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State of Washington  
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No. 52681-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIELLE AYLWARD,

Appellant.

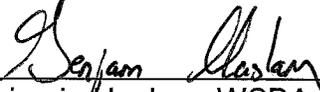
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BRIEF OF RESPONDENT

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**I. RESPONSES TO ASSIGNMENTS OF ERROR**

1. The search incident to arrest of Aylward's purse did not violate her rights under article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution.
2. Aylward's trial counsel was not ineffective for electing not to file a motion to suppress under CrR 3.6 as there was no basis for such a motion and no prejudice to Aylward from failing to file one.
3. The trial court did not err in entering Finding of Fact 2.
4. The trial court did not err in entering Conclusion of Law 2.

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

1. Was the warrantless search of Aylward's purse permissible under the exception to the warrant requirement for search incident to a lawful arrest?
2. Is ineffective assistance of counsel established for failing to file a motion to suppress evidence where there were legitimate reasons not to file such a motion, and no prejudice resulted to Aylward from her trial counsel deciding not to file one?

### III. STATEMENT OF THE CASE

On May 10, 2017, while on patrol, Officer Rodney Nawn of the Long Beach Police Department observed a vehicle registered to the Appellant Danielle Aylward ("Aylward") driving on Pacific Avenue in Long Beach. CP 6; RP 37. Aylward's driver status indicated suspended in the third degree, so Officer Nawn stopped the vehicle. *Id.* Officer Nawn contacted the driver, Aylward, who he recognized from numerous law enforcement contacts. *Id.* Officer Nawn informed Aylward she was under arrest for driving while suspended, and had her exit the vehicle. CP 6; RP 38.

Aylward's had a purse in her lap at the time of her arrest, which she placed on the center console of the vehicle during the arrest. RP 38. Aylward was searched incident to her arrest, along with her purse. *Id.* Inside the purse, Officer Nawn located a straw with residue inside resembling methamphetamine. RP 38-39. This residue later tested positive as methamphetamine by the Washington State Patrol Crime Laboratory. RP 50-56.

Aylward was charged by information filed on May 11, 2017, with one count of possession of methamphetamine, in violation of RCW 69.50.4013. CP 10-11. Aylward waived jury trial on September 22, 2017. RP 7. The case proceeded to a bench trial on

August 23, 2018, the Honorable Stephen Brown presiding. RP 34-80. Following trial, Aylward was found guilty of possession of methamphetamine. RP 80.

#### **IV. ARGUMENT**

##### **A. THE SEARCH OF AYLWARD’S PURSE WAS PERMISSIBLE WITHIN THE SCOPE OF A SEARCH INCIDENT TO ARREST**

Aylward asserts that the search of a pouch contained in her purse was not a lawful warrantless search incident to her arrest.<sup>1</sup>

###### **1. Standard of Review.**

The Fourth Amendment provides for “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV. Article I, section 7 does not turn on reasonableness, instead guaranteeing that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. I, § 7. Article I, section 7 is more protective of individual privacy than the Fourth Amendment, and is analyzed first when both provisions are at issue. *State v. Ortega*, 177 Wash.2d 116, 122, 297 P.3d 57

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<sup>1</sup> Brief of Appellant at 7.

(2013) (citing *State v. Walker*, 157 Wash.2d 307, 313, 138 P.3d 113 (2006)); *State v. Afana*, 169 Wash.2d 169, 176, 233 P.3d 879 (2010). Under article I, 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. *Ortega*, 177 Wash.2d at 122, 297 P.3d 57 (citing *Afana*, 169 Wash.2d at 176–77, 233 P.3d 879). At issue here is the search incident to arrest exception.

There are two types of warrantless searches that may be made incident to a lawful arrest: a search of the arrestee's person and a search of the area within the arrestee's immediate control. *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014), (citing *State v. Byrd*, 178 Wn.2d 611, 618, 310 P.3d 793, (2013) (upholding the search of a purse on the arrested persons lap as a proper search incident to arrest), and *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)).

The distinction as to whether a particular personal item constitutes part of the arrestee's person, as opposed to just part of the surrounding area, turns on whether the arrestee had “actual and exclusive possession at or immediately preceding the time of arrest.” *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015)

(quoting *Byrd*, 178 Wash.2d at 623, 310 P.3d 793). Such a search presumes exigencies and is justified as part of the arrest; therefore it is not necessary to determine whether there are officer safety or evidence preservation concerns in that particular situation. *MacDicken*, 179 Wn.2d at 940-41. The same exigencies that justify searches of an arrestee's person extend not just to the arrestee's clothes, but to all articles closely associated with her person. *Byrd*, 178 Wn.2d at 617-18, 622, 310 P.3d 793 (citing *Robinson*, 414 U.S. at 235, 94 S.Ct. 467).

A warrantless search of the arrestee's surroundings is allowed only if the area is within an arrestee's "immediate control." *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), *overruled in part by Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)). Such searches are justified by concerns of officer safety or the preservation of evidence and are limited to those areas within reaching distance at the time of the search. *Gant*, 556 U.S. at 351, 129 S.Ct. 1710.

## **2. Search Incident to Lawful Arrest.**

The search of Aylward's purse in this case was of her person by virtue of her lawful arrest. In very similar circumstances to this case, *Byrd* specifically involved a purse on the arrestee's lap, which

was moved during the course of the arrest. *Byrd*, 178 Wn.2d at 615, 310 P.3d 793. The purse contained a sunglasses case in which the arresting officer found methamphetamine. *Id.* The Court held a lawful arrest gives 'authority of law' to search the arrestee's person. *Id.* at 618-19., 310 P.3d 793.

On the contrary, cases cited by Aylward are inapposite. *VanNess* specifically involved a locked box inside a bag. *State v. VanNess*, 186 Wash.App. 148, 156, 344 P.3d 713 (2015). *Riley* involved a search of digital contents of a cell phone. *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473 (2014). These cases recognize that certain categories of items to be searched implicate an arrestee's significant privacy interests. *VanNess*, 186 Wash.App. at 159-60, 344 P.3d 713. However, they do not overrule the *Robinson* rule, which "strikes the appropriate balance in the context of physical objects." *Riley*, 573 U.S. at 386, 134 S.Ct. 2473. Likewise, in *Wisdom* the shaving kit bag was located on the seat of the arrestee's truck after he had been taken into custody, whereas the purse in this case was located on Aylward's lap at the time of her arrest. *State v. Wisdom*, 187 Wash.App. 652, 349 P.3d 953 (2015).

Here, Aylward's purse was clearly a physical object within Aylward's actual and exclusive possession at or immediately

preceding the time of arrest. RP 38. Aylward's purse was an article closely associated with her person. *Id.* It is apparent from the record that it was searched immediately after Aylward was physically arrested. *Id.* The pouch within her purse was zippered but not locked. RP 38-41. Therefore, the purse and its contents, including the pouch, were permissibly searched by Officer Nawn as part of the search of Aylward's person incident to her arrest.

Even if Aylward's purse were regarded as not a part of the arrestee's person, it was within her immediate control and the State's interests in officer safety and evidence preservation exceed Aylward's privacy interest in a purse that was on her lap at the time of arrest, and which would presumably be transported with her into custody.

Therefore, it was permissible for Officer Nawn to search the purse incident to Aylward's arrest without a warrant.

## **B. AYLWARD WAS NOT DENIED EFFECTIVE COUNSEL FOR FAILING TO MOVE FOR SUPPRESSION**

Aylward asserts trial counsel was ineffective for failure to move to suppress evidence seized following a lawful arrest.<sup>2</sup>

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<sup>2</sup> Brief of Appellant at 14.

## **1. Standard of Review.**

A defendant alleging ineffective assistance of counsel must show (1) counsel's representation was deficient, and (2) the deficiency prejudiced the defendant. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "If either part of the test is not satisfied, the inquiry need go no further." *Hendrickson*, 129 Wn.2d at 78, 917 P.2d 563 (citing *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991)). A reviewing court presumes that counsel's performance was not deficient, but the defendant may overcome that presumption by showing that "no conceivable legitimate tactic" explains counsel's performance. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). Judicial review of an attorney's performance is highly deferential, *Strickland*, 466 U.S. at 689, and such performance is not deficient if it can be considered a legitimate trial tactic, *Hendrickson*, 129 Wn.2d at 61, 77-78.

## **2. There Were Legitimate Reasons Not to File a Motion to Suppress.**

Here, the search of Aylward's purse incident to her arrest was a permissible warrantless search. Therefore, there were legitimate

reasons for Aylward's trial counsel deciding not to file a motion to suppress evidence seized pursuant to that search. Accordingly, trial counsel's decision not to file a motion to suppress did not deny her effective assistance.

**3. There Was No Prejudice to Aylward Caused by Her Trial Counsel's Decision Not to File a Motion to Suppress.**

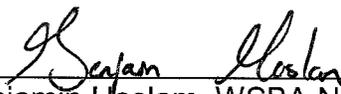
Likewise, as the search of Aylward's purse incident to her arrest was a permissible warrantless search, there was no prejudice to Aylward caused by her trial counsel's decision not to file a motion to suppress.

**V. CONCLUSION**

Based on the foregoing, the search of Aylward's purse was permissible as a search incident to her arrest. As a result, Aylward was not denied effective assistance of counsel by her trial attorney's decision not to file a motion to suppress, and this matter should not be disturbed on appeal.

RESPECTFULLY submitted this 25<sup>th</sup> day of April, 2019.

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**Transmittal Information**

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