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STATE OF WASHINGTON
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SUPREME COURT NO. 97896-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RACHEL RICHARDS,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 51700-1-II
Cowlitz County No. 17-1-01472-6

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, RACHEL RICHARDS, by and through her attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Richards seeks review of the October 29, 2019, published decision of Division Two of the Court of Appeals affirming her conviction. *State v. Richards*, 450 P.3d 1238 (2019).

C. ISSUE PRESENTED FOR REVIEW

Richards was arrested for suspected shoplifting. She was handcuffed, patted down, and taken to the loss prevention office. Police took her purse from her and searched it, finding stolen merchandise. The officer also searched a small closed pouch found inside the purse, although there was no reason to believe evidence relevant to the shoplifting charge would be found in the pouch. Where there was no legitimate evidence preservation or officer safety concern, did search of the closed container exceed the lawful scope of the search incident to arrest?

D. STATEMENT OF THE CASE

On November 11, 2017, Christa Garvin, a loss prevention officer at the Walmart in Woodland, called law enforcement to report she had seen a woman, identified as Rachel Richards, concealing items in her

purse. 1RP¹ 17-18. Garvin also saw Richards put some items in her shopping cart, which she paid for. She did not see Richards remove the packaging from any items, and she never saw Richards manipulate any containers or pockets in her purse to hide things more secretly. 1RP 18-19.

After Richards made her purchases and headed to the exit, Garvin approached her, but Richards refused to stop and talk. 1RP 19. Woodland Police Officers stopped Richards when she stepped outside and placed her under arrest. 1RP 6-7, 19. Richards was patted down and placed in handcuffs, and she was escorted to the loss prevention office. 1RP 7, 20. She did nothing to raise concerns that she was a safety threat. 1RP 22.

Officer Rob Lipp took possession of Richards's purse and searched it. 1RP 7. Garvin watched as Lipp removed items from Richards's purse, confirming that they were stolen. 1RP 21. She believed all the stolen items were recovered and had no reason to believe Richards had hidden any stolen items inside any containers in her purse. 1RP 21-22; Exhibit 1 (CrR 3.6 Hearing).

Lipp continued to search the purse after recovering the stolen items, intending to search any container he found for stolen merchandise or tools, although Garvin had not reported seeing Richards unwrap any items or use any tools. 1RP 11-12. He found a small zippered pouch inside

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—2/20/18 and 3/13/18; 2RP—3/8/18.

the purse and opened it, discovering some drug paraphernalia and heroin residue. 1RP 8; Exhibit 2 (CrR 3.6 Hearing).

Richards was charged with possession of heroin and third degree theft. CP 1-2. She moved to suppress evidence discovered in the closed pouch in her purse, arguing that search of the pouch exceeded the scope of a valid search incident to arrest. CP 3-9. Richards argued that no officer safety concerns justified search of the pouch, nor was there reason to think the pouch would contain evidence of the crime of arrest. 1RP 27, 31-32. The warrantless search of the pouch was therefore illegal, and evidence found in that container should be suppressed. 1RP 28.

The State argued that articles immediately associated with a person fall under the gambit of a search incident to arrest. Because the purse was in Richards's possession when she was arrested, police had authority to search it and its contents. 1RP 28-30. The court agreed and denied the motion to suppress. 1RP 33-35.

The court did not enter written findings of fact or conclusions of law. It explained its ruling at the suppression hearing as follows:

All right. So, factually, the Defendant was observed by loss prevention stealing a number of items, small items, placing them in her purse. She was detained at the door to the store, taken by law enforcement into the loss prevention office which is about twenty feet away from the door.

Her purse was searched. Inside her purse was located a number of small items that had been stolen. Also located a pouch

that was closed, that was not locked in any fashion. The officer searched that, located drug paraphernalia and other items at issue here.

From a legal standpoint, Ms. Richards was under arrest when she was taken into the loss prevention office. We have a good body of case law that says there's no specific words required when her freedom of movement has been interfered with, not allowed to leave. She is under arrest at that point.

The search of the pouch, and I guess it's an interesting question whether or not a general, you know, observation shoplift and the number of small items taken would, in and of itself, constitute a basis to search that pouch. We've got a pretty robust body of case law, including the *Byrd* case, that indicates that closed packages inside a purse that are not locked are subject to search pursuant to that search incident to arrest.

Given that, it's not necessary, I guess, to examine any further the issue of probable cause to search that on the shoplift, although I think it exists there, too. She was clearly under arrest. The officers were entitled to search those closed and unlocked containers pursuant to the arrest, so I'll deny the Motion to Suppress.

1RP 33-35.

Richards appealed, arguing that search of the closed container in her purse exceeded the permissible scope of the search incident to her arrest. The Court of Appeals disagreed and affirmed her conviction.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case involves a significant constitutional question this court should resolve: whether a lawful search incident to arrest extends to search of closed containers within an arrested person's bag, where there are no evidence preservation or officer safety concerns.

The Fourth Amendment protects people from unreasonable searches and seizures. U.S. Const. amend. IV. The Washington Constitution is even more protective, ensuring that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. Warrantless searches are per se unreasonable under both the Fourth Amendment and article I, section 7. *See State v. Rankin*, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). This presumption is subject to only a few “jealously and carefully drawn exceptions to the warrant requirement.” *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the heavy burden of demonstrating that an exception to the warrant requirement makes the search lawful. *Id.* (citing *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)); *State v. VanNess*, 186 Wn. App. 148, 154, 344 P.3d 713 (2015).

One exception to the warrant requirement is a search incident to a lawful arrest. *VanNess*, 186 Wn. App. at 155. The trial court and Court of

Appeals concluded that the search of the closed pouch found inside Richards's purse was justified under this exception, relying on *State v. Byrd*². 1RP 34-35; Opinion at 5-6. In *Byrd*, this Court upheld the validity of a warrantless search of the defendant's purse, seized from her lap and set on the ground during her arrest. Following the categorical rule announced in *United States v. Robinson*,³ the Court held that the lawful arrest justified the search of her person and all objects on or closely associated with her person at the time of her arrest, including her purse. *Byrd*, 178 Wn.2d at 625. The court rejected the need to consider whether the search was justified by concerns of officer safety or evidence preservation. *Id.*

Since *Byrd* was decided, however, the United States Supreme Court has narrowed the search incident to arrest exception. See *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 2484-85, 189 L. Ed. 2d 430 (2014). The Court noted in *Riley* that the search incident to arrest exception was recognized to allow search of an arrestee's person and the area within her immediate control when the search was reasonable to ensure officer safety or to prevent concealment or destruction of evidence. *Id.* at 2483. While *Robinson* had held that a search incident to arrest

² *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013).

³ *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

required no additional justification other than the valid arrest, the *Riley* Court rejected this categorical rule. *Id.* at 2484.

In *VanNess*, Division One noted that “[a]fter *Riley*, a lawful arrest no longer provides categorical justification to search, without a warrant, all items found on an arrested person at the time of arrest.” *VanNess*, 186 Wn. App. at 160. Instead, if the arrestee has a significant privacy interest in the item to be searched, that item may be searched incident to arrest only if interests in officer safety and evidence preservation exceed an arrestee's privacy interest in the category of item. *Id.* (citing *Riley*, 134 S. Ct. at 2484).

In *VanNess*, the defendant was wearing a backpack when he was arrested on warrants. The arresting officer removed the backpack, handcuffed the defendant, and placed him in a patrol car. The officer then searched the backpack. *VanNess*, 186 Wn. App. at 152. In addition to knives, the officer found a small locked box within the backpack. He pried it open with a screwdriver and found evidence of controlled substances. *Id.* at 153. The trial court found that the officer lawfully searched the backpack and box incident to the defendant's arrest, but the Court of Appeals disagreed. *Id.* at 162.

After discussing the origins of the search incident to arrest exception, as well as its current status in light of the Supreme Court's

decision in *Riley*, the Court of Appeals held that the justification for a search incident to arrest does not apply to locked containers separated from an arrestee's person. *Id.* at 161. Because the defendant no longer had access to the contents of his backpack at the time of the search, the search could not be justified on officer safety concerns. And since the defendant was arrested on outstanding warrants, the officer could not reasonably believe evidence relevant to the crime of arrest would be found in the container within the backpack. *Id.* at 161-62.

This case involved a similar situation. Richards was carrying a purse when she was arrested. The arresting officer removed the purse, patted her down and placed her in handcuffs, and escorted her to the loss prevention office. He then searched the purse. When he located a small closed container within the purse, he opened it and discovered evidence of controlled substances. The Court of Appeals distinguished this case from *VanNess* on the basis that the pouch Richards carried inside her purse was closed but not locked, stating that "search of a closed, unlocked pouch in a purse in the arrestee's possession simply does not implicate the type of significant privacy interests that would render the search of the pouch unlawful." Opinion, at 6.

Washington courts recognize an individual's privacy interest in closed containers whether locked or unlocked, however. *State v. Wisdom*,

187 Wn. App. 652, 670, 349 P.3d 953 (2015) (search of unlocked shaving kit found in front seat of truck defendant was driving not justified as search incident to arrest); *see VanNess*, 186 Wn. App. at 161 (search incident to arrest analysis same for searches of vehicles and of objects found on arrestee's person). Whether there is a legitimate distinction between the privacy interest in a locked container found in an arrestee's bag and a closed but unlocked pouch found in an arrestee's bag is a significant constitutional question this Court should resolve. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Richards's conviction.

DATED this 26th day of November, 2019.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

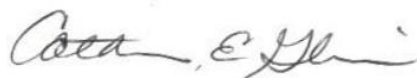
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in
State v. Rachel Richards, Court of Appeals Cause No. 51700-1-II, as
follows:

Rachel Richards
1005 NE 142nd Ave
Vancouver, WA 98684

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



Catherine E. Glinski
Done in Manchester, WA
November 26, 2019

October 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RACHEL DARSHELL RICHARDS,

Appellant.

No. 51700-1-II

PUBLISHED OPINION

MAXA, C.J. – Rachel Richards appeals her conviction of unlawful possession of heroin.¹ She argues that the trial court erred by not suppressing evidence that police officers seized in a search incident to her arrest. We hold that the officers did not exceed the scope of a lawful search incident to arrest when they searched a closed pouch in Richards’s purse that she was carrying at the time of arrest. Accordingly, we affirm Richards’s conviction.

FACTS

On November 11, 2017, a loss protection officer at a retail store in Woodland, observed Richards placing store merchandise into her purse. The officer approached Richards after she left the store without paying for the items in her purse. Two police officers, who were waiting

¹ Richards also was convicted of third degree theft, but she does not challenge that conviction on appeal.

outside, detained Richards and escorted her to the loss protection office. There, the officers arrested Richards and searched her purse.

During the search of the purse, the officers discovered the stolen merchandise and a closed, zippered pouch. They opened the pouch and searched it, looking for theft tools used for removing secure access devices. The pouch contained drug paraphernalia, foil residue, straws, and syringes.

The State charged Richards with unlawful possession of heroin. Richards filed a motion to suppress the contents of the pouch found in her purse. The trial court considered the evidence set out above and denied the motion. The court gave an oral ruling, but did not enter written findings of fact and conclusions of law.

Richards subsequently was convicted of possession of heroin. She appeals her conviction.

ANALYSIS

A. STANDARD OF REVIEW

When reviewing a trial court's denial of a CrR 3.6 motion to suppress evidence, we determine whether substantial evidence supports the findings of fact and whether those findings of fact support the conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the finding. *Id.* at 866-67. We review conclusions of law de novo. *Id.* at 867.

Here, the trial court did not make written findings of fact or conclusions of law as required by CrR 3.6. Although failure to enter findings of fact and conclusions of law is error, such error is harmless if the trial court's oral findings are sufficient to permit appellate review.

State v. Weller, 185 Wn. App. 913, 923, 344 P.3d 695 (2015). We conclude that the trial court's error is harmless here.

B. SCOPE OF SEARCH INCIDENT TO ARREST

Richards argues that the officers' warrantless search of the closed pouch in her purse was unlawful. We disagree.

1. Legal Principles

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit warrantless searches unless one of the exceptions to the warrant requirement applies. *State v. Rooney*, 190 Wn. App. 653, 658, 360 P.3d 913 (2015). The State has the burden of establishing an exception. *Id.* at 658-59.

One exception to the warrant requirement is a search of a person incident to a lawful arrest of that person. *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015). Under this exception, an officer making a lawful custodial arrest has authority to search the person being arrested as well articles of the arrestee's person such as clothing and personal effects. *State v. Byrd*, 178 Wn.2d 611, 617-18, 621, 310 P.3d 793 (2013) (citing *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). An article immediately associated with the arrestee's person may be searched if the arrestee has actual possession of it at the time of a lawful custodial arrest. *Id.* at 621. This rule is referred to as the "time of arrest" rule. *Id.* at 620-21. Based on this rule, an officer may search a purse or a bag in the arrestee's possession at the time of arrest. *Id.* at 622.

A search of an arrestee's person or articles in his or her possession does not require a case-by-case determination that a warrantless search is necessary for officer safety or evidence

preservation. *Brock*, 184 Wn.2d at 154-55. Such a search is reasonable regardless of “the probability in a particular arrest situation that weapons or evidence would in fact be found.” *Robinson*, 414 U.S. at 235. Instead, “[t]he authority to search an arrestee’s person and personal effects flows from the authority of a custodial arrest itself.” *Byrd*, 178 Wn.2d at 618.

A second type of search incident to arrest involves a search of the area within the arrestee’s control. *Byrd*, 178 Wn.2d at 617. This type of search must be justified by showing that the arrestee might access the surrounding area to obtain a weapon or destroy evidence. *Id.* (citing *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)); *see also State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009) (addressing the search of an automobile incident to arrest).

The United States Supreme Court addressed the search of an article in an arrestee’s possession incident to an arrest in *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). The Court held that police may not conduct a warrantless search of the digital information on a cell phone found on the arrestee’s person at the time of arrest. *Id.* at 386. In reaching this decision, the Court compared the minimal benefits of a cell phone search with respect to officer protection and evidence preservation with the significant privacy concerns implicated by the large amounts of personal and intimate information on modern cell phones. *Id.* at 387-96.

In *State v. VanNess*, Division One of this court relied on *Riley* in holding that the search incident to arrest exception did not apply to the search of a locked box inside a backpack an arrestee was carrying at the time of the arrest. 186 Wn. App. 148, 156-62, 344 P.3d 713 (2015).

The court in *VanNess* stated:

After *Riley*, a lawful arrest no longer provides categorical justification to search, without a warrant, all items found on an arrested person at the time of arrest. Instead, if the item to be searched falls within a category that implicates an arrestee's significant privacy interests, the court must balance the government interests against those individual privacy interests. Only when government interests in officer safety and evidence preservation exceed an arrestee's privacy interest in the category of item to be searched may it be searched incident to arrest without a warrant.

Id. at 160.

In evaluating the arrestee's privacy interest in the locked box, the court noted that our Supreme Court has held that officers cannot search a locked container found in an automobile incident to an arrest without justification based on officer safety or preservation of evidence. *Id.* at 160-61 (citing *Valdez*, 167 Wn.2d at 777). The court concluded that the locked box in the backpack could not be searched without a warrant because the arresting officer raised no concerns about his safety and there was no indication that the officer believed that the box would contain evidence relevant to the crime of arrest. *VanNess*, 186 Wn. App. at 162.

2. Analysis

Here, there is no question that the officers could search Richards's purse incident to her arrest because it was in her possession. *Byrd*, 178 Wn.2d at 622. Under *VanNess*, the officers would have been precluded from searching a *locked* container in that purse absent concerns about officer safety or an indication that a locked container contained evidence relevant to the crime of arrest. 186 Wn. App. at 162. The issue here is whether the same rule applies to a closed, *unlocked* container in Richards's purse. We conclude that it does not.

Washington courts addressing searches of purses incident to arrests have expressed no concern about officers searching closed, unlocked containers inside a purse or bag. In *Brock*, the

court held that a search incident to an arrest was lawful when officers found drugs in a wallet inside a backpack searched incident to an arrest. 184 Wn.2d at 152, 159. In *Byrd*, the court held that a search incident to an arrest was lawful when officers found drugs in a sunglasses case inside a purse. 178 Wn.2d at 615, 625. See also *State v. Whitney*, 156 Wn. App. 405, 409, 232 P.3d 582 (2010) (pill bottle); *State v. Jordan*, 92 Wn. App. 25, 31, 960 P.2d 949 (1998) (film canister and pill bottle); *State v. Gammon*, 61 Wn. App. 858, 863, 812 P.2d 885, (1991) (pill bottle); *State v. White*, 44 Wn. App. 276, 280, 722 P.2d 118 (1986) (cosmetics case).

None of these cases specifically addressed whether officers could lawfully search closed, unlocked containers. But Richards cites no cases in which a court has held that opening a closed, unlocked container during a lawful search of a purse or bag incident to an arrest is prohibited. She references *State v. Wisdom*, in which the court held that the search of an unlocked shaving kit in an arrestee's car was unlawful. 187 Wn. App. 652, 670-73, 349 P.3d 953 (2015). However, in that case the court found that the search of the car in which the shaving kit was found was not a lawful search incident to arrest. *Id.* at 672-73. Here, the search of Richards's purse was lawful.

We note the court's comment in *VanNess* that a search of a locked container may "implicate[] an arrestee's significant privacy interests" and therefore may preclude application of the search incident to arrest exception. 186 Wn. App. at 160. But the search of a closed, unlocked pouch in a purse in the arrestee's possession simply does not implicate the type of significant privacy interests that would render the search of the pouch unlawful.

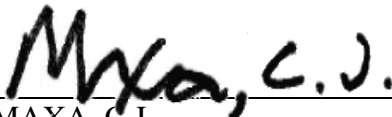
We conclude that officers searching a purse or bag incident to arrest may lawfully search closed, unlocked containers within that purse or bag. Accordingly, we hold that the trial court

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did not err in denying Richards's motion to suppress the evidence discovered in the search of the pouch in her purse.


CONCLUSION

We affirm Richards's conviction of unlawful possession of heroin.

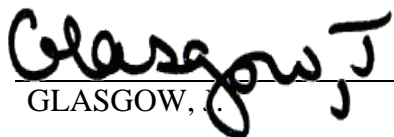


MAXA, C.J.

We concur:



MELNICK, J.



GLASGOW, J.

GLINSKI LAW FIRM PLLC

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