

68335-7

68335-7

NO. 68335-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERESA RUSSELL,

Appellant.

OCT 17



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

The Honorable Charles R. Snyder, Judge  
Steven J. Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying appellant's motion to suppress. Supp. CP \_\_ (sub no. 95, Findings and Conclusions re: Suppression Hearing, 12/21/11)(attached as Appendix A).

2. The trial court erred in entering Findings of Fact 7, 8, 9 and 10. Appendix A at 2-3.

3. The trial court erred in concluding appellant lacked "standing to contest the search of Helen Kluck's person." Appendix A at 4 (Conclusion of Law 2).

4. The trial court erred in concluding appellant lacked standing to contest the search of Kluck because she never possessed the cocaine found on Kluck, after inconsistently denying her pretrial motion to dismiss for a lack of evidence establishing appellant possessed the cocaine found on Kluck. Appendix A at 4 (Conclusion of Law 2); Supp. CP \_\_ (sub no. 93, Order re: Knapstad Motion, 12/21/11)(attached as Appendix B).

5. The trial court erred in entering Conclusions of Law 3 and 4. Appendix A at 4.

6. It was error for a judge who did not hear the pretrial motions to sign and enter the written findings of fact, conclusion of law and orders associated with those motions. Appendix A at 5; Appendix B at 2; Supp. CP \_ (sub no. 94, Findings and Conclusions re: Confession Hearing,

12/21/11)(attached as Appendix C).

7. The sentencing judge erred in refusing to consider appellant's request for something other than a standard range sentence.

Issues Pertaining to Assignments of Error

1. Are several of the findings of fact associated with the trial court's denial of appellant's motion to suppress invalid because they are not supported by substantial evidence?

2. Did the trial court err in concluding appellant lacked standing to challenge the search of Kluck when it was the drugs discovered on Kluck that were used to charge appellant with possession of cocaine?

3. The trial court denied appellant's pretrial motion to dismiss, finding there was sufficient evidence appellant possessed the drugs found on Kluck. The court then held appellant lacked standing to challenge the search of Kluck because she never possessed the drugs found on Kluck. Did the trial court err by denying the motion to suppress evidence based on this inconsistent reasoning?

4. Was it error for a judge who did not hear pretrial motions to sign and enter the corresponding findings of fact, conclusions of law and orders, especially when the hearing judge was still active and merely unavailable on the day they were presented?

5. Was it error for the sentencing court to categorically refuse to

consider appellant's requests for a non-standard range sentence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecutor charged appellant Teresa Russell with possession of cocaine, bail jumping, witness intimidation and witness tampering. CP 89-91. Russell filed a pretrial motions to dismiss the drug charge for insufficient evidence (CP 107-115); a motion to suppress the cocaine, (CP 96-106; Supp. CP \_\_ (sub no. 55, Motion to Suppress, 9/8/11), and a motion for "automatic standing." CP 80-86. The trial court denied each motion. Appendices A & B; 1RP<sup>1</sup> 97-98, 115-19.

A jury found Russell guilty of cocaine possession and bail jumping, but not guilty of witness intimidation and tampering. CP 49. The court sentenced Russell to concurrent standard range sentences of 18 months for the cocaine possession and 60 months for the bail jumping. CP 13-21; 2RP 11. Russell appeals. CP 3-12.

2. Pretrial Hearing on Defense Motions

On the evening of January 9, 2010, Deputy Taddonio told Deputy Gervol he had seen two women in a car registered to Russell at a gas station.

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<sup>1</sup> There are five volumes of verbatim report of proceedings referenced as follows: 1RP - four-volume, consecutively paginated set for the dates of July 11, 2011 (pretrial), and July 12-14, 2011 (trial); and 2RP - December 21, 2011 (sentencing).

1RP 12, 35. At the time, Gervol had probable cause to arrest Russell for another incident. 1RP 12. After confirming Russell was driving, Gervol signaled for the car to stop. 1RP 13. Gervol claimed Russell failed to immediately pull over, and instead drove slowly for more than a quarter mile before pulling to the shoulder. 1RP 11-13. Russell said she did not immediately notice Gervol behind her, and when she did she went to a church parking lot because she knew she would be arrested and did not want her car left on the side of the road. 1RP 78-79.

Gervol claimed he saw Russell furtively moving her arm near the passenger's side of her car before stopping. 1RP 13-14. Russell said he probably saw her reaching for a cigarette. 1RP 79.

Gervol arrested Russell without incident, advised her of her rights and placed her in the back of his patrol car. 1RP 15-18, 37. Russell consented to a search of her car, and specifically asked that the methadone locked in the trunk be retrieved before she went to jail so she would not get sick from heroin withdrawals. Appendix A at 2 (Finding of Fact 3); 1RP 16-17, 27, 40, 42, 77, 80-82. Russell denied, however, knowing of any other drugs in the car. 1RP 17.

Gervol called for a narcotics-detecting dog to search the car. 1RP 17. Before the dog search began, Russell's passenger, Helen Kluck, "was asked to exit the vehicle so we could execute the search. She voluntarily

agreed to stay in the area and converse with Deputy Taddonio." 1RP 18. Gervol denied Kluck had "been detained for any reason" at the time of the search. 1RP 20. Gervol also explained Russell had asked that Kluck be allowed to take her car so it would not have to be towed. 1RP 18-19.

As the dog searched the car, Taddonio asked Kluck, who had no driver's license, if she knew anyone who could take Russell's car. 1RP 42-44. When Taddonio noticed the dog alerting on the scent of narcotics in the car, he asked Kluck "if she was aware of any narcotics in the vehicle." 1RP 44. Taddonio claimed Kluck became nervous, avoided eye contact, patted herself down, and denied any knowledge of drugs. Taddonio believed Kluck was lying. 1RP 44-45.

Taddonio asked Kluck if he could search her purse. Kluck responded by picking it up opening it and sifting through it for the officer. 1RP 45. When Taddonio told her he would rather search the purse himself, Kluck handed it to him, mentioned the personal hygiene products contained within, and then said, "I would rather you didn't." 1RP 45-46. According to Taddonio:

With her concerns about personal hygiene products, I advised it didn't matter to me. I again reaffirmed, "Can I search your purse?" That's when she responded, "I'd rather you didn't," and then in the context, I took, it was, you know, almost as if she was admitting there was something there, and I said, "I understand you would rather I didn't. May I search your purse?" And at that point, she said, "Yes, you

may."

1RP 46.

Taddonio then searched Kluck's purse and found a glass pipe and suspected cocaine. RP 47. Kluck promptly claimed Russell gave her the drugs. 1RP 47. When asked if she had more, Kluck admitted she did, and more cocaine and a pipe were eventually recovered from her pants pockets and underwear. 1RP 47-51.

Taddonio claimed Russell was upset about the drugs found on Kluck, denied possessing them, and declared it was Kluck's "fall to take." 1RP 52. Kluck, on the other hand, claimed both she and Russell bought the drugs in Burlington and that they were on their way to Russell's home when Gervol initiated the traffic stop, at which point Russell allegedly made her take all the drugs before she would pull over. 1RP 53-54.

According to Gervol, Russell admitted she and Kluck were going to her home to use the cocaine, but denied ever possessing it. 1RP 21-22.

Russell admitted she and Kluck had gone to Burlington together, but said it was because Kluck asked for a ride to collect a debt. 1RP 74. She also admitted inviting Kluck to her house to watch movies, and that Kluck said she had a "surprise" for her when they got there, but denied any knowledge of Kluck's drugs. 1RP 76, 80. She also denied instructing Kluck to hide anything as they were being pulled over, or ever telling Gervol she

knew of Kluck's drugs and that they planned to share them. 1RP 80-81, 83.

The trial court denied Russell's motion to dismiss. The court concluded there was "some evidence of possession" by Russell of the drugs found on Kluck such that the jury could find Russell guilty based on "direct possession". 1RP 97-98. Conversely, the court found Russell's lack of actual or constructive possession at the time of the search deprived her of standing to challenge the constitutionality of the search of Kluck, and as such had no basis to seek suppression of the drugs used to prosecute her. 1RP 115-19.

### 3. Post-trial and Sentencing

Following conviction, Russell sought a mitigated exceptional sentence, citing her failing health and the role chemical dependency played in commission of the bail jumping offense. CP 35-48.

For whatever reason, the Honorable Steven J. Mura, rather than the trial judge, the Honorable Charles R. Snyder, was the sentencing judge. 1RP 1, 125, 295, 505; 2RP 2. Russell's counsel objected to the change of judges, noting Judge Snyder had heard the case and was thus better suited to impose a just sentence. 2RP 4.

Judge Mura agreed "it is preferable to have the trial judge do the sentencing." 2RP 5. He stated he was unaware of any prohibition against another judge imposing sentence, however, and noted that sometimes it is

unavoidable. 2RP 5. The prosecutor informed Judge Mura that Judge Snyder would be available in a month. 2RP 7.

After some discussion regarding Russell's poor health, Judge Mura decided to proceed to sentencing. He allowed that because he had not heard the evidence, he would be reluctant to depart from the standard range. 2RP 8. Sure enough, Judge Mura then imposed a 60-month standard range sentence. CP 13-21; 2RP 11.

Judge Mura also signed findings of fact, conclusions of law, and an order denying the motion to suppress, an order denying the motion to dismiss, and findings of fact, conclusion of law and an order finding Russell's post-arrest statements admissible. Appendices A, B & C.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING RUSSELL'S MOTION TO SUPPRESS.

Several factual findings relied on by the trial court to deny Russell's motion to suppress the cocaine are not supported by the record and are therefore in error. The trial court also erred in concluding Russell lacked standing to challenge the search of Kluck. These errors warrant reversal of Russell's judgment and sentence for cocaine possession.

Under the Fourth Amendment and article 1, section 7, warrantless searches and seizures are per se unreasonable unless the State demonstrates

they fall within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). Any evidence derived directly or indirectly from an illegal seizure must be suppressed unless sufficiently attenuated from the initial illegality to be purged of the original taint. Wong Sun v. United States, 371 U.S. 471, 484-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995). This court reviews conclusions of law relating to the suppression of evidence de novo, and associated findings of fact for substantial evidence. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

a. The Trial Court's Factual Findings are Not Supported by Substantial Evidence.

Several of the trial court's written findings of fact are not supported by the evidence. Findings of fact 8, 9 and 10 reference testimony by Kluck. Appendix A at 3. Kluck did not testify at the suppression hearing. See 1RP 10-119. Because these findings are based on non-existent testimony, they are unsupported and therefore invalid. Winterstein, 167 Wn.2d at 628.

Finding of fact 7 is unsupported for a different reason. It states that when Taddonio asked to search Kluck's purse

she picked her purse up from the ground and opened it for the Deputy; the Deputy then asked if he, himself, could

search the purse; Kluck stated that she would rather that he didn't referring to female hygiene products; the Deputy then asked for clarification as to whether that meant he could or could not look in the purse; Kluck then handed him the purse to search; . . .

Appendix A at 2 (emphasis added).

Finding of fact 7 wrongly states Kluck had possession of her purse when she told Taddonio she would rather he not search it. The record shows, however, that Taddonio already held the purse when she told him she did not want it searched. RP 45-46. Like findings 8, 9 and 10, finding 7 is invalid.

b. The Trial Court Erred in Concluding Russell Lacked Standing.

The drugs found on Kluck were the basis for the cocaine possession charge against Russell. The trial court did not find the search constitutional. It instead concluded Russell lacked standing to challenge the search. Appendix A at 4 (Conclusion of Law 2). This was error that requires reversal.

A Washington defendant charged with a possessory crime has automatic standing to challenge the admissibility of evidence obtained as a result of an illegal search. State v. Michaels, 60 Wn.2d 638, 646-47, 374 P.2d 989 (1962). This "automatic standing" rule has been repeatedly affirmed in recent years. State v. Evans, 159 Wn.2d 402, 406-07, 150 P.3d

105 (2007); State v. Jones, 146 Wn.2d 328, 332-33, 45 P.3d 1062 (2002);  
State v. Williams, 142 Wn.2d 17, 22-23, 11 P.3d 714 (2000).

Jones involved a traffic stop. Jones was arrested on an outstanding warrant and placed in a patrol car. Police then ordered Jones' girlfriend out of the car and directed her to leave her purse. Police searched the purse and found a stolen gun that Jones claimed was his. 146 Wn.2d at 331. The State charged Jones with unlawful possession of a firearm and his motion to suppress was denied. 146 Wn.2d at 330. The Supreme Court reversed, holding that Jones had automatic standing to challenge the search of his girlfriend's purse and that the search was unlawful. 146 Wn.2d at 338. On the issue of standing, the Court held:

To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure.

Jones, 146 Wn.2d at 332.

Because Jones was charged with possession of a firearm, the first requirement was obviously met. 146 Wn.2d at 332-33. The Court also found the second requirement was met because Jones constructively possessed the gun because he controlled the car and contents therein, because his items were in the purse, and because he admitted the gun was his." 146 Wn.2d at 333.

In addition to the two requirements discussed above, the Jones Court also required a showing that the challenged police action resulted in the discovery of the evidence used against the defendant. 146 Wn.2d at 334. The Court found a direct relationship between the challenged police action and the gun. The Court held that unless Jones had automatic standing, he would have to either admit he possessed the gun or claim he did not possess it, thereby losing his ability to challenge the search. Cite.

Jones, 146 Wn.2d at 334-35.

Under Jones, the trial court erred in denying Russell the opportunity to challenge the search of Kluck. All three requirements for automatic standing were satisfied. First, Russell was charged with possession of cocaine. CP 94-95. Possession, whether actual or constructive, is an essential element of this offense. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

Second, Russell challenged the search of Kluck, which led to discovery of the cocaine used to charge Russell. CP 96-106.

Finally, as the trial court correctly found in the context of denying Russell's pretrial motion to dismiss, there was sufficient evidence Russell directly or constructively possessed the cocaine found on Kluck. 1RP 97-98. Despite this denial, the trial court also decided that for purposes of standing, Russell did not have actual or constructive possession of the cocaine, and that if Russell was guilty of possessing the cocaine found on

Kluck, it had to be based on accomplice liability. 1RP 115-19.

These inconsistent findings cannot both be correct. Either Russell had constructive possession of the cocaine because it had been in the car she controlled or she did not. If she did, under Jones she had automatic standing to challenge the search of Kluck's purse. If she did not, the court erred by denying the motion to dismiss. This Court should reverse Russell's judgment and sentence for cocaine possession and remand for a new suppression hearing.

2. THE JUDGE WHO ENTERED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS ASSOCIATED WITH A PRETRIAL HEARING LACKED THE NECESSARY AUTHORITY.

It is well settled that a judge lacks authority to enter findings of fact if he or she did not hear the evidence in the matter.

RCW 2.28.030(2) is clear:

A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:

...

- (2) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.

A limited exception to this prohibition is contained in CR 63(b), which allows a different judge to enter written findings of fact and

conclusions of law if the original judge is unable to "by reason of death, sickness or other disability". The related criminal rule is CrR 6.11:

**(a) Disability of Judge During Jury Trial.** If, before the judge submits the case to the jury, he is unable to continue with the trial, any other judge assigned to or regularly sitting in the court, upon familiarizing himself with the record of the trial, may proceed with the trial. Upon defendant's objection to the replacement, a mistrial shall be granted. If, after the judge submits the case to the jury, he is unable to continue, the case shall proceed before another judge.

**(b) Disability of Judge During Nonjury Trial.** If a judge before whom trial without jury has commenced is unable to proceed with the trial, a mistrial shall be granted.

In State v. Bryant, 65 Wn. App. 547, 547, 829 P.2d 209 (1992), a juvenile pled guilty to two counts of theft. At his disposition hearing, the judge found manifest injustice and imposed commitment beyond the standard range. After his oral decision, the judge directed the State to prepare findings of fact consistent with his ruling. A commissioner – not the judge -- later signed and entered the findings of fact and conclusions of law. Id. at 547-548. This Court remanded for resentencing, holding that “a successor judge only has the authority to do acts which do not require finding facts. Only the judge who has heard evidence has the authority to find facts.” Id. at 550.

Similarly, in DGHI Enterprises v. Pacific Cities, Inc., 137 Wn.2d 933, 936, 977 P.2d 1231 (1999), the trial judge rendered an oral decision

granting the defendant's motion to dismiss. The judge discussed the proposed findings of fact and conclusions of law and asked the defendants to prepare documents. The judge held two later hearings to discuss the proposed findings and objections made by the plaintiff. The judge scheduled a third hearing but unexpectedly died before that proceeding. *Id.* at 936-937

Following the judge's death, the plaintiff filed a motion for a new trial, which was denied by a successor judge. The successor judge signed the findings of fact and conclusions of law considered by the trial judge and entered judgment for the plaintiff. The defendant appealed the order denying its motion for a new trial and the Court of Appeals affirmed denial. *Id.* at 937-938.

In reversing the Court of Appeals and remanding the case, the Supreme Court concluded "the successor judge could not properly sign findings of fact and conclusions of law because he did not hear the evidence in the case. Only the deceased predecessor judge, who did hear the case, had authority to sign the findings of fact and conclusions of law." *Id.* at 950.

Both this Court and the Supreme Court cited State ex rel. Wilson v. Kay, 164 Wash. 685, 4 P.2d 498 (1931), as precedent. In Wilson, the plaintiff sued the defendant for malpractice and the trial judge rendered

judgment for the plaintiff. A minute entry was made of the judge's oral ruling. The judge died before findings of fact and conclusions of law were entered. A successor judge was appointed and the plaintiff sought entry of findings of fact and conclusions of law. The successor judge signed and entered the findings over the defendant's objection. *Id.* at 686-687.

The Supreme Court found the successor judge lacked authority to enter findings of fact. It reasoned an oral decision is neither binding nor final because the judge could change his initial conclusions. *Id.* at 690-691. The Court reversed the judgment and remanded for a new trial.

Case law has been historically consistent. WESCO Distrib., Inc. v. M.A. Mortenson Co., 88 Wn. App. 712, 949 P.2d 413 (1997) (successor judge erred in entering judgment based upon the transcript of an oral decision rendered by the trial judge who died before entry of formal findings and conclusions); Tacoma Recycling Inc. v. Capital Material Handling Co., 42 Wn. App. 439, 711 P.2d 388 (1985) (successor judge following a remand lacked authority to adopt the findings and conclusions of original judge); In re Woods, 20 Wn. App. 515, 581 P.2d 587 (1978) (termination of parental rights remanded for entry of additional findings; new trial would be required if the trial judge left the bench); Wold v. Wold, 7 Wn. App. 872, 503 P.2d 118 (1972) (findings of fact in a

dissolution were inadequate and a new trial was required because the trial judge was no longer on the bench).

Here, Judge Snyder held a combined CrR 3.5, CrR 3.6 and motion to dismiss hearing on July 11, 2011. 1RP 10-120. He made oral findings and conclusions associated with each matters. 1RP 97, 119-20. It was Judge Mura, however, who signed and entered written findings of fact, conclusions of law and orders. Appendices A, B & C. It is unclear whether Judge Mura reviewed the report of proceedings or merely rubber-stamped the State's proposed findings and conclusions.

In either event, Judge Mura had no authority to sign and enter written finding and conclusions for pretrial matters he did not consider. RCW 2.28.030(2) prohibits judges from acting in matters they did not hear. Judge Mura could not make factual findings and legal conclusions because he did not hear any supporting evidence. Only Judge Snyder had authority to sign and enter the findings and conclusions, which he did not do.<sup>2</sup> Russell's conviction must be reversed.

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<sup>2</sup> **CrR 3.5(c) Duty of the Court to Make a Record.** After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefore.

**CrR 3.6(b) Hearing.** If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONSIDER THE ALTERNATIVE SENTENCES PROPOSED BY RUSSELL

The sentencing judge refused to consider various sentencing alternatives proposed by Russell because he was not the trial judge, and refused to postpone sentencing to allow the trial judge to preside over sentencing. This was an abuse of discretion that deprived Russell of her due process rights at sentencing. This court should reverse and remand for resentencing.

A sentencing court has discretion to determine whether the circumstances of an offense warrant an exceptional sentence below the standard range. State v. Korum, 157 Wn.2d 614, 637, 141 P.3d 13 (2006). When such discretion is called for, the judge must exercise meaningful discretion. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005).

A trial court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). All defendants have the right to the trial court's examination of available sentence alternatives. In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A trial court's failure to exercise its discretion or to properly understand the breadth of its discretion is an abuse of discretion. See State v. Elliott, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to

hear expert testimony was a failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was a security risk before ordering "shock box" was abuse of discretion), review denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), review denied, 136 Wn.2d 1002 (1998).

In Grayson, the trial court refused to consider imposition of the DOSA (Drug Offender Sentencing Alternative) requested by Grayson, apparently because there was no money available for such an alternative sentence. 154 Wn.2d at 336. The Supreme Court remanded for resentencing, finding the court's categorical refusal to consider the alternative was an abuse of discretion. 154 Wn. 2d at 342.

Here, Judge Snyder presided over the pretrial and trial proceedings, but Judge Mura presided over sentencing. 2RP 3. Russell's counsel promptly objected to the change of judge. 2RP 3-5. The prosecutor advised Judge Mura there was no legal bar to him imposing sentence on Russell. 2RP 5.

Judge Mura acknowledged it was "preferable to have the trial judge do the sentencing[.]" and inquired when Judge Snyder would be available. 2RP 5, 7. When told Judge Snyder was not available until the following

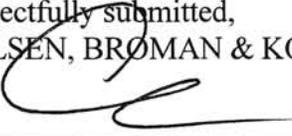
month, that Russell's sentencing had already been delayed, and that there were costs to the county associated with further delay, Judge Mura decided to proceed. At the same time, however, he stated, "Quite frankly, I don't know that I'm going to be inclined to sentence outside the standard range without having heard the case." 2RP 8. This was an abuse of discretion that requires resentencing because it constituted a categorical denial, just like in Grayson, to fully and fairly consider the sentencing options available.

D. CONCLUSION

The trial court erred when it denied the defense motion to suppress. Russell's judgment and sentence for cocaine possession should be reversed. Judge Mura erred in signing findings, conclusions and orders that involve matters heard by Judge Snyder. This too requires reversal and remand for properly entered finding and conclusions. In the alternative, this Court should remand for resentencing before Judge Snyder.

DATED this 17<sup>th</sup> day of October 2012.

Respectfully submitted,  
NIELSEN, BROMAN & KOCH, PLLC

  
\_\_\_\_\_  
CHRISTOPHER H. GIBSON  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant

Appendix A



- 1           2. The Defendant was arrested properly, based on probable cause, for  
2           Rendering Criminal Assistance from her car on 1/9/2010.
- 3           2. The Defendant was properly advised of her MIRANDA rights and her  
4           rights pertained to a consent to search; the Defendant was asked for  
5           consent to search the Defendant's vehicle and voluntarily consented  
6           to the search;
- 7           3. Neither the basis for the Defendant's arrest for Rendering nor the  
8           Consent to Search is contested here;
- 9           4. The passenger in the vehicle, Helen Kluck, was told that she was free  
10          to go; Kluck was asked to leave the vehicle so the canine search for  
11          drugs could be conducted; Kluck moved from the car a distance  
12          variously described as 10 yards (30 feet) to 100 feet;
- 13          5. Kluck was asked to remain in the area at some point because the  
14          Defendant wanted someone to drive her vehicle from the area so that  
15          it would not have to be impounded;
- 16          6. The drug dog alerted to drugs in or around the vehicle; a search for  
17          drugs resulted in no drugs being found in the vehicle;
- 18          7. In his contact with Kluck, Deputy Tadonnio noted that Kluck was  
19          very nervous and would not make eye contact with him; he suspected  
20          that the dog search and her nervousness was the result of possessing  
21          drugs; he asked if he could look in her purse; she picked her purse up  
22          from the ground and opened it for the Deputy; the Deputy then asked  
23          if he, himself, could search the purse; Kluck stated that she would  
24          rather that he didn't referring to female hygiene products; the Deputy  
25          then asked for clarification as to whether that meant he could or could  
26          not look in the purse; Kluck then handed him the purse to search;

1 paraphernalia for consuming cocaine was found in a silver kit in the  
2 purse; the Deputy asked Kluck if she had any drugs; Kluck  
3 immediately reached into the coin pocket of her jeans; the Deputy  
4 reached out to stop her and a bindle of what appeared to be cocaine  
5 was exposed from the pocket; a field test confirmed the substance was  
6 cocaine;

7 8. Helen Kluck confirmed the Deputy's account and testified that it was  
8 her voluntary decision to consent to the search of the purse;

9 9. Kluck went on to testify that she decided to reveal to the Deputy that  
10 she had a cocaine pipe secreted in her pants; she produced the pipe  
11 and also spontaneously admitted that she had a second bindle of  
12 cocaine secreted in her vagina; Kluck was placed under arrest;  
13 advised of her *Miranda* warnings and after waiving them, she  
14 described the circumstances under which the cocaine was acquired  
15 and transported;

16 10. Kluck testified that they had purchased the cocaine together in Skagit  
17 County; Kluck had given the Defendant her money and the  
18 Defendant had returned with a bindle of cocaine for each of them.  
19 Kluck had selected her bindle from the Defendant's hand; they were  
20 going to the Defendants house to watch TV and consume the drugs;  
21 Kluck stated that the Defendant had passed her pipe and her bindle to  
22 her instructing Kluck to secret them on her person, while the Deputies  
23 with emergency lights and sirens were attempting to stop the  
24 Defendant's vehicle;

25 11. The defendant initially denied any knowledge of any cocaine; when  
26 confronted with Kluck's admissions, the Defendant made admissions

1 regarding driving to Skagit County to purchase drugs and driving  
2 them back to Whatcom County for the intended purpose of consuming  
3 the drugs at the Defendant's house.

4  
5 12. From the foregoing Findings of Fact, the Court makes the following:

6  
7 **CONCLUSIONS OF LAW**

- 8  
9 1. The Defendant did not possess any of the drugs at the time Helen Kluck  
10 consented to the search of her purse and person at a location well away  
11 from the Defendant and her car;
- 12 2. The Defendant does not have standing to contest the search of Helen  
13 Kluck's person;
- 14 3. The search of Helen Kluck's purse, revealing used drug paraphernalia,  
15 was voluntary as a product of consent and the production of the cocaine  
16 bindle in her pocket was voluntary;
- 17 4. Helen Kluck's admissions of a second pipe and bindle in her clothing  
18 was spontaneous, and not the product of any questioning.

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20 From the foregoing Conclusions, the Court makes the following:

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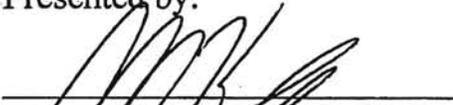
ORDER

Now, therefore, it is hereby Ordered, Adjudged and Decreed that the drugs and paraphernalia and statements acquired from Helen Kluck shall be admissible in trial of the above-encaptioned trial.

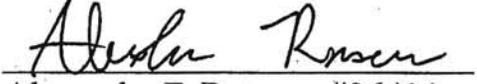
Done in Open Court this <sup>Dec.</sup> 21 day of July, 2011.

  
~~Charles R. Snyder~~ STEVEN J. MURPHY  
Superior Court Judge

Presented by:

  
Mac D. Setter 8031  
Chief Criminal Deputy  
Prosecuting Attorney

Copy received and approved as to form:

  
Alexander F. Ransom #36414  
Attorney for the Defendant

Appendix B

FILED IN OPEN COURT  
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IN THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

ORIGINAL

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THE STATE OF WASHINGTON, )  
)  
Plaintiff, )  
v. )  
Teresa M. Russell )  
)  
Defendant, )  
)

No. 10-1-11138-3  
Order re: Knapstead Motion

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This matter have come on regularly for hearing before the Honorable Charles Snyder, Judge of the Superior Court on the Defendant's motion to dismiss under Knapstead, the Defendant appearing personally and with counsel, Alexander F. Ransom, the State of Washington appearing through its attorney, Mac D. Setter, Chief Criminal Deputy, Whatcom County Prosecutor's Office, the Court having taken testimony and heard argument of counsel and being otherwise fully advised in the premises, makes the following:

Findings of Fact

1. the State has provided additional factual representations;

93

1 2. the Defendant has offered additional factual representations;

2

3 From the foregoing Finding of Facts, the Court makes the following:

4

5 Conclusions of Law:

- 6 1. There are disputed facts in this case;
- 7 2. Based on the undisputed facts of the case as presented in the motions
- 8 and in testimony at the hearing, a prima facie case has been
- 9 established.

10

11 Order:

12 It is hereby ordered, adjudged and decreed that the Motion to Dismiss  
13 under Knapstead should be and is hereby denied.

14

15 Done in open court this 21 day of <sup>DEC.</sup> ~~July~~, 2011.

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~~Charles R. Snyder~~ ~~STEVEN S. MUZA~~  
 Superior Court Judge

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Presented by:

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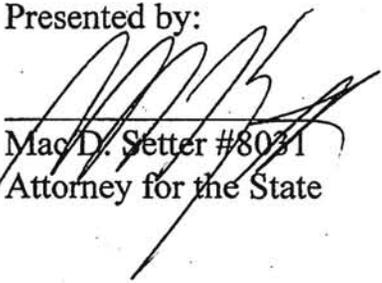
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 Mac D. Setter #8031  
 Attorney for the State

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Copy received and approved as to form:

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 Alexander F. Ransom #36414  
 Attorney for the Defendant



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ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, )  
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 ) Plaintiff, )  
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 ) v. )  
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 ) Teresa Marie Russell, )  
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 )  
 ) Defendant, )  
 )

No. 10-1-00038-3  
Findings and Conclusion re:  
Confession Hearing

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This matter having come on regularly before the Court for a determination as to whether the Defendant's statements to law enforcement are admissible under CrR 3.5, the Defendant appearing personally with his attorney, Alexander F. Ransom, the State appearing through Mac D. Setter, Chief Criminal Deputy Prosecuting Attorney for Whatcom County, State of Washington, the Court having advised the Defendant that 1) she may, but need not, testify as to the circumstances under which a statement was made, 2) that if she does testify, she will be subject to cross-examination as to the circumstances of the statement(s) and her credibility, 3) if she does testify, she does not by so testifying waive her right to remain silent during the trial and 4)

1 if she does testify at the hearing, neither this fact nor her testimony at the  
2 hearing shall be mentioned to the jury unless she testifies concerning the  
3 statement at trial, after being advised of these rights, the Defendant elected to  
4 take the stand, the Court having heard argument of counsel and being otherwise  
5 fully advised in the premises, makes the following:

6  
7 **FINDINGS OF FACT:**

- 8
- 9 1. The Defendant was arrested from her car on 1/9/2010.
  - 10 2. The Defendant was orally advised from a form of her *Miranda* rights by  
11 Deputies Gervol and Taddonio of the Whatcom County Sheriff's Office;  
12 including:
    - 13 a. That the defendant had a right to remain silent;
    - 14 b. That any statements the Defendant made could and would be used  
15 against her in a court of law
    - 16 c. That the Defendant has a right to consult with an attorney before  
17 any questions are asked;
    - 18 d. That if the Defendant could not afford an attorney, one would be  
19 provided at no expense before any questions were asked.
  - 20 3. The Defendant stated that she understood her rights and waived them;
  - 21 4. The Defendant then made oral statements to the Deputies at the scene and  
22 at the Whatcom County Jail;
  - 23 5. The Defendant had been advised of her rights in connection with arrests  
24 on numerous prior occasions;
  - 25 6. No promises or threats were made by the Deputies during their contact  
26 with the Defendant;
  - 27 7. There were no disputed facts:
- 28

1 From the foregoing Findings of Fact, the Court makes the following:

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3

CONCLUSIONS OF LAW

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1. the Defendant was properly advised of her constitutional rights under  
6 *Miranda*;

6

7

2. The Defendant made a knowing, intelligent and voluntary waiver of these  
8 rights based on her significant experience with these rights.

8

9

3. No promises or threats were made to gain the Defendant's cooperation.

10

4. The Defendant's oral statements to the Deputies were made voluntarily.

11

12

From the foregoing Conclusions, the Court makes the following:

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ORDER

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Now, therefore, it is hereby Ordered, Adjudged and Decreed that the  
17 statements made by the Defendant shall be admissible in trial of the above-  
18 encaptioned trial.

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Done in Open Court this 21 day of <sup>DEC.</sup> ~~July~~, 2011.

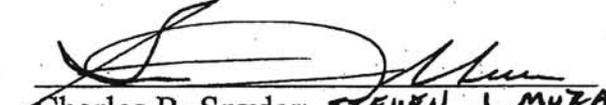
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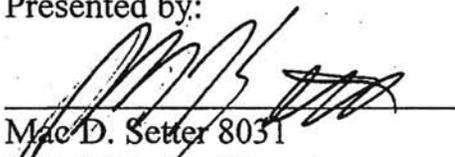
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~~Charles R. Snyder~~ STEVEN J. MURA  
Superior Court Judge

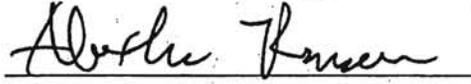
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Presented by:

  
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Mac D. Setter 8031  
Chief Criminal Deputy  
Prosecuting Attorney

Copy received and approved as to form:

  
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Alexander F. Ransom #36414  
Attorney for the Defendant

