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

REPLY BRIEF OF APPELLANT

Attorney for Appellant Erin McGovern:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. 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, including the pre-textual stop motion argued at the CrR 3.6 hearing.
3. Whether the Superior Court committed reversible error in failing to dismiss counts based upon insufficient evidence.

II. STATEMENT OF THE CASE

Any facts discussed beyond the Statement of Facts set forth in Appellant's Brief will be noted within the Argument.

III. 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 prosecution introduced through Deputy Bohanek's 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]

Respondent argues that a mistrial is the only appropriate remedy when there is "a substantial likelihood that the prejudice affected the verdict." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (Citations and alterations omitted). However, Respondent fails to enumerate how the introduced evidence was not prejudice which affected the verdict, other than assertions that the

[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

curative instruction sufficed. The error did affect the outcome of the trial. No curative instruction could possibly un-ring the bell of the jury hearing "She didn't want me to search the bags," the implication of that statement being "she knew what I would find in them. She was hiding something from us." Respondent's stated intent upon entering this testimony into evidence does not alter the fact that it was indeed entered into evidence. The prosecution need only state as a matter of procedure we obtained a warrant without stating that Ms. McGovern asserted her constitutional rights.

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.

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 a CrR 3.6 hearing, pretrial and trial the court refused repeated requests 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) Appellant does assign error to the court's factual findings in the CrR 3.6 hearing. 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) Deputy Bohanek's vehicle was not even equipped with a speed measuring device. (VRP 11/25/2013 p. 48) His sole purpose for stopping any vehicles on the date in question was to seek drug activity, not to conduct traffic stops for minor violations. Because the stop was pre-textual, the stop was illegal outright, making the trial court's decision to deny suppression an abuse of discretion.

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. (VRP 11/25/2013 p. 29-31) 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.

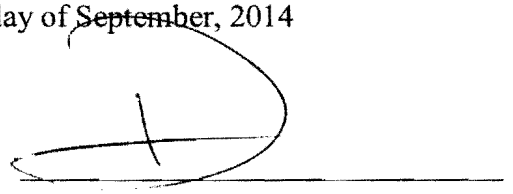
Defense moved for dismissal of the charges based upon the government evidence being insufficient to support the charges. (VRP 11/26/2013 p. 231) Defense argued that the evidence that the defendant committed the drug offense was insufficient and that the prosecutor submitted insufficient evidence on the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

Respondent has not shown how the element of *mens rea* in the charge of Possession of Another's Identification is evidenced in the trial record. It is not. Absence of Appellant's knowledge or intent to possess the identification requires a finding of insufficient evidence. Further, there was not sufficient evidence that Appellant herself possessed the controlled substances found among her possessions, or that she had even been aware the substances were there. (See VRP and 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 pre-textual search and seizure requires suppression of illegally seized evidence. Lastly, insufficient evidence of the four charges was filed in this case. This case must be remanded for new trial with appropriate findings.

Respectfully submitted this 19 day of ~~September~~, 2014



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COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent	)	
	)	Cause No. 321978
vs.	)	Cause No. 12-1-02255-1
	)	
	)	DECLARATION
	)	OF SERVICE
ERIN E. MCGOVERN Appellant	)	
	)	
	)	

I, Leah M. Hill, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a legal assistant in the office of Phelps & Associates, PS, served in the manner indicated below, an original and one copy of the Appellant's Reply Brief, on September 19, 2014.

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X Legal Messenger
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I further declare that I served in the manner indicated below, a true and correct copy of the Appellant's Reply Brief, on September 19, 2014.

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SPOKANE, WA 99260

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ERIN MCGOVERN
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Spokane Valley, WA 99216

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Spokane, WA on this 19 day of September, 2014

Leah Hill
LEAH M. HILL