IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WENDY M. GARCIA-LOERA,
Appellant.

No. 2 CA-CR 2018-0220
Filed July 31, 2019

Appeal from the Superior Court in Pima County
No. CR20171985001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Steven D. West P.C., Tucson
By Steven D. West
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Judge Brearcliffe and Judge Espinosa concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a bench trial, Wendy Garcia-Loera was convicted of possession of a narcotic drug and possession of drug paraphernalia. The trial court suspended the imposition of sentence and placed her on concurrent, three-year terms of probation. On appeal, Garcia-Loera argues the court erred by denying her motion to suppress the evidence seized from her purse during a search of a mobile home she was visiting. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Garcia-Loera's convictions. *See State v. Miles*, 211 Ariz. 475, ¶ 2 (App. 2005). In April 2017, Tucson Police Department officers learned through social media that Joseph Ortiz was selling marijuana. Ortiz, who was affiliated with a gang, had also posted photographs of himself holding numerous kinds of guns, and, approximately a month earlier, he had accidently shot himself in the leg while "playing with a gun." An undercover officer arranged to meet Ortiz at a mobile home to make a purchase. While others surveilled the mobile home, Officer Sampson, who was in plain clothes, met Ortiz outside and bought one ounce of marijuana for $40. During the transaction, Sampson saw that Ortiz had at least another pound of marijuana in his possession.

¶3 Sampson subsequently sought, and was granted, a warrant to search Ortiz and the mobile home for, among other things, marijuana, drug paraphernalia, drug-related money, and weapons. As Sampson described it, the officers "want[ed] to find out if there [was] any more marijuana[or] illegal activity in the house." They also wanted to retrieve the $40 buy money. Because of the photographs of Ortiz holding guns, the court granted Sampson's request that the warrant be executed "unannounced" or "without knocking."

¶4 While Sampson obtained the warrant, other officers continued to watch the mobile home and observed "multiple people

coming in and out." Sampson then sought to amend the warrant, explaining to the judge: "We have multiple people in the house [from] what I'm understanding from surveillance. I'd love to add the names John and Jane Doe to the warrant." The judge granted the amendment.

¶5 Pursuant to the warrant, a SWAT (Special Weapons and Tactics) team entered the mobile home and found Ortiz, Garcia-Loera, at least three other adults, and five children. They placed the adults in plastic cuffs and moved everyone outside to prevent the destruction of evidence and to make it safer to conduct the search. In the living room, Officer Cuestas found a black purse containing .135 grams of heroin in a small baggie. The purse also contained tin foil and a straw, which, according to Sampson, "[is] commonly used [as a pipe] for smoking heroin." Garcia-Loera's social security card was also in the purse. During a search of Garcia-Loera's person, Cuestas found another piece of tin foil and a pill she identified as Percocet.

¶6 A grand jury indicted Garcia-Loera for one count of possession of a narcotic drug, "to wit: heroin," and one count of possession of drug paraphernalia, "to wit: baggie and/or straw and/or foil." [1] Garcia-Loera was convicted as charged, and the trial court placed her on probation as described above. We have jurisdiction over Garcia-Loera's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 Garcia-Loera argues the trial court erred by denying her motion to suppress the evidence seized from her purse. We review the denial of a motion to suppress for an abuse of discretion if it involves a discretionary issue, but we review constitutional issues and purely legal issues de novo. *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007). We consider only the evidence presented at the suppression hearing and view it in the light most favorable to sustaining the trial court's ruling. *State v. Tarkington*, 218 Ariz. 369, ¶ 2 (App. 2008). "[W]e are obligated to uphold the trial court's ruling if legally correct for any reason." *State v. Rojers*, 216 Ariz. 555, ¶ 17 (App. 2007) (quoting *State v. Cañez*, 202 Ariz. 133, ¶ 51 (2002)).

¶8 The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. "Police generally may not search a home or seize evidence without a warrant supported by probable

[1]Ortiz was indicted under the same cause number and pled guilty to solicitation to possess marijuana for sale.

cause." *Gay*, 214 Ariz. 214, ¶ 8. Evidence obtained in violation of the Fourth Amendment must be suppressed, unless the good-faith exception to the exclusionary rule applies. *State v. Peoples*, 240 Ariz. 244, ¶ 9 (2016).

¶9 In her motion to suppress, Garcia-Loera conceded that she had "no standing to challenge the search of the [mobile home] where she was located . . . as a guest." She nonetheless argued that "the search of her person and her purse" was unconstitutional because "the police had absolutely no information that she was involved, in any way, with the crime for which they were seeking evidence related to . . . Ortiz." She thus reasoned that the warrant, as it applied to her, was not supported by probable cause and that the good-faith exception did not apply because the officers "failed to give the judge any evidence to allow the people in the residence to be personally searched."

¶10 At the suppression hearing, both Sampson and Cuestas testified. After hearing their testimony, the trial court informed the parties:

> Let me tell you what I am thinking about. I will tell you, I will tip my hand. I think the John Doe warrant is fundamentally flawed. But the search of the purse . . . was made pursuant to the warrant for the search of the residence rather than the search of the individual John and Jane Doe. So I will give both counsel an opportunity to further expand upon that. If you want to recall Officer Sampson or ask further questions of Officer Cuestas on that particular subject. If you want to take a short break and gather your thoughts, I will gladly do that.

After additional testimony and argument, the court determined the John and Jane Doe amendment was invalid because it lacked probable cause and the officers did not act in good faith because there was "no attempt to further justify adding these unidentified, unspecified individuals to the warrant." However, the court further concluded that the search of the purse was nonetheless valid based on officer safety because Sampson had informed the judge who issued the warrant of "concerns about gang membership, automatic weapons, [and] a prior shooting . . . in the leg incident." And the court reasoned that the heroin and paraphernalia found in the purse were "discovered in plain view during the officer's safety search."

¶11 Garcia-Loera filed a motion for reconsideration, arguing that "her purse was in her possession at the time of the . . . SWAT entry" and that "she was immediately separated from her purse by being handcuffed and taken outside." She asserted the officers "had no reason to believe that . . . Ortiz had any nexus to the purse" and, consequently, "the legal part of the search warrant, could not lawfully extend to [her] belongings." She attached a "Declaration" to her motion, avowing, "I was sitting in the living room couch with my purse next to me, when police officers fired flash bangs into the trailer and burst through the door."

¶12 In response, the state asserted that the motion for reconsideration should be denied because "[t]he officers had valid safety reasons to search the purse, and after the officers looked inside the purse, the drugs were in plain view." It pointed out that the "'new' parts" of Garcia-Loera's motion were "the highly-suspect factual claims in her 'Declaration,' which—if they were true—she could have just as easily submitted into the record during the suppression hearing." The state thus reasoned that Garcia-Loera's "failure to present facts at the suppression hearing is not good cause for reconsideration." The trial court denied Garcia-Loera's motion.

¶13 On appeal, Garcia-Loera maintains that the search of her purse should be treated as a "warrantless search" because the trial court found the John and Jane Doe amendment invalid and she was not otherwise named therein. She argues, "No probable cause existed to believe [she] was involved in any criminal activity, and no facts existed to believe she had a weapon." Even assuming the officers had authority to address safety concerns, she contends, "A pat down of the purse would have easily allayed any officer concern for the presence of a firearm." The state, however, asserts the search of the purse was proper because it was within the scope of the premises warrant. We agree.

¶14 "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." *United States v. Ross*, 456 U.S. 798, 820-21 (1982). Thus, a premises search warrant naming particular items "also provides authority to open closets, chests, drawers, and containers in which [those items] might be found." *Id.* at 821. However, a premises search warrant cannot "be construed to authorize a search of each individual in that place." *Ybarra v. Illinois*, 444 U.S. 85, 92 n.4 (1979); *see also State v. Lewis*, 115 Ariz. 530, 532 (1977) (to allow search of people incidentally on premises at time of warrant's execution unreasonable under Fourth Amendment). This is

particularly true with visitors, who are merely present on the premises at the time a warrant is executed. *United States v. Robertson*, 833 F.2d 777, 782 (9th Cir. 1987); *see also Lewis*, 115 Ariz. at 532. The search of personal belongings, such as a purse, can under certain circumstances amount to a search of the person. *Wyoming v. Houghton*, 526 U.S. 295, 305-06 (1999); *see also Ross*, 456 U.S. at 822-23.

¶15 In determining whether a premises search warrant allows a search of a visitor's belongings, the Arizona Supreme Court has adopted the possession test. *State v. Gilstrap*, 235 Ariz. 296, ¶¶ 8, 15 (2014). Under this test, "officers may search personal items, such as purses or clothing, that are not in their owners' possession when police find them in executing a premises search warrant." *Id.* ¶ 9. Thus, "the search of a personal item like a purse is not regarded as a search of the person when the item is not in the person's possession." *Id.*

¶16 Applying the possession test here, whether the officers had authority under the premises warrant to search Garcia-Loera's purse essentially turns on the location of the purse at the time the SWAT team entered the mobile home. However, no evidence on this issue was presented at the suppression hearing. Cuestas testified that he "believe[d] the SWAT officers had mentioned [Garcia-Loera was] detained in [the living room] area" and that at the time he saw the purse it "was either on the couch or right on the floor next to the couch." But that testimony does not answer the question of the purse's location in relation to Garcia-Loera at the time the SWAT team entered. It was Garcia-Loera's burden to present such evidence.

¶17 Pursuant to Rule 16.2(b)(1), Ariz. R. Crim. P., it is generally the state's "burden of proving by a preponderance of the evidence the lawfulness in all respects of the acquisition of all evidence." However, if the evidence was obtained pursuant to a warrant, the state's burden "arises only after the defendant alleges specific circumstances and establishes a prima facie case supporting the suppression of the evidence at issue." Ariz. R. Crim. P. 16.2(b)(2)(C). Thus, under Rule 16.2(b), the state carries the burden of persuasion, and that burden never changes. *State v. Hyde*, 186 Ariz. 252, 266 (1996). "However, when a defendant moves to suppress evidence that the state has obtained under [a warrant], the burden of going forward rests on the defendant." *Id.*

¶18 In this case, the search of the purse was conducted pursuant to a warrant. Although the trial court found the John and Jane Doe amendment invalid, it nonetheless signaled to the parties at the suppression

hearing that it thought the premises search warrant would apply. It then allowed the parties to present additional evidence and argument. Yet, Garcia-Loera still offered no evidence on the location of the purse, and she did not otherwise request a continuance. Accordingly, she failed to meet her burden of going forward under Rule 16.2(b).[2] *See Hyde*, 186 Ariz. at 266; *cf. State v. Walker*, 258 P.3d 1228, 1238 (Or. 2011) (defendant failed to meet burden of establishing search of purse not authorized by warrant when record silent on location of purse at time defendant ordered out of room).

¶19 We recognize that, in her declaration attached to the motion for reconsideration, Garcia-Loera avowed that she was "sitting in the living room couch with [her] purse next to [her]" at the time the SWAT team entered the mobile home. However, our review is limited to the evidence presented at the suppression hearing. *See Tarkington*, 218 Ariz. 369, ¶ 2. We generally do not consider issues raised for the first time in a motion for reconsideration, particularly where the issue involves evidence that was previously available but not presented to the court. *See State ex rel. Horne v. Campos*, 226 Ariz. 424, n.5 (App. 2011); *see also Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 14 & n.5 (App. 2006).

¶20 Under the premises search warrant, officers could search all containers in the mobile home in which the items sought—including marijuana, money, and weapons—could be found. *See Ross*, 456 U.S. at 820-21. Because there was no evidence establishing that Garcia-Loera's purse was in her possession when the SWAT team entered the mobile home, officers could search the purse pursuant to the warrant. *See Gilstrap*, 235 Ariz. 296, ¶¶ 8-9.[3] The purse could reasonably hold marijuana, money,

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[2]Garcia-Loera suggests the trial court found, "[T]he only reason why [the purse] is sitting there and not on [Garcia-Loera's] person is because she was separated from it by SWAT." But in making that statement, the court was characterizing Garcia-Loera's position, not making a factual finding. Moreover, this issue was presented to the court as part of the motion for reconsideration, which the court denied. *See State v. Peralta*, 221 Ariz. 359, ¶ 9 (App. 2009) (we assume trial court made all findings required to support ruling).

[3]Garcia-Loera contends *Gilstrap* is inapplicable because, unlike in that case, she "was separated from the possession of her purse under the color of law." But as explained above, Garcia-Loera failed to present any evidence at the suppression hearing establishing that her purse was taken from her when the SWAT team entered the mobile home.

and weapons. Indeed, it was found near "grated marijuana," a backpack containing marijuana, and drug paraphernalia, and the $40 Sampson used to purchase marijuana from Ortiz was not found on his person. Accordingly, the trial court did not err in denying Garcia-Loera's motion to suppress.[4] *See Gay*, 214 Ariz. 214, ¶ 4.

Disposition

¶21 For the reasons stated above, we affirm Garcia-Loera's convictions and disposition.

[4]Because we find the search of the purse proper under the premises warrant, we need not address the trial court's alternate conclusion that it was justified for purposes of officer safety. *See Rojers*, 216 Ariz. 555, ¶ 16.