

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07-29-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,) 1 CA-CR 09-0489
)
Appellant,) DEPARTMENT D
)
v.) MEMORANDUM DECISION
)
LISSA LINNETTE WILLIAMS,) (Not for Publication -
) Rule 111, Rules of the
Appellee.) Arizona Supreme Court)
)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-0020081290

The Honorable Danna D. Hendrix, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

C. Kenneth Ray, II, P.C. Prescott
By C. Kenneth Ray, II
Attorney for Appellee

Sheila Sullivan Polk, Yavapai County Attorney Prescott
By Steven J. Sisneros, Deputy County Attorney
Attorneys for Appellant

T H O M P S O N, Judge

¶1 The state of Arizona (state) appeals the trial court's grant of Lissa Linnette Williams' motion to suppress her statements and evidence seized from Williams' purse and her

person. For the reasons that follow, we reverse and remand this case to the trial court for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶12 In reviewing a trial court's ruling on a motion to suppress, we view the facts in the light most favorable to upholding the court's ruling. *State v. Teagle*, 217 Ariz. 17, 20, ¶ 2, 170 P.3d 266, 269 (App. 2007). We consider only the evidence presented at the suppression hearing. *Id.*

¶13 Tucker, a police informant¹ for Detective Direen, set up a transaction to purchase one ounce of methamphetamine in Phoenix with Williams (defendant). Tucker explained to Detective Direen that he would drive to Phoenix and defendant would carry the drugs. Detective Direen told Tucker to stay in phone contact and drive the entire way.

¶14 On October 11, 2008, Tucker, defendant, and defendant's five year-old minor child headed to Phoenix as planned in defendant's Jeep Wrangler. Police surveillance was dropped while they were en route to Phoenix. Detective Direen left several unanswered calls and text messages for Tucker, and

¹ Tucker pled guilty to a marijuana charge and transportation of dangerous drugs for sale and agreed to become an informant to positively influence the outcome of his sentencing. As part of his agreement with the state, Tucker was to make five sales. At the time of the incident in this case, Tucker had four sales to go, and it was commonly known he could not reach the five sales before sentencing.

was out of contact with Tucker for approximately four hours. Tucker eventually called Detective Direen to tell him they were at a Wal-Mart in Anthem, Arizona. A deputy observed defendant and her child leaving Wal-Mart in a Highlander and Tucker leaving in his Jeep, and notified Detective Direen accordingly.

¶15 Detective Direen contacted Deputy Shrum, a K-9 officer, and told Deputy Shrum to develop reasonable suspicion to stop the Highlander. Detective Direen instructed Deputy Shrum to wait until another officer could be present before stopping the vehicle. Deputy Shrum followed the Highlander for approximately 25 miles and eventually stopped the Highlander for speeding and going over the fog line three times.

¶16 Deputy Shrum approached the driver. Meanwhile, Detective Direen arrived and approached defendant, who was in the back seat with her child. Defendant consented to a pat-down. The pat-down did not disclose any contraband or weapons. Detective Direen directed defendant to sit in Detective Long's vehicle. Deputy Shrum deployed his drug-detection canine on the vehicle which resulted in an "alert" at the front driver's door. The canine was removed with no further exterior "sniffing" of the vehicle.

¶17 The detectives conducted a search of the vehicle and did not locate any drugs. One of the detectives conducted a preliminary search of defendant's purse at the scene, but did

not find any drugs in the purse. Detective Direen placed the purse in his vehicle.

¶18 Detective Long observed defendant pushing buttons on her cell phone. Defendant's cell phone piqued his interest because a cell phone is a very important tool of communication in the drug world. After approximately ten seconds, he demanded defendant give him the cell phone. Defendant did not acknowledge him. Detective Long testified at the suppression hearing as follows:

I then reached in to get the cell telephone out of her hands, and basically what she did was she switched hands; she switched it, I believe, from her right hand to her left hand and held it across the back seat so I could not reach it. I had to lean into the vehicle and take the cell phone out of her hand, which I can't remember if I was able to gain control of it at that point or not.

So in order to stop her from destroying evidence, she was extracted from the vehicle by her collar, placed on the ground, and I had help from Deputy Shrum in securing Ms. Williams in handcuffs at that point.

Detective Long further testified he took forceful action because he was concerned defendant was destroying drug-related evidence from her cell phone.

¶19 Detective Long testified he did not tell defendant she was under arrest. He further testified as follows:

[Defense counsel]: Once you secured the phone from her, did you, in fact, arrest her?

[Detective Long]: She was placed in handcuffs at that point.

[Defense counsel]: All right. Still in this investigative detention, as you perceive that term?

[Detective Long]: Yes.

[Defense counsel]: Not in custody?

[Detective Long]: Not at that point, no.

Detective Long further testified that he told defendant he knew she was destroying evidence and that defendant stated, "Yes, I was destroying evidence. I was deleting text messages on the phone."

¶10 Detective Direen removed the handcuffs from defendant because the handcuffs were causing defendant's child to become upset. Detective Direen told defendant she was not under arrest, but detained for investigative purposes, and transported defendant and her child to the police station. The Highlander was also transported to the police station.

¶11 While at the station, Officer Dartt emptied the contents of defendant's purse onto the table and saw a white substance, which field tested positive for methamphetamine. Based upon the drugs found in her purse, defendant was placed under arrest. Detective Direen then asked defendant who she wanted him to call to pick up her child. Defendant told him she wanted Lockwood to do so. Lockwood is a defense attorney and

has in loco parentis guardianship of the child. Detective Direen called Lockwood to pick up defendant's child.

¶12 When Lockwood arrived at the police station, defendant was crying and told him she needed to talk to him. Before Lockwood could speak with defendant, Detective Direen ushered Lockwood to a private room and asked him if he was there to pick up the child or to represent defendant. Lockwood stated he was there to take the child. Detective Direen told Lockwood to take the child and leave. Detective Direen testified that the officers were not done with their investigation, so he was not going to allow defendant to speak with Lockwood. Lockwood left the station with defendant's child. Approximately ten minutes later, Lockwood returned to the station because he needed to talk to defendant about the child's medication and retrieve the keys to defendant's apartment. The detectives allowed Lockwood to speak to defendant.

¶13 After Lockwood left, defendant requested to speak to Detective Morgan.² She stated she had not wanted to talk to the officers with her child present. Detective Morgan read her *Miranda* warnings. Defendant did not invoke her *Miranda* rights. Defendant told Detective Morgan she had drugs concealed in her body. A female officer was called to accompany defendant to a

² The record is unclear as to whether this occurred after Lockwood's first or second visit.

private area. Defendant produced 11.8 grams of methamphetamine she had concealed in her body.

¶14 On October 21, 2008, defendant was charged by information with five felonies, three of which were drug offenses relating to the methamphetamine. The other two counts alleged child abuse, a class 3 felony; and tampering with evidence, a class 6 felony.

¶15 The trial court granted defendant's motion to suppress, thereby suppressing defendant's statements made at the scene and the methamphetamine seized from defendant's purse and person. The state filed a motion for reconsideration, which the court denied. The state filed a motion to dismiss under Arizona Rule 16.6(a) of Criminal Procedure in order to pursue this appeal. The court dismissed the charges without prejudice and the state timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article VI § 9, and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)(2003), 13-4031 (2001), and -4032(6) (2009).

DISCUSSION

¶16 We review a ruling on a motion to suppress evidence for an abuse of discretion. *State v. Nelson*, 208 Ariz. 5, 6, ¶ 4, 90 P.3d 206, 207 (App. 2004). We apply a de novo standard to any legal conclusions and will not reverse a ruling absent clear and manifest error. *Id.*; *State v. Hyde*, 186 Ariz. 252, 265, 921

P.2d 655, 668 (1996). The "clear and manifest error" standard applies to questions of fact. *Matter of Appeal in Maricopa County, Juv. Action No. JT30243*, 186 Ariz. 213, 216, 920 P.2d 779, 782 (App. 1996). A court abuses its discretion if the record "fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *Files v. Bernal*, 200 Ariz. 64, 65, 22 P.3d 57, 58 (App. 2001) (citation omitted); see also *Merlina v. Jejna*, 208 Ariz. 1, 3, ¶ 6, 90 P.3d 202, 204 (App. 2004) (abuse may occur if record fails to support decision).

1. Defendant's statements at the scene

¶17 Although the state requests that we reverse the trial court's order suppressing defendant's incriminating statements made at the scene, the state does not fully articulate its argument or explain how the court erred. The state simply argues that Detective Long had probable cause to arrest defendant due to the events that occurred roadside with her cell phone.

¶18 On this issue, the trial court reasoned as follows:

[Detective Long] took the phone from defendant, handcuffed her and told her she was under arrest...the statement must be suppressed. Defendant's statements were not spontaneous. Defendant made her statement after her arrest, prior to *Miranda*, and in response to Detective Long.

¶119 The state conceded that Detective Long arrested defendant, but then, inconsistent with such concession, seeks to use defendant's statement given without the benefit of *Miranda* warnings.³

¶120 We agree with the state that Detective Long had sufficient probable cause to arrest defendant. Detective Long knew, from his training and experience, that cell phones are

³ Our review of the record suggests defendant may have been in investigative detention. "When an officer is engaged in an investigation, he may detain a person under circumstances which would not justify an arrest." *State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981). Detention is justified while the officer is seeking more information about the crime. *Id.* In *Aguirre*, for example, the defendant was handcuffed and placed in a patrol car. *Id.* On appeal, the defendant contended that he was then under arrest without a warrant or probable cause. *Id.* We reasoned that the amount of force used by the officers must be evaluated in light of the circumstances and determined the defendant was detained but not arrested. *Id.*; see also *State v. Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1966) (discussing *Aguirre* at length and citing approvingly).

Here, Detective Long testified he restrained defendant in handcuffs to prevent her from deleting any drug-related messages or evidence. Defendant ignored Detective Long when he demanded she surrender the phone and tried to prevent him from confiscating the phone by switching it in her hands and holding it away from him. Detective Long had reason to believe that if he did not put handcuffs on her, she would continue her behavior. Arguably, the force used by Detective Long was reasonable to detain her for investigative purposes. If defendant was not in custody, the officers had no obligation to read defendant *Miranda* warnings. See *State v. Smith*, 193 Ariz. 452, 457, ¶ 18, 974 P.2d 431, 436 (1999) ("*Miranda's* procedural safeguards apply only to custodial interrogation.").

In light of *Aguirre* and *Blackmore*, this may have presented a close case on the issue of whether defendant was arrested or in investigative detention. However, the state has always characterized the events as an arrest, so we will accept the state's characterization.

commonly used to facilitate drug transactions. He demanded defendant give him the phone and she ignored him and began holding it away from him as he tried to take the phone from her hands. Additionally, the canine had alerted to the vehicle in which defendant had been a passenger. Detective Direen testified that in addition to the information given to him by the informant, he had seen defendant's own vehicle at a known drug house in Phoenix. Thus, the officers had probable cause to arrest defendant at the scene.⁴

¶21 However, defendant's statements must be suppressed because she made the statements pre-*Miranda* in response to Detective Long's custodial questioning. We affirm the trial court's ruling suppressing defendant's statements made at the scene.

2. Search of defendant's purse

¶22 The state claims the court erred in suppressing the methamphetamine found in defendant's purse, arguing the

⁴ The trial court found that Detective Long "told defendant she was under arrest." There is no evidence in the record supporting this finding. Detective Long's own testimony contradicts the court's conclusion. He testified he did not tell defendant she was under arrest and that he placed handcuffs on defendant to prevent her from destroying evidence. The record fails to support the court's conclusion that Detective Long told defendant she was under arrest. Nonetheless, we hold the arrest was lawful and supported by probable cause. See *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (affirming a trial court's ruling because it was legally correct result, even if based on an erroneous conclusion).

detectives had sufficient probable cause to search the entire car and defendant's purse.

¶123 We agree. "Under the 'automobile exception' to the Fourth Amendment warrant requirement," law enforcement officers can lawfully search a vehicle if probable cause exists to believe it contains contraband. *State v. Reyna*, 205 Ariz. 374, 374, ¶ 1, 71 P.3d 366, 366 (App. 2003) (citing *United States v. Johns*, 469 U.S. 478, 484 (1985)). A drug sniffing dog's alert on an automobile provides probable cause to search the vehicle. *State v. Box*, 205 Ariz. 492, 496, ¶ 14, 73 P.3d 623, 627 (App. 2003).

¶124 The detectives had probable cause to search all containers in the vehicle, including defendant's purse, without regard to ownership. *See Wyoming v. Houghton*, 526 U.S. 295, 301 (1999) ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search," regardless of ownership (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982)) (emphasis omitted)). Moreover, the detectives were not required to search the purse contemporaneously with the vehicle at the scene. *See Reyna*, 205 Ariz. at 378, 71 P.3d at 370; *see also United States v. Burnette*, 698 F.2d 1038 (9th Cir. 1983) (where officers lawfully

searched purse at site of initial investigation, it was lawful to search purse again at police station).

¶125 The search of the purse is also legitimate under another exception to the warrant requirement, as a search incident to defendant's arrest. See *United States v. Moreno*, 569 F.2d 1049, 1052 (9th Cir. 1978) (search of a purse); *United States v. Cornejo*, 598 F.2d 554, 557 (9th Cir. 1979) (search of a purse). We therefore hold the court erred in suppressing the evidence obtained from defendant's purse.

3. Right to counsel

¶126 After requesting to speak with Detective Morgan and being advised of her *Miranda* rights, defendant told Detective Morgan she had drugs concealed inside her body and produced 11.8 grams of methamphetamine.

¶127 The court suppressed this evidence, concluding it was obtained as a result of a violation of defendant's right to counsel. Specifically, the court reasoned:

Both Mr. Lockwood and Detective Direen testified that they believed Mr. Lockwood could not speak with defendant unless he was there to represent her. Mr. Lockwood believed he was given the option of either picking up the child or representing defendant, but not both. Detective Direen stated he would not allow Mr. Lockwood to talk to defendant unless he was going to represent her. Either way, the practical result was that, without justification, the State prevented defendant from getting access to an attorney.

Defendant had been formally charged with possession of methamphetamine...Defendant had a Sixth Amendment right to consult in private with an attorney...The Court finds that the State inappropriately interfered with defendant's Sixth Amendment right to counsel.

¶128 The court's ruling is flawed. Defendant was not formally charged until October 21, 2008. Defendant could not exercise a right to counsel under the Sixth Amendment because that right had not yet attached. See *State v. Hitch*, 160 Ariz. 297, 299, 772 P.2d 1150, 1152 (App. 1989) ("Under the Sixth Amendment, the right to counsel attaches once adversary proceedings have commenced.") The Sixth Amendment right to counsel arises only when a defendant is formally charged with a crime. *Moran v. Burbine*, 475 U.S. 412, 428-32 (1986); *State v. Hall*, 129 Ariz. 589, 592, 633 P.2d 398, 401 (1981). Thus, the court committed error in holding defendant had a Sixth Amendment right to counsel and that the detectives interfered with her right to counsel.

¶129 Furthermore, we conclude the methamphetamine was not obtained in violation of *Miranda*. "The Fifth Amendment right identified in *Miranda* [*v. Arizona*, 384 U.S. 436 (1966),] is the right to have counsel present at any custodial interrogation." *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981). The sequence of events, according to the record, is that the detectives found

the methamphetamine in her purse and subsequently placed defendant under arrest. Then the officers asked defendant who they should call to pick up defendant's child. Defendant responded that she wanted Lockwood to pick up her child. Upon Lockwood's arrival, defendant told Lockwood she wanted to talk to him.⁵ Although defendant was in custody at that point, the detectives had not engaged in custodial interrogation. Moreover, defendant never indicated a desire to have an attorney present during questioning.⁶ See *State v. Thornton*, 172 Ariz. 449, 453, 837 P.2d 1184, 1188 (App. 1992) (citing *McNeil v. Wisconsin*, 501 U.S. 171 (1991)).

⁵ This statement appears on its face to relate to the child because Lockwood was summoned to the police station as the in loco parentis guardian of defendant's child. If the trial court believed this constituted a request to have counsel present during questioning, defendant's statement is ambiguous at best in these circumstances. Even if we assume defendant's statement was ambiguous, we note that defendant requested to speak to Detective Morgan after Lockwood left. See *State v. Staatz*, 159 Ariz. 411, 414-15, 768 P.2d 143, 146-47 (1988) (after an invocation of the Fifth Amendment right to counsel where a defendant initiates the dialogue, police may pursue questioning in the absence of counsel). Under the circumstances, defendant's wishes were certainly clarified by law enforcement when after requesting to speak to Detective Morgan, defendant was advised of her right to counsel in the *Miranda* warnings.

⁶ We also note that Lockwood returned to the police station approximately ten minutes later, after he left with the child, to ask defendant questions about the child's medication. Defendant did not take this opportunity to consult with Lockwood in a legal capacity, which is further support that she did not articulate a request to have counsel present.

¶30 After her child left the police station, defendant told the officers she wanted to speak with Detective Morgan because she expressed trust in him. Detective Morgan read her *Miranda* rights and defendant did not invoke her right to counsel. Accordingly, the trial court erred in finding defendant's right to counsel was violated and suppressing the methamphetamine on that basis.

¶31 In affirming the court's suppression of defendant's statements and reversing the court's suppression of the methamphetamine seized from defendant's purse and person, we are mindful of the exclusionary rule. The exclusionary rule requires suppression of evidence that was obtained directly or indirectly in violation of the Fourth, Fifth, or Sixth Amendments and their state constitution counterparts. *Murray v. United States*, 487 U.S. 533, 536-37 (1988). The test for exclusion is whether the evidence was obtained "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quotation omitted). The rule is inapplicable if the police obtained the evidence from an "independent source." *State v. Hackman*, 189 Ariz. 505, 508 n. 3, 943 P.2d 865, 868 (App. 1997).

¶32 The discovery of the methamphetamine was sufficiently distinguishable from the *Miranda* violation and was purged of the

primary taint. Defendant's purse had been placed in Detective Direen's vehicle before the incident with the cell phone leading to defendant's arrest. On this record, we are convinced the detectives would have properly searched defendant's purse at the police station, irrespective of any statements made by defendant. As to the evidence obtained from defendant's person, we conclude those events were also sufficiently distinguishable from the *Miranda* violation. Defendant stated she wanted to talk to Detective Morgan. She received *Miranda* warnings, did not invoke her rights, and voluntarily told Detective Morgan she had drugs concealed inside her body. The methamphetamine was obtained pursuant to defendant's voluntary confession, not as an exploitation of the original *Miranda* violation at the scene. Thus, we hold the exclusionary rule is inapplicable under these circumstances.

4. Other incriminating statements

¶133 Finally, our review of the record indicates that Detective Direen may have questioned defendant about her involvement during the transport to the police station and before or after the search of the purse at the police station.⁷

⁷ We are referring to the following dialogue from the suppression hearing:

[Defense Counsel]: On direct examination, you made reference to some discussions that

Detective Direen testified defendant made "denial statements" during these conversations. Nonetheless, to clarify this issue, we hold that if defendant made any statements in response to Detective Direen's questions while she was in custody and pre-*Miranda*, those statements must be suppressed.

CONCLUSION

¶34 For the foregoing reasons, we affirm the trial court's ruling suppressing defendant's statements at the scene, reverse the trial court's grant of defendant's motion to suppress with respect to the methamphetamine in her purse and on her person, and remand this case for further proceedings consistent with this decision.

you had, or that someone had there, concerning Ms. Williams to help herself.

[Detective D.]: Correct.

[Defense Counsel]: Was that discussions that you had with her post-*Miranda*?

[Detective D.]: I believe before and after, that was probably discussed.

[Defense Counsel]: So pre-*Miranda*, then, there was some questioning and discussions with her?

[Detective D.]: Yes. I asked her involvement in this before *Miranda*, yes.

[Defense Counsel]: Pre- or post-discovery of the contents of the purse?

[Detective D.]: Both.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

SHELDON H. WEISBERG, Judge