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Division II
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### COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

#### STATE OF WASHINGTON

V.

#### CHERYL HEATH

#### PETITION FOR REVIEW

Thomas E. Weaver WSBA #22488 Attorney for Appellant

The Law Office of Thomas E. Weaver P.O. Box 1056 Bremerton, WA 98337 (360) 792-9345

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#### A. Identity of Petitioner

Cheryl Heath asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

#### B. Court of Appeals Decision

The Court of Appeals affirmed Mr. Heath's Judgment and Sentence on April 21, 2020. A timely motion for reconsideration was denied on May 7, 2020. A copy of the decision, including the order denying reconsideration, is attached in the Appendix and pages A-1 to A-12.

#### C. Issues Presented for Review

- 1. Is the Court of Appeals decision in this case is in direct conflict with this Court's cases in *State v. Byrd, infra* and *State v. Brock, infra* which limited searches incident to arrest to personal items in an arrestee's actual possession at the time of a lawful *Terry* detention that ripens into a lawful arrest?
- 2. Is the Court of Appeals decision in this case is in direct conflict with the Division I decision of *State v. Alexander, infra*, which properly applied this Court's *Byrd/Brock* jurisprudence?

3. Did the Court of Appeals improperly place itself in the position of the fact-finder, substituting its view of the facts for those of the trial court, an issue of substantial public interest that should be reviewed by this Court?

#### D. Statement of the Case

Cheryl Heath was contacted for a minor traffic violation, arrested for a driving without ignition interlock, and her backpack was searched incident to arrest. As a result she was charged and convicted of possession of a controlled substance — cocaine. Prior to trial, Ms. Heath filed a motion to suppress evidence, arguing that the search of her backpack exceeded the proper scope of a search incident to arrest. At the suppression hearing, the State chose not to present any testimony, relying instead on the police report of Officer Jennifer Corn. Ms. Heath objected to the trial court's consideration of the report, which the court overruled. Ms. Heath testified at the hearing. The trial court denied the motion to suppress.

On appeal, Ms. Heath again objected to consideration of Officer Corn's report. The Court of Appeals ruled that it did not need to resolve the issue because Ms. Heath's "own testimony supports the trial court's decision." Opinion, 11.

The unrebutted testimony of Cheryl Heath at the suppression hearing establishes the following material facts. On September 7, 2018, Ms Heath was contacted by Officer Corn after she made an illegal left turn. RP, 7. Ms. Heath was leaving the Seattle-Bremerton ferry terminal on a 250 Rebel Motorcycle. RP, 9-10. Her intent was to pull over right away after coming off the ferry and smoke a cigarette. RP, 9-10. Smoking is prohibited on the ferry and a rule she finds "inconvenient." RP, 10. Her cigarette pack was in a backpack she was carrying on her back. RP, 10. After she pulled over, she promptly removed the backpack and removed the cigarettes from the backpack. RP, 10. She then placed the backpack on the ground. RP, 11. She lit her cigarette. RP, 11. After she had completed placing the backpack on the ground and lighting her cigarette, Officer Corn pulled up behind her and activated her emergency lights. RP, 11. Ms. Heath correctly assumed she was being contacted about the illegal left turn. RP, 11. Ms. Heath was no longer in physical possession of the backpack when the emergency lights were activated. RP, 10-11. The backpack had been on the ground for 30 seconds to one minute before the officer activated her emergency lights. RP, 12.

At the suppression hearing, Ms. Heath asked the trial court to resolve a disputed fact. Specifically, Ms. Heath argued based upon her

testimony that she was not in actual possession of the backpack at the time Officer Corn activated her emergency lights. In addition to objecting to the court's consideration of Officer Corn's police report, she also argued Officer Corn's report is ambiguous on this point. Specifically, the relevant part of the report states:

I observed a motorcyclist, later identified as Cheryl Heath, turn left (Westbound) from northbound Warren Avenue, drive in the crosswalk then west onto 4th Street. For a few seconds she had to drive northbound in the southbound lane of Warren Avenue. She drove to the right shoulder of 4th Street, stopped her bike and lit a cigarette. I pulled in behind her and activated my overhead red and blue lights. Upon contact, she immediately recognized what she had done wrong and told me she usually takes Burwell Street, but it was Friday and she wanted to get home. When I walked up, she got off the bike and took off her backpack she was wearing when she was stopped. . . Officer Felty arrived, spoke to Heath and took her into custody. Once I completed the citation I collected Heath's backpack from the seat of the motorcycle along with her helmet.

CP, 16. The trial court refused to resolve the disputed fact, finding, "That defendant took off her backpack. Cheryl Heath testified she took off her backpack prior to Officer Corn activating her emergency lights. Officer Corn did not testify at the hearing, although her report was admitted. The Court declines to make findings whether she removed the backpack before or after the emergency lights were activated because the Court would reach the same conclusions regardless." CP, 56, Finding of Fact VI.

On appeal, Ms. Heath argued the trial court had an affirmative obligation to resolve the disputed fact. The Court of Appeals disagreed, saying, "We hold that the relevant inquiry here is not when the officer's lights were activated but whether the trial court's other findings, which are supported by Heath's own testimony, support the court's conclusion that the search of the backpack was a lawful search incident to arrest. And we hold that the findings support the court's conclusion." Opinion, 9.

The Court of Appeals summarized Ms. Heath's testimony, in relevant part, as follows: "After pulling over, she got off of the motorcycle, removed her backpack, took her cigarettes out of the backpack, and set the backpack on the ground. After placing her backpack on the ground and lighting her cigarette, Heath *first noticed* the patrol car's emergency lights." Opinion, 3 (emphasis added.). Later in the opinion, the Court emphasized the italicized portion when it said, "It is irrelevant when Heath saw the patrol car's lights or otherwise realized that Corn was stopping her." Opinion, 10. As noted, the Court of Appeals affirmed the order denying suppression.

Ms. Heath filed a timely motion for reconsideration. In the motion, she pointed out that Ms. Heath did not testify that she first noticed the patrol car's emergency lights after setting down the backpack. Her testimony was:

Q. Was – had you removed the backpack before or after the emergency lights were turned on?
A. Before,

Q. Had you removed the cigarettes from the backpack before or after you – the emergency lights were turned on? A. Before.

RP, 10-11. Therefore, contrary to the Court of Appeals assertion, Ms. Heath did not testify she *first noticed* the emergency lights after taking off her backpack. Rather, her unrebutted testimony was that the backpack had *in fact* been removed prior to the activation of the emergency lights. The Court of Appeals denied reconsideration without comment. Ms. Heath seeks review.

#### E. Argument Why Review Should Be Granted

Review by this Court is warranted when a decision of the Court of Appeals is in conflict with the decisions of this Court or a decision of the Court of Appeals, is a significant question of law under the Constitution, and when the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). Ms. Heath's case meets all of these criteria.

First, the Court of Appeals decision is in direct conflict with this Court's jurisprudence. In two cases, this Court has clearly outlined when the search of an arrestee's personal property is permitted by the Fourth Amendment and article 1, section 7 of the Washington Constitution. *State v. Byrd*, 178 Wn.App 611, 310 P.3d 793 (2013); *State v. Brock*, 184

Wn.2d 148, 355 P.3d 1118 (2015). In *Byrd*, the defendant had a purse in her lap at the time of her arrest. The Court concluded that a purse in the lap is an item "closely associated with the person" and the search incident to arrest was lawful. But this Court limited its ruling to items in the arrestee's "actual possession" and "does not extend to an arrestee's constructive possession, but only those personal items in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." *Byrd* at 623. In *Brock*, this Court determined an item is in a person's possession "at or immediately preceding the time of arrest" when the person is detained during a "lawful *Terry* stop and the *Terry* stop ripens into a lawful arrest." *Byrd* at 159, citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

The Division II decision in Ms. Heath's case is also in conflict with a recent Division I decision. *State v. Alexander*, 10 Wn.App.2d 682, 449 P.3d 1070 (2019), *review denied*, 458 P.3d 785 (2020). In *Alexander*, the police officer approached the defendant in response to a trespassing complaint, detained her, and after determining she had a warrant, arrested her. The defendant, who was sitting on a park bench at the time of the detention, had a backpack within her arm's reach. Division I properly concluded that the search was illegal because the backpack was not in her

actual possession at the time of the initial detention, but was merely in her constructive possession.

The Court of Appeals decision in Ms. Heath's case conflicts with both this Court's jurisprudence in *Byrd/Brock* and the Court of Appeals case of *Alexander*. Ms. Heath had already removed her backpack when Officer Corn detained her by activating her emergency lights. Once Ms. Heath removed her backpack and placed it on the ground, she was no longer in actual possession of the backpack. Although Ms. Heath may have been in constructive possession of the backpack at the time of the *Terry* detention, she was not in actual possession of the search incident to arrest was unlawful under *Byrd/Brock*.

Ms. Heath's unequivocal and unrebutted testimony was that she removed the backpack prior to Officer Corn activating her emergency lights. The trial court's Finding of Fact VI also establishes this fact, "Cheryl Heath testified she took off her backpack prior to Officer Corn activating her emergency lights." She was, therefore, not in possession of the backpack at the time she was detained during a lawful *Terry* stop that ripened into an arrest. The trial court should have granted the motion to suppress. The Court of Appeals decision otherwise is in direct conflict

with this Court's *Byrd* and *Brock* decisions and Division I's *Alexander* decision. Review is warranted.

Ms. Heath also has grave concerns about how this appeal evolved, which raises an issue of substantial public interest that should be resolved by this Court. In the trial court, Ms. Heath objected to the introduction of Officer Corn's police report in lieu of her testimony. Ms. Heath then testified at the suppression hearing, creating a material disputed fact that could not be resolved with Officer Corn's report. The trial court specifically declined to resolve the disputed fact, although it was obliged to do so under CrR 3.6.

The trial court's refusal to resolve the disputed fact was compounded by the Court of Appeals when it put itself into the position of the fact-finder. The Court of Appeals found as a matter of fact that Ms. Heath "first noticed the patrol car's emergency lights" after she removed her backpack. But Ms. Heath did not testify to this fact and this finding is directly contradicted by the trial court's Findings of Fact VI, which found, "Cheryl Heath testified she took off her backpack prior to Officer Corn activating her emergency lights." Trial courts have an affirmative obligation to resolve both legal disputes and factual disputes. *State v. Cruz*, 88 Wn.App. 905, 946 P.2d 1229 (1997). It is inappropriate for the

Court of Appeals to substitute its view of the testimony for that of the trial court. Further review is appropriate.

#### F. Conclusion

This Court should grant review and reverse the order denying the motion to suppress.

DATED this 2<sup>nd</sup> day of June, 2020.

Thomas E. Weaver, WSBA #22488 Attorney for Defendant/Appellant

# Appendix A

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

STATE OF WASHINGTON,

No. 52994-7-II

Respondent,

v.

CHERYL ANN HEATH,

**UNPUBLISHED OPINION** 

Appellant.

SUTTON, A.C.J. — Cheryl Ann Heath appeals her conviction for unlawful possession of a controlled substance, cocaine.<sup>1</sup> Heath's conviction was based on the discovery of cocaine in a backpack that she had been wearing when a law enforcement officer observed her commit a traffic infraction. Heath had set down the backpack immediately before her initial detention. The trial court concluded that the search of the backpack was a proper search incident to arrest under the "time of arrest rule."

Heath argues that the trial court erred when it (1) admitted the arresting officer's investigation report under ER 104 and ER 1101 at the suppression hearing without also requiring the arresting officer to testify when there were material factual issues that needed to be resolved, (2) refused to decide the disputed issue of when Heath set down her backpack in relation to when the arresting officer activated her patrol vehicle's emergency lights, and (3) concluded that the

<sup>&</sup>lt;sup>1</sup> Heath was also convicted of operating a motor vehicle without an ignition interlock device, but she raises no issues related to this conviction.

search of the backpack was a lawful search incident to arrest under the time of arrest rule. Because the trial court did not rely on the officer's report to support its conclusion that the search of the backpack was lawful and Heath's own testimony supports the trial court's decision, we affirm Heath's conviction.

#### FACTS<sup>2</sup>

After stopping Heath for making an illegal turn on her motorcycle, Officer Jennifer Corn and a second officer arrested Heath for driving without an ignition interlock device. After the arrest, the officers searched Heath's backpack and found cocaine.

The State charged Heath with unlawful possession of a controlled substance, cocaine, and operating a motor vehicle without an ignition interlock device. Heath moved to suppress the drug evidence, arguing that the search of the backpack was illegal.

At the suppression hearing, the State relied exclusively on Corn's certified investigation report. Heath declined to stipulate to Corn's report and objected to the State's reliance on the report without also presenting testimony from Corn. The trial court overruled the objection.

In her report, Corn stated that she had observed Heath make an illegal turn, stop her motorcycle, and light a cigarette. Corn then pulled in behind Heath and activated the patrol car's overhead lights. Corn further stated that when she approached Heath, Heath "got off the bike and took off her backpack." Clerk's Papers (CP) at 16.

<sup>&</sup>lt;sup>2</sup> The brief background facts are based on the trial court's unchallenged findings of fact, which are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Heath also testified at the hearing. She stated that she made an illegal turn after driving off of the Bremerton-Seattle ferry while wearing the backpack and immediately pulled over to smoke a cigarette. After pulling over, she got off of the motorcycle, removed her backpack, took her cigarettes out of the backpack, and set the backpack on the ground. After placing her backpack on the ground and lighting her cigarette, Heath first noticed the patrol car's emergency lights. She assumed that the officer was contacting her because the officer had observed her make the illegal turn. Heath estimated that the officer approached her about 30 seconds after Heath had removed her backpack to take out her cigarettes. Heath commented that "[i]t doesn't take long to take my cigarettes out and light them, and I turned around and saw the lights."

The trial court denied Heath's motion to suppress. The trial court's written findings of fact and conclusions of law provided, in part:

#### FINDINGS OF FACT

IV.

That Corn saw defendant make a left turn through a no left turn zone and immediately pull[] over to smoke a cigarette.

V.

That Corn initiated a traffic stop of the defendant.

VI.

That defendant took off her backpack. Cheryl Heath testified she took off her backpack prior to Officer Corn activating her emergency lights. Officer Corn did not testify at the hearing, although her report was admitted. The Court declines to make findings whether [Heath] removed the backpack before or after the emergency lights were activated because the Court would reach the same conclusions regardless.

VII.

That defendant removed a pack of cigarettes from the backpack and placed her backpack beside her motorcycle. She was in the process of lighting a cigarette when Officer Corn approached her.

#### **CONCLUSIONS OF LAW**

П.

That State v. Byrd, [3] State v. Brock, [4] and the "Time of Arrest" rule allow officers to search an arrestee's belongings when they are in the arrestee's actual and exclusive possession at or immediately preceding arrest.

III.

That defendant actually and exclusively possessed the backpack immediately preceding arrest.

IV.

That officers lawfully searched defendant's backpack incident to arrest.

CP at 57-58 (emphasis added).

Following a stipulated facts trial, the trial court found Heath guilty of unlawful possession of a controlled substance, cocaine, and operating a motor vehicle without an ignition interlock device. Heath appeals the denial of her suppression motion and her resulting conviction for unlawful possession of a controlled substance, cocaine.

#### **ANALYSIS**

#### I. ADMISSION OF CORN'S REPORT

Heath first argues that the trial court erred in admitting Corn's report under ER 104 and ER 1101 because the report was inadmissible hearsay and the trial court was required to resolve credibility issues at the suppression hearing. Specifically, Heath argues that the trial court should not have admitted the report because "there was a material disputed fact: did the defendant remove her backpack before or after the officer activated her emergency lights." Br. of Appellant at 13.

<sup>&</sup>lt;sup>3</sup> 178 Wn.2d 611, 310 P.3d 793 (2013).

<sup>&</sup>lt;sup>4</sup> 184 Wn.2d 148, 355 P.3d 1118 (2015).

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We need not reach this issue because, as discussed below, the trial court did not rely on Corn's report to resolve the disputed suppression issue.

#### II. EVIDENCE WAS PROPERLY ADMITTED UNDER THE TIME OF ARREST RULE

Heath argues that the trial court erred in refusing to decide the disputed issue of when Heath set her backpack down and in concluding that the search of her backpack was a lawful search incident to arrest under the time of arrest rule. We disagree.

#### A. LEGAL PRINCIPLES

#### 1. Review Standard

We review the trial court's denial of a CrR 3.6 suppression motion by examining "whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise." *Garvin*, 166 Wn.2d at 249 (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). We consider unchallenged findings of fact verities on appeal. *Reid*, 98 Wn. App. at 156. We review de novo the trial court's conclusions of law pertaining to the suppression of evidence. *Garvin*, 166 Wn.2d at 249.

#### 2. Time of Arrest Rule

One exception to the warrant requirement is a search incident to arrest. *Brock*, 184 Wn.2d at 154. There are "two analytically distinct concepts" encompassed by this exception. *Byrd*, 178 Wn.2d at 617. "The first of these propositions is that 'a search may be made of the area within the control of the arrestee." *Byrd*, 178 Wn.2d at 617 (quoting *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). "[T]he second proposition of the search incident

to arrest" allows for searches "of the person of the arrestee by virtue of the lawful arrest." *Byrd*, 178 Wn.2d at 617 (emphasis omitted) (quoting *Robinson*, 414 U.S. at 224).

"[S]earches of an arrestee's person, including articles of the person such as clothing or personal effects, require 'no additional justification' beyond the validity of custodial arrest." *Byrd*, 178 Wn.2d at 617-18 (quoting *Robinson*, 414 U.S. at 235). "The authority to search an arrestee's person and personal effects flows from the authority of a custodial arrest itself." *Byrd*, 178 Wn.2d at 618 (citing *Robinson*, 414 U.S. at 232). "Washington law has long recognized the validity of searching a defendant and the property immediately within his or her control without a warrant in the process of making an arrest." *State v. Ellison*, 172 Wn. App. 710, 719, 291 P.3d 921 (2013).

In recent years, our Supreme Court has further refined the search of a person exception to the warrant requirement in *Byrd* and *Brock*. In *Byrd*, Byrd was arrested for possession of stolen property after a police officer confirmed that the car she was riding in had stolen license plates. 178 Wn.2d at 615. At the time of her arrest, she was sitting in the front passenger seat with her purse in her lap. *Byrd*, 178 Wn.2d at 615. Before removing Byrd from the car, an officer took Byrd's purse from her lap and placed it on the ground nearby. *Byrd*, 178 Wn.2d at 615. After placing Byrd in a patrol car, the officer searched the purse and discovered methamphetamine. *Byrd*, 178 Wn.2d at 615.

Our Supreme Court concluded that the search of the purse was lawful, holding that the search of a person exception extends to personal property "immediately associated" with the arrestee's person and concluding that the purse in question was immediately associated with Byrd's person at the time of arrest. *Byrd*, 178 Wn.2d at 621, 623. The court cautioned that this exception did not apply to all "articles within the arrestee's reach but not actually in his [or her]

possession." *Byrd*, 178 Wn.2d at 623. Instead, the exception applied to "only those personal articles in the arrestee's actual and exclusive possession at *or immediately preceding* the time of arrest." *Byrd*, 178 Wn.2d at 623 (emphasis added). And the court limited such searches "only to articles 'in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person." *Byrd*, 178 Wn.2d at 623 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 78, 70 S. Ct. 430, 94 L. Ed. 653 (1950) (Frankfurther, dissenting), *overruled by Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)).

Two years later, our Supreme Court examined the scope of the language "immediately preceding arrest" in *Brock*. 184 Wn.2d at 154. In *Brock*, officers searched the backpack that Brock had been carrying when the officers approached him in a public park. 184 Wn.2d at 151. The officers took the backpack from Brock for safety purposes and to facilitate a *Terry*<sup>5</sup> stop and frisk, and they placed the backpack in the passenger seat of a patrol vehicle. *Brock*, 184 Wn.2d at 151-52. After discovering that Brock was providing false information, the officers arrested him and searched the backpack. *Brock*, 184 Wn.2d at 152.

Our Supreme Court held that the backpack was part of Brock's "person" at the time of the arrest even though he was not wearing it when he was formally arrested. *Brock*, 184 Wn.2d at 158-59. The court explained:

When the personal item is taken into custody as a part of the arrestee's person, the arrestee's ability to reach the item during the arrest and search becomes irrelevant.

Rather, the safety and evidence preservation exigencies that justify this "time of arrest" distinction stem from the safety concerns associated with the officer having to secure those articles of clothing, purses, *backpacks*, and even luggage, that will travel with the arrestee into custody. Because those items are part of the

<sup>&</sup>lt;sup>5</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

person, we recognize the practical reality that the officer seizes those items during the arrest. From that custodial authority flows the officer's authority to search for weapons, contraband, and destructible evidence.

Brock, 184 Wn.2d at 156 (emphasis added).

The court then further concluded that the lapse of time between Brock's physical possession of the backpack and his arrest was not the determinative factor as to whether he had the backpack in his actual possession immediately preceding his arrest. *Brock*, 184 Wn.2d at 158-59. The court explained:

Although we must draw these exceptions to the warrant requirement narrowly, we do not draw them arbitrarily; the exception must track its underlying justification. . . [W]e draw the line of "immediately preceding" with that focus. *The proper inquiry is whether possession so immediately precedes arrest that the item is still functionally a part of the arrestee's person*. Put simply, personal items that will go to jail with the arrestee are considered in the arrestee's "possession" and are within the scope of the officer's authority to search.

Brock, 184 Wn.2d at 158 (emphasis added).

The court continued:

Under these circumstances, the lapse of time had little practical effect on Brock's relationship to his backpack. . . . Once the arrest process had begun, the passage of time prior to the arrest did not render it any less a part of Brock's arrested person.

Brock, 184 Wn.2d at 159 (emphasis added).

Thus, *Brock* clarified that the arrestee need not be in actual, physical possession of the searched property at the time of the arrest for the search of the person rule to apply and established a test for determining whether an item was in an arrestee's actual possession immediately preceding the start of the arrest process. 184 Wn.2d at 159.

#### B. TRIAL COURT'S REFUSAL TO DECIDE FACTUAL ISSUE, LAWFUL SEARCH INCIDENT TO ARREST

Heath argues that the trial court erred by refusing to decide the disputed factual issue of whether Heath "removed the backpack before or after the emergency lights were activated." Br. of Appellant at 14-15 (quoting CP at 57). We hold that the relevant inquiry here is not when the officer's lights were activated but whether the trial court's other findings, which are supported by Heath's own testimony, support the court's conclusion that the search of the backpack was a lawful search incident to arrest. And we hold that the findings support the court's conclusion.

As the court stated in *Brock*, when evaluating whether the backpack was part of Heath's person, and therefore subject to search incident to arrest, "[t]he proper inquiry is whether possession so *immediately precedes* arrest that the item is still functionally a part of the arrestee's person." 184 Wn.2d at 158 (emphasis added). Additionally, the court in *Brock* held that it is not the timing of possession in relation to the actual arrest that is important but that the relevant time is when the "arrest process" begins. 184 Wn.2d at 159. As the court in *Brock* states, "[o]nce the *arrest process* had begun, the passage of time prior to the arrest did not render" the item "any less a part of [the defendant's] arrested person." 184 Wn.2d at 159.

Here, the trial court found that Heath removed her cigarettes from her backpack and put the backpack down and that she was in the process of lighting her cigarette when Corn approached her. CP at 57 (FF VII). This finding is supported by Heath's own testimony, so Corn's report was not necessary to make this finding.<sup>6</sup> RP at 12.

<sup>&</sup>lt;sup>6</sup> Heath testified that only 30 seconds passed from the time she took her backpack off until Corn walked up to her.

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It is irrelevant when Heath saw the patrol car's lights or otherwise realized that Corn was stopping her. What is relevant is when Heath had the backpack in her possession in relation to the arrest. Although Heath had already put the backpack down when she observed the patrol car's lights and when Corn actually contacted her, Heath, by her own admission, had actual possession of the backpack when Corn observed her make the illegal turn while wearing the backpack and had set the backpack down mere seconds before Corn approached her on foot. Thus, Heath had actual possession of the backpack containing her personal items *immediately* before the arrest. And because Heath had been wearing the backpack and the backpack contained her personal items, such as her cigarettes, the backpack was "in a fair sense a projection of h[er] person." *Byrd*, 178 Wn.2d at 623 (quoting *Rabinowitz*, 339 U.S. at 78 (Frankfurther, dissenting)). These facts support the trial court's conclusion that this was a valid search incident to arrest.

<sup>&</sup>lt;sup>7</sup> Heath has filed a statement of additional authorities citing to *State v. Alexander*, 10 Wn. App. 2d 682, 449 P.3d 1070 (2019), *review denied*, 458 P.3d 785 (2020), in support of her argument that constructive possession is not sufficient to justify a search incident to arrest. This case is not persuasive because, unlike here, no one had observed Alexander in actual possession of the backpack "at any earlier time." *Alexander*, 10 Wn. App. 2d at 692.

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Because the trial court did not rely on Corn's report to support its conclusion that the search of the backpack was lawful and Heath's own testimony supports the trial court's decision, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Maxa, J.

Classow

GLASGOW

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May 7, 2020

### IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

#### **DIVISION II**

STATE OF WASHINGTON,

No. 52994-7-II

Respondent,

v.

CHERYL ANN HEATH,

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant.

Appellant moves for reconsideration of the Court's April 21, 2020 unpublished opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. SUTTON, MAXA, GLASGOW

FOR THE COURT:

Sutton, A.C.J.

#### THE LAW OFFICE OF THOMAS E. WEAVER

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#### **Transmittal Information**

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8	IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II
9	STATE OF WASHINGTON, ) Court of Appeals No.: 52994-7-II
10	Plaintiff/Respondent,  DECLARATION OF SERVICE OF
11	) PETITION FOR REVIEW vs.
12	CHERYL HEATH,
13	) Defendant/Appellant.
14	,
15	STATE OF WASHINGTON )
16	COUNTY OF KITSAP )
17	I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.
18	On June 2, 2020, I e-filed the Petition for Review in the above-captioned case with Washington State Court of Appeals, Division Two; and designated said document to
emailed to Randall Sutton ( <u>rsutton@co.kitsap.wa.us</u> ) at the Kitsap County Prosecutor	emailed to Randall Sutton ( <u>rsutton@co.kitsap.wa.us</u> ) at the Kitsap County Prosecutor's Office
20	through the Court of Appeals transmittal system.
21	On June 2, 2020, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Petition for Review to the defendant:
22	
23	Cheryl Heath 4246 Arsenal Way W
24	Bremerton, WA 98312
25	////
	DECLARATION OF SERVICE - 1  The Law Office of Thomas E. Weaver P.O. Box 1056

Bremerton, WA 98337 (360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: June 2, 2020, at Bremerton, Washington. Alisha Freeman 

#### THE LAW OFFICE OF THOMAS E. WEAVER

June 02, 2020 - 4:18 PM

#### **Transmittal Information**

Filed with Court: Court of Appeals Division II

**Appellate Court Case Number:** 52994-7

**Appellate Court Case Title:** State of Washington, Respondent v. Cheryl Ann Heath, Appellant

**Superior Court Case Number:** 18-1-01343-5

#### The following documents have been uploaded:

• 529947\_Affidavit\_Declaration\_20200602161611D2957907\_1556.pdf

This File Contains:

Affidavit/Declaration - Service

The Original File Name was Heath Service of PRV.pdf

529947\_Petition\_for\_Review\_20200602161611D2957907\_9926.pdf

This File Contains:

Petition for Review

The Original File Name was Heath PRV.pdf

#### A copy of the uploaded files will be sent to:

• jcross@co.kitsap.wa.us

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

#### **Comments:**

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email: )

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PO Box 1056

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