

NO. 43767-8-II

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

STATE OF WASHINGTON,

Respondent,

vs.

JESSICA HAMILTON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

STATE'S RESPONSE BRIEF

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I. COUNTERSTATEMENT OF THE ISSUES

1. If a defendant disclaims any interest in a purse at the time it is searched, does she abandon any privacy interest in it?
2. Is a defendant who testifies at trial that she had no privacy right in an item judicially estopped from arguing, on appeal, that the item was searched or seized unlawfully?
3. Can trial counsel be found ineffective for choosing not to bring a motion to suppress that would directly contradict his client's version of events?

II. INTRODUCTION

Jessica Hamilton appeals her conviction of possession of methamphetamine, arguing that her purse was unlawfully searched and that her trial lawyer should have moved to suppress the resulting evidence. But, when Hamilton's ex-husband presented the purse to law enforcement asking them to search it, Hamilton denied that the purse was hers. At trial, she testified that she had never seen the purse until officers questioned her about the drug paraphernalia inside it. Under Hamilton's version of events, she did not have a privacy interest in the purse and could not predicate error on its search. Her counsel unsuccessfully moved to suppress evidence based on the search of Hamilton's house, which was all he could legitimately do given her testimony. The Court should affirm.

III. STATEMENT OF THE CASE

In October of 2011, Travis Hamilton and Jessica Hamilton were in the process of getting divorced. Verbatim Report of Proceedings (VRP) (July 19, 2012) at 55–57. Travis¹ had discovered that Jessica¹ was frequenting drug houses and had noticed a change in Jessica's appearance that suggested she was taking drugs. Clerk's Papers (CP) at 6-7. Travis searched the family home and found several methamphetamine pipes. *Id.* When he confronted Jessica with the pipes, she left home and the marriage dissolved. *Id.*

Jessica left about two weeks before October 11, 2011, taking with her the couple's Ford Explorer. VRP (July 19, 2012) at 56-57. She returned on October 10, 2011 with the Explorer, dropping off the couple's two kids. *Id.* at 57, 59, 61. The Explorer was loaded with lots of personal effects, including bags and a tent. *Id.* at 61-62. In the meantime, Travis had obtained a protection order against Jessica, which awarded Travis the use of the Explorer. *Id.* at 58. On October 11, 2011, Travis arranged to have Jessica served with a copy of the order while she was at the house they had been sharing. *Id.* When

¹ Because the couple shared a last name, the State refers to each person by first name in this section. No disrespect is intended.

he arrived at the house, Travis found that Jessica had unloaded the items from the Explorer into the dining room and kitchen. *Id.* at 62; 107. Travis noticed that one of the bags was open and had drug pipes in it. *Id.* at 63-64.

The police arrived and asked Jessica to come outside to serve her with a copy of the protection order. *Id.* at 65. Travis came outside and asked the officers to check the car and house because he was concerned about the weird bags containing drug materials; he didn't want his kids to have access to them. *Id.* The officers said they couldn't go in the house. *Id.* They told Travis that if he was concerned about something in the house and brought it out, they would look at it. *Id.* at 65, 82-83. Travis went back into the house, grabbed the open bag of paraphernalia, and brought it out to the officers, showing its contents to Centralia Police Officer Clary. *Id.* at 66, 73.

Jessica told Officer Clary that the bag was not hers. *Id.* at 18, 98-99. Centralia Police Officer Lowrey began speaking with her. Initially Jessica said that the bag was not hers; she merely found it in the car. *Id.* at 21, 114-15. The officers testified that, when pressed with whether her fingerprints or other belongings would be inside,

Jessica said that they would be. She indicated that her wedding rings were inside, but she was just storing them in there. *Id.* at 22-23; 115. While Officer Lowrey was talking with Jessica, Officer Clary was searching the bag. *Id.* at 114-16. Inside it was a pipe that eventually tested positive for methamphetamine. *Id.* at 112, 121-22. Right next to the pipe was a zippered pouch contained Jessica's wedding rings. *Id.* at 65, 116.

The State charged Jessica with possession of methamphetamine. CP at 1-3. At a CrR 3.5 hearing, Jessica testified that the purse was not hers and she told the officers so. VRP (July 19, 2012) at 30. She said she had put her rings in a purse so they wouldn't get lost, but not *that* purse, because she didn't know to which purse the officers were referring. *Id.* at 31-32. She said she had never actually seen the purse in question until the police were field testing its contents. *Id.* at 29-30.

At trial, Jessica testified that she had been washing the Explorer's windshield and was worried her rings would fall off, so she put them in a black pouch in the car's cupholder, *id.* at 147, which was a different pouch than the one in which the officers found the rings. *Id.* at 148. She described how her two friends moved things from the

Explorer to the house while she built a fire. *Id.* at 146-47. Later, after being served with the protection order, Jessica saw Travis bring out a purse, but Jessica was a distance away and did not see the purse clearly. *Id.* at 149-50. She explained that she told the officers she had put her rings in a pouch, assuming it was the one they were talking about. *Id.* at 151. When she saw the purse in question, she told them it was not hers. *Id.* at 151. None of the bags or pouches offered in evidence was the pouch in which she put her rings, nor did they belong to her. *Id.* at 152, 156.

During the trial, defense counsel moved to suppress the evidence of the purse and its contents based on the allegation that police officers asked Travis Hamilton to search his house as their agent. *Id.* at 80-82. The Court denied the motion, finding that officers had not ordered Travis to search the house (they had in fact declined to do so), and Travis had the right to remove items from his own house if he did not want them there. *Id.* at 82-83. Defense counsel did not otherwise move to suppress evidence found during the officers' search of the purse. In closing, he argued that his client said at the time of the search and at the time of trial that the purse was not hers, and that the State had utterly failed to prove

possession. VRP (July 20, 2012) at 216-17.

The jury convicted the defendant as charged. *Id.* at 235-37. She was sentenced to 30 days in jail, CP at 28-36, from which she timely appealed, CP at 37-48.

IV. ARGUMENT

A. BECAUSE THE DEFENDANT DENIED ASSOCIATION WITH THE PURSE AT THE TIME OF THE SEARCH, SHE DEMONSTRATED NO PRIVACY INTEREST IN IT AND THE OFFICERS' SEARCH WAS LAWFUL.

At the time her husband produced the purse in question to be searched, Hamilton² denied that the purse was hers. By disavowing any interest in the purse, Hamilton gave up her right to contest the lawfulness of its search. Furthermore, because Hamilton disavowed any interest in the purse, the police had authority to rely on Hamilton's husband's consent to search. Therefore, the search was lawful and the Court should affirm Hamilton's convictions.

1. Because Hamilton Disavowed A Privacy Interest In The Purse, She Cannot Claim Error Based On Its Unlawful Search.

Both the state and federal constitutions protect a criminal defendant from unlawful searches. Wash. Const. Art. 1, § 7; U.S.

² Because confusing the defendant with her ex-husband is unlikely after this point, the State hereafter refers to the defendant as Hamilton.

Const. amend IV. To avail oneself of these provisions' protection, however, one must have a privacy interest in the item searched. See Wash. Const. Art. 1, § 7 ("No person shall be disturbed in *his* private affairs, or *his* home invaded, without authority of law." (emphasis added)); U.S. Const. amend IV ("The right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." (emphasis added)); *State v. Athan*, 160 Wn.2d 354, 366-67, 374, 158 P.3d 27 (2007) (requiring, under both constitutions, that a defendant have a privacy interest in an item he or she claims was unlawfully searched).

Disavowals of property are usually analyzed under the rubric of abandonment: a defendant retains no privacy interest in property if he or she voluntarily abandons it. *State v. Reynolds*, 144 Wn.2d 282, 287-88, 27 P.3d 200 (2001). In *Reynolds*, an officer observed a coat next to a passenger in a vehicle, and then found the same coat under the car when he next contacted the passenger. *Id.* at 284-85. The passenger said that the coat wasn't his and he hadn't put it under the car. *Id.* at 285. The Court held that in doing so, the passenger voluntarily abandoned his interest in the coat and the officer's search of it was constitutional. *Id.* at 291.

Reynolds was refined in *State v. Evans*, 159 Wn.2d 402, 407-08, 150 P.3d 105 (2007). *Evans* held that a defendant who denied ownership of a locked briefcase found in his trunk and who objected to the briefcase's seizure did not abandon his privacy interest in the briefcase. *Id.* at 413. The opinion first addresses whether the defendant had a privacy interest in the item at all, concluding that the defendant retained such an interest by keeping the briefcase locked and within his closed trunk, and by objecting to its seizure. *Id.* at 409. The Court then concluded that because the defendant retained a privacy interest in his trunk, in which the briefcase was found, his disavowal of ownership coupled with his objection to its search did not abandon his interest in it. *Id.* at 410-13. Under *Evans'* analysis, then, a defendant may only claim error from the search of an item if (1) he or she had a privacy interest in it, and (2) he or she did not voluntarily abandon the interest.

Hamilton's case is more favorable to the State than either *Reynolds* or *Evans*, and should be resolved under *Evans'* first prong: lack of a privacy interest. The evidence available to the police at the time of the search was that Hamilton and others had unloaded several items from a car into a house. The owner of the house brought out

one of the items and asked the police to search it, and Hamilton denied it was hers. Thus, the officer was in a public place, had no specific information that the item was Hamilton's, was hearing Hamilton deny ownership of the item, and was asked to search it by the person in possession of it (Hamilton's ex-husband). Under the circumstances, the officer reasonably concluded that Hamilton had no privacy interest in the purse, allowing for the search.

Even if Hamilton's connection with the purse gave rise to a privacy interest, Hamilton abandoned that interest under *Reynolds* and under *Evans's* second prong. As in *Reynolds*, the officer in this case searched the item in a public place after Hamilton's disavowal of ownership. Unlike *Evans*, in which the defendant objected to the seizure of the briefcase and claimed ownership of the area in which the briefcase was found, Hamilton neither objected to the officers' interaction with the purse nor asserted a privacy claim to the open area in which the search occurred. Under the circumstances, Hamilton voluntarily abandoned the purse and the officers' search of it was lawful. The Court should affirm her conviction.

2. Even If Hamilton Had A Non-Abandoned Privacy Interest In The Purse, Her Disclaimer Of Any Association With The Purse Rendered Travis Hamilton's Consent Controlling.

Hamilton argues that her ex-husband's consent to the search of the purse was invalid because the police did not obtain affirmative "cohabitant consent" from Hamilton. This argument is dubious because it applies the state constitution's special protections for the home to chattel searched outside the home. Even if the cohabitant-consent rule applied, however, Hamilton's disavowal of the purse demonstrated to the officer that she was not a cohabitant, so her ex-husband's consent authorized the search.

The Washington constitution confers more-robust protection than its federal counterpart with regard to home searches. *E.g.*, *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) (requiring warnings that the homeowner need not consent to a search). To search a home occupied by cohabitants with equal authority, the state constitution requires consent from all present cohabitants, not merely one. *See State v. Walker*, 136 Wn.2d 678, 686, 965 P.2d 1079 (1998) (holding that a search is valid against a present cohabitant only if he or she consented); *accord State v. Morse*, 156 Wn.2d 1, 14, 123 P.3d 832 (2005). These cases pertain to searches of homes, where

state constitutional privacy protections are at their zenith. *Ferrier*, 136 Wn.2d at 112. It is an open question, which this Court need not decide in this case, whether Washington's cohabitant-consent rule applies to searches of chattel outside the home.

Assuming, without conceding, that the cohabitant-consent rule applies to this case, Travis Hamilton's consent to search the purse was adequate. At the time of the search, Travis Hamilton had brought the purse out of his house and had possession and control of it, while the defendant was disavowing that the purse was hers. Under the circumstances, Travis Hamilton demonstrated his authority to consent while the defendant undermined her own authority to oppose the search. In *Morse*, the Court held that consent of one with lesser authority over premises does not bind one with equal or greater authority over the premises. *Morse*, 156 Wn.2d at 13. This case is the converse of *Morse*: Hamilton's conduct at the time of the search indicated that she had *less* authority than her ex-husband over the purse (or none at all), and therefore her ex-husband's consent was adequate to authorize the search. Consequently, the search was lawful and the Court should affirm Hamilton's conviction.

B. BECAUSE SHE TESTIFIED AT TRIAL THAT THE PURSE IN QUESTION WAS NOT HERS, THE DEFENDANT IS JUDICIALLY ESTOPPED FROM REPRESENTING ON APPEAL THAT SHE HAD A PRIVACY RIGHT IN THE PURSE.

This case is unusual. In many cases, a defendant claims that an incriminating item isn't theirs, but files pretrial motions to suppress predicated on having a privacy interest in the area in which the contraband was found. (E.g., "That dope you found in my car isn't mine, but I am challenging your search of my car.") These positions are not factually inconsistent. Here, in contrast, Hamilton not only denied an interest in the purse at the time of the search, but also denied any connection to the purse at trial. Because she represented at trial that she did not have a privacy interest in the purse, Hamilton is judicially estopped from representing the opposite on appeal.

Judicial estoppel is an equitable doctrine that prevents a litigant from asserting a factual position in one court proceeding and then, in a subsequent proceeding, asserting an inconsistent factual position to seek an advantage. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008). This doctrine preserves respect for judicial proceedings and avoids waste of time and duplicity. *Id.* at 540. It is most common in bankruptcy cases, when a debtor fails to list an asset

during bankruptcy and then, in a subsequent proceeding, attempts to claim the asset. *E.g.*, *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13 (2007) (debtor fails to list personal injury claim as an asset in bankruptcy and later attempts to sue on claim). But, judicial estoppel also applies in criminal proceedings to both the prosecutor and the defendant. *See City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 262 P.3d 1239 (Div. 3, 2011) (prosecuting authority); *State v. Newcomb*, 160 Wn. App. 184, 246 P.3d 1286 (Div. 2, 2011) (same); *City of Spokane v. Marr*, 129 Wn. App. 890, 893, 120 P.3d 652 (Div. 3, 2005) (criminal defendant); *State v. Sweany*, 162 Wn. App. 223, 228-29, 256 P.3d 1230 (Div. 3, 2011) (same), *aff'd on unrelated grounds*, 174 Wn.2d 909, 281 P.3d 305 (2012).

Estoppel applies when (1) a party's position is "clearly inconsistent" with its earlier representation, (2) acceptance of the inconsistent position in the second proceeding suggests that the first or second court was misled, and (3) the party asserting the inconsistent position would derive an unfair advantage if not estopped. *Arkison*, 160 Wn.2d at 538-39. These factors are not exclusive; other factors may be relevant. *Id.* Some other factors are whether the party successfully maintained the earlier position that it

now seeks to contradict, whether the parties and question are the same in the subsequent proceeding, and whether it is unjust to allow the party to change its position. *Markley v. Markley*, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948); accord *Arkison*, 160 Wn.2d at 539 (citing *Markley's* factors as relevant but nonessential).

Judicial estoppel applies regardless of whether the finder of fact ultimately decides not to believe the litigant's representation; it attaches at the time that the party makes the representation to the finder of fact. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001). In *Hamilton*, a debtor failed to disclose a claim against his insurance company as an asset when he filed for bankruptcy. *Id.* at 781. The bankruptcy trustee discovered the concealment and vacated the discharge of the debtor's debts. *Id.* The debtor later sued the insurance company. *Id.* at 781-82. The Ninth Circuit held that he was judicially estopped from pursuing the claim even though his misrepresentation had been discovered and the prior proceedings had been vacated. *Id.* at 784.

Washington law has adopted *Hamilton*. In *Bartley-Williams v. Kendall*, the Court of Appeals approved of its reasoning and noted that the court "had discretion to apply judicial estoppel in order to

prevent Hamilton . . . from enjoying the benefit of [his] inconsistent positions.” 134 Wn. App. 95, 99-100, 138 P.3d 1103 (Div. 1, 2006). Several other recent cases also cite *Hamilton* approvingly. *E.g.*, *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866 (Div. 3, 2007); *Skinner v. Holgate*, 141 Wn. App. 840, 853, 173 P.3d 300 (Div. 2, 2007); *Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222, 227-28, 108 P.3d 147 (Div. 1, 2005).

In this case, the defendant steadfastly maintained that the contraband-containing purse was not hers, and that she had never seen it until the officers questioned her about the drug paraphernalia inside it. VRP (July 19, 2012) at 29-32; 146-56. Based on these representations, her attorney argued in closing that Hamilton knew better than anyone what she did or did not do. VRP (July 20, 2012) at 213. She told the jury exactly where she had put her rings—in a pouch in the car. *Id.* at 214. She explained how her friends moved things from the car to the house, and that the purse in which the police later found her rings was not hers. *Id.* at 216. She was not, in fact, allowed to be within 500 feet of the house in which the purse was found by her ex-husband. *Id.* at 217. In short, based on Hamilton’s

representations at trial, her attorney got to argue to the jury that the State's possession case was ridiculous. *Id.*

Applying the *Arkison* factors, Hamilton's assertion on appeal that she had a privacy interest in the purse is "clearly inconsistent" with her trial testimony. Accepting her position on appeal would strongly suggest that her trial testimony was perjurious. She derives an unfair advantage from the inconsistent positions in two ways: First, had she represented at or before trial that she had a privacy interest in the purse, the State could have created a more meaningful and direct record regarding her representations to the contrary at the time of the search. Second, had Hamilton represented her real privacy interests in the purse at trial, her counsel would not have been allowed to ask for an acquittal based on the alleged "accident" of her friends placing her rings in a purse she had never seen before. As for the discretionary factors: the parties are the same, the question is the same, and it is unjust to allow Hamilton to make a mockery of her jury trial by allowing her to scrap her entire testimony. The fact that Hamilton was unsuccessful in the prior proceeding is not controlling. *Markley*, 31 Wn.2d at 614-15; *Arkison*, 160 Wn.2d at 539. Rather, under *Hamilton* and the cases adopting it into Washington law,

estoppel attached at the time Hamilton testified that she had no interest in the purse, notwithstanding the jury's decision not to believe her. The Court should hold that Hamilton is estopped from asserting a privacy interest in the search of the purse on appeal, and should affirm her conviction.

C. TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE FOR CREDITING THE DEFENDANT'S VERSION OF EVENTS.

Hamilton claims that her trial counsel was constitutionally ineffective for failing to move to suppress evidence from the search of the purse. But counsel *did* move to suppress: during trial, he argued that Hamilton's ex-husband unlawfully searched her house as an agent of law enforcement, and the purse was a fruit of the search. VRP (July 19, 2012) at 80–82. He lost the argument because the ex-husband owned the house and searched it of his own accord, not on law enforcement's request, *id.* at 82-83, a ruling that Hamilton does not challenge on appeal.³

³ The State opines that RAP 2.5's "manifest error" standard does not apply to Hamilton's appeal because of this defense motion, which challenged the search of Hamilton's house and, consequently, her purse as a fruit of the house's search. If the Court finds that this was not "a whisper" of the current argument and so holds that RAP 2.5 applies, Hamilton's claim fails because it is not manifest. The record herein does not sufficiently demonstrate Hamilton's privacy interest in the purse to afford her relief for the first time on appeal.

Based on Hamilton's assertions at the time of trial that she had never seen the purse until officers questioned her about it, her lawyer could not ethically have brought a motion to suppress the search of the purse. See CrR 3.6 (requiring motions to suppress to be supported by an affidavit stating the facts demonstrating a claim to relief); RPC 3.3(b)(e) (preventing a lawyer from submitting false testimony to the court); RPC 3.1 (disallowing frivolous claims). But Hamilton's privacy interest in the house was both established by the evidence and factually consistent with her disavowal of the purse. Thus, trial counsel's motion to suppress was the best he could make given his client's representations. A lawyer can hardly be deemed deficient for making the only ethical motion supported by his client's position. See generally *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (requiring deficient performance for an ineffective assistance claim).

To the extent that trial counsel did not simply treat his client's story as a lie and move to suppress the search of the purse, he employed sound trial strategy. The defense theory of the case was one of accident: Hamilton's friends moved stuff from her car to her house, and in doing so placed her rings in someone else's bag. VRP

(July 20, 2013) at 213-17. Hamilton had a witness, her statements at the time of the incident, and other evidence to support this theory in the hopes that the jury would find a reason to doubt. Choosing to concentrate on Hamilton's accident defense was not ineffective assistance. See *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (noting that strategic decisions are not ineffective assistance). The trial court should affirm Hamilton's convictions.

IV. CONCLUSION

Jessica Hamilton asks the court to overturn her conviction for possession of methamphetamine on the theory that her purse was unlawfully searched and that her trial counsel was ineffective for failing to move to suppress the resulting evidence. But, at the time of the search and at the time of trial, Hamilton represented that the purse was not hers and that she had never seen it before the officers began questioning her about it. Therefore, she abandoned any privacy interest in the purse and is judicially estopped from arguing the opposite on appeal. Her trial counsel made the only ethical motion to suppress possible given Hamilton's position, and otherwise

employed sound trial strategy. The Court should reject Hamilton's appellate contentions and affirm her conviction.

RESPECTFULLY SUBMITTED this March 15, 2013.

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