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A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not err by denying Appellant's motion to suppress evidence and statements resulting from a constitutional search of a tan and pink bag located by Deputy Wheeler in a vehicle pursuant to the lawful arrest of the driver.
2. The trial court did not err by entering Finding of Fact 5.
3. The trial court did not err by entering Conclusion of Law 4. (A copy of the Findings of Fact and Conclusion of Law pertaining to the CrR 3.6 hearing is attached as Appendix A.)
4. The trial court did not err by entering Finding of Fact 2.1 and Conclusion's of Law 3.1 in the Judgment and Sentence which found the appellant guilty of possession of methamphetamine. CP at 74, 75.

B.

STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court did not err in denying the CrR 3.6 motion to suppress evidence obtained as a result of the search of the tan and pink bag, where the Appellant was a non-arrested passenger in the vehicle. Assignments of Error 1, 2, and 3.

2. The State did not violate Appellant's constitutional rights under Article 1, § 7 of the Washington Constitution when Deputy Wheeler searched a tan and pink bag in a vehicle incident to the driver's arrest. Deputy Wheeler informed the Appellant, who was the passenger, to exit the vehicle so that he could search the vehicle. No one claimed the bag. Thus, the Deputy did not know, nor should he have known, that the bag belonged to the Appellant. Assignment of Error 3.
3. The trial court did not err in convicting the Appellant; the evidence used at trial against the Appellant was obtained from a lawful search of a tan and pink bag incident to the arrest of the driver, where the Appellant was the non-arrested passenger. Assignment of Error 4.

C.

STATEMENT OF THE CASE

The State accepts the Statement of the Case as delineated by
Michelle D. McCormick.

D.

ARGUMENT

DEPUTY WHEELER DID NOT KNOW NOR SHOULD HE HAVE KNOWN THAT THE TAN AND PINK BAG FOUND ON THE PASSENGER SIDE OF THE TRUCK BELONGED TO THE NON-ARRESTED PASSENGER. BECAUSE THE SEARCH OCCURRED INCIDENT TO THE LAWFUL ARREST OF THE DRIVER, NO WARRANT WAS REQUIRED TO SEARCH THE BAG.

At the outset, the State agrees with the Appellant that Ms. McCormick has automatic standing to challenge the validity of the search of the truck in which she was a passenger. Appellant's Brief at 10-11. The real question here is whether the search conducted by the police violated Article 1, section 7 of the Washington State Constitution. The seminal case involving searches of items in a vehicle where there is a non-arrested person is *State v. Parker*, 139 Wash. 2d 486, 987 P.2d 73 (1999). In *Parker* the Washington State Supreme Court adopted "a straightforward rule allowing police officers to assume all containers within the vehicle may be validly searched, unless officers *know or should know* the container is a personal effect of a passenger who is not independently suspected of criminal activity and where there is no reason to believe contraband is concealed within the personal effect immediately prior to the search." *Id.* at 503.

Here, the holding in *Parker* makes it abundantly clear that the search of the tan and pink bag in this case was proper. Ms. McCormick was the passenger of a vehicle in which the driver was lawfully arrested. RP (Jan.14, 2008) at 9. *Parker* allows an officer to validly search all containers in the vehicle unless the officer knows or should know that the container is personal effect of the non-arrested individual.

Based on the record in this case, Ms. McCormick cannot show that Deputy Wheeler knew or should have known that the tan and pink bag belonged to Ms. McCormick. The bag in question could have belonged to the arrested driver. The bag was located within reach of the driver and Ms. McCormick. RP (Jan. 14, 2008) at 9. Nothing in the record shows that the bag was clearly and closely associated with Ms. McCormick. To the contrary, at no time during the incident did Ms. McCormick or the arrested driver ever claim ownership of the bag.¹ Additionally, Ms. McCormick took a purse with her upon being informed that Deputy Wheeler intended to search the vehicle. Finally, unlike the situation in *Parker*, both of the individuals in the vehicle were females. Therefore,

¹ The failure of Ms. McCormick or the driver to claim ownership of the bag directly relates to whether Deputy Wheeler knew or should have known that the bag belonged to Ms. McCormick. The absence of any claim of ownership militates against the assertion that Deputy Wheeler's actions were proscribed under *Parker*. See, e.g., *State v. Bello*, 142 Wash. App. 930, 941, 176 P.3d 554 (2008); *infra* at 7.

there was no way that Deputy Wheeler could have known or should have known that the tan and pink bag belonged to the non-arrested passenger.

Furthermore, Deputy Wheeler was not obligated to show the tan and pink bag to Ms. McCormick in order to verify her claim of ownership before he examined the bag. *State v. Jackson*, 107 Wash. App. 646, 650-651, 27 P.3d 689 (2001). The Appellant's reliance on *State v. Jones*, 146 Wash. 2d 328, 45 P. 3d 1062 (2002) is misplaced. Appellant's Brief at 15-16. The assertion that the facts in *Jones* parallel the current case, Appellant's Brief at 16, has the solidity of wind. The police in *Jones* ordered the female passenger to place the purse which she had taken out of the vehicle back into the car. This action indicated that the police should have been aware that the purse belonged to the passenger--not the driver who was arrested.² In the present case, the bag in question never left the vehicle; consequently, the police did not have reason to suspect that the bag belonged to the passenger. Moreover, *Jackson* makes clear that the police do not have to ask passengers whether a purse/bag belongs to them. While the Appellant makes a precatory assertion that the police should be required to ask passengers questions about who owns a purse/bag, Appellant's Brief at 16, this argument is foreclosed by *Jackson*.

² Unlike the present case, the driver in *Jones* was a male. Hence, it was more likely in *Jones* that the purse in question belonged to the female passenger. Because the current case involves two females, it is impossible to make any such gender distinction.

In a larger context, the gravamen of the Appellant's argument is that the search of the tan and pink bag was illegal since Deputy Wheeler should have known that the bag belonged to the passenger. At this juncture, the Court of Appeals should not substitute its judgment for the judgment of the trial court on a factual matter. The Court of Appeals must give deference to the trial court's findings of fact and not disturb those findings provided that there is substantial evidence to support those findings. *State v. Hill*, 123 Wash. 2d 641, 644-647, 870 P.2d 313 (1994). Because there is substantial evidence to support the trial court's findings, the Court of Appeals should not accept as fact the inference proffered by the Appellant, viz., that Deputy Wheeler knew or should have know that the bag belonged to Ms. McCormick.³ Since this supposition goes beyond the Findings of Fact of the trial court, and is contrary to Conclusion of Law 4,⁴ the assertion by the Appellant that Deputy Wheeler needed a warrant to search the tan and pink bag should be rejected. Appellant's Brief at 15.

³ The bag in question could have belonged to the driver or the passenger. Because the passenger left the vehicle and did not take the bag, one can make a reasonable inference that the bag was not hers. The proximity of the bag to the passenger does not automatically establish that the bag belonged to the passenger.

⁴ Conclusion of Law 4 also should be viewed as a finding of fact since it contains the following factual assertion: "The officer did not know or have reason to know that the bag belonged to the defendant." A statement of fact in a Conclusion of Law is treated as a Finding of Fact. *See State v. Pierce*, 23 Wash. App. 664, 669, 597 P.2d 1383 (1979).

Even if the Court of Appeals were to determine that Deputy Wheeler knew or should have known that the tan and pink bag belonged to Ms. McCormick, the search would still be valid pursuant to *Parker*. The fact that Deputy Wheeler found the bag within the reach of the arrested driver provided Deputy Wheeler with an independent authority to search the bag.

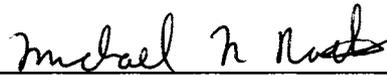
In this connection, Division One of the Court of Appeals recently held that evidence was lawfully seized when police officers found contraband in the portion of the passenger compartment that the arrested passenger could reach immediately before his arrest. *State v. Bello*, 142 Wash. App. 930, 176 P.3d 554 (2008). The facts of *Bello* are remarkably similar to the case at hand. In *Bello*, neither the driver nor the arrested passenger gave any indication that the contraband in question belonged to them. Equally important, the contraband was within the span of control of the arrested individual immediately prior to his arrest. The *Bello* court found that this search did not violate Article 1, Section 7 of the Washington State Constitution. The reasoning of the *Bello* Court should be followed here, and the Appellant's claim should be rejected.

E.

CONCLUSION

For the reasons listed above, the Appellant's assignments of errors should be rejected and the relief sought by the Appellant should be denied. The Appellant's conviction for possession of a controlled substance (methamphetamine) should be upheld.

RESPECTFULLY SUBMITTED:



MICHAEL N. ROTHMAN
SPECIAL DEPUTY PROSECUTOR
WSBA # 33048

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APPENDIX A

'08 MAR 10 P1 52

CHERYL BROWN
COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON
FOR GRAYS HARBOR COUNTY**

STATE OF WASHINGTON,
Plaintiff,

vs.

MICHELLE MCCORMICK,
Defendant

No. 07-1-00463-0

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter having come before the court upon the motion of the defendant to suppress all evidence seized during a warrantless search on August 17, 2007 of a bag belonging to the defendant. The court heard testimony, reviewed legal briefs of counsel for the parties and heard argument of counsel.

Based upon the above, the court makes the following:

FINDINGS OF FACT

1. On August 17, 2007, Officer Wheeler of the Elma P.D., while on routine traffic patrol, stopped a vehicle (a Ford Ranger pickup truck) operated by Alicia Muir for traffic infractions involving defective equipment. The defendant was seated in the passenger seat of the Muir vehicle.
2. Ms. Muir informed Officer Wheeler that she did not possess a valid drivers license.
3. A subsequent check by Officer Wheeler disclosed that Ms. Muir's driving status was suspended or revoked for unpaid tickets.

4. Officer Wheeler then arrested Ms. Muir for Driving While Suspended or Revoked and ordered her to step out of her vehicle, at which time Ms. Muir was handcuffed, searched for weapons and placed in the back seat of the patrol vehicle.
5. Officer Wheeler then ordered the defendant to step out of the vehicle as he intended to search the vehicle incident to the arrest of Ms. Muir. When the defendant exited the vehicle, she removed her purse and took it with her to the front of the vehicle where the officer had instructed her to stand. She did not attempt to remove any other items from the vehicle.
6. During his search of the vehicle, Officer Wheeler observed a tan and pink bag on the floor of the passenger side of the vehicle in the area where the defendant had been seated. The area where the bag was found was within easy reach of the driver's area of the vehicle.
7. A search of the bag resulted in the seizure of multiple items, including:
 - a. a knife box containing a glass smoking device in which the officer observed crystallized residue which he believed from his experience and training to be methamphetamine;
 - b. a black, zipped nylon bag containing several items, including two clear, plastic bags containing a white powdery substance recognized by the officer as methamphetamine and drug paraphernalia associated with the use of methamphetamine; and
 - c. a clear, plastic bag containing marijuana, which the officer recognized from his training and experience.
8. The defendant was then detained, advised of her Miranda rights, and questioned about ownership of the pink and tan bag. The defendant admitted to ownership of the bag, at which time she was placed under arrest.

From the foregoing findings of fact, the court reaches and makes the following:

CONCLUSIONS OF LAW

1. The initial stop of the Muir vehicle by Officer Wheeler was for the purpose of enforcing the traffic laws and was not pretextual.
2. Following the traffic stop, Officer Wheeler became aware of facts which gave him probable cause to arrest Alicia Muir for the crime of Driving While License Suspended or Revoked.
3. Officer Wheeler made a valid, custodial arrest of Ms. Muir and initiated a search incident to that arrest of the vehicle being operated by Ms. Muir for the purpose of searching for weapons.

4. Officer Wheeler searched a pink and tan bag on the floor of the vehicle in the area where the defendant had been seated. The officer did not know, or have reason to know, that the bag belonged to the defendant. The officer was justified in assuming that all containers in the Muir vehicle were subject to search.
5. The scope of the search of the bag was reasonable, i.e., it was limited to items and areas large enough to conceal a weapon.
6. The warrantless search in this case was incident to a valid, custodial arrest and was reasonable in its scope.
7. The defendant's motion to suppress evidence seized during the warrantless search is denied.
8. The defendant was properly advised of her constitutional rights prior to any custodial interrogation and she made a knowing and voluntary waiver of her rights when she answered questions from the police officers.
9. The defendant's motion to suppress statements made by her to the police is denied.

DATED: March 10, 2008



JUDGE

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

STATE OF WASHINGTON,)
)
 Respondent.)
)
 vs.)
)
 MICHELLE D. McCORMICK,)
)
 Appellant.)
 _____)

NO 37651-2-II
AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

MICHAEL ROTHMAN, being first duly sworn on oath, deposes and says:

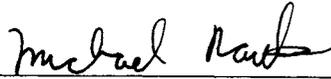
I am the Senior Prosecuting Attorney for Pacific County, Washington.

That on March 5th, 2009, I mailed two copies of the State's Brief of Respondent to Peter Tiller, Attorney for Appellant at the following address:

PETER TILLER
ATTORNEY AT LAW
P.O. BOX 58
CENTRALIA, WA 98531

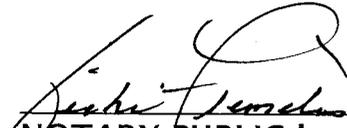
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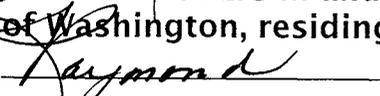
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Michael Rothman

SUBSCRIBED & SWORN to before me this 5th day of
March, 2009.



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