

No. 294978

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ERIN M. MACKEY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE LINDA G. TOMPKINS

BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Ms. Mackey shared a home with Walter Styer, a parolee under DOC supervision. During a monthly supervision session, Mr. Styer admitted to using drugs that day. Corrections officers took him into custody. They then drove to his residence and initiated a search for the drugs. There, officers saw Ms. Mackey's purse in an upstairs bedroom. Believing that "drug users have other individuals carry their narcotics or deal narcotics on their behalf," they searched Ms. Mackey's purse. Observing what they thought were drugs in a satchel inside and attached to the purse, they called in the Spokane police department canine unit to conduct a second warrantless search for drugs in the bedroom. Ms. Mackey challenges the legality of the search of her personal belongings on both Fourth Amendment grounds of unreasonable search and Article 1 § 7 of the Washington State Constitution protection against a warrantless search.

I. Assignments of Error

- A. The court erred when it failed to suppress evidence from an unconstitutional warrantless search.
- B. The court erred in finding: “The photos do not indicate that the bag is or is not distinctly feminine.” (CP 57).
- C. The court erred in finding: “Because the items searched were both located in Styer’s bedroom, it was reasonable to assume that they belonged to him or were controlled by him.” (CP 38).
- D. The court erred in its conclusion of law: “Mackey left the bedroom to meet with law enforcement upon their arrival. Mackey made no attempt to protect the privacy of the purse. *State v. Worth*, 37 Wn. App. 889, 683 P.2d 622 (1984).”
- E. The court erred in its conclusion of law: “Based on the evidence they were searching for, namely drugs, it was reasonable to search the bag and purse as these are both common repositories for narcotics.” (CP 38).

Issues Pertaining To Assignments Of Error

- 1. Were Ms. Mackey’s rights under the Fourth Amendment To the United States Constitution and Article 1 § 7 of the Washington State Constitution to be free from an unreasonable search and

seizure violated when officers conducted a warrantless search of her purse and satchel?

2. Did the trial court err when it admitted evidence found in Ms. Mackey's purse, during a warrantless search of the residence she shared with a parolee under DOC supervision?

II. Statement of Facts

Erin Marie Mackey was charged with two counts of Possession of a Controlled Substance- heroin and methamphetamine. (CP 2). Defense counsel moved to suppress the evidence and dismiss all charges based on an unlawful search and seizure. (CP 5-11). A CrR 3.6 hearing was held February 25, 2010 and March 4, 2010. (RP 3-26)¹.

The court denied the motion in a memorandum opinion issued on April 23, 2010. (CP 35-38). After a motion for reconsideration was filed, a hearing was conducted on May 20, 2010. The court denied the motion for reconsideration on June 17, 2010. (CP 56-57).

In its memorandum opinion, the court stated: (1) Ms. Mackey's purse was not "distinctly feminine in appearance"; (2) the search was reasonable because drug offenders often conceal contraband in items appearing to belong to others; (3) it was reasonable to search the satchel and purse as

¹ For purposes of this brief the hearing dates of 2/25/10 and 3/4/10 will be referenced as RP page no.; the hearing date of 5/20/10 will be referenced as RP1 page no.; the hearing dates of 9/20-22/10 and 10/21/10 will be referenced as RP2 page no.

they are common repositories for narcotics; (4) because the items searched were both located in Mr. Styer's bedroom, it was reasonable to assume that they belonged to him or were controlled by him; (5) the handwritten note near the bag "advertised the contents of the bag"; and (6) Ms. Mackey made no attempt to protect the privacy of her purse. (CP 37-38). The following evidence was presented.

On August 20, 2009, CCO Dan Turner met with Walter Styer, a parolee under DOC supervision. Mr. Styer admitted he had recently used methamphetamine, but did not test positive for drugs. (CP 120; RP2 32). CCO Turner did not recall finding drugs on Mr. Styer's person and surmised "that either drugs, drug remnants, or paraphernalia would likely be found in his residence." (CP 120).

Corrections Officers Turner, Cooper and four others drove to the residence Mr. Styer shared with Ms. Mackey to perform a search. (RP2 54). Officers approached the home while Mr. Styer remained in custody, seated in the backseat of a patrol car with one officer. (RP 14; RP2 53, 55). Without a warrant, officers Turner and Cooper entered the residence.² (RP2 40).

² CCO Cooper testified she accompanied CCO Turner to the residence "actually looking for a wanted subject in the residence. We went upstairs looking for that subject" but did not find him. (RP2 61).

Ms. Mackey and her friend, Lance Shields, were in the upstairs bedroom she shared with Mr. Styer when officers entered her home. (RP 16; CP 120). Mr. Shields' stepdaughter came upstairs to tell them "the police are here." Ms. Mackey left her purse in the bedroom on her bed and went downstairs. Mr. Shields hid in the closet because he had an outstanding warrant. (RP 16).

The officers "cleared" the lower level and then went upstairs to clear the second level. (RP2 40). In the upstairs bedroom, CCO Cooper pulled back a curtain, saw Mr. Shields, and ordered him out of the bedroom closet. Mr. Shields was placed on the floor and handcuffed by Officer Turner. (RP 16; RP2 62).

As CCO Turner lifted him off the floor, Mr. Shields observed CCO Cooper re-zipping (closing) Ms. Mackey's purse, which had been lying on the bed. (RP 17). Officer Turner described it as "a camouflage colored zippered purse, that had both a shoulder strap and a handle." (RP2 44). Officer Cooper later testified she could not recall if the purse was open or closed. (RP2 62).

Attached by a chain to the purse strap was a small black nylon satchel. (RP2 62; States Exh. P-2, P-3, P-4). Officer Turner testified the black satchel was off to the side of the purse. "It was attached to the hand strap, but it was off to the side." (RP2 44).

Officer Cooper reported that while she was in the bedroom she observed a handwritten note lying on the bed next to the purse, which read, “you had 3 grams with the bag[.] I took ½ tea out of it to take down the street[.] I will be back in 20 mins. ‘K’”. (CP123; CP 25; RP2 63). She believed the note referred to some type of drug transaction, and thought she should look in the black satchel and purse. (RP2 64). Officers testified they did not know who wrote the note or when it had been written. (RP2 58, 75, 99).

In her certificate, which mirrored that of Officer Turner’s, Officer Cooper wrote:

Up to that point, neither illegal narcotics nor paraphernalia had been located, meaning that it was very likely that any left-over narcotics and the paraphernalia used by Mr. Styer to ingest the methamphetamine were located in the items unsearched: the purse and satchel.

And

Based on my training and experience, it is well-known that drug users have other individuals carry their narcotics or deal narcotics on their behalf. These individuals include their girlfriends, especially those with limited or no criminal history (like Ms. Mackey), or children.
(CP 123-24).

Officer Cooper opened the satchel. (CP 124; RP2 65). She saw what she believed to be “either marijuana, heroin, or some sort of narcotic substance and possibly methamphetamine.” (RP2 65). She also saw

papers and a wallet inside the purse. (RP2 65). The corrections officers then called the Spokane Police Department to conduct a search for drugs. (CP 124; RP2 66).

Officer Keith Cler, of the Canine Unit arrived to conduct a warrantless search for drugs in the home. (CP 1, 23). He was told to “go upstairs and search the bedroom” of Mr. Styer and Ms. Mackey. (RP1 5; RP2 80). Officer Cler observed the same handwritten note as Officer Cooper, but reported that it was located on a nightstand near the bed, not on the bed next to the purse. (RP1 11; CP 1, 23).

Officer Cler’s report read:

“...K9 Angel showed a change of behavior that was consistent with past controlled substance finds and alerted to a purse (cameo (sic) colored) lying on the bed. Inside the purse was a small black nylon bag that had a chain that went from the bag to the carrying strap of the purse.” (CP 23).

Officer Cler also later testified the black nylon bag was inside the purse. (RP2 82, 96). He searched the black bag and found drugs he recognized as heroin and methamphetamine. (RP2 82). He searched the camouflage colored purse and found Ms. Mackey’s identification and a SIM card from a cell phone, which he seized. (RP2 82, 87).

Ms. Mackey was found guilty of two counts of possession of a controlled substance in a jury trial. (CP 91). She appeals.

III. ARGUMENT

Ms. Mackey's Rights Under The Fourth Amendment To Be Free From An Unreasonable Search And Art. 1§7 Of The Washington State Constitution To Be Safe From Governmental Trespass Were Violated When Officers Conducted A Warrantless Search Of Her Purse And Satchel.

On appeal of a suppression ruling, a trial court's conclusions of law are reviewed *de novo* and its findings of fact for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds*, *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

The issue here is a legal issue: whether during the warrantless search of her home, the warrantless search of Ms. Mackey's purse and satchel violated her rights under the Fourth Amendment to the United States Constitution and Article 1 § 7 of the Washington State Constitution. Questions of law are reviewed *de novo*. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d (2005).

1. Ms. Mackey Had A Reasonable Expectation of Privacy In Her Purse And Satchel And Officers Acted Unreasonably When They Searched Her Belongings.

Parolees under the supervision of the Washington State Department of Corrections have a diminished right to privacy. RCW 9.94A.631. If there is reasonable cause to suspect a probationer to be in violation of sentence conditions, officers may conduct a search of the parolee, known areas the parolee occupies in the home, common areas of the residence, and his personal effects. *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981), quoting *State v. Simms*, 10 Wn. App. 75, 87, 516 P.2d 1088(1973)).

The authority of DOC officers to search Mr. Styer, his home and his personal effects did not diminish Ms. Mackey's constitutional protections in her personal property, as such protections are possessed individually. *State v. Broadnax*, 98 Wn.2d 289, 296, 654 P.2d 96 (1982) overruled on other grounds by *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), (quoting *Ybarra v. Illinois*, 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)). Indeed, association with another suspected of criminal activity "does not strip an individual of his constitutional protections." *Broadnax*, 98 Wn.2d at 301. The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. It does not prohibit "reasonable" warrantless searches. *State v. Morse*, 156 Wn.2d 1, 9, 123

P.3d 832 (2005). The focus of inquiry is whether government officials acted reasonably under the circumstances. *Id.* Here, they did not.

Ms. Mackey challenges the trial court's conclusion that absent probable cause and a search warrant, it was reasonable for officers to search her purse and satchel. Under a Fourth Amendment analysis, the question is whether Ms. Mackey had a legitimate expectation of privacy in her purse and the attached satchel, which were found in the bedroom she shared with a parolee under DOC supervision.

To establish a reasonable expectation of privacy requires satisfaction of a two-part test. First, whether Ms. Mackey 'exhibited an actual (subjective) expectation of privacy by seeking to preserve something as private.' And second, whether 'the expectation is one that society is prepared to recognize as reasonable.' *Katz v. United States*, 389 U.S. 347, 351-52, 88 S.Ct. 507, 19 L.Ed.2d 57 (1967).

Ms. Mackey exhibited an actual subjective expectation of privacy in her belongings. Ms. Mackey had possession of the purse and satchel when she was in her bedroom. When she responded to the entry by the officers, she left her purse in the bedroom and went downstairs. In its analysis, the trial court concluded that the search of the purse was reasonable because Ms. Mackey did not make any effort to keep her purse private. This was wrong for two reasons.

First, the purse and satchel were in her bedroom, not open to general viewing. Ms. Mackey did not relinquish control, rather, officers detained her in the downstairs area. Although not free to physically retrieve her bag, she remained in constructive possession, and thus retained a reasonable expectation of privacy in it. (RP2 55).

Second, the court misunderstood and improperly applied the holding in *State v. Worth*, 37 Wn. App. 889, 683 P.2d 622 (1984). In *Worth*, a search warrant was issued for the premises and person of John Folkert. The warrant was not issued on the basis of any information about Ms. Worth. When officers served the warrant, they searched Ms. Worth's purse and found caffeine tablets. They urged her to inform on Mr. Folkert, which she refused to do. Although Ms. Worth refused consent, officers emptied her purse and found cocaine in an inner compartment. The question was whether the search of her purse constituted an impermissible search of her person. The reviewing court stated it had doubts about the validity of the first search, but "we shall assume, for the sake of this appeal only" that it was valid, and declined to consider the issue. *Worth*, at 892. The court held the second search was an impermissible search of her person, which violated her Fourth Amendment rights. The court specifically held that it was apparent to officers conducting the search that Ms. Worth's purse was

not just another household item that police could search on the basis of the warrant. Further, the court expressly stated:

“Personal effects worn or held typically fall outside of the ambit of a search warrant. (internal citations omitted). We do not believe that the purpose of the Fourth Amendment is furthered by making its application hinge on whether an individual happens to be holding or wearing such a personal item as a purse when a search is underway. 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.” *Worth* at 893.

Here, although there was no search warrant, officers were operating on the authority to search a parolee’s home and personal effects. Similar to *Worth*, there was no authority to conduct a personal search of other home occupants or their belongings. The trial court erred in concluding Ms. Mackey was required to do something more than leave her purse in her own bedroom in order to maintain it as private.

She also satisfies the second portion of the test as society has recognized her expectation of privacy in her purse to be a reasonable one. A purse constitutes a traditional repository of personal belongings under the Fourth Amendment. *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). The purse and pouch in this case was such a repository of personal belongings. Officers who searched and seized the purse and satchel described it as a “purse”. The very function of a purse is

to hold personal and private belongings. *Id.* at 762 n.9. The purse and satchel in this case were unquestionably associated with an expectation of privacy and were protected by the Fourth Amendment.

Testimony was inconsistent as to whether the purse was originally fully zippered closed, as well as whether the small black nylon satchel was inside or outside of the purse. Whether the purse was partially or completely closed is somewhat irrelevant, because what is clear is that CCO Cooper opened the closed black satchel to search for drugs.

A container that can support a reasonable expectation of privacy may not be searched, even on probable cause without a warrant. *United States v. Jacobsen*, 466 U.S. 109, 120, n.17, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). The certificates prepared by officers Turner and Cooper and submitted to the court stated:

“Up to that point, neither illegal narcotics nor paraphernalia had been located, meaning that it was very likely that any left-over narcotics and the paraphernalia used by Mr. Styer to ingest the methamphetamine were located in the items unsearched: the purse and satchel.”

and

“Based on my training and experience, it is well-known that drug users have *other individuals carry their narcotics* or deal narcotics on their behalf. *These individuals include their girlfriends, especially those with limited or no criminal history (like Ms. Mackey), or children.* (Emphasis added).

(CP 121,124).

It is unmistakable that at the time of the search, both officers were of the mindset that Mr. Styer's drugs were likely to be found hidden in Ms. Mackey's belongings. The authority to search Mr. Styer's items gave no permission to search those of Ms. Mackey.

The acts of the officers were unreasonable in the context of Fourth Amendment rights and the trial court erred in concluding it was reasonable. The motion to suppress should be reversed on these grounds.

2. Under Article 1 § 7 Of the Washington Constitution Which Provides Greater Privacy Protection Than The Fourth Amendment, Any Lawful Search Of Ms. Mackey's Personal Items Required Probable Cause And A Search Warrant.

The Washington Constitution provides even greater privacy protection than the Fourth Amendment: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I §7. The necessary “authority of law” is generally a search warrant. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1990). Under Washington constitutional protections of privacy, unless justified by a recognized exception, a warrantless search is per se unreasonable. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Exceptions to the warrant requirement are limited and narrowly drawn. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). The State bears the burden of

showing a warrantless search falls within one of the recognized exceptions. *State v. Khounvichai*, 149 Wn.2d 557, 562, 69 P.3d 862 (2003).

In the facts of this case, correctional officers had reasonable cause to believe that Mr. Styer, Ms. Mackey's co-tenant, had violated a condition of his community custody: he admitted to his DOC supervisor that he had very recently used drugs. Washington courts recognize an exception to the warrant requirement to allow a warrantless search of a parolee, his home, and his personal property, when there is reasonable cause to believe a condition of sentence has been violated. *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996); RCW 9.94A.631(1). Ms. Mackey does not dispute that officers were empowered to lawfully search Mr. Styer's personal property, his areas of the residence, and common areas. Instead, she argues corrections officers had no authority to search her items and upon discovery of contraband, to enlist a Spokane police officer to conduct a warrantless search of the same items.

The court erred when it stated, "Because the items searched were both located in Styer's bedroom, it was reasonable to assume that they belonged to him or were controlled by him." (CP 38). The court's finding is not supported by substantial evidence. It was more or equally reasonable to assume the items belonged to and were controlled by Ms.

Mackey. It was a purse, typically associated with a female and, it was in the bedroom where she had been sitting only moments earlier.

In *State v. Rison*, 116 Wn. App. 955, 69 P.3d 362 (2003), this court held that an apartment tenant had authority to consent to a search of his own apartment, but no authority to consent to search another's property within that apartment. Reasoning that Mr. Rison's eyeglass case was a repository for his personal items, the court found that an expectation of privacy was not diminished simply because others might have had access to personal items. *Id.* at 960.

Similarly here, merely because Mr. Styer shared a bedroom with Ms. Mackey, or even had access to her personal items, did not extinguish her constitutional protections from an unwarranted disturbance in her private affairs. The officers were empowered to search his property, not hers.

The trial court wrestled with determining whether the purse was gender neutral and thus "fair game" in a search of Mr. Styer's personal effects. In its memorandum opinion, the court quoted *People v. Veronica*, 107 Ca. App.3d 906, 166 Cal. Rptr. 109 (1980), "a purse with designs like a woman would wear" and therefore obviously belonging to a parolee's wife could not be searched in a warrantless parole search of the family's residence. (CP 37).

Here, each officer who viewed or handled the purse and satchel referred to it as a “purse”; at the time, there was never a question it was something gender neutral, such as a backpack. Further, the exhibit pictures showed a purse with a zipper top, a shoulder strap, and a handle strap. (State’s exh. P-2, P-3, P-4). The court’s finding here was not supported by substantial evidence. Not only was it more likely the purse belonged to a woman, but the corrections officers actively searched it *because “drug users have other individuals carry their narcotics.”* (CP121, 124). (Emphasis added).

The court further erred when it relied on as “perhaps most determinative” the fact that a handwritten note was found in the bedroom which “advertised the contents of the bag”. (CP 38). There was no evidence for the court to consider as to who wrote the note, when it was written, or what “bag” it referenced. There was conflicting evidence about where the note was located in relation to the purse. It was mere speculation by the court that the words “3 grams with the bag” and “1/2 tea” “could easily describe the contents of the bag,” that is, the purse and attached satchel. (CP 38). While the note may have created an articulable suspicion, under Article 1 § 7 of the Washington Constitution, the proper course of action would have been to either seek consent from Ms. Mackey or present the information to a neutral magistrate to procure a search

warrant for her purse and satchel. The State did not establish the search of her items fell within an exception to the warrant requirement

Whether under a consent to search (*State v. Rison*), a lawful search warrant (*State v. Worth*), or as here, under RCW 9.94A.631, authority to conduct a search is not unlimited. Officers here exceeded their authority when they conducted two searches of Ms. Mackey's items. The denial of the motion to suppress the evidence was error. Under the Fourth Amendment, Ms. Mackey had a reasonable expectation of privacy in her personal property and officers conducted an unreasonable search and seizure. Under Article 1, § 7 of the Washington Constitution, Ms. Mackey had a personal constitutional right to be free from an unwarranted disturbance of her private affairs absent a search warrant.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Mackey respectfully asks this court to reverse the motion to suppress the evidence and dismiss all charges, as there is no other evidence implicating Ms. Mackey.

Dated: April 11, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of the laws of the United States and the State of Washington, that I have mailed, first class, postage prepaid, or personally served as appropriate, a copy of Corrected Brief of Appellant to Mark E. Lindsey, Spokane County Prosecutor's Office, W. 1100 Mallon Ave, Spokane, WA 99260; and Erin Marie Mackey, 2202 W. Gardner, Spokane, WA 99201.

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