STATE'S RESPONSE AND MOTION TO STRIKE DEFENDANT'S MOTION FOR A NEW FINDING OF PROBABLE CAUSE

Rule 5, Ariz. R. Crim. P. – a defendant is not entitled to a new finding of probable cause if he was not denied any substantial right at the preliminary hearing and the State presented credible evidence against him at the hearing.

Also contains a discussion of resisting arrest.

The State of Arizona, pursuant to Rule 5.5, Arizona Rules of Criminal Procedure, opposes and moves to strike the defendant's Motion for a New Finding of Probable Cause, for the reasons set forth in the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court should refuse to consider the defendant's motion for a new finding of probable cause because the defendant was not denied any substantial procedural right, and the State presented credible evidence of guilt at the preliminary hearing in this matter.

I. FACTS

The following facts are based on Phoenix Police Departmental Report # 2000-02213655 and the transcript of the preliminary hearing in this matter. The preliminary hearing was held on January 5, 2001 in the East Phoenix #1 Justice Court and Officer Jason Trovato was the only witness who testified at that hearing. On December 16, 2000 Phoenix Police Officers Erin Murphy, #6433, and Jason Trovato, #6371 contacted the defendant about a possible theft from Jesse Hernandez, who was with the defendant when officers approached. The officers arrived at the scene in a fully marked police car and were in full uniform.

Mr. Hernandez told the police that the defendant had taken money from his wallet. Although the defendant had only $7.00 in her hand, which was much less than

the $152.00 the victim claimed was stolen, she did admit that the money had belonged to the victim, saying, "This was all he had." In addition, she kept reaching her hands into the front of her leggings and into her sweatshirt pockets as officers were questioning her.

The officers conferred and decided to place the defendant under arrest. While the officers were placing handcuffs on her, the defendant became agitated, tensed up her arms, and refused to put her hands behind her back. When the officers finally got the handcuffs on her, the defendant began to "thrash about" and tried to break free of Officer Trovato's grasp. The defendant used profanity, stating, "There's no fucking way you're arresting me for theft." The defendant's thrashing movements required three officers to hold her down. The officers had to pin the defendant against the patrol car in order to get her under control.

II. LAW AND ARGUMENT

The defendant is not entitled to a new determination of probable cause because the State presented credible evidence of guilt and the defendant was not denied any substantial procedural right.

Rule 5.5(a), Arizona Rules of Criminal Procedure, provides:

> a. Grounds. A magistrate's determination to bind over a defendant shall be reviewable in the Superior Court only by a motion for a new finding of probable cause alleging that the defendant was denied a substantial procedural right, or that no credible evidence of guilt was adduced. This motion shall allege specifically the ways in which such evidence was lacking.

The defendant now claims that the probable cause determination made at the preliminary hearing was improper. She contends that no credible evidence of guilt was presented during the hearing because there was no probable cause to arrest her and

because there was insufficient evidence that she resisted arrest. She concludes that her rights were violated and demands that this Court remand the case for a new finding of probable cause.

This motion is meritless for three reasons. First, it is illegal to use force to resist even an unlawful arrest. A.R.S. § 13-404(B)(2) states that a person may not use force to resist an arrest that the person knows or should know is being made by a peace officer, **whether the arrest is lawful or unlawful**. The officers here were in full uniform, and the defendant's statement, "There's no fucking way you're arresting me for theft," showed that she actually knew, or should have known, that they were peace officers. It follows that whether or not the officers had probable cause to arrest the defendant was irrelevant for purposes of the resisting arrest charge.

Second, it is irrelevant for purposes of a probable cause hearing whether the officers had probable cause to arrest the defendant. Under Rule 5.3(a) of the Arizona Rules of Criminal Procedure, the magistrate "shall admit only such evidence as is material to the question whether probable cause exists to hold the defendant for trial." Whether there was probable cause for an arrest is not "material to the question whether probable cause exists to hold the defendant for trial," and thus is neither admissible nor necessary for the defendant to be bound over.

Finally, even if the question of probable cause for arrest were relevant, the officers did have probable cause to arrest the defendant in this case. The State will outline the factors briefly for the Court's benefit.

1. It is illegal to resist even an unlawful arrest.

A.R.S. § 13-404(B)(2) provides that it is illegal to use force to resist even an unlawful arrest, unless the force used by the arresting officers is excessive. *See State v. Yoshida*, 195 Ariz. 183, 185 ¶¶ 11-12, 986 P.2d 216, 218 (App. 1998); *State v. Doss*, 192 Ariz. 408, 412-13 ¶ 16, 966 P.2d 1012, 1016-17 (App. 1998*); State v. Sands*, 145 Ariz. 269, 276, 700 P.2d 1369, 1376 (App. 1985). Here, there was no evidence that the officers employed excessive force. Thus, the defendant's claim that the officers lacked probable cause to arrest her is irrelevant: Even if the officers did not have probable cause, she had no right to resist them.

2. There was probable cause to arrest the defendant.

"The police have probable cause to arrest when reasonably trustworthy information and circumstances would lead a person of reasonable caution to believe an offense has been committed by the suspect." *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), quoting *State v. Moorman*, 154 Ariz. 578, 582, 744 P.2d 679, 683 (1987). In this case, the officers spoke directly to Jesse Hernandez in person at the scene and heard him accuse the defendant of stealing his money. The defendant was with the victim when police arrived, and she had money in her hand that she admitted had come from the victim. But most suspicious was the fact that she kept reaching her hands down her pants and into her pockets while the officers were talking to her and to the victim and trying to determine what had happened. Clearly, for purposes of the probable cause hearing, the officers had sufficient reasonably trustworthy information from the victim to give them reasonable grounds to believe the defendant had stolen money from the victim. This information, along with all the circumstances (the defendant's admission that she was holding some money belonging to the victim, and

the defendant's furtive motions of reaching into her pants and pockets), was sufficient to lead the officers to believe that the defendant had committed a theft. Therefore, the officers had probable cause to arrest the defendant for theft.

The defendant protests that the victim's statements were not credible and that he could not explain the discrepancy between the amount he claimed was stolen and the amount found on the defendant. However, credibility of witnesses is an issue for trial, not for probable cause determination. The justice court heard the evidence presented and correctly determined that probable cause existed to hold the defendant to answer. The State asks this Court to deny the defendant's motion for remand.

3. The defendant's "time line for resisting arrest" argument is not supported by law.

A.R.S. § 13-2508(A)(1) provides:

> A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
>
> > 1. Using or threatening to use physical force against the peace officer or another; or
> >
> > 2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

The defendant's motion argues that the defendant began resisting only after her actual arrest, and that therefore her actions did not constitute resisting arrest. The crux of this argument is the defendant's statement: "Resisting arrest has a very short window of opportunity. A suspect can only resist arrest between the time that the officer

communicates and attempts to make an arrest and the time the arrest is complete." However, the defendant cites absolutely no authority for this proposition.

The defendant cites *State v. Green*, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975) for the proposition that the act of arrest is complete when a defendant's liberty of movement is restricted. However, the court's finding in *Green* was made for the purpose of determining a defendant's *detention status*, not for the purposes of determining when a defendant is resisting arrest. Therefore, *Green* does not support the defendant's argument.

The defendant also seems to equate the statutory phrase "effecting an arrest" with "attempting to make an arrest." But nowhere in § 13-2508(A) is "arrest" broken down into categories specifying when the "window closes" for resisting, nor does the case law support the defendant's argument. The defendant cites *State v. Womack*, 174 Ariz. 108, 847 P.2d 609 (App. 1992) in support of her argument that the Justice Court should have dismissed the complaint in this case. She argues that her conduct constituted merely "avoiding" arrest rather than "resisting" arrest. However, *Womack* is not on point and is clearly distinguishable from the facts of this case. In *Womack*, officers tried to stop the defendant's motorcycle because it had no taillight. The defendant refused to stop and was not captured until after a chase. As part of a plea agreement, the defendant entered an *Alford* plea to resisting arrest. The prosecutor gave the factual basis for the resisting arrest charge, including the fact that the officers and members of the public faced the risk of injury during the chase. On appeal, the defendant argued that there was no factual basis for the resisting arrest plea. The court of appeals held that flight from an officer *prior to* any indication that the officer intended

to arrest the suspect does not constitute resisting arrest. *Id*. at 111, 847 P.2d at 612. The court stated that "resist" means "to exert force in opposition"; "to exert oneself so as to counteract or defeat," "to withstand the force or effect of," and "resistance" means "an opposing or retarding force." *Id*. at 112, 847 P.2d at 613. The court concluded, "In our opinion, the defendant's flight was conduct which prevented, without the use of resistance, the effectuation of his arrest. In other words, such conduct constituted avoiding arrest, not resisting arrest." *Id*. at 112, 847 P.2d at 613. *Womack* decided only that fleeing from officers, without any physical resistance, does not constitute resisting arrest. *Womack* does not address the issue raised here, which is the **point in time** at which a defendant may commit the offense of resisting arrest.

The State could find no case law to support the defendant's theory that a defendant may not resist arrest after being handcuffed. In fact, the State could find no controlling case law specifically stating what the time line is for resisting arrest. Common sense suggests that there is no specific "bright line" event at which time a "window of opportunity" closes. The purpose of the prohibition against resisting arrest is "to prohibit threats or any conduct that creates a substantial risk of injury to another, including the officer." *Womack*, 174 Ariz. 108, 111, 847 P.2d 609, 612.

A practical examination of the purpose of the statute shows that as long as the officers are attempting to take the defendant into physical custody, they risk injury if the defendant threatens or uses force. A.R.S. § 13-2508 does not set out any "bright line" to determine when an arrest has been "completed." Instead, the statute contemplates an ongoing series of actions. When the defendant's freedom of movement is restricted in the slightest way, although the defendant may be considered "detained" or "in custody"

for other purposes, the defendant may still resist arrest, in that he may resist further restrictions or confinement. For example, suppose a defendant was placed in handcuffs without incident, but then began violently kicking the officers, prompting them to attempt to restrain the defendant's legs so they could safely transport him to the police station. Under the defendant's argument here, the defendant's conduct in kicking the officers would not constitute "resisting arrest" because he was already in handcuffs, despite the evident fact that he was forcibly resisting any further restriction.

In this case, once the police handcuffed the defendant, she began yelling that the officers could not arrest her, flailing about and struggling with the officers. All of her actions occurred at the scene of her arrest, and it took three officers to subdue her resistance sufficiently to place her in a police car. The defendant's conduct here is quite different from the simple flight discussed in *Womack*, because she engaged in violent physical resistance. Thus, the case law the defendant cited does not support her position that the offense of resisting arrest cannot be committed once the defendant has been handcuffed.

4. The State presented evidence to establish probable cause for all of the elements of resisting arrest.

Finally, the defendant argues that there was no probable cause to hold her to answer the resisting arrest charge because the facts were insufficient to show that she acted with the intent to injure the officers or expose them to the risk of physical injury. Again, she cites no authority to support her argument, and the case law shows she is incorrect. As stated above, A.R.S. § 13-2508(A)(1) provides that a person resists arrest by "using or threatening to use" physical force against the arresting officer or another. § 13-2508(A)(2) prohibits resisting arrest by using any other means to create a substantial

risk of injury to the officer or another. In *State v. Flynt,* ___ Ariz. ___, ___ (335 Ariz. Adv. Rep. 3), 13 P.3d 1209, 1212 ¶ 7 (App. 2000), the court of appeals stated that actual risk of physical injury is not necessary. Conduct that merely "threatens" such injury, such as use of force or threats of force alone, are sufficient to constitute the crime of resisting arrest, even though there may be no actual risk of physical injury.

Here, the defendant's actions while Officer Trovato was originally attempting to handcuff her constituted resisting arrest. Her actions of using the strength of her arms to keep him from getting the handcuffs on her amounted to "using or threatening to use physical force," thus violating A.R.S. § 13-2508(A)(1). See *State v. Henry*, 191 Ariz. 283, 285, 955 P.2d 39, 41 (App. 1997); *State v. Harney*, 128 Ariz. 355, 625 P.2d 944 (App. 1981). But her actions once she was handcuffed are the clearest example of resisting arrest. She tried to break free from Officer Trovato's grasp, she "flailed about," and she required three officers to control her. This conduct was clearly in violation of subsection (A)(1). In addition, the defendant violated subsection (A)(2) by violently struggling, creating a scenario where the officers were placed in substantial risk of being physically injured. Since it took three officers to hold her down, it was reasonably foreseeable that one of them would become injured during the struggle. The State presented ample evidence to support this Court's finding of probable cause. Therefore, this Court should deny the defendant's motion to remand.

III. CONCLUSION

This Court should deny the defendant's motion for a new finding of probable cause because the defendant was not denied any substantial procedural right and credible evidence of guilt was adduced at the preliminary hearing.

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

[2] Indeed, the defendant's motion effectively concedes that she did physically resist after she was handcuffed: "There are no facts to support the element that Ms. White resisted arrest while the arrest was being effected or attempted. Rather, Ms. White was already placed under arrest and according to the findings at justice court, the resistance occurred while her ring and key chain were being collected for property evidence."

[3] The *Flynt* Court also noted that a defendant's actions might violate both subsections of the statute.