

217 OR App 429
IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,

v.

SANDRA JEAN PHILLIPS,

Defendant-Appellant.

Umatilla County Circuit Court
Case No. CFH040194

Appellate Court No. A130148

COMBINED APPELLANT'S BRIEF
AND EXCERPT OF RECORD

Appeal from the Judgment of the Circuit Court
for Umatilla County
Honorable JEFFREY M. WALLACE, Judge

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of Proceeding, Judgment to be Reviewed, Relief Sought

This is a criminal case in which defendant seeks reversal of her judgment of conviction, entered after a bench trial, on one count of unlawful possession of a controlled substance (methamphetamine), ORS 475.894(1).¹ (*See* ER-2 [judgment]).

The indictment on that offense alleges:

The defendant, on or about 02/22/04 * * * did unlawfully and knowingly possess Methamphetamine, a controlled substance[.] (ER-1 [indictment]).

Statutory Basis for Appeal

This appeal is authorized by ORS 138.020 ("Either the state or the defendant may as a matter of right appeal from a judgment in a criminal action in cases prescribed in ORS 138.010 to 138.310, and not otherwise.").

Perfection of Appeal

On October 14, 2005 defendant filed and served a notice of appeal from the judgment of conviction entered on September 13, 2005. (ER-2 [judgment]). On November 18, 2005 this court granted defendant's motion for leave to file a delayed notice of appeal. (11/18/05 order).

Question Presented

Was defendant's consent to search her purse voluntary?

¹ ORS 475.894(1) provides, in part, that "[i]t is unlawful for any person knowingly or intentionally to possess methamphetamine[.]"

Summary of Argument

Defendant's conviction for possession of a controlled substance should be reversed because she did not voluntarily consent to a search of her purse or her car during a traffic stop, and the methamphetamine seized from her purse should have been suppressed. During defendant's performance of field sobriety tests that she and the arresting officer believed she was failing, the officer stated that he did not want to arrest her for DUII but was concerned only with getting any controlled substance she had off the streets, and that her car would be impounded and inventoried for valuables if she were arrested. Under the circumstances, the officer's statement was either a promise not to arrest, impound, and inventory if defendant consented to a search, or a threat to carry out those actions if she did not. Even if the officer had the legal authority to arrest defendant for DUII, his statement essentially conveyed to her that she had no choice but to consent and that a search would occur regardless. Therefore defendant's response—"Okay, I'll give it to you"—was merely acquiescence to a show of police authority, which as a matter of law is not a voluntary consent.

Moreover, when defendant subsequently directed the officer to look in the zippered pouch of her purse, she had been placed in handcuffs for officer safety purposes, further undermining the voluntariness of her consent.

Alternatively, because there is no evidence in this record, nor any known authority subject to judicial notice, allowing the inventory of defendant's car after it was impounded, the officer's statement that her car would be inventoried was an "illegal" threat—*i.e.*, a threat to do something he had no legal right to do—which,

according to this court, was enough to render involuntary whatever consent defendant subsequently gave.

Statement of Facts

Defendant recites the historical facts as found by the trial court and supported by the record. *State v. Belt*, 325 Or 6, 13-14, 932 P2d 1177 (1997); *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968).

1) Testimony at suppression hearing

Defendant's conviction for possession of methamphetamine is based on the warrantless search of her purse during a traffic stop. Hermiston Police Officer Chris Washburn testified that on the afternoon of February 22, 2004 he saw defendant driving, with her mother in the passenger seat and her daughter in the back seat, and that no one was wearing a seat belt. (6/13/05 Tr 5-6). He started to stop defendant as she pulled into a driveway and parked on the front lawn of a residence.² (6/13/05 Tr 6). All three got out of the car, defendant's mother and daughter went inside the house with grocery bags, and defendant remained outside talking to the officer. (6/13/05 Tr 6-7).

According to Officer Washburn, when he told defendant the reason for the stop, she said she almost always wore her seatbelt and just forgot this time. (6/13/05 Tr 6). He described defendant as having dilated pupils, a dry mouth, and "tremoring"

² Defendant's mother testified that defendant pulled the car into the yard because a truck was parked halfway in the middle of the driveway, and defendant's car would have been sticking out. (6/13/05 Tr 25). She also said parking in the yard made it easier to get groceries out of the back, and they were going to wash the car. (6/13/05 Tr 25-26).

eyelids, and continually talking, licking her lips, and walking around near her car—all of which he testified were signs of marijuana or methamphetamine use. (6/13/05 Tr 7, 8). Officer Washburn said he asked whether defendant had used marijuana or methamphetamine recently, and she said “I smoked some last night or a day ago[,]” and when he asked if it was methamphetamine she had used the night before, she said “I did that days ago. Last night it was just pot.” (6/13/05 Tr 8). According to the officer, he then asked whether she had any marijuana or methamphetamine with her, and said he was concerned she may have, and defendant said “you can’t search me or my car,” then started shouting toward the house to call someone named ³ and defendant’s mother and sister came outside. (6/13/05 Tr 8).

At that point, Hermiston Police Officer Doug Smith arrived at the scene. (6/13/05 Tr 9, 16). Officer Smith testified that defendant seemed excited and upset, pacing and constantly moving as though unable to stand still, and looking around everywhere, exhibiting what he called involuntary eye movement—which he said was consistent with being under influence of methamphetamine. (6/13/05 Tr 16, 17-18).

Officer Washburn said he told defendant he was going to do a DUII investigation, and during questioning she admitted smoking marijuana and using methamphetamine “once in a while.” (6/13/05 Tr 9). He said she also agreed to field sobriety tests, and shortly after beginning those tests she said “I know I’m failing.”

³ Defendant’s uncle ³ apparently was a security officer at the courthouse. (6/13/05 Tr 25, 29, 34).

(6/13/05 Tr 9).⁴ Officer Washburn testified that he believed defendant was failing the tests at the time. (6/13/05 Tr 12). He then told her that “my objective was not to arrest her for the DUI at that point but, rather, my concern was the controlled substance, if she had any, just to make sure that it got off the streets at that time.” (6/13/05 Tr 9). The officer denied ever telling defendant he could impound her car and tear it apart to look for drugs; rather, he said she asked during the DUI investigation what would happen to her car, and he told her “it would be impounded, and during the impound, there would be an inventory search of the contents of her vehicle, for valuables and so forth.” (6/13/05 Tr 11-12).⁵ Officer Washburn also denied threatening to arrest defendant if she did not consent to a search of her purse and car; rather, he said he told her she would be arrested if she failed the field sobriety tests. (6/13/05 Tr 12).⁶

⁴ Defendant testified that she told the officer she would not pass the field sobriety tests, because her father had been giving her that test since she was 14 and she could never pass, regardless of whether she was under the influence. (6/13/05 Tr 33).

⁵ Defendant’s mother testified that she heard the officer say “if he couldn’t search the car, he was going to have it impounded and they would have it gone through and ripped and tore all apart[.]” (6/13/05 Tr 27, 29).

⁶ Defendant testified that Officer Washburn asked for her “personal stash” and said he wanted to search her purse and car, and when she said she would not consent, he said “if I didn’t consent to it that he was going to arrest me for driving under the influence, at which point that would give him the right to search my car and my purse anyway, so he was going to do it no matter what.” (6/13/05 Tr 34). She also testified that the Officer Washburn said he would take her to the police station for a urine test and they both knew she would not pass. (6/13/05 Tr 34).

According to Officer Washburn, in response to his statement about not intending to arrest her for DUII, and wanting only to get the controlled substances off the street, defendant said “Okay, I’ll give it to you[,]” and she walked over to the car, pulled her purse out of the car and placed it on the hood, and from the purse removed a bag containing less than an ounce of marijuana, which she handed to the officer. (6/13/05 Tr 9, 13).⁷ He testified that he asked if that was all she had, and how she smoked it without a pipe, and defendant said “Okay, there’s more in there[,]” and when he asked whether she minded him getting it out, she quickly grabbed her purse and said “I’ll get it for you and give it to you.” (6/13/05 Tr 10). Officer Washburn said he stopped defendant, saying he was concerned about weapons, officer safety, and her reaching into her purse, and defendant kept grabbing for her purse on the hood of the car and he kept stopping her. (6/13/05 Tr 10). Officer Smith testified that defendant kept yelling “You can’t search. You can’t search. You can’t search.” (6/13/05 Tr 18).

Both officers testified that defendant was walking around, yelling and waving her arms, and Officer Smith handcuffed her behind her back for officer safety reasons. (6/13/05 Tr 10, 18, 19, 24). According to Officer Washburn, defendant then said “to go ahead and get it out of her purse.” (6/13/05 Tr 10). Officer Smith testified that after handcuffing defendant, he asked if there was anything in her purse, defendant said she was trying to get to it, and he asked “would you let us get it or would you

⁷ Defendant testified that she did not pull the bag of marijuana from her purse and hand it to Officer Washburn, and instead that the bag was beside the seat in her car. (6/13/05 Tr 36-37).

direct us to where it's at," and defendant said yes, she would direct them to where the items were in her purse. (6/13/05 Tr 19, 20). Both officers testified that defendant directed Officer Washburn where to look in her purse. (6/13/05 Tr 10-11, 19-20). According to Officer Washburn, defendant said the items were in a zippered pouch, and reaching inside he found a marijuana pipe, two vials of methamphetamine, a vial of methamphetamine residue, and a folded paper with methamphetamine inside. (6/13/05 Tr 10-11). Both officers testified that defendant claimed this was what she was trying to get out of her purse. (6/13/05 Tr 11, 21).⁸

Officer Smith testified that defendant was placed in the patrol car about five or ten minutes after those items were recovered. (6/13/05 Tr 21). She was arrested for possession of a controlled substance. (6/13/05 Tr 12). Officer Washburn testified that although he believed defendant was under the influence, he forgot to continue the DUII investigation at the police station, and she was not arrested for driving under the influence. (6/13/05 Tr 12-13).

2) **Trial court's credibility and fact findings**

In a written order, the trial court stated that it found the two police officers—Washburn and Smith—to be “generally credible.” (ER-8). The court then made the following findings of fact.

1. On February 22, 2004, at approximately 1:04 p.m., Hermiston Police Officer Chris Washburn (hereinafter referred to as “Washburn”) observed the Defendant in a 1984 Chevy Camaro driving on W. Hermiston

⁸ At the hearing, defendant denied ever saying she would get any illegal substances out of her purse, or ever giving consent to search her purse or her car. (6/13/05 Tr 34-35).

Avenue in the 900 block with no seatbelt on. Defendant's mother, (hereinafter referred to as " ") was in the front passenger seat while Defendant's daughter was in the back seat. Neither passenger was wearing a seatbelt.

2. Washburn initiated a routine traffic stop. In lieu of pulling over the vehicle on the street, Defendant pulled into the driveway and up onto the front lawn at Avenue. Defendant, and the child stepped out of the car after it was parked on the front lawn. As Washburn approached, and the child proceed to go into the house. Washburn advised Defendant that the reason for the traffic stop was a seatbelt violation.

3. During Washburn's initial contact with Defendant, Washburn noticed Defendant was continually walking around the car, pacing back and forth, her pupils were dilated, her mouth was dry, her eyelids were trembling involuntarily, and she was continually talking to the point where Washburn had trouble questioning and conversing with Defendant. As Washburn, through training and experience, had previously been a Certified Drug Recognition Expert (hereinafter referred to as "DRE"), he recognized these characteristics to be related to the use of controlled substances.

4. Washburn questioned Defendant several times regarding methamphetamine and marijuana use. Defendant eventually responded that she had "smoked some last night or a couple of days ago." Washburn further inquired as to what was smoked the previous night and Defendant stated that she had smoked marijuana the night before and had smoked methamphetamine a few days prior to the date of the incident.

5. Washburn proceeded to inquire of Defendant about the possibility of possession of controlled substances at the present time. Upon this inquiry, Defendant responded by stating to Washburn that he could not search her car. Upon further inquiry, Defendant continued to yell towards the house and talk to and Defendant's sister when they approached her from the house while continuing to ignore Washburn.

6. At some point during the encounter, Hermiston Police Officer Douglas T. Smith (hereinafter referred to as "Smith") arrived on the scene. Through Smith's training and experience, he also concurred with Washburn's assessment of Defendant's conduct as indicative that Defendant was acting consistent with someone using methamphetamines.

7. Washburn then informed Defendant that he was going to conduct a driving under the influence of intoxicants (DUI) investigation at that time. Defendant agreed to take the field sobriety tests at the same time informing Washburn that she knew she would not pass it. Halfway through the test, Defendant knew she was not passing the test and conveyed this to Washburn.

8. During the DUI investigation, Washburn did not threaten [defendant] by stating her car would be impounded and then "tore apart" in a

search. However, upon inquiry by Defendant as to the status of her car if she did not pass the DUII field sobriety tests, Washburn did inform Defendant that her car could be impounded and inventory searched. Washburn also informed Defendant that she would be arrested if she did not pass the field sobriety test.

9. Washburn then stated that his intention was not to arrest Defendant for DUII but that he was more concerned with taking controlled substances off the street. According to Washburn, at this time, Defendant said “Okay, I’ll give it to you” and she then started walking towards the car. After exiting the vehicle at the time of the initial stop, Defendant had placed her purse on the hood of the car. Defendant then produced a bag of marijuana and handed it over to Washburn. It is unclear from the record whether the bag of marijuana was produced from the purse or from inside the vehicle. Washburn inquired as to the paraphernalia for the marijuana at which time Defendant said there was more in the purse. Defendant started to approach the purse. However, Washburn felt uncomfortable with Defendant going into the purse because he was concerned about her agitated state and concerned that there may be a weapon in the purse. During this time, Smith was trying to calm Defendant down as she was continually walking around and yelling to her sister and

10. Defendant continued to yell at Washburn and Smith, stating that they couldn’t search anything. Smith, having previously met Defendant, again tried to calm her down but Defendant continued to flare her arms around, yell and remained somewhat agitated. Smith explained to Defendant that they would not let her touch the purse because of their “officer safety” reasons only, and was not under arrest.

11. Prior to being handcuffed, Defendant told the officers that there was more “stuff” in the purse that she would get for them. Then, after being handcuffed, Defendant directed Washburn and Smith to her purse to obtain the additional items. She told Washburn that there was “more stuff” in the zipper pouch of the purse. Defendant walked over to the hood of the car to direct and observe Washburn as he proceeded to reach in and take out the additional items from the zipper pouch of the purse. Inside the purse, Washburn discovered a marijuana pipe, two vials of methamphetamine, one vial of methamphetamine residue, and one folded piece of paper containing methamphetamine. I find that despite being handcuffed, Defendant voluntarily consented to the search of the purse.⁹]

⁹ This a conclusion of law, not a finding of fact. See Standard of Review section, *infra*.

12. Approximately ten minutes later, Defendant [was] placed under arrest for Possession of a Controlled Substance and then placed in the back of the patrol car.

(ER-5 to ER-8).

3) **Trial testimony, verdict, and sentence.**

At defendant's bench trial, Officer Washburn repeated much of his testimony from the suppression hearing, the state presented evidence that the substances seized from defendant's purse tested positive as methamphetamine, and the trial court found defendant guilty of unlawful possession of a controlled substance, sentencing her to 18 months probation. (9/13/05 Tr 15-17, 20, 30, 32; ER-2).

ASSIGNMENT OF ERROR

The trial court erred in denying defendant's motion to suppress.

A. Preservation of Error

Defendant filed a pre-trial motion to suppress "all evidence seized from the defendant's purse and automobile by Officer Washburn[.]" (Motion to Suppress, p.

1). At the hearing on that motion, defense counsel asserted the following in his opening statement.

[Defense counsel]: In this case, the defendant did not give permission for any searching. In fact, denied the officer's continued requests to search. He kept wanting to search. She kept telling him, "No, you can't search."

Then he entered into some coercion to get permission to search. Those included, "We'll impound your car and take your car from you." "I'm going to arrest you for DUII if you do not consent to search."

And so the issue before the Court is whether or not the defendant, in fact, consented to a search and, if not, if the evidence should be suppressed if the Court finds that the search was consented to. We believe that it was coerced, and searches based on coercion are also—can't turn into permission because of coercion.

(6/13/05 Tr 4). After the presentation of evidence, defense counsel stated the following in closing argument.

[Defense counsel]: The State, in their memorandum in opposition to the motion, relies on consent. Consent cannot be coerced. You can't get a valid consent by doing things to people to make them consent, and what I think happened in this case, assuming that—assuming, without necessarily agreeing that there ever was a consent—it was coerced because the defendant insisted from the get-go that she—that they could not look in her purse.

(6/13/05 Tr 40).

The trial court denied defendant's motion to suppress, stating the following in its written ruling under the heading "Conclusions of Law."

2. Washburn had probable cause to stop the Defendant for the purpose of issuing a traffic citation for the seatbelt violation.

3. Washburn's observation of Defendant, including the fact of her pulling up into the driveway and onto the front lawn of the residence at _____, her continually walking around the car, pacing back and forth and the other physical characteristics which he observed, gave Washburn, based upon his training and experience, reasonable suspicion to conduct a further investigation to determine if the Defendant was driving under the influence of a controlled substance. Therefore, Washburn had probable cause to request that Defendant submit to field sobriety tests.

4. Based upon the testimony of Washburn and Smith, which I find to be credible, Washburn did not appear to threaten or coerce Defendant. Rather, and in response to a question by Defendant, Washburn merely informed Defendant (1) of the procedure he could follow with respect to the impoundment of her vehicle and (2) that she would be arrested if she failed the field sobriety tests.

5. To summarize the *Findings of Fact*: When Washburn stated that his intention was not to arrest Defendant for DUII, but that he was more concerned with taking controlled substances off the street, Defendant then stated "Okay, I'll give it to you" and then started walking toward the car. Defendant had previously placed the purse on the hood of the car and produced a bag of marijuana. Again, it is unclear from the record whether the bag of marijuana was produced from inside the vehicle or the purse. Washburn then asked about the paraphernalia for the marijuana, and Defendant said that there was more in her purse. Defendant then started to approach the purse. Given the Defendant's excited and agitated emotional and physical state, I feel that the officers were justified in refusing to let the Defendant reach into the purse.

as it may have contained some type of weapon. For the same reason, I feel that the officers were justified placing the Defendant in handcuffs for officer safety reasons, Smith having unsuccessfully tried to calm her down.

6. Again, summarizing the *Findings of Fact*: Prior to being handcuffed, Defendant told the officers that there was more “stuff” inside the purse that she would get for them. After being handcuffed, Defendant directed the officers to her purse to obtain the additional items. She walked over to the car to direct and observe Washburn as he proceeded to reach in the purse and take out the additional items of drugs and drug paraphernalia. Again, I find that, given the totality of the circumstances, and despite being handcuffed for officer safety purposes only, the Defendant did voluntarily consent to the search of the purse.

(ER-8 to ER-9).

B. Standard of Review

In reviewing a pretrial suppression order, this court reviews the trial court’s legal conclusions for errors of law, and is bound by its factual findings if there is sufficient evidence in the record to support them. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993); *State v. Woodall*, 181 Or App 213, 217, 45 P3d 484 (2002). More specifically, although a “trial court’s findings of historical facts regarding the voluntariness of a defendant’s consent to search are binding on this court if there is supporting evidence in the record[,]” “a trial court’s ultimate conclusion on whether consent was voluntary” is a question of law for the appellate court. *State v. Sosa-Alvarez*, 122 Or App 350, 353, 857 P2d 883, *rev den* 318 Or 98 (1993).

ARGUMENT

1) Defendant did not voluntarily consent to a search.

The trial court should have excluded the methamphetamine seized from defendant’s purse because she did not voluntarily consent to a search, but instead merely acquiesced to a show of police authority.

Generally, a warrantless search is *per se* unreasonable, and when evidence is seized without a warrant—as in this case—it is the state’s burden to prove an exception to the warrant requirement. *State v. Guzman*, 164 Or App 90, 99, 990 P2d 370 (1999), *rev den* 331 Or 191 (2000). Consent is one such exception, and when the state relies consent it must prove by a preponderance of the evidence that it was voluntary. *Id.* In assessing voluntariness, this court examines the totality of the circumstances to determine whether defendant’s consent was given “by an act of free will or was the result of coercion, express or implied.” *State v. Parker*, 317 Or 225, 230, 855 P2d 636 (1993).

In this case, Officer Washburn’s statement to defendant—that he did not intend to arrest her for DUII, and instead was only concerned with getting any controlled substances she had “off the streets,” and that her car would be¹⁰ impounded and inventoried upon her arrest (6/13/05 Tr 9, 12; ER-7)—was either a “promise” not to arrest her for DUII or to impound and inventory her car if she consented to a search, or it was a “threat” to arrest, impound, and inventory if she did not consent. Under either characterization, Officer Washburn’s statement rendered whatever consent defendant gave involuntary.

¹⁰ The trial court’s finding that “Washburn did inform Defendant that her car *could* be impounded and inventory searched” (ER-7, ¶ 8; emphasis added) is contrary to Officer Washburn’s testimony that he told defendant that “it *would* be impounded, and during the impound, there *would* be an inventory search of the contents of her vehicle, for valuables and so forth.” (6/13/05 Tr 12; emphasis added).

Although generally, a threat by police to do what is lawful does not render a subsequently obtained consent involuntary,¹¹ “a threat to do that which is lawful does not, in and of itself, *compel* a finding that a subsequent consent was voluntary.” *State v. Greason*, 106 Or App 529, 535, 809 P2d 695, *rev den*, 311 Or 643 (1991) (emphasis in original). Rather, an officer’s threat to obtain a warrant if the defendant does not consent “is but one factor” in determining the voluntariness of consent *Id.*; *State v. Bowen*, 137 Or App 327, 331, 904 P2d 1076 (1995), *rev den* 323 Or 74 (1996) (same).

For example, in *State v. Dimeo*, 304 Or 469, 747 P2d 353 (1987), an informant’s consent to have his telephone calls to the defendant recorded was deemed involuntary,¹² in part because the police threatened to have the informant “booked and incarcerated” and “have his case processed” if he did not cooperate. 304 Or at 476-79. That was so, even though a pound of cocaine had been taken from the

¹¹ See *State v. Williamson*, 307 Or 621, 627, 772 P2d 404 (1989) (Carson J., concurring) (“If the officers threaten only to do what the law permits them to do, the coercion that the threat may produce is not constitutionally objectionable.”) (*quoting State v. Douglas*, 260 Or 60, 81, 488 P2d 1366 (1971) (O’Connell, C. J., dissenting on other grounds)); *State v. Bowen*, 137 Or App 327, 331, 904 P2d 1076 (1995), *rev den* 323 Or 74 (1996) (“consent is not involuntary simply because police threaten ‘to do what the law permits them to do’”) (*quoting Williamson*). See also *State v. Rodal*, 161 Or App 232, 242, 985 P2d 863 (1999) (“the officers, having observed marijuana plants growing on defendant’s property, had probable cause to seek and obtain a warrant” and “had both subjective and objective probable cause to arrest defendant for manufacturing a controlled substance” and therefore “the actions that the officers threatened to take here were permissible and * * * defendant’s consent was voluntary”).

¹² The voluntariness of the informant’s consent was relevant in *Dimeo* under Oregon’s wiretap statute. 304 Or at 474.

informant and he already had been arrested for possession and conspiracy to deliver cocaine. 304 Or at 471. In other words, although the police in *Dimeo* had lawful authority to book and incarcerate the informant and have his case processed, their threat to do so if he did not cooperate nonetheless weighed *against* finding his consent voluntary.

In this case, even assuming Officer Washburn may have had authority to arrest defendant for DUII—based on his interpretation of defendant’s behavior, her apparent failure of the field sobriety tests, and his belief that she was intoxicated—his statement nonetheless informed defendant that she had no choice but to consent. That is, she was essentially told that if she did not turn over whatever controlled substances she had, she would be arrested and her car impounded and inventoried for valuables. Under those circumstances defendant’s response of “Okay, I’ll give it to you,” was “mere acquiescence to police authority,” which, as a matter of law, “does not constitute voluntary consent to search.” *State v. Davis*, 133 Or App 467, 474, 891 P2d 1373, *rev den* 321 Or 429 (1995). *See also State v. Freund*, 102 Or App 647, 652, 796 P2d 656 (1990) (consent was not voluntary where “the officer’s statement told defendant that she had no choice whether a search would occur; her only option was whether the search and seizure was to be ‘calm and efficient.’”); *State v. Courson*, 98 Or App 576, 580, 779 P2d 628 (1989) (where “it is highly probable that defendant simply felt that he had no choice but to comply with the search request[,] * * * the state failed to carry its burden to prove that [the] defendant’s consent was a product of his free will”).

Alternatively, even assuming Officer Washburn had authority to arrest defendant for DUII, the portion of his threat to *inventory her car* if she did not consent to a search was not something he had a right to do. The City of Hermiston has authorized only the *impoundment* of vehicles driven by those arrested and charged with DUII, but not the *inventory* of such vehicles for valuables, nor for any other reason. Section 70.07(A)(5) of the Hermiston City Code provides that “[t]he following vehicles are hereby declared to be nuisances and subject to seizure and impoundment * * * [a] motor vehicle in which the operator is arrested and charged with driving under the influence of intoxicants in violation of the provisions of the Oregon Motor Vehicle Code.”¹³ There is no evidence in the record, however, nor any other known authority subject to judicial notice, permitting an *inventory* of vehicles impounded pursuant to section 70.07(A)(5) of the Hermiston City Code.

As such, Officer Washburn had no legal authority to inventory the contents of defendant’s car. *State v. Haney*, 195 Or App 273, 277-78, 97 P3d 1211, *adh’d to as mod* 196 Or App 498, 103 P3d 108 (2004) (under administrative search exception to warrant requirement, inventory “must be authorized by a politically accountable

¹³ Defendant located the above quoted section of the Hermiston City Code at www.hermiston.or.us, by clicking on “Code of Ordinances” at the left side of the city’s web page, then clicking on “Title VII: Traffic Code,” then clicking on “Chapter 70 General Provisions,” and then clicking on “70.07 Seizure and impoundment of motor vehicles.” *See Stroeder v. Office of Medical Assistance Programs*, 178 Or App 374, 385 n 7, 37 P3d 1012 (2001) (taking judicial notice of information posted on state agency’s “site on the World Wide Web”); OEC 202(7) (“Law judicially noticed is defined as * * * [a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom.”); *see also State v. Nelson*, 181 Or App 593, 600 n 2, 47 P3d 521 (2002) (taking judicial notice of inventory policy in ordinance enacted by Clackamas County).

lawmaking body”); *see also State v. Atkinson*, 298 Or 1, 10, 688 P2d 832 (1984) (inventory “must be conducted pursuant to a properly authorized administrative program, designed and systematically administered so that the inventory involves no exercise of discretion by the law enforcement person directing or taking” it).

Therefore, this is among the class of cases in which an illegal threat by the police—*i.e.*, a threat to do something they had no legal authority to do—rendered the subsequently obtained consent involuntary. *See State v. Coen*, 203 Or App 92, 103, 105, ___ P3d ___ (2005) (because trooper lacked subjective probable cause to arrest defendant for DUII, “[i]t follows that the threat [to arrest defendant] was unlawful and, further, that defendant’s consent to give the [blood and urine] samples was not given voluntarily and that the results of the chemical analysis should have been suppressed”); *State v. Powelson*, 154 Or App 266, 274-75, 961 P2d 869 (1998) (where officers told the defendant that he could either consent to a search or be detained, and threat to detain was unlawful, defendant’s ensuing consent was not voluntary); *State v. Cox*, 150 Or App 464, 468, 947 P2d 207 (1997) (“Because he lacked probable cause, [officer] could not have lawfully arrested defendant. It follows that his threat to arrest defendant became unlawfully coercive.”).

Moreover, that defendant was in handcuffs at the time she purportedly directed Officer Washburn to look in the zippered pouch of her purse, also weighs against the voluntariness of that portion of her consent. *See, e.g., State v. Johnson*, 96 Or App 166, 170, 772 P2d 426 (1989) (fact that defendant “was handcuffed and locked in the back of a patrol car,” among other factors, “indicates that the consent was elicited in a

coercive atmosphere”); *see also State v. Meyer*, 120 Or App 319, 321, 329-30, 852 P2d 879 (1993) (same, regarding consent obtained after police broke into residence and person was in handcuffs and dressed only in a bathrobe).¹⁴

In sum, Officer Washburn’s threat to arrest defendant, and have her car impounded and inventoried, was enough to overbear her will and render whatever consent she gave involuntary—which is demonstrated by the fact that before Officer Washburn delivered that threat and defendant was placed in handcuffs, she loudly, adamantly, and repeatedly refused to consent, and afterward she became compliant and agreed to direct the officers to the place in her purse where the items in question were located. *See Cox*, 150 Or App at 468 (defendant’s consent resulted from unlawful threat to arrest where he “several times refused to consent to the search and agreed only after the threat to arrest was made”). Moreover, the threat to inventory defendant’s car was particularly significant because, at the time Officer Washburn made that statement, defendant’s purse was still in the car. (*See* 6/15/05 Tr 9, 12: testimony by Officer Washburn that defendant removed purse from car, placed purse on hood of car, and then removed bag of marijuana from her purse—all of which occurred after DUUI investigation).¹⁵ Defendant also testified that it was the threat to

¹⁴ Although “[t]he fact that defendant was in handcuffs when he consented does not render the consent involuntary *per se*[,]” *State v. White*, 130 Or App 289, 293, 881 P2d 169 (1994), it is nonetheless a factor that can weigh against voluntariness, as *Meyer* and *Johnson* demonstrate.

¹⁵ The trial court’s finding—that “[a]fter exiting the vehicle at the time of the initial stop, Defendant had placed her purse on the hood of the car” (ER-7, ¶ 9)—is therefore not supported by the record.

impound her car that made her so agitated, and her mother testified that the car had belonged to defendant's father before he died, and that it was defendant's "pride and joy." (6/15/05 Tr 29, 37).

For these reasons, defendant did not voluntarily consent and the trial court erred in denying her motion to suppress the methamphetamine seized from her purse.

2) The record does not support an alternative basis for affirmance.

Although Officer Washburn testified that he believed defendant was under the influence, she was not in fact arrested for DUII. (6/13/05 Tr 12-13). The "search incident to arrest" exception therefore does not provide an alternative basis for affirmance. For that reason, the record also does not establish that the contents of defendant's purse would have been inevitably discovered during an inventory for valuables at the jail. *See State v. Weems*, 190 Or App 341, 79 P3d 884 (2003) (declining to apply inevitable discovery exception on appeal, where "[t]he state did not establish [the requisite] facts below, and the trial court did not base its decision on the inevitable discovery rule").

CONCLUSION

For the above reasons, this court should reverse defendant's judgment of conviction.

Respectfully submitted,


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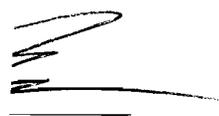


NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed the original Combined Appellant's Brief and Excerpt of Record with the State Court Administrator, Appellate Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on February 13, 2007.

I further certify that I filed the Combined Appellant's Brief and Excerpt of Record upon Mary H. Williams, attorney for respondent, on February 13, 2007 by mailing two copies, with postage prepaid, in an envelope addressed to:

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