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Court of Appeals
Division II
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No. 52994-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

CHERYL ANN HEATH

BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | |
|---|----|
| A. Assignments of Error..... | 1 |
| 1. The trial court erred by considering the police officer’s report at the CrR 3.6 evidentiary hearing. | |
| 2. Finding of Fact VI is not supported by substantial evidence. | |
| 3. The trial court erred by concluding Officer Corn conducted a lawful search incident to arrest of Ms. Heath’s backpack. | |
| B. Statement of Facts..... | 2 |
| C. Argument..... | 9 |
| The trial court erred by considering the police officer’s report at the CrR 3.6 evidentiary hearing..... | 9 |
| Officer Corn conducted an illegal search incident to arrest of Ms. Heath’s backpack..... | 16 |
| D. Conclusion..... | 20 |

TABLE OF AUTHORITIES

Cases

Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) 2, 17

State v. Binkin, 79 Wn.App. 284, 290, 902 P.2d 673 (1995)..... 12, 13

State v. Blunt, 118 Wn.App. 1, 8, 71 P.3d 657 (2003)..... 12

State v. Brock, 184 Wash.2d 148 355 P.3d (2015) 17, 18, 19

State v. Byrd, 178 Wn.App 611, 310 P.3d 793 (2013) 17, 18, 19

State v. Cruz, 88 Wn.App. 905, 946 P.2d 1229 (1997) 15, 16

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998) 15

State v. Gantt, 163 Wn.App. 133, 139, 257 P.3d 682 (2011)..... 19

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 10

State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998) 16

State v. Jones, 50 Wn.App. 709, 750 P.2d 281 (1988)..... 10, 13

State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002)..... 10, 12, 13

State v. Powell, 181 Wn.App. 716, 326 P.3d 859 (2014) 12

State v. Smith, 68 Wn.App. 201, 842 P.2d 494 (1992) 16

State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) 2, 17

Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) .. 18, 19

United States v. Raddatz, 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) 13

A. Assignments of Error

Assignments of Error

1. The trial court erred by considering the police officer's report at the CrR 3.6 evidentiary hearing.
2. Finding of Fact VI is not supported by substantial evidence.
3. The trial court erred by concluding Officer Corn conducted a lawful search incident to arrest of Ms. Heath's backpack.

Issues Pertaining to Assignments of Error

1. At the CrR 3.6 evidentiary hearing, the prosecutor relied solely on inadmissible hearsay to justify a warrantless search. Did the trial court err by considering the police officer's report at the CrR 3.6 evidentiary hearing?
2. Is Finding of Fact VI, which declines to resolve the sole disputed fact, supported by substantial evidence?
3. Ms. Heath's backpack, which she had removed prior to being seized, was searched incident to arrest 15 minutes after her seizure. Did the trial court err by concluding Officer Corn conducted a lawful search incident to arrest of Ms. Heath's backpack?

B. Statement of Facts

Cheryl Heath was charged by Information with one count of possession of a controlled substance (cocaine) and one count of driving a motor vehicle without an ignition interlock. CP, 1. Prior to trial, she moved pursuant to CrR 3.6 to suppress evidence seized pursuant to an illegal search incident to arrest. CP, 6. She cited *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) and *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009) as the basis for the motion. CP, 6 Both sides briefed the issue. CP, 7, 11. The case was called for an evidentiary hearing on November 26, 2018. CP, 10. The Court denied the motion. CP, 10. Findings of fact and conclusions of law were later entered. CP, 56.

Mr. Heath proceeded to trial by way of stipulated facts. CP, 33, 37. The Court convicted her of both counts. CP, 36, 40. The Court sentenced her to 4 months on Count 1 and 0 days on Count 2. A timely notice of appeal followed. CP, 59.

Attached to the State's Memorandum was a copy of Officer Corn's police report. It reads, in relevant part:

On 9/27/2018 I was working patrol for the City of Bremerton Police Department. At approximately 1554 hours I was parked on the south side of 4th Street, west of Warren Avenue. During

this time of day, with the base letting out and the ferry offload creating traffic congestion on the main thoroughfares of Warren Avenue, Burwell Street and 6th Street. During the heavy traffic times, vehicles have been cutting through and driving in the crosswalks that run east and west across Warren Avenue at 4th Street, causing near collisions. There is a concrete curb barrier to prevent vehicle traffic from crossing in this section of Warren Avenue.

I observed a motorcyclist, later identified as Cheryl Heath, turn left (Westbound) from northbound Warren Avenue, drive in the crosswalk then west onto 4th Street. For a few seconds she had to drive northbound in the southbound lane of Warren Avenue. She drove to the right shoulder of 4th Street, stopped her bike and lit a cigarette.

I pulled in behind her and activated my overhead red and blue lights. Upon contact, she immediately recognized what she had done wrong and told me she usually takes Burwell Street, but it was Friday and she wanted to get home. When I walked up, she got off the bike and took off her backpack she was wearing when she was stopped. . .

Officer Felty arrived, spoke to Heath and took her into custody. Once I completed the citation I collected Heath's backpack from the seat of the motorcycle along with her helmet. I advised her I was placing her citation in her bag and she told me I could leave the bag and her helmet on the motorcycle, her friend would pick it up. Officer Felty had contacted a friend of Heath's at her request to come collect the motorcycle for her. I told her I was highly concerned that someone would steal the backpack, it was highly likely to happen in this area. She told me she didn't care and to leave it on the motorcycle. I asked her if there was something in the backpack she shouldn't have and she told me "No, ma'am, absolutely not."

I checked her return in WACIC/NCIC and saw she had a previous conviction for delivery/manufacture/possession with intent of a controlled substance. There was also one for possession of heroin. I searched the backpack incident to arrest and located a small cylindrical metal container. Inside the container I located a small baggie of suspected powder cocaine,

a short blue tooter straw with cocaine residue and a razor blade with cocaine residue. From my training and experience as a police officer and former narcotics detective to be a kit for use of cocaine.

CP, 16.

The prosecutor also submitted a supplemental report from Officer Corn that the time between the traffic stop and the search incident to arrest was "at a minimum, 15 minutes." CP, 18.

When the CrR 3.6 evidentiary hearing was called, the judge asked both parties if they were ready. RP, 3. The defense responded in the affirmative. RP, 3. The following colloquy occurred:

THE COURT: Okay. When you are ready -- or go ahead.

MR. WEAVER: Your Honor, I filed a motion to suppress pursuant to 3.6. It's a warrantless search, and the burden is on the State.

THE COURT: All right. Since we are dealing with a 3.6 and not a 3.5, I have nothing to pre-advise Ms. Heath about. Mr. Hines?

MR. HINES: I don't want to repeat too much from my briefing.

MR. WEAVER: Your Honor, I object. We need -- there is no evidence before the Court.

MR. HINES: The evidence would be police reports to this case.

MR. WEAVER: I do not stipulate.

MR. HINES: We do not need a stipulation for that.

THE COURT: Do we have case law one way or another on that?

MR. HINES: Well, in a suppression hearing I know that the evidence rules are relaxed, so the Court can consider it. The Court is not bound by the rules of evidence under Evidence Rule 104.

MR. WEAVER: I have never done a 3.6 hearing of a warrantless search that did not have testimony. I have done them on warrant searches.

Warrant searches are different because the -- the search is resumed [sic] valid. Warrantless searches are presumed invalid, and the State has the burden of showing that one of the enumerated exceptions applies. They have a burden of doing that with evidence.

MR. HINES: As stated, Evidence Rule 104, when the Court is determining admissibility of evidence, the Court is not bound by the rules of evidence.

The law -- ordinarily police reports would not be considered. They certainly can be during this hearing, and I am offering that to the Court.

THE COURT: Mr. Weaver, you have any case law that says that I cannot simply consider the police reports?

MR. WEAVER: I can't think of any off the top of my head. I did not know until we got here this morning that the State did not subpoena the officers. I have never done a 3.6 hearing of a warrantless search without officers testifying about the reason that they did the search.

THE COURT: Well, let me put it this way: Absent some case law, the option is I either go forward today, or I set this over. . .

MR. WEAVER: Without stipulating to the authenticity of the reports or their veracity, I am willing to proceed, but I am going to call my client. And if the -- now, I guess I want to be clear that we are not continuing this. The Court is going to hear testimony from my client, and then we are going to have argument. . .

THE COURT: All right. So Mr. Weaver, where were we? I'm sorry, Mr. Hines. Where were we?

MR. HINES: So I suppose if we are having an evidentiary hearing, my evidence is just the reports and --

THE COURT: Which they can be.

MR. HINES: Yeah, so if there is more evidence, then I will turn it over to Mr. Weaver to provide that.

THE COURT: Now -- okay. Mr. Weaver, at this point he has turned it over to you.

MR. WEAVER: I will call Ms. Heath.

RP, 3-8.

The Court then heard testimony from Ms. Heath. Ms. Heath testified on September 7, 2018, she was contacted by law enforcement after she made an illegal left turn. RP, 7. She was leaving the Seattle-Bremerton ferry terminal on a 250 Rebel Motorcycle. RP, 9-10. Her intent was to pull over right away after coming off the ferry and smoke a cigarette. RP, 9-10. Smoking is prohibited on the ferry and a rule she finds "inconvenient." RP, 10. Her cigarette pack was in a backpack she was carrying on her back. RP, 10. After she pulled over, she removed the backpack and removed the cigarettes from the backpack. RP, 10. She then placed the backpack on the ground. RP, 11. She lit her cigarette. RP, 11. After she had completed placing the backpack on the ground and lighting her cigarette, Officer Corn pulled up behind her and activated her emergency lights. RP, 11. Ms. Heath was no longer in physical possession of the backpack when the emergency lights were activated. RP, 10-11. Ms. Heath correctly assumed she was being contacted about the illegal left turn. RP, 11.

Ms. Heath was subjected to cross-examination. In response to questions from the prosecutor, she testified the backpack had been off her back for 30 seconds to one minute when the officer activated her emergency lights. RP, 12.

After hearing from Ms. Heath, the parties again addressed the question whether the State was required to present testimony at the evidentiary hearing. RP, 13.

Defense counsel again objected. RP, 13. The Court responded, “I checked with two other judges just to make sure. It is not required, nor does the rule require it. The rule states -- I have my rule book -- opposing counsel may be ordered to serve and file Memorandum of Authorities, and the Court shall determine whether an evidentiary hearing is required. It doesn't say that it has to have live testimony. The rules are relaxed, as it is a motion hearing and not a trial. Mr. Hines is correct in that regard.” RP, 13-14. Defense counsel stated, “All right. I will just note my objection. We will keep moving on.” RP, 14.

During its oral ruling, the trial court compared the “sworn statement” of Officer Corn to Ms. Heath’s testimony, saying, “[Ms. Heath] stated that she doesn't know exactly how long it took the officer to be there because she said she had taken these things out and lit the cigarette

and turned around and, boom, the officer was there. The officer's testimony -- or testimony -- the officer's sworn statement is that he walked off. She got off the bike and then took off the backpack, meaning that she had it on when he was there -- or she was there; female officer, sorry." RP, 20.

C. Argument

The trial court erred by considering the police officer's report at the CrR 3.6 evidentiary hearing.

At the CrR 3.6 evidentiary hearing, the prosecutor submitted Officer Corn's report over the defense objection. The trial court admitted the police report pursuant to ER 104(a) and ER 1101. The police report, which is clearly hearsay pursuant to ER 801, was admitted at the evidentiary hearing in error.

Considering the number of CrR 3.6 hearings conducted in this State every year, there is a surprising paucity of case law discussing the interplay of ER 104(a), ER 1101, and CrR 3.6. Each of these is discussed.

ER 104(a) reads: "(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall

be determined by the court, subject to the provisions of section (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.” This rule has been interpreted as applying to situations where there is a question whether a proffered piece of evidence is admissible. The purpose is to allow the trial court to consider the admissibility of certain types of evidence without being bound by the rules of evidence. Examples include determining the admissibility of co-conspirator statements pursuant to ER 801, character evidence pursuant to ER 404, and evidence of corroboration of child hearsay pursuant to RCW 9A.44.120. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985); *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002); *State v. Jones*, 50 Wn.App. 709, 750 P.2d 281 (1988). But in each of these cases, the proponent of the evidence must still proffer the evidence at trial.

Similar to ER 104, ER 1101 reads in part: “When Rules Need Not Be Applied. The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations: . . . (3) Miscellaneous Proceedings. Proceedings for extradition or rendition; detainer proceedings under RCW 9.100; *preliminary determinations in criminal cases*; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search

warrants; proceedings with respect to release on bail or otherwise. . .”

(Emphasis added.) But there is little case law defining “preliminary determinations in criminal cases.”

CrR 3.6 reads:

(a) Pleadings. 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. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

This rule was amended in 1997 to create a somewhat more streamlined procedure. Former CrR 3.6 read: “At the conclusion of a hearing, upon a motion to suppress physical, oral or identification evidence the trial court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) the court's findings as to the disputed facts; and (4) the court's reason for the admissibility or inadmissibility of the evidence sought to be suppressed.” The current version of the rule makes clear that there is a three-step procedure for a motion to suppress. First, the trial court makes

a determination based upon the pleadings whether an evidentiary hearing is required. Second, if an evidentiary hearing is required, such hearing shall be conducted. Third, the court shall enter written findings of fact and conclusions of law. Findings of fact and conclusions of law are not required unless evidentiary hearing is conducted. *State v. Powell*, 181 Wn.App. 716, 326 P.3d 859 (2014)

CrR 3.6 does not define “evidentiary hearing.” The purpose of an evidentiary hearing is to contest and resolve disputed facts. *State v. Blunt*, 118 Wn.App. 1, 8, 71 P.3d 657 (2003). The question in Ms. Heath’s case is whether the trial court may rely on inadmissible hearsay, rather than testimony, to resolve a disputed fact.

There is significant discussion of the term “evidentiary hearing” in *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). In *Kilgore*, the issue was what information may be relied upon by a trial court in determining whether character evidence has been proved by a preponderance of the evidence pursuant to ER 404. The appellant relied upon *State v. Binkin*, 79 Wn.App. 284, 290, 902 P.2d 673 (1995), where the Court held, “Where the existence of a prior bad act is contested, the trial court should conduct a pretrial hearing so that it can hear the testimony and determine which version is more credible.” The Court in

Kilgore overruled *Binkin*, holding that the trial court may rule on the admissibility of ER 404 evidence based upon an offer of proof from the proponent of the evidence, but still retains discretion to hold an evidentiary hearing. It is clear, however, in both *Binkin* and *Kilgore*, that any evidentiary hearing requires live testimony subject to cross-examination in order to resolve disputed issues.

To be sure, there is some support for the position that the rules of evidence do not apply at an suppression hearing. See discussion in *State v. Jones*, 50 Wn.App. 709, 750 P.2d 281 (1988). But even then, caution must be exercised. In *United States v. Raddatz*, 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), cited approvingly in *Jones*, the Court said, “At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial. . . To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record.”

In Ms. Heath’s case, there was a material disputed fact: did the defendant remove her backpack before or after the officer activated her emergency lights. While the trial court could theoretically have decided the issues on the pleadings, the Court elected to hold an evidentiary hearing. At that evidentiary hearing, Ms. Heath testified under oath

subject to cross-examination that she pulled her motorcycle over, took off her backpack, removed the cigarettes, placed the backpack on the ground, and lit a cigarette, all before the officer activated her emergency lights.

The prosecutor relied on the officer's report, not testimony and not subject to cross-examination, to argue that she was wearing the backpack at the time of the seizure. The police report is ambiguous on the disputed issue, however. On the one hand, it reads, "When I walked up, she got off the bike and took off her backpack she was wearing when she was stopped." But the report also states that prior to the emergency lights being activated, she "drove to the right shoulder of 4th Street, stopped her bike and lit a cigarette." Assuming, as Ms. Heath testified, that the cigarettes were in the backpack, these two statements in the report contradict each other. This is the type of ambiguity that cross-examination would have cleared up.

The trial court then compounded the problem by declining to decide the disputed issue. Finding of Fact VI reads: "That defendant took off her backpack. Cheryl Heath testified she took off her backpack prior to Officer Corn activating her emergency lights. Officer Corn did not testify at the hearing, although her report was admitted. The Court declines to make findings whether she removed the backpack before or

after the emergency lights were activated because the Court would reach the same conclusions regardless.” CP, 56. Normally, findings of fact are treated as verities on appeal absent a timely objection. It is unclear whether Ms. Heath is required to assign error to Finding of Fact VI because it does not actually find anything. In an abundance of caution, however, Ms. Heath assigns error to Finding of Fact VI.

Ms. Heath’s backpack was searched without a warrant.

Warrantless searches are presumed unlawful. The State had the burden of proving one of the exceptions to the warrant requirement. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). In order to do so, the State relied on an ambiguous police report, which was itself hearsay, that was directly contradicted by Ms. Heath’s live testimony. The State failed to present substantial evidence she was still wearing the backpack at the time of the seizure.

In *State v. Cruz*, 88 Wn.App. 905, 946 P.2d 1229 (1997) the Court of Appeals emphasized the need for findings of fact in resolving disputed facts.

The State had the burden of justifying the warrantless search of Mr. Cruz's wallet insert. The State could satisfy its burden by showing Mr. Cruz consented and voluntarily handed the wallet insert to the trooper, eliminating the need for a warrant. The voluntariness of consent is a question of fact. Although the trooper

testified Mr. Cruz consented, Mr. Cruz denied doing so. The absence of a finding on this critical factual issue results in a presumption that the State failed to sustain its burden of proving consent by clear and convincing evidence.

Cruz at 906 (citations omitted). See also *State v. Smith*, 68 Wn.App. 201, 842 P.2d 494 (1992), abrogated in part *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998) (when a case comes before the Court of Appeals without the required findings, there will be a strong presumption that dismissal is the appropriate remedy).

In this case, Ms. Heath raised a CrR 3.6 suppression issue meriting an evidentiary hearing on a warrantless search. The State presented no testimony, choosing instead to rely on inadmissible hearsay. The State did not meet its burden of proving a warrant exception. This Court should summarily reverse and dismiss.

In the alternative, this Court should resolve the disputed factual issue in Ms. Heath's favor: the backpack was removed from her body prior to the emergency lights being activated and prior to the seizure.

Officer Corn conducted an illegal search incident to arrest of Ms. Heath's backpack.

According to Officer Corn's report, she "searched the backpack incident to arrest." Since 2009, it has been clear that searches incident to

arrest of a vehicle are generally unlawful once the person has been removed from the vehicle. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009). “Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Gant* at 351. Relying on *Gant* and *Valdez*, Ms. Heath argued in the trial court that the warrantless search of her backpack 15 minutes after her custodial arrest was unlawful.

In response, the State argued the search was permitted under *State v. Byrd*, 178 Wn.App 611, 310 P.3d 793 (2013) and *State v. Brock*, 184 Wash.2d 148 355 P.3d (2015). Both cases are distinguishable. In *Byrd* and *Brock*, the Washington Supreme Court held that nothing about *Gant* and *Valdez* cases invalidated the “longstanding time of arrest rule” that officers may search incident to arrest an arrestee’s person and “articles closely associated with her person.” *Byrd* at 614. This longstanding rule raises two legal questions: (1) when is the “time of arrest;” and (2) what is meant by “articles closely associate with a person.” The *Byrd* case answers the second question; the *Brock* case answers the first.

In *Byrd*, the defendant had a purse in her lap at the time of her arrest. The Court concluded that a purse in the lap is an item “closely associated with the person.” But the rule laid down by the Court is limited to items in the arrestee’s “actual possession” and “does not extend to an arrestee’s constructive possession, but only those personal items in the arrestee’s actual and exclusive possession at or immediately preceding the time of arrest.” *Byrd* at 623.

In *Brock*, the defendant was wearing a backpack at the time he was seized pursuant to *Terry v. Ohio*. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). The officer instructed the suspect to remove the backpack while he performed a pat-down search. The two of them then walked back to the patrol car with the officer carrying the backpack. About 10 minutes later, the suspect was arrested for giving false information and the backpack was searched incident to arrest. The Supreme Court clarified that the “time of arrest” begins with a *Terry* seizure when it ultimately results in an arrest. *Byrd* at 159.

Applying the *Byrd* and *Brock* cases, Ms. Heath’s case turns on the issue whether she was in actual or constrictive possession of the backpack at the time of her seizure. A *Terry* seizure occurs when the officer uses physical force or a display of authority to curtail an individual's freedom

of movement, which in a normal traffic stop is initiated by the activation of emergency lights. *State v. Gantt*, 163 Wn.App. 133, 139, 257 P.3d 682 (2011). According to Ms. Heath's testimony, prior to the activation of the emergency lights, she had time to stop her motorcycle, remove her backpack, remove cigarettes from the backpack, place the backpack on the ground, and light a cigarette. She was, therefore, in constructive possession of the backpack, but not actual possession of the backpack at the time of the seizure.

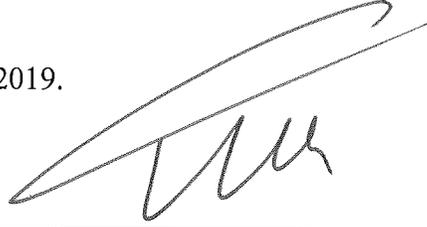
The trial court seemed disturbed by this conclusion, saying, "This is searching the extension of the person, and to find differently would be allowing people simply to throw items of clothing that they had in their possession off before the officer touches them for the sake of being able to suppress whatever may be in them, and I don't think that is the intent at all." RP, 21. Ms. Heath agrees that people may not avoid a search by simply throwing the contraband away before the officer touches it. But Ms. Heath is not urging such an absurd result. Rather she is arguing, consistent with *Byrd* and *Brock*, that a person is free to dispose of contraband in their actual possession up to the point when the officer exercises a display of authority comparable to a *Terry* seizure. In Ms. Heath's case, the display of authority occurred after she placed the backpack on the ground, at which time the backpack was no longer

“closely associated with her person.” The subsequent search incident to arrest fifteen minutes later was, therefore, illegal.

D. Conclusion

This Court should reverse and dismiss.

DATED this 4th day of April, 2019.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

THE LAW OFFICE OF THOMAS E. WEAVER

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

STATE OF WASHINGTON,) Court of Appeals No.: 52994-7-II
)
Plaintiff/Respondent,) DECLARATION OF SERVICE OF BRIEF
) OF APPELLANT
vs.)
)
CHERYL HEATH,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On April 4, 2019, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated said document to be emailed to Randall Sutton (rsutton@co.kitsap.wa.us) at the Kitsap County Prosecutor's Office through the Court of Appeals transmittal system.

On April 4, 2019, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Cheryl Heath
4246 Arsenal Way W
Bremerton, WA 98312

////

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

3 DATED: April 4, 2019, at Bremerton, Washington.

4
5 
6 _____
Alisha Freeman

THE LAW OFFICE OF THOMAS E. WEAVER

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