No. 32197-5-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Erin E. McGovern,
Appellant

Appeal from the Superior Court of Spokane County

BRIEF OF APPELLANT

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I. INTRODUCTION

On August 06, 2012 Ms. Erin Elizabeth McGovern was charged by information (CP 4-5) with Count I possession of a controlled substance methamphetamine, Count II possession of another's identification, Count III possession of a controlled substance alprazolam, and Count IV possession of a controlled substance methylphenidate. A jury trial was held on November 25, 2013 before the Honorable John O. Cooney in Superior Court of Spokane County, Washington. The jury returned a verdict of guilty on all four counts on November 27, 2014. (CP 137-140) The court sentenced Ms. McGovern on December 11, 2013 (CP 164-168) and a timely appeal was filed. (CP 173-174)

II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

1. Whether the Superior Court committed reversible error by failing to grant a motion for mistrial when the government introduced evidence that the defendant asserted her constitutional rights under the Fourth Amendment and Article I § 7.
2. Whether the Superior Court committed reversible error in denying motions to suppress evidence based upon illegal detention and search.
3. Whether the Superior Court committed reversible error in failing to dismiss counts based upon insufficient evidence.

III. STATEMENT OF THE CASE

On November 07, 2013 a suppression hearing was held before the Honorable Gregory D. Sypolt. (CP 23-54;72-75) The court denied the motion to suppress the evidence. (VRP 11/7/2013 p. 39-46) At a presentment hearing held on November 21, 2013 the defense presented proposed findings of fact and conclusions of law. (VRP 11/21/2013 p. 48/CP 78-81) The government presented their own findings of facts and conclusions of law. (VRP 11/21/2013 p. 50-51) The court adopted the prosecutions proposed order. (VRP 11/21/2013 p. 51-52/CP 88-91)

On November 25, 2013 motions in limine and a 3.5 hearing were held before the Honorable John Cooney. The defense sought to exclude evidence of uncharged crimes. (VRP 11/25/2013 p. 8) The government stated that they intended to introduce why the officer obtained a search warrant. (VRP 11/25/2013 p. 8 lines 15-22) The defense argued why a search warrant was obtained was irrelevant to the jury. (VRP 11/25/2013 p. 9) The defense argues that items unrelated to the charges before the court should be excluded and not used to "impugn my client's integrity" and to convict her based upon facts that aren't relevant to this case or would be unduly prejudicial under 404(b). (VRP 11/25/2013 p. 9 lines 17-23)

The state argues that the basis for the search warrant is relevant. (VRP 11/25/2013 p. 11 lines 14-24) The defense stated that was decided as a question of

law (VRP 11/25/2013 p. 11 lines 25 to pg. 12 line 5) which is not before the jury. The defense objected to the government introducing these facts before the jury to impugn the defendant's character and irrelevant facts would leave the case open to a mistrial. (VRP 11/25/2013 p. 12) The defense argued "The propriety of the search or the search warrant was not for the jury to decide." (VRP 11/25/2013 p. 13) The court ruled evidence of the basis of the warrant and contraband should not be admitted. (VRP 11/25/2013 p. 60-61) The defense asks the court to consider a continuing objection under the Fourth Amendment, Article I § 7, and *Arizona v. Gant* to this evidence. (VRP 11/25/2013 p. 12 lines 6-12)

Ms. Erin McGovern testified she was a passenger in the front seat of the BMW on June 19, 2012 stopped in Spokane County. (VRP 11/7/2013 p. 7) The police removed the driver and the other passenger. (VRP 11/7/2013 – pg. 7) Then they told Ms. McGovern to get out. (VRP 11/7/2013 p. 7-8) She was taken to the front of the BMW and ordered to empty her pockets. (VRP 11/7/2013 p. 8) There were two officers present at the stop and they searched her. (VRP 11/7/2013 p. 9) She was told to stay in front of the car and the police kept her identification. (VRP 11/7/2013 p. 9)

As the police searched the BMW she objected and was moved from the front of the vehicle to the back of the car and handcuffed when (VRP 11/7/2013 p. 10) she stated they could not search the car. (VRP 11/7/2013 p. 11) She observed they were searching her things and she told them again they could not search.

(VRP 11/7/2013 p. 11 lines 10-17) She kept asking questions because they said she was not arrested but she was handcuffed. (VRP 11/7/2013 p. 11 lines 21-25) When she kept asking about being handcuffed but not arrested she was read her rights. (VRP 11/7/2013 p. 12) The police continued to search her bags. (VRP 11/7/2013 p. 13) The police left them along the interstate just inside Spokane County and towed the car. (VRP 11/7/2013 p. 14)

The defense argued *State v. Parker* applied to this case. (VRP 11/7/2013 p. 23/CP 23-54/CP 72-75) The deputy searched the compartments and packages without a warrant. (VRP 11/7/2013 p. 11 lines 10-17/CP 28) (VRP 11/7/2013 p. 29) An arrest occurred in handcuffing her outside of the car and detaining her as the search was conducted. (VRP 11/7/2013 p. 29) It was argued the stop was pretext, and it was an unreasonable detention to remove the people from the BMW. (VRP 11/7/2013 p. 31) The defense argues inaccuracies in the search warrant affidavit requires a Franks hearing. (VRP 11/7/2013 p. 31-32/CP 23-54;72-75) The defense argues that the questioning about the relationship of the occupants amounted to an investigation beyond the scope of the speeding infraction. (VRP 11/7/2013 p. 34-35) Further this investigation violated Article I § 7 and was a pre-text stop. (VRP 11/7/2013 p. 36-37/CP 23-54;72-75) Suppression of all the evidence obtained from the warrantless stop, search, and detention of Ms. McGovern was requested. (VRP 11/7/2013 p. 37 lines 17 to pg. 38)

At a 3.5 hearing Deputy Nathan Bohanek testified the white BMW was stopped for traveling 75mph in a 70mph zone. (VRP 11/25/2013 p.18) Ms. McGovern was seated in the front seat passengers. (VRP 11/25/2013 p. 18) Three people were seated in the vehicle and Deputy Bohanek advised the driver that the stop was due to speeding and tinted windows. (VRP 11/25/2013 p. 19) Deputy Bohanek was assigned to the Criminal Interdiction Team which tries to "interdict criminal activity." (VRP 11/25/2013 p. 29) He was assigned to a "special unit working the highway based on a grant from the state patrol." (VRP 11/25/2013 p. 29-30) They were looking for drug activity on Interstate 90 that day. (VRP 11/25/2013 p. 31) The real reason they were out there that day was looking for drugs, weapons, persons wanted on warrants, and criminal activity. (VRP 11/25/2013 p. 31) He was talking to the driver from the passenger's front side where Ms. McGovern was seated. (VRP 11/25/2013 p. 33)

When Deputy Bohanek inquired who owned the vehicle Ms. McGovern responded, "Victor Antoine." Upon learning the driver of the vehicle had a suspended driver's license she was ordered from the vehicle. (VRP 11/25/213 p. 20) Noting inconsistencies in the driver's story he sought the driver's permission to search the car. (VRP 11/25/2013 p. 21) The driver, non-owner, consented to the search of the vehicle while Ms. McGovern remained in the car. (VRP 11/25/2013 p. 21) The police then "began pulling the remaining two occupants from the vehicle." (VRP 11/25/2013 p. 21) The other two occupants including Ms.

McGovern were searched and Cpl. Elliott stood with them while Deputy Bohanek searched the vehicle. (VRP 11/25/2013 p. 22) Ms. McGovern had no choice about exiting the vehicle when told to exit. (VRP 11/25/2013 p. 36 lines 20-25) He did not get permission from Ms. McGovern to search the area of the vehicle where she was seated. (VRP 11/25/2013 p. 37) As he was searching the vehicle Ms. McGovern protested that he could not search the vehicle. (VRP 11/25/2013 p. 37 lines 10-13) He told Ms. McGovern he did not need her permission. (VRP 11/25/2013 p. 37) Ms. McGovern was told he would search the vehicle including the area she was in. (VRP 11/25/2013 p. 38)

Deputy Bohanek found in the backseat a satchel or bag with two laptop computers. (VRP 11/25/2013 p. 22 lines 22-25) Deputy Bohanek claimed that Ms. McGovern told him the bag belonged to her and she did not want him to search the bag. (VRP 11/25/2013 p. 23) In the front passenger's seat area he found two purses. (VRP 11/25/2013 p. 25) One purse was larger and there was a smaller purse belonging he believed to a female. (VRP 11/25/2013 p. 25) Ms. McGovern told him those were her bags and denied consent to search the bags.

In the glove box was also a Leatherman's wallet with credit cards belonging to Victor Antoine and Tyson Andrew. The vehicle was then seized and towed from the scene to obtain a search warrant. (VRP 11/25/2013 p. 27) All three occupants were left alongside the highway. (VRP 11/25/2013 p. 27) The driver was issued a criminal citation for driving while license suspended. (VRP

11/25/2013 p. 39) He did not allow the occupants to remove any of their belongings. (VRP 11/25/2013 p. 40) He failed to mention these bags when he prepared his affidavit to search the vehicle. (VRP 11/25/2013 p. 40 lines 5-17/CP 23-54;72-75) He never read Miranda warnings that day because he did not believe the occupants of the vehicle were detained. (VRP 11/25/2013 p. 41)

The Deputy testifies that he obtained written consent to search the vehicle after he completed the search. (VRP 11/25/2013 p. 47-48) The vehicle he drove for the pace had never been certified for accuracy. (VRP 11/25/2013 p. 48)

Defense renewed the 3.6 motion arguing that the stop was without a reasonable basis because the squad car was not certified as accurate. (VRP 11/25/2013 p. 54) Further, the officers were working as a drug interdiction team. The court then denied the motion to suppress. (VRP 11/25/2013 p. 55; p. 76-80)

At trial Deputy Bohanek testified he was driving with a Cpl. Elliott on June 19, 2012. (VRP 11/25/2013 p. 87) The BMW was stopped based upon Deputy Bohanek's estimate that the BMW was traveling over the posted 70 mph speed limit. (VRP 11/25/2013 p. 89) He contacted the driver at the passenger side window. (VRP 11/25/2013 p. 90) When he asked who owned the vehicle Ms. McGovern stated the owner was Victor Antoine. (VRP 11/25/2013 p. 91) He determined the driver had a suspended license and the car was not registered to Victor Antoine. (VRP 11/25/2013 p. 91-92)

The driver was removed from the car (VRP 11/25/2013 p. 92 lines 9-13) and she authorized the vehicle search. (VRP 11/25/2013 p. 93 line 22) The passengers including Ms. McGovern were removed from the car and frisked. (VRP 11/25/2013 p. 94)

In the back seat he found a satchel with two laptop computers in the bag. (VRP 11/25/2013 p. 95) The prosecution, over defense objection, asked if anyone claimed the bag. The deputy testified Ms. McGovern claimed the bag. The deputy stated that Ms. McGovern "did not want me to search the bag." (VRP 11/25/2013 p. 96 lines 15-20) The defense moved for a mistrial (VRP 11/25/2013 p. 96 lines 18-25) because the prosecution introduced testimony that Ms. McGovern refused under the Fourth Amendment and Article I §7 to allow the search of her property. (VRP 11/25/2013 p. 97)

The defense argued that introducing this violates her right to assert her constitutional rights and not have the assertion of her rights used as evidence against her . (VRP 11/25/2013 p. 97 lines 1-20) The government responds that the reason the officer didn't search the bag was relevant. The prosecution asks the court give a curative instruction rather than granting a mistrial. (VRP 11/25/2013 p. 98 lines 7-15) The court took a brief recess for the defense to obtain case law to support the mistrial motion. (VRP 11/25/2013 p. 98)

The court returns to the bench without the jury and cites *State v. Gauthier*, 174 Wn. App. 257 which cites *United States v. Prescott* from the 9th Circuit and

State v. Burke from the Washington Supreme Court. The court states that the two cases stand for the proposition that "like the defendant's Fifth Amendment right, the Fourth Amendment right may not –when they assert that right, it may not be introduced at trial as substantive evidence of guilt." (VRP 11/25/2013 p. 99 lines 13-22) The defense points out that the three cases cited here include *State v. Gauthier*, 174 Wn. App. 257 (2013), *United States v. Prescott*, 581 F.2d 1343 (1978), and *State v. Burke*, 163 Wn.2d 204 (2008) (VRP 11/25/2013 p. 100)

The court states this is troublesome because in *Gauthier* the court held the prosecutor's use of the defendant's constitutional right to refuse a warrantless search as substantive evidence of guilt was manifest constitutional error properly raised for the first time on appeal. That error deprived him of his right to invoke with impunity the protection of the Fourth Amendment. (VRP 11/25/2013 p. 100 lines 13-21) Here, the court believes it was offered for a different purpose and not as substantive evidence of guilt. (VRP 11/25/2013 p. 100 lines 22-25) It was offered here briefly as a basis why a warrant was obtained. (VRP 11/25/2013 p. 11 lines 22-25)

The defense requests a curative instruction. (VRP 11/25/2013 p. 101 line 16) The defense argues that no curative instruction will cure the jury "wondering why would she not allow them to search her items; that must mean that there's something in those items that she didn't want anyone to know about. It impugns her right to not be searched and suggests in some fashion she is guilty of the crime

charged here. (VRP 11/25/2013 p. 102 lines 3-9).....a curative instruction would not adequately address the problem raised by the government's introduction of evidence that's not relevant, evidence that's highly prejudicial and that is violative of my client's Fourth Amendment and Article I § 7 right to require law enforcement to get a search warrant before they search her personal items." (VRP 11/25/2013 p. 102 lines 10-19) The defense points out that each time the police discuss obtaining the warrant they ring the bell again. (VRP 11/25/2013 p. 103 lines 1-4) The court proposes a curative instruction reading: "That testimony was provided that the defendant did not consent to a search; you are not to consider this evidence during your deliberations....." (VRP 11/25/2013 p. 103 lines 14-18)..... "but or infer guilt in anyway." (VRP 11/25/2013 p. 103 lines 23-24) The court grants the motion to not allow testimony of the defendant's exercise of her Fourth Amendment Rights. (VRP 11/25/2013 p. 104 lines 13-16) The defense requests it also be given in written instructions to the jury. (VRP 11/25/2013 p. 104 lines 17-20)

The jury returns to the instruction: "Testimony was offered that the defendant did not consent to a search. You are not to consider this evidence during your deliberations nor are you to infer guilt in any way based on this evidence." (VRP 11/25/2013 p. 105 lines 6-9)

Deputy Bohanek is asked if he determined ownership of the bag in the back seat. The defense objected to introduction of the statements based upon 3.5

and *Miranda*. (VRP 11/25/2013 p. 105 lines 20-22) The court noted the objection and allowed the testimony. (VRP 11/25/2013 p. 105 line 22) The deputy stated he then continued to search the front passenger's seat and the bags and purse were found on the front passenger's seat. (VRP 11/25/2013 p. 105) The deputy testified that Ms. McGovern told him the bags were her bags. (VRP 11/25/2013 p. 105-106) The vehicle was seized and taken to a secured facility to await a search warrant. (VRP 11/25/2013 p. 107-108)

The defense objected to evidence from the search based upon the motion previously made. (VRP 11/25/2013 p. 109) In the black purse found on the front seat was an Idaho identification card with three Washington identification cards. (VRP 11/25/2013 p. 110) The defense renews the motion for mistrial at which time the court conducts a conference at the bench outside the hearing of the jurors. The court states that the pretrial ruling excluded contraband in the vehicle. The defense notes that several identifications involve uncharged crimes which should not be introduced because they are irrelevant and highly prejudicial under 404(b). (VRP 11/25/2013 p. 111) The defense renews the prior objections to references to the search. (VRP 11/25/2013 p. 112) The court denies the motions on items found in the bags. (VRP 11/25/2013 p. 112)

Deputy Bohanek identifies exhibit 6 which was an evidence envelope. (VRP 11/25/2013 p. 112-113) The deputy identifies three identification cards from Washington and one identification card from Idaho belonged to Ms.

McGovern. (VRP 11/25/2013 p. 112-113) The items were admitted subject to the defenses prior objections. (VRP 11/25/2013 p. 114) The prosecution offered exhibit 5 containing a black cylinder with a screw on lid containing a white crystalline substance. Also found in the purse were two Camel brand smokeless tobacco containers which contained a variety of prescription medications. (VRP 11/25/2013 p. 115) The pills were peach colored, yellow colored, and some white powder. (VRP 11/25/2013 p. 117) The defense objects on the white powder being admitted. (VRP 11/25/2013 p. 117) The prosecution hands the deputy P1, P2, P3, and P7 which he identifies as evidence envelopes sent to the evidence lab. (VRP 11/25/2013 p. 119)

The deputy testifies he was working criminal interdiction. (VRP 11/25/2013 p. 132) : "We were attempting to contact people conducting or engaged in criminal behavior." (VRP 11/25/2013 p. 132-133) The deputy testified that they had no radar unit in the police car. (VRP 11/25/2013 p. 133) That he used traffic stops as a reason to stop vehicles looking for criminal activity. (VRP 11/25/2013 p. 133 lines 15-17) The deputy testified that he was suspicious because he was looking for other criminal activity. (VRP 11/25/2013 p. 135 lines 18-21) The vehicle stopped was a four door 1995 BMW 318. (VRP 11/25/2013 p. 136) The deputy testifies the consent to search the vehicle was signed at 1426 hours, (VRP 11/25/2013 p. 138) after the police searched the vehicle. (VRP 11/25/2013 p. 138) The deputy testifies Ms. McGovern was read her *Miranda*

warnings at 1409 hours. (VRP 11/25/2013 p. 143) The stop occurred at 1340 hours according to the deputy. (VRP 11/25/2013 p. 143) Ms. McGovern was told to exit the vehicle and she was searched for weapons. (VRP 11/25/2013 p. 143)

Brendan Cassida testified that exhibit 5 contained his driver's license. (VRP 11/25/2013 p. 155) The driver's license was taken several years before in a car prowl which may have occurred in January 2012. (VRP 11/25/2013 p. 155-156) He never gave Ms. McGovern permission to have his driver's license. (VRP 11/25/2013 p. 156) The prosecution moves to admit P5 which the defense objects to based upon search violations. (VRP 11/25/2013 p. 156) The court admitted P5. (VRP 11/25/2013 p. 156) The defense makes a continuing objection to evidence admitted based upon prior motions. (VRP 166)

Deputy Bohanek is recalled and questioned about who he asked to consent to the search of the vehicle. (VRP 11/26/2013 p. 169) The defense objects to the reopening of this area of questioning because of the courts prior ruling on the mistrial. (VRP 11/26/2013 p. 169) The court overruled the objection to the reopening of the consent to search issue. (VRP 11/26/2013 p. 169) The prosecutor then asks the deputy if he asked anyone else for consent to search. (VRP 11/26/2013 p. 169 line 17) The deputy claimed "I didn't need to." (VRP 11/26/2013 p. 169 line 16)

The states next witness was Devon Hause who works at the Washington State Patrol Crime Lab in Cheney, Washington. (VRP 11/26/2013 p. 193) She has

a bachelor's degree from Eastern Washington University with an emphasis in forensic science. She is certified by the American Board of Criminalistics in drug analysis. (VRP 11/26/2013 p. 194) The witness identified P4 as a lab report.

After a break the jurors return to the court and Ms. Hause returns to the stand testifies over defense objection. (VRP 11/26/2013 p. 208) The witness is given item number 11 which she identifies as a part of a pill. (VRP 11/26/2013 p. 210) The pill was identified as methylphenidate or Ritalin which is a stimulant. (VRP 11/26/2013 p. 211) The court then admitted P1 on the states motion. The court grants the admission of P1 noting the defense objections. (VRP 11/26/2013 p. 211)

The prosecutor then gives Ms. Hause item number 13 which was alprazolam or Xanax. (VRP 11/26/2013 p. 212) It was explained that it is an anti-anxiety drug. (VRP 11/26/2013 p. 212) It was identified as a controlled substance. (VRP 11/26/13 p. 213)

Then the witness identifies item number 27 and exhibit P7. The envelope contained.....could not say what was in the bag. (VRP 11/26/2013 p. 225) Exhibit P7 (item 27) was admitted into evidence. (VRP 11/26/2013 p. 227) The state rested and the defense stated that it had a motion. (VRP 11/26/2013 p. 230) The court excused the jury for a recess. (VRP 11/26/2013 p. 231)

The defense sought dismissal of all of the counts because of insufficient evidence. (VRP 11/26/2013 p. 231) There was no testimony from the officer that

he found that bag. (VRP 11/26/2013 p. 231) On the count under 9A.56.330 there was no evidence of any level of knowledge or evidence it was maintained for "the sole purpose of misrepresenting herself." (VRP 11/26/2013 p. 232) There has been no evidence of any knowledge or intent by Ms. McGovern to possess the identification. (VRP 11/26/2013 p. 233)

The defense explains there is a knowledge or intent element for which no evidence has been provided. The court must find this crime has no intent or knowledge requirement in spite of section (d). (VRP 11/26/2013 p. 235 lines 7-18) The court denied the defense motion to dismiss any counts for insufficient evidence. (VRP 11/26/2013 p. 236)

The defense rests on the record. (VRP 11/26/2013 p. 238) The defendant elected not to testify or to present a defense based upon the lack of evidence. (VRP 11/26/2013 p. 238) The jury was released for the day to return the following day. (VRP 11/26/2013 p. 238-239)

The court returns on 11/27/2013 without the jurors to continue discussions on jury instructions. The defense renews the motion to dismiss on Count III based upon insufficient evidence. The count regarding the yellow rectangular pill alprazolam. (VRP 11/27/2013 p. 257-258) The court denies the motion to dismiss for insufficient evidence on Count III. (VRP 11/27/2013 p. 258)

Jury instructions were discussed including an instruction regarding the defendant's assertion of her Fourth Amendment rights. (VRP 11/27/2013 p. 258-

259/CP 103-109) The defense maintains that a mistrial is the proper remedy but seeks the curative instruction with a modification: "You are to infer no guilt upon the defendant's exercise of these rights nor are you to consider this evidence during your deliberations." (VRP 11/27/2013 p. 260)

The jury returned a verdict on 11/27/2013. On Count I the jury found the defendant guilty, Count II the jury found guilty to the crime of possession of a controlled substance, Count III the jury found guilty to the crime possession of a controlled substance alprazolam, and Count IV guilty of possession of a controlled substance methylphenidate. (VRP 11/27/2013 p. 318) A sentencing was held on December 11, 2013. (VRP 12/11/2013 p. 323) The court sentenced Ms. McGovern on all three felonies, I, III, and IV and the misdemeanor. (VRP 12/11/2013 p. 326/CP 152-163)

IV. ARGUMENT

ISSUE 1: The Superior Court committed reversible error in denying a mistrial based upon the government's introduction of evidence that the defendant asserted her rights under the Fourth Amendment and Article I § 7 of the Washington State Constitution.

The government suggested pretrial that they intended to introduce testimony that they obtained a search warrant when the defendant objected to the search of her property. (VRP 11/25/2013 p. 8-14) The court ruled that the evidence of the basis of the warrant was not to be admitted and that evidence of contraband should not be admitted. (VRP 11/25/2013 p. 60-61) The prosecution

introduced through Deputy Bohanek testimony that: "Ms. McGovern identified the bag as being hers. She did not want me to search the bag." Defense moved for mistrial citing *State v. Gauthier*, 174 Wn. App. 257, *State v. Burke*, 163 Wn.2d 204 (2008), and *United States v. Prescott*, 581 F.2d 1343 (1978) (VRP 11/25/2013 p. 96-100) The court denied the motion but gave a curative instruction although the defense maintained this would not correct the error. (VRP 11/25/2013 p. 100-104)

The use of a defendant's assertion of her right to remain silent cannot be used as evidence of the defendant's guilt without violating the defendant's Fifth Amendment and Article I § 9 of the Washington State Constitution. *State v. Burke*, 163 Wn.2d 204, 222-223 (2008) In *State v. Gauthier*, 283 P.3d 126 (2013) the court held that where defendant's assert their rights under Article I § 7 of the Washington State Constitution and the Fourth Amendment it was privileged conduct that cannot be used as evidence of criminal wrongdoing. *State v. Gauthier*, 298 P.2d 126, 132 (Div. I 2013)[1]

The admission of evidence that a defendant asserted their right to require a search warrant under Article I § 7, Fourth Amendment, and Article I § 9 requires reversal and a new trial.

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[1] *Gauthier, supra* follows the Ninth Circuit opinion in *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978). The court held that because the Fourth Amendment gives individuals a constitutional right to refuse a warrantless search is privileged conduct that cannot be used as evidence of criminal wrongdoing. Id. 1351-52. The court in *Prescott* ruled that at retrial the court should take care to exclude all evidence of *Prescott's* refusal to consent to the search. Id. at 1353

ISSUE 2: The Superior Court committed reversible error in failing to suppress evidence seized based upon illegal stop and search of the defendant and her property.

At pretrial and trial the court refused repeated request from defense to suppress evidence based upon illegal stop and search of the defendant. (VRP 11/25/2013 p. 54; p. 109; p. 117/CP 23-54;72-75) Defense argued the stop was a pre-text stop. (CP 72-75) In determining if a stop is pre-textual the court should consider the totality of the circumstances, including the officer's subjective intent and the subjective reasonableness of the officer's conduct. *State v. Ladsen*, 138 Wash.2d 343, 358-359 (1999)

Evidence in this case that the traffic stop was pre-textual is overwhelming. Deputy Bohanek was assigned to a criminal interdiction team which attempts to "interdict criminal activity." (VRP 11/25/2013 p. 29; p. 55) He was assigned to a "special unit that was working the highway based on a grant from the state patrol." (VRP 11/25/2013 p. 29-30) They were looking for drug activity on Interstate 90 that day. (VRP 11/25/2013 p. 31) The deputies were looking for drugs, weapons, wanted persons, and criminal activity. (VRP 11/25/2013 p. 31)

Ultimately, the police conducted a warrantless search of a vehicle based on a minor traffic law violation for speeding 5mph over the limit on the interstate based on an estimated speed. (VRP 11/25/2013 p. 18) The officer stated the real reason for the stop was that they were looking for drugs, weapons, wanted

persons, and criminal activity. The warrantless search should be suppressed based upon Article I § 7 and the Fourth Amendment.

ISSUE 3: The Superior Court committed reversible error in failing to dismiss the charges based upon insufficient evidence.

Defense moved for dismissal of the charges based upon the government evidence being insufficient to support the charges. (VRP 11/26/2013 p. 231) Defense argued that the evidence that the defendant committed the drug offense was insufficient and that the prosecutor submitted insufficient evidence on the charge of unlawful possession of an identification. (VRP 11/26/2013 p. 232-233)

When reviewing a challenge to the sufficiency of the evidence, the appellate court must determine "Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of the fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed. 560 (1979)[2] The *Jackson* standard ensures that defendant's due process right in trial court was properly observed. Sufficient evidence supports a conviction if, when viewed in the light most favorable to the state, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Hosier*, 157 Wash.2d 1, 8, 133 P.3d 936 (2006)

[2] The purpose of this standard of review is to ensure that the trial court fact finder "rationally applied" the constitutional standard required by due process clause of the Fourth Amendment, which allows conviction of a criminal offense only upon proof beyond a reasonable doubt. *Jackson,* 443 U.S. at 317-318, 99 S. Ct. 2781; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed. 368 (1970)

There are several issues here including an element of *mens rea* on the possession of the identification card. (See trial record generally) The drug charge was insufficient because the government failed to admit adequate evidence that Ms. McGovern possessed the charged drugs. (See trial record generally)

V. CONCLUSION

The Superior Court committed error requiring a new trial because of the government's use of her assertion of her constitutional rights under Article I § 7 and the Fourth Amendment. The admission of evidence seized as the result of the illegal search and seizure requires suppression of illegally seized evidence.Last, insufficient evidence of the four charges was filed in this case.

Respectfully submitted this 11 day of July, 2014

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