

NO. 47756-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

TAMARA LYNNE CHURCHILL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 15-1-00012-6

BRIEF OF RESPONDENT

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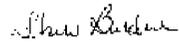
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether under the circumstances of the case, Churchill's purse was readily recognizable as belonging to her and should not have been searched under authority of the premises warrant being served.

2. Whether the trial court properly inquired as to Churchill's ability to pay legal financial obligations and whether that issue is preserved for review.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Tamara Lynne Churchill was charged by information filed in Kitsap County Superior Court with Possession of a Controlled Substance [Methamphetamine]. CP 1 She moved to suppress the drug evidence. CP 5. After hearing of that motion pursuant to CrR 3.6, the trial court entered Findings of Fact and Conclusions of Law For Hearing on CrR 3.6 (herein after "F and C") denying the motion to suppress. CP 84.

The matter proceeded to trial on May 27, 2015. RP (5/27) 1 *et. seq.* On June 1, 2015, the jury returned a verdict of guilty. CP 130. Sentencing was done on June 5, 2015. CP 135. Churchill was sentenced within the standard range. *Id.* She timely filed the present appeal. CP 146.

B. FACTS

The case began with the service of a search warrant. RP (3/30) 6. Bremerton police had developed probable cause for the residence of Anthony Anderson by conducting “controlled purchases” using a confidential informant. RP (3/30) 6. No one else was named in the warrant but police expected to find other people, unknown how many, in the residence. RP (3/30) 7; RP (3/30) 27. Police knocked and announced that they were police serving a search warrant. RP (3/30) 9; RP (3/30) 29. An unknown female opened the door. RP (3/30) 9.

A number of people came out of the apartment and were detained. RP (3/30) 9-10; RP (3/30) 30. Police did not see the location of all the people before the door was opened. RP (3/30) 32. Churchill did not immediately come out of the apartment. When police entered, she was lying on a couch, she sat up, looked out the door, “and then lay back down like she was pretending to be asleep.” RP (3/30) 32 (ln. 20). Police began to yell at her to show her hands and come out but she continued to “pretend to be asleep.” RP (3/30) 33 (ln. 11). When police moved in with a Taser, Churchill quickly stood up and was taken down, detained, and taken outside. RP (3/30) 32-33.

The apartment was small; the living room estimated to be around 10 feet by 10 feet. RP (3/30) 35. With the furniture and other items, the living room was very tight. Id. One corner was full of “luggage bags.”

RP (3/30) 35. There were bags, luggage, backpacks and like items scattered throughout the house. RP (3/30) 37. Police found at least 10 purses in the residence. RP (3/30) 37.

Churchill's purse was found on the couch upon which she had been lying opposite where her head was. RP (3/30) 36. No other purses were found on that couch. RP (3/30) 43. The officer who picked up Churchill's purse did not know who it belonged to because of the large number of bags and purses in the small apartment. RP (3/30) 36. The officer found the purse was open with a cigarette pouch lying on top. RP (3/30) 37. In that pouch, the officer found a bag of meth. *Id.* The purse was taken outside and the detained people were asked who owned it. *Id.* No one responded. RP (3/30) 38. Further search of the purse revealed Churchill's identification. RP (3/30) 38. Although the officer assumed the purse belonged to one of the females, he did not seek consent to search because no one claimed ownership of it. RP (3/30) 45. It should be noted that at trial Churchill testified that "I said it wasn't my purse." RP (5/28) 442.

III. ARGUMENT

A. THE SEARCH OF THE PURSE WAS LAWFUL BECAUSE UNDER THE CIRCUMSTANCES IT WAS NOT READILY RECOGNIZABLE AS BELONGING TO CHURCHILL.

Churchill argues that the search of her purse was unlawful because she was not a resident of the premises being searched and because neither her person nor her personal effects could be searched under the warrant. This claim is without merit because under the circumstances the police had no way of knowing that the unlocked container, the purse, they found and searched belonged to her until the search revealed her identification in the purse.

Warrantless searches and seizures are per se unreasonable. *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). The standard of review for this case is succinctly stated in *State v. Lohr*:

When reviewing a trial court's denial of a suppression motion, we review its findings of fact for whether substantial evidence supports them and whether its findings support its conclusions of law. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Unchallenged findings of fact are verities on appeal. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. We review the trial court's conclusions of law de novo.

164 Wn.App. 414, 418, 263 P.3d 1287 (2011)(internal citation omitted).

Article 1, section 7 of the Washington Constitution provides that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” A valid search warrant provides “authority of law.” *State v. Campbell*, 166 wn.App. 464, 472, 272 P.3d 859 (2011).

In the present case there is no challenge to the validity of the warrant—the authority of law under which the police entered and detained Churchill. Moreover, no argument is made that the purse as such did not fall within the scope of the warrant authorizing a search of Anthony Anderson’s premises.¹ *See United States v. Ross*, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (“a lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.”). Thus the narrow question in this case is whether the officer who searched Churchill’s purse under the authority of a valid warrant knew or could readily recognize that the purse belonged to or was closely associated with a particular person who was not subject to that warrant and, whether the trial court’s findings and conclusions that he did not are supported by substantial evidence.

¹ The warrant was not designated by appellant. The Complaint for Search Warrant is included as attachment to the defense trial court brief at CP 61.

1. The trial court's finding of fact III is supported by substantial evidence and the trial court's conclusion of law III should be reviewed de novo.

Churchill assigns error to the trial court's finding that "Detective Rauback was unsure who owned the purse on the couch." CP 85 (assignment of error #3). No particular argument can be found explaining why this finding is unsupported. This snippet of finding of fact III is supported by the other facts found by the trial court. In unchallenged finding II, the trial court found that "there were numerous bags, purses and luggage on the floor by the end of the couch on which the purse was on the cushion." CP85. This verity nearly directly quotes Detective Rauback's testimony. RP (3/30) 35-37. Clearly, the trial court found that the testimony was credible. In any event, it is unrebutted in the record.

Moreover, the un-complained of remainder of finding III explains again that the Detective "also noticed, strewn around the apartment, numerous pieces of luggage and approximately ten purses, in the ten foot by ten foot living room." CP 85. Further, the Detective saw five women exit and was unaware of their location before entry. *Id.* Thus Detective Rauback was aware of five women, including Churchill, and ten purses and many other pieces of luggage and bags all within a very small space. Under these circumstances, it is difficult to see how any particular purse could have been readily identified as belonging to any particular detainee.

Add that through training and experience the Detective has found that male drug dealers will hide contraband in a female's purse. RP (3/30) 39. And, finally, it makes little sense for the Detective to ask of the detainees who owned the purse if he already knew. It is completely fair and rational under the testimony and the circumstances to believe the finding that the Detective was "unsure who owned the purse." That finding is adequately supported by direct testimony, found to be credible, and reasonable inferences therefrom. *See Keever & Associates, Inc. v. Randall*, 129 Wn.App. 733, 737, 119 P.3d 926 (2005) (if supported by substantial evidence, appellate court will not substitute its judgment for that of the trial court even if appellate court may have found disputed facts differently).

Similarly, Churchill challenges two of the trial court's conclusions of law. In assignments of error 4 and 5, Churchill challenges two phrases from conclusion III asserting that each is erroneous "to the extent it is deemed a finding of fact." Brief at 2. First, the phrase "that the purse was not closely associated with the defendant or immediately recognizable as the defendant's" is challenged and, second, the phrase "there was no way for Detective Rauback to know which female the purse belonged to" is challenged. CP 86. A finding of fact is an "assertion that a phenomenon has happened or is or will be happening independent of or

anterior to any assertion as to its legal effect.” *Molden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn.App. 194, 197, 584 P.2d 968 (1978). “[B]ut if a determination is made by a process of legal reasoning from, or of interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law.” *Id.* (footnote 5, citing *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955 (6th Cir. 1976)). The challenged phrases are conclusions. Both phrases have legal significance under the cases being used in the trial court’s ruling. They constitute rulings on the questions of law presented—whether the purse was closely enough associated with Churchill and whether or not Detective Rauback knew or should have known it was her purse.

Even if considered findings, the two phrases are in fact supported by the evidence. The analysis of challenged finding III above applies equally well to these two pieces of the trial court’s ruling however characterized. But as conclusions they are to be reviewed de novo, which is to ask whether these conclusions follow from the facts found.

2. The search of Churchill’s purse was not unlawful under the circumstances of this case.

It does the state no harm to concede Churchill’s assertion that search and seizure rights are “possessed individually.” Brief at 7, citing *State v. Broadnax*, 98 Wn.2d 289, 296, 654 P.2d 96 (1982). The same is the case under either article 1, section 7 or the Fourth Amendment to the

United States Constitution. *See State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). It follows that there should be no search of an individual absent individualized probable cause or considerations of officer safety merely because she is found in a place where probable cause to search has been separately determined. It remains to be determined whether or not those principles control the present case.

In *State v. Worth*, 37 Wn.App. 889, 683 P.2d 622 (1984), the court disapproved of a search of a purse belonging to a woman who was present, but unnamed when a search warrant was served. *Worth's* purse “rested against her chair” when an officer seized it and did a weapons search. *Id.* at 891. Unfortunately, no more precise information is found in the decision (e.g., was she touching the purse? Were there other purses or bags?). Later, because *Worth* would not implicate the male named in the warrant, police emptied her purse and found contraband. *Id.* It is this second search that was held to be invalid. *Id.* at 894.

The *Worth* Court rebuffed the state’s argument that the search was permissible as a limited weapons search because *Worth* had not behaved in a suspicious manner. *Id.* at 892-93. Nor did the Court find that the search was valid because *Worth* was not at the moment holding her purse. *Id.* at 893-94. The Court said

A narrow focus on whether a person is holding or wearing a personal item would tend to undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable personal

effects, such as Worth's purse, which an individual has under his control and seeks to preserve as private. In the case at bench the officers did readily recognize the purse belonged to Ms. Worth and asked her consent to search it. The court found, however, that consent was not given, and the State does not challenge that finding.

Id. Worth's proximity to the purse, it being taken from the chair upon which she was seated, allows for the finding that it remained under her control. That police asked for consent evinces their knowledge that it was hers.

The facts of the present case are different. In *Worth*, it appears that there was no room for confusion as to the ownership or possession of that particular purse. But the present case contains facts nearly guaranteed to cause uncertainty—five female detainees and 10 purses. And, yet another circumstance not found in *Worth* obtains here: that Churchill initially failed to comply with police commands caused police to focus on her person to the exclusion of any items near her when she was forcibly taken down and detained. After that, the ability to differentiate between the other nine purses and Churchill's purse is lost. Here, unlike in *Worth*, the trial court properly found that these circumstances engendered uncertainty.

Similarly, *State v. Lohr*, 164 Wn.App. 414, 263 P.3d 1287 (2011), involved the search of a purse belonging to a person present, but not named, during the service of a search warrant. Lohr was free to leave and asked for boots and pants that were seven to eight feet away. Id. at 416-

17. A purse was near those items and the police asked if it belonged to Lohr. *Id.* She acknowledged that it was hers and asked for it. *Id.* The police searched the purse, ostensibly to look for weapons and to ascertain whether it was in fact Lohr's purse, and found methamphetamine. *Id.* The Court observed that "[d]espite the fact that Lohr's purse was not located next to her but was seven to eight feet away, it was next to her clothing and was clearly associated with her." *Id.* at 421.

The *Lohr* Court announced the rule as "if an item is readily recognizable as belonging to an individual not named in the warrant, the item is not within the warrant's scope." *Id.* at 423-24. In determining the readily recognizable question, whether the defendant controlled the item or tried to maintain the item's privacy are important though not dispositive considerations. *Id.* The Court concluded that substantial evidence did not support the trial court's finding that the purse was not "immediately recognizable as belonging to [Lohr]." *Id.* at 423 (parentheses in original).

This because

the record contains no indication that Clary questioned Lohr's ownership of the boots and pants before returning them to her. Lohr's purse was located with her boots and pants, which were recognizable as her personal effects, and it follows that her purse was also readily recognizable as her personal effect. Furthermore, Lohr claimed the purse when Clary asked whether it was hers; and, after Lohr claimed the purse, Clary saw an identification card with Lohr's name on it when he looked inside the purse.

Id. Dictionary .com defines readily as “promptly, quickly, easily.”² When one says to the officer that the clothing belongs to her and when the purse is with the clothing and when the person identifies the purse as her own when asked, she has asserted control over the item and sought to preserve its privacy. Under these facts, it is in fact difficult to avoid the conclusion that police cannot promptly, quickly and easily recognize that the item is the personal effect of one not named in the warrant and thus outside the scope of the warrant.

But in the present case, that conclusion is not so easily reached. Here, Churchill never affirmatively claimed any item in the residence. Here, Churchill failed to claim that it was her purse when asked. *See State v. Cantrell*, 124 Wn.2d 183, 191-92, 875 P.2d 1208 (1994) (a nonconsenting passenger’s silence during vehicle search was “inconsistent with his later claim he retained an expectation of privacy.”) And, as iterated and reiterated herein, under the circumstances presented to law enforcement at the scene, there’s was no way to quickly and easily ascertain the provenance of any one of the many bags and purses found. Once there was no response as to ownership from all five detainees, there was no way the police return any one of the purses without first ascertaining the owner, including by looking for identification therein. At

² <http://dictionary.references.com>

bottom, the circumstances of the present case are distinct from those in *Lohr*.

In *State v. Hill*, 123 Wn.2d 641, 648, 870 P.2d 313 (1994), the court said

Where an item is not clearly connected with an individual, and there is no notice to the police that the individual is a visitor to the premises, there are no grounds on which the defendant may claim that officers are forbidden to search that item pursuant to a premises warrant.

This is the adverse of the rule in *Worth* and *Lohr*. The rule applies to Churchill. The purse was not clearly connected to her when found. The police were not on notice that she was a visitor. The search of the purse under the authority of the premises warrant was not forbidden. The trial court should be affirmed.

B. THE TRIAL COURT INQUIRED REGARDING CHURCHILL'S ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS AND CHURCHILL FAILED TO PRESERVE THE ISSUE FOR REVIEW.

Churchill next claims that under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) (construing RCW 10.01.160) the trial court erred in imposing legal financial obligation without an individualized inquiry into her ability to pay. This claim is without merit because it was not preserved below and the trial court in fact addressed the issue at sentencing..

First, Churchill is correct that this case contains mandatory assessments that do not fall under *Blazina*. The victim assessment, DNA collection fee, and mandatory drug crime fine are mandatory and therefore not in issue. Brief at 17. Second, this issue is raised for the first time on appeal and thus should be deemed waived herein. But the trial court did in fact address this issue at sentencing.

As noted in Churchill's brief, the trial court discussed Churchill's present and future ability to pay. Churchill was asked about her ability to work. RP (6/5/15) 11-12. The trial court also knew that Churchill was 36 years old, (CP 1), that she had been employed in the past by the local shipyard (RP (6/5/15) 5), that she has worked recently as a nanny, (RP (6/5/15) 6) and intended to resume that calling (RP (6/5/15) 9). Further, Churchill was sentenced to a reasonably short time—60 days. CP 136. From this information, the trial court found on the record that Churchill would have the future ability to pay. RP (6/5/15) 12. But in light of the conviction and jail sentence, the trial court reasonably set her minimum payment at \$25 a month and ordered that the first payment not be due until 180 days after her release. Id.

At that point in sentencing, it should fall to Churchill, or her counsel, to object; neither did. This case, then, should not warrant review. This is particularly true where the sentencing in this case happened after

Blazina was published and placed defendant's and defense counsel on notice as to its contents. Here, during discussion with the trial court, Churchill made no showing of any sort of disability, inordinately high debt, or any other consideration that may affect her future pecuniary ability. If the trial court's inquiry was error, Churchill has not preserved it. RAP 2.5.

IV. CONCLUSION

For the foregoing reasons, Churchill's conviction and sentence should be affirmed.

DATED February 1, 2016.

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