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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**CLARISSA LOPEZ,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Did the trial court err when it denied Lopez's motion to suppress the evidence recovered from the bank bags?
- B. Was Lopez right to double jeopardy violated by her convictions for Count I and Count II?

## II. STATEMENT OF THE CASE

On June 23, 2016, the Lewis County Joint Narcotics Task Force (JNET) was serving a search warrant at a mobile home associated with Ian Angelo. 1RP<sup>1</sup> 24-25, 34, 42, 52; CP 54. While the officers were serving the warrant, Lopez arrived at the location riding as a passenger in a vehicle driven by Maile Reyes.<sup>2</sup> 1RP 25-26, 34, 42, 52; CP 54. The vehicle pulled up in front of the residence and stopped. 1RP 25-26, 42; CP 54.

Detective Holt contacted the vehicle and spoke to the driver, Ms. Reyes. 1RP 25-27, 35; CP 55. While Detective Holt was speaking with Ms. Reyes, Lopez got out of the vehicle, voluntarily, on her own. 1RP 26, 52; CP 55.

Detective Withrow and Detective Schlecht contacted Lopez after she had exited the vehicle. 1RP 26-27, 43, 53; CP 55. When

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<sup>1</sup> There are numerous volumes of report of proceedings on two different paginated tracks. The report of proceedings that include the 3.5/3.6 Motion Hearing held on 6/27/17 will be cited as 1RP. The other paginated sequence that includes the trial held on 9/25/17 will be cited as 2RP.

<sup>2</sup> Maile Reyes is also referred to as Maile Christensen in the transcript.

Lopez exited the vehicle she was in possession of a purse. 1RP 26-27, 35, 43; CP 55. Detective Schlecht asked Lopez for consent to search her purse, which she granted. 1RP 43, 53; CP 55. Inside the purse was a locked bank bag. 1RP 36-37, 43, 53; CP 55. Lopez would not consent to a search of the bank bag. *Id.*

Lopez was advised of Miranda warnings after denying consent to search the bank bag. 1RP 37; CP 55. Lopez initially stated she did not know what was in the bank bag. 1RP 44, 54. Lopez eventually told detectives the bank bag contained an unused methamphetamine pipe, a digital scale, and some baggies. 1RP 43-44, 54; CP 55. The key to open the bank bag was on Lopez's key ring in her purse. 1RP 55, 60.

The detectives explained to Lopez and Mr. Angelo they were interested in Lopez and Mr. Angelo working as confidential informants. 1RP 29, 35; CP 55. Mr. Angelo and Lopez agreed to speak with the detectives about becoming informants, but wanted to do so inside their residence. 1RP 35-36; CP 55.

Lopez told the detectives there was more methamphetamine in her and Angelo's shared bedroom. 1RP 45; CP 55. Lopez assisted detectives in locating a second bank bag from the bedroom. 1RP 30, 39, 45-46; CP 55. Lopez also provided the keys

to the second bank bag. 1RP 45-46, 60; CP 55. The second bag contained approximately 100 grams of methamphetamine. 1RP 39; CP 55. Mr. Angelo and Lopez agreed to work with the detectives as confidential informants, therefore they were not arrested that day. 1RP 39-40.

Ultimately, the confidential informant agreement did not work out, as Lopez did not follow through with her obligations with law enforcement. CP 6-7. The State charged Lopez on September 26, 2016 with Count I: Possession of a Controlled Substance – Methamphetamine, and Count II: Possession of Methamphetamine with the Intent to Deliver. CP 1-2. The State filed an amended information on April 13, 2017 adding two additional charges. CP 11-13. The amended information charged Lopez with Count I: Possession of a Controlled Substance – Methamphetamine, and Count II: Possession of Methamphetamine with the Intent to Deliver, Count III: Bail Jumping, and Count IV: Possession of Methamphetamine with the Intent to Deliver. *Id.*

Lopez challenged the search of her purse and house and the trial court conducted a CrR 3.5 and CrR 3.6 hearing. 1RP 15-95. Lopez testified, contrary to the detectives, that Detective Holt stopped the vehicle she was in and told her to get out of the

vehicle. 1RP 67-68. Lopez also stated Detective Withrow, while searching her purse, manipulated the bank bag and told her he knew what was inside, and if she did not allow him to search the contents of the bank bag, Lopez would be charged with whatever was inside the bag. 1RP 69, 76. Lopez explained it was only after this, she allowed the detectives to search the bank bag. 1RP 70. The trial court denied Lopez's motion to suppress. 1RP 93-95; CP 54-57.

On June 30, 2017, after the denial of Lopez's suppression motion, the State filed a second amended information charging Lopez with Count I: Possession of a Controlled Substance – Methamphetamine, and Count II: Possession of Methamphetamine with the Intent to Deliver, Count III: Bail Jumping, Count IV: Possession of Methamphetamine with the Intent to Deliver, and Count V: Bail Jumping. CP 46-48. Lopez waived her right to a jury trial and proceeded with a stipulated facts bench trial 2RP 8-11; CP 61-66. The trial court found Lopez guilty as charged. CP 62-66. At sentencing Lopez argued Counts I and II were the same unit of prosecution, were possibly the same criminal conduct, and it was therefore a violation of Lopez's right to be free of double jeopardy to have both stand. 2RP 15-16. Lopez's attorney also stated the 80-

month sentence was agreed. 2RP 16. The trial court found Count I and II were not same criminal conduct, it was not a violation of double jeopardy to have both convictions, and sentenced Lopez to the agreed 80 months. 2RP 18-19; CP 70-80. Lopez timely appeals. CP 82-93.

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

### **III. ARGUMENT**

#### **A. THE TRIAL COURT CORRECTLY DENIED LOPEZ'S MOTION TO SUPPRESS THE EVIDENCE.**

Lopez argues the trial court incorrectly denied her motion to suppress the methamphetamine discovered when the detectives searched her purse and residence. Brief of Appellant 7-17. First, there was substantial evidence to support all the findings of fact Lopez has challenged. The trial court appropriately ruled Lopez was not seized and she consented to the search. Even if the trial court's ruling was erroneous, this Court can uphold the suppression based upon a proper investigatory detention. This court should find the motion to suppress the evidence was properly 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 (2011). Determination of whether a person has been seized by the police "is a mixed question of law and fact." *State v. Butler*, 2 Wn. App. 2d 549, 556, 411 P.3d 393 (2018) (internal quotations and citations omitted).

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).

Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992).

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 The Challenged Findings Of Fact.**

Lopez asserts the trial court erred by entering the following findings of fact: 1.3, 1.4, 1.5, and 1.7; CP 54-55. Yet, in Lopez's brief she does not specifically address the lack of evidence to support each finding. See Brief of Appellant. Lopez does, in her argument portion put forward contrary testimony and argue it to be the facts, but without noting how they would apply to the findings. *Id.* Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *Lohr*, 164 Wn. App. at 419. See Brief of Appellant.

Finding of fact 1.3 is supported by Detective Holt's testimony. RP 25-26. Detective Holt testified the vehicle pulled up to the residence and stopped on its own and he did not direct the vehicle to stop. RP 25-26. While Detective Holt acknowledged his written report stated he stopped the vehicle, that was not his testimony regarding what occurred. RP 25-26, 31-32. Detective Withrow's testimony supports Detective Holt's testimony. 1RP 42.

Detective Withrow stated, the vehicle “pulled up toward the front, kind of stopped right in the front of the house on the road there.” *Id.*

Finding of fact 1.4 is supported by Detective Holt’s testimony. RP 26, 52. Detective Schlecht testified Lopez was getting out of the vehicle when the officers contacted her. 1RP 53. Detective Holt explained Lopez got out of the vehicle on her own, and he did not direct her to get out of the vehicle. 1RP 26. Lopez did this while Detective Holt was speaking to the driver. 1RP 26.

Finding of fact 1.5 is supported by Detective Holt and Detective Withrow’s testimony. 1RP 26, 43. Detective Holt stated, Detective Withrow contacted Lopez after she got out of the vehicle. 1RP 26. Detective Withrow said he contacted Lopez in front of the house, in the driveway area. 1RP 43. Detective Withrow explained Lopez was not far away from the vehicle. 1RP 43. While Detective Schlecht stated Lopez was getting out of the vehicle when she was contacted, Detective Holt and Detective Withrow’s testimony support the finding of fact. 1RP 53.

Finding of fact 1.7 is supported by Detective Haggerty, Detective Withrow, and Detective Schlecht’s testimony. 1RP 36-37, 43, 53. Detective Haggerty, Withrow, and Schlecht testified Lopez initially gave consent to search her purse, but not the bank bag

inside of her purse. 1RP 36-37, 43, 53. After initially denying knowledge of what was in the bank bag, Lopez said there was an unused meth pipe and a digital scale inside. 1RP 43-44, 54. According to Detective Schlecht, after speaking to Lopez and Mr. Angelo together, Lopez gave consent to get in the bank bag, providing a key to open the bag from her key ring. 1RP 55.

All the evidence outlined above is sufficient for this court to find substantial evidence to support the challenged findings of fact. 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.**

In this matter the trial court ruled Lopez was not seized by law enforcement and the subsequent search of her purse and the residence was by valid consent. CP 56-57. The trial court's rulings are supported by the evidence and the law. Arguendo, if the Court were to determine Lopez was seized when she arrived at her residence, the seizure was a valid *Terry* seizure.

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).

A person is not seized simply because they encounter a police officer who approaches them and asks a handful of questions. *Id.*, citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 1870, 64 L. Ed 2d 497 (1980). An encounter is considered consensual so long as that person would feel free to terminate the contact with the police and go about their business, and therefore, no reasonable suspicion is required. *Id.*

A person is seized within the meaning of the Fourth Amendment when, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L. Ed.2d 497 (1980). Not every encounter between an officer and an individual amount to a seizure. *Mendenhall*, 446 U.S. at 551-55. “The defendant bears the burden of proving a seizure occurred in violation of article I, section 7.”

*Butler*, 2 Wn, App. 2d at 557 (emphasis original, citations and quotations omitted).

The courts in Washington continue to use *Mendenhall's* seizure analysis and apply it to seizure analysis under article I, section 7:

“Examples of circumstance that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. ... In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.”

*Id.* at 558, citing *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (alteration original) (quoting *Mendenhall*, 446 U.S. at 554-55).

The vehicle Lopez was riding in drove up to the scene where detectives were serving a search warrant on her residence. 1RP 25-26, 34, 42, 52, 64-66. Detective Withrow, Detective Holt, and Detective Schlecht all describe the vehicle as pulling up in front of the house and parking. 1RP 25-26, 42, 52-53. The only person who testified that Detective Holt commanded and directed the vehicle to stop was Lopez. 1RP 67. Lopez is also the only person who

testified Detective Holt, or any officer, had his gun drawn. 1RP 25-29, 35, 42, 52-54, 67. Therefore, the vehicle pulled up and parked on the driver's own accord, not through the seizure of the police.

Once the vehicle was parked, Officer Holt contacted the driver of the vehicle, Ms. Reyes, to find out what was going on. RP 25-26. While Detective Holt was speaking to Ms. Reyes, Lopez exited the vehicle. 1RP 26. According to Detective Holt he did not direct Lopez to get out of the vehicle. 1RP 26. Detective Schlecht did not hear Detective Holt tell Lopez to exit the vehicle. 1RP 56. Detective Withrow acknowledged Lopez exited the vehicle and went over to Detective Withrow's location per Detective Holt's request. 1RP 47. Even if Detective Holt requested Lopez, upon her exiting the vehicle, go speak with the other detectives because he was speaking to Ms. Reyes, a request is different than a command. Ms. Lopez voluntarily got out of the vehicle and walked over to the other two detectives.

While speaking to Lopez neither Detective Withrow, nor Detective Schlecht placed handcuffs on Lopez, drew a weapon, they did not threaten Lopez, and neither detective yelled or raised his voice. 1RP 28-29, 54. While Lopez testified she did not feel free to leave, the test here is an objective test, not a subjective test,

based upon a reasonable person standard. *Mendenhall*, 446 U.S. at 554. An officer may contact a person who has freely driven up to the scene where they are executing a search warrant. While Detective Holt spoke to the driver, Lopez, the passenger chose to exit the vehicle. According to two detectives' accounts, no one directed Lopez to get out of the vehicle or contact any other police officers. Even if Detective Holt "requested" Lopez go over and speak with Detective Withrow or Detective Schlecht, a request and an order or command are different. A police officer can request to speak with a person, this is not a seizure. Lopez injected herself into this situation. It was her choice. Ultimately, a reasonable person, who decides to stop at the scene of a search warrant execution, under these facts, would not believe they were seized. There was no seizure, and the trial court's ruling denying the motion to suppress, and find Lopez was not seized should be affirmed.

- a. If Lopez was seized, the seizure is permissible under a *Terry* investigatory stop, because the detectives had a reasonable, articulable suspicion Lopez was engaged in criminal activity.**

While not conceding that Lopez voluntarily spoke to officers and was not seized, *arguendo*, if Lopez was seized by the

detectives, the seizure was lawful. The detectives had reasonable, articulable suspicion Lopez was engaged in criminal activity, and therefore, it was permissible to seize her for investigatory purposes.

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).

In evaluating investigative stops, the court must determine: (1) whether the initial interference with the suspect's freedom of movement was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In evaluating the proper scope of a contact to determine whether the intrusion on a suspect's liberty

is so substantial that its reasonableness is dependent upon probable cause, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. *Williams*, 102 Wn.2d at 740. Courts have not adopted any specific outside time limitation for a permissible *Terry* stop. *Id.*

Courts generally recognize crime prevention and crime detection are legitimate purposes for investigative stops or detentions. See, e.g., *Terry v. Ohio*, 392 U.S. at 22. Thus, exceptions to the warrant requirement exist to provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *Id.* at 171-2. The State must show the particular search or seizure in question falls within one of these exceptions. *Id.* at 172.

To justify a seizure on less than probable cause, *Terry* requires a reasonable suspicion based on the totality of the circumstances that the person seized has committed or is about to commit a crime. *Duncan*, 146 Wn.2d at 172. An officer must be

able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the detention. *State v. O'Neill*, 148 Wn.2d 564, 576, 62 P.3d 489 (2003).

Accordingly, the court determines the existence of reasonable suspicion for a *Terry* seizure based upon an objective view of the facts known to the officer. *State v. Mitchell*, 80 Wn. App. 143, 147, 906 P.2d 1013 (1995). Additionally, the court takes into account and gives deference to an officer's training and experience when determining the reasonableness of a *Terry* stop. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 60 (1991). While an inchoate hunch is insufficient to justify a stop, circumstances that appear innocuous to the average person may appear incriminating to a police officer in light of past experience. *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). The officer is not required to ignore that experience. *Id.* Reasonableness is measured not by exactitudes, but by probabilities. *Id.*

Subsequent evidence that the officer was in error regarding some of the facts will not render a *Terry* stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) ("The Fourth Amendment does not proscribe 'inaccurate' searches only

'unreasonable' ones"). Also, before initiating a *Terry* stop, the officer need not rule out all possibilities of innocent behavior. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988). The means of investigation need not be the least intrusive available, but police must reasonably try to identify and pursue less intrusive alternatives. *State v. Mackey*, 117 Wn. App. 135, 139, 69 P.3d 375, 377 (2003).

The detectives arrived at Lopez's residence prior to her arriving to serve a search warrant in regard to Ian Angelo, Lopez's boyfriend. 1RP 34, 42, 44. Detective Haggerty explained,

Through our investigation our intelligence led us to believe which bedroom it would be. And that happened to be the bedroom that we focused on when we executed the search warrant. Mr. Angelo was actually inside and being noncooperative and I ordered Detective Schlecht to push the exterior portable air conditioning unit into the house to gain access originally. At the same time or close to it Sergeant Riordan breached the door. We knew that that was their bedroom and it was their shared bedroom from our investigation.

1RP 36. Detective Haggerty also explained when they executed the search warrant, prior to Lopez arriving, the detectives discovered evidence Lopez was engaged in criminal activity. 1RP 37. "Upon our execution, knowing it's a shared bedroom, we located or saw visually a used methamphetamine smoking device which is a class

C felony.” 1RP 37. Detective Haggerty explained he advised Lopez of her Miranda warnings on the exterior of the house due to the discovery of the used methamphetamine pipe. 1RP 37.

The methamphetamine pipe in Lopez’s bedroom was sufficient articulable suspicion that Lopez was involved in, at a minimum, the possession of illegal drugs, and therefore justified an investigatory seizure when Lopez arrived at the residence. *Duncan*, 146 Wn.2d at 172. Lopez argues the detectives stated she was detained. They had the right to detain her. Lopez argues the State presented no evidence that gave rise to justify an investigatory seizure. Brief of Appellant 13. This is simply untrue. The detectives could point to specific and articulable facts, the methamphetamine pipe in Lopez’s bedroom, which, taken together with rational inferences from those facts, reasonably warranted Lopez’s detention. *O’Neill*, 148 Wn.2d at 576. This Court should affirm the detectives’ seizure of Lopez as a valid investigatory detention.

**b. Lopez consented to a search of her purse, including the bank bag, and the subsequent search of her residence.**

Contrary to Lopez’s contention in her briefing, Lopez consented to the search of her purse and bank bag. As argued above, Lopez was not illegally seized, she either voluntarily

contacted detectives, or in the alternative, the detectives seized Lopez pursuant to a lawful investigatory seizure. The detectives did not threaten or coerce Lopez to allow them to search her purse, therefore, Lopez's consent was valid.

One exception to the warrant requirement is consent to search. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The State will have the burden to establish a defendant's consent to search was lawfully obtained. *Thompson*, 151 Wn.2d at 803. "In order to meet this burden, three requirements must be met: (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent." *Id.* The court must look at the totality of the circumstances to determine if consent was freely and voluntarily given. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The determination whether consent is voluntarily given is a question of fact. *Reichenbach*, 153 Wn.2d at 132.

The court may consider a number of factors when determining if consent was voluntary. *O'Neill*, 148 Wn.2d at 588. These factors include, but are not limited to: the intelligence or degree of education of the person, were *Miranda* warnings given and was the person advised of the right to refuse consent. *Id.* at

588. “While knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however.” *Reichenbach*, 153 Wn.2d at 132 (citations omitted). The court may also weigh such factors as implied or express claims of police authority to search, a defendant’s cooperation, an officer’s deception as to identity or purpose and previous illegal actions of the police. *Id.*

In *O’Neill*, the officer had O’Neill step out of the car after O’Neill gave a false name and told the officer his driver’s license had been revoked. *O’Neill*, 148 Wn.2d at 572. The officer saw what he believed was a spoon used for cooking drugs when O’Neill stepped out of the vehicle. *Id.* The officer asked O’Neill for consent to search the vehicle. *Id.* at 573. O’Neill refused and told the officer he would need to get a warrant to search the car. *Id.* at 573. The officer responded he did not need a warrant and could arrest O’Neill for the drug paraphernalia and search the vehicle incident to O’Neill’s arrest. *Id.* The conversation went back and forth. *Id.* The officer continued to ask for consent. *Id.* O’Neill continued to refuse. *Id.* Eventually, O’Neill consented to the search of the car. *Id.* The officer found drugs in the car. *Id.*

The Supreme Court held consent can be given while a person is detained. *Id.* at 589. However, under the circumstances in *O'Neill*, where a defendant refused consent and only acquiesced after continued pressure by the police, consent cannot be valid because it was not freely and voluntarily given. *Id.* at 589-91.

In this matter, the detectives testified Lopez consented to Detective Schlecht searching her purse. 1RP 36-37, 43, 53. Lopez limited the search of her purse, excluding the bank bag that was inside of it. *Id.* Therefore, without explicitly testifying to the fact, it is clear Lopez knew or understood she had the right to limit the scope of the search. Lopez was being cooperative with the detectives. 1RP 35. The detectives were honest and upfront with Lopez, and Mr. Angelo, about their business at the residence. 1RP 35-38, 53-55. Lopez knew prior to consenting to the search of her purse the detectives were at the residence serving a narcotics search warrant. 1RP 53.

Prior to entering Lopez's residence, Detective Haggerty read Lopez her *Miranda* warnings. 1RP 37. Once inside the residence, everyone sat in the living room, and the parties discussed Lopez's possible involvement as a confidential informant. 1RP 37-38, 44-45. Lopez then admitted the bank bag inside her purse contained

methamphetamine. 1RP 45. Lopez also stated there was more methamphetamine inside her and Mr. Angelo's bedroom, and the keys to the bank bag. 1RP 45. Lopez even assisted Detective Withrow in locating the other bank bag and key. 1RP 45-46. Detective Schlecht explained after he spoke to both Mr. Angelo and Lopez together, Lopez gave consent to open the bank bag, and provided the key to open it. 1RP 55.

The trial court is given deference by this Court regarding the credibility of the witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige*, 65 Wn. App. at 618. Lopez's testimony contradicting the detectives account was not found credible by the trial court. Lopez even wrongly identified who searched her purse, identifying Detective Withrow. 1RP 76.

There was no credible evidence of threats or coercion by the detectives. Lopez had the authority to consent to the search of the bank bag, the search did not exceed the scope of her consent, and Lopez's consent was voluntary. The totality of the circumstances supports finding that Lopez gave consent freely and voluntarily. The Court should affirm the trial court's denial of the motion to suppress.

**B. LOPEZ'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WERE NOT VIOLATED BY HER CONVICTIONS ON COUNT I AND COUNT II.**

Lopez argues her convictions for Count I, Possession of Methamphetamine, and Count II, Possession of Methamphetamine with the Intent to Deliver violate her right to be free from double jeopardy. Brief of Appellant 17-20. Lopez argues because the bags were ultimately opened at the same time, in the same location, her convictions for both offenses cannot stand. Lopez's analysis is flawed and her convictions do not violate her right to be free of double jeopardy.

**1. Standard Of Review.**

Double jeopardy claims are reviewed de novo. *State v. Barbee*, 187 Wn.2d 375, 382, 386 P.3d 729 (2017).

**2. Count I, Possession Of Methamphetamine Is Not Identical In Law And In Fact To Count II, Possession Of Methamphetamine With The Intent To Deliver.**

The Fifth Amendment of the United States Constitution and Article One, Section Nine of the Washington State Constitution provide that no person shall be put in jeopardy twice for the same offense. "In Washington, a defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact." *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998),

*citing State v. Calle*, 125 Wn.2d 769, 777, 888 P.3d 155 (1995). This analysis is commonly known as the *Blockburger* test. *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), *citing Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). The remedy for a double jeopardy violation is vacation of the lesser of the offenses. *Marchi*, 158 Wn. App. at 829.

There are two parts to the double jeopardy analysis. *Marchi*, 158 Wn. App. at 829. “[W]hether the two charged crimes arose from the same act and, if so, whether evidence supporting conviction of one crime was sufficient to support conviction of the other crime.” *Id.*, *citing In re Organge*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). When a single transaction violates two statutes, the question then becomes, does each require proof of an additional fact? *Blockburger*, 284 U.S. at 304.

Possession of a controlled substance “does not contain an element not found possession with the intent to deliver[,]” and therefore the two offenses are identical in law. *State v. O’Connor*, 87 Wn. App. 119, 940 P.2d 675 (1997). The only remaining inquiry is if the two offenses are based on the same transaction. Lopez cites to *O’Connor* to support her argument her two convictions are in violation of double jeopardy. Brief of Appellant 18-19. The facts in

Lopez's case are distinguishable from the facts in *O'Connor*. The two offenses are not based upon the same transaction.

A sheriff deputy noticed a small baggie of white powder, what appeared to be a glass pipe, and a pink paper bundle in an open blue metal box on the floor near the passenger seat of the vehicle O'Connor was driving after the deputy had conducted a stop on the vehicle. *O'Connor*, 87 Wn. App. at 121. O'Connor had a passenger in the vehicle who attempted to cover the open metal box with her purse. *Id.* The deputy searched the box and discovered 1.4 grams of methamphetamine. *Id.* A second deputy searched O'Connor and found in O'Connor's left sock a bag containing 71 grams of methamphetamine. *Id.* at 122. The deputy also located 1.1 grams of methamphetamine in O'Connor's jacket pocket, and \$6,095 in O'Connor's pants pockets and wallet. *Id.*

O'Connor was charged with the same two charges as Lopez in Counts I and II, possession of a controlled substance with the intent to deliver and possession of a controlled substance. *O'Connor*, 87 Wn. App. at 122; CP 46-47. O'Connor was found guilty as charged, basing the possession with intent to deliver on the 71 grams found in O'Connor's sock and the possession on the

methamphetamine found in the box and O'Connor's jacket. *O'Connor*, 87 Wn. App. at 122.

This Court, in analyzing the facts, looked at two cases, *State v. Lopez*, 79 Wn. App. 755, 904 P.2d 1179 (1995), *overruled State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998) and *State v. McFadden*, 63 Wn. App. 441, 820 P.2d 53 (1991), *overruled Adel*, 136 Wn.2d 629, to help it determine if O'Connor's two convictions arose out of the same act or transaction. *Lopez* similarly looks at the facts and reasoning in *McFadden*, how it compares and was analyzed in *O'Connor*, and distinguishes her case from *McFadden*, and aligns her case with *O'Connor*. Brief of Appellate 19-20.

*Lopez* brought the methamphetamine to the scene that constituted the charge of Possession of Methamphetamine for Count I. The bank bag containing the methamphetamine was in *Lopez*'s purse, arrived at the scene of the execution of the search warrant, in *Lopez*'s possession at the time she arrived at the scene. The second bank bag, containing the 100 grams of methamphetamine, constituting Count II, Possession of Methamphetamine with the Intent to Deliver, was located in Mr. Angelo and *Lopez*'s shared bedroom, in the residence that the detectives were already inside having cleared and began executing

a search warrant on. While Lopez did aid in the location in the second bank bag, this does not make the two bank bags part of the same transaction. Unlike *O'Connor*, where the defendant was within arm's reach of all of the drugs at the time of his contact with the police, Lopez brought one of the bank bags to the scene, while the other located in a place where the officers had already begun the execution of a warrant. The fact that the two bags were ultimately opened at approximately the same time does not render them part of the same transaction. The convictions for Count I and Count II do not violate Lopez's right to be free of double jeopardy and the Court should affirm.

#### IV. CONCLUSION

The trial court properly denied Lopez's motion to suppress the methamphetamine recovered from the bank bags. Lopez's contact with the detectives was voluntary and she consented to the search. In the alternative, the detectives had a reasonable, articulable suspicion Lopez was engaged in criminal activity, therefore allowing detectives to seize Lopez for investigatory purposes. Lopez's consent to search was voluntary. The convictions for Count I and Count II do not violate Lopez's right to

be free from double jeopardy and the Court should affirm the convictions.

RESPECTFULLY submitted this 15<sup>th</sup> day of June, 2018.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: \_\_\_\_\_  
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**LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE**

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