

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0157

STATE OF MONTANA,

Plaintiff and Appellee,

v.

IOLA MAERRIEA JOHNSTON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Robert L. Deschamps III, Presiding

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STATEMENT OF THE ISSUES

Whether the court abused its discretion when it denied Johnston's motion to suppress without holding a hearing after the court told Johnston she could have an evidentiary hearing if she requested one, and she never did so.

STATEMENT OF THE CASE

The State charged Johnston with criminal possession of dangerous drugs with intent to distribute, tampering with evidence, and unlawful use/possession of property subject to criminal forfeiture. (Doc. 5.) Johnston filed several pro se documents while she was represented by counsel, including motions to suppress (Appellant's Apps. B, C.)¹ The court eventually allowed Johnston to represent herself and directed the State to respond to the pro se documents Johnston had filed in court on July 28, 2021. (8/5/21 Tr. at 54-56.) The State responded, and the court denied the motions. (Doc. 31; Doc. 35, available at Appellant's App. E.)

Before trial, the State dismissed the forfeiture count. (12/8/21 Tr. at 110.) At the conclusion of the trial, the court found Johnston guilty of a lesser included

¹ Most of Johnston's pro se filings are contained in the district court record in an electronic folder labeled "DC-20-420 Sealed, lodged." The pro se filing attached to Appellant's Brief as Appendix B is not contained in the district court record filed in this Court on June 29, 2022. Counsel for the State has confirmed, however, that the district court received that document and forwarded it to the State on January 5, 2020.

offense of criminal possession of dangerous drugs and tampering with evidence.
(*Id.* at 226-29.)

STATEMENT OF THE FACTS

I. The offense

On August 11, 2020, Deputy United States Marshals Shane Meinhold and Chris Strommen arrested Johnston on a warrant as she was leaving her niece's apartment in Missoula. (12/8/21 Tr. at 112-13, 136.) When they told Johnston she was under arrest, she tried to pull away and threw her purse and cell phone back toward the apartment door. (*Id.* at 113-14.) Johnston's purse landed in the doorway of the apartment. (*Id.* at 114.) Johnston screamed loudly during this time. (*Id.*)

A woman exited the apartment and tried to take the purse inside. (*Id.*) The woman ignored the marshals' direction not to touch the purse. (*Id.*) She picked it up and tried to take it inside, but Deputy Marshal Meinhold was able to wrestle the purse away from her. (*Id.* at 114-15.) He was also able to get Johnston's cell phone. (*Id.* at 115.)

Probation Officer Jeremy Lizotte arrived about 30 seconds after Deputy Marshal Meinhold initiated Johnston's arrest. (*Id.* at 119, 136-37, 140.) Officer Lizotte had been asked to assist with arresting Johnston, so he was waiting

nearby when Deputy Marshal Meinhold initiated the arrest. (*Id.* at 140.) When Officer Lizotte arrived, Johnston's purse had been placed on the hood of a law enforcement vehicle. (*Id.* at 141-42; State's Ex. 3.)

Officer Lizotte searched Johnston's purse pursuant to his authority as a probation officer. (12/8/21 Tr. at 137, 140-44, 158.) When he opened the purse, he found a sandwich bag containing a large quantity of clear crystals that appeared to be methamphetamine, in addition to another bag containing small jeweler baggies. (*Id.* at 142-43.) When Officer Lizotte saw the crystals, he informed Deputy Marshal Meinhold, who was attending to Johnston, that he had located a large quantity of methamphetamine. (*Id.* at 143-44.) Johnston interrupted, stating that it was "an ounce." (*Id.* at 144.) Officer Lizotte stopped the search of the purse and turned it over to Missoula Police Officer Randy Long. (*Id.* at 143-45.) An officer later located \$1,426 in her purse. (*Id.* at 170.)

Officer Long assisted in the investigation on August 11, 2020, based on the marshals' request. (*Id.* at 160-61.) He arrived after the marshals, Officer Lizotte, and another Missoula officer. (*Id.* at 173.) Officer Long advised Johnston of her rights and asked her about the purse. (*Id.* at 162.) She told him that the methamphetamine in the purse was hers, and she had purchased it that morning for \$700. (*Id.*) The methamphetamine weighed about one ounce, which Officer Long later testified exceeds an amount typically used for personal use. (*Id.* at 162-63.)

Officer Lizotte and Deputy Marshal Meinhold searched sections of Johnston's niece's apartment, with her permission, based on her statements about which property belonged to Johnston. (*Id.* at 119-24, 141.) One of the items seized was a notebook with a page that said, "People who owe me" and contained a list of names and amounts. (*Id.* at 122; State's Ex. 2.)

II. Pretrial procedural history

Abigail Rogers was appointed to represent Johnston at the start of the case. (Doc. 6.) Rogers reserved the ability to file a motion to suppress physical evidence and admissions in the Omnibus Hearing Memorandum filed September 22, 2020. (Doc. 10 at 3.) The motion stated, "NOTE: The motions will be deemed submitted without a hearing unless a Request for Hearing is submitted prior to the end of the briefing period." (*Id.*)

Several months later, on November 30, 2020, Rogers informed the court that she and Johnston "had a total breakdown in our attorney-client relationship." (11/30/20 Tr. at 6.) Rogers stated that she had requested that the public defender's office reassign the case. (*Id.*) Joan H. Burbridge filed a notice of appearance on December 1, 2020. (Doc. 13.)

Despite having counsel, Johnston filed numerous pro se documents, which were not docketed. (Folder "DC-20-420, Sealed, lodged"; Appellant's Apps. B, C.)

At a status conference on January 5, 2021, the court noted that Johnston had submitted a handwritten motion to suppress. (1/5/21 Tr. at 18-19.) The court appeared to be referring to the motion to suppress dated December 23, 2020. (Appellant’s App. B.) The court informed Johnston that because she had an attorney, “I can’t be having you filing stuff on your own without going through your attorney.” (1/5/21 Tr. at 19.) The court informed Johnston that it was referring the matter to Burbridge so that she could decide whether they wanted to pursue a motion to suppress. (*Id.*) The court explained that it was not going to consider the motion to suppress unless requested to do so by Burbridge. (*Id.*)

In response, Burbridge explained that Johnston wanted the evidence suppressed. (*Id.* at 19-20.) Burbridge requested to reopen the omnibus hearing so she could file a motion to suppress. (*Id.* at 20-21.) The court agreed to reopen the motions deadline and set a briefing schedule, requiring Johnston to file a motion to suppress by January 29, 2021. (*Id.* at 21-22.) The State confirmed that the court did not want it to respond to the pro se motion. (*Id.* at 21.)

The court told Burbridge that it had read Johnston’s pro se motion to suppress “and couldn’t quite make heads or tails of it without seeing the recording.” (*Id.* at 22.) The court directed Burbridge, “if we need to have an evidentiary hearing on this matter, please ask for it conspicuously in writing.” (*Id.* at 22-23.) The court stated that “at the bare minimum, I’m probably going to need

a copy of this recording and anything else that goes with it so I can understand what it is she's trying to say.” (*Id.* at 23.)

Burbridge never filed a motion to suppress. On July 26, 2021, Burbridge moved to vacate the bench trial and set a status conference because “there is an irretrievable breakdown in the attorney client relationship that needs to be addressed before the matter can proceed to trial.” (Doc. 27.)

The court held a status conference on August 5, 2021. Burbridge informed the court that there had been an “irretrievable breakdown in the attorney-client communication” and that Johnston was not willing to communicate with Burbridge. (8/5/21 Tr. at 47-48.) Johnston told the court that she “would love to represent myself,” and the court ordered that she could do so with the assistance of standby counsel. (*Id.* at 48-54.)

The court noted that it had “received a whole raft of motions and documents from Ms. Johnston.” (*Id.* at 47.) The court informed the State that it would require the prosecutor to respond to the documents Johnston had filed. (*Id.* at 53.) The State pointed out that it had previously been told that it did not have to respond to her pro se filings. (*Id.* at 53-54.) The court explained that because it was allowing Johnston to represent herself, it wanted to allow her to present her filings. (*Id.* at 54.) The State and the court then clarified in the following exchange that Johnston was relying on her July 28, 2021 filings:

MR. JENNINGS: That's fine.

Would you like me to respond to her most recent filings?

THE COURT: Yeah.

Ms. Johnston, the last batch of stuff filed was filed with the Court on July 28th.

And I don't see anything that was filed by you, you know, in the last six months at least before that.

So, is that paperwork that was filed on July 28th what you are relying on at this point?

THE DEFENDANT: Yes, I am.

(*Id.* at 54-55.)

After a brief discussion about discovery, the court told Johnston that it wanted to "make sure that what you wrote to the Court on July 28th is what you're standing on at this point." (*Id.* at 55.) She replied, "Yes, sir, this is." (*Id.*) The Court stated that if more discovery was produced, it may give rise to a new motion. (*Id.* at 56.) But the court directed the State, "right now, let's just focus on these motions that were filed on July 28th." (*Id.*) The court asked the prosecutor to respond to those motions, and the prosecutor agreed to do so. (*Id.*)

Johnston's pro se motion to suppress is contained in a 56-page document received by the court on July 28, 2021. (Folder "DC-20-420 Sealed, lodged," document "Ex Parte Documents from Defendant 7 28 2021" (hereinafter 7/28/21 Doc.); Appellant's App. C.) In the motion, Johnston asserted there had been an

illegal search because federal marshals initiated an arrest relying on information obtained by a confidential informant, Max Corrigan, but marshals “did not contact the probation officer prior, nor have a probation or parole [officer] present when U.S. Marshals search[ed] my purse.” (Appellant’s App. C at 2.) Johnston also asserted that the State entrapped her and withheld discovery. (*Id.* at 2-3.)

Johnston also set out her version of the facts from the day of her arrest in the motion. According to Johnston, she purchased one ounce of methamphetamine from Corrigan, and Corrigan told her to wait at her niece’s apartment. (*Id.* at 4.) Johnston said Corrigan called her and told her to go outside, and marshals then arrested her. (*Id.* at 4-5.) Johnston asserted that Deputy Marshal Meinhold retrieved her purse from the woman inside the apartment and searched it himself. (*Id.* at 5.) Johnston claimed Deputy Marshal Meinhold informed dispatch he “found drugs” 31 seconds into the incident. (*Id.* at 5-6, 13.) Johnston claimed that Corrigan gave the marshals incorrect information about her possessing assault rifles. (*Id.* at 6.) Johnston referenced Officer Lizotte’s report that he searched a “tan purse” upon his arrival, (*id.* at 7), but she also claimed that her purse was pink and Deputy Marshal Meinhold illegally searched her pink purse without Officer Lizotte present, (*id.* at 9, 13). Johnston claimed that federal marshals did not follow proper statutory procedure because they did not notify the probation

officer before initiating the arrest. (*Id.* at 11.) Johnston attached a dispatch report and reports from Officers Lizotte and Long to her motions. (7/8/21 Doc. at 41-47.)

In response, the State asserted that Johnston's purse was legally searched pursuant to a valid probation search. (Doc. 31 at 4.) The State explained that Johnston was arrested pursuant to an arrest warrant, and her purse was then searched as part of a probationary search. (*Id.* at 2.) The State explained that Deputy Marshal Meinhold and Officer Lizotte both stated in their reports that Officer Lizotte searched Johnston's purse. (*Id.* at 3.) The State also submitted the arrest warrant that was the basis for the arrest, Officer Lizotte's report, and Deputy Marshal Meinhold's report. (Docs. 32-34.)

Officer Lizotte's report stated:

"This officer arrived on the scene immediately after [Johnston's] apprehension.

Upon arrival, Deputy US Marshal Meinhold pointed to a tan purse on the hood of a US Marshal vehicle. Deputy Meinhold informed this officer when JOHNSTON was located, the tan purse was in her possession.

This officer confirmed JOHNSTON was currently serving a suspended sentence for Assault on a Peace Officer

This officer conducted a probation search of a tan purse. . . .

(Doc. 33.) Officer Lizotte's report described his discovery of "a large amount [of] a crystalline substance that appeared to be methamphetamine" in Johnston's purse. (*Id.*) Similarly, Deputy Marshal Meinhold's report stated, "A probationary search

of JOHNSTON's purse was conducted outside the residence by TFO Lizotte and approximately one ounce of methamphetamine, drug paraphernalia and a taser were located." (Doc. 34.)

The court denied Johnston's motion to suppress. (Doc. 35.) The court noted that it "deem[ed] the matters submitted and ready for rulings." (*Id.* at 1.) The court concluded that the search of Johnston's purse was permitted as a probation search. (*Id.* at 2.) The court relied on Officer Lizotte's and Deputy Marshal Meinhold's reports to conclude that Officer Lizotte searched Johnston's purse pursuant to a valid probationary search. (*Id.* at 3.)

III. The trial

At trial, Johnston attempted to show that law enforcement knew she was at her niece's house based on information learned from a confidential informant and that law enforcement had that informant call her on her phone and lure her out of the apartment. (12/8/21 Tr. at 125-30, 133, 190-91, 200-01.) The court informed Johnston that information was irrelevant to whether she was guilty of the offenses. (*Id.* at 130, 134-35.)

Johnston claimed that her purse was illegally searched by Deputy Marshal Meinhold before Officer Lizotte arrived. (*Id.* at 136-37, 198.) She asserted that a patrol car video demonstrated that Officer Long arrived after Officer Lizotte, but

she did not offer the video as evidence, and Officer Long disputed that claim. (*Id.* at 172-73.)

In contrast to Johnston's assertion that Deputy Marshal Meinhold searched her purse, Officer Lizotte and Deputy Marshal Meinhold both testified that Officer Lizotte arrived shortly after the marshals initiated the arrest, and Officer Lizotte searched Johnston's purse. (*Id.* at 119, 136-37, 141-44, 158, 216.)

Johnston acknowledged that she had paid the informant \$700 the day of her arrest for methamphetamine. (*Id.* at 204.) Although she contended that she was not certain the white substance she had received was methamphetamine, she said she was "hoping" it was. (*Id.*)

SUMMARY OF THE ARGUMENT

Johnston waived her right to a hearing when the court gave her an opportunity to request a hearing and she failed to do so. A court should not be required to hold a hearing if the moving party does not plan to present evidence. Therefore, it is appropriate for a court to inform a party that she must request a hearing for one to be scheduled. The district court did not abuse its discretion when it failed to hold a hearing after informing Johnston that she needed to request a hearing if she wanted one, and she failed to request one.

The district court correctly denied Johnston's motion to suppress based on Officer Lizotte's and Deputy Marshal Meinhold's reports, which both stated that Officer Lizotte searched Johnston's purse based on his authority to conduct a probationary search.

Finally, even if this Court determines that the district court erred by failing to hold a hearing, Johnston's convictions should be affirmed because the evidence developed at trial demonstrates that Officer Lizotte conducted a lawful probationary search.

ARGUMENT

I. Standard of review

This court reviews a district court's denial of a motion to suppress to determine whether the court's findings of fact are clearly erroneous and whether its interpretation and application of the law are correct. *State v. Tucker*, 2008 MT 273, 345 Mont. 237, 190 P.3d 1080. This Court reviews the denial of an evidentiary hearing for a clear abuse of discretion. *Id.*

II. The district court correctly denied Johnston's motion to suppress.

As an initial matter, the only motion to suppress that should be considered is the motion that Johnston filed July 28, 2021, contained in Appellant's App. C. The motion dated December 23, 2020, contained in Appellant's App. B, should not be

considered. It was not docketed because it was improperly filed by Johnston when she had counsel. (1/5/21 Tr. at 18-19.) When the Court later allowed Johnston to represent herself on August 5, 2021, the court twice clarified with Johnston that she was relying on the documents the court received on July 28, 2021. (8/5/21 Tr. at 55.) Johnston confirmed that was correct. (*Id.*) Johnston did not request to revive her December 23, 2020 motion. Instead, she agreed with the court that only the July 28, 2021 documents were at issue. Therefore, Johnston's improperly filed motion from December 23, 2020, should not be considered.

A. The court did not err by failing to hold a hearing because the court directed Johnston to request a hearing if she wanted one, and she did not do so.

The district court was not required to hold a hearing when Johnston was informed that she could have a hearing if she requested it, and she failed to do so. A district court has discretion in holding a hearing on the merits of a motion, except as required by statute. *Tucker*, ¶ 34. Montana Code Annotated § 46-13-302(2) provides that a court “shall hear the merits” of a motion to suppress “[i]f the motion states facts that, if true, would show that the evidence should be suppressed.”

Although Mont. Code Ann. § 46-13-302(2) requires a hearing on a motion to suppress, that right was waived under the facts of this case. The omnibus form made it clear that a motion to suppress would “be deemed submitted without a hearing unless a Request for Hearing is submitted prior to the end of the briefing

period.” (Doc. 10 at 3.) The court again notified Johnston that she would need to request a hearing if she wanted one when it directed Burbridge, “if we need to have an evidentiary hearing on this matter, please ask for it conspicuously in writing.” (1/5/21 Tr. at 22-23.)

This Court has held that a party in a civil case waives its right to an evidentiary hearing if the party fails to request a hearing because the rules of civil procedure provide that the right to a hearing is waived unless a party requests a hearing. *Citizens for Open Gov’t, Inc. v. City of Polson*, 2015 MT 55, ¶ 28, 378 Mont. 293, 343 P.3d 584 (quoting M. R. Civ. P. 56(c)(2)). Here, the court had a similar rule, which Johnston was informed of in the Omnibus Hearing Memorandum and in court. By failing to request a hearing after being given the opportunity to do so, Johnston waived her right to a hearing.

To conclude otherwise would require a court to hold a hearing even when the defendant does not intend to subpoena any witnesses or present any evidence. Holding a hearing when the defense does not plan to present evidence would be a waste of judicial resources. Rather than wasting resources, the court invited Johnston to request a hearing. She never did so. As a result, the court did not err by failing to hold a hearing.

B. The district court correctly rejected Johnston's claim that her purse was searched by Deputy Marshal Meinhold.

In her motion to suppress, Johnston raised a factual dispute, rather than a legal one. Johnston asserted that the search of her purse was unlawful because it was searched by Deputy Marshal Meinhold before Officer Lizotte arrived and that he did not have authority to conduct the search because he was not a probation officer. (Appellant's App. B at 5, 8-14.)

The district court correctly determined, based on the exhibits attached to the motion and response, that Johnston's purse was searched by Officer Lizotte. Officer Lizotte's and Deputy Marshal Meinhold's reports both stated that Officer Lizotte searched Johnston's purse and located the methamphetamine during the search. (Docs. 33-34.) Johnston attached a 9-1-1 dispatch report which she seemed to believe supported her assertions, but it did not indicate when Officer Lizotte arrived at the scene or contradict Officer Lizotte's and Deputy Marshal Meinhold's reports. (7/28/21 Doc. at 41-43.) Because the exhibits demonstrated that Johnston's claim was false, the district court correctly denied her motion to suppress.

Johnston did not dispute that Officer Lizotte would have had the authority to search her purse, so that claim is not at issue on appeal. Further, if this Court considers that claim to be part of the issue raised, Officer Lizotte had the authority to conduct a probationary search.

[A] probation officer may search a probationer's residence and property, or cause them to be searched by another officer, without a warrant or probable cause for evidence of violation of a probation condition or the criminal law if: (1) such searches are generally authorized by an established state law regulatory scheme that furthers the special government interests in rehabilitating probationers and protecting the public from further criminal activity by ensuring compliance with related conditions of probation and the criminal law; (2) the probation officer has reasonable cause to suspect, based on awareness of articulable facts, under the totality of the circumstances that the probationer may be in violation of his or her probation conditions or the criminal law; and (3) the warrantless search is limited in scope to the reasonable suspicion that justified it in the first instance except to the extent that new or additional cause may arise within the lawful scope of the initial search.

State v. Peoples, 2022 MT 4, ¶ 17, 407 Mont. 84, 502 P.3d 129.

The search was authorized by an established state regulatory scheme satisfying the first factor. *Peoples*, ¶¶ 19-20 (citing Mont. Admin. R. 20.7.1101 (2008).) And Officer Lizotte had reasonable cause to suspect that Johnston was in violation of her probation condition. The federal officers, who were coordinating with Officer Lizotte, were searching for Johnston so they could serve an arrest warrant that had been issued based on her failure to appear on criminal charges. (Doc. 32; 12/8/21 Tr. at 113, 140-41.) According to Johnston's own statements, Johnston had purchased methamphetamine from a confidential informant, who was coordinating with Deputy Marshal Meinhold, before her arrest. (Appellant's App. C at 4.) This information provided Officer Lizotte with reasonable cause to suspect that Johnston was violating her probation conditions. Finally, the scope of

the search was appropriate because there was reasonable suspicion to believe that Johnston's purse would contain evidence related to her purchase of methamphetamine.

C. Even if this Court determines that a court must hold an evidentiary hearing absent an express waiver of the hearing, this Court should rely on the evidence that was presented at trial rather than remanding for a hearing.

Johnston's request for a remand should be denied even if this Court concludes that the district court erred in failing to conduct a hearing on the motion to suppress. The factual dispute in the motion to suppress—who searched Johnston's purse—has been resolved by Deputy Marshal Meinhold's and Officer Lizotte's testimony. At trial, Johnston claimed that Deputy Marshal Meinhold searched her purse. (*Id.* at 136-37, 198.) But Deputy Marshal Meinhold and Officer Lizotte both refuted that claim and insisted that Officer Lizotte searched her purse. (*Id.* at 119, 136-37, 141-44, 158, 216.) Deputy Marshal Meinhold also testified that Johnston's claims about the 9-1-1 report, which appear to be the basis for her assertion that Officer Lizotte arrived after her purse was searched, were based on her misunderstanding of the report. (*Id.* at 214.) There is no reason to remand this case for a hearing on a factual matter that has already been established. The testimony demonstrates that Officer Lizotte searched Johnston's purse.

Further, the case cited by *Johnston*, *State v. Harris*, 2001 MT 231, ¶ 24, 306 Mont. 525, 36 P.3d 372, does not support her assertion that this case should be

remanded. In that case, the district court erred in denying an ineffective assistance of counsel claim without holding an evidentiary hearing on the merits of the claim. *Harris*, ¶¶ 23-26. Because the factual record had not been made, this Court could not rule on the merits of the claim. In contrast, this Court has information on appeal demonstrating that Johnston's claim was based on an incorrect factual assertion. It would be futile to remand because the evidence has already been established at trial.

CONCLUSION

The district court correctly denied Johnston's motion to suppress. As a result, Johnston's convictions for criminal possession of dangerous drugs and tampering with evidence should be affirmed.

Respectfully submitted this 14th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,156 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Mardell Ployhar

MARDELL PLOYHAR

CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-14-2023:

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