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No. 90155-4  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

vs.

**Jeanne Barringer,**

Petitioner/Appellant.

---

Lewis County Superior Court

Cause No. 12-1-00119-1

The Honorable Judge James Lawler

## **Petitioner's Supplemental Brief**

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### ISSUES ON REVIEW

**ISSUE 1:** Does a 2 ½ hour investigatory detention based on mere suspicion violate the Fourth Amendment and Wash. Const. art. I, § 7?

**ISSUE 2:** In the absence of formal arrest, does a lengthy detention disturb a person's private affairs without the "authority of law" required by Wash. Const. art. I, § 7?

**ISSUE 3:** Does a pretextual custodial arrest made for the purpose of speculative criminal investigation violate Wash. Const. art. I, § 7, even if supported by probable cause?

**ISSUE 4:** Did the police lack probable cause to arrest Barringer for drug-related crimes during the 2 ½ hours preceding her formal arrest?

**ISSUE 5:** Did the prosecution fail to prove that Barringer voluntarily consented to a search of her purse after police detained her for 2 ½ hours, interrogated her about her drug use, searched her (with her permission), subjected her and her property to a canine drug sniff, strip-searched her (with her "consent"), and seized her purse while threatening to seek a search warrant?

### STATEMENT OF FACTS

It was snowing outside Morton on February 29, 2012. RP (5/30/12) 5, 13. Michael Hartley was driving his girlfriend's SUV; Jeanne Barringer was his passenger. RP (5/30/12) 16. The car left the road and got stuck in a ditch. RP (5/30/12) 6. Hartley didn't have a valid license. The two switched seats. RP (5/30/12) 6, 16, 18.

Officer Royle was the first to arrive at 7:42 pm. RP (5/30/12) 4. He pulled in behind the car with his overhead lights on. RP (5/30/12) 5, 7. Both Barringer and Mr. Hartley told him she had been driving the car. He took Barringer's license and confirmed it was valid. He kept the license. He also learned that the car was un insured. Trooper Hovinghoff arrived at 7:53 pm, lights activated. RP (5/30/12) 14-15, 40. He took Barringer's license from Royle and kept it. RP (5/30/12) 41.

According to Hovinghoff, he had learned "probably over pan-

cakes” with other officers, that Barringer was known to associate herself with drugs. RP (5/30/12) 51. He went and spoke to Barringer and Hartley.

Both told him Barringer had been driving. RP (5/30/12) 16. Hovinghoff was suspicious of this claim. He’d seen Hartley driving the same car earlier. RP (5/30/12) 17. When he learned that Hartley’s license was suspended, he got Barringer out of the car. RP (5/30/12) 18. At this point, Barringer admitted that Hartley was driving when the car went off the road. RP (5/30/12) 18. Hovinghoff got Hartley out and asked him the same question, but he again denied driving. RP (5/30/12) 18. Hovinghoff arrested Hartley. RP (5/30/12) 18.

Hartley told the officer he couldn’t get into trouble and offered information for lenience. RP (5/30/12) 19. After waiving his rights, he said that Barringer had just purchased an ounce of methamphetamine. RP (5/30/12) 19. Hartley said they had gone to Rochester for her to buy it. He agreed to being named as the informant in a warrant application. RP (5/30/12) 19. He said he didn’t see any methamphetamine, but did see cash before the purchase. RP (5/30/12) 20. Then he admitted he was driving the car when it went into the ditch. RP (5/30/12) 20.

Hovinghoff asked Barringer when she’d last used drugs. She said her last use was months ago. RP (5/30/12) 21. He asked if there were any drugs in the vehicle and she said no. RP (5/30/12) 21. Hovinghoff told her that Hartley had just told him she just bought an ounce of methamphetamine. RP(5/30/12) 22. He asked her for permission to search her person, and gave her *Ferrier* warnings. She agreed. RP (5/30/12) 22. She had no

contraband on her. RP (5/320/12) 23.

Still at the side of the road, Hovinghoff next asked for permission to search the SUV. Barringer said that it was not her car and that he should ask Hartley. RP (5/30/12) 23. Hovinghoff told Barringer she was being detained for investigation of possession of methamphetamine and cuffed her. RP (5/30/12) 23, 43. She had to sit down and catch her breath before being put into the back of the police car. RP (5/30/12) 23. Hovinghoff read Barringer her constitutional rights. RP (5/30/12) 24. Barringer again said that Hartley had been driving. RP (5/30/12) 25.

Hartley agreed to a search of the SUV. No contraband was found. RP (5/30/12) 25-26. Hovinghoff asked Barringer if he could search her purse. When she said “no,” he put the purse into his vehicle. RP (5/30/12) 27, 44. Hovinghoff told Barringer that he could ask for a search warrant if she didn’t consent. RP (5/30/12) 27.

Hovinghoff spoke with Hartley again, and Hartley suggested that Barringer may have put the methamphetamine into her privates. RP (5/30/12) 28. He also said that Barringer had a marijuana pipe that should be in the vehicle. RP (5/30/12) 33. At this point, the tow truck arrived and the officers took Barringer, still cuffed in the back of the police car, to the tow yard. RP (5/30/12) 28-29, 37.

Hovinghoff called for a drug detection dog, which arrived at the tow yard at 8:57 pm. The dog sniffed the car, the purse, and Barringer, and did not alert. RP (5/30/12) 29-31, 40.

Hartley told Hovinghoff that he had seen money, in \$20’s and

\$50's, in Barringer's possession, that he drove her to Rochester to buy methamphetamine, that she dropped him off so he didn't know where she'd purchased it, and that he picked her up after she'd completed her purchase. RP (5/30/12) 31. He again acknowledged that he hadn't seen any actual methamphetamine. RP (5/30/12) 32.

Hovinghoff called for a female officer so that a strip search of Barringer could be requested. Deputy Shannon arrived at 9:30 pm. RP (6/1/12) 5, 13. Barringer, still cuffed, needed to use the restroom by this time. RP (6/1/12) 7. Shannon took Barringer to the Morton police station and asked if she would agree to a strip search as Barringer used the restroom. RP (6/1/12) 7. Barringer agreed to this search at 10:11 pm.<sup>1</sup> RP (5/30/12) 38; RP (6/1/12) 8.

At the station, Shannon closely observed while Barringer relieved herself. She also searched Barringer's pants and bra. All of this turned up nothing. RP (6/1/12) 8-9, 17-18. Shannon brought Barringer back to Hovinghoff's location, where he cuffed her again. RP (5/30/12) 37; RP (6/1/12) 9.

Shannon asked Barringer why she wouldn't agree to a search of the purse. RP (6/1/12) 10. Barringer said she had marijuana in it, to help her deal with the symptoms of stomach cancer. RP (6/1/12) 10. Both Shannon and Hovinghoff told Barringer that neither were "concerned" about a bit of marijuana. RP (5/30/12) 35; RP (6/1/12) 10-11.

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<sup>1</sup> Hartley had been released around 10 pm. RP (5/30/12) 47-48.

Once again, Hovinghoff reviewed the *Ferrier* warnings with Barringer, including that she could restrict the search. RP (5/30/12) 35; RP (6/1/12) 11. Barringer said he could search the purse. RP (5/30/12) 36. As the search began, she asked him not to look in the purse's pockets. RP (5/30/12) 36; RP (6/1/12) 11. He said if she didn't agree he could search the whole purse, he'd seek a warrant. RP (5/30/12) 36; RP (6/1/12) 11.

There were 17 grams of methamphetamine in the pocket of the purse. RP (5/30/12) 36. Barringer denied knowledge of the substance. RP (5/30/12) 37. Hovinghoff told Barringer she was under arrest, and booked her into jail. RP (5/30/12) 37. It was 10:38 pm when Barringer was formally arrested. RP (5/30/12) 38, 40.

The defense moved to suppress the evidence. CP 26-35.

At the hearing, Hovinghoff testified after he asked her for permission to search the SUV, he told Barringer that she was being detained for investigation of possession of methamphetamine. RP (5/30/12) 23. He also said that after he cuffed her, read her her rights, and placed her into the back of a police car, when she told him that Hartley had been driving, he believed that he had probable cause to arrest her for making a false statement. RP (5/30/12) 25. He said up until this point, he was investigating the false statement; he said after she admitted Hartley was driving, he continued investigating since Barringer could still be making false statements. RP (5/30/12) 40. He indicated that once he had probable cause to arrest Barringer, he delayed the arrest so that he could complete his methamphetamine investigation and would decide at that point whether or not to

formally arrest her. RP (6/1/12) 3. Additionally, he told the court that he did not formally arrest Barringer until 10:38 pm. He admitted that he did not investigate the crime of making a false statement for the whole 2 ½ hours. Rp (6/1/12) 4.

Hovinghoff said that during the roughly 30 minutes while they waited for the drug dog to arrive, he drafted his warrant application. RP (5/30/12) 29-30. He resumed drafting his warrant request while they waited for Deputy Shannon to arrive. He testified that he'd spent the whole 2½ hours he'd been with Barringer "investigating." RP (5/30/12) 49-50.

The trial court denied the suppression motion. CP 4-11; RP (6/1/12) 29-34. After a stipulated trial, Barringer was found guilty. CP 37-51, 52. She timely appealed. CP 20-21. The Court of Appeals upheld her conviction and the trial court's denial of her suppression motion.

### ARGUMENT

Both the Fourth Amendment and Wash. Const. art. I, § 7 prohibit searches or seizures undertaken without a search warrant.<sup>2</sup> *State v. Eisfeldt*, 163 Wash.2d 628, 634, 185 P.3d 580 (2008). This "blanket prohibition against warrantless searches is subject to a few well guarded exceptions..." *Id.*, at 635. The state bears the heavy burden of producing

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<sup>2</sup> The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.* In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002).

clear and convincing evidence showing that a warrantless search or seizure falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Where police obtain evidence as a direct result of an unconstitutional search or seizure, “that evidence must also be excluded as ‘fruit of the poisonous tree.’” *Eisfeldt*, 163 Wn.2d at 640 (internal quotation marks omitted) (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Thus, if police obtain consent through “exploitation of a prior illegal seizure,” any evidence discovered must be suppressed. *State v. Harrington*, 167 Wn.2d 656, 670, 222 P.3d 92 (2009).

Art. I, § 7 “is qualitatively different from the Fourth Amendment.” *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). A broad right to privacy ground the state provision; it “protects citizens from governmental intrusion into their private affairs without the authority of law.” *Id.*

**I. THE 2 ½ HOUR INVESTIGATORY DETENTION DISTURBED BARRINGER’S PRIVATE AFFAIRS WITHOUT AUTHORITY OF LAW.**

A. A 2 ½-hour Terry stop is per se unreasonable under art. I, § 7.

1. An investigatory detention must be justified at its inception and reasonable in its scope.

Art. I, § 7 applies to brief investigatory seizures. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). To justify such a seizure, police must have a well-founded suspicion that the suspect engaged in criminal conduct. *Id.*, at 62. The officer must be able to point to specific and articulable facts which reasonably warrant the particular intrusion. *Id.*

An investigatory detention must be justified at its inception.

*Gatewood*, 163 Wn.2d at 539. Its scope must be reasonably related to the circumstances which justified the interference in the first place. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

If the officer's suspicions are dispelled, then "the officer must end the investigative stop." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). It is only if "the officer's initial suspicions are confirmed or are further aroused [that] the scope of the stop may be extended and its duration may be prolonged." *Id.* Furthermore, the degree of intrusion must be appropriate to the kind of crime under investigation and the likelihood that the suspect is dangerous. *See, e.g., State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

2. The 2 ½ hour investigatory detention was far too long and far too intrusive to be reasonable under art. I, § 7.

In assessing the validity of a brief detention, courts consider the totality of the circumstances. *Acrey*, 148 Wn.2d at 747. This can include "the officer's training and experience, the location of the stop, and the conduct of the person detained, [as well as] 'the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained.'" *Id.*, quoting *Williams* 102 Wn.2d at 740.

The officers must use "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Williams*, 102 Wn.2d at 738. In *Williams*, the Supreme Court found an investigatory stop unreasonable, noting that a 35-minute detention "appear[ed] to approach excessiveness." *Id.*, at 741.

Here, Barringer was detained for 2 ½ hours based on Hartley’s unsupported allegations. The only crime under investigation was possession of methamphetamine. Barringer had her identification and her purse taken. She was handcuffed and searched. She was transported away from the scene of the accident, and held in the back of a patrol car. She (and her purse) were subjected to a drug-sniff dog. She was transported to and from the Morton Police department so that a female officer could conduct a strip search. CP 5-10.

Throughout all of this, she was kept waiting—for the drug-sniff dog, for a female deputy, and for preparation of a search warrant application that was never submitted. Over the course of 2 ½ hours, the police dispelled certain claims made by Hartley. They did not find the marijuana pipe Hartley alleged was in the SUV. They did not find drugs or other contraband on her body following the strip search suggested by Hartley. CP 5-10; RP (5/30/12) 27, 33.

These repeated failures should have dispelled Hovinghoff’s suspicions, and he was therefore required to “end the investigat[ion].” *Acrey*, 148 Wn.2d at 747. Instead, he insisted on keeping Barringer and her property in custody, escalating the intrusion as he prolonged the detention, even though his “initial suspicions [were not] confirmed or... further aroused” (as required to justify such escalation). *Id.*; CP 5-10.

The 2 ½ hour detention was unreasonable under art. I, § 7.

First, the officers’ purpose was to investigate only a very minor

crime – simple possession.<sup>3</sup> Barringer—who had no felony record—was not suspected of a violent crime, and nothing suggested she was dangerous. *See Williams*, 102 Wn.2d at 740.

Second, the detention was highly intrusive. As noted, Barringer’s property was retained, and she herself was handcuffed, restrained in a police car, transported, searched, subjected to a drug-sniff dog, forced to wait for a female officer, and strip searched before consenting to a search of her purse. Each step in the escalation yielded nothing suspicious.

Third, the 2 ½ hour detention was unreasonably long.<sup>4</sup> It far exceeded the 35-minute detention in criticized by the Supreme Court in *Williams*. Each time the police intruded further without result, their suspicions should have been dispelled, and the seizure ended.<sup>5</sup> *Acrey*, 148 Wn.2d at 747. Instead, Hovinghoff prolonged and intensified the detention.

Under these circumstances, the 2 ½ hour detention was unreasona-

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<sup>3</sup> The record makes clear that Hovinghoff had no interest in pursuing Barringer for making a false statement under RCW 9A.76.175.

<sup>4</sup> The Court of Appeals erroneously analyzed only the first 75 minutes as an investigative detention. Opinion, pp. 8, 10-13. It selected this time period by concluding that Hovinghoff had probable cause and arrested Barringer before 8:57, which was 75 minutes into the detention. The court’s position is addressed elsewhere in this brief. However, even 75 minutes is more than twice the 35-minute detention in *Williams*, which, according to the Supreme Court, “appears to approach excessiveness.” *Williams*, 102 Wn. 2d at 741.

<sup>5</sup> In addition, the state failed to prove that police acted diligently. Royle could have done more to investigate the accident—or any other matter—before Hovinghoff arrived. Instead, all he did was ask if the two needed medical attention and took Barringer’s license. *See* Opinion, p. 13; CP 5. Presumably this took less time than the 11 minute period between when he arrived and when Hovinghoff came. CP 5. Nor did Hovinghoff explain why it took him significant time to complete his warrant application. RP (5/30/12) 30. The state did not introduce evidence showing how long a warrant application normally takes. Furthermore, the state did not prove that the drug sniff dog came as quickly as possible, or that the female deputy came without delay. RP (5/30/12) 4-51; RP (6/1/12) 3-21.

ble. *Williams*, 102 Wn.2d at 741-742. It violated the Wash. Const. art. I, § 7. Barringer's statements, her alleged consent, and the evidence found in her purse must be suppressed as fruit of the poisonous tree. *Eisfeldt*, 163 Wn.2d at 640; *Harrington*, 167 Wn.2d at 670.

The state failed to meet its "heavy burden" of establishing an exception to the warrant requirement. *Garvin*, 166 Wn.2d at 250. Barringer's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

3. The 2 ½ hour investigatory detention also violated the Fourth Amendment.

Like art. I, § 7, the Fourth Amendment places restrictions on brief investigative detentions. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The underlying guidelines are the same: an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.*, at 21. Police action must be justified at its inception and "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, at 20.

The U.S. Supreme Court has invalidated an investigatory detention based solely on its duration. *U.S. v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). In *Place*, the court analyzed a 90-minute seizure of personal property as an investigatory detention, holding that

[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause... the brevity of the invasion of the individual's Fourth

Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.

*Id.*, at 709.

Here, whether the detention is 75 minutes or 2 ½ hours, it cannot be upheld under the Fourth Amendment. A 2 ½ hour detention exceeds the time period in *Place*, and thus is unreasonable as a matter of law. *Id.* Even the 75-minute period analyzed by the Court of Appeals in this case approaches the duration of the seizure in *Place*, and thus is also likely unreasonable *per se*.<sup>6</sup> *Id.*

The other factors discussed above also make this seizure unreasonable under the Fourth Amendment. Barringer had no felony history, was suspected of only a minor crime, and was not dangerous. Each step in the investigation served to dispel rather than increase suspicion, but police did not release Barringer. Throughout the detention, the officers' conduct was unreasonably intrusive. Finally, the prosecution did not introduce evidence allowing the court to determine "whether the police diligently pursue[d] their investigation." *Place*, 462 U.S. at 709.

The seizure violated Barringer's rights under the Fourth Amendment. *Id.* Barringer's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

B. In the absence of formal arrest, the 2 ½ hour detention violated art. I,

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<sup>6</sup> As argued elsewhere in this brief, the Court of Appeals erred by analyzing only the first 75 minutes of the detention. However, even a 75-minute detention likely violates the Fourth Amendment, which permits only a *brief* detention based on less than probable cause. *Place*, 462 U.S. at 709.

§7.

Under art. I, § 7, an arrest can provide the authority of law for disturbance of a person's private affairs; by contrast, the mere existence of probable cause without an actual arrest does not provide such authority of law. *State v. O'Neill*, 148 Wn.2d 564, 585-586, 62 P.3d 489 (2003). Thus, under art. I, § 7, a search incident to arrest cannot precede the arrest, despite the existence of probable cause.<sup>7</sup> *Id.* In addition to probable cause, “[t]here must be an actual custodial arrest to provide the ‘authority’ of law...it is the arrest, not probable cause to arrest, that constitutes the necessary authority of law...” *Id.* The *O'Neill* rule is in keeping with art. I, § 7's general prohibition against legal fictions.<sup>8</sup>

In this case, the Court of Appeals and the trial judge relied on a prohibited legal fiction to justify the 2 ½ hour detention. Both justified the lengthy detention on the grounds that the trooper had probable cause—developed during the initial 75-minute detention—to arrest Barringer for making a false statement. CP 11; Opinion, pp. 13-15.

But Hovinghoff did not arrest her for that crime. The record shows that Hovinghoff was only interested in her alleged possession of methamphetamine. He told her she was being detained for investigation of posses-

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<sup>7</sup> This is in contrast to the federal rule, which permits the search to precede the arrest. *U.S. v. Powell*, 483 F.3d 836, 838-842 (D.C. Cir. 2007) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)).

<sup>8</sup> For example, a pretextual traffic stop is unconstitutional, even if police have another legitimate basis for the stop. *Ladson*, 138 Wn.2d at 351. By contrast, the federal constitution allows pretextual traffic stops. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

sion of methamphetamine. RP (5/30/12) 23. After handcuffing her, he continued to pursue his drug investigation, and held her without formally arresting her for another 75 minutes. RP (5/30/12) 30, 38. The sole focus during the entire 2 ½ hour detention was Barringer’s alleged drug possession, not her false statement. RP (5/30/12) 40, 43. Hovinghoff’s *post-hoc* testimony about her false statement does not transform the lengthy detention for drug investigation into an arrest for making a false statement.

As in *O’Neill*, the mere existence of probable cause cannot provide the “authority of law” required to disturb a person’s private affairs. *O’Neill*, 148 Wn.2d at 585-86. The officer in *O’Neill* could not lawfully search absent an actual arrest; similarly, Hovinghoff could not lawfully continue to detain Barringer without actually arresting her.<sup>9</sup>

Hovinghoff’s prolonged detention of Barringer could not “be constitutionally justified for its true reason (i.e. speculative criminal investigation).” *Ladson*, 138 Wn.2d at 351. Allowing a 2 ½ hour detention on the grounds that the officer *could have* arrested a suspect midway through is to elevate “form over substance; [it is] a triumph of expediency at the expense of reason.” *Id.* As the Supreme Court made clear in *O’Neill*, art. I, § 7 does not allow such a legal fiction.

The evidence here was seized following a prolonged detention conducted without authority of law. *O’Neill*, 148 Wn.2d at 585-86. The

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<sup>9</sup> For the same reason, her detention cannot be justified as an arrest for possession of marijuana. The officer did not make a formal arrest based on her admission that she had marijuana, and instead told her they were not concerned about that crime. RP (6/1/12) 10.

state failed to meet its “heavy burden” of establishing one of the narrowly drawn exceptions to the warrant requirement. *Garvin*, 166 Wn.2d at 250. Barringer’s conviction must be reversed, the evidence suppressed as fruit of the poisonous tree, and the charge dismissed with prejudice. *Eisfeldt*, 163 Wn.2d at 640; *Harrington*, 167 Wn.2d at 670.

C. Even if Hovinghoff had arrested Barringer for making a false statement, the arrest would have been pretextual, and could not provide the “authority of law” required by art. I, § 7.

Wash. Const. art. I, § 7 “forbids use of pretext as a justification for a warrantless search or seizure.” *Ladson*, 138 Wn.2d at 353. The constitution requires courts to “look beyond the formal justification for the [seizure] to the actual one.” *Id.* This has been the law in Washington for more than 50 years. *Id.*, at 353 (citing *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962)).

This rule applies not only to pretextual traffic stops, but also to arrests based on probable cause. *Michaels*, 60 Wn.2d at 644-645. An arrest that is “mere pretext for [a] search” is unlawful. *Id.*, at 645.

As noted, Hovinghoff did not make a formal arrest during the first 2 ½ hours that he detained Barringer. RP (5/30/12) 37-38. Even if he had arrested Barringer for making a false statement, such an arrest would have been a “mere pretext for [a] search.” *Id.* Hovinghoff admitted that he did not investigate the false statement during the entire 2½ hour period, either before or after the 75-minute mark. RP (5/30/12) 40; RP (6/1/12) 3. When he handcuffed her, he told her she was being held for investigation of a

drug charge. RP (5/30/12) 23.

Under these circumstances, an arrest for making a false statement would have been a pretext to enable Hovinghoff to pursue his drug investigation. Such an arrest could not provide the “authority of law” required under art. I, § 7.<sup>10</sup>

If Hovinghoff had arrested Barringer for making a false statement, the arrest would have been a pretext for “speculative criminal investigation” into her possession of methamphetamine.<sup>11</sup> *Ladson*, 138 Wn.2d at 351. Such a pretextual arrest cannot provide the “authority of law” required under art. I, § 7. *Michaels*, 60 Wn.2d at 644-645. Barringer’s conviction must be reversed, the evidence suppressed as fruit of the poisonous tree, and the charge dismissed with prejudice. *Eisfeldt*, 163 Wn.2d at 640; *Harrington*, 167 Wn.2d at 670.

## **II. THE PROSECUTION FAILED TO PROVE THAT BARRINGER FREELY AND VOLUNTARILY CONSENTED TO A SEARCH OF HER PURSE.**

A. In the absence of a search warrant, police may not rely on consent unless it is freely and voluntarily given.

Consent is an exception to the warrant requirement. *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011). However, before consent can justify a warrantless search, it must be both “meaningful” and

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<sup>10</sup> Similarly, a later arrest for possession of marijuana would have been a pretext for the ongoing methamphetamine investigation. When Barringer admitted to having marijuana in her purse, the officers told her they were not concerned about that, didn’t arrest her, and didn’t investigate further. RP (5/30/12) 35; RP (6/1/12) 10-11.

<sup>11</sup> Hovinghoff did not develop probable cause to believe Barringer possessed methamphetamine until after he’d searched her purse. As noted elsewhere in this brief, Hartley’s allegations did not establish probable cause because under the *Aguilar-Spinelli* test.

“informed.” *Id.*, at 754, 758. The state bears the burden of proving that any consent was freely and voluntarily given. *Bumper v. N. Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (U.S.N.C. 1968).

The state’s burden “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” *Id.*; *see also Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The police “may not misrepresent the scope or extent of their authority to obtain a search warrant.” *State v. Apodaca*, 67 Wn. App. 736, 739-40, 839 P.2d 352 (1992) *overruled on other grounds by State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995).

In this case, Barringer unequivocally refused consent to search her purse. CP 7. After she refused consent, the police continued to detain her (and her property) and sought permission for numerous other searches (including a strip search). Furthermore, when Barringer sought to limit the scope of any search, Hovinghoff told her that “the consent would be for the whole purse,” and that if she limited her consent, he would apply for a warrant.<sup>12</sup> RP (5/30/12) 36.

This threat to obtain a warrant was groundless. Because of this, any consent was not freely and voluntarily given.

B. Barringer’s alleged consent was no more than acquiescence to a groundless threat to obtain a search warrant.

A search warrant must be based on probable cause. *Fernandez v.*

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<sup>12</sup> A suspect has the right to limit the scope of any search. *State v. Ferrier*, 136 Wn.2d 103, 118-119, 960 P.2d 927 (1998).

*California*, 134 S. Ct. 1126, 1132, 188 L.Ed.2d 25 (2014). If probable cause stems from an informant's tip, the state must establish both the informant's basis of knowledge and veracity.<sup>13</sup> *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) (citing *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984)). These two independent prongs may not be dispensed with unless police investigation confirms the informant's allegations. *Young*, 123 Wn.2d at 195. However, the police must corroborate more than public or innocuous facts. *Id.*

Here, the officers' suspicion that Barringer possessed drugs was based entirely on Hartley's tip. Even if Hartley had an adequate basis of knowledge,<sup>14</sup> the prosecution never established his credibility.<sup>15</sup> Although named, he was not a named citizen informant<sup>16</sup>—he sought to barter information to avoid getting in trouble, and thus was clearly motivated by self-interest. *See, e.g., State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090 (1996) (“The earlier domestic dispute colored her information with self-interest,” and thereby precluded a finding of veracity.)

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<sup>13</sup> This is known as the *Aguilar-Spinelli* test. *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

<sup>14</sup> This, in itself, is questionable. Hartley did not witness any transaction or see any drugs. CP 8.

<sup>15</sup> The officers' subjective belief in Hartley's credibility is irrelevant, because the determination of probable cause is an objective one. Findings of Fact Nos. 1.12 and 1.28 have no bearing on the issue of probable cause (insofar as they pertain to the officers' subjective belief in Hartley's credibility); accordingly, the findings should be vacated.

<sup>16</sup> The credibility determination is relaxed when the informant is a named citizen; however, the police must have something “more than simply” the citizen's identity. *State v. McCord*, 5 Wn. App. 888, 893, 106 P.3d 832 (2005).

Further, the state did not establish whether Hartley had prior criminal convictions.<sup>17</sup> *See* RP, *generally*. In addition, Hartley made clear that he would make extreme allegations without any basis, as when he suggested that Barringer had hidden drugs within her body. RP (5/30/12) 28. Finally, the police were unable to confirm any of Hartley's information, and, in fact, found proof that affirmatively refuted his claim that they would find a marijuana pipe in the SUV. RP (5/30/12) 27, 33; CP 7, 8.

Under these circumstances, Hartley was not reliable. The information he provided did not amount to probable cause. *State v. Sanchez*, 171 Wn. App. 518, 288 P.3d 351 (2012), *reconsideration denied* (Jan. 28, 2013). Accordingly, the Hovinghoff's threat to obtain a warrant was groundless.<sup>18</sup> The officer should not have pressured Barringer into agreeing to a search of her purse through his unsupported claim of authority. *Apodaca*, 67 Wn. App. at 736, 739-40.

The prosecution failed to prove that Barringer's consent was freely and voluntarily given.<sup>19</sup> *Schultz*, 170 Wn.2d at 754, 758; *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). Her conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice. *Id.*

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<sup>17</sup> It is clear from the record that he had previously been associated with others involved in criminal activity. RP (6/1/12) 16-17.

<sup>18</sup> Because Hovinghoff had no basis upon which to secure a warrant, he lacked authority to detain Barringer during the lengthy period it took him to prepare the warrant request.

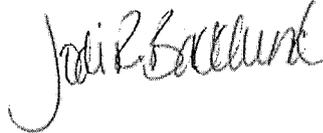
<sup>19</sup> In addition, as argued elsewhere, her alleged "consent" was the fruit of the ongoing illegal seizure. *Eisfeldt*, 163 Wn.2d at 640; *Harrington*, 167 Wn.2d at 670.

**CONCLUSION**

Trooper Hovinhoff violated Barringer's Fourth Amendment right to be free from unreasonable searches and seizures. He also disturbed her private affairs without authority of law, in violation of art. I, § 7. The Supreme Court should reverse the Court of Appeals, suppress the evidence, vacate Barringer's conviction, and dismiss the case with prejudice.

Respectfully submitted on November 6, 2014.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Petitioner's Supplemental Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief to:

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I filed the Supplemental Brief electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 6, 2014.



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Attached is the petitioner's supplemental brief.

Thank you.

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