

NO. 43767-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSICA HAMILTON
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel when trial counsel failed to move to suppress methamphetamine residue that would have been suppressed, that was obtained by an unconstitutional search and seizure under both Article 1, section 7 of the state constitution and the Fourth Amendment to the United States Constitution.

Issues Presented on Appeal

1. Did the warrantless search of a purse appellant had used but did not own, violate article one section 7?
2. Did the warrantless search of a purse appellant had used but did not own, violate the Fourth Amendment?
3. Was counsel ineffective for failing to move to suppress the fruit of a warrantless search, without an exception or authority of law, methamphetamine residue found in a glass pipe that was located inside the purse?

B. STATEMENT OF THE CASE

3.5 Hearing

Officer Clary and Officer Butcher served a protection order on

Ms. Hamilton on October 11, 2011. RP 12. Mr. Hamilton who was in the process of filing for divorce, obtained the order. RP 12-13. According to officer Clary, Mr. Hamilton came outside the family residence with a purse in his hand and told the police that it contained drug paraphernalia. RP 14. Based on that statement, Clary looked inside the purse and saw a rubber strap and possibly needles. RP 14. Ms. Hamilton stated that the purse was not hers but that she found it in her car and had put her wedding rings in a small pouch inside the purse for safekeeping. RP 14-15, 21-22-23. After searching further, Clary also found a glass pipe. RP 15. Ms. Hamilton denied ownership of the purse, but stated that she had used it for her rings. RP 15, 18, 22-23.

Officer Lowery, admitted that after Mr. Hamilton brought the purse out of the house and pulled it open, and implied that it contained paraphernalia, Lowery believed that the other officers could see the paraphernalia. RP 21. Lowery could not see in the bag but testified that Clary could see inside the bag after opening it. “— He would—he would take the bag and open it like this. You could see what was inside of it, yes.” RP 24. Mr. Hamilton told the police that he did not recognize the bag. RP 25. The police did not know if

there was any residue in the pipe until after a field test that tested positive for methamphetamine. RP 27.

The trial court admitted Ms. Hamilton's statements to the police concerning her lack of ownership of the purse and the fact that she stored her rings in the purse, based on its conclusion that she was not detained by the police until after the drug test of the pipe. RP 27, 35. The trial court ruled the statements were admissible, non custodial statements because Ms. Hamilton was not under arrest until after the police field tested the pipe. RP 36. Trial counsel never moved to suppress the pipe and residue.

C. ARGUMENT

1. APPELLANT'S STATE CONSTITUTIONAL RIGHTS WERE VIOLATED BY A SEARCH AND SEIZURE OF HER PURSE WITHOUT CONSENT OR LAWFUL AUTHORITY.

The state executed an unlawful search and seizure in violation of state and federal constitutional protections by opening and examining items inside a purse without a warrant and without any other authority of law. Courts are responsible for enforcing legally protected expectations of privacy. *State v. Afana*, 169 Wash.2d 169, 176, 233 P.3d 879 (2010). When a party claims both state and federal

constitution violations, the reviewing Court first examines the state constitution. *Afana*, 169 Wash.2d at 176, (quoting *State v. Patton*, 167 Wash.2d 379, 385, 219 P.3d 651 (2009)).

Article I, section 7, is not concerned with the reasonableness of a search, but instead requires a warrant before any search, whether reasonable or not. *State v. Eisfeldt*, 163 Wash.2d 628, 634, 185 P.3d 580 (2008); *State v. Monaghan*, 165 Wash.App.782, 787, 266 P.3d 222 (2012); . *State v. Morse*, 156 Wash.2d 1, 9, 123 P.3d 832 (2005). “This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....” *State v. Valdez*, 167 Wash.2d 761, 772, 224 P.3d 751 (2009) (internal quotation marks and citations omitted). Because article I, section 7, provides greater protection to individuals than the Fourth Amendment, it is the proper analytic framework for this issue. *Eisfeldt*, 163 Wash.2d at 636.

Article I, section 7 of the state constitution provides: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Thus, where the Fourth Amendment precludes only “unreasonable” searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs “without authority of law.” *Valdez*, 167 Wash.2d at 772.

Article I, section 7 thus prohibits both unreasonable searches, including those that would be considered reasonable under the Fourth Amendment. *See York v. Wahkiakum Sch. Dist. No. 200*, 163 Wash.2d 297, 305–06, 178 P.3d 995 (2008). The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment. *York*, 163 Wash.2d at 306; *State v. White*, 97 Wash.2d 92, 109–10, 640 P.2d 1061 (1982), overruling on other grounds recognized in *State v. Graham*, 130 Wash.2d 711, fn.2, 927 P.2d 227 (1996), superseded by statute on by RCW 9A.76.020(1).

“The term ‘private affair []’ generally means ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.’ ” *State v. Athan*, 160 Wash.2d 354, 366, 158 P.3d 27 (2007) (quoting *State v. Myrick*, 102 Wash.2d 506, 511, 688 P.2d 151 (1984)). “In determining if an interest constitutes a ‘private affair,’ the Court looks at the historical treatment of the interest being asserted, analogous case law, and statutes and laws supporting the interest asserted.” *Athan*, 160 Wash.2d at 366, 158 P.3d 27 (quoting *Myrick*, 102 Wash.2d at 511, 688 P.2d 151).

If the Court determines that the interest asserted constitutes a

“private affair,” the second step asks whether the authority of law required by article I, section 7 justifies the intrusion. *Valdez*, 167 Wash.2d at 772. This requirement is satisfied by a valid warrant, limited to a “few ‘jealously and carefully drawn’ exceptions.” *State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563 (1996) (internal quotation marks omitted) (quoting *State v. Houser*, 95 Wash.2d 143, 149, 622 P.2d 1218(1980)).

The State Supreme Court has repeatedly held the privacy protected by article I, section 7 survived where the reasonable expectation of privacy under the Fourth Amendment was destroyed. For example in *State v. Boland*, 115 Wash.2d 571, 578, 800 P.2d 1112 (1990), this court found a warrantless search of an individual's garbage violated article I, section 7, even though “it may be true an expectation that [others] will not sift through one's garbage is unreasonable....” By contrast, the United States Supreme Court previously held individuals had no reasonable expectation of privacy in their garbage, and therefore there was no protection under the Fourth Amendment. *California v. Greenwood*, 486 U.S. 35, 40-41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).

The State Supreme Court held the same in *State v. Gunwall*,

106 Wash.2d 54, 720 P.2d 808 (1986). In *Gunwall*, the Court considered whether the State could collect without a warrant phone numbers dialed by an individual. United States Supreme Court precedent holds an individual's reasonable expectation of privacy is destroyed when he dials a phone number because he "had to convey that number to the telephone company...." *Gunwall*, 106 Wash.2d at 55; *Smith v. Maryland*, 442 U.S. 735, 743–44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). But our State Supreme Court held the individual privacy interest, no matter how unreasonably held, survives the conveyance of the phone number to the phone company and, as such, article I, section 7 prohibits collecting these numbers without a warrant. *Gunwall*, 106 Wash.2d at 69.

In *Kealey*, 80 Wash.App. 162, 907 P.2d 319 (1995), review denied, 129 Wash.2d 1021, 919 P.2d 599 (1996), the defendant accidentally left her purse behind after trying on shoes in a department store. A store clerk opened the purse and smelled marijuana, then closed it and tossed it into a corner. *Kealey*, 80 Wash.App. at 165. The defendant returned to the shoe department and looked for the purse until closing time, to no avail. The next morning, shoe department managers found the purse, opened it, and

discovered not only marijuana but methamphetamine powder. They called the police, explaining that a woman shopper had left the purse behind. *Kealey*, 80 Wash.App 165-66. The police unzipped it without obtaining a warrant, simply intending to determine its owner. They found Kealey's identification and ultimately arrested her for possessing the drugs.

Analyzing the issues under the Fourth Amendment in *Kealey*, the Court held that the defendant had a reasonable expectation of privacy in her purse, which was lost or mislaid property, as opposed to abandoned. *Id.* See also *State v. Lohr*, 164 Wash.App. 414, 421-22, 263 P.3d 1287 (2011). Determination of a violation of article I, section 7 requires a two-part analysis:

First, we must determine whether the state action constitutes a disturbance of one's private affairs.... Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The "authority of law" required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions.

Valdez, 167 Wash.2d at 773, quoting, *York*, 163 Wash.2d at 306.

There can be no dispute that the search conducted here constituted a disturbance of one's private affairs because a purse is a "private affair", entitled to greater protection than under the Fourth

Amendment, which happens to provide full protection against unreasonable searches. *State v. Parker*, 139 Wash.2d 486, 494, 496, 987 P.2d 73 (1999); *State v. Gibbons*, 118 Wash. 171, 187–88, 203 P. 390 (1922).

For example, more than 75 years ago, in *Gibbons*, the State Supreme Court explicitly recognized the citizens of this state have a right to the privacy of their vehicles because a person's article 1, section 7 protection attach to the person and his private affairs wherever he finds himself. *Parker*, 139 Wash.2d at 494, *Gibbons*, 118 Wash. at 187–88.

We note that the case before us does not involve a search ... in the home of appellant; but manifestly the constitutional guaranty that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law," *protected the person of appellant, and the possession of his automobile and all that was in it*, while upon a public street of Ritzville, against arrest and search without authority of a warrant of arrest, or a search warrant, *as fully as he would have been so protected had he and his possession been actually inside his own dwelling*; that is, his "*private affairs*" were under the protection of this guaranty of the constitution, whether he was within his dwelling, upon the public highways, or wherever he had the right to be.

Gibbons, 118 Wash. at 187–88 (quoting Wash. Const. art. I, § 7) (most emphasis added). For the same reasons, because a car is a

private affair, it is logical that a purse is as well because of the expectation of privacy in that more closely held private affair. *Parker*, 139 Wash.2d at 494, *Gibbons*, 118 Wash. at 187–88. Since the first prong of the test is met, the second requires examining whether the police were authorized to investigate the purse.

Exceptions to the warrant requirement are limited and narrowly drawn. *White*, 135 Wash.2d at 769; *Hendrickson*, 129 Wash.2d at 70–71. The State, therefore, bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for. *Monaghan*, 165 Wash.App. at 788-789; *Johnson*, 128 Wash.2d at 447. To determine the existence and scope of the jealously guarded exceptions that provide “authority of law” absent a warrant, the Courts look at the constitutional text, the origins and law at the time our constitution was adopted, and the evolution of that law and its doctrinal development. *See York*, 163 Wash.2d at 306, 178 P.3d 995.

a. No Authority of Law to Search Without Warrant.

The state may argue that the purse was in “open view” open when Mr. Hamilton brought it out to the police, but the testimony does not support this assertion. Mr. Hamilton, Ms. Hamilton’s somewhat estranged and hostile husband wanted the police to search his house

because it was filled with things he did not recognize and he knew other people had been in the house. RP 65, 68, 69. The police told Mr. Hamilton to bring outside anything he wanted them to see. RP 69. The bag on the counter that Mr. Hamilton brought to the police looked like it could be one the many bags Ms. Hamilton owned, but Mr. Hamilton did not recognize the bag as Ms. Hamilton's. RP 70-72.

Mr. Hamilton stated that he did not open the purse. RP 66. Officer Lowery testified that Mr. Hamilton opened the purse for him to see the contents and said "this is the kind of stuff I'm talking about" and handed the purse to officer Lowery. RP 21. Officer Clary testified that Mr. Hamilton came out of the house with a handbag and told the police that it contained drug paraphernalia. Clary testified that he looked inside the purse while Ms. Hamilton was standing outside her home and saw drug paraphernalia. RP 13-14. During the 3.5 hearing, Officer Clary stated that once he looked inside the bag he could see the drug paraphernalia because the "purse was fabric and was kind of open at the top". RP 18. Officer Butcher testified that he looked inside the closed pouches that were inside the purse and saw wedding rings in one pouch and a glass pipe inside another. RP 113-114.

Ms. Hamilton informed the police that she did not know who owned the purse but admitted that she found it and thought it was “cute” so she put her wedding rings in a pouch inside the purse for safekeeping. 96-98, 115-116. The purse contained several smaller pouches: one contained the wedding rings, and another contained a glass pipe with methamphetamine residue. RP 115-116.

There were no finger prints or any other DNA presented to connect Ms. Hamilton to the meth pipe. Inside the purse there were several coupons with the name “K. Fagerness WA”. RP 101. The police did not ask Ms. Hamilton about a Mr. or Ms. Fagerness even though the testimony indicated that Mr. Fagerness possessed the purse earlier in the day on October 11, 2011 and was with Ms. Hamilton before the arrest. RP 125, 140. Ms. Hamilton was not arrested until after the paraphernalia was found and filed tested for methamphetamines. RP 24, 27.

i. No “Open View”

When a law enforcement officer observes something in open view from a lawful vantage point, the observation is not a “search” triggering the protections of article I, section 7. *State v. Kennedy*, 107 Wash.2d 1, 10, 726 P.2d 445 (1986); *State v. Seagull*, 95 Wash.2d

898, 901, 632 P.2d 44 (1981); *State v. Swetz*, 160 Wash. App. 122, 134, 247 P.3d 802 (2011). Based on the forgoing testimony the paraphernalia was not in open view. Rather Mr. Hamilton opened the purse and the officers looked inside. “[T]he ‘open view’ doctrine applies when an officer observes contraband from a ‘nonconstitutionally protected area.’” *Seagull*, 95 Wash.2d at 901; 632; *Kennedy*, 107 Wash.2d at 10. “Under the open view doctrine, when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a search.” *State v. Bobic*, 140 Wash.2d 250, 259, 996 P.2d 610 (2000) (internal quotation marks omitted) (quoting *State v. Rose*, 128 Wash.2d 388, 392, 909 P.2d 280 (1996)).

Accordingly, “[t]he ‘open view’ observation is ... not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a search pursuant to a warrant.” *State v. Lemus*, 103 Wash.App. 94, 102, 11 P.3d 326 (2000). Officers lawfully encountering contraband perceived with their senses may seize it, where the contraband is immediately recognized as such by the officers and it is readily visible. *Kennedy*, 107 Wash.2d

at 9-10

Here, Mr. Hamilton had to open the purse and the officers had to look inside to see the contraband, thus it was not readily visible and the open view doctrine does not apply.

ii. No Common Authority: Co-Habitant Present

The state may also argue that Mr. Hamilton had common authority to search the purse. In search and seizure cases involving cohabitants, this court has adopted the “common authority” rule. *Morse*, 156 Wash.2d at 17; *State v. Thompson*, 151 Wash.2d 793, 92 P.3d 228 (2004); *State v. Walker*, 136 Wash.2d 678, 965 P.2d 1079 (1998); *State v. Leach*, 113 Wash.2d 735, 782 P.2d 1035 (1989). A person’s expectation of privacy is reduced when authority to control a space is shared with others. *Leach*, 113 Wash.2d at 739. Because there is some inherent risk that a person sharing control over an item may consent to the search of that item the common authority rule considers the “reasonable expectations of privacy” and “assumption of risk.” *Morse*, 156 Wash.2d at 7-8; *State v. Christian*, 95 Wash.2d 655, 659–60, 628 P.2d 806 (1981); *Leach*, 113 Wash.2d at 739. Only the person who possesses a constitutional right may waive that right. *Cf. Walker*, 136 Wash.2d 678 (wife’s consent not

effective as waiver of husband's constitutional right to be free from invasion of privacy).

This State Supreme Court has made explicitly “that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search.” *Morse*, 156 Wash.2d at 13, *see also*, *Leach*, 113 Wash.2d at 744. This requires the police to directly address the person from whom they are seeking consent and it also requires informing that person that she may refuse to consent. *Morse*, 156 Wn.2d at 13 (citing, *State v. Ferrier*, 136 Wash.2d 103, 116, 960 P.2d 927 (1998)). In *Morse* the Court reiterated that the consent must come from the owner of the property the police wish to search by stating the following.

We have never held that a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises. We have never held that a person is not present in her home unless and until the police come upon her. We decline to do so now.

Morse, 156 Wn.2d at 13.

In *Morse*, house guests consented to a search of Morse’s home. *Morse*, 156 Wash.2d at 13. The Court held that under the state constitution, the consent by the house guest was invalid because the

police were required to obtain consent from Morse, who was present at the time of the search. *Id.*

In *Walker*, the wife of the defendant, Mrs. Walker, consented to a search of her home. However, before the search began, Mr. Walker, Mrs. Walker's husband, arrived. The police did not obtain Mr. Walker's consent to search and he did not affirmatively object to the search. *Walker*, 136 Wn.2d at 684. The police found drugs in the couple's bedroom. *Walker*, 136 Wash.2d at 685. Mrs. Walker was convicted. She argued, relying on *Leach*, that without her husband's consent, the search was invalid as against her. This Court rejected her argument, but concluded that pursuant to *Leach* because both Mr. and Mrs. Walker were cohabitants and both present during the search, Mrs. Walker's consent to the search was invalid as to the husband." *Walker*, 136 Wash.2d at 684. In sum, pursuant to *Leach* 1 "the police must obtain the consent of a cohabitant who is present in

1 In *Leach*, a Fourth Amendment case, the Court adopted the federal test for consent set forth in *United States v. Matlock*, 415 U.S. 164, 170, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). *Leach*, 113 Wash. 2d at 739.

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its

order to effect a valid warrantless search.” *Walker*, 136 Wash.2d at 685, citing *Leach*, 113 Wash.2d at 739..

Here, as in *Walker* and *Morse*, Ms. Hamilton was present when the police decided to search a purse over which she had exercised control. Mr. Hamilton had no common authority over the purse because he did not recognize the purse. Mr. Hamilton could have permitted the police to search the common areas of his and Mrs. Hamilton’s home, but that consent could not have extended to the closed purse ro to support a conviction against Ms. Hamilton. *Morse*, 156 Wash.2d at 13-14; *Walker*, 136 Wash.2d at 684-685. Because Mr. Hamilton did not have the authority to consent to the search and the police did not obtain consent from Ms. Hamilton, the search

attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

(Citations omitted.) *United States v. Matlock*, 415 U.S. at 171 n. 7, 94 S.Ct. at 993 n. 7.

violated the prohibition against searches without the authority of law. *Morse*, 156 Wash.2d at 13-15; *Walker*, 136 Wash.2d at 684-685. Under Article 1, section 7, had the defense moved for suppression, the trial court would have granted the motion.

lii Private Search Doctrine Inapplicable Under Washington State Constitution

The state may argue that the search of the purse was conducted by a private actor and therefore not subject to constitutional protections. This would be incorrect because the private search doctrine is inapplicable under the Washington Constitution. *State v. Eifeltd*, 163 Wash.2d 628, 636, 185 P.3d 580 (2008). In *Eifeltd*, the Supreme Court reversed the Court of Appeals where the police, without a warrant followed a private actor through a house that the private actor said contained marijuana. The Court reasoned that because the private actor did not have “free access” to the house, he could not provide consent to search. *Id.*, citing, *Morse*, 156 Wash.2d at 10-11.

Under our State Constitution there is a “bright line rule holding” the private search doctrine inapplicable under article 1, section 7.

Eisfeldt, 163 Wash.2d at 638.

Here as in *Eisfeldt*, Mr. Hamilton did not have free access to the purse and Ms. Hamilton did not assume the risk that her husband would invite others to look into her purse, because a purse is a private affair not shared with Mr. Hamilton. Thus the private search did not permit the police to search the purse and as in *Kealy*, simply leaving a purse behind does not amount to abandonment or an offer for anyone in the area to look inside. *Kealey*, 80 Wash.App 165-66. Ms. Hamilton like Ms. Kealy, maintained a privacy interest in her purse such that no one could search it without her permission. *Id.*

2. APPELLANT'S FEDERAL
CONSTITUTIONAL RIGHTS WERE
VIOLATED BY A SIEZURE OF HER
PURSE WTIHOUT CONSENT OR A
WARRANT OR AN EXCEPTION TO THE
WARRANT REQUIREMENT.

The Fourth Amendment to the federal constitution prohibits warrantless searches unless one of the narrow exceptions to the warrant requirement applies. *Buelna Valdez*, 167 Wash.2d 761, 768, 771–72, 224 P.3d 751 (2009); *State v. Winterstein*, 167 Wash.2d 620, 628, 220 P.3d 1226 (2009); *Swetz*, 160 Wash. App. at 127-128.

The Fourth Amendment protects against ‘unreasonable

searches' by the State. U.S. CONST. amend. IV ("The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated"). *Monaghan*, 165 at 787.

The Fourth Amendment thus guarantees that before a search of an individual's person or effects can be commenced, a magistrate must make a prior determination that probable cause exists for the search. *Lohr*, 164 Wash. App. at 423-424. Moreover, the Fourth Amendment requires that a search warrant must particularly describe the place, person, or things to be searched. *State v. Eisele*, 9 Wn. App. 174, 511 P.2d 1368 (1973); CrR 2.3(c); *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

A warrantless search is per se unconstitutional absent an exception. *Buelna Valdez*, 167 Wash.2d at 761; *Swetz*, 160 Wash.App. at 127-128. Here there were no exceptions to the warrant requirement, thus the search was unconstitutional.

Lohr, even though a search warrant case for premises, is instructive. Therein the premises warrant did not confer authority upon the officer to search the individuals found at the premises or their personal effects, such as a purse. *Lohr*, 164 Wash. App. at 421-22. Generally officers have no authority under a premises warrant to

search personal effects an individual is wearing or holding. See *State v. Worth*, 37 Wn. App. 889, 892, 638 P.2d 622 (1984); *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

In *Worth*, Worth lived with Folkert and the warrant authorized the search of Folkert's house. *Worth*, 37 Wn. App. At 892. The Court held that the fact that Worth lived with Folkert did not give the police the authority to search Worth's purse and violated her Fourth Amendment rights. The warrant only authorized the search of Folkert's house and Folkert's person. Incident to the search warrant, the police were only authorized to detain Worth while they searched the house. *Worth*, 37 Wn. App. At 892-893.

In holding the search of Worth's purse unconstitutional, the Court noted that two factors were determinative: (1) Worth's purse was readily recognizable to the officers as a personal effect belonging to her; and (2) she had the purse under her immediate control and sought to protect it as private, making it an extension of her person. *Worth*, 37 Wn.App. at 893.

Similarly, in *Lohr* the police had a warrant to search the premises where Lohr was a guest. *Lohr*, 164 Wash.App. at 416. The police did not however have a warrant to search the occupants of the

house. When the police seized Lohr's purse without a warrant and without an exception to the warrant requirement, they violated state and federal constitutional rights. *Lohr*, 164 Wash. App. at 423-424; *Accord, Afana*, 169 Wash.2d at 177.

Here, the police did not have any sort of warrant and had no exception to the warrant requirement to search the premises or Ms. Hamilton's personal property. The state's police witnesses all testified that they had to look inside the purse to see paraphernalia; none testified that it was in open view. RP 14, 15, 24. Moreover, the police testified that they only saw paraphernalia; no one saw suspected contraband and it is not illegal to possess paraphernalia.

Mere possession of drug paraphernalia, such as a pipe, is not a crime. RCW 69.50.412; *see also State v. Neeley*, 113 Wash.App. 100, 107, 52 P.3d 539 (2002); *State v. McKenna*, 91 Wash.App. 554, 563, 958 P.2d 1017 (1998). Nonetheless, without a warrant or an exception to the warrant requirement, the police searched and seized the purse and field tested it for methamphetamine. RP 14, 16. These actions violated Ms. Hamilton's constitutional protections against unreasonable searches. *Afana*, 169 Wash.2d at 177; *Buelna Valdez*, 167 Wash.2d at 768 (cannot search premises/vehicle once in

handcuffs); *Winterstein*, 167 Wash.2d at 628; *Lohr*, 164 Wash. App. at 423-424. Without a warrant or an exception to the warrant requirement, the trial court would have suppressed the residue.

3. MS. HAMILTON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL DID NOT MOVE TO SUPPRESS THE EVIDENCE OBTAINED BY THE ILLEGAL SEARCH.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Washington article I, section 22. While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both

Strickland prongs. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

In *Reichenbach*, the Supreme Court held that trial counsel's performance was deficient where the attorney failed to challenge the admission of a baggie of methamphetamine "despite serious questions about the validity of the warrant upon which the search was based." *Reichenbach*, 153 Wn.2d at 130-131. The Court held that counsel's failure to challenge the search based upon an invalid warrant cannot be explained as a legitimate tactic. *Id.* The Supreme Court determined that the failure to move to suppress the methamphetamine prejudiced the defendant because the baggie was abandoned in response to the unlawful seizure of Reichenbach's person, thus, the baggie of methamphetamine was involuntarily abandoned and the police officers seized the baggie in violation of article I, section 7 of the state constitution. *Reichenbach*, 153 Wn.2d at 131-137.

In *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998), this Court reversed a conviction for prejudicial ineffective assistance of counsel where defense counsel offered evidence of a prior conviction for possession of illegal drugs that would not have been

admissible at trial if introduced by the state. *Saunders*, 91 Wn. App. at 578-581. This Court held that there were “no reasons of tactics or strategy for offering the evidence.” In that case, counsel did not challenge the evidence in a pretrial motion and so had no reason to believe the evidence would come in if offered by the State. Additionally, the state never attempted to prove the prior conviction in its case. The Court held “we can discern no reason from the record why counsel “would not have objected to such damaging prejudicial evidence.” *Saunders*, 91 Wn. App. at 578-579, quoting, *Hendrickson*, 129 W.2d at 78.

Reichenbach is on point and the facts herein even stronger than in *Reichenbach*, because *Reichenbach* involved an invalid warrant, whereas herein the police conducted a search without a warrant. In this case, the issue of a warrantless search was boldly obvious and counsel’s failure to move to suppress inconceivable, particularly where counsel pursued a motion to suppress statements that were not particularly inculpatory. There simply are no reasons of tactics or strategy for not moving to suppress the evidence.

As in *Reichenbach*, and *Saunders* trial counsel’s performance was deficient because the attorney did not have any tactical reasons

not to move to suppress the only evidence of the crime, when that evidence would have been suppressed because the police did not have a warrant; there was no exception to the warrant requirement or any authority of law to search the purse. *Reichenbach*, 153 Wn.2d at 130-131; *Saunders*, 91 Wn. App. at 578-579.

D. CONCLUSION

Ms. Hamilton respectfully requests this Court reverse and dismiss her conviction based on ineffective assistance of counsel because retrial would require suppression of the only evidence of a crime.

DATED this 16th day of January 2013

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and Jessica Hamilton C/O Lisa Roberts 1242 N. Fork Road Chehalis, WA 98532 a true copy of the document to which this certificate is affixed on January 16, 2013. Service was made by electronically to the prosecutor and to Ms. Hamilton by depositing in the mails of the United States of America, properly stamped and addressed.

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