

No. 42960-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RACHEL J. RIDER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it denied Rider's motion to suppress the evidence obtained from her purse?
- B. Did the trial court abuse its discretion when it allowed Officer Ayers to testify that he arrested Rider for theft?
- C. Did the trial court abuse its discretion when it denied Rider's request for a stay of the imposition of her sentence?

II. STATEMENT OF THE CASE

On February 5, 2011 Rachel Rider was detained by Wal-Mart loss prevention employee, Adrian Bingham, on suspicion of shoplifting. MRP 3-4, JRP 15-16.¹ Mr. Bingham had watched Rider select several items and conceal the items in her purse. MRP 4. Mr. Bingham saw Rider then walk to the bathroom in the front of the store, past the points of payment without first purchasing the merchandise Rider had placed in her purse. MRP 4. When Rider was detained by loss prevention, none of the merchandise was found on her person. MRP 7-8. The merchandise that Rider put in her purse was found in the bathroom. MRP 7-8.

Officer Ayers from the Chehalis Police Department responded to Wal-Mart and contacted Rider in the loss prevention

¹ There are three main verbatim report of proceedings the State intends on citing to in its briefing. The CrR 3.6 hearing on 11-2-11 will be cited as MRP; the jury trial on 12-1-11 will be cited as JRP; and the sentencing hearing on 1-4-12 will be cited as SRP.

office. MRP 4, JRP 16. Rider was seated on a bench with her purse on a table next to her. MRP 5, JRP 16-17. Officer Ayers placed Rider under arrest for theft. MRP 8. Rider was taken into custody and handcuffed. MRP 5, 8, JRP 17. Rider and her purse were taken out to Officer Ayers's police car and both were searched incident to Rider's arrest. MRP 5-6, JRP 19-20. At the time Officer Ayers searched Rider's purse he had no knowledge if the purse had been searched by a loss prevention employee of Wal-Mart. MRP 6. Officer Ayers, in addition to a search incident to the arrest, was also searching for further evidence of the crime of the theft. MRP 6. Officer Ayers located an Advil bottle that contained four blue pills. MRP 9, JRP 20. Rider admitted that the pills were generic valium and she did not have a valid prescription for the pills. JRP 20-21.

Rider filed a motion to suppress, which was denied. CP 4-14; 48-50. A jury convicted Rider of possession of a controlled substance. CP 47. Rider timely appeals her conviction. CP 61. The State will further supplement the facts as needed throughout its briefing below.

III. ARGUMENT

A. THE WARRANTLESS SEARCH OF THE LOCKED BOX FOUND IN RIDER'S PURSE WAS PERMISSIBLE, THEREFORE THE TRIAL COURT CORRECTLY RULED THAT THE EVIDENCE OBTAINED FROM IT WAS ADMISSIBLE.

A person who is under arrest may be searched incident to their arrest. In this case Rider was arrested for theft after allegedly shoplifting from a Wal-Mart store. MRP 5, 8, JRP 17. The officer searched her purse, which she had on her at the time of arrest, seated at most an arm's length away from her on a table, after she was arrested and escorted out to his police vehicle. MRP 5, 8, JRP 17, 19. Contrary to Rider's argument to this Court, the search was permissible and her conviction for possession of diazepam should be affirmed.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. art. I, § 7. People have a right to not have government unreasonably intrude on one's private affairs. U.S. Const. amend IV. Probable cause is required to be established prior to the government obtaining a warrant to search. U.S. Const. amend IV. Article I, section seven, of the Washington

State Constitution protects the privacy rights of the citizens of Washington State. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

The general rule is that warrantless searches are considered per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2026, 29 L.Ed.2d 564 (1971). It is the State's burden to show that a warrantless search falls within an exception to this rule. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), citing *Arkansas v. Sanders*, 448 U.S. 753, 759, 99 S. Ct. 2586, 2590, 61 L.Ed.2d 235 (1979). "The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry*² investigated stops." *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

² *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).

When a person is under actual, lawful custodial arrest he or she may be searched incident to that arrest. *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973); *State v. O'Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). The right to search incident to arrest is of long pedigree in English and American law. *Weeks v. United States*, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914).³ Because the purpose of the search is to ensure officer safety and the preservation of evidence, only the area within the arrestee's reach is subject to search. *Chimel v. California*, 395 U.S. 752, 755-63, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969). This is the area from which the arrestee might obtain a weapon or destructible evidence. *Id.*

The search incident to arrest rule is per-se, therefore a law enforcement officer is not required to make fine distinctions regarding whether its officer-safety rationale is satisfied in any individual case:

We do not think the long line of authorities of this Court dating back to *Weeks*, or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication.

³ Noting that "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested . . . has been uniformly maintained in many cases"

A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.

United States v. Robinson, 414 U.S. at 235.

The right also applies to searches of all containers in the defendant's possession. *E.g., id.* at 236 (cigarette package containing heroin); *Draper v. United States*, 358 U.S. 307, 314, 79 S. Ct. 329, 3 L.Ed.2d 327 (1954) (search of bag in the defendant's hand at the time of arrest was lawfully incident to arrest). The right is limited to containers of a type from which the defendant "might gain possession of a weapon or destructible evidence." *United States v. Chadwick*, 433 U.S. 1, 14-15, 97 S. Ct. 2476, 53 L.Ed.2d 538 (1977),⁴ *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982 (1991).

The search must be substantially contemporaneous with the arrest and within the same area. *Vale v. Louisiana*, 399 U.S. 30,

⁴ Disapproving of a search of a 200-pound, double-locked footlocker an hour after the arrest

34, 90 S. Ct. 1969, 26 L.Ed.2d 409 (1970). A search remote in time or place from the arrest is not incident to it. *E.g., Preston v. United States*, 376 U.S. 364, 367-68, 84 S. Ct. 881, 11 L.Ed.2d 777 (1964);⁵ *Stoner v. California*, 376 U.S. 483, 487, 84 S. Ct. 889, 11 L.Ed.2d 856 (1964).⁶ But a search of the defendant's personal effects within his or her wingspan, made at the time and place of the arrest, is lawful even if by the time the search occurs the defendant is detained and the officer has control of the items. *See United States v. Garcia*, 605 F.2d 349, 352 (7th Cir. 1979), *cert. denied*, 446 U.S. 984 (1980);⁷ *United States v. Mehciz*, 437 F.2d 145, 146-148 (9th Cir. 1971).⁸

The United States Supreme Court ruled it was constitutional for a law enforcement officer to search the passenger compartment of an arrestee's automobile incident to arrest. *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L.Ed.2d 768 (1981). The Court further held, "[i]t follows from this conclusion that the police

⁵ In *Preston* the Court found that a search of car at garage, where it was towed after its occupants had been arrested and taken to the police station, was not incident to arrest.

⁶ In *Stoner* the Court stated, "[T]he search of the petitioner's hotel room in Pomona, California, on October 27 was not incident to his arrest in Las Vegas, Nevada, on October 29."

⁷ Upholding a search in which the defendant dropped her suitcases right before arrest, was moved away while being arrested, and another officer brought the suitcases over and searched them.

⁸ Finding a search of the defendant's suitcase, after he was cuffed but in the same spot as the arrest, indistinguishable from *Draper* and therefore approved under *Chimel*.

may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrest, so also will the containers in it be within his reach. Such container may, of course, be searched whether open or closed..." *New York v. Belton*, 453 U.S. at 460-61 (citations omitted).

The Washington State Supreme Court decided that pursuant to the Washington State Constitution and case law a law enforcement officer may search the passenger compartment of a vehicle incident to arrest for evidence and weapons. *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986). The Court further held that locked containers found during a search of the passenger compartment of a motor vehicle incident to arrest may not be searched without first obtaining a warrant. *State v. Stroud*, 106 Wn.2d at 152. The Court reasoned that there was a heightened expectation of privacy in a locked container found inside a car. *Id.*

The United State Supreme Court later decided a search of an automobile incident to a recent occupants arrest only pertains to certain limited circumstances. *Arizona v. Gant*, 556 U.S. 332, 351, 129 S. Ct. 1602, 173 L. Ed. 2d 485 (2009). The exceptions allowed

by the Supreme Court in *Gant* are (1) if at the time of the search, the passenger compartment of the vehicle is within the arrestee's reach, and (2) "reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*, 556 U.S. at 351. In *Gant* the crime of arrest was driving on suspended license. *Gant* was arrested, handcuffed and placed in the back of the patrol car. It was not reasonable to believe that the vehicle would contain evidence of *Gant* driving on a suspended license.

The United States Supreme Court looked at *Chimel*, *Belton* and the Fourth Amendment of the United States Constitution when it examined the search incident of a vehicle incident to arrest in *Gant*. See, *New York v. Belton*, 453 U.S. 454; *Chimel v. California*, 395 U.S. 752. The Court discussed how the *Chimel* holding was that a search incident to arrest was justified by the interest of officer safety and evidence preservation. *Arizona v. Gant*, 556 U.S. at 337-38. This interest created an exception to the warrant requirement. *Id.* The Court looked at the reasonableness of a warrantless search and held that automobiles create unique circumstances which justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Id.* at 350.

Washington law quickly followed *Gant* in limiting searches of automobiles incident to arrest of a recent occupant of the automobile. *State v. Patton*, 167 Wn.2d 379, 394, 219 P.3d 651 (2009); *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009). The Washington State Supreme Court found that the *Belton* and *Stroud* rule could not survive the heightened privacy guaranteed under Article I, section seven of the Washington State Constitution and therefore effectively eliminated warrantless searches of automobiles except in very limited circumstances. *State v. Valdez*, 162 Wn.2d at 760. In many aspects, the courts have now been treating the privacy rights in an automobile similar to the right of privacy one has in their residence.

The historic justifications for search incident to arrest have been applied by the Washington State Supreme Court. *State v. Smith*, 119 Wn.2d 675. This justification, which has been found to be permissible under Article I, section 7 of the Washington State Constitution, corresponds to the common law right. *State v. Salinas*, COA No. 65527-2-I, at slip 11 (July 2, 2012), *citing State v. Ringer* 100 Wn.2d 686, 693, 674 P.2d 1240 (1983). A person who has been arrested has a diminished expectation of privacy. *State v. Salinas*, COA No. 65527-2-I, at slip 11; *State v. Jordan*, 92 Wn.

App. 25, 30, 960 P.2d 949 (1998), *citing State v. White*, 44 Wn. App. 276, 278, 722 P.2d 118, *review denied*, 107 Wn.2d 1006 (1986). This diminished privacy interest includes “personal possession closely associated with the person’s clothing.” *State v. Salinas*, COA No. 65527-2-I, at slip 11, *citing State v. Parker*, 139 Wn.2d 486, 499, 987 P.2d 73 (1999); *State v. Jordan*, 92 Wn. App. at 30. Also the property which has been “seized incident to a lawful arrest may be used to prosecute the arrested person for a crime other than the one for which he was initially apprehended.” *State v. Jordan*, 92 Wn. App. at 30.

In *Jordan* police found on two separate occasions closed containers on Jordan when he was arrested on an outstanding warrant. *State v. Jordan*, 92 Wn. App. at 26. The court held that search of the closed containers, a pill bottle and a film canister, were valid searches under the search incident to arrest exception to the warrant requirement. *Id.* at 30.

In *Smith* the officer had to chase Smith down and during a struggle Smith’s fanny pack fell off. *See, State v. Smith*, 119 Wn.2d 675. After arresting Smith the officer went back, retrieved the fanny pack and searched it incident to Smith’s arrest. *Id.* The Washington State Supreme Court held that the search, incident to

arrest, of the fanny pack was permissible and the evidence obtained from that search was admissible. *Id.* at 684. The Court reasoned that “Smith was in actual physical possession of the fanny pack just prior to the arrest, and the fanny pack was within his reach at the moment of arrest. For search incident to arrest purposes, therefore, the fanny pack was in his control at the time of arrest.” *Id.* at 682.

Rider argues that Supreme holding in *State v. Snapp* applies to warrantless searches incident to arrest regardless of the circumstances of the arrest. Brief of Appellant 7-10. Upon a careful reading of *Snapp* it is clear the Supreme Court’s analysis is limited to searches of a vehicle after a recent occupant’s arrest. *State v. Snapp*, 174 Wn.2d 177, 188, 275 P.3d 289 (2012). The court states at the beginning of its analysis, “[t]he exception at issue here is a the search incident to arrest, and more specifically , the search of a vehicle incident to arrest.” *State v. Snapp*, 174 Wn.2d at 188. In its conclusion the court states, “[w]e hold that the second version of the vehicle-search-incident-to-arrest exception recognized by the United States Supreme Court in *Gant*... does not apply under article I, section 7.” *Id.* at 201. *Snapp* analysis regarding vehicle searches is not helpful in Rider’s case because

Rider was in a holding room, sitting on a bench next to her purse, when she was placed under arrest for theft.

Rider relies briefly on *State v. Byrd* to argue that the search of Rider's purse was not permissible. Brief of Appellant 5-6. Byrd was a passenger in a vehicle that was stopped for the use of stolen license plates. *State v. Byrd*, 162 Wn. App. 612, 614, 258 P.3d 686 (2011). Byrd, who was the owner of the vehicle, was arrested for possession of stolen property. *State v. Byrd*, 162 Wn. App. at 614. Byrd had her purse sitting on her lap when the officer ordered Byrd out of the vehicle announced and she was under arrest. *Id.* The officer took Byrd and the purse back to his patrol car, placed Byrd in the back of the patrol car and searched her purse incident to arrest. *Id.* Division III of the Court of Appeals held that, "*Gant* rejected the well-accepted interpretation that *Belton* authorizes the search of a vehicle incident to a recent occupants arrest after the arrestee has been secured and cannot access the inside of the vehicle." *Id.* at 616. The Court went on to state the holdings in *Gant* applies to a search incident to arrest whether the object searched is a car or personal property of a person arrested. *Id.* at 617.

The State respectfully disagrees with Division III's interpretation of the search incident arrest exception to the warrant requirement as argued above. The trial court in this case correctly declined to apply *Byrd*. CP 50. *Byrd* is at best a case that deals with a person who is in possession of property in a vehicle, which is distinctly different than the circumstances of Rider's case. The trial court correctly applied *Smith*, which has not been overruled, is more factually analogous with Rider's case and correctly applies the law in regards to search of a person and or personal property upon arrest.

If an officer can search a person incident to arrest, even once they are handcuffed, for officer safety and destruction of evidence, then a search of the personal belongings that were in the arrestee's custody or control, under the same reasoning is permissible. This would include a purse that is easily accessible and on the arrestee's person at the time of the arrest pursuant to *Smith* and *Salinas*. A person has a diminished expectation of privacy in their person once they are arrested and this diminished expectation would also transfer to their personal belongings in their possession at or near the time of arrest. The trial court properly ruled that the evidence contained within the purse was admissible

pursuant to a search incident to arrest. Rider's conviction should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED OFFICER AYERS TO TESTIFY TO THE FACT SURROUNDING RIDER'S ARREST.

The State is permitted to present evidence or testimony regarding uncharged crimes that are part of the same incident or continuous chain of events that completes the picture of the events under the res gestae exception. *See State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003). In this case, Rider's alleged shoplifting is what created the circumstances under which Officer Ayers contacted her. Rider argues that the trial court impermissibly admitted ER 404(b) evidence of the attempted theft. The trial court properly allowed the evidence under the res gestae exception and even if the trial court abused its discretion in doing so, Rider cannot show to this Court that she suffered any prejudice from the ruling.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v.*

Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

The purpose and scope of ER 404(b) is that it "governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character" 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, §404(b), (1) at 241 (2011-2012).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

ER 404(b). Evidence of misconduct or other crimes is admissible when it completes the crime story under the *res gestae* exception. *State v. Hughes*, 118 Wn. App. at 725, *citing State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). "Where another offense constitutes a "link in the chain" of an unbroken sequence of events

surrounding the charged offense, evidence of that offense is admissible in order that a complete picture be depicted for the jury.” *State v. Hughes*, Wn. App at 725 (citations and internal quotations omitted). Even when a court does not fully articulate the balance of the probative value versus the prejudicial value of the evidence on the record the court’s record can provide adequate reasoning that satisfies this requirement. *Id.* (citations omitted).

In *Hughes* the State argued that the uncharged burglary and weapons charges were part of the same transaction as the charged crime and therefore admissible under the res gestate exception. *Id.*, footnote 8. Hughes argued that the evidence was prejudicial and irrelevant. The Court of Appeals noted that the record reflected that the trial court adopted the State’s argument, which was sufficient. *Id.*

In the present case Rider sought to preclude the State’s witnesses from testifying that Rider was detained or taken into custody for theft. JRP 6; CP 30. The deputy prosecutor argued that that information was part of the res gestae of the crime and the fact that Rider was detained for suspicion of theft explains why Officer Ayers contacted her. JRP 6. Rider’s trial counsel made contradictory arguments that the evidence was unfairly prejudicial

yet stated the evidence didn't really bolster the State's case because Rider was only charged with possession of a controlled substance. JRP 7. The trial court ruled that it would allow the evidence in a limited fashion because it explained the context in which Rider was contacted by Officer Ayers. JRP 8. The evidence regarding the theft was admissible to establish the res gestae of the crime and the trial court did not abuse its discretion by admitting the testimony.

While the State does not agree that the trial court erred in its admission of the testimony regarding Officer Ayers taking Rider into custody for theft, assuming *arguendo* that there was an error, Rider has not shown that the error prejudiced her. To be prejudicial Rider would have to show, within a reasonable probability, that the outcome of the trial was materially affected by the trial court's ruling. See, *State v. Bourgeois*, 133 Wn.2d at 403. Rider's argument to this court regarding the prejudice is, "[c]onsidering the strong persuasive power of the prior suspicion of theft **and the inadmissibility of the valium evidence**, there is more than a reasonable probability that absent this highly prejudicial evidence the prior bad act likely influenced the jury's decision." Brief of Appellant 14-15 (emphasis added). Rider's analysis regarding

whether the alleged 404(b) evidence was prejudicial is incorrect. The correct analysis is limited to whether the trial court's ruling allowing the alleged inadmissible evidence of the theft materially affected the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d at 403. Rider's argument regarding the diazepam is irrelevant to this analysis.

The State elicited testimony that upon a search of Rider's purse, Officer Ayers located diazepam in an Advil bottle. JRP 20, 37. Officer Ayers asked Rider about the pills and she stated they were generic valium, she got the pills from a friend for her anxiety and she did not have a valid prescription for the pills. JRP 21. Given the uncontroverted evidence regarding Rider's possession of diazepam, she has not met her burden to show that the evidence of her arrest for theft materially affected the outcome of her trial.

Rider also appears to suggest that the court must sua sponte give a limiting jury instruction in regards to the testimony regarding Rider being detained and taken into custody for theft. Brief of Appellant 11. After reviewing the record it does not appear that Rider's trial counsel requested a limiting jury instruction. See, JRP 48-49; CP 31-33. Rider's trial counsel had no objections or exceptions to the jury instructions given. JRP 49. By failing to

request the limiting instruction Rider failed to preserve the error for review. ER 105; *State v. Russell*, 171 Wn.2d 118, 123, 249 P.3d 604 (2011).

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED RIDER’S REQUEST TO STAY THE IMPOSITION OF HER SENTENCE PENDING APPEAL.

Rider’s dissatisfaction with the trial court’s ruling in regards to her motion to suppress evidence under CrR 3.6 is not a basis for arguing that the trial court abused its discretion when it denied her request for a stay of the imposition of her sentence pending appeal. Brief of Appellant 15-16; SRP 9. A trial court’s decision whether to stay the imposition of a sentence is reviewed under an abuse of discretion standard. *State v. Cole*, 90 Wn. App. 445, 447, 949 P.2d 841 (1998). The trial court did not abuse its discretion when it denied Rider’s motion to stay the imposition of her sentence. The trial court, while not detailing its reasons, heard the evidence during the trial and came to the conclusion that a stay of imposition of sentence was not appropriate in Rider’s case.

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IV. CONCLUSION

For the reasons argued above this court should affirm Rider's conviction and the trial court's denial of Rider's motion to stay the imposition of her sentence.

RESPECTFULLY submitted this 10th day of July, 2012.

JONATHAN L. MEYER
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by: _____
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