IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONNA A. BROEKE, Appellant.	No. 38773-5-II UNPUBLISHED OPINION

Penoyar, C.J — Donna Broeke appeals her convictions of possession of methamphetamine with intent to deliver (count I) and possession of methamphetamine (count II). Broeke argues that (1) the police seized her in violation of the Washington Constitution and, therefore, the trial court erred by denying her motion to suppress an incriminatory statement and baggies of methamphetamine that police obtained from her after the seizure; (2) the trial court erred by denying her motion to disclose a confidential informant's identity; and (3) a community custody condition in her judgment and sentence that prohibits possession or use of drug paraphernalia is not a valid crime-related prohibition and is unconstitutionally vague. We affirm Broeke's convictions, but we strike the community custody condition as being void for vagueness and remand for resentencing on that sole issue.

FACTS

I. Background

A confidential informant told Vancouver police that Gabriel Corona, a Ridgefield resident, sold methamphetamine. The informant had purchased methamphetamine from Corona on more than 20 occasions, including at Corona's house, where the informant observed drug use, pipes,

scales, and plastic baggies. Police obtained a warrant to search Corona, his Ridgefield house, and his silver Ford Expedition. Corona also had outstanding warrants for his arrest. Corona lived at the Ridgefield house with his girl friend Broeke, and Broeke's mother, son, sister, and niece. The search warrant did not implicate Broeke in criminal activity.

On the afternoon of March 6, 2008, Vancouver police officer Spencer Harris surveilled the Ridgefield house in preparation for executing the search warrant. Two men arrived at the house and accompanied Corona inside. Corona purchased methamphetamine from the two men. Shortly thereafter, the two men departed in their car. Harris relayed this information to nearby officers, who stopped the car, observed an "off-white crystalline substance" through the window, and arrested the two men. 2 Report of Proceedings (RP) at 268. Officers confiscated 270 grams of methamphetamine and $1,230 from the men.

Meanwhile, about four minutes after Corona's suppliers departed, Corona and Broeke exited their house. Harris observed a purse on Broeke's shoulder. A few minutes later, the couple left in the Expedition, with Broeke driving and Corona in the front passenger seat. Corona carried about 25 grams of methamphetamine in two plastic baggies in his pocket. A small baggie contained about 0.5 grams of methamphetamine, and a large baggie contained the rest.

Harris radioed information about the Expedition's route to Vancouver police officer Jeremy Free, who stopped the Expedition about three miles from the couple's house. After Free turned on his emergency lights to effectuate the stop, the Expedition began to swerve. At trial, Corona and Broeke each testified that, as Broeke prepared to pull over, Corona told Broeke to hide the two baggies of methamphetamine[1] in her pants or he would, in Corona's words, "kick her

[1] At the CrR 3.5/CrR 3.6 hearing, Broeke testified that Corona only gave her the large baggie

ass." 4 RP at 455. Broeke put the baggies down the front of her pants. After Broeke pulled over, Free arrested Corona, handcuffed him, and placed him in the back of his patrol car.

Free told Broeke that the police were going to search the Expedition. Free informed Broeke that she was free to leave but that if she wanted to remain, she should stand on a hill above the road for her safety. Broeke did not tell the officers that she wanted to leave. At the CrR 3.5/CrR 3.6 hearing, Broeke testified that Free also told her to leave her purse in the car because "it was part of the car." 1 RP at 104. Broeke testified that she could have walked to a nearby gas station but that she did not feel free to leave because her purse contained all her "belongings . . . cell phones . . . cigarettes, everything." 1 RP at 105. Broeke's purse also may have contained her driver's license.[2] Broeke walked up the hill and sat down.

Harris arrived on the scene and spoke with Broeke. Harris read Broeke her *Miranda*[3] rights. Broeke later testified that she understood her rights and that she did not ask for an attorney. Harris told Broeke that she was free to leave.[4] He also stated that police had search

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when Free initiated the traffic stop. Broeke testified that she already carried the small baggie in her bra.

[2] Broeke's testimony at the CrR 3.5/CrR 3.6 hearing was unclear on this point:

> Q: Your purse have your driver's license in it?
> A: Everything.
> Q: Everything. All your - -
> A: Right. All my belongings, my cell phones, my cigarettes, everything - -
> Q: Okay.
> A: - - was in my purse.
> Q: A number of personal items you didn't want to leave?
> A: Yes.

1 RP at 105-06.

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

warrants for the Expedition and her Ridgefield house. Broeke informed Harris that she wanted to return to her house in order to comfort her son and her sister during the search. Harris responded that Broeke had to wait until police secured the house before she returned. In response to Harris's questioning, Broeke stated that there were no drugs in the Expedition or at the house. Broeke asked Harris to retrieve her cigarettes and lighter from her purse, which Harris did. Broeke testified that police did not otherwise search her purse. At one point, Harris permitted Broeke to speak with Corona through the patrol car's window while Harris stood nearby.

Three or four officers, including Free and Harris, searched the Expedition while several other officers left to search the Ridgefield house. Police found no contraband in the Expedition. Harris informed Broeke that police had seized the Expedition and that he would drive it back to the house. Free told Broeke that she could walk to the house or he could give her a ride in his patrol car. Broeke accepted a ride. Free may have performed a pat-down search of Broeke before she entered the patrol car.[5] Broeke, who was not handcuffed or otherwise restrained, sat in the backseat of the patrol car next to Corona. As the backseat occupants, Corona and Broeke could not open the patrol car's doors from the inside.

At the Ridgefield house, Harris spoke with officers who were searching the house. Around that time, according to Broeke's testimony, Corona told her to conceal the large baggie of methamphetamine in her vagina. Broeke complied.

The officers executing the search warrant told Harris that they had discovered a glass pipe

[4] Contrary to the officers' testimony, Broeke testified that neither Free nor Harris informed her that she was free to go.

[5] Broeke testified that police performed a pat-down search after she got out of the Expedition.

with residue that had field-tested positive for methamphetamine in the southeast bedroom. Broeke's sister had informed the officers that Corona and Broeke shared that bedroom. Officers also discovered an identification document with Corona's and Broeke's names in that bedroom.

Harris returned to the patrol car and asked Broeke and Corona if they used the glass pipe to smoke methamphetamine, and they both responded, "[Y]es." Clerk's Papers (CP) at 162. Police arrested Broeke for possession of methamphetamine and handcuffed her.

Corona then spoke with police inside the house. Corona told police that he had asked Broeke to hide the methamphetamine. Harris went outside and informed Broeke about Corona's admission. Broeke repeatedly denied possessing any methamphetamine. Harris brought Broeke inside the house, and Corona told Broeke to turn over the methamphetamine to the police. Broeke removed the small baggie from her bra. Harris told Broeke that he thought that she had more. Corona told Broeke to turn over all of the drugs. Broeke turned toward the wall, reached into her pants, and extracted the large baggie.

II. Procedural History

The State charged Broeke with possession of methamphetamine with intent to deliver[6] (count I) with a school bus stop enhancement[7] and possession of methamphetamine[8] (count II). After a consolidated hearing, the trial court denied Broeke's CrR 3.6 motion to exclude the methamphetamine that she turned over to police, which was the basis for count I, and Broeke's

[6] RCW 69.50.401(1), (2)(b). The information alleges that Broeke committed count I as an accomplice, *See* RCW 9A.08.020(3).

[7] RCW 9.94A.533(6); RCW 69.50.435(1)(c).

[8] RCW 69.50.4013(1).

CrR 3.5 motion to suppress her incriminatory statement about the pipe, which was the basis for count II. The trial court also denied her repeated motions, before and during trial, to disclose the confidential informant's identity.

In closing argument, the State argued that Broeke committed count I as Corona's accomplice. Broeke's defense was that she only possessed the methamphetamine as a result of Corona's coercion and that she never knew that Corona sold methamphetamine. Broeke did not request a duress instruction.

The jury convicted Broeke on both counts but acquitted her of the school bus stop enhancement. The trial court included the following community custody provision in Broeke's judgment and sentence:

> Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

CP at 146. The trial court denied Broeke's motion for a new trial. Broeke appeals.

ANALYSIS

I. Legality of Seizure

Broeke contends that police officers illegally seized her when they refused to return her purse during and following the traffic stop.[9] She argues, therefore, that her incriminating statement and the methamphetamine that she relinquished to police should have been suppressed as the fruits of an illegal seizure. We disagree.

[9] As part of this argument, Broeke assigns error to the trial court's findings and conclusions that: (1) the police's retention of Broeke's purse did not amount to a seizure, (2) the police did not restrain Broeke in any way, and (3) Broeke's entry in the patrol vehicle was voluntary.

A. Standard of Review

Whether police have seized a person is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). We give great deference to a trial court's findings of fact that resolve the differing accounts of the circumstances surrounding the encounter. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The ultimate question of whether those facts constitute a seizure, however, is a legal question that we review de novo. *Armenta*, 134 Wn.2d at 9.

B. Analysis

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[10] A seizure occurs under article I, section 7 when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This is an objective inquiry to determine "whether a reasonable person in the individual's position would feel he or she was being detained." *Harrington*, 167 Wn.2d at 663. If police unconstitutionally seize an individual prior to arrest, the exclusionary rule requires suppression of evidence obtained via the government's illegality. *Harrington*, 167 Wn.2d at 664.

[10] Article I, section 7 the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. *Harrington*, 167 Wn.2d at 663. Therefore, we need not engage in a separate Fourth Amendment analysis.

Our Supreme Court has articulated a nonexclusive list of police actions that likely constitute a seizure, including the threatening presence of several officers, an officer's display of a weapon, a physical touching of the individual, and the use of tone or language indicating that compliance with the officer's request might be compelled. *Harrington*, 167 Wn.2d at 664 (quoting *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998)); *accord United States v. Mendenhall,* 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). Broeke has the burden to prove that the police violated article I, section 7. *See Harrington*, 167 Wn.2d at 664.

We conclude that police did not seize Broeke anytime before her arrest.[11] Free and Harris explicitly informed Broeke that she was free to leave during each officer's initial encounter with Broeke. Broeke disputes this fact, but we defer to the trial court's resolution of this credibility dispute. *See Armenta*, 134 Wn.2d at 9. Additionally, the officers gave Broeke no reason not to leave, except by lawfully securing and searching the Expedition pursuant to a valid search warrant. Any reluctance on Broeke's part to leave the scene of the search stemmed from

[11] We note our Supreme Court's observation that, under article I, section 7, an "operator of a vehicle is seized when a police authority signals the operator to stop after a traffic infraction." *State v. Mendez*, 137 Wn.2d 208, 222, 970 P.2d 722 (1999); *see also Brendlin v. California*, 551 U.S. 249, 251, 259 n.5, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (holding that, when a police officer makes a traffic stop, the passenger is seized under the Fourth Amendment, and noting that three state supreme courts—including ours in *Mendez*—have held differently). Here, however, the basis for the police stop was a valid search warrant, not a traffic infraction; thus, *Mendez* is not directly on point. In any event, even if Free originally seized Broeke by signaling her to stop, the seizure ended when Free informed Broeke that she was free to leave and police officers turned their attention to executing the search warrant.

her own decision to interact with Corona and possibly from her hope that police would return her purse.[12]

Although several officers were present at the scene, they were primarily engaged in searching Corona's vehicle. Free wore a holster, presumably with a gun, while Harris wore plain clothes.[13] Nothing in the record suggests, however, that any officer displayed weapons or otherwise exerted force on Broeke. To the contrary, Broeke's freedom of movement was unrestrained. Broeke sat on the hill, at a location removed from the officers' labors, while the officers searched the Expedition. Police also allowed Broeke to speak with Corona through the

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[12] Broeke cites no authority for her contention that police officers seize an individual when they do not return the individual's purse to her while they lawfully search an area that contains the purse pursuant to a valid search warrant. Instead, she relies on *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980), a case in which our Supreme Court held that the presence of a car in a high crime area next to a closed park late at night did not give police a reasonable and articulable suspicion to stop the car. 93 Wn.2d at 642-43. Because the stop lacked justification, the *Larson* court concluded that the trial court properly suppressed evidence that a police officer observed in the car passenger's purse as she retrieved identification from her purse at the officer's request. *Larson*, 93 Wn.2d at 640-41, 645-46. *Larson* thus addressed an entirely different legal issue and has no application here.

The removal of a suspect's identification or property from the suspect's presence may, in some circumstances, constitute a seizure. *State v. Hansen*, 99 Wn. App. 575, 578-79, 994 P.2d 855 (2000). For instance, a police officer seizes an individual by taking a suspect's identification back to his or her patrol car to run a warrants check. *State v. Dudas*, 52 Wn. App. 832, 833-34, 764 P.2d 1012 (1988); *State v. Aranguren*, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985); *see also State v. Thomas*, 91 Wn. App. 195, 198, 201, 955 P.2d 420 (1998) (officer seized suspect when he stepped back three steps while holding suspect's identification in order to use hand-held radio for a warrants check). As we explain in greater depth in our opinion, however, the circumstances here—including the retention of Broeke's purse pursuant to a valid search warrant issued to investigate Corona's criminal activity and the officers' repeated comments to Broeke that she was free to go—lead us to conclude that police did not seize Broeke by retaining her purse.

[13] Free wore blue jeans, a shirt and a tactical vest stating "police," a badge, and a duty belt with holster and handcuffs. 3 RP at 356. Harris wore "plain clothes [and a] T-shirt." 2 RP at 243. It is unclear what other officers wore.

patrol car's window.

Finally, while placing an individual in the backseat of a patrol car would, in some circumstances, be a significant factor in determining that the police had seized the individual that is not the case here.[14] Broeke accepted Free's offer for a ride rather than choosing to walk home or seek alternative transportation. Under these facts, a reasonable person in Broeke's position would not have felt that she was being detained. Therefore, the exclusionary rule does not require suppression of the incriminating evidence that the State introduced against Broeke at trial.

II. Identity of Confidential Informant

Broeke contends that the trial court erred by denying her motion to disclose the confidential informant's identity or, in the alternative, to hold an in camera hearing to determine the nature of the informant's testimony.[15] We disagree.

A. Standard of Review

We review the trial court's refusal to order disclosure of an informant's identity and its decision whether to hold an in camera hearing for abuse of discretion. *State v. Petrina*, 73 Wn. App. 779, 782-83, 871 P.2d 637 (1994). A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons or when its decision is manifestly unreasonable. *Petrina*, 73 Wn. App. at 783.

[14] The thrust of Broeke's argument on appeal is that police illegally seized her when they retained her purse. Broeke did not fully develop the argument that police seized her by placing her in a patrol car to take her home. In any case, the latter argument is not persuasive under these facts.

[15] As part of this argument, Broeke assigns error to the trial court's findings and conclusions that she did not (1) provide an affidavit to establish the informant's potential testimony; or (2) make a showing that the informant's testimony would have been relevant, helpful, or essential to a fair determination of the case.

B. Analysis

Generally, the State is privileged from disclosing the identity of individuals who report criminal activity to police. *Roviaro v. United States,* 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *accord State v. Thetford*, 109 Wn.2d 392, 395-396, 745 P.2d 496 (1987). RCW 5.60.060(5) recognizes this general rule: "A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure." CrR 4.7(f)(2) also states, in relevant part, that "[d]isclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant."[16]

The purpose of the State's privilege is to protect the public interest in effective law enforcement. *Roviaro*, 353 U.S. at 59. The "fundamental requirements of fairness," however, require the privilege to give way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Roviaro*, 353 U.S. at 60-61. The trial court must balance "the public interest in protecting the flow of information against the individual's right to prepare his

[16] Broeke argues that the trial court's denial of her motion violated the Sixth Amendment's compulsory process clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend. VI. The United States Supreme Court, however, has suggested that the source of law for *Roviaro*'s holding is the Fifth Amendment's due process clause and the Court's supervisory authority over federal courts. *See United States v. Raddatz*, 447 U.S. 667, 679, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980); *see also McCray v. Illinois*, 386 U.S. 300, 309, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967). Our Supreme Court has not clearly stated whether a defendant's right to learn an informant's identity in some cases derives from the federal or state constitutions, although it has determined that a defendant does not have a "constitutional right to disclosure" of an informant's identity when the informant "supplied information relating only to probable cause, but not relevant to the issue of guilt or innocence." *State v. Casal*, 103 Wn.2d 812, 816, 699 P.2d 1234 (1985) (citing *McCray,* 386 U.S. at 300) (emphasis omitted).

defense" based on "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro*, 353 U.S. at 62.

The preferred method for determining whether disclosure is relevant or helpful to the defense, or essential to a fair determination of issues, is for the trial court to hold an in camera hearing at which the trial court hears the informant's testimony and applies the *Roviaro* standards. *State v. Harris*, 91 Wn.2d 145, 150, 588 P.2d 720 (1978). An in camera hearing to determine whether the identity of an informant should be revealed, however, "is required only when the defendant makes an initial showing that the informant is a material witness." *State v. Vazquez*, 66 Wn. App. 573, 581, 832 P.2d 883 (1992). "[T]he strongest case for disclosure is made out when it appears that the informant was an eyewitness or a participant in the alleged crime." *State v. Vargas*, 58 Wn. App. 391, 396, 793 P.2d 455 (1990) (quoting *People v. Goggins*, 34 N.Y.2d 163, 313 N.E.2d 41, 44 (1974)); *accord Vazquez*, 66 Wn. App. at 581. The defendant has the burden to show that an in camera hearing is necessary and that disclosure of the informant's identity is warranted in order to ensure a fair trial. *Vazquez*, 66 Wn. App. at 581.

The trial court properly denied Broeke's alternative motions because Broeke failed to make a preliminary showing that disclosure was warranted under the *Roviaro* standards. With regard to count I, Broeke argues that the informant was a "frequent and recent guest to the home" who could corroborate Broeke's testimony that she did not know about Corona's drug operations in the house. Appellant's Br. at 23. This argument ignores that the State offered no proof of Broeke's involvement in drug sale activity in the house. Rather, the State's sole proof of Broeke's involvement in methamphetamine delivery derived from her actions during and after the

vehicle search. The State argued that Broeke acted as Corona's accomplice by concealing drugs that Corona intended to sell. The informant had no knowledge or information about whether Corona coerced Broeke to conceal the drugs on her body when police stopped the couple's vehicle.

We also note that other frequent and recent occupants of the house—including, for example, Broeke's relatives who lived in the house—could have provided similar, or more compelling, corroborative testimony about Broeke's ignorance of Corona's drug dealing operation. Additionally, Broeke's argument that the State must disclose the informant's identity because the informant did *not* witness the crime sharply contrasts with our previous statements that the need for disclosure is strongest when "the informant *was an eyewitness or a participant* in the alleged crime." *Vazquez*, 66 Wn. App. at 581 (quoting *Vargas*, 58 Wn. App. at 396) (emphasis added). In sum, although the informant's potential testimony that he or she never observed Broeke involved in drug activities at her house has some peripheral relevance, it is insufficient to overcome the public's strong interest in effective law enforcement.

As we noted above, the basis for Broeke's count II possession charge was her voluntary admission that she used the pipe in her bedroom to smoke methamphetamine. Broeke's admission that she committed the crime obviates any need to disclose the informant's identity with regard to count II. *See State v. Lusby*, 105 Wn. App. 257, 263, 18 P.3d 625 (2001) (holding that disclosure of informant was not necessary where defendant admitted to the crime at the time of a search that led to the discovery of incriminating evidence).

III. Community Custody Condition

Broeke asks us to strike the community custody condition related to drug paraphernalia

because it is an invalid crime-related prohibition and the term "paraphernalia" is unconstitutionally vague. Our Supreme Court recently held in an unrelated case that the same community custody condition that the trial court imposed here is unconstitutionally vague. *State v. Sanchez Valencia*, No. 82731-1, slip op. at 2, 13 (Wash. Sept. 9, 2010). Accordingly, we strike the condition as being void for vagueness and remand for resentencing.

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.

Penoyar, C.J.

We concur:

Armstrong, J.

Worswick, J.