IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANITA KAY OSTER, Appellant.	No. 41850-9-II UNPUBLISHED OPINION

Worswick, A.C.J. — Danita K. Oster appeals her conviction of unlawful possession of a controlled substance, methamphetamine. She claims the police unlawfully stopped her, unlawfully arrested her, and unlawfully searched her incident to her arrest. She also claims inordinate delay in entering findings of fact from the suppression hearing and that the prosecutor purposefully misconstrued the evidence when drafting the suppression hearing findings of fact. We affirm.

Facts

At 6:00 PM, on September 8, 2010, Chehalis Police Department Officer Monte Henderson was dispatched to the 200 block of Second Street to investigate a suspicious woman wandering around. When he arrived, the woman, later identified as Oster, was standing in front of a home that Officer Henderson knew from past criminal activity there. Oster told Officer Henderson that she wanted to get in the house to retrieve some of her belongings. He described her as rambling on and saying things that did not make sense. He also observed that she was

sweaty, nervous, and acting evasive, and he concluded that she might be under the influence.

Officer Henderson continued to talk with Oster when Chehalis Police Department Officer Renshaw arrived. As he walked toward them, both officers noticed a purse on the front porch about 20 feet away. One of the officers asked Oster if she knew whose purse it was and Oster responded that she did not know. Officer Renshaw then picked up the purse and remarked, "[I]f it's not yours, you don't mind us looking in here, do you[?]" Report of Proceedings (RP) at 7. Oster then turned around, grabbed the purse from his hands, and started walking down the sidewalk with it, saying, "[N]o, no, this is mine, you can't look at it." RP 7. The officers ordered her to stop and when she did not, they grabbed her, pulled the purse from her, put her in handcuffs, and placed her in the patrol car because she was yelling and screaming and neighbors were coming out to watch. Officer Henderson told Oster at that time that he was detaining her for obstructing a police officer.[1]

The officers then looked at the purse and noticed a glass pipe, which they took from the purse along with a large folding knife. Officer Henderson then told Oster that she was under arrest for possession of drug paraphernalia. Officer Henderson transported Oster to jail, where the booking officer conducted a routine strip search and recovered a bindle of white powder from inside Oster's bra. Forensic testing identified the substance in the bindle as methamphetamine. Based on this evidence, the State charged Oster with unlawful possession of methamphetamine.[2]

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[1] RCW 9A.76.020(1) makes it unlawful to obstruct a police officer:

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

[2] A violation of RCW 69.50.4013.

The trial court held a CrR 3.6 hearing in which only Officer Henderson testified.[3] The trial court found that the officers had Oster in custody when they observed the glass pipe in Oster's purse. It also found that the officers had a reasonable suspicion that Oster had obstructed a public servant. It then concluded that the officers could search Oster's purse as a search incident to arrest and the subsequent search at the jail resulted from lawful jail protocol. It then denied Oster's motion to suppress and Oster waived her right to a jury trial.[4]

At the bench trial, Officer Henderson testified as did Penelope Justice and Jason Dunn. Justice testified that she was a corrections officer at the Lewis County jail. She explained that the jail policy is to strip search anyone who comes into the jail on a drug charge. She conducted the search of Oster, during which she noticed a piece of plastic sticking out of Oster's bra, which turned out to be a bindle of methamphetamine. Jason Dunn, a forensic scientist with the

[3] Officer Renshaw was unavailable to testify at both this hearing and at trial because of his deployment to Afghanistan.

[4] The trial court made the following conclusions of law regarding the motion to suppress:

> 2.1 The Court finds that at the point where the defendant stated the purse was hers and she grabbed it from the officer and attempted to walk away (finding 1.9 above) she was in custody and not free to leave.
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> 2.2 Regardless of whether she was free to leave or not, the officers had a reasonable suspicion that the crime of obstructing a public servant was being committed in their presence.
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> 2.3 Once the defendant was under circumstances that constituted formal arrest, the defendant's purse was searched incident to that arrest, and the contraband was found in the purse.
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> 2.4 The contraband found on the defendant's person when being searched at the jail was lawful because the defendant was being booked for a new offense, and searches of the defendant's person are part of the jail protocol.
>
> 2.5 All contraband seized in this case was seized incident to lawful arrest.

Clerk's Papers (CP) at 23.

Washington State Crime Laboratory, testified that he tested the substance found in the bindle and concluded that it was methamphetamine. The trial court found Oster guilty and, at a later sentencing hearing, imposed a 30-day, standard range sentence. Oster appeals.

ANALYSIS

I. Findings of Fact

Oster assigns error to eleven of the trial court's suppression hearing findings of fact, claiming that the record does not support them. In many instances, the State concedes the errors, explaining that trial counsel did not have a copy of the verbatim report of proceedings when he drafted the findings. We review the findings of fact entered following a suppression hearing for substantial evidence in the record. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We treat any unchallenged findings as verities on appeal. *Hill*, 123 Wn.2d at 644. And we decide de novo whether those findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). We consider the challenged findings of fact seriatim.

Finding 1.1 provides: "On 09-08-2010 at 1800 hours, Chehalis Patrols were dispatched to the report of a disorderly and suspicious female wandering the area of 275 SW 2nd Street." Clerk's Papers (CP) at 21. The testimony does not support that Oster was disorderly. In all other respects, the record supports this finding.

Finding 1.2 provides: "Patrols were advised that the female was sitting on the porch of 275, which is a vacant residence." CP at 22. The testimony does not support that Oster was

sitting on the porch or that the residence was vacant. The testimony was that Oster was standing on the sidewalk in front of 275 Southwest Second Street, a home familiar to Officer Henderson because of past criminal activity.

Finding 1.3 provides: "Officer Henderson arrived and saw a female standing on the sidewalk in front of the residence. She began rambling about her belongings being inside the 275 residence." CP at 22. Officer Henderson's testimony supports this finding.

Finding 1.4 provides: "Henderson observed that the female was breathing rapidly and sweating. She was nervous and evasive." CP at 22. The testimony does not support that Oster was breathing rapidly. In all other respects, the record supports this finding.

Finding 1.5 provides: "It appeared to Henderson that, based on his training and experience, the female may be exhibiting the signs of being under the influence of some substance." CP at 22. The testimony supports this finding. Officer Henderson testified that he believed that Oster may have been under the influence. The prosecutor then asked him to clarify whether she appeared under the influence of controlled substances. Officer Henderson said yes.

Finding 1.6 provides: "Officer Renshaw (Chehalis PD) arrived. He noticed a large brown leather purse lying on the front porch of the residence. Henderson heard Renshaw ask the female if the purse was hers. She said, "No, I don't know who that belongs to." CP at 22. The testimony does not support that it was a large brown purse; rather, it was an open top floppy bag. Officer Henderson also testified that either Officer Renshaw or he asked Oster whom the purse belonged to and she responded, "I don't know." RP at 7.

Oster does not challenge findings 1.7 through 1.10 and thus they are verities on appeal.[5]

State v. Hill, 123 Wn.2d at 644.

Finding 1.11 provides: "Oster became combative, so the officers placed her in handcuffs and placed her in the back of Officer Henderson's patrol vehicle." CP at 22. Officer Henderson testified that Oster grabbed the purse from Officer Renshaw, she refused to stop when ordered to do so, and a physical struggle ensued until they were able to get Oster handcuffed and secured in the police vehicle. This was sufficient evidence to support the finding.

Finding 1.12 provides: "The officers then looked in the purse and saw a large glass smoking device in plain sight near the top of the purse." CP at 22. Officer Henderson testified that after they secured Oster, Officer Renshaw looked down at the "open top floppy bag and this pipe was sitting right on top." RP at 9. This was sufficient evidence to support the finding.

Finding 1.13 provides: "She was taken to the Lewis County Jail. At the jail, she was booked and read her Miranda warnings." CP at 23. Officer Henderson testified that he read the *Miranda*[6] warnings to Oster before he took her to the jail; thus the finding was inaccurate as to when Officer Henderson read Oster her rights.

Finding 1.14 provides: "While being searched, Corrections Officer Justice found a small baggie with a crystal substance inside. The baggie was found in Oster's bra during the search."

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[5] These unchallenged findings of fact are:

> 1.7 The female was later identified as the defendant, Danita Kay Oster.
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> 1.8 Renshaw told the female that if the purse was not hers, then she wouldn't mind him looking inside. Renshaw picked up the purse.
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> 1.9 The female turned, grabbed the purse from Renshaw and said, "Yes its mine." Then she started to walk away.
>
> 1.10 The officers stopped her.

CP at 22.

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

CP at 23. Officer Henderson did not identify the corrections officer in his testimony, but he testified that narcotics were found during the strip search. Corrections Officer Justice testified at trial not at the suppression hearing, so this finding is partially erroneous.

Finding 1.15 provides: "Justice gave the substance to Henderson, who then field tested the substance. The substance field tested positive for methamphetamine." CP at 23. Officer Henderson testified that one of the corrections officers handed him the baggie of narcotics and he placed it into evidence. While this finding is consistent with the trial testimony, the testimony at the suppression hearing did not discuss the field testing and thus this finding is extraneous to our review.

While the record does not support portions of several of these findings of fact, none is entirely erroneous nor affects the conclusions of law in any material way. As such, we address the conclusions of law to see if the accurate portions of the findings of fact support them.

II. Conclusions of Law

As we noted above, we decide de novo whether the findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d at 214.

We need only address the trial court's conclusion of law 2.1 because it is dispositive as the police seizure of the methamphetamine at the county jail followed Oster's formal arrest for obstructing a police officer. The State presented no evidence at trial discovered as a result of the officers searching Oster's purse, so any discussion about the legality of that search is purely academic.[7] Further Oster did not challenge the legality of the initial stop below and thus has not

[7]This includes the trial court's alternative conclusion that the purse search was justified under *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (an officer must have a

preserved this issue for appeal. *State v. Lee*, 162 Wn. App. 852, 856, 259 P.3d 294 (2011), (discussing *State v. Robinson*, 171 Wn.2d 292, 306-07, 253 P.3d 84 (2011), four conditions precedent for issue preservation not to apply), *review denied*, 173 Wn.2d 1017.[8]

The trial court concluded that Oster was in custody when the police "at the point where the defendant stated the purse was hers and she grabbed it from the officer and attempted to walk away (finding 1.9 above) she was in custody and not free to leave." Findings of fact 1.9 through 1.11 support this conclusion. Moreover, findings of fact 1.13 and 1.14 establish that Officer Henderson read Oster her *Miranda* rights before booking her into the jail. It was during the booking process that the corrections officer found the methamphetamine hidden in Oster's bra.

Nonetheless, Oster claims that there was insufficient evidence to arrest her for obstructing a public servant. We disagree.

Oster argues that the crime of obstructing a law enforcement officer requires both a false statement, additional conduct, and the police exercising their lawful duty. RCW 9A.76. 020(1). She argues here that the only thing present was her false statement that she did not know who owned the purse. She compares her situation to that in *State v. Williams*, 171 Wn.2d at 474, 251 P.3d 877 (2011).

There, the police went to Williams's residence to investigate a report that he had left a tire dealership without paying. 171 Wn.2d at 476. Williams admitted doing so but gave his brother's

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reasonable suspicion of criminal activity before he can stop and detain a person who the police reasonably suspect is engaged in criminal conduct).

[8] Oster does not claim that she can raise this issue for the first time on appeal as a manifest constitutional error. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251, 1255 (1995) (discussing RAP 2.5(a)).

name to the officer because he did not want the officer to discover that he had an outstanding arrest warrant. 171 Wn.2d at 476. When his brother's description did not match Williams's appearance, the officer arrested Williams. 171 Wn.2d at 476. The State charged and convicted Williams of first degree theft, obstructing a law enforcement officer, and making a false or misleading statement to a public servant. 171 Wn.2d at 476. The Supreme Court reversed the obstruction conviction, reasoning that it requires both conduct and a false statement and as Williams had only given a false statement, the conviction failed for insufficient evidence. 171 Wn.2d at 485-86.

Here we have much more than Oster's false statement. She disclaimed owning the purse, but when Officer Renshaw picked it up, she grabbed it from him, began walking away, disregarded his orders for her to stop, and resisted the officers' attempts to wrest the purse away from her. Findings of fact 1.8 through 1.11 support the lawfulness of Oster's arrest for obstructing a public servant.

Oster next contends that her arrest for possessing drug paraphernalia was improper; therefore her search incident to that arrest was unlawful. Oster did not make this claim below and thus has failed to preserve it for our review.[9] *Lee*, 162 Wn.App. at 856. Nonetheless, the State concedes that there is no crime for merely possessing drug paraphernalia; only using drug paraphernalia to ingest controlled substances is illegal. RCW 69.50.412. But it argues, Oster was already under arrest for obstructing a public officer when Officer Henderson told her that she was under arrest for possessing drug paraphernalia and, most importantly, the search incident to arrest

[9] Oster does not claim that she can raise this issue for the first time on appeal as a manifest constitutional error. *See State v. McFarland*, 127 Wn.2d at 333; RAP 2.5(a).

followed her arrest for obstruction. We agree with the State.

III. Due Process

Oster claims that the trial court violated her right to due process by waiting until the trial date, two and one-half months later, to enter the suppression hearing findings. She argues that by the time they got to trial, the court had forgotten the facts and, consequently, just signed the findings as the prosecutor had drafted them without proper scrutiny. She also claims that this impeded her ability to challenge the erroneous findings of fact because the trial judge could not remember the testimony. She argues that CrR 3.6 requires the trial court to enter findings "at the conclusion of the hearing" not when it was convenient for the judge. Br. of Appellant at 22.

As we noted above, the errors in the findings of fact did not deviate in any material and significant way from the testimony presented at the suppression hearing. Following that hearing, the trial court orally ruled, "We have a lawful arrest, the lawful custodial arrest leads to her being taken to the jail, there was a lawful booking search at the jail, all the items that were seized as a result of this contact are admissible at a trial in this matter." RP at 20. The testimony at the suppression hearing supports this proper conclusion. Oster cannot show any actual prejudice from the trial court's decision to enter its findings on the trial date. *See State v. Cannon*, 130 Wn.2d 313, 329-330, 922 P.2d 1293 (1996) (findings may be filed even while appeal is pending).

IV. Prosecutorial Misconduct

Lastly, Oster contends that the prosecutor committed misconduct by misrepresenting the evidence presented at the suppression hearing in the findings of fact he drafted for the trial court. She argues, "Exploiting the limitations of the judge to introduce misleading or patently false Findings was misconduct per se." Br. of Appellant at 24.

To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defense has the burden of proving such prejudice. *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986).

We have already held that the findings of fact were adequate for our review and that the proper findings supported the trial court's conclusions of law. As such, Oster cannot show prosecutorial misconduct because she cannot show actual prejudice.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Van Deren, J.