

No. 49055-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STEPHANIE KEEN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUE

- A. Did the trial court err when it denied Keen's motion to suppress the evidence recovered from her purse after a warrantless search?
- B. Did the trial court perform an adequate inquiry of Keen's ability to pay prior to imposing discretionary legal financial obligations?

II. STATEMENT OF THE CASE

On September 26, 2015, at approximately 11:26 a.m., Stephanie Keen called law enforcement and reported that a man named "Alan" was chasing her and shooting at her. RP (2/3/16) 5-6; CP 21. Keen reported she was at the Chevron station at 1050 Harrison, in Centralia, Washington. RP (2/3/16) 5; CP 21.

Centralia Police Officer Murphy was advised while en route that Keen had been dropped off near the Chevron by a Lewis County Sheriff's Deputy around 11:19 a.m. RP (2/3/16) 6; CP 21. Apparently, Keen had been delusional at that time. RP (2/3/16) 14-15; CP 21.

Upon arrival, Officer Murphy noticed business was being carried on as usual at the Chevron. RP (2/3/16) 6-7; CP 22. Officer Murphy found this odd and inconsistent with the report from Keen of shots being fired. RP (2/3/16) 7; CP 22.

Officer Murphy spoke with a customer who said Keen was inside and appeared to be uninjured despite Keen's claim she had been shot. RP (2/3/16) 7; CP 22.

Next Officer Murphy spoke to the cashier. RP (2/3/16) 8; CP 22. The cashier said Keen had asked the cashier to call law enforcement. *Id.* Since the cashier did not know why Keen wished to call law enforcement, the cashier dialed the telephone and handed it to Keen. *Id.*

According to the cashier, Keen had locked herself in the men's bathroom. RP (2/3/16) 8; CP 22. Officer Murphy approached the men's bathroom and could hear yelling from inside the bathroom. RP (2/3/16) 8. Officer Murphy knocked on the bathroom door and identified himself as a police officer. RP (2/3/16) 8; CP 22. Keen refused to open the door. RP (2/3/16) 9; CP 22. Officer Murphy again identified himself as a police officer, and Keen again refused to open the door. *Id.*

Officer Murphy got a "blank" key from the cashier for the men's bathroom. RP (2/3/16) 9; CP 22. Officer Murphy attempted to use the key to unlock the door. *Id.* Officer Murphy was unable to unlock the bathroom door due to resistance from Keen holding the lock from the inside. *Id.* In his attempt to gain entry into the

bathroom, Officer Murphy used enough force to bend the key in the lock. *Id.*

Officer Murphy next attempted to unlock the door using his multi-tool. RP (2/3/16) 9; CP 22. With the use of his multi-tool, Officer Murphy was able to overcome Keen's resistance on the lock. RP (2/3/16) 9-10; CP 22.

Officer Murphy attempted to open the bathroom door but Keen was pushing against the door and was actively resisting his entry. RP (2/3/16) 10; CP 22. Officer Murphy attempted a second time, using significantly more force, to push through the now unlocked door, and was able to gain entry into the bathroom. RP (2/3/16) 10; CP 22. The force of the entry caused Keen to be pushed back into the bathroom. RP (2/3/16) 10; CP 23.

The men's bathroom was approximately eight feet deep by eight feet wide. RP 10; CP 22. The bathroom contained a single toilet, a single sink, and a trash can. RP (2/3/16) 10-11; CP 22. Officer Murphy and Keen were the only people present in the bathroom. RP (2/3/16) 10-12; CP 22.

When Officer Murphy gained entry into the bathroom Keen was not wearing her purse. RP (2/3/16) 11; CP 22. There was a purse approximately six inches from Keen, between Keen and the

bathroom wall. *Id.* Based upon its proximity to Keen in a locked, men's bathroom, Officer Murphy believed the purse belonged to Keen. *Id.*

Upon entry into the bathroom Officer Murphy ordered Keen to the ground and Keen complied. RP (2/3/16) 10; CP 23. Officer Murphy handcuffed Keen, placing her under arrest for obstructing a law enforcement officer. *Id.* Keen told Officer Murphy to look at the bullet holes in the walls. RP (2/3/16) 12; CP 23. There were no holes in the walls. *Id.*

Officer Murphy picked up Keen, her purse, and her water bottle and escorted Keen to his patrol car. RP (2/3/16) 11-12; CP 23. Keen was placed in the back seat of the patrol car. RP (2/3/16) 14; CP 23. Keen's purse and water bottle were placed on the top of the trunk of the patrol car. *Id.*

Officer Murphy searched Keen's purse. RP (2/3/16) 14-16; CP 23. Officer Murphy searched Keen's purse because he was going to take Keen to the hospital for a mental health check and Keen's purse would be transported with Keen. RP (2/3/16) 14-15; CP 23. Officer Murphy would then take Keen's purse, along with Keen, to the Lewis County jail to be booked for obstructing a law enforcement officer if Keen was not put on a 72-hour civil

commitment hold. *Id.* Officer Murphy would have referred the obstructing a law enforcement officer charge to the prosecuting attorney had Keen been placed on a 72-hour hold for mental health reasons. RP (2/3/16) 15; CP 23.

The search of Keen's purse revealed a baggie. RP (2/3/16) 15; CP 23. The contents of the baggie field-tested presumptively positive for methamphetamine. *Id.* Keen was advised she was under arrest for possession of methamphetamine. *Id.*

Due to the discovery of the methamphetamine, Officer Murphy now believed Keen to be under the influence of the methamphetamine and not suffering from a mental disorder. RP (2/3/16) 15; CP 23. Aid was called to the scene and confirmed Keen did not need to be taken to the hospital. *Id.*

Keen was booked into the Lewis County Jail for possession of methamphetamine. RP (2/3/16) 16; CP 23. Keen's purse and water bottle were given to jail staff on behalf of Keen. *Id.*

The State charged Keen with one count of Possession of a Controlled Substance - Methamphetamine. CP 1-2. Keen filed a motion to suppress the evidence, claiming an unlawful search. CP 4-13. The trial court denied the motion to suppress. RP (2/3/16) 49; CP 24. Keen was convicted after a stipulated facts bench trial. RP

(3/18/16) 7; CP 26-30. Keen timely appeals her conviction and the denial of the motion to suppress. CP 39-47.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY DENIED KEEN'S MOTION TO SUPPRESS THE EVIDENCE.

Keen argues the trial court incorrectly denied her motion to suppress the evidence located in her purse.¹ The trial court appropriately ruled Officer Murphy was permitted to search Keen's purse because she was in possession of the purse at the time of her arrest. Further, there was substantial evidence to support findings of fact 1.30, which Keen has challenged. This court should find the motion challenging the search was correctly denied.

1. Standard Of Review.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859

¹ Keen breaks her argument in regards to the motion to suppress into two sections, one challenging one of the findings and one for the substantive argument. The State will respond to both in this one section.

(2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

2. There Was Substantial Evidence Presented To Sustain Findings Of Fact 1.30.

Keen asserts contrary to the finding of fact 1.30, Officer Murphy did not testify he searched the purse because he was going to transport Keen to the hospital. Brief of Appellant 25. According to Keen, Officer Murphy merely stated he had initially planned on taking Keen to the hospital for a mental health evaluation, but the search of the purse was incident to arrest. *Id.*

Finding of fact 1.30 states:

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.

While Officer Murphy did testify he searched the purse incident to Keen's arrest, he also testified consistent with finding of fact 1.30. RP (2/3/16) 14-15, 31. Officer Murphy stated,

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 last couple days having hallucinations, paranoia, yet they found everything unfounded in their call logs.

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 the obstructing is going to be -- you know, that won't be an issue down the road.

So that was my intent; that was my plan.

RP 14-15. Officer Murphy also stated he searched the purse because it was Keen's property, she was going to jail, and it was going to be transported with her. RP (2/3/16) 14, 31.

Officer Murphy's testimony is sufficient for this court to find substantial evidence to support finding of fact 1.30. The two statements are not inconsistent, Keen was going to the hospital first and then to jail, up until Officer Murphy found the

methamphetamine in Keen's purse. RP (2/3/16) 15. This Court should find the trial court's findings were supported by substantial evidence.

3. The Fourth Amendment And Article One, Section Seven, Protect Citizens From Warrantless Searches And Seizures By Police.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989). "Under article 1, section 7, a warrantless search is per se unreasonable unless the State proves that one of the few carefully drawn and jealously guarded exceptions applies." *Byrd*, 178 Wn.2d at 616 (internal quotations and citations omitted). The

remedy for an unconstitutional search or seizure is exclusion of the evidence that was uncovered and obtained. *State v. Monaghan*, 165 Wn. App. 782, 789, 266 P.3d 222 (2012).

4. Officer Murphy Searched Keen's Purse Incident To Her Lawful Arrest.

Separately, both the state and federal constitutions permit warrantless arrests when the officer has probable cause that a suspect who is in a public place has committed a misdemeanor in the officer's presence. See RCW 10.31.100; *Carroll v. United States*, 267 U.S. 132, 156, 45 S. Ct. 280, 69 L. Ed. 543 (1925). If a police officer lacks probable cause to arrest a person, the arrest is constitutionally invalid rendering any evidence seized tainted and inadmissible. 3 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.1(a), at 4-5 (4th ed. 2004). Probable cause is not proof beyond a reasonable doubt. *State v. Neeley*, 113 Wn. App. 100, 107, 52 P.3d 539 (2002). A reviewing "court's probable cause determination is grounded on a practical, nontechnical review of the total facts of the case under consideration." *Neeley*, 113 Wn. App. at 107 (citations omitted).

When a person is under actual, lawful custodial arrest he or she may be searched incident to that arrest. *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L.Ed.2d 427

(1973); *State v. Byrd*, 178 Wn.2d at 618-19; *State v. O'Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). The right to search incident to arrest is of long pedigree in English and American law. *Weeks v. United States*, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914).² Because the purpose of the search is to ensure officer safety and the preservation of evidence, only the area within the arrestee's reach is subject to search. *Chimel v. California*, 395 U.S. 752, 755-63, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969).

In *Byrd* the Supreme Court cited to the United States Supreme Court's decision in *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) to explain the search incident to lawful arrest exception. *Byrd*, 178 Wn.2d at 617-18.

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.

Id., citing *Robinson*, 414 U.S. at 235 (internal alterations omitted).

The Supreme Court upheld the distinction between searches of an

² Noting that "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested . . . has been uniformly maintained in many cases."

arrestee's person as compared to the arrestee's surroundings. *Byrd*, 310 P.3d at 797. It is not necessary to do a case specific determination that there was an officer safety issue or the search was necessary for evidence preservation when the search is of the person after a lawful custodial arrest. *Id.* A purse can be considered part of an arrestee's person. *Id.*

In *State v. Brock*, the Supreme Court further clarified the search incident to arrest exception in regards to personal items of the arrestee. *State v. Brock*, 184 Wn.2d 148, 335 P.3d 1118 (2015). In *Brock* the defendant was detained as part of a *Terry*³ investigative stop. *Brock*, 184 Wn.2d at 151. At the time Brock was detained by the officer he was wearing a backpack. *Id.* The officer had Brock remove the backpack, and when they moved over to the officer's patrol car, the officer carried the backpack over to the car and set it 12 to 15 feet away from Brock. *Id.* at 151-52. Brock was placed under arrest approximately 10 minutes after his initial contact with the officer. *Id.* at 152. After placing Brock under arrest the officer searched the backpack incident to arrest and discovered marijuana and methamphetamine. *Id.*

³ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).

The key question in Brock was how to define “actual and exclusive possession at or immediately preceding the time of arrest?” *Brock*, 184 Wn.2d 154-58.⁴ Immediately preceding does not necessarily mean in the seconds before the arrest. *Id.* 157-58.

The Supreme Court held,

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 jail with the arrestee are considered in the arrestee’s “possession” are within the scope of the officer’s authority to search.

Id. at 158.

Keen argues because her purse was not attached to her person when the officer saw her, there was no evidence Keen actually possessed the purse. Brief of Appellant 22. Keen states she at best constructively possessed the purse, which was found six inches from her. *Id.* Therefore, according to Keen, she did not possess the purse at the time of her arrest or immediately preceding the time of her arrest and the only justification for the search of the purse would be for destruction of evidence or weapons, which the testimony and evidence does not support. *Id.* at 22-23.

⁴ Citing *Byrd*, 178 Wn.2d at 623.

Officer Murphy was dispatched to the Chevron around 11:26 a.m. and arrived on the scene at 11:34 a.m., eight minutes later. RP (2/3/16) 6. Sometime between the time Keen spoke to the dispatcher at 911 and when Officer Murphy arrived, Keen locked herself in the men's bathroom. *Id.* at 8. Officer Murphy forced entry into the bathroom not long after arriving, after attempting to open the door with a key, and then forcing the lock open with his multi-tool. *Id.* at 9-10.

When Officer Murphy used physical force to open the men's bathroom door Keen fell backwards into the bathroom. *Id.* at 10. Keen was the only occupant of the men's bathroom when Officer Murphy gained entry. *Id.* at 10-12. Keen's purse was approximately six inches from Keen, between Keen and the bathroom wall. *Id.* at 11.

Officer Murphy placed Keen under arrest for Obstructing a Law Enforcement Officer, a misdemeanor committed in his presence. RCW 9A.76.020; RP (2/3/16) 14-15. The purse was in Keen's exclusive possession immediately preceding the time of her arrest. A purse is a personal item, which is closely related to Keen. The item, a woman's purse which was located in a locked men's bathroom, six inches from Keen, where Keen is the single

occupant. Keen had recently entered the men's bathroom, surely carrying her purse with her, locked herself in, and then began to actively resist Officer Murphy's attempts to have Keen exit the men's bathroom.

Keen's argument that Keen was not in actual possession of the purse because the purse was not attached to Keen at the time Officer Murphy gained entry into the bathroom and Officer Murphy had not seen Keen with her purse, perhaps under other facts would lead one to that conclusion. The facts in Keen's case matter. Keen had entered the men's bathroom shortly before the officer arrived on the scene. Keen was a woman in the men's bathroom. Keen was the sole occupant in the bathroom. Keen's purse was located mere inches from her. The totality of the evidence in this case shows Keen was in possession of her purse immediately preceding her arrest. Therefore, Officer Murphy's search of Keen's purse incident to Keen's arrest for Obstructing a Law Enforcement Officer was permissible pursuant to *State v. Brock*. The trial court correctly denied the motion to suppress and this Court should affirm the ruling and Keen's conviction.

B. THE TRIAL COURT INQUIRY OF KEEN REGARDING HER ABILITY TO PAY WAS SATISFACTORY PRIOR TO ITS IMPOSITION OF NON-MANDATORY LEGAL FINANCIAL OBLIGATIONS.

Keen argues the trial court imposed discretionary legal financial obligations, the court appointed attorney fees, VUCSA fine, and lab fee without considering her financial resources and present or future ability to make payments. This is incorrect. The trial court's consideration was satisfactory given its inquiry of Keen. If this Court finds the trial court erred, the correct remedy is to remand this case back to the trial court for the judge to conduct the required inquiry.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

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.

Blazina, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances. *Id.* The trial court must make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id.* In *State v. Duncan*, the Washington State Supreme Court determined that the imposition and collection of legal financial obligations have constitutional implications and may be challenged for the first time on appeal. *State v. Duncan*, 185 Wn.2d 430, 434-38, 374 P.3d 83 (2016).

The State requested and the trial court imposed discretionary legal financial obligations of \$900 (the State actually incorrectly requested \$1,200) for reimbursement of court appointed attorney fees, \$1,000 for VUCSA fine, and \$100 for the crime lab fee. RP (5/25/16) 4, 8; CP 34. The trial court inquired upon Keen if there was any reason, physical or emotional, why she would be unable to earn an income or work. RP (5/25/16) 7. The trial court also inquired if Keen worked. *Id.* Keen explained she was not currently working. *Id.* Keen explained she had been applying for Social Security but had decided not to pursue that route. *Id.* The

trial court asked Keen if she anticipated she would be going back to work. *Id.* Keen replied, "Absolutely." *Id.*

The trial court inquiry was sufficient. This Court should affirm the imposition of the legal financial obligations. If this Court does find the inquiry inadequate, it should remand the case back to the trial court to make the proper inquiry.

IV. CONCLUSION

The trial court properly denied Keen's motion to suppress the methamphetamine located in her purse. Keen's purse was searched incident to her lawful arrest, as it was immediately in her control prior to her arrest. Further, the trial court's findings of fact are supported by substantial evidence. The trial court also made an adequate inquiry regarding Keen's ability to pay her discretionary legal financial obligations. This Court should affirm the trial court's rulings and Keen's conviction and sentence.

RESPECTFULLY submitted this 14th day of February, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



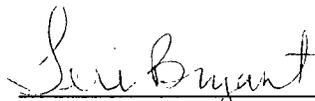
by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. STEPHANIE KEEN, Appellant.	No. 49055-2-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 14, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Kristen V. Murray, Hart Jarvis Chang, PLLC, attorney for appellant, at the following email address: kmurray@hartjarvischang.com.

DATED this 14th day of February, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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