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Division II
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NO. 51700-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RACHEL RICHARDS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen M. Warning, Judge
The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in concluding police lawfully search a closed container in appellant's purse incident to her arrest.

2. The court erred in denying appellant's motion to suppress evidence seized pursuant to an unlawful search.

Issue pertaining to assignments of error

Appellant was arrested for suspected shoplifting. She was handcuffed, patted down, and taken to the loss prevention office. Police took her purse from her and searched it, finding stolen merchandise. The officer also searched a small closed pouch found inside the purse, although there was no reason to believe evidence relevant to the shoplifting charge would be found in the pouch. Where there was no legitimate evidence preservation or officer safety concern, did search of the closed container exceed the lawful scope of the search incident to arrest?

B. STATEMENT OF THE CASE

On November 11, 2017, Christa Garvin, a loss prevention officer at the Walmart in Woodland, called law enforcement to report she had seen a woman, identified as Rachel Richards, concealing items in her

purse. 1RP¹ 17-18. Garvin also saw Richards put some items in her shopping cart, which she paid for. She did not see Richards remove the packaging from any items, and she never saw Richards manipulate any containers or pockets in her purse to hide things more secretly. 1RP 18-19.

After Richards made her purchases and headed to the exit, Garvin approached her, but Richards refused to stop and talk. 1RP 19. Woodland Police Officers stopped Richards when she stepped outside and placed her under arrest. 1RP 6-7, 19. Richards was patted down and placed in handcuffs, and she was escorted to the loss prevention office. 1RP 7, 20. She did nothing to raise concerns that she was a safety threat. 1RP 22.

Officer Rob Lipp took possession of Richards's purse and searched it. 1RP 7. Garvin watched as Lipp removed items from Richards's purse, confirming that they were stolen. 1RP 21. She believed all the stolen items were recovered and had no reason to believe Richards had hidden any stolen items inside any containers in her purse. 1RP 21-22; Exhibit 1 (CrR 3.6 Hearing).

Lipp continued to search the purse after recovering the stolen items, intending to search any container he found for stolen merchandise or tools, although Garvin had not reported seeing Richards unwrap any

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—2/20/18 and 3/13/18; 2RP—3/8/18.

items or use any tools. 1RP 11-12. He found a small zippered pouch inside the purse and opened it, discovering some drug paraphernalia and heroin residue. 1RP 8; Exhibit 2 (CrR 3.6 Hearing).

Richards was charged with possession of heroin and third degree theft. CP 1-2. She moved to suppress evidence discovered in the closed pouch in her purse, arguing that search of the pouch exceeded the scope of a valid search incident to arrest. CP 3-9. At a hearing on her motion before the Honorable Stephen M. Warning, Richards argued that no officer safety concerns justified search of the pouch, nor was there reason to think the pouch would contain evidence of the crime of arrest. 1RP 27, 31-32. The warrantless search of the pouch was therefore illegal, and evidence found in that container should be suppressed. 1RP 28.

The State argued that articles immediately associated with a person fall under the gambit of a search incident to arrest. Because the purse was in Richards's possession when she was arrested, police had authority to search it and its contents. 1RP 28-30. The court agreed and denied the motion to suppress. 1RP 33-35.

The court did not enter written findings of fact or conclusions of law. It explained its ruling at the suppression hearing as follows:

All right. So, factually, the Defendant was observed by loss prevention stealing a number of items, small items, placing them in her purse. She was detained at the door to the store, taken by law

enforcement into the loss prevention office which is about twenty feet away from the door.

Her purse was searched. Inside her purse was located a number of small items that had been stolen. Also located a pouch that was closed, that was not locked in any fashion. The officer searched that, located drug paraphernalia and other items at issue here.

From a legal standpoint, Ms. Richards was under arrest when she was taken into the loss prevention office. We have a good body of case law that says there's no specific words required when her freedom of movement has been interfered with, not allowed to leave. She is under arrest at that point.

The search of the pouch, and I guess it's an interesting question whether or not a general, you know, observation shoplift and the number of small items taken would, in and of itself, constitute a basis to search that pouch. We've got a pretty robust body of case law, including the *Byrd* case, that indicates that closed packages inside a purse that are not locked are subject to search pursuant to that search incident to arrest.

Given that, it's not necessary, I guess, to examine any further the issue of probable cause to search that on the shoplift, although I think it exists there, too. She was clearly under arrest. The officers were entitled to search those closed and unlocked containers pursuant to the arrest, so I'll deny the Motion to Suppress.

1RP 33-35.

C. ARGUMENT

SEARCH OF THE CLOSED CONTAINER IN RICHARDS'S PURSE EXCEEDED THE PERMISSIBLE SCOPE OF THE SEARCH INCIDENT TO ARREST, AND THE EVIDENCE DISCOVERED IN THE POUCH SHOULD HAVE BEEN SUPPRESSED.

The Fourth Amendment protects people from unreasonable searches and seizures. U.S. Const. amend. IV. The Washington Constitution is even more protective, ensuring that "[n]o person shall be

disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. Warrantless searches are per se unreasonable under both the Fourth Amendment and article I, section 7. See *State v. Rankin*, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). This presumption is subject to only a few “jealously and carefully drawn exceptions to the warrant requirement.” *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the heavy burden of demonstrating that an exception to the warrant requirement makes the search lawful. *Id.* (citing *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)); *State v. VanNess*, 186 Wn. App. 148, 154, 344 P.3d 713 (2015).

One exception to the warrant requirement is a search incident to a lawful arrest. *VanNess*, 186 Wn. App. at 155. The court below concluded that the search of the closed pouch found inside Richards’s purse was justified under this exception. 1RP 34-35. Although the trial court did not enter written findings of fact and conclusions of law in support of its ruling on Richards’s motion to suppress, this Court can conduct a de novo review of whether the unchallenged facts support the legal conclusion that the officer was entitled to search the closed pouch incident to arrest. The record from the CrR 3.6 hearing is sufficient, even without the court’s

written findings, to conduct this review. *See State v. Otis*, 151 Wn. App. 572, 577, 213 P.3d 613 (2009).

The court below referred to *State v. Byrd*² in support of its conclusion that the search was lawful. 1RP 34. In that case, the Court upheld the validity of a warrantless search of the defendant's purse, seized from her lap and set on the ground during her arrest. Following the categorical rule announced in *United States v. Robinson*,³ the Court held that the lawful arrest justified the search of her person and all objects on or closely associated with her person at the time of her arrest, including her purse. *Byrd*, 178 Wn.2d at 625. The court rejected the need to consider whether the search was justified by concerns of officer safety or evidence preservation. *Id.*

Since *Byrd* was decided, however, the United States Supreme Court has narrowed the search incident to arrest exception. *See Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2484-85, 189 L. Ed. 2d 430 (2014). The Court noted in *Riley* that the search incident to arrest exception was recognized to allow search of an arrestee's person and the area within her immediate control when the search was reasonable to ensure officer safety or to prevent concealment or destruction of evidence. *Id.* at 2483. While *Robinson* had held that a search incident to arrest

² *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013).

³ *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

required no additional justification other than the valid arrest, the *Riley* Court rejected this categorical rule. *Id.* at 2484.

“After *Riley*, a lawful arrest no longer provides categorical justification to search, without a warrant, all items found on an arrested person at the time of arrest.” *VanNess*, 186 Wn. App. at 160. Instead, if the arrestee has a significant privacy interest in the item to be searched, that item may be searched incident to arrest only if interests in officer safety and evidence preservation exceed an arrestee's privacy interest in the category of item. *Id.* (citing *Riley*, 134 S. Ct. at 2484).

In *VanNess*, the defendant was wearing a backpack when he was arrested on warrants. The arresting officer removed the backpack, handcuffed the defendant, and placed him in a patrol car. The officer then searched the backpack. *VanNess*, 186 Wn. App. at 152. In addition to knives, the officer found a small locked box within the backpack. He pried it open with a screwdriver and found evidence of controlled substances. *Id.* at 153. The trial court found that the officer lawfully searched the backpack and box incident to the defendant's arrest, but the Court of Appeals disagreed. *Id.* at 162.

After discussing the origins of the search incident to arrest exception, as well as its current status in light of the Supreme Court's decision in *Riley*, the Court of Appeals held that the justification for a

search incident to arrest does not apply to locked containers separated from an arrestee's person. *Id.* at 161. Because the defendant no longer had access to the contents of his backpack at the time of the search, the search could not be justified on officer safety concerns. And since the defendant was arrested on outstanding warrants, the officer could not reasonably believe evidence relevant to the crime of arrest would be found in the container within the backpack. *Id.* at 161-62.

This case involved a similar situation. Richards was carrying a purse when she was arrested. The arresting officer removed the purse, patted her down and placed her in handcuffs, and escorted her to the loss prevention office. He then searched the purse. When he located a small closed container within the purse, he opened it and discovered evidence of controlled substances. Although the pouch inside Richards's purse was not locked, Washington courts recognize an individual's privacy interest in closed containers, whether locked or unlocked. *State v. Wisdom*, 187 Wn. App. 652, 670, 349 P.3d 953 (2015) (search of unlocked shaving kit found in front seat of truck defendant was driving not justified as search incident to arrest); *see VanNess*, 186 Wn. App. at 161 (search incident to arrest analysis same for searches of vehicles and of objects found on arrestee's person).

Richards conceded below that the search of her purse was permitted incident to her arrest. 1RP 26. But the search of the closed container within the purse exceeded the scope of a permissible search incident to arrest. There was no indication Richards was seen unwrapping merchandise, manipulating items when placing them in her purse so as to conceal them in a closed container, or using any tools. 1RP 11, 18-19, 21-22. Thus the State cannot show the officer reasonably believed evidence relevant to the crime of arrest would be found in the closed pouch. Moreover, Richards was separated from the purse and thus had no access to it or its contents, and her conduct raised no concerns for officer safety. 1RP 9-10, 22.

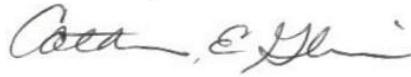
The search incident to arrest exception does not justify the search of the closed container found in Richards's purse. The evidence found during this unconstitutional search should be suppressed and the charge based on that evidence dismissed. *See VanNess*, 186 Wn. App. at 165-66.

D. CONCLUSION

Search of the closed container in Richards's purse exceeded the scope of a valid search incident to arrest. Evidence seized during the unlawful search must be suppressed and the controlled substance charge dismissed.

DATED September 27, 2018.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI

WSBA No. 20260

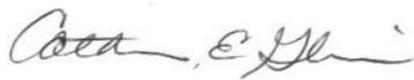
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. Rachel Richards*, Cause No. 51700-1-II as follows:

Rachel Richards
1005 NE 142nd Ave
Vancouver, WA 98684

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



Catherine E. Glinski
Done in Manchester, WA
September 27, 2018

GLINSKI LAW FIRM PLLC

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