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State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

CHERYL ANN HEATH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-01343-18

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Heath's CrR 3.6 motion to suppress?
2. Whether the trial court erred in receiving and considering police reports in a CrR 3.6 hearing?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Cheryl Ann Heath was charged by information filed in Kitsap County Superior Court with possession of a controlled substance, cocaine and operating a motor vehicle without an ignition interlock device. CP 1-2.

Heath moved to suppress the drug evidence under CrR 3.6. CP 6. Hearing was had on the motion with the state relying on certified police reports and the defense offering the testimony of Heath. CP 10. Heath objected to the state relying on police reports. RP 3. The trial court denied the motion, concluding that the backpack from which the drugs came was lawfully searched. CP 58.

Heath submitted the case to the trial court on stipulated facts: she stipulated to sufficient facts on to the possession of controlled substance count (CP 33-36); she stipulated to sufficient facts on the ignition

interlock count. CP 37-40.

Heath was sentenced to four months in custody. CP 43. Heath timely appealed. CP 59.

B. FACTS

As noted, at the CrR 3.6 hearing the state relied on a police report attached to the responsive brief. Bremerton Police Officer Corn wrote that she observed a motorcycle improperly drive a crosswalk and briefly go the wrong direction on the street. CP 16. The motorcycle stopped on the shoulder and the driver lit a cigarette. *Id.* The officer pulled behind the motorcycle with emergency lights on. *Id.* As the officer approached, Heath stood up off the motorcycle and removed a backpack she was wearing. *Id.* In processing Heath for a traffic infraction, the officer discovered that she was driving without a required ignition interlock device. *Id.*

Another officer arrived and arrested Heath. CP 16. Officer Corn collected Heath's backpack and helmet. *Id.* Heath told Officer Corn to leave those items with the motorcycle. *Id.* Officer Corn was concerned that the items would be stolen if left behind. *Id.*

The backpack was searched incident to arrest. CP 17. Inside, Officer Corn found a baggy of suspected cocaine and ingestion

paraphernalia. Id.

Heath claimed that she had removed her backpack and removed her cigarettes from it before the officer pulled up. RP 10-11. She claimed she had placed the backpack on the ground and had lit a cigarette before contact with police. Id. She estimated that it was 30 seconds to one minute of time between taking off the backpack and being contacted. RP 12.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT THE SEARCH OF THE BACKPACK WAS A LAWFUL SEARCH INCIDENT TO ARREST.

Heath argues that the trial court erred in denying the motion to suppress. This claim is without merit because the trial court correctly concluded that this was a lawful search incident to arrest of an item closely associated with the person of the arrestee.

A warrantless search is presumed unreasonable except in a few established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The State bears the burden of proving that a warrantless search falls under an established exception. *State v. Johnson*, 128 Wn.2d 431, 451, 909 P.2d 293 (1996). A search incident to arrest an established exception. *State v. Moore*, 161

Wn.2d 880, 885, 169 P.3d 469 (2007). On appeal from the denial of a suppression motion, the trial court's conclusions of law are reviewed de novo. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

Searches incident to arrest cover the person of the arrestee and the area within the immediate control of the arrestee. *See Arizona v. Gant*, 556 U.S. 332, 129 S. Ct 1710, 1716, 173 L. Ed. 2d 485 (2009). This area may include items that are immediately associated with the person of the arrestee. *See, e.g. State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992) (search of fanny pack that defendant was wearing when the officer tackled him); *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (defendant's purse).

Heath asserts that the search incident to arrest in this case was unlawful by citing to cases that address searches of the passenger compartments of cars. Brief at 16-17. This argument is misplaced under circumstances where there is in fact no passenger compartment that is subject to search. Whether Heath removed the backpack and placed it on the ground before police contact or took it off at the point of police contact, the backpack was never in a passenger compartment. Heath asserts no authority and advances no argument that the concept of a passenger compartment extends so far.

Next, Heath's argument about the placing the backpack on the

ground similarly stretches the facts too far. Brief at 19. The trial court found that Heath's testimony and Officer Corn's report were inconsistent on when Heath actually removed the backpack and placed it on the ground. CP 57. The trial court concluded that Heath had "actual and exclusive possession at or immediately preceding arrest." CP 58. Heath claims here that she would not seek the absurd result that a person may avoid a search by simply throwing the contraband away. But she claims that the simple act of placing the pack on the ground is somehow different from throwing it away. This is a distinction without a difference. In either case the contraband is on the ground when the officer picks it up. In either case the circumstances allow a finding that the item involved is associated with the person of the arrestee.

State v. Lohr, 164 Wn.App. 414, 263 P.3d 1287 (2011), involved the search of a purse belonging to a person present, but not named, during the service of a search warrant. Lohr was free to leave and asked for boots and pants that were seven to eight feet away. *Id.* at 416-17. A purse was near those items and the police asked if it belonged to Lohr. *Id.* She acknowledged that it was hers and asked for it. *Id.* The police searched the purse, ostensibly to look for weapons and to ascertain whether it was in fact Lohr's purse, and found methamphetamine. *Id.* The Court observed that "[d]espite the fact that Lohr's purse was not located next to

her but was seven to eight feet away, it was next to her clothing and was clearly associated with her.” *Id.* at 421; *see also State v. Worth*, 37 Wn.App. 889, 893-94, 683 P.2d 622 (1984) (“A narrow focus on whether a person is holding or wearing a personal item would tend to undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable personal effects, such as Worth’s purse, which an individual has under his control and seeks to preserve as private.”).

In *U.S. v. Perdoma*, 621 F.3d 745 (8th Cir. 2010) *cert. denied* 563 U.S. 992 (2011), a man at an airport ran from an investigator and was captured and arrested. After Perdoma was handcuffed, the police looked into his bag and found a pound of methamphetamine. Perdoma claimed the search was not a lawful search incident to arrest. Specifically, he argued that the search was unlawful because the bag was out of his reach when searched because he was restrained and police had control of the bag. 621 F.3d at 750.

These facts, however, do not control. 621 F.3d at 750. The test is not whether or not the police have control of the item searched but is whether or not the item “remains in “the area from which [the arrestee] *might* gain possession of a weapon or destructible evidence.”” 621 F.3d at 750 (emphasis and alteration by the court) *quoting Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). *Perdoma*

establishes that the fact that Heath was restrained at the time of the search of the backpack does not vitiate the legality of the search.

The result is very similar under Washington Constitution Article 1, Section 7. In *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014), appellant complained of a search of the bags he was carrying incident to his arrest. When searched, the bags had been moved about a car length away from MacDicken. 179 Wn.2d at 939. It was held that the search incident to arrest was lawful because “the bags were immediately associated with his person.” 179 Wn.2d at 942.

The *MacDicken* majority relied on *State v. Byrd*, 178 Wn.2d 611, 625, 310 P.3d 793 (2013). There, Byrd was a passenger in a car stopped because of swapped license plates. 178 Wn.2d at 615. The driver said the car belonged to Byrd and in the process of removing her from the car for arrest the officer took her purse from her lap and placed it on the ground. *Id.* On these facts, the Court of Appeals affirmed the trial court holding that because of the restraint of Byrd, she was unable to access it and the search was unlawful. 178 Wn.2d at 616.

The Supreme court reversed. 178 W.2d at 625. First noting that “Article I, section 7 is more protective of individual privacy than the Fourth Amendment,” the Court discussed two principles relating to searches incident to arrest one concerning the area in control of the

arrestee and the second concerning the person of the arrestee. The justification for the first sort of search is to not allow the arrestee to reach weapons or destructible evidence. 178 Wn.2d at 617. The second, search of the person, does not rely on these justifications as they are always present in an arrest. *Id.* The authority to arrest provides the authority of law to search the person of the arrestee. 178 Wn.2d at 618.

The Supreme Court followed the so-called “time of arrest” rule with regard to the search of the person of the arrestee. 178 Wn.2d at 621. “Under this rule, an article is “immediately associated” with the arrestee's person and can be searched under *Robinson*¹, if the arrestee has actual possession of it at the time of a lawful custodial arrest.” *Id.* Moreover, “Washington courts have long applied this rule, holding that searches of purses, jackets, and bags in the arrestee's possession at the time of arrest are lawful under both the Fourth Amendment and article I, section 7.” 178 Wn.2d at 622. The rule “does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest.” 178 Wn.2d at 623.

Finally, in *State v. Brock*, 184 Wn.2d 148, 355 P.3d 1118 (2015), the Supreme Court followed *Byrd* when considering the search incident to

¹ *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

arrest of a backpack. Police found Brock in a park bathroom after the park had closed. 184 Wn.2d at 151. He was carrying a backpack which the officer had him remove. *Id.* The officer took control of the backpack and escorted Brock to his patrol vehicle. *Id.* Brock was 12 to 15 feet away from the backpack when arrested. 184 Wn.2d at 152. The officer searched the backpack incident to arrest and discovered marijuana and methamphetamine. *Id.*

The *Brock* Court held that since Brock was wearing the backpack the search was of his person and was permissible as incident to arrest. The Court noted that if an item is seized from the person of the arrestee, “the passage of time does not negate the authority of law justifying the search incident to arrest.” 184 Wn.2d at 159.

There is nothing in the present case by which Heath might rebut the plain fact that the backpack was clearly associated with her or was, as it sat beside her on the ground, still subject to her control. The backpack was very much like the purses at issue in *Lohr*, *Worth*, and *Byrd*. Whether off or on at the exact moment when the police car pulled up, the backpack was seen in Heath’s possession immediately prior to arrest. When the officer observed the infraction being committed, Heath had the backpack on. Under the reasoning of *Byrd*, the backpack was a personal effect that was closely associated with her person such that the search of it fell within

the lawful search of the person incident to arrest. The trial court correctly so concluded. The denial of the motion to suppress should be affirmed.

B. THE TRIAL COURT DID NOT ERR IN RECEIVING AND CONSIDERING POLICE REPORTS INSTEAD OF LIVE TESTIMONY IN A CRR 3.6 HEARING.

Heath next claims that the trial court erred in allowing the state to satisfy its burden by the submission of a police incident report. This claim is without merit because hearsay is admissible in CrR 3.6 hearing, because the defense does not articulate how Heath was prejudiced by the submission, and because the defense did not subpoena the officer.

Heath's primary contention here is that the police reports are hearsay and therefore "inadmissible." Brief at 12. From there, Heath reasons that the reports therefore have no place in an evidentiary hearing. Another contention is that an evidentiary hearing requires cross examination to be an evidentiary hearing as such. Thus, since the police reports are hearsay and not subject to cross examination the reports are not evidence.

Our rules of evidence do not offer a definition of the word itself. But the structure of the rules evinces that the word evidence is quite broad. ER 401 provides a definition of "relevant evidence" and in so doing refers

to a broader universe of things that are evidence—a universe beyond the scope of this brief. At bottom the question of admissibility is different than the question of what is evidence. Here, the police reports admitted met the requirements of ER 401: the reports have a tendency to make the existence of any fact of consequence in this case more probable or less probable than it would be without the evidence. The reports are relevant evidence and thus have a place in an evidentiary hearing.

The question of admissibility, of course, encompasses more than the question of relevance. But Heath’s complaint about admissibility fails. Review of a trial court’s rulings to admit or exclude evidence is for abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). “There is an abuse of discretion when the trial court’s decision is manifestly unreasonable or based upon untenable grounds or reasons. . .”
Id.

In *State v. Fortun-Cebada*, 158 Wn. App. 158, 241 P.3d 800 (2010), the admission of hearsay evidence in a suppression hearing was challenged on grounds of ineffective assistance of counsel for failing to assert a confrontation clause objection. 158 Wn. App. at 171. Fortun-Cebada argued that *Crawford v. Washington*² controlled the issue. Id.

This argument was rejected. The rational is clear:

But nothing in *Crawford* suggests that the Supreme Court intended to change its prior decisions allowing the admission of hearsay at pretrial proceedings, such as a suppression hearing. *See McCray v. Illinois*, 386 U.S. 300, 311–13, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967) (no Confrontation Clause violation where defendant was denied the chance to discover an informant's name at pretrial hearing); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 54 n. 10, 107 S.Ct. 989, 999, 94 L.Ed.2d 40 (1987) (plurality opinion) (Noting that to accept a broader interpretation would transform the Confrontation Clause into a constitutionally compelled rule of discovery and further recognizing the Court “normally has refused to find a Sixth Amendment violation when the asserted interference with cross-examination did not occur at trial.”); *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (“it is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause”); *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (“The right to confrontation is basically a trial right.”).

Fortune-Cebada, 158 Wn. App. at 172-73. Moreover, an “overwhelming majority of state courts” have reached the same result. The Court held that Fortun-Cebada’s counsel was not ineffective because the hearsay was admissible in a CrR 3.6 hearing. 158 Wn. App. at 173; *see also State v. Mecham*, 181 Wn. App. 932, 950-51, 331 P.3d 80 (2014) (In driving with suspended license case validity of revocation order is legal issue for court in pretrial proceeding to which confrontation right does not apply.).

Without expressly so holding, the *Fortuna-Cebada* Court also nixed Heath’s argument about cross examination. The appellant’s reliance on *Crawford* includes that he should have had an opportunity to cross

² 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

examine the hearsay that was admitted. 158 Wn. App. at 172. In holding that the hearsay evidence was admissible, it was necessarily held that there is no right to cross examination in a CrR 3.6 hearing. *See also In re Harbert*, 85 Wn.2d 719, 727 (ftnt 3), 538 P.2d 1212 (No confrontation right in juvenile declination hearing but if counsel believes hearsay reports from probation officer are in error, she may subpoena the witness.).

CrR 3.6 nowhere forecloses any party's right to subpoena a witness. CrR 4.8 allows as subpoena for the witness to appear at "a hearing or trial." A subpoena may issue over the signature of "an attorney for a party." Thus Heath had the unfettered ability to subpoena Officer Corn had she wanted that officer to provide live testimony. She did not.

Moreover, Heath, neither here nor below, articulates any particular prejudice from the absence of the officer. With no confrontation right and cases that hold, as a result, that hearsay is admissible in CrR 3.6 hearings, Heath should be constrained to demonstrate the prejudice that the trial court's procedure caused her. She has not articulated particular prejudice. Moreover, the trial court ruled that Heath's disputed issue of fact had no effect on the decision of the search issue. CP 57 (finding VI.). Heath has not established that the trial court abused its discretion in receiving and considering police reports in the CrR 3.6 hearing.

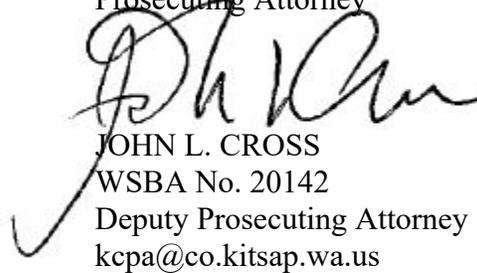
IV. CONCLUSION

For the foregoing reasons, Heath's conviction and sentence should be affirmed.

DATED May 15, 2019.

Respectfully submitted,

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