IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
GWEN ELLEN CHAMPAGNE,
Respondent.

No. 58681

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting respondent Gwen Ellen Champagne's pretrial motion to suppress evidence.[1] Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

First, the State contends that the district court erred by granting Champagne's motion to suppress because she voluntarily removed the plastic baggie containing contraband from her bra. We disagree. Testimony from the preliminary hearing indicated that the arresting officer demanded that Champagne remove the baggie, and the district court found that "[t]here was no evidence or inference present at the preliminary hearing to suggest that [Champagne] consented to the removal of the baggie from her brassiere." We conclude that the State failed to satisfy its burden and demonstrate by clear and convincing evidence that Champagne consented to the warrantless seizure, see McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 83 (2002); State v. Burkholder, 112 Nev. 535, 539, 915 P.2d 886, 888 (1996) (search based on

[1]We exercise our discretion to entertain this appeal. NRS 177.015(2).

11-29752

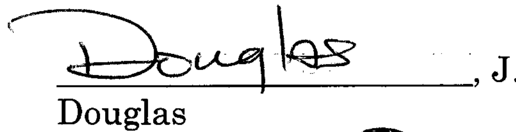
consent is lawful where the State can show that the defendant's consent "was voluntary and not the result of duress or coercion"), and therefore, the district court did not err by rejecting the State's contention. See Somee v. State, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008) ("We review the district court's findings of historical fact for clear error but review the legal consequences of those factual findings de novo.").

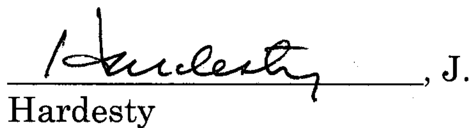
Second, the State contends that the district court erred by granting Champagne's motion to suppress because the plastic baggie containing methamphetamine was in plain view and thus properly seized without a warrant. We disagree. "An object is deemed to be in plain view when the intrusion of the police is lawful, the discovery of the incriminating evidence by the police is inadvertent, and it is immediately apparent that the items they observed may be evidence of a crime." Ford v. State, 122 Nev. 796, 803-04, 138 P.3d 500, 505 (2006); see Luster v. State, 115 Nev. 431, 434, 991 P.2d 466, 468 (1999) ("The plain view doctrine . . . allows the seizure of objects not specified in a search warrant so long as certain criteria are met."). "If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—i.e., if 'its incriminating character [is not] immediately apparent,'—the plain view doctrine cannot justify its seizure." Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (quotation marks omitted) (alteration in original) (citation omitted) (quoting Horton v. California, 496 U.S. 128, 136 (1990)).

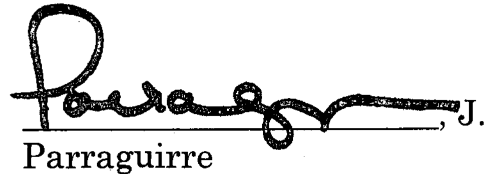
In its order granting Champagne's motion, the district court noted that the arresting officer based his request for the removal of the baggie "only upon a suspicion or a hunch" and found that "[n]o other indicia of narcotic's possession or use was evident at the time of the traffic

stop." We agree with the district court that the plain view doctrine does not apply and allow for the warrantless seizure of the plastic baggie sticking out of Champagne's bra because it was not immediately apparent that it contained contraband. Therefore, we conclude that the district court did not err by rejecting the State's contention. See Somee, 124 Nev. at 441, 187 P.3d at 157-58. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


______________________, J.
Douglas


______________________, J.
Hardesty


______________________, J.
Parraguirre

cc: Hon. Robert W. Lane, District Judge
Attorney General/Carson City
Nye County District Attorney
Gibson & Kuehn
Nye County Clerk