FILED
May 2, 2012
Court of Appeals
Division III
State of Washington

No. 29787-0-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

GABRIELA BARRON,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT.

1. **The police impermissibly strip searched Barron at the jail in disregard of the mandatory statutory procedures and contrary to Barron's constitutional rights**

a. The strip search was contrary to the requirement of article I, section 7.

A strip search may not be conducted without the authority of law. State v. Audley, 77 Wn.App. 897, 907, 894 P.2d 1359 (1995); Const. art. I, § 7. It is "well-settled" that Article I, section 7, provides greater protection to individual privacy than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 76 P.3d 217 (2003).[1] While the Fourth Amendment bars searches and seizures that are "unreasonable" based on evolving norms, Article I, section 7 "prohibits any disturbance of an individual's private affairs 'without authority of law.'" State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).[2] This "creates 'an almost absolute bar to

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[1] 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.

[2] Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

warrantless arrests, searches, and seizures, with only limited exceptions." Id.

"The protections guaranteed by article I, section 7 are qualitatively different from those under the Fourth Amendment." State v. Snapp, _ Wn.2d _, 2012 WL 11341130, *4 (April 5, 2012). Interpreting the Fourth Amendment, a plurality of the Supreme Court recently ruled that jails may strip search arrestees if they are being placed in the general population of the jail. Florence v. Bd. of Chosen Freeholders of Burlington, _ U.S. _, 132 S.Ct. 1510, 1522 (April 2, 2012). This ruling rests on the Fourth Amendment and not the authority of law required under article I, section 7. Moreover, there was no testimony establishing that Barron was searched because she was going to be placed in the jail's general population, or that she would have been so placed if not for the illegal search of her purse, and the fruits of the illegal search may not justify the strip search.

b. The warrantless strip search did not comply with the mandatory statutory requirements and was unauthorized by law.

The State's brief does not discuss the mandatory statutory requirement of supervisory approval before an officer has legal authority to conduct a strip search. RCW 10.79.140. The State's

failure to address the absence of required supervisory approval should be construed as a concession of error, and this lack of approval is dispositive alone, requiring reversal of the fruits of the unlawful search.

RCW 10.79.140 explicitly states, "no strip search may be conducted without the specific prior approval of the jail unit supervisor . . ." unless reasonable suspicion can be presumed by the arresting offense. RCW 10.79.140. Disorderly conduct was Barron's predicate arresting offense. CP 81. Disorderly conduct is not an offense for which reasonable suspicion may be presumed. See Appellant's Opening Brief, at 29-30; RCW 10.79.130.

The prosecution contends that while conducting the strip search, Officer Evialon developed reasonable suspicion, thus retroactively justifying the search. Resp. Brief at 20, 23. This new theory was not presented to the trial court or found to have been proved by the trial court, and fails upon inspection.

It is axiomatic that a search may not be justified by what it turns up. Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("a search unlawful at its inception may be validated by what it turns up"). There is no inevitable discovery exception to the exclusionary rule under our state constitution and

no "good faith" exception to the warrant requirement. State v. Winterstein, 167 Wn.2d 620, 634, 220 P.2d 1226 (2009); State v. Afana, 169 Wn.2d 169, 181, 184, 233 P.3d 879 (2010). Washington's exclusionary rule is "nearly categorical." Afana, 169 Wn.2d at 184; Winterstein, 167 Wn.2d at 636.

Strip searches are defined as, "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person." RCW 10.79.070(1). A body cavity search is "touching or probing of a person's body cavity," including stomach, rectum, or vagina. RCW 10.79.070(2), (3). The prosecution implies that Evialon did not strip search Barron because she ordered Barron to remove her own clothes, but that is precisely what a strip search is, and an even more invasive "body cavity" search occurs where the officer touches the person's intimate areas. RCW 10.79.070(2), (3). A body cavity search requires a warrant. RCW 10.79.080.

A strip search also requires a warrant unless a specific exception to the warrant requirement applies and there is "specific prior written approval of the jail unit supervisor on duty." RCW 10.79.130, 140(2). The police had neither an exception to the

warrant requirement nor prior supervisor approval. RP 46. Evialon said that ordering a female to remove all clothes and expose their naked body was something she treated as standard procedure and she did not ask for approval or permission. RP 46-47.

Evialon initiated the strip search by taking Barron into a private room and telling her that she must "take all her clothes off to make sure she wasn't concealing anything." RP 43, 51. While still clothed but after Evialon ordered her to disrobe, Barron began crying. RP 43. She started crying after Evialon told her "I was there to make sure she removed all the clothing and I would not go hands on with her unless need be." RP 48. Evialon made clear to Barron that the search was not optional. RP 48.

At that point, Barron told Evialon she was concealing something and knew she was going to be charged with a felony. RP 44. Evialon did not inquire whether Barron was referring to her initial charges, which involved potential drug residue found in her purse and was suppressed as illegally seized. RP 44; CP 81. She insisted that Barron must remove her clothes. RP 44. Barron started disrobing, while crying and apologizing for her odor. RP 44. Barron took off her pants and asked to use the restroom. RP 44. Evialon ordered Barron to take off her clothes and change, and

then she could use the bathroom. RP 44. Barron continued taking off her clothes as directed, and once her underwear was down, she handed an envelope to the officer that came from her vaginal area. RP 44-45. Barron continued by taking off the rest of her clothes to complete the strip search as requested. RP 45.

The prosecution baselessly contends that Evialon met the statutory requirement of a "less intrusive" strip search when she let Barron take off her own clothes rather than the officer removing them. Less intrusive means of searching someone are codified as acts such as a fully clothed pat down. RCW 10.79.140(2). The statute expressly defines a strip search as directing "a person to remove or arrange" his or her own clothes. RCW 10.79.070. By taking Barron into a separate room and ordering her to remove her clothes, Evialon initiated a strip search that was not justified at its inception. See e.g., RCW 10.79.100 (setting forth standards for conducting strip search).

The strip search was not justified because the officer lacked reasonable suspicion based on the offense of arrest and lacked prior supervisory approval, both of which are required by statute. RCW 10.79.140. Absent the authority of law to order Barron to take off her clothes and expose her genitals, the strip search violated

article I, section 7. State v. Miles, 160 Wn.2d 236, 247-48, 156 P.3d 864 (2007) (scope of warrantless invasion limited by authority of law); see State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (probable cause to arrest does not provide authority of law to search absent actual arrest under article I, section 7); see also State v. Hatchie, 161 Wn.2d 390, 400, 166 P.3d 698 (2007) (misdemeanor arrest warrant does not provide authority of law to conduct general search under article I, section 7). The exclusionary rule requires suppression of the fruits of the search conducted in violation of article I, section 7.

2. **The police lacked probable cause to arrest Barron for disorderly conduct**

Barron was arrested for disorderly conduct. Disorderly conduct statutes are constitutionally limited to "fighting words," or conduct incites an immediate breach of the peace. State v. Yoakum, 30 Wn.App. 874, 876, 638 P.2d 1264 (1982) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 103 1 (1942)). Because conduct that does not constitute fighting words is afforded First Amendment protection, disorderly conduct requires some evidence that the words at issue actually inflicted some injury, incited a breach of the peace or created a risk of assault.

City of Kennewick v. Keller, 11 Wn.App. 777, 787, 525 P.2d 267 (1974).

Without citing to the record, the prosecution asserts that Barron was disturbing the peace by her very presence in public after she had a fight with another person. Resp. Brief at 16. This argument greatly overstates the nature of Barron's circumstances. Barron had some blood on her knee, but was not actively bleeding or seriously injured and did not need medical attention. RP 16. Officer Orth asked if she had been stabbed and she said no. Id. Barron was not right in front of the house where the incident occurred, but farther down the street. RP 17. Orth did not appear to have spoken to the three other people present and did not convey any sense of public unrest based on Barron's presence. RP 15, 26.

The prosecution selectively quotes testimony indicating that the fight between Barron and Michelle Garcia started inside the house and led outside. Resp. Brief at 17-18. Barron told the officer Garcia chased her outside. Defense counsel asked Orth if he had "any definite information about whether there was a physical altercation outside or was that unclear?" Orth responded, "It was unclear." RP 26. "Unclear" evidence about whether an altercation occurred outside does not supply probable cause that a crime

occurred. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

Defense counsel also asked Orth whether he learned the fight occurred in public and Orth said he had information that "they were chasing each other" in public. RP 27. Orth clarified that by "chase," he meant Barron running from Garcia, not the other way around. RP 26. There was no claim that the chase lasted any notable distance beyond the threshold of Garcia's home.

The prosecution further misrepresents the testimony by alleging that the officer thought Barron had been stabbed. Resp. Brief at 19. Orth testified that Barron told him at the outset that she was not stabbed. RP 17. He never claimed he was under the impression she was stabbed.

Most significantly as a legal matter, the prosecution justifies Barron's arrest without citing to any legal authority other than RCW 10.31.100, which is a blanket statute directing when police officers may make a warrantless arrest. There must be probable cause to believe that a person has committed a pertinent crime before an arrest is authorized under RCW 10.31.100(a). This statute does not supply probable cause to arrest of its own accord.

The purported commission of disorderly conduct that the State claimed was the basis for Barron's arrest requires a fight in a public place and this fight must tend to incite an immediate breach of the peace in order to be construed in a manner that does not violate the First Amendment. Keller, 11 Wn.App. at 785. The State insists that Barron was upset, excited, and injured but does not explain how this meets the threshold of "noisy, riotous or tumultuous conduct." Resp. Brief at 18-19. There was an argument that started in Michelle Garcia's home and ended when Barron was chased into the front yard. RP 26. There was no evidence that the disturbance had continued outside other than Barron being chased out of the home. RP 20-21, 26.

The prosecution's claim that an injured person commits disorderly conduct by standing down the street from where she was injured with blood on her knee is simply absurd and the State cites no authority for this proposition. There was no unruly crowd gathered, no one paid particular attention to Barron, and no one was disturbed by her presence. The trial court's findings of fact demonstrate that the State did not prove community outrage justified the arrest. CP 76-78.

The police did not testify about any excessive commotion in the neighborhood that breached the peace. The court did not find there was objectively reasonable evidence that the community was unduly disturbed by significant noise, tumult, or riot, as required to disorderly conduct under the municipal code upon which the officer relied. Sunnyside Mun. Code 9.60.010. "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Facts omitted from the court's written findings are deemed unproved by the State, because the prosecution has the burden of proof at a suppression hearing. Id. The trial court did not find the fight occurred in the yard or there was palpable evidence of a riotous conduct that disturbed the peace. CP 76-78. Accordingly, the officer did not have probable cause to arrest Barron for disorderly conduct, or authority to transport her to the police station where she was unlawfully strip searched.

3. Barron was unlawfully seized when she was held in a locked police car for over twenty minutes

Barron was seized when the police officer put her into a locked police car and took away her purse while he investigated the assault allegation. See Opening Brief, at 11-20.

Rather than respond to the legality of the seizure as argued in Barron's Opening Brief, the prosecution asserts that the police had authority to detain Barron as a witness, rather than as a suspect. Resp. Brief at 4-14. The State relies on State v. Dorey, 145 Wn.App. 423, 186 P.3d 363 (2008), a Court of Appeals ruling for which no further review was sought. Dorey acknowledged that the very paucity of law in Washington about whether and when a witness may be detained based on that person's status of a witness. Id. at 429. Dorey characterized State v. Carney, 142 Wn.App 197, 174 P.3d 142 (2007), a case decided while Dorey was pending, as the first Washington case to address the point of when a witness may be detained by police. Id. The three judges who decided Carney each wrote separately, thus demonstrating the split of authority on how to decide whether the police may detain a potential crime witness. In both Dorey and the majority in Carney, the courts concluded that the witnesses could not be detained

because the crimes for which they might have had information were not serious enough and their relationships to the crimes were too distant.

The State's argument in Barron's case is based on distinguishing Dorey and Carney. It relies on a case involving a far different factual scenario of an incoherent and intoxicated possible victim in Metzker v. State, 797 P.2d 1219 (Alaska Ct.App. 1990), and another case with an injured victim who was briefly detained when the police saw marijuana in his car and thus considered him a suspect in State v. Mitchell, 145 Wn.App. 1, 186 P.3d 1071 (2008), rev. denied, 165 W.2d 1022 (2009). Because Barron was not seriously injured, there was no weapon involved that would make the incident legally serious, and no reason to presume Barron would flee when she was waiting for the police, she was not the kind of witness who may be seized for the purpose of investigation.

Moreover, the trial court did not rely on the "exigent circumstances" of a witness claim as a basis for the detention. The court did not decide whether the officer detained Barron as a victim or witness or suspect. CP 79. The court did not explain what if any exigency existed when Barron was not seriously injured and there

was no presently imminent threat. The trial court's failure to set forth findings of fact documenting the exigent circumstances such that they meet the standard of Dorey or Carney establishes that the prosecution did not meet its burden of proving this basis for detaining Barron. Armenta, 134 Wn.2d at 14. Consequently, the police officer lacked authority to seize Barron and lock her in a police car.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Gabriela Barron respectfully requests this Court hold that she was unconstitutionally seized, arrested, and strip searched, and remand the case for suppression of all illegally seized evidence.

DATED this ~~4th~~ 2nd day of May 2012.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 29787-0-III
	)	
GABRIELA BARRON,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MAY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JAMES HAGARTY, DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	DAVID BRIAN TREFRY ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X]	GABRIELA BARRON 131 E PARKLAND DR #13 SUNNYSIDE, WA 98944	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MAY, 2012.

X_____