90155-4

No. 43576-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEANNE BELLE BARRINGER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES iii

I. ISSUES.....1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 12

A. TROOPER HOVINGHOFF DID NOT ILLEGALLY DETAIN BARRINGER WHEN HE EXTENDED THE INITIAL CONTACT FOR A TRAFFIC CITATION TO INVESTIGATE BARRINGER FOR POSSESSION OF METHAMPHETAMINE 12

1. Standard Of Review Regarding Finding Of Facts And Conclusions of Law 12

2. The Extension Of The Initial Contact For Investigation Of A Motor Vehicle Collision Was Justified By The Articulable Suspicion Of Criminal Activity Standard.....14

a. Trooper Hovinghoff had an articulable suspicion that criminal conduct had occurred 15

b. Barringer was placed under custodial arrest and Trooper Hovinghoff's investigation of Barringer for unlawfully possessing methamphetamine was permissible 19

c. Trooper Hovinghoff diligently pursued his investigation 22

B. BARRINGER CONSENTED TO EACH SEARCH INDEPENDENTLY AFTER BEING FULLY ADIVISED OF HER RIGHTS 29

1. Standard Of Review.....30

2. Barringer Consented To Each Search After Trooper Hovinghoff Fully Advised Her, Each Time, Of Her Rights 30

IV. CONCLUSION.....39

TABLE OF AUTHORITIES

Washington Cases

State ex. rel. Lige v. County of Pierce, 65 Wn. App. 614, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992).....13

State v. Acrey, 148 Wn.2d 738, 64 P.3d 594 (2003).....15, 23

State v. Apodoaca, 67 Wn. App. 736, 839 P.2d 352 (1992) 38

State v. Belieu, 112 Wn.2d 587, 773 P.2d 46 (1989).....19

State v. Bliss, 153 Wn. App. 197, 222 P.3d 107 (2009).....15, 16

State v. Brown, 154 Wn.2d 787, 117 P.3d 336 (2005).....15

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008) 14

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998) 35

State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005) 20, 22

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996).....30

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).....12, 13

State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980) 30

State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992).....20

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) 14, 22

State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287 (2011) 13

State v. Lund, 70 Wn. App. 437, 853 P.2d 1379 (1993) 19

State v. Mendez, 137 Wn. 2d 208, 970 P.2d 722 (1999) 15

State v. Mierz, 127 Wn.2d 460, 9001 P.2d 286 (1995) 38

State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) 22, 31, 33, 34, 37

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004).....15

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 31, 32, 33

State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008) 13, 30

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005).....13

State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).....23

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009) 20

Federal Cases

Arkansas v. Sanders, 448 U.S. 753, 99 S. Ct. 2586, 2590, 61 L.Ed.2d 235 (1979) 30

Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) 15, 16

Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925) 19

Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 2026, 29 L.Ed.2d 564 (1971) 30

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 31

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 15, 16, 22, 23, 30

U.S. v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983) 23

U.S. v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 84 L.Ed.2d 605 (1985) 23

Washington Statutes

RCW 9A.76.175 21

Constitutional Provisions

Washington Constitution Article I, § 7 .....14, 21, 22

U.S. Constitution Amendment IV 14

I. ISSUES

A. Did the officer unlawfully extend the initial seizure of Barringer without lawful authority?

B. Did Barringer knowingly and voluntarily consent to the search of her purse?

II. STATEMENT OF THE CASE

On February 29, 2012, at 7:26 p.m., Washington State Patrol Dispatch notified Trooper Hovinghoff of a one-car collision on State Route 12 near milepost 98 in Lewis County, Washington. 1RP 12-13; CP 4-5.[1] Trooper Hovinghoff began responding to the scene. 1RP 13; CP 5.

At approximately 7:42 p.m., Morton Police Officer Royle arrived at the scene of the collision and observed a Chevy Blazer facing eastbound that was stuck in the eastbound ditch off the roadway. 1RP 4-6; CP 5. The passenger side of the vehicle was leaning significantly toward the ditch. 1RP 14-15; CP 5. Based on his observations, Officer Royle believed that the vehicle drove off the roadway into the ditch and therefore a traffic infraction had been committed by the driver. 1RP 7; CP 5. Officer Royle contacted the occupants of the vehicle to determine if they needed medical

[1] The State cites to two of the volumes of the verbatim report of proceedings in its brief. The CrR 3.6 hearing is contained in two volumes – 05/30/12 will be cited as 1RP and 06/1/12 will be cited as 2RP.

attention and to investigate the collision. 1RP 7-8; CP 5. Officer Royle observed Barringer in the driver's seat and Michael Hartley in the back of the vehicle. 1RP 6; CP 5. Officer Royle asked what had happened and Barringer said she drove off the roadway. 1RP 6; CP 5. Officer Royle asked for Barringer's driver's license and proof of the vehicle's insurance. 1RP 6; CP 5. Barringer provided her license and said the vehicle did not have insurance. 1RP 6; CP 5. Officer Royle asked for and verbally received identification information from Mr. Hartley. 1RP 6-7; CP 5. Officer Royle retained Barringer's identification and returned to his vehicle. 1RP 6; CP 5.

At approximately 7:53 p.m., Trooper Hovinghoff arrived on the scene. 1RP 14; CP 5. It was snowing and Trooper Hovinghoff observed that the section of roadway at the collision scene was covered with snow and ice. 1RP 14; CP 5. Trooper Hovinghoff contacted Barringer, who was seated in the driver's seat of the Blazer. 1RP 15-16; CP 5. Mr. Hartley was in the rear seat behind the driver's seat. 1RP 15-16; CP 5. Trooper Hovinghoff asked Barringer what had happened and if she and Mr. Hartley were injured. 1RP 16; CP 5. Barringer said she was driving and went into the ditch. 1RP 16; CP 5. Barringer also told Trooper Hovinghoff that the vehicle did not have insurance. 1RP 16; CP 5. Mr. Hartley

verbally identified himself and Trooper Hovinghoff recognized Mr. Hartley as a person the trooper had witnessed driving the Blazer a little earlier that day. 1RP 17; CP 5.

Trooper Hovinghoff contacted Officer Royle who handed over Barringer's driver's license. 1RP 7; CP 5. Officer Royle had run driver's checks on both occupants and discovered that Barringer had a valid driver's license but Mr. Hartley's license was suspended. 1RP 18; CP 6.

Trooper Hovinghoff returned to the Blazer and asked Barringer to exit the vehicle. 1RP 18; CP 6. Trooper Hovinghoff asked Barringer if Mr. Hartley was driving the Blazer earlier and she stated, "Yes, he was. He was driving." 1RP 18; CP 6. Trooper Hovinghoff placed Mr. Hartley under arrest for driving while license suspended. 1RP 18; CP 6. Mr. Hartley told Trooper Hovinghoff that he did not want to get into trouble and had some information if the trooper would work with him. 1RP 19; CP 6. Trooper Hovinghoff did not make any promises or offers in exchange for information to Mr. Hartley at any time during the investigation. 1RP 50, 2RP 7; CP 9.

After reading Mr. Hartley his constitutional rights, Trooper Hovinghoff asked Mr. Hartley about the information. 1RP 19; CP 6. Mr. Hartley told the trooper that Barringer had an ounce of

methamphetamine with her. RP 19-20; CP 6. Mr. Hartley said he had not seen the methamphetamine but he drove Barringer to Rochester to buy it. 1RP 20; CP 6. Mr. Hartley said the methamphetamine was probably on Barringer's person or in the Blazer. 1RP 19, 25; CP 6. Trooper Hovinghoff asked Mr. Hartley if he was willing to be named in a search warrant as providing this information and Mr. Hartley replied yes. 1RP 19; CP 6. Mr. Hartley told the trooper he had seen Barringer with approximately 1,000 dollars before they went to Rochester. 1RP 20; CP 6. The reason for the trip to Rochester was to purchase methamphetamine and Mr. Hartley and Barringer discussed that she was going to buy methamphetamine. 1RP 20; CP 6. Mr. Hartley also admitted that he was driving the vehicle when it went into the ditch. 1RP 20; CP 6.

Trooper Hovinghoff believed Mr. Hartley to be a credible source based on the level of detail provided and the fact Mr. Hartley was willing to be named in a warrant. 1RP 19-20; CP 6. Trooper Hovinghoff formed a suspicion that Barringer had committed the crimes of Making a False Statement to a Public Servant by lying about who drove the vehicle into the ditch and Possession of Methamphetamine. 1RP 21; CP 6.

Trooper Hovinghoff contacted Barringer and asked her when she last used drugs. 1RP 21; CP 6. Barringer replied that she did not use drugs. 1RP 21; CP 6. The trooper asked if it had been days, weeks, or months, and Barringer replied it had been months. 1RP 21; CP 6. Trooper Hovinghoff asked Barringer if she had any drugs in the vehicle and she said no. 1RP 21; CP 6.

Trooper Hovinghoff asked Barringer for voluntary consent to search her person. 1RP 21-22; CP 6. Barringer asked why and the trooper told her that Mr. Hartley said that she had just bought an ounce of methamphetamine in Rochester and that she was still in possession of it. 1RP 22; CP 6. The trooper told Barringer that consent was voluntary and she could refuse, restrict, or revoke the consent at any time and anything located during the search would be used against her. 1RP 22; CP 6-7. Barringer consented to a search of her person and Trooper Hovinghoff conducted a pat-down search of the outside of Barringer's clothing. 1RP 22-23; CP 7. Trooper Hovinghoff did not locate any drugs on Barringer. 1RP 22-23; CP 7.

Trooper Hovinghoff then asked Barringer for consent to search the Blazer, which she stated she could not give because the vehicle did not belong to her. 1RP 23; CP 7. Trooper Hovinghoff

then advised Barringer that she was being detained for the investigation of Possession of Methamphetamine and handcuffed her. 1RP 23; CP 7. The trooper read Barringer her constitutional rights, which she acknowledged that she understood these rights. 1RP 23; CP 7. Barringer was handcuffed placed in the back of Officer Royle's patrol vehicle. 1RP 24; CP 7. Barringer admitted Mr. Hartley had been driving when the vehicle went into the ditch. 1RP 24-25; CP 7. Trooper Hovinghoff believed he had probable cause to arrest Barringer for Making a False Statement to a Public Servant. 1RP 25.

Trooper Hovinghoff contacted Mr. Hartley who provided consent to search the Blazer and filled out a voluntary consent form. 1RP 27; CP 7. Mr. Hartley advised the trooper that the only thing in the vehicle belonging to Barringer was a purse. 1RP 26; CP 7. Trooper Hovinghoff spoke to Barringer who admitted the purse in the Blazer belonged to her. 1RP 27; CP 7. Trooper Hovinghoff said that Mr. Hartley gave consent to search the vehicle and asked to search Barringer's purse, which she refused. 1RP 27; CP 7. Trooper Hovinghoff advised that his other option was to apply for a search warrant and that it would be up to a judge to grant the warrant. 1RP 27; CP 7. Trooper Hovinghoff explained that there

was a chance that the judge would not grant the warrant. 1RP 27; CP 7.

Trooper Hovinghoff searched the vehicle, found Barringer's purse and placed the purse in his patrol vehicle to secure it while applying for a search warrant. 1RP 27; CP 7. Trooper Hovinghoff did not find anything of evidentiary value in the vehicle. 1RP 27-28; CP 7. Due to the poor weather and the road conditions along with the safety concerns, Trooper Hovinghoff directed that the towing company tow the vehicle to the parking lot of McKenzie's Towing in Morton so he could continue the investigation. 1RP 28; CP 8.

Around 8:57 p.m. Trooper Hovinghoff requested assistance from Lewis County Sheriff's Deputy Chris Fulton and his canine partner. 1RP 29-30; CP 8. While waiting for arrival of the canine unit, Trooper Hovinghoff began writing a search warrant for the Defendant's person and her purse. 1RP 29; CP 8. Deputy Fulton arrived around 9:27 p.m. and led his canine around and inside the Blazer, a couple of bags and Barringer's purse. 1RP 30-31; CP 8. The canine did not signal that it detected the presence of drugs. 1RP 31; CP 8.

At approximately 9:30 p.m. Deputy Sue Shannon arrived and spoke to Trooper Hovinghoff. 1RP 29; CP 8. Trooper Hovinghoff re-

contacted Mr. Hartley in the presence of Deputy Shannon. 2RP 6; CP 8. According to Mr. Hartley, earlier in the evening he observed Barringer counting around 1,000 dollars in denominations of twenties and fifties in her bedroom. 1RP 31; CP 8. Mr. Hartley observed the cash in Barringer's purse 10 to 15 minutes prior to leaving for Rochester to purchase methamphetamine. 1RP 31; CP 8. In Rochester Mr. Hartley and his girlfriend, Tina Harvey, exited the Blazer and Barringer took the vehicle to purchase the methamphetamine. 1RP 31; CP 8. Barringer returned and she and Mr. Hartley drove back from Rochester without Ms. Harvey and discussed that Barringer had purchased methamphetamine. 1RP 31-32; CP 8. Mr. Hartley did not see the methamphetamine but Barringer said they would look at it once they got back home. 1RP 32; CP 8. Based on training and experience, the level of detail provided, Mr. Hartley's level of cooperation, and the facts recited by Mr. Hartley, Trooper Hovinghoff and Deputy Shannon believed that Mr. Hartley was a credible source of information about the presence of meth. 1RP 32-33, 2RP 16-17; CP 8.

Deputy Shannon spoke with Trooper Hovinghoff and told him that, based on her training and experience, females commonly hide contraband in their private area. 2RP 7; CP 8. Deputy

Shannon and Trooper Hovinghoff re-contacted Barringer at 10:11 p.m. CP 9. Barringer asked to go to the bathroom. 2 RP 7; CP 9. Trooper Hovinghoff asked Barringer if she would give voluntary consent to be strip-searched by Deputy Shannon. 1RP 33; CP 9. Barringer consented to the search. 1RP 33; CP 9. Barringer was transported in Officer Royle's vehicle to the Morton Police Department where her handcuffs were removed and she was allowed to use the bathroom. 1RP 10-11, 2RP 8; CP 9. During and after Barringer's use of the bathroom, Deputy Shannon visually inspected Barringer's vaginal area, the toilet, and the inside of Barringer's pants and did not locate any contraband. 2RP 8-9; CP 9. Deputy Shannon then did a pat-down of the outside of Barringer's clothing. 2RP 9; CP 9. Barringer was transported back to the location of the Blazer. 2RP 9; CP 9. Approximately five minutes elapsed during the time that Barringer was away from the scene of the Blazer. 1RP 34; CP 9. Deputy Shannon told Trooper Hovinghoff that nothing was located during the search. 2RP 9; CP 9.

Trooper Hovinghoff returned to working on a search warrant for the purse. 1RP 34; CP 9. During this time, Deputy Shannon sat with Barringer, who was no longer handcuffed, in the back of

Officer Royle's patrol car. 2RP 9; CP 9. Deputy Shannon asked Barringer what she was concerned the trooper might find in the purse. 2RP 9-10; CP 9. Barringer replied that she had a small amount of marijuana in her purse. 2RP 10; CP 9. Deputy Shannon told Barringer that the trooper was not concerned about a small amount of marijuana in the purse as he had been informed that there was a large quantity of meth in the purse. 2RP 10; CP 9. Barringer told Deputy Shannon there was no methamphetamine in the purse and that the marijuana was the only thing she was worried about. CP 9. Barringer told Deputy Shannon that Trooper Hovinghoff could look inside the purse if he disregarded the marijuana because she did not have a large quantity of meth in her purse. 2RP 10; CP 9.

Trooper Hovinghoff told Barringer that he is not worried about a little marijuana. 1RP 35; CP 9. The trooper asked for voluntary consent to search the purse. 1RP 35; CP 9. Trooper Hovinghoff told Barringer that he could not coerce her or make her any promises, and that the consent would have to be knowingly and voluntarily given. 1RP 35; CP 9-10. Barringer constented to the search. 1RP 36; CP 10.

The purse was placed on the hood Trooper Hovinghoff's vehicle while the Defendant stood approximately three feet away near the passenger side door. 2RP 11; CP 10. Barringer told the trooper not to look in the front pocket. 1RP 36; CP 10. Trooper Hovinghoff responded that if she did not want to consent to a search of the whole purse then he would need to apply for a search warrant for the whole purse. 1RP 36; CP 10. Barringer told the trooper he could search the purse. 1RP 36, 2RP 11; CP 10.

Barringer told Deputy Shannon that Barringer had control over the purse the entire time inside the vehicle and that no one else had gotten into the passenger seat prior to Trooper Hovinghoff's arrival. 2RP 12; CP 10. Trooper Hovinghoff located two plastic baggies containing white crystals and one broken glass pipe with white residue in the front pocket of the purse. 1RP 36; CP 10. Based on training and experience, Trooper Hovinghoff believed that the white crystalline substance was methamphetamine. 1RP 36; CP 10. After removing these items, Barringer said "I didn't put that in there" and claimed she did not know where it came from. 1RP 36, 2RP 12-13; CP 10. At approximately 10:38 p.m., Trooper Hovinghoff placed Barringer under arrest for Possession of Methamphetamine. 1RP 37-38; CP 10.

Barringer challenged the search of her purse at a CrR 3.6 hearing. 1RP, 2RP. The trial court held the search was permissible and denied the evidence to suppress. CP 4-11. Barringer was convicted of Possession of Methamphetamine after a stipulated facts bench trial. CP 37-52.

III. ARGUMENT

A. TROOPER HOVINGHOFF DID NOT ILLEGALLY DETAIN BARRINGER WHEN HE EXTENDED THE INITIAL CONTACT FOR A TRAFFIC CITATION TO INVESTIGATE BARRINGER FOR POSSESSION OF METHAMPHETAMINE.

Trooper Hovinghoff's detention of Barringer was legal. The extension of the traffic stop was supported by an articulable suspicion that Barringer was committing the crime of Possession of Methamphetamine. Further, Trooper Hovinghoff had probable cause that Barringer had committed the crime of Making a False Statement to a Public Servant when she was placed under custodial arrest.

1. Standard Of Review Regarding Finding Of Facts And Conclusions of Law.

Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Where there is substantial evidence in the

record supporting the challenged facts, those facts will be binding on appeal." *Id.* Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson,* 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

In the present case Barringer only assigned error to findings of fact 1.7, 1.12, 1.15 and 1.28. Therefore, the findings of fact not assigned error are verities on appeal. The findings of fact Barringer assigned error to are all supported by the unrefuted testimony of the State's witnesses. Finding of fact 1.7 is supported by the testimony of Trooper Hovinghoff with the exception of the time listed in the finding, 1630 hours. 1RP 17, 42. Finding of fact 1.12

was testified to by Trooper Hovinghoff. 1RP 19-20, 42. Finding of fact 1.15 is based upon Trooper Hovinghoff's testimony. 1RP 21-23. Finding of fact 1.28 is supported by Trooper Hovinghoff and Deputy Shannon's testimony. 1RP 32-33, 2RP 16-17. Therefore, the challenged findings are supported by substantial evidence and were properly found by the trial court.

2. The Extension Of The Initial Contact For Investigation Of A Motor Vehicle Collision Was Justified By The Articulable Suspicion Of Criminal Activity Standard.

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. Article One, 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). A

warrantless "seizure is considered per se unconstitutional unless it falls within one of the exceptions to the warrant requirement." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citation omitted).

a. Trooper Hovinghoff had an articulable suspicion that criminal conduct had occurred.

The United States and Washington State constitutions permit an officer to seize someone for investigative purposes without a warrant if the officer has reasonable suspicion that the person has committed a crime. *See Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (federal constitution); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (same); *State v. Brown*, 154 Wn.2d 787, 796, 117 P.3d 336 (2005) (state constitution). An officer must have some suspicion that the person he or she is detaining is connected to a particular crime and not a generalized suspicion that the person detained is up to no good. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009) (citation omitted). An officer must be able to identify "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Mendez,* 137 Wn. 2d 208, 223, 970 P.2d 722 (1999), *abrogated by Brendlin v. California,* 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132

(2007) (*citing Terry v. Ohio,* 392 U.S. at 21). When a court determines the reasonableness of the officer's suspicion it looks at the totality of the circumstances. *Bliss*, 153 Wn. App. at 204.

Officer Royle and Trooper Hovinghoff responded to a dispatched call of a one-car collision. 1RP 4-6, 12-13; CP 5. Trooper Hovinghoff arrived at the scene and found the Blazer in the ditch on the eastside of State Route 12. 1RP 12-15; CP 5. Trooper Hovinghoff contacted Barringer and Mr. Hartley to see if they were okay and to investigate how the Blazer got into the ditch. 1RP 15-16; CP 5. Barringer told Trooper Hovinghoff she was driving and went into the ditch. 1RP 16; CP 5. Barringer had a valid license but the vehicle did not have insurance. 1RP 16, 18; CP 5-6. Trooper Hovinghoff was investigating a possible traffic infraction of not being properly insured and also the possible reasons the vehicle went into the ditch such as negligent driving, reckless driving or driving under the influence of alcohol and/or drugs. 1RP 16-17.

Trooper Hovinghoff discovered Mr. Hartley's driver's license was suspended. 1RP 18; CP 6. Trooper Hovinghoff also remembered seeing Mr. Hartley driving the Blazer earlier that day. 1RP 17; CP 5. Trooper Hovinghoff went back to the Blazer and asked Barringer to step out so he could inquire if Mr. Hartley was

the one actually driving the Blazer when it went into the ditch. 1RP 18; CP 6. Barringer admitted Mr. Hartley had been driving earlier and Trooper Hovinghoff placed Mr. Hartley under arrest for Driving While License Suspended. 1RP 18; CP 6.

Mr. Hartley admitted he drove into the ditch. 1RP 20; CP 6. Mr. Hartley then divulged information to Trooper Hovinghoff in the hope that Trooper Hovinghoff would give Mr. Hartley a break on his driving while license suspended charge. 1RP 19; CP 6. Trooper Hovinghoff did not make Mr. Hartley any promises or offers in exchange for the information Mr. Hartley provided to Trooper Hovinghoff. 1RP 50; 2RP 7; CP 9.

Mr. Hartley told Trooper Hovinghoff that he had driven Barringer to Rochester to purchase an ounce of methamphetamine. 1RP 19-20; CP 6. Mr. Hartley had seen Barringer with 1,000 dollars prior to leaving for Rochester. 1RP 20; CP 6. Mr. Hartley told Trooper Hovinghoff he had not seen the methamphetamine but Mr. Hartley and Barringer had discussed that they were going to Rochester to buy methamphetamine. 1RP 20; CP 6. Mr. Hartley told Trooper Hovinghoff he believed the methamphetamine was on Barringer's person or in the Blazer. 1RP 19, 25; CP 6. Mr. Hartley also agreed to be named in a search warrant.

The trooper acted properly when he initially detained Barringer regarding the investigation for the traffic infractions. Upon learning that Mr. Hartley was suspended and remembering Mr. Hartley driving the Blazer earlier that day, Trooper Hovinghoff had an articulable suspicion that the crime of Driving While License Suspended had occurred. Trooper Hovinghoff also had an articulable suspicion that the crime of Making a False Statement to a Public Servant had occurred when Barringer told Trooper Hovinghoff she had been the one driving the Blazer. When confronted, Barringer admitted Mr. Hartley had been driving earlier and Mr. Hartley admitted he had been the one driving. Once Mr. Hartley provided the information regarding the methamphetamine to Trooper Hovinghoff, the trooper had an articulable suspicion that Barringer was in possession, either actual or constructive, of methamphetamine. Trooper Hovinghoff's continued detention of Barringer for the purpose of the investigation of the possession of methamphetamine was permissible under the investigative detention exception to the warrant requirement.

b. Barringer was placed under custodial arrest and Trooper Hovinghoff's investigation of Barringer for unlawfully possessing methamphetamine was permissible.

A seizure becomes a custodial arrest when an officer restricts a person to the point where a reasonable person would believe he or she is under arrest. *State v. Belieu*, 112 Wn.2d 587, 599, 773 P.2d 46 (1989). The determination of a custodial arrest is an objective standard. *Belieu*, 112 Wn.2d at 773. A custodial arrest must be supported by probable cause that a crime has been committed by the arrestee. *State v. Lund*, 70 Wn. App. 437, 444, 853 P.2d 1379 (1993). "Probable cause exists where the facts and circumstances within the arresting officers' knowledge, and of which they had reasonable trustworthy information are sufficient to warrant a person of reasonable caution to believe that a crime has been committed." *Lund*, 70 Wn. App. at 444-45 (internal quotations and citations omitted).

Separately, both the state and federal constitutions permit warrantless arrests when the officer has probable cause that a suspect who is in a public place has committed a misdemeanor in the officer's presence. *See* RCW 10.31.100; *Carroll v. United States*, 267 U.S. 132, 156, 45 S. Ct. 280, 69 L. Ed. 543 (1925). Both constitutions also recognize an "independent source" doctrine,

which approves of searches and seizures if they are invalid for one reason but constitutional under some independent rationale. *State v. Gaines*, 154 Wn.2d 711, 722, 116 P.3d 993 (2005); *accord State v. Winterstein*, 167 Wn.2d 620, 633-34, 220 P.3d 1226 (2009). If an arrest is supported by probable cause the arrest is not made unlawful because the officer subjectively relied upon a different offense from the one in which probable cause actually existed. *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992).

Trooper Hovinghoff, after asking for and receiving voluntary consent from Barringer to pat down her person, handcuffed Barringer. [2] 1RP 21-23; CP 7. Trooper Hovinghoff informed Barringer that she was being detained for investigation of possession of methamphetamine. 1RP 23; CP 7. Barringer was then placed in the back of a police car and Trooper Hovinghoff read Barringer her constitutional rights. 1RP 23-24; CP 7. A reasonable person under these circumstances would not believe they were free to leave. Under an objective standard, Barringer was under custodial arrest at this point which required the trooper to have probable cause that a crime was committed.

[2] The State will discuss the voluntariness of Barringer's consent in the section below.

Trooper Hovinghoff had probable cause to believe the crime of Making a False Statement to a Public Servant had occurred.

> A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

RCW 9A.76.175. Trooper Hovinghoff was investigating whether a traffic infraction or other driving related crime had occurred. Trooper Hovinghoff had relied upon Barringer's initial statement that she had been the one driving and had put the car in the ditch during his initial investigation. 1RP Mr. Hartley admitted he was the one driving the Blazer when it went into the ditch.1RP 20; CP 6. Barringer also admitted Mr. Hartley had been the person driving. 1RP 18; CP 6. A reasonably cautious person with the facts and circumstances known to Trooper Hovinghoff would believe Barringer committed the crime of Making a False Statement to a Public Servant. Barringer's custodial arrest was supported by probable cause.

Barringer argues for a per se rule that a lengthy detention without a formal arrest violates Article I, section 7 regardless of the presence of probable cause. Brief of Appellant 18-19. No authority for such a rule exists. The cases cited by the defense deal with

searches incident to arrest and pretextual stops. *See State v. O'Neill*, 148 Wn.2d 564, 584-86, 62 P.3d 489 (2003) (concluding that an actual arrest must precede a search incident to arrest); *Ladson*, 138 Wn.2d at 351 (holding that pretextual seizures are unconstitutional). Neither of those issues is before the court. Rather, the question is whether it is constitutional to detain someone beyond the limits of *Terry* if probable cause exists and they are in a public place. Because probable cause gives the officers authority to arrest in such a situation, the continued detention is supported by "authority of law" and no Article I, section 7 violation occurs. Indeed, a per se rule to the contrary would be inconsistent with the independent source doctrine, for it would exclude evidence despite an independent, constitutional source of authority for the detention. *See Gaines*, 154 Wn.2d at 722. The court should reject the defense's proposed new rule.

c. Trooper Hovinghoff diligently pursued his investigation.

If this Court were to find that the custodial arrest was not sufficient to detain Barringer until Trooper Hovinghoff completed his investigation regarding the possession of methamphetamine, arguendo, Trooper Hovinghoff's actions were lawful because he diligently pursued the investigation.

An officer must diligently pursue his or her investigation to be within the scope of a *Terry* detention. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984), *citing U.S. v. Place*, 462 U.S. 696, 709, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983). The length of the seizure must be limited: if the ensuing investigation dispels the officer's suspicions, the stop must end, but the stop may persist or be extended if the officer's suspicions are confirmed or further aroused. *Acrey,* 148 Wn.2d at 747. The courts have not placed a bright line time limit on when an investigative detention goes on to long and becomes a custodial arrest. *U.S. v. Sharpe*, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L.Ed.2d 605 (1985). The United States Supreme Court acknowledge that while "a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." *Sharpe*, 470 U.S. at 685.

Each step the trooper took in this case was in attempt to confirm or dispel his suspicion that Barringer was in possession of methamphetamine. Trooper Hovinghoff received detailed information from Mr. Hartley who explained that he saw Barringer with 1,000 dollars prior to leaving for Rochester. 1RP 20; CP 6. Mr. Hartley explained that he and Barringer discussed that the reason

they were going to Rochester was so Barringer could purchase an ounce of methamphetamine. 1RP 20; CP 6. Mr. Hartley acknowledged he had not seen the methamphetamine but he stated that Barringer had the methamphetamine either on her person or in the Blazer. 1RP 19-20, 25; CP 6. Mr. Hartley was willing to be named in a search warrant and he was not made any promises regarding the information he was providing. 1RP 19-20, 50; CP 6.

Trooper Hovinghoff contacted Barringer, asked her about when she last used drugs and asked for voluntary consent to search her person. 1RP 21-22; CP 6. Trooper Hovinghoff explained to Barringer that Mr. Hartley had told the trooper Barringer was in possession of methamphetamine. 1RP 22; CP 6. Trooper Hovinghoff advised Barringer (as he did each time he asked for voluntary consent to search) that she could refuse the search, restrict where the trooper searched, she could revoke consent at any time and that anything that was found could be used against her. 1RP 22; CP 6-7. Barringer agreed to let Trooper Hovinghoff search her person. 1RP 22; CP 7. Trooper Hovinghoff did not find anything of evidentiary value but this did not dispel his suspicion

because the drugs could still be in the car, the belongings inside of the car or inside her person.

Trooper Hovinghoff continued to detain Barringer and requested her permission to search the vehicle, which she stated she could not give because the vehicle did not belong to her. 1RP 23; CP 7. Trooper Hovinghoff obtained written consent to search the Blazer from Mr. Harltley. 1RP 25-26; CP 7. Trooper Hovinghoff asked Barringer if he could search her purse which was located in the Blazer and she told the trooper no. 1RP 26-27; CP 7. Trooper Hovinghoff advised Barringer that he only had two options, he could ask her for voluntary consent to search the purse or he could apply for a search warrant and the judge would have to determine if the trooper could search the purse. 1RP 27; CP 7. The trooper found nothing of evidentiary value in the Blazer. 1RP 27-28; CP 7.

Due to the weather conditions and for safety concerns, it was determined that the Blazer would be towed to a parking lot in Morton. At approximately 8:57 p.m., Trooper Hovinghoff requested assistance from Deputy Fulton and his canine partner. 1RP 29-30; CP 8. It took a half an hour for Deputy Fulton to arrive and while waiting for Deputy Fulton, Trooper Hovinghoff began to work on a search warrant for Barringer and her purse. 1RP 29; CP 8. The

canine was deployed around the Blazer, a couple of bags and Barringer's purse. 1RP 30-31; CP 8. The canine did not signal that it detected the presence of drugs. 1RP 31; CP 8.

After the canine failed to detect any drugs Trooper Hovinghoff spoke to Mr. Hartley again. 1RP 21. Mr. Hartley gave a greater detailed account of what had occurred. 1RP 31. Mr. Hartley described the money, denominations of twenties and fifties. 1RP 31; CP 8. Mr. Hartley explained he had witnessed Barringer with the money only 10 to 15 minutes prior to them leaving for Rochester. 1RP 31; CP 8. Mr. Hartley said he and Ms. Harvey got out of the vehicle in Rochester and Barringer took the Blazer to go purchase the methamphetamine. 1RP 31; CP 8. Mr. Hartley also stated he had not seen the methamphetamine but Barringer told Mr. Hartley they would look at the methamphetamine once they arrived home. 1RP 32; CP 8. At this point Trooper Hovinghoff believed the methamphetamine was either inside of Barringer or inside of Barringer's purse. 1RP 33.

Trooper Hovinghoff asked Barringer for voluntary consent to be strip searched by Deputy Shannon. 1RP 33; CP 9. This was done in an attempt to confirm or dispel if Barringer had the drugs inside of her person. Barringer agreed to be strip searched. 1RP

33; CP 9. Barringer was transported to the Morton Police Department so she could use the bathroom and Deputy Shannon could perform the search. 1RP 10-11; CP 9. Deputy Shannon visually inspected Barringer and checked the toilet after Barringer used the bathroom. 2RP 8-9; CP 9. Nothing was located during the search, which took about five minutes. 1RP 34, 2RP 8-9; CP 9.

When Deputy Shannon and Barringer returned from the Morton Police Department they sat in the back of the patrol car and talked while Trooper Hovinghoff returned to work on his search warrant for Barringer's purse. 1RP 34, 2RP 9-10; CP 9. Trooper Hovinghoff also explained that canines are not always 100 percent reliable and given the detailed information that Mr. Hartley had given to him, he wanted to continue to write out the search warrant. 1RP 34. During this time Deputy Shannon learned that Barringer was concerned about Trooper Hovinghoff searching her purse because it contained marijuana. 2RP 9-10; CP 9. Deputy Shannon assured Barringer that Trooper Hovinghoff would not care about a small amount of marijuana. 2RP 10; CP 9. Barringer told Deputy Shannon that she was in control of her purse prior to being removed from the Blazer. 2RP 12; CP 10. Barringer told Deputy

Shannon that Trooper Hovinghoff could look in her purse if he would disregard the marijuana. 2RP 10; CP 9.

Deputy Shannon got out of the patrol car and told Trooper Hovinghoff that Barringer was concerned about a small amount of marijuana in her purse. 2RP 10. Trooper Hovinghoff again requested voluntary consent for the purse, which Barringer gave. 1RP 35; CP 9-10. Trooper Hovinghoff located approximately 17 grams, over half an ounce, of methamphetamine in Barringer's purse. 1RP 36; CP 10.

Barringer argues that the length of the total detention, approximately two and a half hours, was unreasonable and the trooper did not act diligently in an attempt to confirm or dispel his suspicion. Brief of Appellant 13-15. Trooper Hovinghoff did act diligently in an attempt to confirm or dispel his suspicion. Mr. Hartley, who agreed to be named and was present until almost the very end of the investigation, gave a detailed accounting of what had occurred and told the trooper Barringer had methamphetamine either on her person or inside of the Blazer. Trooper Hovinghoff's actions, one step at a time, were in an attempt to either confirm or dispel his suspicion that Barringer was in possession of methamphetamine. The only way the trooper could fully dispel his

suspicion was to search not only Barringer and the Blazer but also Barringer's purse. The trooper diligently went through the steps necessary to accomplish this, which did take some time. When it became apparent that Barringer would not consent to his search of her purse, Trooper Hovinghoff began to write out a search warrant. During the process of writing out his search warrant the canine was called, the vehicle had to be removed from the roadway and Barringer had requested to use the bathroom. While Trooper Hovinghoff was in the process of writing out the search warrant Deputy Shannon interrupted him and told the trooper that Barringer would consent to the search of the purse, which is why the search warrant was never requested.

The length of time, while longer than many cases, given the facts and circumstances presented here was not excessive. The trooper diligently attempted to confirm or dispel his suspicions. The scope of the investigative detention was permissible and this Court should affirm Barringer's conviction.

B. BARRINGER CONSENTED TO EACH SEARCH INDEPENDENTLY AFTER BEING FULLY ADIVISED OF HER RIGHTS.

Trooper Hovinghoff fully advised Barringer of her rights each time he asked her for consent to a search. Barringer consented to

each search knowingly and voluntarily.

1. Standard Of Review.

The trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *Sadler*, 147 Wn. App. at 123.

2. Barringer Consented To Each Search After Trooper Hovinghoff Fully Advised Her, Each Time, Of Her Rights.

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* investigated stops." *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

A person can consent to being searched by an officer. The State must show that the consent was voluntarily and freely given.

O'Neill, 148 Wn.2d at 588. The determination whether consent is voluntarily given is a question of fact. *State v. Reichenbach,* 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The court must look at the totality of the circumstances. R*eichenbach,* 153 Wn.2d at 132. The court may consider a number of factors when determining if consent was voluntary. *O'Neill*, 148 Wn.2d at 588. These factors include, but are not limited to: the intelligence or degree of education of the person, were *Miranda*[3] warnings given and was the person advised of the right to consent. *Id.* at 588. "While knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however." *Recichenbach*, 153 Wn.2d at 132 (citations omitted). The court may also weigh such factors as implied or express claims of police authority to search, a defendant's cooperation, an officer's deception as to identity or purpose and previous illegal actions of the police. *Id.*

In *Reichenbach*, Mr. Seaman had been in contact with police regarding his landlord forcing Mr. Seaman to drive the landlord to go purchase drugs. *Reichenbach*, 153 Wn.2d at 128-29. After numerous calls, a detective obtained a search warrant for the landlord, Reichenbach, and Mr. Seaman's car. *Id.* at 129. On that

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

date, Mr. Seaman had called the detective to inform him that Reichenbach was again forcing Mr. Seaman to drive Reichenbach to a location so Reichenbach could purchase methamphetamine. *Id.* 128-29. Mr. Seaman did call the detective to inform him that Reichenbach was having difficulty obtaining methamphetamine and Mr. Seaman was unsure Reichenbach would be able to obtain the drugs. *Id.* at 129. The detective did not inform the court that Reichenbach was having difficulty obtaining methamphetamine. *Id.* Officers staged a car accident to block the road and contacted Mr. Seaman's car. *Id.* The officer's ordered Reichenbach out of the vehicle and searched the vehicle. *Id.* The officers discovered methamphetamine on the floor near where Reichenbach had been sitting.

The Court of Appeals held the search warrant obtained by detectives allowing them to search Mr. Seaman's car and Mr. Reichenbach was invalid. *Id.* 130-31. The Supreme Court in *Reichenbach* now looked to whether Mr. Seaman's consent would be sufficient to permit the officers to search the vehicle. *Id.* at 130-31. The Court acknowledged that Mr. Seaman was cooperating with police, was not coerced and seemed of reasonable intelligence. *Id.* at 132-33. The Court found that Mr. Seaman had

consented to a search of the entire vehicle. *Id.* at 133. The Court did find that Reichenbach was unlawfully seized when the officers ordered him out of the vehicle at gunpoint and it was at that time that Reichenback involuntarily abandoned the methamphetamine due to the police's unlawful actions. *Id.* at 135-37.

In *O'Neill*, the officer had O'Neill step out of the car after O'Neill gave a false name and told the officer his driver's license had been revoked. *O'Neill*, 148 Wn.2d at 572. The officer saw what he believed was a spoon used for cooking drugs when O'Neill stepped out of the vehicle. *Id.* The officer asked O'Neill for consent to search the vehicle. *Id.* at 573. O'Neill refused and told the officer he would need to get a warrant to search the car. *Id.* at 573. The officer responded he did not need a warrant and could arrest O'Neill for the drug paraphernalia and search the vehicle incident to O'Neill's arrest. *Id.* The conversation went back and forth. *Id.* The officer continued to ask for consent. *Id.* O'Neill continued to refuse. *Id.* Eventually, O'Neill consented to the search of the car. *Id.* The officer found drugs in the car. *Id.* The Supreme Court held that consent can be given while a person is detained. *Id.* at 589. However, under the circumstances in *O'Neill*, where a defendant refused consent and only acquiesced after continued pressure by

the police, consent cannot be valid because it was not freely and voluntarily given. *Id.* at 589-91.

In the present case Barringer consented to three separate searches. Barringer consented to a search of her person, a strip search and a search of her purse. CP 6-10. In each instance Trooper Hovinghoff fully advised Barringer of her rights. CP 6-10.

Trooper Hovinghoff asked Barringer if he could search her person. 1RP 21; CP 6. Trooper Hovinghoff advised Barringer that she could refuse to be search. 1RP 22. Trooper Hovinghoff advised Barringer that if she consented to be searched she could restrict where he looked and she could also revoke her consent at any time. 1RP 22. Trooper Hovinghoff also advised Barringer that anything that was found could be used against her. 1RP 22. Barringer told Trooper Hovinghoff, "Go ahead and search." 1RP 22. Trooper Hovinghoff then conducted the search. 1RP 22.

Trooper Hovinghoff asked for Barringer's consent to search her purse prior to his search of the Blazer. 1RP 27. This request was made after Barringer had been handcuffed and placed in the back of Officer Royle's police car. 1RP 23-27. Trooper Hovinghoff had read Barringer her constitutional rights prior to placing her in the patrol car. 1RP 23-24. Trooper Hovinghoff told Barringer that he

only had a couple of options. 1RP 27. The trooper stated, "I could ask for voluntary consent or I could apply for a search warrant. It would be up to a judge whether they granted the warrant or not so there could be a possibility that I could not search the purse from that." 1RP 27. Barringer did not give consent to search her purse at that time. 1RP 27.

Trooper Hovinghoff asked Barringer for consent to have Deputy Shannon strip search her. 1RP 33. Trooper Hovinghoff stated, "[a]gain, I advised her of the *Ferrier*, refuse, restrict, revoke, and anything found could be used against her." 1RP 33.[4] Barringer consented to the search by Deputy Shannon. 1RP 33.

Finally, Trooper Hovinghoff, after working on the search warrant for the purse, was informed by Deputy Shannon that Barringer did not want to consent to the search of the purse earlier because it contained a little bit of marijuana. 1RP 35. Trooper Hovinghoff spoke to Barringer and explained he was not concerned about a little bit of marijuana. 1RP 35. Trooper Hovinghoff told Barringer he was concerned about the ounce of methamphetamine. 1RP 35. Trooper Hovinghoff stated,

> I told her I couldn't promise her anything. I told her it would be voluntary consent. It would have to be given

[4] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

> voluntarily and knowingly. She could refuse the consent. She could restrict where I looked. She could revoke that consent at anytime, and anything that was found could be used against her.

1RP 35. Barringer told Trooper Hovinghoff, "[g]o ahead and search the purse." 1RP 36. Trooper Hovinghoff got ready to search the purse while Barringer was standing about three feet away. 1RP 36; CP 10. Barringer told Trooper Hovinghoff not to search the front pocket of the purse. 1RP 36. Trooper Hovinghoff told Barringer, "'Well, the consent would be for the whole purse.' If she didn't want to give consent for whole purse, I would just apply for a search warrant. I then again said, 'It would be up to a judge to grant it and he may not grant it.'" 1RP 36. Barringer then told Trooper Hovinghoff, "[g]o ahead and search."

Barringer does not argue that she did not consent to the search of her person or her strip search. Brief of Appellant 20-21. Barringer argues that the search of her purse was not consented to because consent was only received after her initial refusal, continued detainment and groundless threat to obtain a search warrant. Brief of Appellant 20. The State respectfully disagrees. Under the totality of the circumstances of this case, Barringer's consent was voluntary and the search of her purse was lawful.

Barringer was advised at least four separate times of her right to refuse the search and if she consented the right to restrict what was searched and her right to revoke the search at any time. 1RP 22, 27, 33, 35. Barringer had been read her constitutional rights. 1RP 23-24. Trooper Hovinghoff informed Barringer that he would seek a warrant but told Barringer that the decision whether to grant the search warrant request was up to the judge and there was a possibility the judge would not grant the warrant. 1RP 27, 36. Barringer did initially refuse consent to search her purse. 1RP 27. Trooper Hovinghoff asked for Barringer's consent a second time after being informed by Deputy Shannon that Barringer refused consent because she was concerned about a little marijuana she had inside of her purse. 1RP 35. This is not a case like *O'Neill* where the officer asked for consent was told no, and then the officer repeatedly told O'Neill he could search whether O'Neill consented to the search or not and only then did O'Neill give his consent to the search.

Trooper Hovinghoff informed Barringer he was not concerned about a little marijuana and went through Barringer's rights again. 1RP 35. Barringer consented but then restricted the consent to only a portion of her purse. 1RP 35-36. Trooper

Hovinghoff informed Barringer that if she did not want to consent to the entire purse then he would apply for a search warrant. 1RP 36. But once again, Trooper Hovinghoff explained the decision to grant a warrant was not his and he may not get to search the purse. 1RP 36. Trooper Hovinghoff did not misrepresent the scope or extent of his authority to obtain a search warrant. *See, State v. Apodoaca*, 67 Wn. App. 736, 740, 839 P.2d 352 (1992), *overruled on other grounds by State v. Mierz*, 127 Wn.2d 460, 9001 P.2d 286 (1995). Barringer was also fully informed of why Trooper Hovinghoff wanted to search her purse. Barringer knew Trooper Hovinghoff believed she had a large quantity of methamphetamine in her purse. 1RP 22, 2RP 10.

When evaluating Barringer's consent to the search of her entire purse under the facts and circumstances of this case, her consent was knowingly and voluntarily made. Barringer was well informed of her rights. Barringer was informed that while an officer may apply for a warrant that application was not a guarantee that the judge will grant the warrant. Trooper Hovinghoff's actions were not coercive. This Court should uphold the trial court's conclusion of law that Barringer consented to the search of her purse and affirm her conviction.

IV. CONCLUSION

For the reasons argued above this court should affirm Barringer's conviction.

RESPECTFULLY submitted this 26th day of February, 2013.

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by:_____
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