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STATE OF WASHINGTON
BY W. J. McCABE
DEPUTY

41850-9

WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington
Respondent

v.

DANITA K. OSTER
Appellant

41850-9

Lewis County Superior Court Cause Number 10-1-00515-8

The Hon. Nelson Hunt

APPELLANT'S BRIEF

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II. ASSIGNMENTS OF ERROR & ISSUES

A. Assignments of Error

1. The trial court erroneously denied Appellant's motion to suppress physical evidence obtained during a strip search at the County Jail in violation of Washington Constitution Article 1, Section 7, and the Fourth Amendment.

(a) The police had no articulable grounds to detain Appellant in the first instance.

(b) The police had no lawful grounds to search Appellant's purse.

(c) The police had no lawful grounds to subject Appellant to custodial arrest.

Therefore, evidence obtained in a strip-search of Appellant at the County jail was inadmissible.

2. The CrR 3.6 Findings of Fact misrepresent the evidence.

(a) The record does not support the Findings.

(b) The court violated due process by delaying entry of findings until its lack of recall rendered defense objections meaningless.

(c) It was prosecutorial misconduct to take advantage of the court's failure to uphold due process by presenting findings that misrepresented the evidence.

B. Issues Pertaining to Assignments of Error

1. Is an anonymous tip reporting a “suspicious person” on a public street sufficient grounds for the police, without further investigation, to intrude upon the privacy of any random person who happens to be standing on the street when the police arrive?
2. Does a “sweaty” or “nervous” appearance constitute articulable independent grounds to detain a person under *Terry*?¹
3. Could the police interaction with Appellant be characterized as a “social contact”?
4. Did the police have articulable grounds for a *Terry* stop?
5. Was Appellant lawfully arrested for obstructing the police based solely on a false statement made in the course of an unlawful detention?
6. Was Appellant lawfully arrested for possessing a glass pipe that the police did not find until they conducted a warrantless search of Appellant’s purse after she was arrested?
7. Was the warrantless search of Appellant’s purse lawful under any exception to the warrant requirement?
8. Is possession of a glass pipe grounds for a custodial arrest?
9. Are the court’s suppression findings supported by the evidence adduced at the CrR 3.6 hearing?
10. Did the trial court violate due process by delaying entry of CrR 3.6 Findings?
11. Did the prosecutor commit misconduct by exploiting the inability of the court and defense counsel to remember the specifics of the CrR 3.6 evidence to introduce spurious findings?

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

II. **SUMMARY OF THE CASE**

This is an elementary search and seizure case. The questions presented are whether the police lawfully approached Appellant on a public street and intruded on her privacy, and whether they exceeded the lawful scope of any conceivable grounds to detain her, arrest her, take her into custody, or subject her to warrantless searches of her purse at the scene and of her person at the jail.

III. **STATEMENT OF THE CASE**

Procedural Facts: Appellant, Danita K. Oster, was arrested on a public street in Chelalis, Washington at around six o'clock in the evening on September 8, 2010. RP 5, 9.² She was booked into jail on a charge of possession of drug paraphernalia. RP 11. A strip search during booking turned up what appeared to be a controlled substance. RP 10. Oster was formally charged with possession of methamphetamine. CP1. The substance was later identified as methamphetamine by the Washington State Patrol Crime Lab. RP 63.

Oster moved under CrR 3.6 to suppress all the evidence obtained in a warrantless search and seizure. CP 5-6; RP 3-25. The trial court denied her motion to suppress. CP 23; RP 19. The court concluded Oster

² RP is the verbatim reort of proceedings. It is in a single, continuously paginated volume containing the CrR 3.6 hearing, the trial, and sentencing.

was lawfully searched incident to a lawful arrest and that she was again lawfully searched incident to being lawfully booked into jail. CP 22-23. Oster waived her right to a jury and was tried to the bench. CP 20; RP 35-67.

She was convicted of unlawful possession of methamphetamine and received a standard range sentence of 30 days. CP 31, 33. She appeals. CP 42.

Substantive Facts: The following facts were elicited at the CrR 3.6 hearing on December, 8, 2010. RP 4-11. Chehalis police officer Monte Henderson and a second officer, Renshaw, responded to a report of a suspicious person on Second Street in Chehalis in separate cars. The only person in sight was Appellant, Danita K. Oster, who was standing on the sidewalk. RP 5. Based solely on the fact that no-one else was around, Henderson presumed Oster must be the suspicious person. Henderson believed criminal activity had occurred in the past at a nearby house at 275 SW 2nd Street. RP 5.

Henderson got out of his car and asked Oster to explain her presence in the neighborhood. She told him she had some belongings inside the house and was waiting for a friend to come and let her in. Henderson perceived this as “rambling on” and not making sense. RP 5.

Henderson thought Oster appeared to be “sweaty and acting very nervous and evasive.” RP 6. He therefore suspected she might be under the influence of something. He continued to interrogate her, asking her how she came there and what exactly she wanted to retrieve from the house. Oster did not answer to Henderson’s satisfaction. RP 6.

After one or two minutes, officer Renshaw got out of his car and approached the porch of the nearby house. Both officers noticed a purse sitting on the front porch. RP 6. Renshaw picked up the purse and one of the officers asked Oster who the purse belonged to. She said she did not know. RP 7. Renshaw then picked up the purse, saying, “Well, if it’s not yours, you don’t mind us looking in here, do you.” Oster then grabbed the purse and said, “No, no, this is mine, you can’t look at it.” RP 8.

She then attempted to end the encounter by walking away. RP 8. The officers ordered her to stop. Oster did not stop. RP 8. The officers physically grabbed her. Renshaw snatched the purse out of Oster’s hands. Then Henderson handcuffed her and put her in the back seat of the patrol car. RP 8. Henderson gave the following reasons for handcuffing Oster and putting her in the police car:

1. She had initially denied the purse was hers and then said it was hers.
2. She was “suspicious.”

3. Grabbing her purse back from Renshaw after he grabbed it from her was a threat to officer safety.
4. Oster obviously wanted to keep her purse out of the hands of the police.
5. Oster was drawing attention to them by yelling, and witnesses were coming out of nearby houses.
6. Henderson was “pretty sure [Oster] was going to end up going to jail. So I thought it would be better to secure her in the car... .”
7. Henderson was pretty sure Oster was under the influence of something and was being “evasive.”

RP 8-9.

Henderson characterized handcuffing Oster and putting her in the patrol car as “detaining” rather than arresting her. RP 11. He did not tell her she was being arrested, but said she was being “detained” for obstructing. RP 11. He testified that he intended to arrest her “for obstructing us,” but never did so. RP 10-11. Henderson was uncertain about whether Oster was in fact arrested, but said that, “for all intents and purposes she was in custody,” at the point when she was handcuffed and put in the car. RP 11. The trial court concluded as a matter of law that Oster was arrested at the point when she attempted to leave and was physically seized. Concl. 2.1, CP 23.

After Oster was handcuffed and in the patrol car, Renshaw searched her purse, which was a floppy, open-top bag. RP 9. Inside, he

found a glass pipe. The officers had not seen the pipe before this. RP 12. They concluded this pipe was what Oster had not wanted them to see. They nevertheless continued to search the purse and found a folding knife. RP 9. They had not seen the knife until this point and could not articulate any reason to suspect Oster might be armed or dangerous. RP 13. Henderson was, however, suspicious that Oster trying to hide something, based on the fact that she was trying to get away. He could not say what he was suspicious of. He just had a hunch that there was something in the purse she did not want them to see. RP 12.

After the discovery of the pipe, Henderson for the first time told Oster she was under arrest. The sole charge was possession of drug paraphernalia. RP 9. Henderson advised Oster of her Miranda rights³ and she asserted her right to remain silent. RP 9. Henderson then transported Oster to the Lewis County jail where she was booked. During booking, she was subjected to a strip search. In the course of this search, the police found what appeared to be narcotics. RP 10, 11.

At the bench trial, over defense counsel's renewed objection, the court admitted evidence that Oster had a bundle of methamphetamine concealed in her bra. RP 54, 63; 64-65.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

IV. **ARGUMENT**

1. AN ANONYMOUS TIP THAT A PERSON ON A PUBLIC STREET IS "SUSPICIOUS" IS NOT GROUNDS TO INTRUDE UPON THE PRIVACY OF ANY RANDOM CITIZEN WHO HAPPENS TO BE PRESENT WHEN THE POLICE ARRIVE.

Article I, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV. Article I, section 7 of our state constitution grants greater protection to individual privacy rights than the Fourth Amendment. *State v. Harrington*, 167 Wn.2d, 656, 663, 222 P.3d 92, 97 (2009).

An officer has probable cause to seize a Washington citizen if and only if the officer has knowledge of facts sufficient to cause a reasonable person to believe that an offense has been committed. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). An informant's tip can only furnish probable cause for arrest *provided* the State establishes the basis of the information and either the informant's credibility or reliability. *Gaddy*, 152 Wn.2d at 71. This test derives from *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), to which

Washington still adheres. *Gaddy*, 152 Wn.2d at 71 n. 2. At minimum, the State needed to show the suppression court that the informant had given his or her name and address, phone number, and other background information. *State v. Wakeley*, 29 Wn. App. 238, 241, 628 P.2d 835 (1981).

The State here made no showing that Henderson or Renshaw had any such knowledge. Rather, the evidence showed that the police subjected Oster to an unlawful search and seizure on a public street based solely on a hearsay report that an anonymous informant claimed to have seen a “suspicious” female in the vicinity. The State offered no evidence that the officers had the slightest clue what this information meant, let alone that either the information or its source was reliable. The suppression court heard not a jot of evidence regarding the alleged nature of the suspicious conduct. Rather than contacting the informant or independently observing Oster to corroborate the tip, Henderson simply barged up to Oster in reliance on a vague and unsupported allegation from persons unknown.

Any evidence derived from this unlawful seizure is fruit of the poisonous tree and is inadmissible in any Washington court for any purpose. *See, State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595

(2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

“If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government’s illegality.” *Harrington*, 167 Wn.2d at 664, citing cases. Suppression will be granted whenever there is a meaningful causal connection between the State’s unlawful activity and the acquisition of evidence, because such evidence is “the fruit of the poisonous tree.” *Wong Sun*, 371 U.S. at 487-88. That is the case here.

The sole remedy is to reverse Oster’s conviction.

2. A “SWEATY” OR “NERVOUS” APPEARANCE DOES NOT CONSTITUTE ARTICULABLE GROUNDS FOR A *TERRY* STOP.⁴

Henderson justified detaining Oster on what he perceived as her sweaty and nervous appearance and evasive demeanor. This is patently insufficient.

To justify detaining and frisking a person without probable cause to arrest, an officer must have a reasonable belief, based on objective facts, that the suspect is armed and presently dangerous. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). Without such objective facts, the police intrusion is merely “arbitrary or harassing.” *Id.*

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The facts here are very like those in *Setterstrom*. There, the police responded to an anonymous report that Setterstrom was under the influence while lawfully present in the lobby of a DSHS office. Setterstrom appeared nervous and fidgety and lied to the police about his name. This was not grounds to intrude on his liberty. *Setterstrom*, 163 Wn.2d at 627.

Likewise, in *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008), the Court held that nervousness and inconsistent statements are not grounds for an intrusion on liberty, being consistent with legal activity. “We do not permit searches merely because people . . . are nervous, or tell inconsistent versions of events.” *Neth*, 165 Wn.2d at 184. In *Neth*, a suspect’s nervous demeanor and inconsistent statements did not justify an intrusion on his privacy even when combined with possession of plastic baggies and a large amount of cash. *Id.*

Here, Oster’s sweating, nervousness, and momentarily denying ownership of her purse did not create reasonable grounds for the police to bother her.

The trial court should have suppressed all evidence derived from the unlawful detention of Oster must be suppressed. This Court should reverse the conviction that ultimately derived from it.

3. THE POLICE INTERACTION WITH OSTER
WAS A SEIZURE, NOT A “SOCIAL CONTACT.”

The determination of whether the facts surrounding the detention of an individual by the police constitute a seizure is one of law and is reviewed de novo.” *Harrington*, 167 Wn.2d at 662.

The State might argue that Henderson’s interaction with Oster was merely a social contact. But the State did not suggest this at the CrR 3.6 hearing. It is the State’s burden to show that a warrantless search and seizure was justified by an applicable exception. *State v. Afana*, 169 Wn.2d 169, 177-78, 233 P.3d 879 (2010). Therefore, this Court reviews a suppression challenge based solely evidence in the trial record. *State v. Swetz*, 160 Wn. App. 122, 129, 247 P.3d 802 (2011). “It is not the reviewing court’s burden to show that a particular exception applies, particularly one the State has not raised.” *Id.*, at 133.

Henderson never claimed his interaction with Oster was anything other than an investigative detention. The police had received a report of a suspicious person, and Oster was the prime suspect since no-one else was around.

Moreover, the encounter could not be characterized as a social contact, because the difference between a seizure and a social contact is whether the subject is free to terminate the encounter and walk away.

State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489, 496 (2003). Any possibility that the seizure could be deemed “social” evaporated when Oster decided to end the encounter tried to walk away. The officers physically grabbed and held her, snatched her purse from her grasp, handcuffed her and shoved her into the patrol car. Henderson testified that he regarded Oster as in custody at the point she tried to leave. The trial court correctly concluded that she was under arrest. Concl. 2.1, CP 23.

That being so, Oster was arrested from the beginning of the encounter, because there was no intervening event between the initial contact and Oster’s walking away that could have changed the nature of the contact or constituted an arrest. At no point could the interaction be characterized as a social contact, because the sine qua non of a social contact is that the subject is free at all times to terminate the encounter and walk away. Oster was not.

4. HENDERSON’S SEIZURE OF OSTER
WAS NOT A LAWFUL TERRY STOP.

The *Terry* stop is a brief investigatory seizure that is an exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A Terry stop seizure. *State v. Kennedy*, 107 Wn.2d

1, 4, 726 P.2d 445 (1986). It is less intrusive than an arrest, but the person is nevertheless is not free to leave. *Id.*⁵

A *Terry* stop must be reasonable from its inception. *Kennedy*, 107 Wn.2d at 4. The police must be able to articulate a well-founded suspicion that a suspect is engaged in criminal conduct. *Terry*, 392 U.S. at 21; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The State must point to specific and articulable facts, known at to the officer at the inception of the stop, which together with rational inferences from those facts, reasonably warranted a particular intrusion. *Kennedy*, 107 Wn.2d at 4; *Terry*, 392 U.S. at 21. The State must show by clear and convincing evidence that a *Terry* stop was justified. *Garvin*, 166 Wn.2d at 250.

For the reasons discussed in Issue 2, the police knew of no articulable facts that would justify seizing Oster. A “well-founded suspicion” has to mean more than having been told that some anonymous lay person thought the person was “suspicious.” Possibly, the police could have acquired sufficient facts — either from the informant or from a brief independent observation — had they bothered to do so. They did not

⁵ It does not rise to the level of “custody” for Miranda purposes. *Berkemer v. McCarty*, 468 U.S. 420, 439-40, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

bother, apparently believing Ms. Oster was a “child of a lesser god” in the protected rights department. They were mistaken.

This Court vacate the judgment and sentence and order any evidence derived from the unlawful detention suppressed.

5. OSTER WAS NOT LAWFULLY ARRESTED FOR OBSTRUCTING BASED SOLELY ON A FALSE STATEMENT MADE IN THE COURSE OF AN UNLAWFUL DETENTION.

The court erroneously concluded that the officers had a reasonable suspicion that Oster was committing the crime of obstructing a public servant. Conclusion 2.2, CP 23.

The obstructing statute says: It is unlawful to hinder, delay, or obstruct a law enforcement officer in the discharge of his official powers or duties. RCW 9A.76.020(1). But the statute assumes the defendant obstructed police exercising a lawful duty. Here, that means the police had the lawful right to investigate some reasonable suspicion of criminal activity. *State v. Barnes*, 96 Wn. App. 217, 224, 978 P.2d 1131 (1999). Otherwise, the State cannot argue that the officer was discharging his lawful police duties. *Id.* Moreover, the crime of obstructing requires some conduct in addition to making a false statement. *State v. Williams*, ___ Wn.2d ___, ___ P.3d ___ (2011), Slip Op. No. 83992-1, filed May 12, 2011 at page 13.

Of particular significance here is the *Williams* court's explanation for holding that a false statement is not enough to justify an arrest. The Court was concerned that "law enforcement officers, without probable cause or even reasonable suspicion that a crime is being committed, may engage citizens in conversation, arrest them for obstruction based upon false statements, and then search incident to the arrest." *Williams*, Slip Op. at 14. That is exactly what these officers did to Ms. Oster.

Henderson's interference with Oster's liberty was unlawful. Therefore, there could be no lawful arrest for obstructing.

6. OSTER WAS UNLAWFULLY ARRESTED FOR POSSESSING A GLASS PIPE NOT FOUND UNTIL A WARRANTLESS SEARCH OF HER PURSE AFTER THE ARREST.

Under *Patton, Buelna Valdez*, and art. 1, § 7, it was unlawful to conduct a warrantless search to seek evidence with which to legitimize Oster's otherwise unlawful arrest. The police cannot arrest people in Washington for possession of something they hope to find in a subsequent search. *Swetz*, 160 Wn. App. at 807. It goes without saying that a lawful arrest must precede a search incident to arrest. *State v. Parker*, 139 Wn.2d 486, 497 987 P.2d 73 (1999), citing *State v. Miles*, 29 Wn.2d 921, 933, 190 P.2d 740 (1948).

Where evidence is obtained through exploitation of a prior unlawful seizure, suppression is required. *Harrington*, 167 Wn.2d at 667; *Garvin*, 166 Wn.2d at 254.

Oster was taken into custody and transported to the County jail under arrest on the spurious charge of possessing a glass pipe which the police did not find until they searched her purse incident to her arrest.

The evidence found during the search of Oster at the jail must be suppressed.

7. THE WARRANTLESS PURSE SEARCH WAS NOT LAWFUL UNDER ANY EXCEPTION TO THE WARRANT REQUIREMENT.

The Fourth Amendment provides: “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....” Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” *Swetz*, 160 Wn. App. at 129. Without probable cause and a warrant, the police cannot arrest a suspect or conduct a broad search. *Setterstrom*, 163 Wn.2d at 626, citing *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). An officer may frisk a person for weapons only if (1) the stop preceding the frisk was lawful, and (2) the officer has a

reasonable concern of danger. *Setterstrom*, 163 Wn.2d at 626, citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). “The failure of any of these makes the frisk unlawful and the evidence seized inadmissible.” *Setterstrom*, 163 Wn.2d at 626.

This was not a lawful Terry frisk. Even the State had shown that a *Terry* stop was justified, an officer may not frisk the detainee without a reasonable belief, based on objective facts, that she is armed and presently dangerous. *Setterstrom*, 163 Wn.2d at 626, citing *Collins*, 121 Wn.2d at 173.

Here, the officers had no such belief. They did not encounter Oster “in a dark alley in a crime-ridden area.” See *Setterstrom*, 163 Wn.2d at 627. It was six o’clock in the evening on a residential street. And Oster did not offer any threatening words or behavior. Like *Setterstrom*, Oster was lawfully in a public place. Whether or not she was “under the influence” is immaterial. Being under the influence is not a crime, nor is it an articulable reason to suspect a crime is being committed. *Setterstrom*, 163 Wn.2d at 627.

This was not a search incident to a lawful arrest. First, as discussed above, Oster was not lawfully arrested.

The problem with the belated search of the purse may explain why the court ruled that Oster was under arrest from the outset of the

police contact, despite the lack of any evidence supporting anything remotely resembling a ground for arrest. This permitted the court to rule that, once Oster was under arrest, her purse was lawfully searched incident to that arrest. Then, once contraband was found in her purse, she was lawfully arrested for possessing it. Concl. 2.3, CP 23. But, at the point her purse was searched, Oster was sort of maybe arrested for obstructing. RP 9.

She also was in handcuffs and secured in the back of the police car. Therefore, it was not lawful to search her purse incident to her arrest.

A lawful search incident to arrest under art.1, § 7 must be justified either by concerns for officer safety or for the preservation of evidence. *Swetz*, 160 Wn. App. at 130, citing *Patton*, 167 Wn.2d at 394-95. Since *Patton*, our courts have ceased to sanction a search incident to arrest that takes place after the arrestee is secured and no longer poses a risk to the arresting officers. *Patton*, 167 Wn.2d at 395; *Swetz*, 160 Wn. App. at 130.

Swetz and *Patton* involved the search of a vehicle, in which it has long been recognized the expectation of privacy is attenuated. The right to privacy of a purse, by contrast, is even more vigorously protected.

The search incident to arrest exception applies solely when officers cannot delay the search to obtain a warrant because the arrestee poses a threat to officer safety or to prevent the destruction of evidence. *State v.*

Buelna Valdez, 167 Wn.2d 761, 777, 779, 224 P.3d 751 (2009). Under *Patton*, *Buelna Valdez*, and art. 1, § 7, it was unlawful to conduct a warrantless search to seek evidence with which to legitimize Oster's otherwise unlawful arrest. The police cannot arrest people in Washington for possession of something they hope to find in a subsequent search. *Swetz*, 160 Wn. App. at 807.

Because it was not possible that evidence of the crime of obstructing could be found in the purse, and because Oster was secured in the patrol car, removing any conceivable concern that she was armed or destroy evidence, under well-settled Washington law, no lawful reason could be devised for searching Oster's purse without a warrant.

Any evidence derived from the search and seizure violation must be suppressed. The Court should reverse Oster's conviction.

8. POSSESSION OF PARAPHERNALIA IS NOT
GROUNDS FOR CUSTODIAL ARREST.

Oster was subjected to custodial arrest on the spurious ground of possession of a glass pipe. The trial court erroneously ruled that this was grounds for a lawful arrest.

It is well-established that mere possession of drug paraphernalia is not a crime. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). A custodial arrest for use of a glass pipe would be lawful solely if

the pipe were used for an illegal purpose in the presence of the arresting officer. RCW 69.50.412; RCW 10.31.100.

Here, there was no such evidence. Without that, there was no evidence Oster used the glass pipe for an illegal purpose. Possessing it was not, therefore, a crime.

Any evidence resulting from her unlawful arrest must be suppressed, and the conviction based on that evidence must be vacated and dismissed with prejudice.

9. THE CrR 3.6 FINDINGS DO NOT REFLECT
THE EVIDENCE IN THE CrR 3.6 RECORD.

At the conclusion of the CrR 3.6 suppression hearing, defense counsel attempted to docket a hearing at which he could enter any objections to the Findings of Fact. The court instructed counsel instead to wait and do this on the trial date. RP 21-22.

By trial date, however, the court retained no recollection of the suppression proceeding and could not meaningfully entertain any objections. The Findings are labelled "Undisputed." CP 21. This is erroneous. The court's Findings do not reflect the evidence actually presented at the hearing. Every single "finding" contains "facts" that were not before the suppression court. Defense counsel tried to dispute the

findings but was not permitted to do so because the court had no recollection of the evidence on which they were based. RP 28.

Finding No:

1.1. On September 8, 2010 at 6:00 p.m., Chehalis police were dispatched to a report of a disorderly and suspicious female wandering the area of 275 SW 2nd Street. Finding 1.1, CP 21.

The evidence at the CrR 3.6 hearing was simply that a suspicious female was reported in the area. The State presented no evidence that the person was disorderly. RP 5. The State elicited no evidence as to what “wandering” meant, or how it was different from walking, waiting, or other lawful manner of being present.movement.

1.2. “Patrols were advised that the female was sitting on the porch or 275, which is a vacant residence.” Finding 1.2, CP 22.

No evidence was presented at the CrR 3.6 hearing (a) that the person was sitting on any porch (let alone a specific porch), or (b) that 275 SW 2nd Street was vacant. RP 5.

1.3. Officer Henderson saw a female standing on the sidewalk in front of the residence. She began “rambling” about her belongings being inside the 275 residence. Finding 1.3, CP 22.

Henderson used the perjorative term “rambling on” to describe Oster’s statements, but he did not explain why she was “rambling” rather than speaking or explaining. RP 5.

1.4. The female was breathing rapidly. Finding 1.4, CP 22. There is no evidence of this.

1.5. Henderson thought the female was under the influence of some substance. Finding 1.5, CP 22. This misrepresents the testimony. Henderson said he thought she might be “under the influence.” He did not say of what — whether a substance, a medical emergency, a deluded idea, a Svengali-like individual, or whatever.

1.6. Officer Renshaw noticed a large, brown, leather purse on the front porch. Finding 1.6, CP 22.

The record contains no such description. The purse was described merely as floppy and open-topped. RP 9.

1.11. After grabbing her purse from Renshaw, Oster became combative. Finding 1.11, CP 22.

There is no evidence of any conduct by Oster that could be described as combative after she grabbed her purse and tried to end the encounter by walking away. Henderson testified that the officers grabbed her and physically restrained her. Then Renshaw grabbed the purse back out of Oster's hands. Oster was immediately handcuffed and put in the back seat of the patrol car. RP 9.

1.12. The officers looked in the purse and saw a large glass smoking device in plain sight near the top of the purse. Finding 1.12, CP 22.

There is no evidence that the glass pipe was (a) large, or (b) in plain sight. The testimony at the CrR 3.5 hearing was simply that a glass pipe was on top of other items in the bag, but that it was hidden from sight until after the officers opened the bag and looked inside it. RP 9.

1.13. Oster was read her Miranda warnings at the jail. Finding 1.13, CP 23.

There is no evidence for this. Henderson testified that he read her rights at the scene after finding the pipe and before transporting her to jail. RP 9.

1.14. While being searched, Corrections Officer Justice found a small baggie with a crystal substance inside. The baggie was found in Oster's bra during the search. Finding 1.14, CP 23.

Presumably, Oster, not Officer Justice was searched. The CrR 3.6 hearing record does not identify the officer who

strip-searched Oster. There is no evidence that the officer found (a) a baggie of any size or description, or (b) a crystal substance, or that (c) anything was in Oster's bra or anywhere else. Henderson merely testified (without objection to the hearsay) that the jail search turned up something that appeared to be a narcotic. RP 10-11.

1.15. Justice then gave the substance to Henderson who field tested it, and the substance field tested positive for methamphetamine. Finding 1.15, CP 23.

This is pure fiction. The State elicited no such testimony at the CrR 3.6 hearing. RP 11.

10. THE COURT VIOLATED DUE PROCESS BY DELAYING THE PRESENTATION OF FINDINGS UNTIL IT HAD NO RECOLLECTION OF THE HEARING

The court rule governing suppression hearings sets forth the "duty of the court." The rule requires the court to enter its findings and conclusions "at the conclusion" of the hearing. CRR 3.6(b). "At the conclusion of" in this context means at the point in time where the hearing concludes, not any time it is convenient so long as entry of findings does not precede the hearing.

Here, rather than entering findings at the conclusion of the CrR 3.6 hearing or setting a date to enter findings shortly thereafter, the court instructed counsel to hold on to the findings and defense counsel's objections until the morning of trial two and a half months later. RP 21-

22. On the morning of the trial, the court had no recollection of the

hearing or the evidence upon which the findings purportedly were based. Possibly recognizing the due process implications of this, the judge chastized counsel for not presenting the findings sooner. RP 28. The court then signed off on Findings that have no more than a nodding acquaintance with the evidence presented by the State at the CrR 3.6 hearing.

There is a reason for requiring the timely entry of findings. Judges conduct many hearings at which they adjudicate many similar fact scenarios. The more time that elapses between the hearing and the findings, the less likely it becomes that the findings will reflect the actual evidence. Delay also precludes defense counsel from meaningfully objecting to misrepresentations and exaggerations such as those we see here. This compromises due process.

Because the erroneous Findings cannot be deemed as supporting the court's conclusions of law, the suppression ruling should be vacated.

11. THE PROSECUTOR COMMITTED
MISCONDUCT BY MISREPRESENTING THE
EVIDENCE IN THE 3.6 FINDINGS.

Prosecuting attorneys are officers of the court. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). They have “a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *Id.*

Prosecutorial misconduct requires reversal if there is a substantial likelihood it affected the outcome of the trial. *Fisher*, 165 Wn.2d at 747, citing *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Defense counsel is expected to object to misconduct unless it is too “flagrant and ill-intentioned” to be curable. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); *Fisher*, 165 Wn.2d at 747.

Here, the defense counsel was not allowed to address the objectionable Findings earlier. By trial date, counsel — like the judge himself — was not in a position to meaningfully object to the prosecutor’s self-serving version of the evidence. Therefore, counsel was not able to request a cure, and the court was not in a position to grant relief.

Exploiting the limitations of the judge to introduce misleading or patently false Findings was misconduct per se.

Oster was prejudiced by these spurious Findings. The State introduced supposed “facts” that were not offered at the suppression hearing but which tend to ameliorate the manifestly unlawful character of the police conduct. For example, the State presented no evidence that Oster was “disorderly” — which suggests an articulable reason to detain and investigate her. Finding 1.1, CP 21. She was not sitting on the porch of a vacant house. Finding 1.2, CP 22. She was standing on the street. There was no vacant house. RP 5. Oster was not breathing rapidly, which

is more suggestive of unlawful conduct than merely being nervous, or even “sweaty.” Finding 1.4, CP 22. Finally, Oster did not become combative after the officers stopped her. Finding 1.10 & 1.11. Henderson did not claim that grabbing her purse and trying to walk away was “combative” and nothing he testified to after Oster was prevented from leaving can be so characterized. Again, this tends to whitewash the officers’ conduct. This is grounds in itself to reverse Oster’s conviction.

V. **CONCLUSION**

For the foregoing reasons, Danita Oster asks this Court to reverse her conviction and vacate the judgment and sentence.

Respectfully submitted this 16th day of May, 2011.

A handwritten signature in black ink that reads "Jordan B. McCabe". The signature is written in a cursive style with a horizontal line underneath it.

Jordan B. McCabe, WSBA No. 27211
Counsel for Ms. Oster

11 MAY 17 11:11:59
STATE OF WASHINGTON
BY JSB
DEPUTY

CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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