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Court of Appeals  
Division III  
State of Washington

NO. 297870

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GABRIELA YASERTH BARRON,

Appellant.

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BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Was appellant illegal seized at the scene of her initial contact with officers?
2. Was appellant's arrest for Disorderly conduct valid?
3. Was the search conducted at the jail legal?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Appellant was not illegally seized.
2. Appellant's arrest was valid
3. The search conducted at the jail was legal.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

CHALLENGE OF FINDINGS AND CONCLUSIONS.

Barron states in her brief under section 'B' ASSIGNMENTS OF ERROR 3 – 8 that Findings of Fact 20, 21, 25, 26, and “ to the extent the courts conclusions of law following the CrR 3.6 hearing are construed as findings of fact, the court improperly entered Conclusions of Law 8,9,11, 27, 28,31,32,33, 34 and 35 Following the CrR 3.6 hearing...”

This court must read RP 85-88 where the parties discuss these findings and conclusions. The only objection lodged is by the State. This was a stipulated facts trial. The parties set up these very specific facts and conclusions to reflect what the parties who were present agreed upon. These were authored in a manner to allow Barron to challenge the actions of the trial court in making the rulings which were are issue in the trial court. There has been no claim that counsel was ineffective or incompetent. Therefore this facial challenge of these findings should be summarily dismissed by the court. Barron has by her actions in the trial court invited this error. As her counsel states;

“As to the Findings of Fact and Conclusion of Law, a brief history here, Your Honor. I sent the Court a revision that took into consideration defense’s request of the State’s original proposed Findings of Fact and the State’s reply to the defense’s revisions, so this is probably the third or fourth version of the Findings of Facts and Conclusion of Law that I’ve sent to the Court via e-mail this morning. (RP 85)

This court should not countenance a parties action where they actively participate in the production of a document then upon appeal claim it is not a valid document. Invited error prohibits a party from "setting up error in the trial court and then complaining of it on appeal." State v. Young, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991); State v.

Sweany, 162 Wn.App. 223, 228-29, 256 P.3d 1230 (Div. 3 2011) “The invited error doctrine " prohibits a party from setting up an error at trial and then complaining of it on appeal." Judicial estoppel prevents a party from taking inconsistent factual positions from one proceeding to the next but does not preclude inconsistent legal positions.” (Citations omitted.)

Clearly Barron is taking an inconsistent position on appeal by indicting these very documents that she extensively participated in authoring now, on appeal, are not supported by the very facts she agreed supported them in the trial court. This is further supported by the fact that Barron does not cite a single case addressing finding and conclusions.

The standard of review in a matter such as this is set out in State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994), wherein the court states:

Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1983). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Halstien, at 129. (Hill, at 644.)

The court in Hill then sets the standard as follows:

We hold that in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. (Hill, at 647.)

There are clearly sufficient facts in the record to support the challenged findings. The testimony of the two witnesses for the State was unrefuted. The “challenged” findings are supported by substantial evidence in the record and were the third or fourth version of a document agreed upon in a stipulated facts trial. The Deputy Prosecutor makes the following statement which indicates the degree of involvement by Barron in the production of these findings and conclusion, “Mr. Case did a good job of incorporating my suggestions and comments based on his comments, so I think it’s fine.” (RP 86-7)

This was a matter of discretion by the trial court and therefore State ex rel. Carroll v. Junker, 79 Wn.2d 12,26,482 P.2d 775 (1971), clearly sets out the standard:

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

DETENTION OF BARRON AS WITNESS.

A police officer may detain a witness if there are exigent circumstances or special officer safety concerns. State v. Dorey, 145 Wn. App. 423, 186 P.3d 363 (2008); State v. Mitchell, 145 Wn. App. 1, 186 P.3d 1071 (2008), *review denied*, 165 Wn.2d 1022 (2009); State v.

Carney, 142 Wn. App. 197, 203, 174 P.3d 142 (2007), *review denied*, 164 Wn.2d 1009 (2008).

In reviewing a particular situation, Washington courts (in fact, many U.S. courts) consider the test contained in the American Law Institute Model Code of Pre-Arrest Procedure § 110.0(1)(b) (1975)(ALI Model Code) to determine whether a witness was properly prevented from leaving the scene. State v. Dorey, 145 Wn. App. 423, 430, 186 P.3d 363 (Div. III, 2008). Under the ALI Model Code, an officer may detain a witness when:

(i) [T]he officer [has] reasonable cause to believe that a misdemeanor or felony, involving danger or forcible injury to persons or of appropriation of or danger to property, has just been committed near the place where he finds such person, and (ii) the officer [has] reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and (iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.”

*City of Kodiak v. Samaniego*, 83 P.3d 1077, 1083-84 (Alaska 2004)(quoting the ALI Model Code). *Accord* 4 Wayne R. Lafave, *Search & Seizure: a Treatise on the Fourth Amendment* § 9.2(b), at 289 (4th ed. 2004).

Other factors this court should consider include “the seriousness of the crime being investigated, a reason to believe the person detained had

knowledge of material to aid in the investigation of such crime, and the need for prompt action.” State v. Mitchell, 145 Wn. App. at 8 (citing 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.2(b) at 289-91 (4th ed. 2004)). In the instant case Officer Orth testified Barron had indicated “she told me that Ms. Garcia had a knife and she was trying to attack her over some supposed theft of a hundred dollars that Linda (Ms. Garcia) believed she had stole.” (RP 5) He went on to testify;

A At that time I was still investigating what was going on and Officer Prieto arrived at my location and I advised him to go over to the residence and see if he could find the other person involved and I asked Ms. Barron if she would be willing to sit in the rear seat of my car so I could head over there and back my partner up and I explained to her she wasn't under arrest at the time and she told me that she would and she took a seat and I grabbed her purse and told her for safety purposes I'm going to put it on my front seat for officer safety purposes and I then proceeded to go to the house next door.

Q And when you asked her to get in the back of your patrol car, how -- what did you say to her, do you remember?

A I don't remember verbatim, but I explained to her that she wasn't under arrest and I needed to, you know, follow up with the investigation to find out what's going on.

Q And did you explain to her why she was being asked to sit in the back of the patrol car?

...

A Well, like I said, my demeanor was -- I was trying to make sure that everybody was okay and I was trying to get, you know, I was kind of in a

hurry to go back my partner up because that other person was possibly armed with a knife.

Q What was Ms. Barron's demeanor at the time?

A She was starting to calm down a little bit and she was still crying but she was, like I said, she was pretty [sic] proceeding to calm down.

Q Did she -- how did she act when you asked her to get in the vehicle?

A She acted like okay, yeah, no big deal and gave, you know, I got her purse and put it in the front and she took a seat in the back.

(RP 6-7)

State v. Mitchell, 145 Wn. App. at 8 (quoting State v. Watkins, 207 Ariz. 562, 88 P.3d 1174, 1177 n. 4 (Ct. App. 2004)(alteration in original)(quoting Charles L. Hobson, *Flight and Terry: Providing the Necessary Bright Line*, 3 MD. J. Contemp. Legal Issues 119, 139 (1992)).

It is very difficult to investigate or prosecute a crime without witnesses. Missing witnesses have been the bane of more than one prosecution. Identifying the witnesses and obtaining their stories is thus an essential part of police work, and is best done as quickly as possible. A *Terry* stop of a ... witness is therefore the essence of good police work.

In cases where Washington courts have found that particular contact went beyond an investigative detention, the officers went beyond the initial investigation without any exigent circumstances or officer safety reasons. In State v. Carney, an unidentified citizen called 911 to complain about a street bike driving recklessly. The Deputies contacted

witnesses in the area and ran checks on them. The court found there were no exigent circumstances which would allow this type of contact.

Similarly, in State v. Dorey, supra, Deputies responded to a complaint of a disturbance involving a black male in a black shirt to see a man matching that description getting into his car to leave the deputy asked Mr. Dorey to stop so he could talk to him. The deputy then requested identification from Dorey because he could be a potential witness. The Court in Dorey, court reasoned that, at the time the deputy contacted Dorey, there was no ongoing or recently committed unsolved crime therefore, there was no reason to believe that Dorey could provide assistance in the investigation. There was also no indication that the deputy was acting to ensure the health or safety of a victim of a crime. And in fact in Dorey, there never was a crime reported.

The court in Dorey relied on Metzker v. Alaska, 797 P.2d 1219 (Alaska Ct. App. 1990) to distinguish a situation where detaining a witness is appropriate.

In the case presently before the court the unrefuted testimony of Officer Orth was there were clearly exigent circumstances and that Barron, had portrayed herself as the victim/witness of an assault involving a knife, a very serious offense. Which according to Barron, and supported by her demeanor and physical appearance, had just

recently occurred and from which she just fled a nearby home from which she was chased by her alleged assailant. (RP 6-7)

In Metzker, supra, the officer noted that the woman was extremely intoxicated, incoherent, and disoriented, but also informed the officer that her boyfriend had, in fact, just hit her. The woman's boyfriend admitted they had gotten in a fight, just as the woman got into a vehicle and left with Metzker, a passing motorist. The investigating officer called out over the radio for another officer to stop the vehicle. The officer who stopped the vehicle noticed that Metzker was highly intoxicated. The Court in Metzker found that the investigating officer was justified in calling for Metzker to be stopped for information about the assault because of the potentially serious offense and that the officer who stopped Metzker had reasonable suspicion to make the stop, which was minimally intrusive. The court found that a victim of or witness to a crime can still be the subject of an investigatory stop in certain circumstances, such as when a crime has recently been reported. A minimally intrusive stop based on solid information indicating that a crime is actually in progress or has just been completed may be justified even when the crime itself is not a felony and involves harm that in other contexts might not seem particularly serious. *Id.* at 1220.

Similarly, in State v. Mitchell, *supra*, a 911 caller reported that a man was being robbed and assaulted in a grocery store parking lot. While the victim, Mitchell, was being treated for his injuries at the scene of the incident, he told officers that he had just been assaulted in the parking lot. However, when an officer asked permission to process Mitchell's vehicle for evidence of the robbery, Mitchell told officers that he no longer wished to participate in the investigation and wished to leave the scene. Officers informed Mitchell that they needed him to remain at the scene because he was the victim of a violent crime that was being investigated.

State v. Mitchell, 145 Wn.App. 1, 186 P.3d 1071 (Wash.App. Div. 1 2008);

The Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution protect individuals from unreasonable seizures and searches by the government. If the detention is unreasonable, the fruits of the unreasonable seizure are subject to exclusion under the "fruit of the poisonous tree" doctrine. The constitutional protection is implicated, however, "only when an encounter between a police officer and a citizen rises to the level of a seizure."

We agree with Mitchell that the police officers who first arrived on the scene did not have a reasonable suspicion that he was involved in any criminal wrongdoing. But a brief detention of a potential witness to a crime is permitted, so long as it meets the Fourth Amendment's reasonableness

requirement. As the United States Supreme Court explained,

[T]he law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen.” Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). See also ALI, Model Code of Pre-Arrest Procedure § 110.1(1) (1975) (“[L]aw enforcement officer may ... request any person to furnish information or otherwise cooperate in the investigation or prevention of crime”). That, in part, is because voluntary requests play a vital role in police investigatory work. See *e.g.*, Haynes v. Washington, 373 U.S. 503, 515, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (“[I]nterrogation of witnesses ... is undoubtedly an essential tool in effective law enforcement”); *U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement* 14-15 (1999) (instructing law enforcement to gather information from witnesses near the scene)

In judging reasonableness, courts apply a balancing test that looks to “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”

This case is the same as Mitchell and Metzker and distinguishable from Dorey and Carney. In Dorey and Carney, the defendants had little to no connection to the events that had just occurred, could not provide any information relating to criminal activity, and the officers were not acting to secure the health or safety of a victim.

In this case, like in Mitchell and Metzker, the defendant was a participant in the events that had just occurred as she admitted being involved in a physical altercation. She provided information relating to criminal activity, the physical altercation, alleged theft, and alleged knife attack, the nearby location of the attack and the very important fact that it has just recently occurred. She was obviously still under the emotional and physical effects of this alleged assault as testified to by Officer Orth. Her claim was that she was the victim of a knife attack, an act that involves potential harm to another and could have been very serious. Most importantly Barron willingly got into the patrol car. She was not forced. Officer Orth asked if she would sit in the patrol car while he went inside to speak with Garcia and the defendant got into the car without protest and her purse was not taken for any possible evidentiary value, it was taken as a portion of the policy of the officer to not allow anything in the area behind him if there was a person in that rear of the car. "...I grabbed her purse and told her for safety purposes I'm going to put it on my front seat for officer safety purposes..." (RP 6)

State v. Sondergaard, 86 Wn. App. 656, 660, 938 P.2d 351 (1997)

"A search conducted pursuant to a valid consent is a well-recognized exception to the warrant requirement. Where the government seeks to rely

upon consent to justify a warrantless search, it must prove that the consent was voluntary.”

Orth stated his basis on for asking Barron to get into the car in the following exchange during cross-examination;

Q Okay. So at the time that you placed Ms. Barron in the back of your car it was so that you could get to this residence and it had nothing to do with her being a suspect or a victim, it was just to get to that residence, is that correct?

A Yes (inaudible) --

Q Okay.

A -- at the same time. If she is a victim I would rather bring her to the person so she could identify them than to her. Yeah, exactly.

Q Okay, so you thought about the possibility of Ms. Barron being a witness for a show up?

A Yes.

Q Okay. And so you had that interest in mind --

A Yes.

Q -- at the time that you put her in the back of the police car as a witness?

A Yes.

Q Okay.

A Well, the victim. Like I said, it was unknown.

(RP 20)

...

Q Okay, alright. Now is it safe to say on the way over to the Garcia household that Ms. Barron is essentially a witness or a complaining witness or a victim and that's her status as she --

A Yes.

...

Q Okay, alright. And during the interview I think you called the putting or placing Ms. Barron in the back of your vehicle initially was a detention and not an arrest, is that accurate?

A It was not a detention.

Q Okay, not even a detention?

A It was not a detention. She willingly got in the back. I explained to her what was going on --

Q Okay.

A -- and she went and sat in the back.

Q Okay. Did Ms. Barron give you any statement before she got in the back of the vehicle that she wished to end the investigation? She didn't want to go any further?

A (Inaudible).

Q Did she ever indicate to you that she didn't want to cooperate or follow through in this case?

A No.

Q Okay. She didn't attempt to walk away from you in that front yard of that residence, did she?

A No.

Q Okay. Now, in fact did it seem like she was perhaps interested in having you go to the Garcia residence and do what you needed to do because of what happened?

A Yes.

(RP 22-23)

ARREST OF BARRON WAS FACTUALLY SUPPORTED.

RCW 10.31.100 states that a police officer may arrest a person for a felony without a warrant when the officer has probable cause to believe that that person has committed or is committing a felony. A police officer

may also arrest a person without a warrant for a misdemeanor or gross misdemeanor offense when the offense is committed in the officer's presence or falls under one of ten exceptions of RCW 10.31.100. RCW 10.31.100(1) provides, "[a]ny police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property...shall have the authority to arrest the person."

When Officer Orth first spoke to the defendant, she informed him that Melinda Garcia had assaulted her with a knife. The defendant herself even admitted that there were accusations of her stealing money from Garcia. Garcia then told Officer Orth that there has been mutual combat over the theft of some money. She indicated that there had not been a knife used or displayed. This was supported by the statements of the other person in the home. Barron herself stated that she was involved in a fight which had started in the home of Garcia and then proceeded outside ending in Barron fleeing while being chased, falling down and injuring herself, **a very different story** from that of Barron. Garcia told him that the defendant stole \$100 from her and she wanted it back

Garcia's statement confirmed most of the statement made by Barron. However it cast the actions of the parties in a different light. The

facts now indicated that these two had mutually fought. Based on the statements and the observations of the officer at the scene there was probable cause to believe that a crime had been committed. The officer determined he was going to charge both with disturbing the peace for their actions in and out of the residence. Barron was down the street from the originating location of this fight. She was by her very nature disturbing the peace and quiet of the city as she stood near hysterical and bleeding in front of a home with others present, claiming, untruthfully, that she had been the victim of a knife attack. False stories such as this are commonly seen in the news and often result in the innocent person accused injured or killed by the pack of onlookers who have come to the aid of the alleged victim because of the hue and cry and disturbing nature of the claims.

Once again under RCW 10.31.100(a), an officer has the authority to arrest a person who has been involved in either of those types of situations, regardless of whether or not the crimes were committed in his presence. Officer Orth had the authority to arrest the defendant for the theft of \$100 and the mutual combat between her and Garcia, even though both of these incidents occurred before Officer Orth arrived. The situation is an exception to the officer presence rule.

The facts as set forth by Officer Orth support the charge of disorderly conduct. As stated above this fight did not just take place in a

home, it spilled out into the community. The actions of these two did not come to an end within the home. Once again as stated above Officer Orth contacted Barron at a distance from the home of Garcia. She was in the public and there were other citizens present.

Officer Orth:

Upon arrival there were some people standing in front of the residence right on the corner and Gabby, Ms. Barron, was also standing in the yard and I contacted her. She was -- I didn't know at that time that she was the suspect or the victim, but she had some apparent wounds on her knee she was bleeding from and I asked her what had happened and she said that she was attacked at the residence right next door by a Linda Garcia. She said the woman had a knife. (RP 5)

...

Well, her story was she had a hundred dollars lying out and she left the room for a second and she believed that -- or she came back and the money was gone. Ms. Barron was the only person there and she got upset. She said at that time she, you know, confronted her and they began to fight, mutual combat fight, and then it proceeded outside and she chased her outside and she said there was no knife involved and I was able to confirm that with a witness that was also in the house. (RP 7) (Emphasis mine.)

...

At that time, I placed Melinda into custody, Melinda Garcia, for disorderly conduct because they were fighting mutually inside, chasing each other outside -- or she chased her outside and they were, you know, she was going to attack her again and a mutually fight it sounded like... (PR 8-9)

...

...Now, you learned through your investigation

about this incident that the altercation occurred in the house?

A Well, and outside, that led outside.

Q Okay. And when I say house, that the altercation was in Melinda Garcia's house?

A Well, yes, and like I said, it happened outside, too. They -- (RP 26)

It must be kept in mind that this was an arrest. It is based on probable cause, this is not a trial were Barron is found guilty beyond a reasonable doubt. Therefore this court must look to the facts as seen by the officer and supported by the record to determine if the officer had cause to arrest in this matter. The officer did not single out Barron for arrest. He took both parties into custody for the same crime.

Barron couches this arrest as being based only on the initial actions of her and Garcia not the totality of the confrontation including where she is chased out of Garcia's home into the street. The only problem with that is the Municipal code is not exclusive, the charges can be, and were, for a violation of either section of the law or both, both occurred here. It is specious to state that "there is no evidence that the disturbance had continued outside." (Brief of appellant at 22) When Officer Orth arrived Barron was basically in hysterics, bleeding in someone's front yard with other citizens out and about at approximately 9:00 PM at night. (CP 11-12)

The claim that the arrest of Barron for her "flight from a fight or

physical altercation” did not meet the municipal code in that it was not “noisy, riotous or tumultuous” conduct is disputed by the very record. It was in fact just that, to the point that Barron ended up in another persons front yard, several houses away from where the fight started, with three or four other person with her, really upset, crying, excited, pants torn, bleeding, with an injured knee, possibly having been stabbed .

#### SEARCH OF BARRON

The trial court ruled that the search of the purse was improper due to the fact that it was held by the officer in a separate location during the contact. The court discussed that the actions of the officer in requesting the search of the “female” was allowed under RCW 10.79. There were several reasons the court stated that this search was proper.

The next issue, however, is did the officer still have without saying that you could use the baggies and the pipes that he still have reason to have her taken in to be arrested, and he did. He was arresting her for the disorderly conduct. That’s why she’s there in the first place, take her to the station, he can have her booked. And -- which raises the issue of the search there which is a strip search, and whether or not that was authorized or by suppressing the pipes and suppressing the baggies, does that mean that there was no reason to have a strip search. Well, the procedure followed there as testified to is that everyone who’s brought in there is subject to search. They don’t want people in there to see contraband or weapons and they don’t want people destroying evidence. And so they’re all searched. In this case, the officer did say that the way in which she was acting, her nervousness, her -- I guess it would be

her complexion -- that she was real nervous and he had her searched to prevent introduction of contraband, to see if any evidence on her, that there was a potential that she had contraband based upon the nervousness -- in any event his testimony was related to her nervousness and her appearance was such that led him to believe that she was concealing something. (RP 75-76)

A fact not addressed at the trial court is that even before this “strip search” was conducted Barron admitted she was in possession of contraband. This statement alone would allow for the continuation of this type of search. The mere request for a “female search” in this instance even if the initial request were deemed to be invalid would be supported by the very statements and actions of Barron when she was taken to the area to be searched.

The Dispatcher Mary Eviolon who did the search testified as follows:

Q And what did you do?

A Went into the dressing room with her. I told her

what I was there for, told her I don't go hands on unless need be, that she needed to take all her clothes off to make sure that she wasn't concealing anything. **Before she even removed anything, any part of her clothing, she huddled in the corner and started crying, said that she wanted to come forth, come clean, that she had something concealed and she wanted me to make sure that I told Officer Orth that she came forward before I had to find it.**  
(Emphasis mine.)

...

Q At what point did the defendant start telling you -- well, stopping the search?

A **We didn't even start the search.**

Q So she was fully clothed (inaudible)?

A Uhm-hm.

Q What was her behavior?

A She was crying. Said that she wanted to come clean with the officers, that she would get charged with a felony because it was going to prevent issues with her (inaudible), so she wanted to make sure that I told the officer that she revealed it to me, that she had it before I found it.

Q Did she tell you or ask you anything else?

A Just -- she just kept saying that she wanted to make sure that I told the officer that she came clean before I found it.

(RP 43-44)(Emphasis mine.)

This confession that she “had something concealed” and was going to be charged with a “felony” (RP 43-44) along with the information provided by Officer Orth more than fulfills the requirements of RCW 10.79.130.(1)(a) and (b) Strip, body cavity searches - Warrant required – Exceptions;

(1) No person to whom this section is made applicable by RCW 10.79.120 may be strip searched without a warrant unless:

(a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility;

(b) There is probable cause to believe that a strip search is necessary to discover other criminal evidence concealed on the body of the person to be searched, but not constituting a threat to facility security;  
(Emphasis mine.)

The basis for the request for the initial search was supported by the facts. The court's ruling was discretionary and that decision alone would be sufficient to uphold the request for the search.

Even if the trial court had not found that a reasonable suspicion is not presumed from the underlying offenses or the confession, a reasonable suspicion existed that the defendant could be concealing a weapon or other contraband that constituted a threat to the security of the jail. RCW 10.79.130(1)(a). Although reasonable suspicion is not defined in the statute, Washington courts have construed it to be the same as the articulable standard for Terry investigatory stops. State v. Harris, 66 Wn. App. 636, 643, 833 P.2d 402 (1992)(citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Reasonable suspicion to conduct a strip search “may be based on factors such as the nature of the offense for which a suspect is arrested, and his or her conduct.” State v. Audley, 77 Wn. App. 897, 908, 894 P.2d 1359 (1995)(citing Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984)).

However, this intervening act on the part of Barron eliminates further analysis regarding the basis for the search. This was a valid arrest for disorderly conduct. She agreed to the stipulated facts trial at which Barron was found guilty of possession with intent to deliver methamphetamine.

Barron alleges that there was not lesser intrusive means taken in this case, this is also untrue. The officer conducting the search did not “go hands on” with Barron due to the cooperation and confession of possession of contraband by appellant.

This confession of a felony crime prior to the search beginning clearly are more than sufficient basis for the officer to develop reasonable suspicion. Therefore appellant’s claim that there can be no “retroactive” application of acts which taken in total create reasonable suspicion is wrong. (Appellant’s brief at 34)

It does not matter what Officer Orth asked the dispatcher to do, as the trained individual who was to conduct a search, Orth did not ask to be a “strip” search he asked for a female search. The search was something which this second trained officer could initiate of her own volition and did after she developed reasonable suspicion that appellant was in possession of contraband by the admission of the appellant that she was committing a *felony* and that she wanted to come clean before they found it. In the

unrefuted testimony this confession occurred and the officer “didn’t even start the search.” The reasonable suspicion was actually probable cause based on the confession of the appellant that she had or was committing a felony in the presence of the officer.

This was a situation more akin to a search incident to arrest in that this was an emergent situation were the officer was informed that the appellant was in custody for what was a minor offense and while in the sole presence of this trained employee of the police she confessed to the commission of a felony. The trained dispatcher had every right to conduct this search incident to arrest and when the actions of the appellant dictated that this contraband be found. For all the dispatcher knew it was a knife or a gun that appellant was in possession. There was not time or requirement that she risk her life or the lives of other by waiting to get the authorization of her supervisor to conduct this search. It must be remembered that appellant did not state what the nature of the felony was, just that it was a felony,

The State can find no factually similar case. However, as was the case in State v. Harris, *infra*, this was an exigent circumstance which clearly allowed this search to occur. The very nature of this type of search, tightly prescribing the location and allowing only those needed to conduct the search and not even allowing others to observe the search placed this

female city employee in an emergency situation where she had the legal right to search the appellant to find this self confessed contraband.

State v. Harris, 66 Wn.App. 636, 642-3, 833 P.2d 402 (1992);

Exigent circumstances justified searching Mr. Harris before placing him in the holding cell. The police had prior experience with gang members taping razor blades to their skin. If Mr. Harris had concealed a razor blade in this fashion, he could have retrieved it while in the cell and had it ready to use when an officer returned for him. We find no reversible error.

Third, Mr. Harris argues the statutory requirements for a strip search were not met. He asserts (1) the police did not have a reasonable suspicion he was concealing drugs, RCW 10.79.130, and (2) Officer Moyer did not obtain written approval of the supervisor to conduct the search, RCW 10.79.140(2).

RCW 10.79.130(1)(b) requires "probable cause" to support a strip search for criminal evidence "not constituting a threat to facility security". The subsection applicable here, RCW 10.79.130(1)(a), requires that police have a "reasonable suspicion" to support a strip search for items that constitute a threat to security. It is clear from the statutory framework "reasonable suspicion" is a lesser standard and involves something other than probable cause.

"Reasonable suspicion" is not defined in the statute, but the term has an established meaning. Specifically, our courts have required that investigatory stops be supported by an articulable suspicion of criminal activity. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In State v. Kennedy, 107 Wash.2d 1, 6, 726 P.2d 445 (1986), the court described that standard "as the ability to reasonably surmise [833 P.2d 406] from the information at hand that a crime was in progress

or had occurred" (citing United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). Kennedy, 107 Wash.2d at 6, 726 P.2d 445, continued:

Hence, the degree of probability required for the police conclusion is less in a stop situation than in an arrest. 3 W. *LaFave [Search and Seizure § 9.2]* at 65 [(1978) ]. *LaFave* suggests that the standard is a substantial possibility that criminal conduct has occurred or is about to occur. We believe this to be the preferred definition.... When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention.

The circumstances reported by Officer Moyer suggested a "substantial possibility" that Mr. Harris was concealing drugs in a fashion that only a strip search would reveal. We therefore hold a "reasonable suspicion" supported the search.

The record is ambiguous with regard to Mr. Harris' claim that Officer Moyer failed to obtain prior written approval from his supervisor to conduct the strip search. Officer Moyer testified he obtained approval; he was not asked if the approval was in writing. In any event, suppression of evidence is not an appropriate remedy for violation of the writing requirement of RCW 10.79.140(2). The purpose of the statutory requirement is to provide proof the officer consulted his or her supervisor and obtained permission to conduct the search. The lack of written approval does not invalidate other proof, in the form of oral testimony, that such permission was obtained. (Footnotes omitted.)

Appellant was going to jail. There is no dispute or doubt about that fact. Therefore she would have been subject to search even with the drugs found in her purse suppressed. Even if the court was wrong in its

statement that there is no an absolute requirement for the supervisor to give permission it would appear that the court in Harris has answered that question. The law states with out doubt that there must be “written” permission and yet the Harris court stated that suppression was not the remedy for a violation of the writing requirement.

State v. Stackhouse, 90 Wn. App. 344, 354-55, 957 P.2d 218 (1998) “We will not disturb a trial court's ruling on a motion in limine or the admissibility of evidence absent an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 118 S. Ct. 1193 (1998); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).”

#### IV. CONCLUSION

Based on the forgoing facts and law Barron’s appeal should be denied. This appeal should be dismissed.

The initial contact between Officer Orth and Barron was consensual. She entered the patrol car not so that the officer could search and detain her but as the probable victim of a knife attack whom the officer wish to keep with him to possibly identify the perpetrator and so that he could go back-up his partner who had entered a location which, from the words of Barron, was very recent scene of a knife attack. This was a fluid situation and the office was dealing with all of the

complexities at once. When asked about his “demeanor” at the scene he stated “Well, like I said, my demeanor was -- I was trying to make sure that everybody was okay and I was trying to get, you know, I was kind of in a hurry to go back my partner up because that other person was possibly armed with a knife.” He had no intent to nor did he plan to “detain” Barron. When he determined that here was mutual combat that had overflowed into the street he arrested both combatants for disturbing the police.

Barron takes great issue with the fact that she was “strip” searched and the officer had no basis for that search. The officer states that what he observed led him to believe that Barron was concealing something on her person. This confession gave an independent basis for this search.

Respectfully submitted this 12<sup>th</sup> day of March, 2012.

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DECLARATION OF SERVICE

I, David B. Trefry state that on March 12, 2012, emailed as copy, by agreement of the parties, of the Respondent's Brief , to Nancy P. Collins, Washington Appellate Project, Nancy Collins at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org) and to Gabriela Barron 131 E. Parkland Dr #3, Sunnyside, WA 98944.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12<sup>th</sup> day of March, 2012 at Spokane, Washington.

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