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

STATE OF WASHINGTON, Respondent

v.

CLARISSA LOPEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY

THE HONORABLE JUDGE J. ANDREW TOYNBEE

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it held the police had not unlawfully seized Ms. Lopez on June 30, 2016.
- B. The trial court erred when it entered Finding of Fact 1.3:
“The vehicle was waived forward by Detective Robin Holt and voluntarily parked in a spot near the trailer.”
- C. The trial court erred when it entered Finding of Fact 1.4:
“Lopez had voluntarily gotten out of the vehicle while Det. Holt was contacting the driver.”
- D. The trial court erred when it entered Finding of Fact 1.5:
“Detective Chad Withrow and Detective Mathew Schlect contacted Lopez after she had exited the vehicle.”
- E. The trial court erred when it entered Finding of Fact 1.7:
“After being contacted, Lopez granted consent to search her purse.”
- F. The trial court erred when it entered Conclusion of Law 2.1: “The vehicle Lopez was riding in was not seized by Detective Holt when he waived them forward.”

- G. The trial court erred when it made Conclusion of Law 2.2: "Lopez's consent to the search of her purse and the contents inside the bag was constitutionally valid."
- H. The trial court erred when it denied the defendant's motion to suppress evidence from the June 30th encounter with police.
- I. The court violated the due process clause when it sentenced Ms. Lopez on the simple possession of methamphetamine and possession of methamphetamine with intent to deliver from the June 30th incident.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court err when it held the police did not conduct an unlawful seizure of Ms. Lopez when there were no specific, articulable facts creating the reasonable belief that she was involved in criminal activity?
- B. Does an illegal seizure vitiate a consent to search?
- C. Is a consent to search involuntary where there is a false threat to obtain a search warrant?
- D. Does simple possession of a controlled substance merge with possession of a controlled substance with intent to

deliver where the same person had the drugs in close proximity?

II. STATEMENT OF FACTS

Suppression Hearing

A confidential informant contacted a member of the Joint Narcotics Enforcement Team of Lewis County (JNET) sometime between May 1st and June 30th, 2016. The team arranged two controlled buys between the informant and Ian Angelo. CP 5. On June 30, 2016, JNET executed a search warrant on Ian Angelo. RP 24-25. The State did not include the search warrant as part of this trial court record because it did not mention or pertain to Clarissa Lopez. The warrant was based only on the controlled buys between the confidential informant and Angelo. RP 22-23.

As officers executed the warrant, having cleared the home, passenger Clarissa Lopez, rode in a vehicle that her friend drove into the Harrison Mobile Home Park. RP 64-65. A JNET officer directed the car to pull forward and stop. RP 26, 31-32, 67. The lead detective directed Officer Holt to make contact with the people in the vehicle. RP 48. Ms. Lopez testified that Holt put a piece of paper on the car window and told her, "We have a search warrant

for Ian and that I needed to get out of the car." Detective Withrow testified Ms. Lopez had been "summoned in." RP 43.

Ms. Lopez said she stepped out of the car at Holt's direction. RP 47, 68. Holt maintained that Ms. Lopez got out of the car of her own accord. Both agreed that once she was out of the car, he directed her to speak with Detective Withrow. RP 26, 47. Ms. Lopez did not believe she was free to leave or walk away. RP 47, 57, 58, 71. Detective Withrow testified officers had seized her. RP 47.

Officers asked for consent to a search of her purse. RP 53, 69. She agreed to a search of the purse but declined consent for a search of a locked bank bag inside the purse. RP 53, 69.

Ms. Lopez reported the officer said, "He could tell there was something in there" and he "was grabbing it and feeling it ..." RP 69, 76. She told him there was an unused pipe, a scale, and some baggies in it. RP 54. He said, "If I didn't want to let him search that he would get a search warrant and then I would be charged with whatever was in there." RP 69. "After he said that a couple of times, I let him search." RP 70. Inside of the bag was methamphetamine. RP 55.

JNET wanted to use Mr. Angelo and Ms. Lopez as confidential informants. RP 28, 50, 53. Aware that JNET had

already found a used methamphetamine pipe inside the home, Haggerty said that he advised Ms. Lopez of her *Miranda* rights before they entered the mobile home to continue their discussions. RP 35, 37, 53, 55.

As the group talked about information that Mr. Angelo and Ms. Lopez could provide for them, Withrow searched the bedroom. RP 39. Ms. Lopez retrieved and opened a second bank bag, which contained 100 grams of field-tested methamphetamine, baggies and other paraphernalia. CP 6; RP 39.

Ms. Lopez entered into an unwritten agreement with JNET. CP 6; RP 30, 35, 39. Over the course of time, she met with numerous detectives. Contact eventually ceased, and Detective Haggerty applied for and received an arrest warrant for her. CP 8-9; RP 40. Ms. Lopez and Mr. Angelo were apprehended on April 6, 2017, and officers collected a backpack with methamphetamine in it. RP 63, 71. She was charged with two counts of possession of methamphetamine with intent to distribute, a single count of possession of methamphetamine and one count of bail jumping. CP 51-53.

At the conclusion of the suppression hearing, the court entered written findings of fact and conclusions of law. CP 54-57.

The court determined the vehicle Ms. Lopez had ridden in was not seized, the consent to the purse search was constitutionally valid, and Ms. Lopez was not in custody either outside or inside of the trailer. CP 56-57.

Ms. Lopez waived a jury trial, and the case proceeded to a stipulated facts trial. 9/25/17 RP 8-10; CP 61. The court found Ms. Lopez was guilty on all counts. 9/25/17 RP 8-10. At sentencing, the defense did not agree that the counts of possession and possession with intent to deliver stemming from the June 30th encounter did not constitute double jeopardy. 9/25/17 RP 17. The court found the offenses did not violate double jeopardy and imposed a total of 80 months incarceration, all counts to run concurrent. 9/25/17 RP 18. Ms. Lopez makes this timely appeal. CP 82-93.

III. ARGUMENT

A. Seizure Of An Individual, Absent An Individualized And Particularized Suspicion She Is Engaged In Criminal Activity, Is Unlawful And The Fruits Of The Seizure Must Be Suppressed.

A trial court's denial of a motion to suppress is reviewed to determine whether substantial evidence supports the factual findings, and if so, whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 252, 249, 207 P.3d 1266 (2009). The appellate court reviews conclusions of law from an order resulting from a suppression hearing *de novo*. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

The question on review is whether the initial seizure of Ms. Lopez was illegal, and vitiated the subsequent consent for a search of the contents of her purse and the second bank bag. *State v. O'Day*, 91 Wn. App. 244, 955 P.2d 860 (1998).

1. Police Unlawfully Seized Ms. Lopez

Under Wash. Const. art. I, § 7, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The requisite for "authority of law" is a warrant. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). A warrantless search or seizure is per se unreasonable unless it falls within one of the exceptions to the warrant requirement, which are limited and narrowly drawn.

State v. Ellison, 172 Wn. App. 710, 719, 291 P.3d 921 (2013); *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999).

One exception to the warrant requirement is a *Terry* investigative stop. *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). A *Terry* stop exception authorizes an officer to briefly detain an individual for questioning *if the officer has reasonable suspicion that the person is or is about to be engaged in criminal activity*. *State v. Fuentes*, 183 Wn.2d 149,158, 352 P.3d 152 (2015). (Emphasis added). The reasonable suspicion must be *based on specific and articulable facts*, known to the officer at the time of the stop. *State v. Gatewood*, 163 Wn.2d 534, 539-40, 182 P.3d 426 (2008).

A *Terry* stop is a seizure under both the Washington and Federal Constitutions. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). In determining whether a seizure has occurred, courts must look objectively at the totality of the circumstances to determine whether a reasonable person would have believed he was free to leave. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Where there is a show of force or authority and an individual's freedom of movement is restrained, and a reasonable

person would not have believed she was free to leave, and given all the circumstances, free to otherwise decline an officer's request and terminate the encounter, the individual has been seized. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998), *Florida v Bostick*, 501 U.S. 429, 436, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

Here, the search warrant authorized JNET to conduct a search on Mr. Angelo. Ms. Lopez was not named in the warrant nor was she at home when officers executed it. Rather, Ms. Lopez was a passenger in a car driven by another resident of the mobile park who was trying to get home.

The court entered a finding: "The vehicle was waived forward by Detective Robin Holt and *voluntarily* parked in a spot near the trailer." Detective Withrow testified that officers "summoned" the vehicle forward. Detective Holt testified that he directed the car to stop. There were police cars in the area and officers patrolling and securing the perimeter.

Ms. Lopez was seized by officers. As her friend drove into the area, they saw police at her home. RP 66. Ms. Lopez said she did not know if they should keep going forward until she saw Officer Holt waving and pointing, motioning them forward. RP 67. The

driver did exactly as the officer directed and pulled forward. She followed his direction and stopped the car behind police vehicles¹. There was nothing voluntary about the vehicle stop; it was in response to the show of authority. Neither Ms. Lopez nor the driver was free to leave. Detective Schlect testified the individuals in the vehicle were detained. RP 57. The vehicle and its occupants had been seized. Ms. Lopez reasonably believed she was not free to leave, because she was in fact, not free to leave according to officers.

Where an officer commands a person to halt, a seizure occurs. *Mendenhall*, 446 U.S. at 544. The court's finding of fact: "Lopez had voluntarily gotten out of the vehicle while Det. Holt was contacting the driver" is not supported by the record. Ms. Lopez testified that Holt told her to get out of the car. RP 68. Detective Withrow testified that Ms. Lopez was in the car at the time Detective Holt contacted them. RP 48. Holt directed Ms. Lopez to talk with other officers, and she complied with his directive. Ms.

¹ Ms. Lopez described the stop location: her car was in the driveway (not the car she rode in into the park) then a police car, and a blue van, presumably a police vehicle. RP 68.

Lopez was not free to leave; she did not voluntarily get out of the car. Detective Withrow testified she had been seized. RP 47.

To be justified, a seizure requires the officer to have reasonable suspicion, based on specific and articulable facts, known to the officer at the time, that the person is or is about to be engaged in criminal activity. *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). In *Martinez*, the Court recognized the necessity for *particularized* suspicion tying a detained individual to the suspected criminal activity. *State v. Martinez*, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006). The State must show by clear and convincing evidence that the seizure was justified. *Garvin*, 166 Wn.2d at 250.

Here, officers did not articulate a particularized suspicion tying Ms. Lopez to suspected criminal activity. The extent of their specific and articulable facts was they were aware that she was associated with Mr. Angelo. The law requires the suspicion to be individualized. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). A person's "mere proximity to other independently suspected of criminal activity does not justify the stop." *Doughty*, 170 Wn.2d at 62.

In *State v. Weyand*, 188 Wn.2d 804, 399 P.3d 530 (2017), our Supreme Court held that the defendant's conduct in walking quickly and looking around after a brief stay in a home known for extensive drug dealing was insufficient to create a reasonable articulable suspicion justifying a *Terry* stop. The Court reasoned:

Just as many members of our society live, work, and spend their days in high crime areas, many members of our society interact with people who have been previously convicted of crimes. The previous convictions of friends, family members, and associates alone does not give rise to a reasonable articulable suspicion necessary to justify a stop and frisk.

Id. at 817.

In *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993), the issue on review was whether the officer's approach and inquiries constituted a seizure in violation of the Fourth Amendment. *Id.* at 15. The officer had approached Gleason, a white male, because he was in a Hispanic neighborhood known for drug trafficking. The State contended the encounter was consensual because Gleason voluntarily spoke with the officer and gave him his ID. The Court reasoned that whether Gleason had been seized depended on whether *Gleason believed* he was free to leave and not talk to officers. Based on the facts, the Court held that the police had exhibited a show of authority and no reasonable

person would have felt free to walk away from the encounter. *Id.* at 16. Although the finding that the apartment complex had a history of drug activity was unequivocal, the officers pointed to no specific and articulable facts that gave rise to a reasonable individualized suspicion that Gleason himself was engaged in criminal conduct. The Court reversed the suppression ruling, finding Gleason had been unlawfully seized. *Id.* at 18.

Weyand and *Gleason* stand for the proposition that even if an officer has a reasonable belief that one person or location is associated with criminal activity, there must be facts to support the inference that a *particular* individual, such as Ms. Lopez who visits that location is engaged in criminal activity.

Officers agreed that Ms. Lopez had been seized. The State presented no evidence that gave rise to a reasonable articulable suspicion necessary to justify the seizure. The seizure was unlawful. Where police unconstitutionally seize an individual before arrest, the exclusionary rule calls for suppression of evidence obtained because of the government's illegal action. *Garvin*, 166 Wn.2d at 254 (“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.”).

The trial court's denial of the defense motion to suppress evidence found in or derived from Ms. Lopez's unlawful seizure requires reversal of her convictions for possession and possession of a controlled substance with intent to deliver based on the April 2016 encounter.

2. The Warrantless Search Of Ms. Lopez's Purse Was Unconstitutional.

The trial court found: "After being contacted, Lopez granted consent to search her purse." And concluded: "Lopez's consent to the search of her purse and the contents inside the bag was constitutionally valid."

In determining whether Ms. Lopez validly consented to a search of the bank bags, the Court must be mindful that Ms. Lopez had been seized, not "contacted."

Art. I, § 7 provides that no person shall be disturbed in his private affairs without authority of law. Voluntary consent is an exception to the warrant requirement. *State v. Cantrell*, 124 Wn.2d 183, 187, 875 P.2d 1208 (1994). Voluntary consent may be vitiated, however, by an illegal seizure. *State v. Soto-Garcia*, 68 Wn. App. 20, 26-27, 841 P.2d 1271 (1992). Ms. Lopez's consent was tainted by the illegal seizure.

In *O'Day*, 91 Wn. App. 244, the Court outlined several relevant factors to consider when determining if an illegal seizure vitiates the consent. *Id.* at 253. The Court examined the temporal proximity of the illegality and the subsequent consent; the presence of significant intervening circumstances; the purpose and flagrancy of the misconduct; and the giving of *Miranda* warnings. *Id.*

In *O'Day*, the officer stopped the car she rode in as a passenger. The officer got permission to search the vehicle from the driver and told O'Day to get out of the car while he searched. Her purse was placed on the hood of the car. The officer found drugs in the car, and rather than impound the car; he asked if she had a driver's license. She did not but voluntarily showed him her ID card. *Id.* at 246. The trooper had no particularized suspicion that she was involved in criminal activity and no concern that she was armed or dangerous.

He reported she was not free to leave and, he asked for consent to search her purse. She agreed and signed a consent to search card. The search yielded methamphetamines in her purse. She was charged with possession. *Id.* at 247. The trial court suppressed the evidence, finding the consent was invalid "because there were insufficient intervening circumstances to attenuate her

detention beyond the purpose of the original stop.” *Id.*

On appeal, the Court determined the trooper had not acted maliciously, but it was evident he was “‘fishing’ for evidence of illegal drug trafficking” and the seizure was unlawful. *Id.* The Court further found the illegal seizure was contemporaneous with the consent; there were no significant intervening events, and the officer had not administered *Miranda* warnings. *Id.* The unlawful investigative detention tainted the consent.

Here, despite an absence of probable cause, the officer told Ms. Lopez, he would get a search warrant for the bag. Threats to obtain a warrant may invalidate consent if sufficient grounds to obtain it do not exist. *State v. Apodaca*, 67 Wn. App. 736, 739-740, 839 P.2d 352 (1992) (overruled on other grounds by *State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995)).

Similarly, the Court also considers whether the person initially refused consent and if law enforcement had to repeatedly request consent. *State v. Flowers*, 57 Wn. App. 636, 645, 789 P.2d 333, *rev. denied*, 115 Wn.2d 1009 (1990). Ms. Lopez testified that only after the officer had asked several times for consent to search did she finally say “yes.”

When the discussion ensued outside between the officers, Angelo, and Ms. Lopez, she was not free to leave, despite no reasonable suspicion she was engaged in criminal activity.

Detective Haggerty testified he gave Ms. Lopez her *Miranda* warnings before they entered the home to continue the discussion, based on the fact he had found a used meth pipe in the home. In the context of the circumstances, this event should not persuade the Court that her consent was voluntary. The series of events, which include the initial unlawful seizure, the false threat to get a search warrant, the repetitious request for consent to search, and the offer of acting as an informant all occurred before Ms. Lopez had been given *Miranda* warnings. Her consent to search was vitiated by everything that preceded it.

Like *O'Day*, the encounter became an unlawful investigative detention which tainted Ms. Lopez's consent.

B. Ms. Lopez's Rights To Be Free From Double Jeopardy Were Violated.

Without conceding any of the above argument, in the alternative, Ms. Lopez was punished twice for the same crime.

The Double Jeopardy Clauses of the state and federal constitutions protect a person from multiple punishments for the

same offense. Wash. Const. art. I, § 9; U.S. Const. Amend. V;
State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

Offenses are the same for purposes of double jeopardy if they are the same in law and fact. *Calle*, 125 Wn.2d at 777. In this case, Ms. Lopez's right to be free from double jeopardy was violated by her convictions for both possession of a controlled substance and possession of a controlled substance with the intent to deliver for counts I and II.

In *State v. O'Connor*, 87 Wn. App. 119, 940 P.2d 675 (1997), during a search the police found methamphetamines in O'Connor's sock, jacket pocket, and a metal box on the floor of O'Connor's car. *Id.* at 121-122. The State charged the defendant with one count of possession of unlawful possession of a controlled substance with intent to deliver and one count of unlawful possession of a controlled substance.

On review, the Court addressed the question of whether O'Connor was being punished twice for the same offense. It found offenses are *not* identical if "each offense contains an element not contained in the other." *Id.* at 123. It held that the crime of possession with intent to deliver contains an element not found in possession: intent to deliver. However, simple possession does not

contain an element not found in possession with intent to deliver. The Court found the two offenses to be legally identical.

After finding the charges were legally identical, the next question was whether the two offenses were based on the same act or transaction. *Id.* at 124. The Court discussed the reasoning and ruling in *State v. McFadden*, 63 Wn. App. 441, 820 P.2d 53 (1991). In *McFadden*, the defendant had actual possession of drugs in his home and constructive possession of drugs in his van. *Id.* at 451-52. Division One held that because the two offenses “involve[d] different quantities of cocaine and different locations,” the convictions “represent[ed] multiple punishments ... for different acts.” *O’Connor*, 87 Wn. App. at 125.

The Court distinguished *McFadden* from *O’Connor*, pointing to the fact that the drugs in *McFadden* were found in separate searches, rather than a continuous, uninterrupted search, where possession occurred at the same time.

Here, the drugs were both in bank bags: one in Ms. Lopez’s purse and the other in the home. The bags were opened in the home, at the same time, in one uninterrupted search. Under a double jeopardy analysis, the facts of this case are closer to *O’Connor* than *McFadden*. This matter should be remanded with

instructions to vacate the conviction and sentence for possession of a controlled substance.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Lopez respectfully asks this Court to reverse the suppression order and dismiss her convictions. In the alternative, Ms. Lopez asks this Court to vacate the conviction for possession of a controlled substance.

Respectfully submitted this 3rd day of April 2018.



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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Clarissa Lopez, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on April 3, 2018 to:

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