SUPREME COURT NO. _____
COA NO. 72034-1-I

IN THE SUPREME COURT OF WASHINGTON 90678-5

STATE OF WASHINGTON,

Respondent,

v.

FRANK YOUELL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Frank Youell asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Youell requests review of the decision in State v. Frank Youell, Court of Appeals No. 72034-1-I (slip op. filed July 28, 2014), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether police seized Youell without a reasonable suspicion that he engaged in criminal activity, in violation of article I section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution?

2. Whether imposition of legal financial obligations in the absence of consideration of an ability to pay is a statutory sentencing error that may be raised for the first time on appeal?

D. STATEMENT OF THE CASE

The State charged Frank Youell with first degree unlawful possession of a firearm. CP 1. The defense moved to suppress evidence of the firearm, contending Youell was unconstitutionally seized and searched when encountered by police on the street. CP 14-24. Officer

Wolfe testified at a CrR 3.6 hearing. 1RP[1] 6-23. The trial court found his testimony credible. CP 39 (FF 9). The following facts are taken from his testimony.

Officers Wolfe and Meeds of the Tacoma Police Department were on patrol in a marked police car. 1RP 6-8. Both officers were in uniform. 1RP 8. Dispatch relayed a 911 caller's report that that she had been robbed at gunpoint by an unknown light skinned black or Indian male in the area of 56th and McKinley. 1RP 8-10. The female identified herself as Sheila Jones. 1RP 10. Jones reported the suspect was wearing a black puffy coat and gray pants.[2] 1RP 9, 21-22. The 911 call was disconnected. 1RP 8-9, 11.

At about 12:42 a.m., Officers Wolfe and Meeds arrived at 56th and McKinley but did not locate a possible suspect. 1RP 11-13. About five minutes later, they saw a man later identified as Youell walking at 52nd Street and McKinley Avenue. 1RP 11-12. The area was residential. 1RP 12-13. Officer Wolfe considered foot traffic in this area at that time of night to be "unusual." 1RP 13. The man was wearing a black coat and

[1] The verbatim report of proceedings is referenced as follows: 1RP – 12/11/12; 2RP – 4/4/13.

[2] Officer Wolfe initially testified that the suspect was reported to be wearing blue jeans, but it was later clarified the suspect was reported to be wearing gray pants. 1RP 9, 21-22.

blue jeans. 1RP 12. He appeared to be of possibly Native American descent. 1RP 12.

The two officers pulled up behind Youell in their marked patrol car and illuminated him with their spotlight. 1RP 12-13. The two officers got out of the car and asked him what he was doing. 1RP 14. Youell said he was "walking to the corner store at 56th and McKinley." 1RP 14. He also said the store was closed and so was walking over to 40th and McKinley where there was a 7/11 open. 1RP 14.

The officer asked for identification. 1RP 15. Youell complied. 1RP 15. Youell took hold of his identification and started writing infromation down in his notebook. 1RP 15. Officer Wolfe retained Youell's identification as Officer Meeds asked Youell what he was doing in the area. 1RP 15-16, 19. Officer Meeds told Youell why the officers were in the area. 1RP 19. Officer Meeds asked if he was willing to consent to a frisk. 1RP 19. Youell said "sure." 1RP 19.

Officer Meeds asked if he had any weapons on him. 1RP 20. Youell said no. 1RP 20. Officer Wolfe then began to frisk Youell. 1RP 20. Youell started looking around and weeping, saying "oh my god, oh my god." 1RP 20. Officer Wolfe interpreted this reaction as Youell trying to hide "something." 1RP 20. At this point the officer detained Youell in handcuffs. 1RP 20-21. Prior to that time, Officer Wolfe had not given

Youell any "orders." 1RP 23. Officer Meeds frisked Youell's beltline and found a firearm. 1RP 21.

The trial court denied Youell's motion to suppress, concluding police lawfully engaged Youell and had a reasonable suspicion of criminal activity by the time he was seized. CP 39-40. Following a bench trial on stipulated facts, the court found Youell guilty of unlawful possession of a firearm and imposed a 42 month sentence. CP 42-44, 50; 1RP 49. The court also imposed legal financial obligations as part of the judgment and sentence, including a $500 fee for court appointed counsel and defense costs. CP 48.

On appeal, Youell argued the investigative stop was unlawful and the firearm evidence should have been suppressed. Brief of Appellant (BOA) at 7-18; Reply Brief at 1-5. Youell also argued the sentencing judge improperly imposed legal financial obligations without considering Youell's ability to pay them. BOA at 19-21. The Court of Appeals affirmed. Slip op. at 1. It held a challenge to the legal financial obligations could not be raised for the first time on appeal. Slip op. at 12. It also held officers properly seized and frisked Youell based on a concern for officer safety. Slip op. at 9-10. Youell seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE POLICE UNLAWFULLY SEIZED YOUELL INVOLVES ISSUES OF SIGNIFICANT CONSTITUTIONAL LAW UNDER ARTICLE I, SECTION 7 AND THE FOURTH AMENDMENT.

What started out as a social contact turned into a seizure without reasonable suspicion that Youell had committed a crime. The Court of Appeals misapplied the law in failing to properly consider the cumulative effect of circumstances that turned a social encounter into a seizure.

Further, whether police had a well-founded suspicion to seize Youell depends on whether the 911 caller's tip possessed the requisite indicia of reliability. The same issue is currently before the Supreme Court in State v. Z.U.E. (No. 89894-4).[3]

Also, whether police had an individualized suspicion that Youell was the robber turns on whether a vague description of the suspect's race and a discrepancy in clothing was sufficient to stop Youell. This case raises an issue that has not received much attention in Washington courts:

[3] The "Supreme Court Issues" page describes the issue in Z.U.E. as follows: "Whether reports to police officers by several 911 callers relating an incident involving a man with a gun and describing the man and the car he had gotten into were sufficiently reliable to justify an investigatory stop of the car in which the defendant was riding." http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2014Sep (last accessed August 26, 2014).

at one point is a suspect description too general to sustain an investigative seizure of a particular individual?

A frisk, meanwhile, is unlawful when the initial seizure is unsupported by a well-founded suspicion that a person had engaged in criminal activity. The Court of Appeals misapplied the law by holding the frisk was justified without first determining whether the stop was justified.

For these reasons, this case raises significant questions of constitutional law. Review is warranted under RAP 13.4(b)(3).

a. Overview Of Terry Stop Exception To The Warrant Requirement.

As a general rule, a warrantless seizure is per se unlawful under both the Fourth Amendment and article I, section 7 unless it falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). "The Terry stop — a brief investigatory seizure — is one such exception to the warrant requirement." State v. Doughty, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010) (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

"A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct." Doughty, 170 Wn.2d at 62. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from

those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. A reasonable, articulable suspicion means that there "is a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "In reviewing the propriety of a Terry stop, a court evaluates the totality of the circumstances." State v. Snapp, 174 Wn.2d 177, 198, 275 P.3d 289 (2012).

b. The Court Of Appeals Failed To Properly Consider The Cumulative Effect Of Circumstances In Determining When The Seizure Occurred.

A seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) (quoting State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)). Significantly, "a series of police actions may meet constitutional muster when each action is viewed individually, but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively." Harrington, 167 Wn.2d at 663.

Notwithstanding Youell's argument that the seizure occurred when police asked him what he was doing, the Court of Appeals concluded the social contact ended and became an investigatory stop only when Youell responded to the question by answering he had come from 56th and

McKinley, the location of the recent armed robbery. Slip op. at 10. The Court of Appeals did not explain how Youell's answer, rather than the officer's question, turned the encounter into an investigatory stop. Between the time the question was asked and the answer given, police did not do anything else that would lead a reasonable person in Youell's situation to believe he was free to leave or decline a request due to an officer's display of authority.

The Court of Appeals misapplied the law by examining the totality of circumstances in isolation from one another to conclude Youell was not seized until he answered the question. Slip op. at 5-9. All the circumstances must be considered cumulatively in determining when a social encounter ripens into a seizure. Harrington, 167 Wn.2d at 663.

The Court of Appeals attempted to distinguish State v. Gantt on the ground that police in that case activated emergency lights before asking the defendant what he was doing. Slip op. at 8 (citing State v. Gantt, 163 Wn. App. 133, 135, 257 P.3d 682 (2011), review denied, 173 Wn.2d 1011, 268 P.3d 943 (2012)). Here, police illuminated Youell with a spotlight before asking him what he was doing. There is no meaningful difference between the two cases. The police did not, as described by the Court of Appeals, "*merely* [drive] up to where Youell was walking and exited their vehicle." Slip op. at 8 (emphasis added). Police fixed him with a spotlight

as they drove up to him. All the circumstances must be considered cumulatively in determining when a social encounter ripens into a seizure. Harrington, 167 Wn.2d at 663.

The Court of Appeals relied on State v. Young, which held a shined spotlight by itself does not constitute a seizure. Slip op. at 6-7 (citing State v. Young, 135 Wn.2d 498, 514, 957 P.2d 681 (1998)). But here, there are additional indicia of authority. The Court of Appeals did not take into account the presence of two officers, rather than one, added to the coercive atmosphere. The presence of more than one officer contributed to the display of authority. Harrington, 167 Wn.2d at 666. Also unlike Young, police asked Youell what he was doing. A mere social contact between a police officer and a citizen "does not suggest an investigative component." Harrington, 167 Wn.2d at 664.

Further, Officer Wolfe's retention of Youell's identification while Officer Meeds questioned Youell about what he was doing contributed to the circumstances supporting a seizure. 1RP 15-16, 19; see State v. Crane, 105 Wn. App. 301, 310-11, 19 P.3d 1100 (2001) (retaining suspect's identification to run warrants check constitutes seizure), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). The Court of Appeals brushed off this circumstance by stating Officer Wolfe "did not run a weapons check or otherwise use the identification to

investigate Youell." Slip op. at 9. The Court of Appeals did not explain how a reasonable person in Youell's situation would believe he was free to leave while police held his identification.

c. The Court Of Appeals Misapplied The Law By Holding The Frisk Was Justified Without First Determining Whether The Stop Was Justified by a Well Founded Suspicion.

According to the Court of Appeals, Youell's response that he had come from the location of the recent armed robbery "and his similarities to the description of the suspect in that robbery, are specific and articulable facts that made it reasonable for the officers to be concerned about a possible weapon and to frisk Youell." Slip op. at 10. The Court of Appeals relied on State v. Russell for the proposition that in "certain situations, a police officer may briefly frisk a person to search for weapons that might pose a risk to officer and bystander safety." Slip op. at 10 (quoting State v. Russell, __Wn.2d__, 330 P.3d 151, 153 (2014).

The Court of Appeals, however, misapplied the law. There was no challenge to the legitimacy of the original stop in Russell. Youell challenged the legitimacy of the original stop. That matters because the original stop must be justified in order for a subsequent frisk to be lawful. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (citing Adams v. Williams, 407 U.S.

143, 146, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, (1972)). The Court of Appeals misconstrued the law in treating the frisk as lawful merely because safety concerns were present. It misapplied the law in failing to address the threshold question of whether police had a well-founded suspicion that Youell had engaged in criminal activity before they frisked him.

d. The Court Of Appeals Failed To Address Whether The 911 Caller's Tip Possessed The Requisite Indicia Of Reliability To Support The Stop.

An informant's tip cannot provide the requisite "reasonable suspicion" for an investigatory detention unless it possesses sufficient "indicia of reliability." State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). The reliability of an informant's tip can be established if (1) the informant was reliable or (2) the officer's corroborative observation suggests either the presence of criminal activity or that the information was obtained in a reliable fashion. State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

The Court in Sieler held "[t]he reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable." Sieler, 95 Wn.2d at 48. Relying on Sieler, the Court of Appeals has held the absence of any information regarding a 911 caller

beyond basic identification precludes a finding of reliability. State v. Hopkins, 128 Wn. App. 855, 863-64, 117 P.2d 377 (2005) (name and cell phone number); see also State v. Z.U.E., 178 Wn. App. 769, 784, 315 P.3d 1158 (2014) (two 911 callers provided basic information: one provided his name, telephone number, and address and another provided her first name, cell phone number and location), review granted, (No. 89894-4).

The 911 caller in Youell's case gave her name and location, while her phone number appeared in the dispatch report. 1RP 8-10. The police did not know anything about the caller beyond this basic identification information. Under Sieler and Hopkins, the 911 caller's tip did not show the requisite indicia of reliability. The police therefore could not rely on it to justify the investigative seizure.

The United States Supreme Court recently held in a 5-4 opinion that the combination of an anonymous 911 caller's firsthand observation of a truck running her off the road, the contemporaneous timing of the call akin to an excited utterance or present sense impression, and the caller's use of the 911 emergency system amounted to sufficient indicia of the tip's reliability under the Fourth Amendment. Navarette v. California, __U.S.__, 134 S. Ct. 1683, 1688-90, 188 L. Ed. 2d 680 (2014). While tips in 911 calls are not per se reliable, the majority emphasized the 911 emergency system allows police to trace and identify callers, verify

important information about the caller, and record calls, which provides victims the opportunity to identify the false tipster's voice. Id. at 1689-90.

In dissent, Justice Scalia blasted the majority on this point: "assuming the Court is right about the ease of identifying 911 callers, it proves absolutely nothing in the present case unless the anonymous caller was aware of that fact. 'It is the tipster's belief in anonymity, not its reality, that will control his behavior.' There is no reason to believe that your average anonymous 911 tipster is aware that 911 callers are readily identifiable." Id. at 1694 (Scalia, J., dissenting) (internal citation omitted).

Again, the reliability of a 911 caller is an issue already pending before this Court in State v. Z.U.E. (No. 89894-4). Article I, section 7 provides greater protection than the Fourth Amendment. Harrington, 167 Wn.2d at 663. Youell's case presents the issue of whether the dissent's reasoning in Navarette is better suited to the heightened protection of private affairs under the Washington Constitution. In Youell's case, there is no indication that the 911 caller was aware that she could be traced and her calls recorded.

Independent police corroboration of the presence of criminal activity can supply the reasonable suspicion necessary to justify a Terry stop in the absence of reliable informant tips. Lesnick, 84 Wn.2d at 944. But confirming a subject's description or location or other innocuous facts

does not satisfy the corroboration requirement. Id. at 943 (the fact that informant accurately described the defendant's vehicle is not sufficient corroboration for a stop).

Police thought Youell's appearance was sufficiently similar to the vague description given by the 911 caller and they saw Youell four blocks away from the reported robbery scene. 1RP 11-12. Before conducting the investigative stop, however, police did not observe Youell with a gun or engaged in any illegal, dangerous, or suspicious activity. Police corroboration of the 911 caller's report is absent here. See State v. Hart, 66 Wn. App. 1, 9, 830 P.2d 696 (1992) (officer's observation of defendant confirming informant's description and defendant's location did not satisfy the corroboration requirement); Hopkins, 128 Wn. App. at 859, 865-66 (insufficient corroboration where officers observed a man who resembled the informant's description at the described location, but did not observe a gun or any illegal, dangerous, or suspicious activity). The officers were unable to independently corroborate the presence of actual or potential criminal activity.

e. The 911 Caller's Description Of The Robbery Suspect Is Too Vague To Support A Reasonable, Individualized Suspicion That Youell Was The Robber.

Even if the 911 caller's tip can be deemed reliable, the seizure was still unlawful because police did not have a reasonable, individualized

suspicion that Youell had committed the reported robbery. There must be a justified suspicion that "the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). "[This] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Cortez, 449 U.S. at 418 (quoting Terry, 392 U.S. at 21 n. 18).

The description given by the 911 caller is so general that it does not single out Youell in any meaningful sense. The 911 caller described the robber as a light skinned black or Indian male wearing a black puffy coat and gray pants. 1RP 8-10, 21-22. No other identifying information, such as height, build, facial features, or hair style of the person was provided. A light skin color is hardly a singular piece of information. A black jacket is not a distinct item of clothing. The trial court found that Youell only "possibly" appeared to be of Native American descent while remarking the description of the suspect's race was "a little vague." CP 38 (FF 4); 1RP 40. Youell wore blue jeans, not gray pants as reported by the caller. 1RP 9, 21-22. That discrepancy in clothing is significant given the vagueness of the suspect's description.

Even if Youell could fairly be said to "substantially match" the description, the description itself is so general that it does not give rise to

reasonable, individualized suspicion that Youell was the assailant. See United States v. Brown, 448 F.3d 239, 247-248 (3rd Cir. 2006) (description of robbery suspects as "African-American males between 15 and 20 years of age, wearing dark, hooded sweatshirts and running south on 22nd Street, where one male was 5'8" and the other was 6'" failed the Fourth Amendment's "demand for specificity" — "reasonable suspicion cannot be met by a description that paints with this broad of a brush.").

2. THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT ON WHETHER THE TRIAL COURT'S FAILURE TO FOLLOW A STATUTORY MANDATE IN IMPOSING LEGAL FINANCIAL OBLIGATIONS CAN BE CHALLENGED FOR THE FIRST TIME ON APPEAL

The trial court ordered Youell to pay a discretionary fee of $500 for a court-appointed attorney and defense costs as part of the judgment and sentence. CP 48. The court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The record does not reflect any such consideration here. CP 48; 2RP 11. The pre-printed, generic language in the judgment and sentence ability regarding ability to pay lacks support in the record. CP 47. The court in Youell's case failed to follow statutory mandate in imposing the legal financial obligations. While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). Boilerplate findings not supported by the record are inadequate. Bertrand, 165 Wn. App. at 404-05.

The Court of Appeals did not dispute that the trial court failed to consider Youell's ability to pay the discretionary cost, in derogation of RCW 10.01.160(3). Instead, the Court of Appeals held the issue could not be raised on appeal without an objection below. Slip op. at 12 (citing State v. Calvin, 176 Wn. App. 1, 25, 316 P.3d 496 (2013), review pending, No. 89518-0).[4]

Precedent, however, establishes the broad proposition that erroneous sentences may be challenged for the first time on appeal. State

[4] On February 5, 2014, the Supreme Court entered an order deferring consideration of the petition for review in Calvin pending a final decision in State v. Blazina (No. 89028-5).

v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996). Erroneous imposition of legal financial obligations without statutory authority falls within this established rule. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (challenge to untimely restitution order may be raised for first time on direct appeal)[5]; see also State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000) (challenge to the sentencing court's authority to impose drug fund contribution, which constitutes a legal financial obligation, reviewable for first time on appeal), review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001). Justification for the rule is that it tends to bring "sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Ford, 137 Wn.2d at 478.

The issue of whether the imposition of legal financial obligations without considering ability to pay may be challenged for the first time on appeal is already before this Court in State v. Blazina (No. 89028-5) and State v. Paige-Coulter (89109-5). Youell raises the same issue. Review is appropriate because this case presents a significant question of substantial public interest under RAP 13.4(b)(4). The Court of Appeals decision also

[5]Restitution is a legal financial obligation. RCW 9.94A.030(30).

conflicts with precedent from the Supreme Court and Court of Appeals under RAP 13.4(b)(1) and (2).

F. CONCLUSION

For the reasons stated above, Youell requests that this Court grant review.

DATED this 27th day of August 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FRANK EARL YOUELL, Appellant.	)	No. 72034-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 28, 2014

APPELWICK, J. — Youell appeals his conviction for unlawful possession of a firearm. He argues that the firearm was discovered pursuant to an unlawful seizure and should have been excluded. He also contends that the trial court erred when it found that he had the ability to pay legal financial obligations without inquiring into his individual circumstances. We affirm.

FACTS

On June 14, 2012, Tacoma police officers Zachery Wolfe and Tyler Meeds responded to a 911 call about an armed robbery at East 56th Street and McKinley Avenue. The caller said the perpetrator was a light-skinned African-American or Native American male in a black puffy coat and gray pants. When the officers arrived on scene, they were unable to locate the caller or a possible suspect.

The officers encountered Frank Youell walking at East 52nd Street and McKinley Avenue. It was around 12:42 a.m. Youell wore a black puffy coat and blue jeans and appeared to be of Native American descent. The officers drove up behind Youell and illuminated him with their spotlight. They then exited the car and approached Youell on foot.

The officers asked Youell what he was doing in the area. Youell responded that he was walking to the corner store at 56th and McKinley, that the store was closed, and that he was going to the 24 hour 7-Eleven on 40th and McKinley. The officers asked for Youell's identification, which Youell voluntarily provided. Officer Wolfe wrote down Youell's information in his notebook while Officer Meeds continued to speak with Youell. Officer Wolfe did not immediately return Youell's identification.

Officer Meeds asked Youell if he had any weapons and Youell responded that he did not. Officer Meeds also asked if Youell would consent to a frisk of his person, to which Youell said, "[S]ure." Youell then looked around, started to cry, and whispered, "[O]h my [G]od, oh my [G]od." This led the officers to suspect that Youell had a weapon, so they handcuffed Youell. Officer Meeds found a .38 caliber handgun in Youell's waistband. A records check showed that Youell was a convicted felon.

The State charged Youell with unlawful possession of a firearm in the first degree. Youell moved to suppress the firearm, arguing that the frisk and subsequent search were unlawful. The trial court denied his motion and found him guilty as charged.[1]

Youell appeals.

DISCUSSION

I. Unlawful Seizure

Youell argues that the trial court erred in denying his motion to suppress. He contends that the officers seized him without reasonable suspicion that he committed a crime. Therefore, he asserts, the firearm they discovered was the fruit of an unlawful

[1] Youell waived his right to a jury trial.

search and should have been excluded. He assigns error to several related findings of fact and conclusions of law.

When reviewing the trial court's denial of a motion to suppress, we ask whether substantial evidence supports the challenged findings of facts and whether the findings support the trial court's conclusions of law. State v. Gibson, 152 Wn. App. 945, 951, 219 P.3d 964 (2009). Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the finding's truth. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We do not assess witness credibility on appeal and instead defer to the trial court on those determinations. State v. Liden, 138 Wn. App. 110, 117, 156 P.3d 259 (2007). Unchallenged findings of fact become verities on appeal. Gibson, 152 Wn. App. at 951. We review conclusions of law de novo. State v. Hinton, 179 Wn.2d 862, 867, 319 P.3d 9 (2014).

A. Challenged Findings of Fact

Youell first assigns error to the trial court's finding that "foot traffic in this area at that time of night was minimal to nonexistent." Youell accurately notes that Officer Wolfe described foot traffic under those circumstances as "unusual"—not "minimal to nonexistent." But, while the trial court took liberties with its phrasing, the salient point here is that it would be uncommon to encounter a pedestrian in this residential area at 12:42 a.m. Because Officer Wolfe's testimony was the only evidence the court considered on this issue, we read the finding of fact to be consistent with his testimony.

Youell next challenges the finding that Youell "appeared to substantially match the suspect description." The 911 caller identified four characteristics about the robber: he

was male, either a light-skinned African-American or Native American, wore a black puffy coat, and wore gray pants. It is undisputed that Youell matched the first three characteristics. The only difference was that Youell's pants were blue, not gray. Though Youell was not an exact match, this was sufficient evidence that he substantially matched the suspect description.

Youell further challenges the finding that he told officers that he was "coming from a store at East 56th Street and McKinley Avenue (the location of the reported robbery)." (Emphasis added.) Youell argues that the testimony actually shows that he said he was walking to the store. Youell is correct that, according to Officer Wolfe's testimony, Youell "said that he is walking to the corner store at 56th and McKinley." However, Officer Wolfe continued that "[Youell] said that they were closed and that he was going to walk over to 40th and McKinley where there was a 7/11 that's open for 24 hours." When the officers encountered Youell, he was at 52nd and McKinley. The finding of fact is supported by the testimony.

Finally, Youell contests the finding that he said he was "just" coming from the location of the robbery. Youell points out that his statement to Officer Wolfe did not include a timeframe. However, the evidence supports the court's finding that Youell indicated he had just come from the location of the robbery. When the officers saw Youell, he was walking down the street four blocks away from the robbery location. The officers asked him what he was doing in the area. His response was that he was at 56th and McKinley and was now headed somewhere else. In other words, Youell was in motion, a short distance from the location of the robbery, and, when asked what he was presently

doing, said he was coming from that location. A rational, fair-minded person could be persuaded of the truth of the court's finding that Youell indicated to the officers that he "just" came from there.

There is substantial evidence to support the trial court's findings of fact.

B. Challenged Conclusions of Law

Youell assigns error to the trial court's conclusion that "the officers did not seize the defendant until they placed him in handcuffs. Prior to that, the officers had engaged the defendant in a voluntary and consensual social contract." Youell maintains that he was seized either when the officers asked him what he was doing or when they asked to frisk him.

A seizure occurs when, "'considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.'" State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) (quoting State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)). This is an objective standard that looks to the law enforcement officer's actions and asks whether a reasonable person in the individual's position would feel he or she was being detained. Id. If a reasonable person under the circumstances would not feel free to walk away, the encounter is not consensual. Id. at 663-64.

Youell asserts that, when the officers approached him, a combination of circumstances constituted a display of authority sufficient to constitute a seizure. Those circumstances are as follows: the officers used a spotlight to illuminate Youell; the officers

approached Youell in a vehicle while he was on foot; the officers were in uniform and drove a marked patrol car; and the officers asked Youell what he was doing.

Shining a spotlight on a defendant does not alone constitute a seizure. State v. Young, 135 Wn.2d 498, 514, 957 P.2d 681 (1998). In Young, the officer encountered the defendant around 9:40 p.m. in an area with a high level of narcotic activity. Id. at 501-02. After Deputy Sheriff Robert Carpenter observed Young acting suspiciously, he drove toward Young at a normal speed. See id. at 502. Young began to walk quickly toward some bushes. Id. at 503. Deputy Carpenter sped up and shone his spotlight on Young. Id. Deputy Carpenter saw Young toss a small object near a tree and quickly move away. Id. Deputy Carpenter exited his car and told Young to stop. Id. Deputy Carpenter retrieved the object, which appeared to contain crack cocaine. Id. He then arrested Young. Id.

The Washington Supreme Court found that Young was not seized when Deputy Carpenter illuminated him with the spotlight. See id. at 514. The court reasoned that shining a spotlight did not constitute a show of authority such that a reasonable person would not have felt free to leave. Id. at 513-14. The court held that "[m]ere illumination alone, without additional indicia of authority, does not violate the Washington Constitution." Id. at 514.

In United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the U.S. Supreme Court provided examples of additional indicia that may amount to a seizure. These included: the threatening presence of several officers; the display of a weapon by an officer; physical touching of the citizen's person; and the use

of language or tone of voice indicating that compliance with the officer's request might be compelled. Id. The Young court noted that such indicia of authority were absent in the case before it:

> [Officer Carpenter's actions did not] rise to the level of intrusiveness discussed in Mendenhall. Carpenter did not have his siren or emergency lights on. No weapon was drawn. The police car did not come screeching to a halt near Young. Young was on a public street in public view. The shining of the light on him revealed only what was already in plain view.

135 Wn.2d at 512-13.

Here, the examples from Mendenhall are likewise absent. Instead, Youell offers the following facts as indicia of authority: the officers asked Youell what he was doing; the officers were in uniforms and a marked police vehicle; and the officers approached in a car while Youell was on foot. However, none of these actions constitute a display of authority.

In State v. Armenta, the court recognized that not every encounter between an officer and a citizen constitutes a seizure. 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). An officer may engage a person in conversation in a public place and ask for identification without seizing that person. Id. at 11. The officer's questions need not be purely conversational. For example, in State v. Thorn, the court found that the defendant was not seized when an officer approached the defendant in a parking lot and asked, "Where is the pipe?" 129 Wn.2d 347, 349, 354, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). Here, the officers did not make a display of authority by approaching Youell on a public street and asking him what he was doing.

Nor did the officers' actions constitute a seizure by virtue of their uniforms and marked patrol car. As the Mendenhall court recognized, characterizing all street encounters between citizens and the police as seizures would be "wholly unrealistic." 446 U.S. at 554. To find that the officers displayed authority merely by displaying the insignia of their profession would elevate virtually all police interactions to seizures. This would likewise be unrealistic.

It would be similarly impractical to find that an officer displays authority to a pedestrian simply by approaching in a vehicle. In Young, the officer was in his patrol car when he approached the defendant, who was on foot. 135 Wn.2d at 503. The court noted that the officer did not have his siren or lights on, nor did he come to a screeching halt. Id. at 513. By contrast, in State v. Gantt, the court found that the defendant was seized when the officer activated his emergency lights before asking the defendant what he was doing. 163 Wn. App. 133, 141, 257 P.3d 682 (2011), review denied, 173 Wn.2d 1011, 268 P.3d 943 (2012). The lights were the crucial display of authority. Id.; see also State v. DeArman, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989). Here, the officers did not flash their lights, activate their siren, or screech to a halt. They merely drove up to where Youell was walking and exited their vehicle.

Young is instructive here. Youell was not seized when the officers approached him, shone a light on him, and asked what he was doing.

Instead, the encounter was initially a social contact. This contact included the officers' request for Youell's identification. See Armenta, 134 Wn.2d at 11 ("[A]sking for officers' identification does not, alone, raise the encounter to an investigative detention.").

Officer Wolfe decided not to immediately return Youell's identification in light of the reported robbery. But, he did not run a weapons check or otherwise use the identification to investigate Youell. Compare State v. Crane, 105 Wn. App. 301, 310, 19 P.3d 1100 (2001), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). He simply held the identification while he and his partner spoke with Youell.

Youell argues that the subsequent request to frisk, coupled with Officer Wolfe's retention of Youell's identification, constituted an intrusion substantial enough to seize him. He notes that "'[r]equesting to frisk is inconsistent with a mere social contact.'" (Quoting Harrington, 167 Wn.2d at 669.) In Harrington, an officer approached the defendant on the street and engaged him in conversation. Id. at 660-61. The officer noticed that Harrington was fidgety and kept putting his hands into his pockets, which bulged. Id. at 661. The officer asked Harrington to remove his hands from his pockets. Id. Another officer arrived. Id. The first officer then asked Harrington if he could frisk him. Id.

The Harrington court found that, while this encounter was initially a social contact, it subsequently rose to the level of a seizure. Id. at 662, 670. Together, the control of Harrington's behavior by asking him to remove his hands, the second officer's sudden arrival, and the request to frisk created a "progressive intrusion substantial enough to seize Harrington." See id. at 666, 667, 669-70.

Youell maintains that he was likewise seized when the officers asked to frisk him. He further challenges the trial court's conclusion that the officers had reasonable suspicion justifying his seizure and that the weapons frisk was lawful. But, in "certain

situations, a police officer may briefly frisk a person to search for weapons that might pose a risk to officer and bystander safety. When justified, these protective frisks do not violate the constitutional prohibition against unreasonable invasions of individual privacy." State v. Russell, No. 89253-9, 2014 WL 3537955, at *1 (Wash. July 10, 2014). In Russell, the frisk was justified because the officer could point to specific and articulable facts that supported his belief that Russell might be armed and dangerous. Id. at *3. The officer recognized Russell from an encounter a week earlier, when Russell had lied about possessing a weapon. Id. During this particular encounter, it was late at night and the officer was alone. Id. The court found that these circumstances amounted to a reasonable safety concern. Id.

Here, the social contact ended and became an investigatory stop when Youell answered that he had come from the location of the recent armed robbery. That fact, and his similarities to the description of the suspect in that robbery, are specific and articulable facts that made it reasonable for the officers to be concerned about a possible weapon and to frisk Youell. The request to frisk was a seizure under Harrington. But, the officers' request to frisk Youell was justified by safety concerns. So, even though Youell was seized when the officers asked to frisk him—rather than moments later when he was handcuffed, as the trial court concluded—the seizure was not unlawful and would not provide a basis to exclude the weapon. The trial court did not err in denying Youell's motion to suppress.

II. Legal Financial Obligations

RCW 10.01.160(3) requires that "[i]n determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." The trial court ordered Youell to pay $1,300 in legal financial obligations (LFOs). The court also entered a boilerplate finding stating that:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

Youell challenges this finding, alleging that the court did not actually consider his financial status.

Youell did not challenge the imposition of costs at trial. Issues not raised in the trial court generally may not be raised for the first time on appeal. RAP 2.5(a); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Our case law has recognized an exception for challenges to illegal or erroneous sentences. Id.

Here, it is important to distinguish between mandatory and discretionary LFOs. Youell's LFOs consisted of $500 of crime victim assessments, $200 for the criminal filing fee, $100 for the DNA database fee, and $500 of court costs. Crime victim assessments, DNA fees, and criminal filing fees are mandatory LFOs and the court lacks discretion to consider a defendant's ability to pay when imposing them. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). To the extent that the trial court imposed mandatory LFOs, Youell's sentence was not illegal or erroneous.

This leaves only the $500 in court costs. But, this item is discretionary. See State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). A defendant's failure to object to a discretionary determination at sentencing waives the right to challenge that determination on appeal. State v. Calvin, 176 Wn. App. 1, 25, 316 P.3d 496, 507 (2013). Youell's failure to object at trial precludes him from challenging the imposition of court costs for the first time on appeal. We decline to review this assignment of error.

The trial court properly denied Youell's motion to suppress.

We affirm.

WE CONCUR:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 72034-1-I
	)	
FRANK YOUELL,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF AUGUST 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FRANK YOUELL
DOC NO. 321976
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JANUARY 2014.

X Patrick Mayovsky

Sanders, Laurie

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