IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JILL CHRISTINE MARKHAM, Appellant.	No. 39743-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — After the trial court denied her pretrial suppression motion, a jury found Jill Christine Markham guilty of unlawful possession of a controlled substance (methamphetamine) with intent to deliver. Markham appeals, arguing that the trial court's denial of her motion to suppress violated constitutional protections against warrantless search and seizure and self-incrimination. Finding no issue of merit, we affirm.

Facts

Markham lived in rural Yelm. Accessible only by a long dirt road, her property included a 10-by-10-foot shed that was approximately 10 feet from the main residence. The shed had one door and one window.

Yelm officers had a felony warrant to arrest Darrell Teitzel at Markham's address. Four officers arrived at the residence to serve the warrant on January 1, 2009, at 11:30 pm. The

officers had been told Teitzel lived in the shed. Deputy Sheriff Michael Young and Officers Robert Malloy and Adam Haggerty approached the residence while the fourth officer waited at the road approximately one-quarter mile away. The first three officers had been to the property before, and Haggerty knew Teitzel from previous arrests, including drug arrests.

As Deputy Young waited at the rear of the residence, Officers Haggerty and Malloy approached the front door. The two officers heard voices coming from the shed. Walking toward it, they recognized Teitzel's voice. They also heard two female voices; one woman was on the telephone. After hearing references to an address, to grams, ounces, and quarters, and to a meeting and delivery, the officers concluded that a drug deal was being planned.

A few minutes later, Teitzel came out of the shed. When Officer Haggerty told Teitzel he was under arrest, he became combative. The two women had followed Teitzel out of the shed, but when Haggerty identified himself, they went back inside and shut and locked the door. As both officers struggled with Teitzel, he threw a glass pipe and a bindle at Officer Malloy's feet.

Deputy Young heard the struggle and ran over to help. As Officer Haggerty shouted at him to watch the shed, he could hear banging inside. Young announced himself and told the occupants to come out. When Markham emerged, she was holding a wine bottle upside down by its neck and had the other hand in her pocket. The other woman came out with her hands up. Young told Markham to drop the bottle and remove her hand from her pocket. Markham dropped the bottle but put both hands in her pockets. Young asked her three or four times to take her hands out of her pockets; Markham kept taking her hands in and out.

Deputy Young decided to handcuff Markham because she would not keep her hands out in the open. With Officer Malloy's assistance, he grabbed Markham's left hand and pulled it out

of her pocket. As he did so, he saw what appeared to be drugs with the aid of Malloy's flashlight. When he said he thought he had seen drugs, Officer Haggerty came over and read Markham her *Miranda*[1] rights. Young asked Markham what was in her pockets; she said it was drugs. The officers did a pat down and found more methamphetamine and a digital scale.

The State charged Markham with unlawful possession of methamphetamine with intent to deliver. She moved to suppress the drug evidence and her incriminating statement, but the trial court denied her motion and entered findings of fact and conclusions of law in support of its decision. A jury found Markham guilty as charged. She appeals the denial of her suppression motion.

Discussion

Challenged Findings of Fact and Conclusions of Law

When reviewing the denial of a suppression motion, we review factual findings for substantial evidence and conclusions of law de novo. *State v. Whitney*, 156 Wn. App. 405, 408, 232 P.3d 582 (2010). We apply the de novo standard of review to conclusions erroneously labeled as findings, and we review findings incorrectly labeled as conclusions as findings of fact. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 557 n.12, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007).

Markham challenges the following findings and conclusions, arguing that some are mischaracterized and that others lack sufficient evidentiary support:

I. FINDINGS OF FACT

. . . .

(11) The conversation between the shed occupants was about a drug deal.

. . . .

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

(16) Deputy Young ordered the occupants of the shed to come out based on law enforcement safety concerns.
(17) When [Markham] exited the shed in one hand she held a bottle of wine upside down in a club fashion and the other hand was in her pocket.
. . . .
(19) Officer safety concerns demanded that the shed occupants exit with their hands up.
(20) [Markham] put down the wine bottle but did not comply with repeated orders to remove her hands from her pockets.
(21) Based on [Markham's] non compliance [sic] with requests to keep her hands out of her pockets[,] law enforcement detained [Markham].
(22) While taking [Markham's] hand out of her pocket Deputy Young could see a plastic bag containing a white substance in her pocket.

II. CONCLUSIONS OF LAW

(1) Law enforcement had the right to ask [Markham] to exit the shed based on officer safety concerns due to the remote location, late hour, combative arrestee, knowledge of drug deal, and escalating situation.
(2) Exigent circumstances existed that necessitated law enforcement's seizure of [Markham].
. . . .
(4) [Markham] was read her *Miranda* rights and waived those rights through continuing to speak with law enforcement.

Clerk's Papers (CP) at 16-17.

We turn first to the question of whether substantial evidence supports the challenged findings. Challenged findings are verities if they are supported by evidence of a sufficient quantity to persuade a fair-minded, rational person of their truth. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Markham argues that the evidence does not support the finding that the shed occupants were talking about a drug deal. Officer Malloy testified that he thought the woman on the phone was talking about a drug deal when she mentioned grams and quarters and a meeting within the half hour, but he could not hear what Teitzel and the other woman were talking about. Officer Haggerty testified that he could hear Teitzel talking and laughing with a woman and that he heard

them mention grams and ounces as well as an address and delivery. He also said he heard another conversation from a second woman in the shed. He added that all three conversed together in the small shed, he thought the conversation was drug related, and it sounded as though they were wrapping up their conversation just before they left. Both officers had experience with drug investigations. This testimony is sufficient to support the court's finding that the occupants' conversation concerned a drug deal.

Markham next challenges the finding that Deputy Young ordered the shed occupants to come out based on law enforcement safety concerns. All three officers expressed their concern about the two women who started to emerge from the shed but then returned and locked the door after hearing that Teitzel was under arrest. Officer Malloy testified that the women needed to come out for the officers' safety, based on his concerns that the shed could contain tools and other objects and his knowledge that weapons are sometimes involved in drug cases. Young testified that he heard banging from the shed after being told to watch it and that he was concerned for his safety because it was dark and the area was rural. He took cover while ordering the women out and was "very apprehensive." Report of Proceedings (RP) (Aug. 3, 2009) at 77. Officer Haggerty testified that his safety concerns arose when the two women ran back into the shed and that he believed, based on experience, that they might have weapons. This evidence provides substantial support for the challenged finding.

Markham next challenges the finding that she held the wine bottle upside down in a club fashion. Deputy Young testified that Markham emerged from the shed holding an empty wine bottle upside down in her hand and in a manner that caused him concern. He made a gesture to demonstrate and, in its oral ruling, the trial court observed that Markham was not just holding a

wine bottle: "It was being carried upside-down, as seen by the officer's gesture which the Court of Appeals may not recognize, with the neck being held in a fist and the wine bottle being up." RP (Aug. 3, 2009) at 135. The record supports the court's finding that Markham held the bottle in a "club fashion." CP at 17.

Markham next argues that the finding that "[o]fficer safety concerns demanded that the shed occupants exit with their hands up" is not supported by the record and should be considered a legal conclusion. CP at 17. The evidence cited above supports the finding regarding the officers' concerns. We agree that whether those concerns justified the officers' demands is a legal conclusion, and we evaluate that justification below.

Markham also challenges the findings that she did not comply with repeated orders to remove her hands from her pockets and was detained based on that noncompliance. The record amply demonstrates that she did not comply with Deputy Young's repeated requests to remove her hands from her pockets and that she was handcuffed as a result.

Finally, Markham argues that the trial court erred in finding that Deputy Young observed a plastic bag containing a white substance while taking Markham's hand from her pocket. Young and Officer Haggerty so testified and we reject this evidentiary challenge.

Turning to the court's conclusions of law, Markham faults the first for containing factual inaccuracies. She contends that the court erred in referring to a "combative arrestee" and an "escalating situation." CP at 17. Two unchallenged findings refer to Teitzel as being combative upon learning of his arrest. His description as a combative arrestee is therefore a verity on appeal. *See State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) (unchallenged findings of fact entered following suppression hearing are verities on appeal). As for the escalating situation,

Deputy Young testified that the other officers were wrestling with Teitzel when he asked the women to come out of the shed. He knew the women had gone back in when they saw officers present. Young testified that the situation was escalating when he came around the corner of the house and that his decision to ask the women to come out of the shed was not a smart choice on his part given the circumstances, including the number of officers available. This conclusion's factual assertions are supported by the evidence.

Markham faults the second conclusion stating that "[e]xigent circumstances existed that necessitated law enforcement's seizure of [Markham]." CP at 17. We reject Markham's contention that this is a factual assertion and discuss whether the circumstances justified Markham's seizure below.

Finally, Markham argues that the trial court incorrectly concluded that Markham was read her *Miranda* rights and then waived them by speaking to the officers. The record supports this sequence of events.

In sum, we find substantial evidence for the challenged findings and, in the analysis that follows, address the legal validity of the court's conclusions.

Admission of Drug Evidence

Markham argues here that the admission of evidence seized without a search warrant violated her rights under the Fourth Amendment and article I, section 7. We review de novo the constitutionality of a warrantless search. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

Under the Fourth Amendment and article I, section 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable. *State v. Williams*, 102 Wn.2d 733,

736, 689 P.2d 1065 (1984). A few exceptions to the warrant requirement apply, however, where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. *Williams*, 102 Wn.2d at 736. The State has the burden of showing that the challenged search falls within one of those exceptions. *Williams*, 102 Wn.2d at 736. The closer officers come to intruding into a dwelling, the greater the constitutional protection. *State v. Chrisman*, 100 Wn.2d 814, 820, 676 P.2d 419 (1984).

When police obtain a valid arrest warrant, they may make a limited intrusion into a suspect's residence to execute the warrant but then must leave. *State v. Hatchie*, 161 Wn.2d 390, 402, 166 P.3d 698 (2007). They cannot use the warrant as a pretext to search for evidence. *Hatchie*, 161 Wn.2d at 401.

Markham argues that the arrest warrant issued for Teitzel did not give the officers authority to order her from the shed where he resided.[2] She asserts that with this order, the officers unlawfully invaded the shed even though they did not enter it. *See State v. Young*, 123 Wn.2d 173, 185-86, 867 P.2d 593 (1994) (warrantless use of infrared device unlawfully invaded home); *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89 (1985) (warrantless arrest of suspect standing in his doorway was unlawful even though officers did not cross threshold). The State responds that the officers were entitled to order the women from the shed as part of a protective sweep.[3]

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[2] We agree with Markham that she has automatic standing to challenge the search of the shed even if it was Teitzel's residence. *See State v. Kypreos*, 115 Wn. App. 207, 212, 61 P.3d 352 (2002) (automatic standing satisfied if offense involves possession as essential element, defendant possessed the subject matter at the time of the search or seizure, and there is direct relationship between challenged police action and evidence used against defendant), *review denied*, 149 Wn.2d 1029 (2003).

[3] The State did not cite this exception below, but we may affirm on any basis the record supports.

A. Protective Sweep

While making a lawful arrest, officers may conduct a reasonable protective sweep of the premises for security purposes. *State v. Hopkins*, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) (citing *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990)). The scope of such a sweep is limited to a cursory visual inspection of places where a person might be hiding. *Hopkins*, 113 Wn. App. at 959. An in-home arrest puts an officer at the disadvantage of being on the suspect's turf and, in some circumstances, an arrest just outside the home may pose an equally serious threat to the arresting officers. *Buie*, 494 U.S. at 333; *United States v. Colbert*, 76 F.3d 773, 776 (6th Cir. 1996).

If the area immediately adjoins the place of arrest, the police need not justify their actions by demonstrating a concern for their safety. *Hopkins*, 113 Wn. App. at 959. If the sweep extends beyond the immediate area of the arrest, officers must point to articulable facts which, taken with rational inferences from those facts, warrant a reasonable belief that the area involved in the protective sweep may harbor an individual who poses a threat to officer safety. *Buie*, 494 U.S. at 334. A general desire to be sure no one is hiding is insufficient to justify a protective sweep outside the immediate area of arrest. *Hopkins*, 113 Wn. App. at 960.

Markham contends that she is entitled to the greater protection against warrantless searches that article I, section 7 affords and that no Washington case has applied the protective sweep exception under the state constitution. *See State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (article I, section 7 affords individuals greater protections against warrantless searches than does the Fourth Amendment). This is not the case. Division Three of this court

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State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

upheld a protective sweep under article I, section 7 in *State v. Smith*, 137 Wn. App. 262, 267-68, 153 P.3d 199 (2007), *aff'd on other grounds*, 165 Wn.2d 511, 199 P.3d 386 (2009).

It is clear that Markham was ordered from the shed in the immediate vicinity of Teitzel's arrest. Markham does not assign error to the finding that the shed was within 10 feet of the residence, and the record shows that Teitzel was arrested within that 10-foot area. Thus, under the Fourth Amendment, the officers did not need to justify their sweep with safety concerns. Even if additional justification for the sweep is necessary under the state constitution, that justification appears on this record. The officers here had a "reasonable articulable suspicion that a protective sweep [was] necessary by reason of a safety threat." *Colbert*, 76 F.3d at 777. As the trial court concluded, "Law enforcement had the right to ask [Markham] to exit the shed based on officer safety concerns due to the remote location, late hour, combative arrestee, knowledge of drug deal, and escalating situation." CP at 17. If the officers could enter the shed to inspect it, they could order known occupants to come out. Deputy Young's actions in ordering the women from the shed were justified as part of a protective sweep.

B. Probable Cause to Arrest

Markham argues that even if she was ordered out of the shed legitimately, she was arrested without probable cause when she was physically seized. *See State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004) (arrest occurs when circumstances would cause reasonable person to believe she was under arrest); *State v. Werth*, 18 Wn. App. 530, 535, 571 P.2d 941 (1977) (defendant was arrested when ordered out of her home at gunpoint and told to keep her hands in plain view and to move away from door), *review denied*, 90 Wn.2d 1010 (1978). Markham acknowledges the search incident to arrest exception to the warrant requirement, but

she argues that a lawful custodial arrest is a prerequisite to any such search. *Moore*, 161 Wn.2d at 885. The lawfulness of an arrest depends on probable cause, which exists when the arresting officer has knowledge of facts sufficient to cause a reasonable officer to believe an offense was committed. *Moore*, 161 Wn.2d at 885. Markham asserts that the officers had no such knowledge at the time of her arrest.

The State responds that Markham was detained rather than arrested after the protective sweep, and it seeks to justify that detention with case law authorizing the detention of occupants during the execution of a residential search warrant. *See State v. King*, 89 Wn. App. 612, 618-19, 949 P.2d 856 (1998) (even without probable cause or reasonable suspicion of criminal activity, it is reasonable for officer executing a search warrant at a residence to briefly detain occupants to ensure officer safety and an orderly completion of the search).

Because the protective sweep exception authorized the officers to order Markham from the shed, the exception also authorized the officers to briefly detain her. We need not extend the rule in *King* to the circumstances presented here, however, because we conclude that Markham's detention was justified as an investigative seizure or *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

A police officer may conduct an investigative *Terry* stop based on less evidence than needed for probable cause to make an arrest when the officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime. *State v. Day*, 161 Wn.2d 889, 896-97, 168 P.3d 1265 (2007); *State v. Acrey*, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). In evaluating the reasonableness of such a stop, courts consider the totality of the circumstances, including the officer's subjective beliefs, his

training and experience, the location of the stop, and the conduct of the person detained. *Day*, 161 Wn.2d at 896; *Acrey*, 148 Wn.2d at 747. If the officer's initial suspicions are confirmed or further aroused, the scope of the stop may be extended and its duration may be prolonged. *Acrey*, 148 Wn.2d at 747.

Although the circumstances must be more consistent with criminal than innocent conduct, "reasonableness is measured not by exactitudes, but by probabilities." *State v. Samsel*, 39 Wn. App. 564, 571, 694 P.2d 670 (1985). "'A founded suspicion is all that is necessary, *some basis from which the court can determine that the detention was not arbitrary or harassing.*'" *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) (quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966)).

An officer's request to keep hands out of one's pockets does not independently rise to the level of seizure. *State v. Harrington*, 167 Wn.2d 656, 666-67, 222 P.3d 92 (2009). Thus, Deputy Young's initial request to Markham to keep her hands out did not necessarily result in her seizure. But even if it did, that seizure was justified by the conversation about a drug deal, Markham's actions in retreating into the shed, and her emergence from the shed holding a wine bottle as a club.

A suspect's reaction to the police helps determine the reasonableness of an officer's use of force during a *Terry* stop. *Belieu*, 112 Wn.2d at 600. Markham's refusal to keep her hands out heightened the officers' concerns and justified the decision to grab her arm and place her in handcuffs, and these actions did not convert the stop into an arrest. *See Belieu*, 112 Wn.2d at 596 (officers' actions in frisking, handcuffing and separating occupants of car was justified by unfolding events and did not exceed the scope of permissible *Terry* investigative stop).

As Deputy Young grabbed Markham's hand and removed it from her pocket, Officer Haggerty shined his flashlight inside to check for weapons. Given Markham's actions in resisting the officer's request to remove her hands, this "frisk" was permissible.

An officer may frisk a person for weapons, but only if he justifiably detained the person before the frisk, he has a reasonable concern of danger, and the frisk's scope is limited to finding weapons. *State v. Xiong*, 164 Wn.2d 506, 512, 191 P.3d 1278 (2008); *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would

be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. In *Xiong*, the court found a frisk unjustified where the defendant made no movement that could be interpreted as an attempt to retrieve a weapon and was not uncooperative with officers. 164 Wn.2d at 513. By contrast, Markham made several movements consistent with the possibility of a weapon and did not cooperate with law enforcement. The frisk was neither arbitrary nor harassing.

Once the officers saw what appeared to be drugs in Markham's pocket, they had probable cause to arrest. *Moore*, 161 Wn.2d at 885. Consequently, the trial court did not err in admitting the drug evidence seized from Markham after her arrest.

Admission of Statement

Markham contends here that the admission of her unwarned custodial statement violated her federal and state constitutional right against self-incrimination. We review this issue de novo. *State v. Johnson*, 94 Wn. App. 882, 897, 974 P.2d 855 (1999), *review denied*, 139 Wn.2d 1028 (2000).

The Fifth Amendment to the United States Constitution states in part that no person "shall be compelled in any criminal case to be a witness against himself." This provision applies to states through the Fourteenth Amendment. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). Article I, section 9 of the Washington Constitution provides that no person "shall be compelled in any criminal case to give evidence against himself." We interpret the two provisions equivalently. *Easter*, 130 Wn.2d at 235.

"A person subjected to custodial interrogation by a state agent is entitled to the benefit of the procedural protections enunciated in *Miranda.*" *State v. Walton*, 67 Wn. App. 127, 129, 834

P.2d 624 (1992). "Custody" for *Miranda* purposes is established as soon as the suspect's freedom of action is curtailed in a manner associated with formal arrest. *Walton*, 67 Wn. App. at 129. The fact that a suspect is not free to leave during a *Terry* stop, however, does not make the stop comparable to a formal arrest for purposes of *Miranda.* *Walton*, 67 Wn. App. at 130.

Markham's argument is based on her earlier challenge to the court's conclusion that she was read her *Miranda* rights and waived them by continuing to speak with law enforcement. Markham argues that the record shows she was not read her *Miranda* rights until after she admitted she had drugs in her pocket.

We disagree. Deputy Young testified that he handcuffed Markham and told Officer Haggerty that he thought she had drugs and that the officer then gave her *Miranda* warnings. After questioning, Markham said her pocket contained drugs.

Even if this sequence is unclear, which the record does not support, the admission of Markham's statement still does not violate her constitutional right against self-incrimination. A detaining officer may ask a moderate amount of questions during a *Terry* stop, including questions designed to elicit incriminating responses, to confirm or dispel the officer's suspicions. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004); *Walton*, 67 Wn. App. at 130. The trial court did not err in admitting Markham's post-arrest statement and properly denied her motion to suppress in its entirety.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

PENOYAR, C.J.