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No. 63676-6-I

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
CHERYL ELLEN WILSON,  
Appellant.

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

The Honorable Ira Uhrig

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BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Cheryl Wilson was the passenger in a vehicle stopped for a traffic infraction. She appeals her conviction for possession of methamphetamine found in her purse when a sheriff's deputy searched the vehicle. Ms. Wilson argues the seizure and search of her purse violated article I, section 7 of the Washington Constitution because (1) the driver did not have authority to consent to the search of Ms. Wilson's purse, and (2) Ms. Wilson did not abandon her purse by leaving it temporarily in the vehicle when she was ordered out of the car by the deputy. In addition, the deputy's stop of the vehicle was pretextual, because the deputy was hoping to investigate possible drug activity and used the stop to gain the driver's permission to search the car.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting into evidence a substance containing methamphetamine found in Cheryl Wilson's purse because the police officer's search and seizure of the purse violated article I, section 7 of the Washington Constitution.

Findings of Fact and Conclusions of Law Re: Suppression,  
Conclusions 2-3.<sup>1</sup>

2. The trial court erred by concluding the driver had authority to consent to the search of Ms. Wilson's purse. Findings of Fact and Conclusions of Law Re: Suppression, Finding of Fact 8.

3. The trial court erred by concluding Ms. Wilson voluntarily abandoned her purse. Findings of Fact and Conclusions of Law Re: Suppression, Conclusion 3, Finding of Fact 7.

4. The trial court erred by concluding the stop of the car in which Ms. Wilson was a passenger was not a pretext stop. Findings of Fact and Conclusions of Law Re: Suppression, Conclusions 1-2.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 7 of the Washington Constitution protects citizens from warrantless seizures unless the State proves the search fits within one of the narrow exceptions to the warrant requirement. To establish a search was consensual, the State must show the consent was voluntary, the person granting the consent had the authority to do so, and the search did not exceed the scope of the consent. Ms. Wilson had a constitutional right to

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<sup>1</sup> A copy of the trial court's Findings of Fact and Conclusions of Law Re: Suppression, CP 28-31, is attached as an appendix.

privacy in her personal property, and there is no evidence she gave the driver authority to consent to a search of her purse. Does a de novo review of the facts and law show that the vehicle driver did not have authority to consent to the search of Ms. Wilson's purse?

(Assignments of Error 1, 2).

2. Although Article I, section 7 of the Washington Constitution protects citizens from warrantless seizures, the government may seize property that has been voluntarily abandoned. Property is not abandoned if the owner seeks to preserve it as private and society recognizes the expectation of privacy as reasonable. Ms. Wilson was the passenger in a car that was stopped for a traffic infraction, she left her purse in the vehicle upon being ordered to exit the car by a law enforcement officer who obtained the driver's consent to search. Does a de novo review of the facts and law demonstrate Ms. Wilson did not voluntarily abandon her purse by leaving it temporarily in the car?

(Assignments of Error 1, 3).

3. Article I, section 7 of the Washington Constitution protects citizens from warrantless seizures used as a pretext to avoid the warrant requirement. In determining if a law enforcement officer's stop of a vehicle for a traffic infraction was a pretext to

investigate other criminal activity, the court must look at the totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions. The trial court decided the sheriff's deputy's stop of the car in which Ms. Wilson was a passenger was not a pretext stop because the officer did not know for certain the car he stopped was the one described by casino employees as belonging to customers suspected of narcotics activity. The court did not, however, find the officer would have stopped the car for a traffic infraction absent his suspicions or consider the reasonableness of the deputy's actions when he used the traffic infraction to question the driver about suspected narcotics activity and obtain her consent to search her vehicle. Does a de novo review of the totality of the circumstances demonstrate the stop of the vehicle for a traffic infraction was a pretext to investigate the deputy's suspicions of other criminal activity? (Assignments of Error 1, 4)

#### D. STATEMENT OF THE CASE

Whatcom County Sheriff's Deputy Jason Nyhus went to the Silver Reef Casino at about 4:00 a.m. on June 11, 2008, for a routine check as part of his patrol duties. RP 5, 16-17; Ex. 1 at 2. Casino security personnel told the deputy about two women who

were “acting suspicious” and were “associated with” casino customers who were known to use narcotics. RP 17-18; Ex. 1 at 2. According to the security guards, one of the women went to her car several times to get something from the trunk. RP 17-1; Ex. 1 at 2.

Security said the two women had just left the casino in a small sedan and turned south onto Haxton Road, and they gave the officer the sedan’s color. RP 18, 28; Ex. 1 at 2. Deputy Nyhus got into his patrol car and tried to catch up with the women. RP 18. The first car he saw was a Honda sedan, and he stopped the car when it failed to signal for a turn. RP 5-6. In his police narrative report, the deputy related:

Security reported the vehicle had just left southbound on Haxton Way. As I caught up with the vehicle I observed the vehicle fail to signal as it turned onto Lummi Shore Road.

I contacted the driver and explained why I had stopped her. [The driver] said she was only bringing \$20.00 a time into the casino. She said she went out to get more money from her purse in the trunk. . . .

Ex. 1 at 2.

At the suppression hearing, the deputy testified his report was inaccurate and he did not know the car he stopped was the same car described by the casino security. RP 19-20, 22; Ex. 1 at 2. The deputy claimed he was concerned by the traffic infraction

because it was a dangerous intersection and there was other traffic on the road at 4:00 a.m. RP 8.

Cheryl Wilson was a passenger in the car stopped by Deputy Nyhus. The car was owned and driven by Ms. Wilson's acquaintance Jeri Schmertz. RP 8, 2902136-38. Deputy Nyhus checked Ms. Schmertz's driver's license and asked her to step out of the car. RP 9, 21, 38-39. In addition to giving Ms. Schmertz a citation, the deputy asked Ms. Schmertz if she was coming from the casino and relayed his suspicions of drug activity based upon the report from casino security. RP 10, 21-22; Ex. 1 at 2. Ms. Schmertz said she had been at the casino and explained she went to her car throughout the evening for money because she only brought \$20 at a time into the casino. RP 21; Ex. 1 at 2.

Deputy Nyhus asked Ms. Schmertz if he could search her car, explaining the search was voluntary, and Ms. Schmertz orally consented to the search. Ex. 1 at 2; RP 11-12. Ms. Wilson was still in the car and could only hear part of the conversation; she was unaware Ms. Schmertz consented to the vehicle search. RP 24, 39-40. Deputy Nyhus ordered Ms. Wilson out of the car and checked her identification. RP 12, 40. Ms. Wilson said she tried to take her handbag with her as she left the car, but the deputy told

her to leave it there. RP 40-41. Deputy Nyhus, however, said Ms. Wilson was not carrying anything when she complied with his request to get out of the car. RP 12. As the deputy searched Ms. Schmertz's vehicle, Ms. Wilson was standing with another law enforcement officer away from the car on the roadway. RP 14, 41.

While searching the floorboard area of the front passenger seat, Deputy Nyhus found Ms. Wilson's purse near the center console. RP 13. Inside the purse he located Ms. Wilson's Nooksack Casino player's card and a hide-a-key container inside of which he found 0.40 grams of a substance that field tested positive for methamphetamine. RP 14-15; Ex. 1 at 2. A later test by the Washington State Crime Laboratory revealed the substance was actually 0.16 grams of a white and off-white crystalline material that did contain methamphetamine. Ex. 1 at 4, 7. According to Deputy Nyhus, Ms. Wilson admitted ownership of the methamphetamine and the purse. RP 15; Ex. 1 at 2.

Ms. Wilson was charged with possession of methamphetamine. CP 42-43. Prior to trial, she moved to suppress the methamphetamine found in the warrantless search of her purse, arguing the stop was pretextual. She also argued the deputy could not constitutionally search her purse pursuant to the

driver's consent, analogizing to case law prohibiting search of a passenger's personal belongings based upon a stop of the driver for a traffic infraction. CP 34-39; RP 59-65.

The court denied Ms. Wilson's motion to suppress the methamphetamine. The court found the deputy's stop of Ms. Schmertz's vehicle was not a pretext stop because he did not have enough information to tie the car to the suspicious activity at the casino. Conclusion of Law 1 (CP 30); RP 68. The court found the seizure and search of Ms. Wilson's purse was constitutional because the deputy had the driver's consent to search the car. Findings of Fact 6-7; Conclusion of Law 3 (CP 29-30); RP 69. Orally the court stated the officer was not required to determine who owned the purse before searching it. RP 70.

Prior to the suppression hearing, Ms. Wilson waived her constitutional right to a jury trial and agreed to have the case decided upon the police reports. CP 32-22; RP 3-4. The court found Ms. Wilson guilty of possession of methamphetamine, and she appeals to this Court. CP 4-16, 25-27.

E. ARGUMENT

1. THE SEIZURE OF MS. WILSON'S PURSE VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION BECAUSE THE DRIVER DID NOT HAVE AUTHORITY TO CONSENT TO THE SEARCH OF MS. WILSON'S PURSE AND BECAUSE MS. WILSON DID NOT ABANDON HER PURSE BY TEMPORARILY LEAVING IT IN THE CAR WHEN DIRECTED TO EXIT THE CAR BY A LAW ENFORCEMENT OFFICER

The trial court found the search of Ms. Wilson's purse and seizure of its contents was constitutional. The court held the deputy's search of the purse was lawful because the driver consented to the car search and because Ms. Wilson voluntarily left her purse in the car when ordered to exit by the officer. The trial court was wrong. A driver may not consent to the search of a passenger's purse, and Ms. Wilson did not abandon her purse by leaving it briefly in the car. Because the search of Ms. Wilson's purse was not lawful, the fruits of the warrantless search should have been suppressed.

a. Ms. Wilson had the constitutional right to privacy in her purse. Article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution protect citizens from warrantless searches and seizures. Article I, section

7 succinctly provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>2</sup>

It is well-settled that the Washington Constitution provides greater protection of an individual’s privacy than the federal constitution, as the state constitution recognizes “an individual’s right to privacy with no express limitations.” State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). The focus under article I, section 7 is on “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant.” Parker, 139 Wn.2d at 494 (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). In contrast, the Fourth Amendment’s protection is limited to those items in which a citizen has a reasonable expectation of privacy. Id. at 493-94. No Gunwall analysis is necessary before the

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<sup>2</sup> The Fourth Amendment states:

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.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

appellate court will consider an article I, section 7 claim.<sup>3</sup> State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

A woman's purse usually contains highly personal items, and courts have recognized a special right to privacy in a purse. State v. Kealey, 80 Wn.App. 162, 170, 907 P.2d 319 (1995), rev. denied, 129 Wn.2d 1021 (1996); United States v. Welch, 4 F.3d 761, 764 (9<sup>th</sup> Cir. 1993), overruled on other grounds, United States v. Kim, 105 F.3d 1579, 1580-81 (9<sup>th</sup> Cir. 1997); Stokvis v. State, 147 S.W.3d 669, 671 (Tx.App. 2004). A warrantless seizure of personal property such as a purse is per se unreasonable. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004); Parker, 139 Wn.2d at 496. The limited and narrowly-drawn exceptions to the warrant requirement, however, include consent and voluntary abandonment. State v. Evans, 159 Wn.2d 402, 407, 150 P.2d 105 (2006); Reichenbach, 153 Wn.2d at 131. The State bears the heavy burden of proving a warrant exception applied. Parker, 139 Wn.2d at 496. This Court reviews the trial court's suppression order de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

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<sup>3</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Ms. Wilson argued Ms. Schmertz's consent to search her car did not cover Ms. Wilson's purse. She analogized to Parker, which held that constitutional protections apply individually, and a search of a vehicle incident to the driver's arrest does not authorize law enforcement to search a passenger's personal belongings. CP 35-36; RP 62-65; Parker, 139 Wn.2d at 497, 502-03 ("We hold the arrest of one or more vehicle occupants does not, without more, provide the 'authority of law' under article I, section 7 of our state constitution to search other, nonarrested vehicle passengers, including personal belongings clearly associated with such nonarrested individuals."). The Parker Court reasoned that a passenger's personal effects are protected from search to the same extent as the passenger himself. Id. at 498-99

The trial court held, however, that Deputy Nyhus searched the purse pursuant to Ms. Schmertz's consent. Finding of Fact 8. The court dismissed Ms. Wilson's argument that she had a right to privacy in her purse, holding Parker did not apply because Ms. Wilson "voluntarily left the purse in the car without directive from Deputy Nyhus." Finding of Fact 7; Conclusion of Law 3. The trial court's decision to admit the evidence found in Ms. Wilson's purse was thus based upon conclusions that the search was authorized

by the driver's consent and Ms. Wilson's abandonment of her purse. The court was incorrect.

b. The search was without authority of law because the driver could not consent to the search of Ms. Wilson's purse. An individual does not lose her constitutional rights by becoming an automobile passenger. Article I, section 7 provides protection to automobile passengers independent from those of the driver. Parker, 139 Wn.2d at 498; see State v. Grande, 164 Wn.2d 135, 146, 187 P.3d 248 (2008) ("The protections of article I, section 7 do not fade away or disappear within the confines of an automobile.").

Thus, the police may not search an automobile passenger and seize her purse as part of a search of the vehicle incident to arrest of the driver. Parker, 139 Wn.2d at 497-98. Absent independent evidence a vehicle passenger is engaged in criminal activity, an officer may not even ask a passenger for identification during a traffic stop. State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004). Nor may a law enforcement officer detain a passenger unless necessary for officer safety. Mendez, 137 Wn.2d at 220-21.

Consent is a recognized exception to the warrant requirement. To support a search based upon consent, the State must establish (1) the consent was voluntary, (2) the person

granting consent had the authority to do so, and (3) the search did not exceed the scope of the consent. Reichenbach, 153 Wn.2d at 13. Here, Ms. Schmertz was the owner of the vehicle and thus had authority to consent to a search of the car. Id. at 131-32. However, the state produced no evidence that Ms. Schmertz had authority to consent to the search of Ms. Wilson's private property. "Ordinarily, only the person who possesses a constitutional right may waive that right." State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005).

Washington courts have not directly addressed the issue presented here: whether a vehicle driver may consent to the search of a passenger's personal belongings.<sup>4</sup> Analogous cases addressing the situation where one or more people have the authority to search a building, however, demonstrate that Ms. Schmertz could not consent to the search of Ms. Wilson's purse. Whether an individual has authority to consent to a search is "a matter of status or control and a question of law." Morse, 156 Wn.2d at 5. A person who has equal or lesser control over a premises does not have authority to consent for those who are

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<sup>4</sup> The Washington Supreme Court has held that under the Fourth Amendment, a passenger could properly consent to search of his father's automobile even if the driver did not consent. State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994). In that case, however, the driver was not the car's owner and had less authority over the vehicle than the passenger.

present and have equal or greater control. Id. at 4-5. The consenting party must have independent authority to consent to the search of a premises and the defendant must have assumed the risk that a co-occupant might permit a search. Id. at 10. “[U]nder article I, section 7 we focus on expectation of the people being searched and the scope of the consenting party’s authority.” Id. Thus, the police may not search a home or office without the consent of all those with authority to consent who are present at the time of the search. State v. Leach, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989).

Applying this analysis to a vehicle search, there is no evidence Ms. Schmertz exercised joint control over Ms. Wilson’s purse or that Ms. Wilson have reasonably assumed the risk Ms. Schmertz could authorize the search of her purse simply because she was riding in her acquaintance’s car. The law of consent in Washington thus shows that Ms. Schmertz did not have lawful authority to consent to the search of Ms. Wilson’s purse.

Other jurisdictions have addressed whether a driver may consent to the search of a passenger’s purse. See State v. Franks, 650 N.W.2d 213, 217-18 (Minn.App. 2002); State v. Matejka, 241 Wis.2d 52, 621 N.W.2d 891, 894, n.3 (2001). The majority have

found a driver's consent to search a vehicle does not extend to her passenger's personal possessions, particularly a purse. Welch, supra (under Fourth Amendment, consent by defendant's companion to search of rental car did not extend to defendant's purse); State v. Celusniak, 135 N.M. 728, 93 P.3d 10, 14-16 (N.M. 2004) (officer could not search purse left in vehicle based upon consent to search vehicle without determining if consenting party owned purse); State v. Friedel, 714 N.E.2d 1231, 1243 (Ind.App. 1999) (driver lacked authority to consent to passenger's purse, unreasonable for police to assume purse belonged to male driver); People v. James, 163 Ill.2d 302, 645 N.E.2d 195 (Ill. 1994) (driver could not consent to search of passenger's closed purse found on passenger seat); State v. Zachodni, 466 N.W.2d 624 (S.D. 1991) (driver's consent to search vehicle not reasonably construed as permission to search wife's purse, who was passenger), abrogated on other grounds, State v. Akuba, 686 N.W.2d 406 (S.D. 2004).

The Illinois Supreme Court, for example, found Fourth Amendment jurisprudence provided no authority for the search of a passenger's purse based upon a driver's consent addressing facts similar to Ms. Wilson's case. In James, the defendant was a passenger in a car stopped by the police because it lacked a rear

license plate, and she left her purse when the officer ordered her and other female occupants out of the car. James, 645 N.E.2d at 197. The driver consented to a search of the car, and the police found drug paraphernalia in the defendant's purse, which was on the front seat, but the officer did not inform the passengers of the search. Id. at 198. The Illinois Supreme Court concluded the police officer should have ascertained the owner of the purse before opening it and searching its contents. The court noted purses are normally carried by women, all of the adult occupants of the car were women, it was found on the passenger seat, and purses are not generally shared by two or more people. Id. at 203. Moreover, there were no officer safety concerns nor an emergency that prevented the officers from asking who owned the purse and could therefore consent. Id. at 204.

The New Mexico appellate court also addressed a vehicle search based on the driver's consent that netted a woman's purse crammed under the driver's seat, analyzing the problem under both the state and federal constitutions. Celusniak, 93 P.3d at 729-30. The State did not claim the driver had common authority over the purse, but instead argued that the owner of the purse was required to protest the search. Id. at 733. The Celusniak Court rejected this

argument, pointing out that the defendant may not have been aware the search was consensual. Id.

Here, the trial court did not find that Ms. Wilson was aware the officer was searching the car and her purse based upon Ms. Schmertz's consent. In the absence of a finding on a factual issue, the appellate court must assume 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). This Court must thus assume that Ms. Wilson was unaware Ms. Schmertz had consented to the search of the car or that the search included her purse.

The few jurisdictions holding a driver's consent to search covers a passenger's personal belongings are based upon the Fourth Amendment principles that do not apply under article I, section 7. Matejka, 621 N.W.2d at 894-99 (looking Fourth Amendment cases granting law enforcement broad authority to search entire vehicle and holding voluntary consent of anyone with common authority over premises may consent to search of contents of premises);<sup>5</sup> State v. Sawyer, 147 N.H. 191, 784 A.2d 1208, 1210-13 (N.H. 2001) (utilizing Fourth Amendment's "apparent

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<sup>5</sup> Citing inter alia, Wyoming v. Houghton, 526 U.S. 295, 303, 307, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)

authority” doctrine).<sup>6</sup> This analysis is useful here because Washington’s constitution focuses on the rights of the individual rather than the reasonableness of the government action. Washington citizens do not lose their privacy right by riding in automobiles. Grande, 164 Wn.2d at 146; Parker, 139 Wn.2d at 497-98 (police may not search passenger’s purse as part of a search incident to arrest of the driver). Nor does Washington utilize the “apparent authority” doctrine in reviewing a search based upon the consent of a third party. Morse, 156 Wn.2d at 10-12.

Even under the “apparent authority” doctrine, however, police must have an objectively reasonable belief that the third party had authority to consent to the search. Illinois v. Rodriguez, 497 U.S. 177, 188, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). Thus, as in James, a reasonable officer would not assume the driver had authority to authorize the search of a passenger’s personal belongings. In that circumstance, the law enforcement officer may not lawfully act upon the consent without further inquiry. Rodriguez, 487 U.S. at 188-89; James, 645 N.E.2d at 197-98; Welch, 4 F.3d at 764-65. As a noted commentator explained,

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<sup>6</sup> See Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (police officers may rely in good faith upon a third party’s “apparent authority” to consent to a search).

“sometimes the facts known by the police cry out for further inquiry, and when this is the case it is not reasonable for the police to proceed on the theory that ‘ignorance is bliss.’” Wayne R. LaFare, 4 Search and Seizure: A Treatise on the Fourth Amendment § 8.3(g), p. 180 (4<sup>th</sup> ed. 2004).

Here, it was apparently not clear to Deputy Nyhus who owned the purse in question, as the court found its placement on the passenger side of the front floorboard consistent with ownership by the driver, Finding of Fact 5, and the State argued there was only one purse in the car. RP 55-56, 66. Because both women were present, the deputy was responsible for determining who owned the purse and could therefore consent to its search. The burden is on the police to obtain consent from the person whose property they are seeking to search. Morse, 156 Wn.2d at 13; Leach, 113 Wn.2d at 744.

Ms. Wilson had a special right to privacy in her purse and its contents. Kealey, 80 Wn.App. at 170; Welch, 4 F.3d at 764. The State was therefore required to show Ms. Schmertz had shared control of the purse beyond her ownership of the vehicle to justify the search based upon only Ms. Schmertz’s consent. Welch, 4 F.3d at 764; Stokvis, 147 S.W.3d at 672. Here, a reasonable

officer would know that the purse probably belonged to one of the two women – the driver or the passenger. A reasonable officer would not expect one woman to have authority to consent to the search of another woman’s purse. Since both women were present, Deputy Nyhus should have asked the women who owned the purse in order to obtain consent from the person with authority to consent to the search – the owner, Ms. Wilson.

c. Ms. Wilson did not lose her right to privacy in her purse because she “voluntarily” left it in the car. Both the federal and state constitutions permit warrantless seizures of property that has been voluntarily abandoned. Evans, 159 Wn.2d at 407-08. Voluntary abandonment, however, does not occur every time a person temporarily relinquishes possession or control of an item. Instead, under the Fourth Amendment, “the fundamental question is whether the relinquishment occurred under circumstances which indicate he retained no justified expectation of privacy in the object.” LaFave, 1 Search and Seizure § 2.6(a), pps. 675-76. Under Article I, section 7, not only is the person’s subjective expectation of privacy at issue, but the court must also determine if the government unreasonably intruded upon privacy interests a citizen of this state is entitled to hold. State v. Boland, 115 Wn.2d

571, 577-78, 800 P.2d 1112 (1990). Thus, in Washington, property is not abandoned if (1) the defendant exhibits a subjective expectation of privacy “by seeking to preserve something as private,” and (2) society recognizes the expectation of privacy as reasonable. Evans, 159 Wn.2d at 409.

Under article I, section 7, a person retains an expectation of privacy, for example, in garbage left on the street for pickup by the licensed garbage collector, Bolland, 115 Wn.2d at 578, but not in items placed in a garbage can at an abandoned neighboring property, State v. Hepton, 113 Wn.App. 673, 678-80, 54 P.3d 233 (2002), rev. denied, 149 Wn.2d 1018 (2003). Similarly, this Court has found property was abandoned when the defendant dropped it on the ground in a public park, State v. Whitaker, 58 Wn.App. 851, 795 P.2d 182 (1990), rev. denied, 122 Wn.2d 1015 (1993), or placed it in a outdoor privy on his father’s property. State v. Putnam, 65 Wn.App. 606, 829 P.2d 787 (1992). In contrast, the Evans Court found the defendant did not abandon a locked briefcase in the backseat of his truck, even though he denied ownership of the briefcase, where he gave the police permission to search the truck but told them not to search the briefcase. Evans, 159 Wn.2d at 405-06, 413.

In Dugas, this Court looked to the defendant's "act and intent" in determining if he voluntarily abandoned his jacket by placing it on the hood of his car. State v. Dugas, 109 Wn.App. 592, 36 P.3d 577 (2001). Dugas was approached on the street by police officers investigating a domestic violence complaint, and he took off his jacket and placed it on top of his car during the conversation. Dugas, 109 Wn.App. at 594. When the officers arrested Dugas, he left the jacket where it was, and the police later seized the jacket and found cocaine in a container in a jacket pocket. Id. This Court found that Dugas did not voluntarily relinquish his expectation of privacy in his jacket by placing it on the hood of his vehicle because he expected his girlfriend to take care of his car.<sup>7</sup> Id. at 596.

As in Dugas, Ms. Wilson did not abandon her purse by leaving it in the vehicle when she was told to exit the car by the deputy. There no evidence Ms. Wilson knew Deputy Nyhus had been granted permission to search the car or that he intended to search her purse when she got out of the car at his direction. The trial court made no such finding, so this Court must assume the State did not meet its burden of proving Ms. Wilson was aware her

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<sup>7</sup> In a case decided under the Fourth Amendment, the Washington Supreme Court found a passenger who stuffed his coat underneath the car and denied ownership had abandoned the coat. State v. Reynolds, 144 Wn.2d 282, 284, 291, 27 P.3d 200 (2001).

purse would be searched when she left it in the car. Armenta, 134 Wn.2d at 14.

As discussed above, Ms. Wilson had a special right to privacy in her handbag. Kealey, 80 Wn.App. at 170; Welch, 4 F.3d at 764. Many people travel in their friend's vehicles, and they do not thereby abandon their expectation of privacy in their personal possessions, especially purses. Here, Ms. Wilson had a subjective expectation of privacy in her handbag which was not extinguished by temporarily leaving it in the car. Celusniak, 93 P.3d 16-18 (passenger did not abandon purse found stuffed under driver's seat when she was told to leave vehicle); Brown v. State, 789 So.2d 1021, 1024 (Fla.App. 2001) (passenger did not abandon fanny pack by placing it on floorboard of automobile after being ordered to exit by police); James, 645 N.E.2d at 204 (occupant did not abandon possessory interest of control over purse by leaving it on passenger seat when ordered to exit by police).

Whether property has been voluntarily abandoned is a legal conclusion generally based upon both act and intent. Evans, 159 Wn.2d at 408. "Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered." Id.

(quoting Dugas, 109 Wn.App. at 595). Here, Ms. Wilson was ordered out of her friend's car so that Deputy Nyhus could search it. Thus, she left the purse in a secure area for only a brief period of time. Ms. Wilson did not deny ownership of the person or try to throw it away. The trial court erred by concluding Ms. Wilson voluntarily abandoned her purse when the law enforcement officer ordered her to get out of the car in which she was a passenger.

d. Ms. Wilson's conviction must be reversed. The State did not prove that Deputy Nyhus's warrantless search and seizure of Ms. Wilson's purse was justified by an exception to the warrant requirement. First, the State did not prove Ms. Schmertz had authority over the purse, so that her consent to search the car did not cover her passenger's privacy property. Second, the State did not show voluntary abandonment of the purse because Ms. Wilson only temporarily left it in a secure vehicle when she was ordered out of the car by the deputy.

The trial court thus erred by admitting the items found in Ms. Wilson's purse after an unconstitutional search and seizure. Ms. Wilson's conviction for possession of methamphetamine must be reversed and remanded for dismissal. Morse, 156 Wn.2d at 16.

2. MS. WILSON'S RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION WAS VIOLATED BECAUSE THE TRAFFIC STOP WAS A PRETEXT TO INVESTIGATE THE OFFICER'S SUSPICION OF UNRELATED CRIMINAL ACTIVITY

Deputy Nyhus was looking for a car that had just left a casino in hopes of investigating possible drug activity. The deputy stopped the first car he saw as he left the casino when the car failed to signal for a turn, and extended the stop by questioning the driver about the suspicious activity and obtaining her consent to search the vehicle. Looking at the officer's subjective motive and objective actions, the traffic stop was a pretext to search for evidence of criminal activity. The pretextual nature of the stop vitiated the driver's consent to search her vehicle, and thus evidence found in the passenger's purse during the unconstitutional search should have been suppressed.

a. Article I, section 7's protection against warrantless seizures is violated when a traffic stop is used as a pretext to avoid the warrant requirement. Any warrantless seizure is per se unreasonable. Reichenbach, 153 Wn.2d at 131; State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The warrant requirement is especially important for article I, section 7 analysis

because “it is the warrant which provides the ‘authority of law’ referenced therein.” Ladson, 138 Wn.2d at 350.

A traffic stop is a seizure for purposes of constitutional analysis, even if the detention is brief. Ladson, 138 Wn.2d at 350. Under the Fourth Amendment, the police may stop a car for a traffic violation even if the traffic stop is a pretext to investigate unrelated criminal activity. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 1774-76, 135 L.Ed.2d 89 (1996). Washington residents, however, have a constitutionally protected interest against warrantless seizures used as a pretext to dispense with the warrant requirement. Ladson, 138 Wn.2d at 358.

“Pretext is, by definition, a false reason used to disguise a real motive.” Ladson, 138 Wn.2d at 359 n. 11 (quoting Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment’s Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1038 (1996)).

Thus, a warrantless traffic stop based on mere pretext violates article I, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen’s privacy interest.

State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Recognizing the particular exigencies of evaluating improper motives, the Ladson Court departed from the purely objective standard mandated for Terry stops under the Fourth Amendment<sup>8</sup> and articulated a new test:

When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.

Ladson, 138 Wn.2d at 358-59. The court explained, "What is needed is a test that tests real motives. Motives are, by definition, subjective." Id. at 359 n. 11 (quoting Leary & Williams).

b. The trial court did not apply the *Ladson* test but instead looked solely at the officer's objective reasons for the stop. This Court reviews conclusions of law concerning a motion to suppress evidence de novo. Mendez, 137 Wn.2d at 214. Here, the trial court found that the stop of Ms. Schmertz's car was not pretextual because Deputy Nyhus was enforcing the traffic code and did not know for certain that Ms. Schmertz's Honda sedan was the sedan described by the casino security personnel. Conclusion of Law 1.

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<sup>8</sup> The Terry objective standard requires the court to consider whether the officer's action (1) was justified at its inception and (2) reasonably related in scope to the circumstances which justified the interference in the first place. Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

“[I]t is not enough for the State to show there was a traffic violation. The question is whether the traffic violation was the real reason for the stop.” State v. Montes-Malindas, 144 Wn.App. 254, 261, 182 P.3d 999 (2008) (quoting State v. Meckelson, 133 Wn.App. 431, 437, 135 P.3d 991 (2006), rev. denied, 159 Wn.2d 1013 (2007)). The trial court’s reasoning misses the point because the court did not address the officer’s subjective intent in its factual findings or conclusions of law.

Ladson and the several subsequent cases that have considered Ladson’s rule held that evidence of improper subjective intent will invalidate an otherwise-lawful stop. Nichols, 161 Wn.2d at 10-11; Ladson, 138 Wn.2d at 353; Montes-Malindas, 144 Wn.App. at 260-62; Meckelson, 133 Wn.App. at 437; State v. DeSantiago, 97 Wn.App. 446, 451-52, 983 P.2d 1173 (1999). Indeed, this is the axiomatic principle that animates Ladson’s holding: that the basis for the stop is itself lawfully sufficient is beside the point, as “our constitution requires we look beyond the formal justification for the stop to the actual one.” Ladson, 138 Wn.2d at 353.

In Ladson, gang emphasis officers testified that while they did not make routine traffic stops on patrol, they utilized the traffic

code to pull over people in order to initiate contact and questioning. Ladson, 138 Wn.2d at 346. The officers in Ladson were familiar with Ladson's co-defendant because of an unsubstantiated street rumor that he was involved in drugs, and accordingly stopped his vehicle on the grounds that his license plate tabs were expired. Id. They used this pretext to arrest Ladson's co-defendant and search Ladson. Id. The Washington Supreme Court reversed the conviction, holding the pretextual stop violated the Washington Constitution. Id. at 352-53.

Similarly, in DeSantiago, an officer watching a narcotics hotspot pulled over an automobile for an illegal left turn in order to investigate whether the driver was involved in the narcotics activity. DeSantiago, 97 Wn.App. at 448. This Court reversed, finding the stop was pretextual. Id. at 452. In both DeSantiago and Ladson, presumably relying upon the Fourth Amendment analysis of Whren, supra, the officers testified candidly about their improper subjective motives.

Since Ladson, divining improper motives from officers' testimony has required a more nuanced inquiry, as officers no longer admit to the use of pretext. In the analogous context of warrantless searches pursuant to the emergency exception,

appellate courts have conducted a comparable examination of the record to ascertain whether a claimed emergency was a pretext for conducting an evidentiary search. See e.g. State v. Leffler, 142 Wn.App. 175, 178 P.3d 1042 (2007) (emergency exception improperly applied where officers did not don protective gear before entering suspected methamphetamine lab and had no information suggestive of imminent harm to persons or property); State v. Lawson, 135 Wn.App. 430, 437, 144 P.3d 377 (2006) (deputies' claimed purpose of investigating "a potential danger to the community" fell short of an emergency and was more consistent with a warrantless evidentiary search); State v. Schlieker, 115 Wn.App. 264, 272, 62 P.3d 520 (2003) (officers' actions were more consistent with an evidentiary search for drug activity than an effort to help persons who were injured or in danger).

This Court also looked at the totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions in Montes-Malindas, finding a pretext stop when an officer stopped a vehicle for driving without its headlights. The officer in Montes-Malindas was in a parking lot investigating an unrelated case when he noticed people in a van acting nervously and changing vehicles and seats within a vehicle;

he decided to watch them when he completed his interview.

Montes-Malindas, 144 Wn.App. at 256. The officer saw the people enter and leave a drug store and followed as their car traveled down the street without its headlights on. Id. at 256-57. The officer stopped the car for the headlight infraction, but not until after the headlights were activated. Id. at 257.

The officer's conduct deviated from a traditional stop for a traffic infraction, as he approached the car from the passenger side so that he could see inside. Montes-Malindas, 144 Wn.App. at 257-58. He then learned the driver did not have a valid operator's license, arrested the driver, and removed and searched two passengers. Id. at 258. The driver was charged with possession of methamphetamine in his hand when arrested and possession of a firearm found in the car. Id.

Although the trial court believed the officer's testimony that he did not follow the van in hopes of finding a legal reason to stop it, this Court found his testimony about his subjective intent was not dispositive. Montes-Malindas, 144 Wn.App. at 260. The officer had testified he was suspicious of the activity he saw earlier and admitted those suspicions were in his mind when he decided to stop the van. Id. at 261. This Court also looked to the objective

facts, such as the officer's action in going to the passenger side of the van and speaking to the passengers rather than the driver, and stopping the car only after it had turned on its headlights, which suggested he was conducting surveillance on the van. Id. at 261-62. Based on the totality of the circumstances, this Court therefore concluded it was a pretext stop. Id. at 262.

Here, Deputy Nyhus was looking for a car leaving the casino and stopped the first car he saw for a traffic infraction. He suspected the occupants had engaged in some form of criminal activity at the casino, and thus he did not simply issue a traffic infraction, but instead investigated the suspected criminal activity by talking to the driver and obtaining her permission to search her car. An investigative stop for traffic infraction is limited in scope. RCW 46.61.021(2); State v. Glossbrener, 146 Wn.2d 670, 676-77, 49 P.3d 128 (2002). Holding a driver beyond the period of time needed to issue the infraction and investigate her license status, car registration, and insurance is a seizure that requires a showing of articulable facts from which the officer could reasonably suspect criminal activity. State v. Tijerina, 61 Wn.App. 626, 811 P.2d 241, rev. denied, 118 Wn.2d 1007 (1991). Deputy Nyhus had no such

reasonable suspicion, but he nonetheless used the traffic stop as a vehicle to investigate the casino security guards' suspicions.

Thus, even though Deputy Nyhus had a valid reason to stop the vehicle for failing to signal, his reason for following the car as well as his later conduct show he was actually investigating the "suspicious" behavior reported to him by the casino staff. The totality of the circumstances shows the deputy's motive was not simply to issue a traffic citation, but to investigate the report from the casino staff.

The trial court here relied upon this Court's opinion in State v. Hoang, 101 Wn.App. 732, 6 P.3d 602 (2000), rev. denied, 142 Wn.2d 1027 (2001), in finding the stop was not pretextual. Conclusion of Law 1; RP 68. The Hoang Court held the Ladson rule does not prohibit police officers from enforcing the traffic code, as long as the traffic infraction is the "actual reason for the stop." Hoang, 101 Wn.App. at 742; accord Nichols, 161 Wn.2d at 10. In Hoang, the police officer saw the defendant's car in a drug area and observed possible drug transactions. Hoang, 101 Wn.App. at 735. When the car make a left-hand turn without signalling, the officer stopped it for the infraction. In finding the stop was not pretextual, this Court relied upon the unchallenged finding of fact

that the officer would have made the same decision to pull the defendant over even if he had not just observed the defendant engaged in suspicious activity. Hoang, 101 Wn.App. at 742. Here the trial court found the officer was enforcing the traffic code and could not match the Honda with the car from the casino. Conclusion of Law 1. But the court did not find the officer would have stopped the car for the violation even if he had not suspected it was the car from the casino. In fact, Deputy Nyhus testified the suspicious activity at the casino was one of the reasons for the traffic stop. RP 21. The State had the burden of proving the warrantless search was constitutional, and this Court must therefore assume it did not meet its burden of showing the deputy would have stopped the car for failing to signal if he had not been trying to investigate the suspicious conduct at the casino. Armenta, 134 Wn.2d at 14.

The facts surrounding the stop also differ from those in Hoang because Deputy Nyhus used the traffic stop to question the driver and obtain her consent to search her car. In Hoang, it was the stop itself that provided grounds to detain the driver beyond issuing a citation: after the stop the officer discovered the car had no license plates, Hoang was holding his hand strangely when

talking to the officer, and Hoang's operator's license was suspended. Hoang, 101 Wn.App. at 735-36. The officer then found cocaine in plain view in the car pursuant to a valid search incident to arrest.<sup>9</sup> Id. at 736, 738. In reviewing the circumstances of the stop, the trial court noted the officer did not depart in any way from normal procedure for a traffic stop and did not question the driver about what he was doing in a drug area in the early morning. Id. at 737, 741.

The trial court here thus misapplied Ladson's test. In evaluating the propriety of the stop, the court focused only on whether the deputy knew the car was the one he was searching for and ignored the deputy's testimony that his suspicion about the casino activity was one of the reasons for the stop. And the State did not establish that the deputy would have stopped the car for the traffic infraction even if he did not suspect it was involved in drug activity. Id.; Conclusion of Law 1. Ladson, 138 Wn.2d at 358-59; Nichols, 161 Wn.2d at 9. The court also ignored the deputy's actions in detaining the car longer than necessary to issue a traffic

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<sup>9</sup> The case was decided prior to Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) and State v. Patton, \_\_\_ Wn.2d \_\_\_, 2009 WL 3384578 (No. 80518-1, 10/22/09).

citation in order to investigate the casino report. The traffic stop here was an unconstitutional pretext stop.

c. Ms. Wilson's conviction must be reversed. When the initial stop of a vehicle is pretextual, it is without authority of law, and any evidence seized as a result of the stop must be suppressed. Ladson, 138 Wn.2d at 359-60. Even voluntary consent to a search is vitiated by unlawful detention. Armenta, 134 Wn.2d at 17-18.

Because the stop of Ms. Schmertz's car for a traffic infraction was a pretext to search for evidence of other criminal activity, the items found in Ms. Wilson's purse during a search of the car should have been suppressed. Without this evidence, the State cannot prove she possessed methamphetamine, and her conviction must be reversed and remanded for dismissal. Ladson, 138 Wn.2d at 360; DeSantiago, 97 Wn.App. at 453.

#### F. CONCLUSION

The search of Ms. Wilson's purse violated article I, section 7. First, the search was not consensual because the driver's consent to search her car did not authorize the search of Ms. Wilson's purse. Second, Ms. Wilson did not abandon her privacy interest in her purse by leaving it in the vehicle when she was ordered to exit

the car by a law enforcement officer. Finally, the deputy's subjective intent and the objective unreasonableness of his behavior establish the stop of the vehicle in which Ms. Wilson was a passenger was pretextual. Her conviction should be reversed and dismissed.

DATED this 2<sup>nd</sup> day of November 2009

Respectfully submitted:



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Elaine L. Winters – WSBA # 7780  
Washington Appellate Project (91052)  
Attorneys for Appellant

**APPENDIX**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:  
SUPPRESSION**

**June 2, 2009**

SCANNED 4

FILED IN OPEN COURT  
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WHATCOM COUNTY CLERK  
By [Signature]  
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, )  
 )  
 Plaintiff. )  
 )  
 vs. )  
 )  
 CHERYL ELLEN WILSON, )  
 )  
 Defendant. )

No.: 08-1-00779-3

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:  
SUPPRESSION

This matter having come regularly before the Honorable Ira J. Uhrig on March 16, 2009 and the plaintiff appearing through Deputy Prosecuting Attorney Craig D. Chambers and defendant appearing and being represented by Rob Olsen, Whatcom County Public Defender, and the court having heard the testimony of Deputy Nyhuis and defendant and heard the argument of counsel hereby makes the following:

I. FINDINGS OF FACT

1. Around 4:00 am on June 11, 2008, Deputy Nyhuis spoke with employees of the Silver Reef Casino. They advised that two females had been acting suspiciously and associating with persons the deputy recognized as narcotic users. One of the females had gone out to her parked vehicle several times and entered the trunk before returning to the casino. The deputy was on

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION  
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1 regular patrol duty in which a main responsibility is traffic enforcement. He was in uniform  
3 driving a marked patrol unit.

5 2. The vehicle which was only described as a dark sedan without make, model, year or  
7 license plate number. It had left, traveling south on Haxton Way.

9 3. Haxton Way is one of the top ten most dangerous highways in Whatcom County.

11 4. Deputy Nyhuis departed southbound on Haxton Way and very quickly observed a  
13 vehicle fail to signal a turn onto Lummi Shore Road. He turned on his overhead lights and  
15 effectuated a stop of the vehicle. The vehicle was a 1995 black Honda Accord. The driver of  
17 this vehicle was Jeri Schmertz. The defendant was seated in the passenger seat. Ms. Schmertz  
19 provided the deputy with her driver's license, but he did not see if she retrieved it from her purse,  
21 pocket or other location.

23 5. The Honda Accord is a smaller two door coupe. A female driver would likely place  
25 her purse on the passenger seat unless it was occupied and, in that case, might easily place it on  
27 the floorboard in front of the passenger seat.

29 6. After being given *Ferrier* warnings, Jeri Schmertz consented to the search of the  
31 interior of the Accord expressing some concerns for items located in its trunk. Deputy Nyhuis  
33 requested that defendant exit the vehicle. Defendant claims she placed her purse over her  
35 shoulder and began to exit the vehicle when the deputy told her to put her purse back into the car.  
37 Deputy Nyhuis testified that defendant got out of the Accord and left the purse on the floorboard.  
39 He denied telling defendant to leave her purse in the car.

41 7. The court resolves this factual dispute in favor of the credibility of the deputy and  
43 therefore finds that defendant voluntarily left the purse in the vehicle without directive from  
45 Deputy Nyhuis.

47 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

1 8. The deputy searched the purse pursuant to the consent given by Ms. Schmertz and  
3 discovered a small plastic baggie in a key holder containing .4 grams of a substance that field-  
5 tested positive for methamphetamine and a casino card belonging to defendant. Defendant  
7 admitted that the methamphetamine in her purse belonged to her.

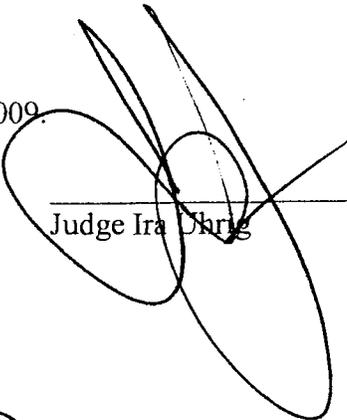
9 From the Foregoing Findings of Fact the court makes the following:

11 II. CONCLUSIONS OF LAW

- 13 1. The stop of the Honda Accord on June 11, 2008 on Lummi Shore Road was not pre-  
15 textual under State v. Hoang, 101 Wn App. 732, 6 P.3d 602 (2000). Deputy Nyhuis  
17 was on routine traffic patrol duty and was enforcing the traffic code concerning turns  
19 made without signaling on a dangerous section of highway. He had insufficient  
21 vehicle identifying information to connect this vehicle to the incident reported earlier  
23 at the casino.
- 25 2. Defendant's motion to suppress pursuant to State v Ladson, 138 Wn2d 343, 979 833  
27 (1999) is denied.
- 29 3. The motion to suppress asserted under State v. Parker, 139 Wn2d 486, 987 P.2d 73  
31 (1999) is also due denied to the factual resolution set forth in Finding of Fact Number

33 7.

35 DATED this 2 day of June, 2009.

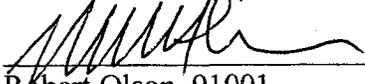
37   
39 Judge Ira Ehrig

41 Presented by:

43   
45 CRAIG D. CHAMBERS, WSBA #11771  
Deputy Prosecuting Attorney

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Robert Olson, 91001  
Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

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(360) 738-2532 Fax

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 63676-6-I
	)	
CHERYL WILSON,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| [X] ERIC RICHEY<br>WHATCOM COUNTY PROSECUTING ATTORNEY<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] CHERYL WILSON<br>7421 SEASHELL WAY<br>BLAINE, WA 98230   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2009.

X \_\_\_\_\_  
*[Handwritten Signature]*

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COURT OF APPEALS  
STATE OF WASHINGTON  
2009 NOV -2 PM 4:52

**Washington Appellate Project**  
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