservation concerns before validly searching the item.” *State v. Brock*, 184 Wn.2d at 155.

In *Robinson*, the Court held that under “the long line of authorities of this Court dating back to *Weeks* [*v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)]” and “the history of practice in this country and in England,” searches of an arrestee’s person, including articles of the person such as clothing or personal effects, require “no additional justification” beyond the validity of the custodial arrest.

State v. Byrd, 178 Wn.2d at 617–18 (quoting *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467 (1973)). The *Byrd* court explained:

Because this exception is rooted in the arresting officer’s lawful authority to take the arrestee into custody, rather than the “reasonableness” of the search, it . . . satisfies article I, section 7’s requirement that incursions on a person’s private affairs be supported by “authority of law.”

Id. at 618. Where an arrest is lawful, there is authority to search. *State v. Grande*, 164 Wn.2d 135, 139, 187 P.3d 248 (2008). However, the Washington Supreme Court has been clear, that for the search of an arrestee’s personal effects to be justified, the arrestee must have had “actual possession of it at the time of the lawful custodial arrest.” *State v. Byrd*, 178 Wn.2d at 621; *State v. Brock*, 184 Wn.2d at 154. See also *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014). “Many courts,

including Washington courts, draw a bright line between these two prongs of the search incident to arrest exception with the ‘time of arrest’ rule.”

State v. Byrd, 178 Wn.2d at 621.

In *Byrd*, the Washington Supreme Court cautioned that the scope of the time of arrest rule is narrow and explicitly held that it “does not extend to all articles in an arrestee’s constructive possession, but only those personal articles in the arrestee’s actual and exclusive possession at or immediately preceding the time of arrest.” *Id.* at 623. “Searches of the arrestee’s person incident to arrest extend only to articles ‘in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person.’” *Id.* (quoting *United States v. Rabinowitz*, 339 U.S. 56, 78, 70 S.Ct 430 (1950)). The *Byrd* court held that broadening the rule to include “articles within the arrestee’s reach but not actually in his possession exceeds the rule’s rationale and infringes on territory reserved to *Gant* and *Valdez*.” *Id.*

Here, the trial court erroneously found *Brock* broadened the time of arrest rule by holding that “personal items that will go to the jail with the arrested person are in the arrestee’s possession.” CP 24. That is, even if an arrestee constructively possesses an item at or immediately preceding the time of arrest, the item is actually possessed as a matter of law if the item will be transported to the jail with the person. 2/3/16 RP 49-50;

3/18/16 RP 5-6; CP 24. In so holding, the trial court appeared to focus on one sentence in the Washington Supreme Court's decision in *Brock*. "Put simply, personal items that will go to the jail with the arrestee are considered in the arrestee's 'possession' and are within the scope of the officer's authority to search." *State v. Brock*, 184 Wn.2d at 158. The trial court's reliance on this sentence was misplaced. In making this assertion, the *Brock* court was explaining why the Court of Appeals decision was incorrect and should be overturned.

In determining the scope of the phrase "immediately preceding", the Court of Appeals focused on the temporal component – the time between Brock's exclusive possession and his arrest – and determined that he did not possess the backpack "immediately" before arrest because it sat in the patrol truck for nearly 10 minutes before Brock was arrested.

In so holding, the court reiterated that the search incident to arrest exception is narrow and that 10 minutes simply cannot similarly be considered "immediately preceding" arrest. The Court of Appeals' analysis misapprehends the purpose of the time of arrest rule. Although we must draw these exceptions to the warrant requirement narrowly, we do not draw them arbitrarily; the exception must track its underlying justification. Because the search incident to arrest rule recognizes the practicalities of an officer having to secure and transport personal items as part of the arrestee's person, we draw the line of "immediately preceding" with that focus. The proper inquiry is whether possession so immediately precedes arrest that the item is still functionally a part of the arrestee's person. Put simply, personal items that will go to the jail with the arrestee are considered in the arrestee "possession" and are within the scope of the officer's authority to search.

Id. at 157-159.

The sole issue in *Brock* was whether the passage of time between a lawful *Terry* stop and later arrest negated the officer's authority to lawfully search a backpack worn by Brock at the time of his stop.

We have previously applied this rule in cases involving an arrestee who was holding the personal item at the precise moment of arrest. But here, because Brock was separated from his backpack several minutes prior to arrest, the issue involves the scope of "immediately preceding arrest".

State v. Brock, 184 Wn.2d at 154. The court held:

Under these circumstances, the lapse of time had little practical effect on Brock's relationship to his backpack. Brock wore the backpack at the very moment he was stopped by Officer Olson. The arrest process began the moment Officer Olson told Brock that although he was not under arrest, he was also not free to leave. The officer himself removed the backpack from Brock as part of his investigation. *** Once the arrest process had begun, the passage of time prior to the arrest did not render it any less a part of Brock's arrested person.

Id. at 159. The *Brock* court was clear that "whether a particular personal item constitutes part of the arrestee's person, as opposed to just part of the surrounding area, turns on whether the arrestee had 'actual and exclusive possession at or immediately preceding the time of arrest.'" *Id.* at 154 (quoting *State v. Byrd*, 178 Wn.2d at 623). In *Brock*, the Washington Supreme Court reaffirmed its ruling in *Byrd* that the time of arrest rule does not extend to personal items in an arrestee's *constructive* possession.

c. Because the purse was not in Ms. Keen's actual and exclusive possession at or immediately preceding the time of her arrest, the subsequent warrantless search cannot be justified as a search incident to arrest.

The warrantless search of the purse violated both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution. Ms. Keen was not in actual and exclusive possession of the purse at or immediately preceding the time of her arrest. At the suppression hearing, the officer testified he never saw Ms. Keen have the purse in her hands, on her person or around her shoulder. 2/3/16 RP 26. When he entered the bathroom to arrest her, the purse was on the ground approximately six inches from her. 2/3/16 RP 11 There was no evidence Ms. Keen actually possessed the purse. At best, she constructively possessed it. The Washington Supreme Court has made clear that personal items constructively possessed cannot be considered part of the arrestee's person for purposes of the search incident to arrest exception to the warrant requirement. *State v. Bryd*, 178 Wn.2d 611, 617, 310 P.3d 793, 796 (2013); *State v. Brock*, 184 Wn.2d 148 154, 355 P.3d 1118 (2015).

As Ms. Keen did not actually possess the purse at or immediately preceding the time of her arrest, the officer's search of the purse could *only* be justified as a search incident to arrest if it were supported by articulable

concerns regarding access to weapons or destruction of evidence. In this case, there was no evidence to support such concerns.

Officer Murphy conceded Ms. Keen had no access to the purse once she was handcuffed in the bathroom. 2/3/16 RP 30, 31. This dispels the notion that a search was required to ensure officer safety or evidence preservation. Upon the officer's entry into the bathroom, Ms. Keen was immediately handcuffed. 2/3/16 RP 10. The officer seized the purse found on the floor and escorted Ms. Keen to his patrol car. 2/3/16 RP 13-14. She was placed in the backseat of the officer's vehicle and the purse was placed on the trunk of the car. 2/3/16 RP 13-14. *See State v. MacDicken*, 179 Wn.2d 939, 941, 319 P.3d 31 (2014) (Searches justified by concerns of officer safety or preservation of evidence are "limited to those areas within reaching distance at the time of the search."); *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2009).

The warrantless search of the purse cannot be justified as a search incident to arrest and was unlawful. Because the State failed to prove that an exception to the warrant requirement justified the search in this case, all evidence obtained from the search should have been suppressed. *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion."); *State v. Duncan*, 146

Wn.2d 166, 176, 43 P.3d 513 (2002) (“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.”); *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.”)

d. Because the evidence seized from the purse should have been suppressed, Ms. Keen is entitled to reversal of her conviction and dismissal of the charges.

Without the evidence obtained from the unlawful search of the purse, the State cannot prove every element of the charge of possession of methamphetamine. In such a circumstance, this court must reverse the conviction and remand for dismissal of the charges with prejudice. *State v. Armenta*, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997) (concluding dismissal appropriate where unlawfully obtained evidence forms the sole basis for the charge.)

B. THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT 1.30 APPEARING AT CP 23 BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE FACTUAL FINDING.

The appellate court reviews the trial court’s findings of fact in a suppression motion for substantial evidence. “When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings

support the conclusions of law.” *State v. Garvin*, 166 Wn. 2d 242, 249, 207 P.3d 1266 (2009). “Evidence is substantial when it is enough ‘to persuade a fair-minded person of the truth of the stated premise.’” *Id.* (quoting *State v. Reid*, 98 Wn.App. 152, 156, 988 P.2d 1038 (1999)). Here, the trial court erroneously entered finding of fact 1.30.

Officer Murphy searched the purse because he was going to take the purse with the Defendant to the hospital for a mental health check and then on to the jail to be booked for obstructing a law enforcement officer if she was not put on a 72-hour civil commitment hold.

CP 23. During the suppression hearing, the officer did not testify he searched the purse because he planned to take it with Ms. Keen to the hospital. While he testified he initially planned to transport Ms. Keen to the hospital for a mental health evaluation, the officer said he searched the purse incident to arrest. 2/3/16 RP 31. He further testified he intended to transport the purse to the jail along with Ms. Keen. “The purse was going with her. It was her property.” 2/3/16 RP 14. Because this factual finding was not supported by substantial evidence, the court erred.

C. THE COURT ERRED BY CONDUCTING AN INSUFFICIENT INQUIRY INTO MS. KEEN'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS PRIOR TO THEIR IMPOSITION.

The Washington Supreme Court has held that RCW 10.01.160 requires the record to reflect that a court made an individualized inquiry

into a defendant's current and future ability to pay before the court imposes discretionary legal financial obligations. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). RCW 10.01.160 provides:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). "This inquiry . . . requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id.* at 839. In so ruling, the *Blazina* court suggested that courts look to the comment in GR 34 for guidance in considering a defendant's ability to pay.

This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. ***Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.***

Id. at 838-39 (citations omitted) (emphasis added). The Washington Supreme Court further analyzed imposition of discretionary legal financial

obligations in *City of Richland v. Wakefield*, __ Wn.2d __, 380 P.3d 459 (2016) and reiterated the punitive consequences of these costs on indigent defendants.

“[O]n average, a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.” Given this reality, trial courts should be cautious of imposing such low payment amounts in the long term for impoverished people.

Id. (quoting *State v. Blazina*, 182 Wn.2d 836, 344 P.3d 680 (2015)).

Here, the trial court conducted a cursory inquiry into Ms. Keen’s current and future ability to pay prior to imposing discretionary legal financial obligations.

COURT: All right. What about your client’s financial situation and employment? I’ll just ask you that. Is there any physical or emotional or other reason why you can’t work and earn an income? Do you work?

KEEN: No, I’m not currently working. I was going through social security and that’s done and I was just kind of waiting for this to wrap up before I –

COURT: What do you mean Social Security done? How was it done?

KEEN: I have decided not to pursue it.

COURT: Okay. So do you anticipate when you’re done with all this going back to work?

KEEN: Absolutely.

COURT: Okay. All right.

5/25/16 RP 7. The court then found Ms. Keen had the ability to make payments “based on her statement that she intends to work” and imposed discretionary legal financial obligations totaling \$2000¹. 2/25/16 RP 8-9.

The trial court’s limited inquiry was inadequate to sufficiently inform the court as to Ms. Keen’s current and future ability to pay discretionary costs. Despite Ms. Keen’s comment that suggested she had applied for social security benefits, there was no follow up from the trial court regarding *why* Ms. Keen was seeking social security benefits. The court also failed to ask Ms. Keen any questions regarding her financial status such as: how long it had been since her last period of employment, the type of employment she might obtain in the future, her current income, her debts, her living expenses and the cost of her current treatment program². Ms. Keen was found indigent at trial and for purposes of appeal. CP 48-52; 53-54. “[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *State v. Blazina*, 182 Wn. 2d 827, 839, 344 P.3d 680 (2015).

¹ The trial court imposed the following discretionary legal financial obligations: \$900 attorney fee, \$1000 VUCSA fee and \$100 lab fee. Mandatory legal financial obligations were also imposed for the \$500 crime victim assessment, \$200 filing fee and \$100 DNA fee. 5/25/16 RP 8.

² At sentencing, Ms. Keen informed the trial court she was participating in a two-year intensive outpatient treatment program for substance abuse. 5/25/16 RP 6.

The trial court's brief inquiry was insufficient to satisfy the requirements of RCW 10.01.160(3). Therefore, if this conviction is not reversed based on the unlawful search of the purse, it is respectfully requested this Court remand the case to the trial court for further inquiry regarding Ms. Keen's ability to pay discretionary legal financial obligations pursuant to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

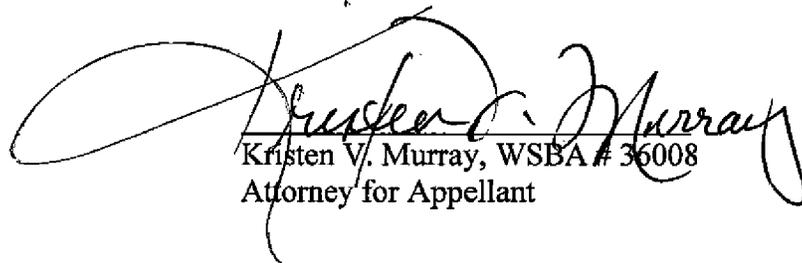
VI. CONCLUSION

The warrantless search of the purse cannot be justified by the search incident to arrest exception to the warrant requirement and was unlawful. Consequently, the trial court erred in denying the motion to suppress evidence. Without this inadmissible evidence, there is insufficient evidence to support Ms. Keen's conviction for unlawful possession of methamphetamine. Accordingly, her conviction should be reversed and the charge dismissed with prejudice.

If Ms. Keen's conviction is not reversed based on the unlawful search of the purse, it is respectfully requested that this court remand the case to the trial court for further inquiry regarding Ms. Keen's ability to pay discretionary legal financial obligations pursuant to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Finally, should this court reject Ms. Keen's arguments on appeal, she asks that the court issue a ruling precluding the State from seeking any reimbursement for costs on appeal due to her continued indigency.³ *State v. Sinclair*, 192 Wn.App. 380, 367 P.3d 612 (2016).

Respectfully submitted this 4th day of November, 2016.



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Attorney for Appellant

³ Ms. Keen was found indigent at trial and, after her conviction, submitted a Declaration requesting review of her conviction at public expense. CP 48-52. The sentencing court found Ms. Keen to be indigent and waived court costs and court appointed attorney fees on appeal. CP 53-54

DECLARATION OF SERVICE

I hereby declare that on November 4, 2016, I filed the Appellant's Brief via Electronic Filing for the Court of Appeals for Division II and delivered via E-mail the same to:

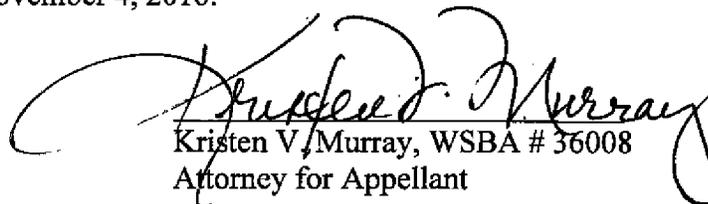
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I further declare that I delivered via United States Postal Service the same to:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated November 4, 2016.


Kristen V. Murray, WSBA # 36008
Attorney for Appellant

HART JARVIS CHANG PLLC

November 04, 2016 - 2:51 PM

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