APPENDIX A

COLORADO COURT OF APPEALS

Court of Appeals No. 14CA0961
El Paso County District Court No. 13CR4796
Honorable David S. Prince, Judge

The People of the State of Colorado,
Plaintiff-Appellee,

v.

Jacqueline Heaven,
Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE FOX
Bernard and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

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Douglas K. Wilson, Colorado State Public Defender, John Plimpton, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Jacqueline Heaven, appeals the judgment of conviction entered on jury verdicts finding her guilty of possession of a controlled substance and possession of drug paraphernalia. She contends that the trial court erred in denying her pretrial mo-

tion to suppress evidence found during a warrantless search of her purse. We disagree and affirm.

I. Background

¶ 2 Police Officer Schenk responded to a report of shoplifting at a large retailer. After speaking with the retailer's loss prevention officer, who had observed Heaven concealing items in her purse and in a bag, Officer Schenk detained Heaven and searched her purse, discovering drug paraphernalia, including a syringe loaded with methamphetamine. Heaven was charged with attempted theft, possession of a controlled substance, and possession of drug paraphernalia.

¶ 3 Before trial, Heaven moved to suppress the evidence discovered in her purse, arguing that it was the fruit of an unlawful search. At the hearing on her motion, Officer Schenk testified that, when he arrived at the scene, he contacted the retailer's loss prevention officer, who had detained Heaven just inside the main door of the store. The loss prevention officer told Officer Schenk that he had observed Heaven conceal several items in her purse and in a separate bag in her shopping cart.

¶ 4 Officer Schenk testified that he might have told Heaven that she was under arrest for shoplifting, but could not recall with certainty. He further testified that he "detained [Heaven] for shoplifting" and took her to a nearby office, where he "immediately" sat her down and searched her purse and person. The search of Heaven's purse did not reveal any shoplifted items, but revealed drugs and drug paraphernalia. Officer Schenk then placed Heaven under arrest.

¶ 5 Officer Schenk also testified that, after he brought Heaven to the office, the loss prevention officer immediately returned to Heaven's shopping cart. When the loss prevention officer came back to the office, he informed Officer Schenk that he had recovered the items he observed Heaven shoplifting. The loss prevention officer also informed Officer Schenk that "he observed [Heaven] concealing items, and then abandoning them." When asked if he was concerned about whether Heaven had a weapon in her purse, Officer Schenk testified that he is "always concerned about that," but did not indicate that he suspected Heaven had a weapon.

¶ 6 The prosecutor argued that the search of Heaven's purse was a search incident to arrest, and therefore exempt from the warrant requirement. Defense counsel urged the court to find that Heaven was not under arrest at the time of the search because Officer Schenk "didn't tell her she was under arrest, you're not free to leave, we're charging you with shoplifting."

¶ 7 After making factual findings, the court denied Heaven's suppression motion on the ground that the search was performed incident to a lawful arrest.

II. Discussion

¶ 8 Heaven contends that the trial court applied an erroneous legal standard in determining that she was under arrest when the search occurred. In particular, she argues that the court applied the "not free to leave" standard applicable to an investigatory detention. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *People v. Brown*, 217 P.3d 1252, 1256 (Colo. 2009). And, she contends, because she

was not under arrest at the time her purse was searched, the trial court erred in denying her suppression motion on grounds that the evidence was lawfully seized in a search incident to arrest. We are not persuaded.

A. Standard of Review

¶ 9 In reviewing the trial court's ruling on Heaven's suppression motion, we defer to the court's findings of fact and will not disturb them unless they are unsupported by the record. *People v. Brunsting*, 2013 CO 55, ¶ 15. We review de novo, however, the trial court's legal conclusion that Officer Schenk did not violate Heaven's constitutional rights. *See id.* Likewise, we review de novo whether the trial court applied the correct legal standard in making its conclusion. *People v. Revoal*, 2012 CO 8, ¶ 9.

B. The Trial Court's Articulation of the Legal Standard

¶ 10 We begin by addressing Heaven's assertion that the trial court applied an erroneous legal standard, namely the "free to leave" standard applicable to investigatory detentions.

¶ 11 Although an arrest is a seizure, not all seizures are arrests. *People v. Tottenhoff*, 691 P.2d 340, 343 (Colo. 1984); *see also Terry v. Ohio*, 392 U.S. 1, 16 (1980). The determination of whether a person has been seized is based on the totality of the circumstances and depends on whether a reasonable person in the defendant's position would believe she was not free to leave the scene or otherwise terminate her encounter with law enforcement. *See, e.g.*, *People v. Begay*, 2014 CO 41, ¶ 14. Our supreme court has stated that "this same 'reasonable person' standard"

also controls "whether a particular form of intrusion constitutes an arrest." *Tottenhoff*, 691 P.2d at 344. That is, "if under the totality of circumstances a reasonable person in the situation of the defendant would have believed that [s]he was being arrested, rather than merely temporarily detained for a brief investigation, an arrest has occurred which must be supported by probable cause." *Id.*; *see People v. King*, 16 P.3d 807, 814 (Colo. 2001) ("Whether an encounter should be characterized as an investigatory stop or an arrest is an objective inquiry based on the totality of the circumstances.").

¶ 12 Here, the trial court found that Heaven was detained by store security, pending the arrival of the police. After Officer Schenk arrived, he took Heaven and her purse to a small office, separated from the rest of the store. The trial court found that Officer Schenk was alone with Heaven in the office, but did not handcuff Heaven or initially tell her that she was under arrest. However, the court found, Officer Schenk also did not inform Heaven that she was "free to leave, which [police officers] fairly routinely do when they are not going to arrest somebody." Thus, the court concluded, "under the objective standard [Heaven] was under arrest. She was not free to leave, and any person in that circumstance would reasonabl[y] believe [she was] not free to leave." The court went on to say, "[i]t would be a different case if the officer had said she was free to leave, which is often the factual circumstance in an evaluation, but that's not what happened here."

¶ 13 We agree that the trial court did not clearly articulate the legal standard for arrest set forth in *Tottenhoff*. However, whether a suspect is "clearly not

free to depart and pursue [her] own affairs" is a factor in determining whether the suspect would objectively believe that she was under arrest. *See Tottenhoff*, 691 P.2d at 344; *cf. People v. Stephenson*, 159 P.3d 617, 620 (Colo. 2007) ("The touchstone of custody is significant curtailment of the defendant's freedom of action that is equivalent to a formal arrest."). Thus, we cannot conclude that the court's articulation of the "free to leave" standard was in error, in particular where, as here, (1) the parties introduced the "free to leave" language in their argument to the court and (2) the court twice correctly indicated that whether a person is told they are free to leave is a factual consideration in determining whether that person is under arrest.

C. Search Incident to Arrest

¶ 14 We likewise reject Heaven's assertion that, because she was not placed under arrest until after Officer Schenk searched her purse, the search could not be justified by the search incident to arrest exception to the warrant requirement.

¶ 15 A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution. *People v. Blackmon*, 20 P.3d 1215, 1218 (Colo. App. 2000). A search incident to a lawful arrest, however, constitutes an exception to the warrant requirement. *Id.* this exception allows law enforcement officers, in making a lawful arrest, to search an arrestee's person and the area within the arrestee's immediate control. *People v. Gothard*, 185 P.3d 180, 184 (Colo. 2008); *see Chimel v. California*, 395 U.S. 752, 762-64 (1969). That is, during a search incident to a lawful arrest, an officer may ex-

tend his search to articles on or near a suspect. *People v. Marshall*, 2012 CO 72, ¶ 16.

¶ 16 A search incident to a lawful arrest must be substantially "contemporaneous with or immediately following the arrest." *Gothard*, 185 P.3d at 184. Contrary to Heaven's argument, a search does not become unreasonable merely because it is conducted before a suspect is actually placed under formal arrest. *See People v. Rios*, 43 P.3d 726, 730 (Colo. App. 2001) (noting that where a police officer had reasonable grounds before the search to make an arrest, the search does not become unreasonable simply because the defendant was not yet under arrest at the time it was conducted); *see also People v. Novitskiy*, 2012 COA 213, ¶ 4 n.2; 2 Joseph G. Cook, *Constitutional Rights of the Accused* § 4:50 (3d ed. 1996) ("Numerous decisions by lower courts indicate that a search preceding an arrest is permissible if the two are substantially contemporaneous and if it is clear that the officer had probable cause to arrest prior to the search."). Thus, if an officer is "entitled to make an arrest on the basis of information then available to the officer, there is nothing unreasonable in the officer's conducting a search before, rather than after, the actual arrest." *People v. Barrientos*, 956 P.2d 634, 636 (Colo. App. 1997).

¶ 17 Whether an officer is entitled to make a warrantless arrest depends on an analysis of probable cause. *People v. Trusty*, 53 P.3d 668, 673 (Colo. App. 2001). And if an arrest is not supported by probable cause, then evidence obtained incident to that arrest must be suppressed. *King*, 16 P.3d at 813. Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to

support a reasonable belief that a crime has been or is being committed by the person arrested. *Id.*; *see also People v. Vaughn*, 2014 CO 71, ¶ 15. In determining whether there was probable cause to arrest, a court considers the totality of the circumstances known to the officer at the time of the arrest. *Trusty*, 53 P.3d at 673. Sufficient probable cause exists if the officer reasonably believed that the person arrested committed a crime. *Id.* When an identified citizen eyewitness provides police with information regarding a crime, "that information is presumed sufficiently reliable to establish probable cause for an arrest." *People v. Valencia*, 257 P.3d 1203, 1208 (Colo. App. 2011).

¶ 18 Here, based solely on the loss prevention officer's report that he observed Heaven concealing items in her purse and in another bag, Officer Schenk had probable cause to arrest Heaven and search her, incident to the lawful arrest, for the stolen items. *See Novitskiy*, ¶¶ 12, 19 (although information received from a citizen informant requires an analysis of the informant's basis of knowledge, such knowledge is typically not lacking when the informant is an eyewitness to the purported crime). That Officer Schenk's search preceded his formal arrest of Heaven is not determinative of the lawfulness of the search, where the two were substantially contemporaneous and probable cause to arrest was clear. *See id.* at ¶ 4, n.2; *Barrientos*, 856 P.2d at 636.

¶ 19 We are not persuaded otherwise by Heaven's assertion that "Officer Schenk did not have probable cause to search the purse because he had been told by the loss prevention officer that Heaven had abandoned the items she initially concealed in her purse."

The timing of when the loss prevention officer told Officer Schenk that he saw Heaven abandoning the items is not entirely clear from the record. But the record permits an inference that Officer Schenk did not know that Heaven had abandoned the items until after he searched her purse. In any event, even if Officer Schenk was informed that Heaven had abandoned the items before he searched her purse, he had probable cause to arrest her based on the loss prevention officer's observation that she had initially concealed them in her purse and bag. *See, e.g.*, *People v. Rosario*, 585 N.E.2d 766, 768 (N.Y. 1991) (holding that the "fellow officer" rule, under which police officers are entitled to rely on a communication from another officer and to act upon it when making an arrest, applies when the communication comes from a noncommissioned auxiliary officer). Therefore, he was permitted to search her purse as a search incident to arrest. *See People v. Bischofberger*, 724 P.2d 660, 665 (Colo. 1986) ("[A] search of the arrestee's person requires no independent justification, and the searching officer may seize and examine weapons, contraband, or other articles which the officer reasonably believes to be related to criminal activity even though these articles do not directly relate to the offense for which the arrest itself was effected."); *Rios*, 43 P.3d at 730 ("[A search incident to arrest] need not be limited to a mere pat-down of the arrestee's outer clothing, but may extend to pockets and other containers, open or closed, found on the person of the arrestee or within his or her immediate reach.").

¶ 20 We are not persuaded by Heaven's reliance on *People v. Lewis*, 975 P.2d 160, 170 (Colo. 1999). In

Lewis, the supreme court stated that "the right to conduct a search incident to arrest only applies following a *lawful* arrest." *Id.* (emphasis added). The use of the word "lawful" was critical to the analysis because the supreme court concluded that Lewis's arrest had been *unlawful*. So, because the arrest had been unlawful, the search incident to Lewis's arrest was likewise unlawful. Although defendant urges us to read more into *Lewis*—that, to be legal, a search incident to arrest can only occur after an arrest—we think that *Lewis* was clearly focused on how the illegality of the *arrest* affected the legality of the search, and not on whether the *order* of the arrest and the search had any effect on the legality of the search.

¶ 21 Turning to this case, it is clear that the arrest was lawful: the record clearly shows that Officer Schenk had probable cause to arrest defendant. *Lewis* therefore does not dictate a different result than the one we reach based on decisions such as *Novitskiy*, *Gothard*, *Rios*, and *Barrientos*.

¶ 22 Having concluded that the search of Heaven's purse was incident to a lawful arrest, we need not address Heaven's contention that a warrant was required before Officer Schenk could search a closed container in her possession. The proposition upon which Heaven relies applies to investigatory seizures, not arrests, and is not implicated when one of the well-delineated exceptions to the warrant requirement applies. *See United States v. Place*, 462 U.S. 696, 701 (1983); *see also Horton v. California*, 496 U.S. 128, 142 n.11 (1990) ("Even if the item is a container, its seizure does not compromise the interest in preserving the privacy of its contents because it may only be opened pursuant to either a search

warrant … or one of the well-delineated exceptions to the warrant requirement.”).

III. Conclusion

¶ 23 The judgment is affirmed.

JUDGE BERNARD and JUDGE RICHMAN concur.