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State of Washington  
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NO. 52681-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIELLE AYLWARD,

Appellant.

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

The Honorable Stephen Brown, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| <u>Table of Authorities</u> .....  | iii         |
| <b>A. ASSIGNMENTS OF ERROR</b> .....   | 1           |
| <b>B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</b> ..   | 1           |
| <b>C. STATEMENT OF THE CASE</b> .....  | 2           |
| 1. <u>Procedural facts</u> .....   | 2           |
| a. <i>Motion to dismiss</i> .....  | 3           |
| b. <i>Verdict and sentencing</i> .....   | 3           |
| 2. <u>Trial testimony</u> .....  | 5           |
| <b>D. ARGUMENT</b> .....   | 7           |
| 1. A WARRANTLESS SEARCH OF THE<br>POUCH CONTAINED IN THE PURSE<br>EXCEEDED THE PERMISSIBLE SCOPE OF<br>A SEARCH UNDER ARTICLE I, SECTION 7<br>OF THE WASHINGTON CONSTITUTION<br>AND THE FOURTH AMENDMENT TO THE<br>UNITED STATES CONSTITUTION..... | 7           |
| 2. IN THE ALTERNATIVE, MS. AYLWARD<br>WAS DENIED THE EFFECTIVE<br>ASSISTANCE OF COUNSEL WHEN HER<br>ATTORNEY FAILED TO FILE A MOTION<br>TO SUPPRESS EVIDENCE SEIZED<br>FOLLOWING THE ILLEGAL SEARCH OF<br>THE POUCH .....                          | 13          |
| <b>E. CONCLUSION</b> .....   | 18          |

## TABLE OF AUTHORITIES

| <u>WASHINGTON CASES</u>  | <u>Page</u>   |
|--|---------------|
| <i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999) .....   | 15            |
| <i>State v. Bennett</i> , 168 Wn.App. 197, 275 P.3d 1224 (2012) .....  | 16-17         |
| <i>State v. Bravo Ortega</i> , 177 Wn.2d 116, 297 P.3d 57 (2013) .....                                       | 9             |
| <i>State v. Brock</i> , 184 Wn.2d 148, 355 P.3d 1118 (2015) .....  | 9             |
| <i>State v. Byrd</i> , 178 Wn.2d 611, 310 P.3d 793 (2013) .....  | 9, 10         |
| <i>State v. Contreras</i> , 92 Wn. App. 307, 966 P.2d 915 (1998) .....                                       | 7, 13         |
| <i>State v. Crawford</i> , 159 Wn.2d 86, 147 P.3d 1288 (2006) .....  | 15            |
| <i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....   | 14            |
| <i>State v. Hamilton</i> , 179 Wn. App. 870, 320 P.3d 142 (2014) .....                                       | 15            |
| <i>State v. Higgs</i> , 177 Wn.App. 414, 311 P.3d 1266 (2013), review denied, 179<br>Wn.2d 1024 (2014) ..... | 16            |
| <i>State v. Houser</i> , 95 Wn.2d 143, 157, 622 P.2d 1218 (1980) .....                                       | 12            |
| <i>State v. Johnston</i> 107 Wn.App. 280, 28 P.3d 775 (2001) .....   | 9             |
| <i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015) .....   | 14            |
| <i>State v. Kalebaugh</i> , 183 Wn.2d 578, 355 P.3d 253 (2015) .....   | 12            |
| <i>State v. Keodara</i> , 191 Wn.App 305, 364 P.3d 777 (2015) .....  | 13            |
| <i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007) .....   | 12            |
| <i>State v. Kyllo</i> , 166 Wash.2d 856, 215 P.3d 177 (2009) .....   | 15            |
| <i>State v. MacDicken</i> , 179 Wn.2d 936, 319 P.3d 31 (2014) .....  | 8             |
| <i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251 (1995) .....                                      | 7, 15         |
| <i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009) .....   | 13            |
| <i>State v. Parker</i> , 139 Wn.2d 486 987 P.2d 73 (1999) .....  | 8             |
| <i>State v. Rankin</i> , 151 Wn.2d 689, 92 P.3d 202 (2004) .....   | 9             |
| <i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....  | 16            |
| <i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....  | 14            |
| <i>State v. VanNess</i> , 186 Wn.App. 148, 344 P.3d 713 (2015) .....   | 8, 10, 12, 17 |
| <i>State v. Wisdom</i> , 187 Wn. App. 652, 349 P.3d 953 (2015) .....   | 12            |
| <br>   |               |
| <u>UNITED STATES CASES</u>   | <u>Page</u>   |
| <i>Riley v. California</i> , ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430<br>(2014) .....                | 10            |
| <i>United States v. Robinson</i> , 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d<br>427 (1973) .....                | 10            |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.                                   |               |

|                     |        |
|---------------------|--------|
| 2d 674 (1984) ..... | 14, 15 |
|---------------------|--------|

|  |                    |
|--|--------------------|
| <b><u>REVISED CODE OF WASHINGTON</u></b> | <b><u>Page</u></b> |
| RCW 69.50.4013 .....                     | 16                 |

|   |                    |
|---|--------------------|
| <b><u>CONSTITUTIONAL PROVISIONS</u></b> | <b><u>Page</u></b> |
| U.S. Const. Amend IV .....              | 7                  |
| Wash. Const. art. I, § 7 .....          | 8                  |
| Wash. Const. art. I, § 22 .....         | 14                 |

|                           |                    |
|---------------------------|--------------------|
| <b><u>COURT RULES</u></b> | <b><u>Page</u></b> |
| CrR 3.6 .....             | 16, 17             |
| CrR 3.6(a) .....          | 16                 |
| RAP 2.5(a)(3) .....       | 7                  |

**A. ASSIGNMENTS OF ERROR**

1. The warrantless search of a pouch located inside Danielle Aylward's purse violated her rights under article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution because it invaded her expectation of privacy and because she was placed under arrest at the time of the search and had no access to destructible evidence within the purse.

2. Counsel was ineffective for failing to file a written motion under CrR 3.6 to suppress evidence obtained by the police in the illegal search of the pouch found inside Ms. Aylward's purse, in violation of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution because had the motion been presented, the trial court would have been required to suppress.

3. The trial court erred in entering Finding of Fact 2. Clerk's Papers (CP) 41.

4. The trial court erred in entering Conclusion of Law 2. CP 41.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Washington courts require a search warrant prior to permitting a search of a closed container subject to very few, well delineated exceptions. Does the search of the pouch found inside Ms. Aylward's purse

exceed the search-incident-to-arrest exception to the warrant requirement?

Assignments of Error 1, 3, and 4.

2. Was Ms. Aylward denied her constitutional right to effective assistance of counsel when her attorney failed to file a written motion to suppress methamphetamine residue found on a straw found during the search of the pouch? Assignments of Error 1 and 2.

3. Where no other evidence supported Ms. Aylward's conviction for possession of methamphetamine, must the conviction be reversed and must the charge be dismissed with prejudice? Assignments of Error 1, 2, and 4.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural facts:**

Danielle Aylward was charged by information filed on May 11, 2017, in Pacific County Superior Court with one count of possession of methamphetamine, contrary to RCW 69.50.4013. Clerk's Papers (CP) 10-11.

Ms. Aylward waived jury trial on September 22, 2017, and the case came on for bench trial on August 23, 2018, the Honorable Stephen Brown presiding. Report of Proceedings<sup>1</sup> (RP) at 34-80; CP 23.

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<sup>1</sup>The record of proceedings consists of the following transcribed volumes: RP – August 11, 2017, September 22, 2017 (waiver of jury trial), October 27, 2017, January 19, 2018; February 2, 2018 (waiver of speedy trial), April 13, 2018, July 6, 2018, July 27, 2018, August 23, 2018 (non-jury

*a. Motion to dismiss and objection to the search*

After the prosecution rested, defense counsel moved to dismiss the charge on the basis of insufficient evidence, and also challenged the legality of the search of Ms. Aylward's purse. RP at 61. The State argued that no written motion pursuant to CrR 3.6 had been filed regarding the search, and that in any case the search was incident to arrest, which includes items closely associated with the person, in this case Ms. Aylward's purse. RP at 63. The court denied the defense motion to dismiss regarding the small amount of methamphetamine residue contained in the straw, stating: "[t]he law doesn't, as far as I know, and I haven't been shown anything otherwise, that there is a minimum amount required." RP at 63-64. The judge did not allow the oral motion challenging the search, stating the CrR 3.6 requires a motion to suppress to be in writing and supported by an affidavit, "and that was not done, so I'm not going to address it." RP at 64.

*b. Verdict and sentence*

The court found Ms. Aylward guilty of possession of methamphetamine as charged. RP at 78-80. During his oral ruling, the trial court judge stated:

[T]his is one of those cases where the Defendant, you know, there might've been some issues, but probably not, as

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trial, entry of findings and conclusions, and sentencing).

to the search. There might have been some issues as to the amount, but the law doesn't provide a defense there. The Defendant said under oath that she didn't know it was there. And all of those items just come up—just come up short when it's, in fact, in your constructive possession by being in a location, like being in a brief—it just wasn't a pouch that was under a seat somewhere, so—and, then—so, there isn't—I just needed something else. Just having a passenger is not enough, that doesn't corroborate that—or that doesn't provide any evidence that somehow the passenger was involved with that.

So, there we are. So, therefore, I conclude beyond a reasonable doubt that all elements of the offense have been established. So the Defendant is guilty of unlawful possession of a controlled substance.

RP at 79-80.

Findings of fact and conclusions of law were entered August 23, 2018. CP 40-42. The court found that police officer Rodney Nawn searched Ms. Aylward incident to arrest, and that the officer also searched the purse found in the car, which contained a gray pouch. After opening the gray pouch, the officer found a straw which contained residue that tested positive for methamphetamine. CP 41 (Findings of Fact 2, 3, and 5).

The court concluded that the State proved beyond a reasonable doubt all the elements of possession of controlled substance – methamphetamine. CP 41 (Conclusion of Law 2). The court also found that the defense failed to meet its burden to prove by a preponderance of the evidence that the possession was unwitting. CP 41 (Finding of Fact 6).

The court sentenced Ms. Aylward as first time offender to 15

days with credit for three days served and the balance converted to community service, followed by 12 months of community custody. RP at 90-91; CP 45. The court imposed legal financial obligations including \$500.00 crime victim penalty assessment and \$100.00 DNA collection fee. RP at 90; CP 47.

Timely notice of appeal was filed September 14, 2018. CP 59-60. This appeal follows.

**2. Trial testimony:**

While on patrol on May 10, 2017, in Pacific County, Washington, Long Beach police officer Rodney Nawn stopped a vehicle driven by Danielle Aylward.<sup>2</sup> RP at 36-37.

Officer Nawn placed Ms. Aylward under arrest for driving while suspended in the third degree. RP at 42-43, CP 6. Officer Nawn testified that when he contacted Ms. Aylward, she had what he described as a “standard purse” in her lap, which she put on the center console of the car. RP at 38, 43.

Officer Nawn searched the purse and inside he found a zippered pouch, which he opened. RP at 38, 40, 41, 42. The pouch contained a plastic straw with a white, crystalline residue on the inside, which he stated

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<sup>2</sup>Ms. Aylward is referred to as Danielle Aylward and Danielle Meadows in the record, and her counsel stated that she has changed her name to Danielle Meadows. RP at 34. For clarity and continuity, this brief refers to the appellant as Danielle Aylward.

resembled methamphetamine. RP at 38-39, 46. The pouch and straw were taken and placed in evidence. RP at 40.

Martin McDermot, a chemist employed by the Washington State Patrol Crime Lab, tested the residue from the straw. RP at 51-57. He testified that the amount of residue was sufficient to test, but not “enough to practically measure.” RP at 59, 60. He testified that the residue tested positive for methamphetamine. RP at 53.

Ms. Aylward testified that she was driving with a passenger in the car on May 10, 2017 at the time of the traffic stop. RP at 66-67. She stated that when she was stopped by Officer Nawn, her purse was open and was on the passenger side floorboard of the front of her car, “next to my passenger.” RP at 68, 69, 71. She stated Officer Nawn took her purse and put it on her lap and told her that she had a suspended license and that she was not supposed to be driving. RP at 68-69. She testified that she did not know that her driver’s license was suspended and denied that the purse was in her lap, as alleged by Officer Nawn. RP at 69, 70. She stated that the pouch and the straw did not belong to her and that she had not seen them before, but acknowledged that she “did have a purse in the car” and that she had a suspended driver’s license. RP at 67, 71.

Ms. Aylward stated that after she was arrested, a second police car arrived and that she was placed into the back of that car when her purse was searched. RP at 70.

## **D. ARGUMENT**

### **1. A WARRANTLESS SEARCH OF THE POUCH CONTAINED IN THE PURSE EXCEEDED THE PERMISSIBLE SCOPE OF A SEARCH UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

Issues raised for the first time on appeal will generally not be considered unless the error is a “manifest error affecting a constitutional right.” *State v. Contreras*, 92 Wn. App. 307, 311, 966 P.2d 915 (1998) (quoting RAP 2.5(a)(3)). To show that an error is manifest, the defendant must demonstrate “how, in the context of the trial, the alleged error actually affected [her] rights.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). “It is not enough that the defendant allege prejudice – actual prejudice must appear in the record.” *Id.* at 334. Ms. Aylward bears the burden of proving prejudice due to her trial counsel’s failure to timely challenge the search of the pouch found in the purse. Ms. Aylward meets the test. The trial court would likely have granted a motion to suppress the methamphetamine had trial counsel so moved.

The Fourth Amendment protects people from unreasonable

searches and seizures. U.S. Const. amend. IV. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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. The Supreme Court has stated that “it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999).

Because Washington's constitution provides greater protections of individual privacy, when presented with potential violations under the state and federal constitutions, Washington courts first examine the state law challenges. *State v. VanNess*, 186 Wn.App. 148, 155, 344 P.3d 713 (2015); *State v. MacDicken*, 179 Wn.2d 936, 940, 319 P.3d 31 (2014). The court determines if the challenged state act involved a disturbance of

private affairs and then asks whether the law justifies the intrusion. *Id.*

Under the Washington State Constitution, “a warrantless search is per se unreasonable unless the State proves that one of the few ‘carefully drawn and jealously guarded exceptions’ applies.” *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013) (quoting *State v. Bravo Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)). See also, *VanNess*, 186 Wash.App. at 155; *State v. Rankin*, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004). If an exception does not apply, a warrantless search is illegal and the illegally seized evidence is excluded from a trial. *VanNess*, 186 Wash.App. at 156. The State carries the heavy burden of proving that a narrowly drawn exception to the warrant requirement applies to make the search lawful. *VanNess*, 186 Wash.App. at 154; *State v. Johnston* 107 Wn.App. 280, 284, 28 P.3d 775 (2001).

The exception at issue in this case is the exception for searches incident to arrest. There are two 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.” *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118

(2015).

In *Byrd*, supra, the Washington Supreme Court considered the validity of a warrantless search of Byrd's purse, seized from her lap and set on the ground by the police when arresting Byrd. *Byrd*, 178 Wash.2d at 617–25. Following the categorical rule announced in *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Court held that the lawful arrest of Byrd 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 Wash.2d at 625.

The year after *Byrd* was decided, the United States Supreme Court in *Riley v. California*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) held that “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 (citing *Riley*, 134 S.Ct. at 2484). 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 this case, *VanNess* is persuasive authority. 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.

Division One 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.

In this case, Officer Nawn testified that the purse was in Ms. Aylward's lap when she was initially stopped. Ms. Aylward

acknowledged that she did have a purse in the car and testified that the purse was on the floorboard of the car next to her passenger. RP at 68, 71.

Officer Nawn placed her under arrest for driving with a suspended license. RP at 38. Ms. Aylward testified that she was in a second police car at the time the purse was searched. RP at 70. At that point she did not have access to her purse or its contents and could not reasonably be believed to pose a threat to officer safety or be at risk to destroy evidence. Officer Nawn searched the purse and after locating a small zippered pouch within the purse, he opened it and discovered the evidence used at trial. Although the record does not indicate that the pouch inside the purse was 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). “Washington courts recognize an individual's privacy interest in his closed luggage, whether locked or unlocked.” *Id.* (citing *State v. Houser*, 95 Wn.2d 143, 157, 622 P.2d 1218 (1980)).

The search incident to arrest exception does not justify the search of the pouch found in Ms. Aylward'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.

Under the rules of appellate procedure, where there has been no objection below, the appellate court may conduct review of the unpreserved claim for the first time on appeal if it is a manifest error affecting a constitutional right. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015); RAP 2.5(a)(3). RAP 2.5(a)(3) provides this narrow exception and requires a showing of actual prejudice, which may be demonstrated by a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). (Internal citations omitted). Ms. Aylward meets the requirements of RAP 2.5(a)(3).

First, admission of evidence obtained in violation of either the federal or state constitutions is an error of constitutional magnitude. *State v. Keodara*, 191 Wn.App 305, 317, 364 P.3d 777 (2015). She has met the second part of the analysis of RAP 2.5(a)(3) because the asserted error is manifest from the record. To determine whether the error had practical and identifiable consequences, this Court places itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the

court could have corrected the error. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Here, the applicable case law leads to the conclusion that a motion to suppress would have been granted had such a motion been brought by trial counsel.

The record here is sufficiently developed for this Court to determine whether a motion to suppress would have been granted or denied. *State v. Contreras*, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998).

**2. IN THE ALTERNATIVE, MS. AYLWARD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY FAILED TO FILE A MOTION TO SUPPRESS EVIDENCE SEIZED FOLLOWING THE ILLEGAL SEARCH OF THE POUCH**

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to move to suppress the evidence obtained in the search, then both elements of ineffective assistance of counsel have been established.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). See U.S. Const. amend. VI; Const. art. I, § 22. A court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the *Strickland* test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30.

Prejudice exists if there is a reasonable probability that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The defendant must affirmatively prove prejudice and show more than a “ ‘conceivable effect on the outcome’ ” to prevail. *State v. Crawford*, 159 Wash.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052).

See, also *State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014) (stating “[i]n order to establish actual prejudice, [the defendant] must show that the trial court likely would have granted a motion to suppress the seized evidence based on an unlawful warrantless search of her purse.”) (citing *McFarland*, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995)).

There is a strong presumption that defense counsel's conduct is not deficient. *State v. McFarland*, 127 Wn.2d at 335. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

When arguments to suppress key evidence are available to counsel but not raised, the failure to challenge the evidence is ineffective when it is prejudicial to the defendant's case. See *State v. Reichenbach*, 153 Wn.2d 126, 131-32, 101 P.3d 80 (2004). Here, counsel recognized that the warrantless search of the pouch was problematic; counsel belatedly challenged the warrantless search at the conclusion of the State’s case, in conjunction with his motion to dismiss due to the small amount of

residue, which was too small to measure.<sup>3</sup> RP at 61-63. But, as the court pointed out, counsel failed to comply with the requirements of CrR 3.6 to challenge the evidence and declined to address the motion. RP at 64. The rule states:

Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion.

CrR 3.6(a).

The rule plainly requires a written motion and legal argument, which counsel did not prepare.

The evidence resulting from the search of the pouch provided the entirety of the State's case. Because counsel recognized the appropriateness of challenging its admission on the grounds that it was improperly obtained, no conceivable tactical reason exists to explain the failure to file a CrR 3.6 motion to suppress it.

As argued in Section 1 above, there is a reasonable likelihood that

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<sup>3</sup>This Court has held that "RCW 69.50.4013 does not require that a defendant possess a minimum amount of a controlled substance in order to sustain a conviction." *State v. Higgs*, 177 Wn.App. 414, 436, 311 P.3d 1266 (2013), review denied, 179 Wn.2d 1024 (2014); see also *State v. Bennett*, 168 Wn.App. 197, 210, 275 P.3d 1224 (2012).

a motion to suppress that was timely filed would have been granted. Searches without the authority of a warrant are presumptively unreasonable unless they fall within an exception to the warrant requirement. *VanNess*, 186 Wash.App. at 155.

Ms. Aylward has met her burden to show that counsel's failure to file a CrR 3.6 motion to suppress on these grounds caused prejudice.

**E. CONCLUSION**

Search of the pouch in Ms. Aylward's purse exceeded the scope of a valid search incident to arrest. Evidence seized during the unlawful search must be suppressed.

Alternatively, Ms. Aylward was denied her right to effective assistance of counsel, when defense counsel failed to move to suppress the contents of the pouch. Her conviction should be reversed and dismissed.

DATED: March 7, 2019.

Respectfully submitted,  
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835  
Of Attorneys for Danielle Aylward

CERTIFICATE OF SERVICE

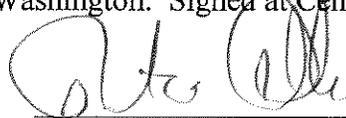
The undersigned certifies that on March 7, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Mark D. McClain, Pacific County Prosecuting Attorney's Office and copies were mailed by U.S. mail, postage prepaid, to the following appellant:

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Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

Danielle Aylward  
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 7, 2019.



PETER B. TILLER

**THE TILLER LAW FIRM**

**March 07, 2019 - 4:03 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Danielle M. Aylward a/k/a Danielle M. Meadows, Appellant  
**Superior Court Case Number:** 17-1-00117-0

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