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Nº. 50372-7-II

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

STATE OF WASHINGTON
Respondent,

v.

KASSANDRA MAE JEFFERS,
Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Lewis County,
Cause No. 16-1-00736-21
The Honorable James W. Lawler, Presiding Judge

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A. ARGUMENT

1. The State misunderstands the standards of review applicable to findings of fact and conclusions of law.

On page 5 of its Response Brief, the State notes that "[Ms.] Jeffers does not assign error to any of the findings of fact, aside from Finding of Fact 1.12, which [Ms.] Jeffers argues should be reviewed as a question of law." The State then argues it will assume that it was an oversight for Ms. Jeffers to fail to assign error to any of the trial court's conclusions of law, specifically Conclusion of Law 2.1 regarding the motion to suppress evidence, and that the State would assume Ms. Jeffers was challenging conclusion of law 2.1. The State misunderstands the standards of review applicable to findings of fact and conclusions of law.

An appellate court reviews findings of fact related to a motion to suppress under the substantial evidence standard.[1] Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding."[2] Appellate courts review conclusions of law pertaining to suppression of evidence de novo.[3] Appellate courts also review de novo whether the trial court's findings of fact support its conclusions of law.[4]

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[1] *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).
[2] *Id*.
[3] *Id*.
[4] *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Unchallenged findings of fact are verities on appeal.[5]

Because conclusions of law are reviewed de novo, it is unnecessary to assign error to them. The State was wise to conclude that Conclusion of Law 2.1 was the conclusion of law relevant to Ms. Jeffers' argument on appeal. There was no oversight or failure to assign error on Ms. Jeffers' part. Ms. Jeffers is simply aware of the standard of review and presented her argument in an efficient manner without wasting the court's time on unnecessary hyper-formalities.

2. The determination of whether an item is closely associated enough to an arrestee's person that the item may be searched incident to the arrest is an issue of law, not an issue of fact.

On page 5 of its Response Brief, the State appears to argue that the determination of whether an article is so closely associated with an arrestee that it may be searched incident to the arrest as an extension of the arrestee's person is an issue of fact, rather than an issue of law. The State is incorrect.

The presence and location of a container are issues of fact, but the question of whether the closeness and relationship of that container to an arrestee is sufficient to render the container searchable incident to the arrest is a question of law. For example, the legal criteria for determining

[5] *State v. O'Neill*, 148 Wash.2d 564, 571, 62 P.3d 489 (2003).

whether a container located near an arrestee was sufficiently closely related to the arrestee to be lawfully searched incident to the were discussed at length in *State v. Brock*:

> There are two discrete types of searches incident to arrest: (1) a search of the arrestee's person (including those personal effects immediately associated with his or her person—such as purses, backpacks, or even luggage) and (2) a search of the area within the arrestee's immediate control. A valid search of the latter requires a 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. *Byrd*, 178 Wash.2d at 617, 310 P.3d 793 (citing *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). The former search does not; in analyzing the search of an arrestee, we utilize the United States Supreme Court's rationale from Fourth Amendment that "'a search may be made of the person of the arrestee by virtue of the lawful arrest.'" *Byrd*, 178 Wash.2d at 617, 310 P.3d 793 (*quoting United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)). In such cases, we presume that safety and evidence justifications exist when taking those personal items into custody as part of the arrestee's person.
>
> **The 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."** *Byrd*, 178 Wash.2d at 623, 310 P.3d 793. This is known as the "time of arrest" rule.[6]

The fact that a legal test exists to determine "whether a particular personal item constitutes part of the arrestee's person, as opposed to just

[6] *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015) (emphasis added).

part of the surrounding area" clearly establishes that this is a legal question, not a factual question. Thus, even though the trial court entered "Finding of Fact" 1.2 that stated "Jeffers's [sic] purse and wallet were closely associated with her when she was told to exit the vehicle,"[7] this was actually a legal conclusion, not a factual finding. Any argument by the State that this determination was a finding of fact is incorrect and is a perpetration of the trial court's improper characterization of this conclusion as a finding of fact rather than a conclusion of law.

3. The State reads *Byrd* and *Brock* too broadly and assumes, without analysis, that Ms. Jeffers' purse was a personal item that constituted part of her person rather than part of her surroundings.

The State concedes that Ms. Jeffers had actual physical possession of her purse only because Officer Scrivner ordered her to remove it from her vehicle when she otherwise would have left it in her car.[8] The State then assumes, without supporting argument, that Ms. Jeffers' purse was an item that was intimately associated with Ms. Jeffers such that it was part of her person that could be searched incident to her arrest regardless of whether it was located inside or outside of her car.[9] The State ignores the legal standard applicable to determining whether an item is sufficiently closely associated with an arrestee to be searched incident to arrest and

[7] CP 22.
[8] State's Response Brief, p. 11.
[9] State's Response Brief, p. 11-14.

fails to conduct the proper legal analysis.

A warrantless search is per se unreasonable under article 1, section 7 of the Washington Constitution "unless the State proves that one of the few 'carefully drawn and jealously guarded exceptions'" to the warrant requirement applies.[10] "There are two types of warrantless searches that may be made incident to a lawful arrest: a search of the arrestee's person and a search of the area within the arrestee's immediate control."[11]

As the Washington Supreme Court stated in *Byrd*, a search of the arrestee's person "including articles of the person such as clothing or personal effects, require[s] 'no additional justification' beyond the validity of the custodial arrest."[12] A search of the area within the arrestee's immediate control, in contrast, must be "justified by concerns of officer safety or the preservation of evidence and are limited to those areas within reaching distance at the time of the search."[13]

Washington courts employ the "time of arrest" rule to determine whether a search incident to arrest involves a search of the arrestee (and articles "immediately associated" with the arrestee's person) or a search of

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[10] *State v. Byrd*, 178 Wn .2d 611, 616, 310 P.3d 793 (2013) (quoting *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)).
[11] *State v. MacDicken*, 179 Wn.2d 936, 940, 319 P.3d 31 (2014).
[12] *Byrd*, 178 Wn.2d at 617–18 (*quoting United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L. Ed 2d 427 (1973)).
[13] *MacDicken*, 179 Wn.2d at 941.

the area within the arrestee's immediate control.[14] Under this rule, an article is "immediately associated" with the arrestee's person and can be searched under *Robinson*, without further justification for police safety or evidence preservation, if it is a "personal [article] in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest."[15]

Washington law distinguishes between "actual possession" and "constructive possession." Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item.[16] The distinction between "actual possession" and "constructive possession" has been recognized and preserved in the search of an arrestee's person incident to arrest context. As cited above, *Brock* affirmed that the determination as to whether a particular personal item constitutes part of the arrestee's person for purposes of a search incident to arrest, 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."[17] This distinction between "part of the arrestee's person" and "part of the surroundings" is another way of saying "actual possession" versus "constructive possession."

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[14] *Byrd*, 178 Wn.2d at 621.
[15] *Byrd*, 178 Wn.2d at 623.
[16] *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).
[17] *Brock*, 184 Wn.2d at 154, 355 P.3d 1118.

The State ignores the distinction between actual and constructive possession and argues that simply because Ms. Jeffers' purse *was* her purse it was automatically searchable incident to her arrest, even though the only reason she had actual possession of the purse and the purse was transported outside of her vehicle was because Officer Scrivner told her to bring it.

Byrd and *Brock* both involved situations where the article searched incident to the arrest of the defendant was an item either sitting on the arrestee's lap (purse in *Byrd*) or worn by the arrestee at the time he was stopped by police (backpack in *Brock*). Both these cases were situations of clear *actual* possession by the arrestee. Contrary to the defendants in *Brock* and *Byrd*, Ms. Jeffers did not have "actual and exclusive possession" of her purse until Officer Scrivner ordered her to bring it out of the car as she exited. Because she did not have *actual* possession of her purse at the time she was stopped by Officer Scrivner Ms. Jeffers' purse was "part of the surroundings" and could not have been lawfully search by Officer Scrivner following her arrest without concerns for officer safety or destruction of evidence.

The State fails to properly analyze the issue of whether Ms. Jeffers' purse was sufficiently "intimately associated" with her person to permit the search of the purse incident to her arrest. The State argues that

just because *Byrd* involved a purse Ms. Jeffers' purse could be searched incident to her arrest. The State's argument fails to take into consideration the distinctions between actual and constructive possession and a search of the arrestee's person versus a search of an arrestee's surroundings. Taken to its logical conclusion, the State's argument would allow police to search the purse of a woman arrested while driving a car even if her purse was in the back seat or trunk of the vehicle the woman was driving.

The search of Ms. Jeffers' purse was not permissible as a search of her person or of her surroundings incident to her arrest. It was not a permissible search of her "person" because she did not have actual possession of it. It was not a permissible search of her surroundings because there was no reason for Officer Scrivner to believe that any evidence was present in her purse that could be destroyed or to believe that his or anyone else's safety was threatened if he did not search her purse.

Finally, as pointed out in Ms. Jeffers' Opening Brief, had Officer Scrivener not directed Ms. Jeffers to bring her purse outside of the vehicle, he would have needed a warrant to search the car and the purse:

> [A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence **of the crime of arrest located in the automobile**, and thus the arrestee's presence does **not** justify a warrantless search under the

search incident to arrest exception.[18]

Because articles associated with an arrestee's person are permitted to be searched incident to arrest due to concerns for the exigencies of officer safety or evidence destruction, in this case Officer Scrivner manufactured those exigent circumstances by ordering Ms. Jeffers to bring her purse with her out of the car. Police may not manufacture their own exigent circumstances in order to justify warrantless search.[19] Officer Scrivener could not have lawfully search Ms. Jeffers purse incident to her arrest had she left it in her vehicle like she was going to. Officer Scrivner would have had to apply for a warrant to search the interior of Ms. Jeffers' vehicle to obtain the purse and discover its contents.

B. CONCLUSION

For the reasons stated above and in Ms. Jeffers' Opening Brief, this court should find the trial court abused its discretion in denying Ms. Jeffers' motion to suppress the evidence found during the search of her purse and remand this case for retrial where all evidence discovered in her purse is suppressed.

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[18] *State v. Snapp,* 174 Wn.2d 177, 189, 275 P.3d 289 (2012) (quoting *State v. Buelna Valdez,* 167 Wn.2d 761, 777 224 P.3d 751 (2009)).

[19] *Cf. State v. Hall*, 53 Wn.App. 296, 302, 766 P.2d 512, *review denied*, 112 Wn.2d 1016 (1989). *See also United States v. Webster*, 750 F.2d 307, 327 (5th Cir.1984), *cert. denied*, 471 U.S. 1106 (1985) (police officers cannot deliberately create exigent circumstances to justify a warrantless entry into a private dwelling); *United States v. Thompson*, 700 F.2d 944, 950 (5th Cir.1983) (and cases cited therein).

DATED this 11th day of December, 2017.

Respectfully submitted,

Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11th day of December, 2017, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Lewis County Prosecutor's Office
Law & Justice Center, 2nd Floor
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And to:

Ms. Kassandra Jeffers
P.O. Box 1411
Toledo, WA 98591

Signed at Tacoma, Washington this 11th day of December, 2017.

Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

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