Supreme Court No.: 93472-0
Court of Appeals No.: 33598-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN BEWICK,

Petitioner.

PETITION FOR REVIEW

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

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Because the opinion below allows the extension of an investigative detention beyond its initial scope and for more than the time reasonably necessary to dispel suspicions, Bryan Bewick, petitioner here and appellant below, requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division Three, in *State v. Bewick*, No. 33598-4-III, filed July 7, 2016. A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review where the decision below allows officers to continue an investigative detention beyond the time reasonable to obtain information proving the individual seized was not the individual sought? RAP 13.4(b)(1), (3), (4).

2. Whether the Court should grant review where the police lacked a basis to conduct a warrantless seizure of Mr. Bewick who matched a general description of a wanted fugitive's description (white male of medium build around an apartment complex), but lacked similarity on all particular characteristics (red hair, large neck tattoo, blue eyes), and where he fled from the three approaching U.S. Marshals in a large vehicle, wearing protective gear? RAP 13.4(b)(1), (3), (4).

3. Whether the Court should grant review where the trial court imposed legal financial obligations (LFOs) without considering Mr. Bewick's ability to pay in conflict with *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015) and RCW 10.01.160? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

Three United States Marshals on the Violent Offender Task Force were looking for a fugitive named Brent Graham in Spokane Valley one afternoon. CP 27, 57. Mr. Graham was known to be a white male with red hair, blue eyes and a large tattoo on his neck. CP 6, 16. The officers also apparently believed Mr. Graham was average for height and weight, *compare* CP 12, 27 *with* CP 6, 14, and that he was staying in apartment 17 of an apartment building at 12114 E. Cataldo Ave. CP 27, 58 (finding 2).

In their brown GMC Tahoe sport utility vehicle and wearing protective tactical vests, the three Marshals positioned themselves so they could watch the stairwell leading to the upstairs apartments in the building. CP 27.

The Marshals saw a white man of medium build and a woman come down the apartment complex stairway. CP 14, 27, 58 (finding 3). The male had a "hoodie" over his head and sunglasses on his face. CP 27, 58 (finding 3).

As the man approached his vehicle, the officers pulled in behind him to check his identity and "see if he was in fact Graham." CP 12, 20, 27-28. The male "attempted to abscond on foot." CP 20. An officer yelled "stop, police" and the man was "subdued" after a short pursuit. CP 20, 28, 58 (finding 6). He was identified as Bryan D. Bewick and his date of birth was obtained. CP 58 (finding 6). Mr. Bewick has brown hair and brown eyes, in direct contrast with Brent Graham's red hair and blue eyes. CP 14, 16. Mr. Bewick also does not have a large neck tattoo like the fugitive Graham. CP 6. The officers then knew Mr. Bewick was not Brent Graham, the fugitive subject of the warrant. CP 6, 14, 16, 58.

Although Mr. Bewick clearly was not Mr. Graham, the officers continued to hold Mr. Bewick until they saw him "attempting to access or accessing" his front left pocket. CP 58 (finding 7). Believing the movement was an attempt to conceal or discard contraband, the officers questioned Mr. Bewick about it and he admitted to having drugs. CP 58 (findings 7, 8). The contraband was seized and Mr. Bewick was charged with possession of a controlled substance. CP 3, 58 (finding 8).

Before trial, Mr. Bewick moved to suppress the evidence. CP 6-23. The parties agreed as to the essential facts, but Mr. Bewick argued law enforcement did not have a lawful basis to seize him and that the scope of the seizure had been exceeded by the time the officers suspected

the contraband. CP 6-23, 29-31; 5/14/15 RP 3-6, 8-9. Denying the motion to suppress, the court found the facts supported a "seizure and detention of [Mr. Bewick] in order to determine his identity" and the subsequent furtive behavior justified further investigation. CP 59.

Mr. Bewick appealed after a stipulated facts bench trial, raising the suppression issues as well as the trial court's imposition of 800 dollars in LFOs. 6/1/15 RP 2-17; CP 36; 43-45, 63-68; Report as to Continued Indigency (filed 7/6/16). Division Three of the Court of Appeals affirmed in an unpublished opinion, holding the investigative detention was lawful at inception and the scope was not exceeded and declining to review the imposition of LFOs. Slip Op. at Appendix.

D. ARGUMENT

1. The Court should grant review to determine whether U.S. Marshals unconstitutionally continued the investigative detention of Mr. Bewick beyond the time reasonably necessary to dispel the officers' initial suspicions after it was clear Mr. Bewick was not the fugitive they initially suspected.

If the U.S. Marshals were authorized to detain Bryan Bewick without a warrant on suspicion he might be the fugitive Graham, they lost that authority when reasonable suspicion that Bewick was Graham was dispelled. *See State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). In the course of seizing Mr. Bewick, the officers would have learned he

did not have red hair, blue eyes, or a large neck tattoo. CP 14, 16, 58. At the inception of the seizure, Mr. Bewick was identified by name and date of birth. CP 58. By this time, the officers' initial suspicions had neither been confirmed nor further aroused. The detention should have ended. *Acrey*, 148 Wn.2d at 747; *Terry v. Ohio*, 392 U.S. 1, 20, 24-27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). But the lower courts held the officers could continue to detain Mr. Bewick, without a warrant, while they conducted a status check—essentially a fishing expedition—and recovered a baggie from his pocket. Slip Op. at 8-9; CP 59. Article I, section 7, the Fourth Amendment, and this Court's case law hold the officers' actions illegal. This Court should grant review and reverse.

A warrantless seizure is presumed unconstitutional unless the State proves it falls "within certain 'narrowly and jealously drawn exceptions to the warrant requirement.'" *State v. Arreola*, 176 Wn.2d 284, 292, 290 P.3d 983 (2012) (quoting *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007)). "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *Acrey*, 148 Wn.2d at 747. It is "clear" that a warrantless detention "must be temporary, lasting no longer than is

necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *State v. Williams*, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984) (quoting *Royer*, 460 U.S. at 500). The lawful duration of a warrantless seizure is determined by asking "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect]." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

According to the agreed facts, Mr. Bewick "was stopped by the officers after a short foot pursuit and identified as Brian D. Bewick with a date of birth of 05/07/86." CP 58 (finding 6). Further, the officers could see Mr. Bewick did not have red hair, blue eyes or a large neck tattoo, like the fugitive Graham. CP 50 (stipulation 2); CP 58 (finding 6); CP 6, 14. At this point the purpose of the stop had been effectuated. *See Royer*, 460 U.S. at 500. The officers had ascertained Mr. Bewick was not Brent Graham, the fugitive subject of the warrant. Where the officer has no hope of discovering information regarding the criminal activity initially suspected, continued detention is unreasonable and unlawful. *State v. Armenta*, 134 Wn.2d 1, 16, 948 P.2d 1280 (1997).

Law enforcement cannot prolong a detention while they gather additional evidence. *Williams*, 102 Wn.2d at 739. Yet here, the officers continued to seize Mr. Bewick after they had determined he was not the suspect they sought. CP 58 (findings 6-8); *see* CP 28 (officer's attestation that contraband was detected after Bewick's identity was known). After he was identified, Mr. Bewick "began accessing or attempting to access his left front pocket." CP 58 (finding 7). In response, the officers inquired of Mr. Bewick and searched his pockets. CP 58 (finding 8); *accord* CP 28 (contraband detected after identity was known). This was unrelated to the investigation they were conducting to find their fugitive suspect. *See Williams*, 102 Wn.2d at 740 (purpose of stop and basis for continuing detention must be related). Moreover, this further investigation and search occurred after the basis for the stop had been achieved and after the reasonable suspicion for a brief investigative detention ended.

The Court should grant review because the Court of Appeals opinion conflicts with this Court's case law and expands the constitutional authority to continue to detain individuals without a warrant and without reasonable suspicion.

2. The Court should also grant review to determine whether law enforcement's warrantless seizure of Mr. Bewick, a white male of medium build in an apartment building suspected to be occupied by a suspected fugitive, was warranted at its inception.

The Court should grant review to determine whether the police even had authority to detain Mr. Bewick in the first instance. For even a brief warrantless seizure to be permissible, an officer must have a reasonable and articulable suspicion that the person stopped is engaged in criminal conduct. *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010). To justify a *Terry* stop, the police officer must identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion. *Terry,* 392 U.S. at 21; *Armenta*, 134 Wn.2d at 10.

Suspicion of criminality must relate to the person seized or searched, not to the location where he is found. *See State v. Smith*, 102 Wn.2d 449, 452-53, 688 P.2d 146 (1984). An individual's presence in a high-crime area is insufficient to establish probable cause. *See State v. Crane*, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003); *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). Mere association with a person whom police have grounds to arrest also does not constitute a lawful basis for detention. *United States v. Di Re*, 332

U.S. 581, 587, 68 S. Ct. 222, 92 L. Ed. 210 (1948) (search of a car passenger unjustified when the driver was arrested). Likewise, the mere proximity to others suspected of criminal activity does not establish probable cause for a search of the associate. *Crane*, 105 Wn. App. at 312; *State v. Dorsey*, 40 Wn. App. 459, 466, 698 P.2d 1109 (1985) (probable cause based on association with others engaged in criminal activity requires an additional circumstance that reasonably implies knowledge of or participation in that activity).

Here, Mr. Bewick was a white male of medium build in the staircase of an apartment building associated with a suspected fugitive who was also a white male of medium build. Around one o'clock in the afternoon, Mr. Bewick exited from a stairwell associated with a number of apartments, including number 17. Apparently like the fugitive Mr. Graham, Mr. Bewick is white and of a medium build. *See* CP 14 (Bewick is 5'09' and weighs 140 pounds); CP 27 (Bewick's physical stature matched Graham's). This was all the officers could tell. CP 27. "This description [Caucasian of medium build] is so general that it fits a very large group of ordinary young men." *State v. Lee*, 97 Wis.2d 679, 685, 194 N.W.2d 547 (1980) (no reasonable, articulable suspicion to search "young, white male" in apartment where subject of warrant lived).

The officers could not have simply stopped anyone just because they happened to be near the apartment complex. *Smith*, 102 Wn.2d at 452-53 (general practice of frisking individuals in particularly dangerous area of the city is not justified by probable cause). Our constitution does not "authorize general, exploratory searches." *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 315, 178 P.3d 995 (2008).

Although Mr. Bewick fled when the three U.S. Marshals in tactical vests and a dark, full-size sport utility vehicle suddenly approached him, flight alone does not justify a seizure. *See* CP 28. "Startled reactions to seeing the police do not amount to reasonable suspicion." *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008). The act of absconding from approaching law enforcement can only justify a warrantless stop when combined with other individualized suspicion. *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) (suspect's leaving at the time a police cruiser arrives does not necessarily lead to the conclusion that it is reasonable to suspect the person of committing a crime); *State v. Graham*, 130 Wn.2d 711, 725-26, 927 P.2d 227 (1996) (finding probable cause when, in addition to ignoring officer's request to stop, the defendant quickly concealed an object in his pants pockets, looked nervous, and sweated profusely on a cold night); *State v. Hobart*, 24 Wn. App. 240, 243, 600 P.2d 660 (1979) (after officer asked if

defendant had cocaine in his pocket, defendant grabbed his pocket and turned away), *rev'd on other grounds*, 94 Wn.2d 437, 617 P.2d 429 (1980).

Mr. Bewick was a white male of medium build at an apartment complex in the middle of the day. The fact that he ran when approached by a dark GMC Tahoe with three U.S. Marshals wearing tactical vests, is hardly surprising, let alone indicative of criminal activity. *See State v. Bruton*, 66 Wn.2d 111, 401 P.2d 340 (1965) (to admit at trial, State must substantiate that "departure from the scene . . . was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution"). It is a reasonable assumption that Mr. Bewick turned and ran in panic or because he was scared. In light of the scant additional suspicion of criminal activity particularized to Mr. Bewick, his flight does not create a lawful basis for a seizure.

It is prohibited to "pyramid[] vague inference upon vague inference" to circumvent the warrant requirement. *Bruton*, 66 Wn.2d at 113. The Court should grant review and hold the police lacked individualized, reasonable suspicion that Mr. Bewick was engaged in criminal activity simply because he was a white male of medium build at a given apartment complex and turned and ran from U.S. Marshals in protective gear who sprang upon him. The police lacked individualized,

reasonable suspicion that Mr. Bewick was engaged in criminal activity on these simple facts. *State v. Z.U.E.*, 183 Wn.2d 610, 617-18, 352 P.3d 796 (2015) (state constitution requires stronger showing by state than federal constitution: "The available facts must substantiate more than a mere generalized suspicion that the person detained is 'up to no good'; the facts must connect the particular person to the particular crime that the officer seeks to investigate."). While the officers arguably could have continued to follow Mr. Bewick or engage in a consensual encounter to determine his identity, they did not have a reasonable, articulable basis to seize Mr. Bewick. *See Gatewood*, 163 Wn.2d at 541.

3. This Court should grant review to determine whether the ability to pay finding is a prerequisite to imposing court costs, a DNA fee and a victim assessment fee with interest accruing immediately.

At sentencing, the court imposed "fees and fines of $200 court costs; $500 to victim assessment; $100 DNA fee" and "a 12% interest rate that does start running today when that judgment is filed" despite costs not being due until August 1, 2016. 6/1/15 RP 16; CP 43-45. Yet, because Mr. Bewick was indigent, the court appointed counsel during the proceedings below. CP 62. And at sentencing, the court made Mr. Bewick aware he could appeal at public expense, days later signing an order of indigency for appeal, based on Mr. Bewick's declaration that he

was unemployed and entirely lacking in assets. 6/1/15 RP 18; CP 63-68. During this appeal, Mr. Bewick attested to his continued indigency. Report as to Continued Indigency (filed 7/6/16).

The trial court's findings reflect a boilerplate statement that Mr. Bewick has the ability or likely future ability to pay, but this finding was not discussed at sentencing. CP 40.

On appeal Mr. Bewick argued the imposition of these legal financial obligations without inquiring into Mr. Bewick's ability to pay was unlawful under the statutes and this Court's holding in *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Op. Br. at 17-24, 28-29. The Court of Appeals declined to review this issue. Slip Op. at 9. In the alternative, Mr. Bewick argued the statutes are unconstitutional if they allow the imposition of 800 dollars in costs plus interest without requiring the sentencing court to determine whether the defendant has the ability to pay those LFOs. Op. Br. at 24-28. Relying on *State v. Mathers*, 193 Wn. App. 913, __ P.3d __ (2016), Division Three summarily denied the constitutional claim. Slip Op. at 10. This Court should grant review because the lower court's opinion conflicts with *Blazina* and raises substantial issues of public import where the imposition of LFOs upon indigent defendants works a disservice on rehabilitation and affects an entire class of offenders. RAP 13.4(b)(1), (4).

The legislature mandates that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). This Court recently held "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *Blazina*, 182 Wn.2d at 830.

Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. Continuing LFO obligations cause background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Id.* at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h)

(convicted criminal defendants "shall be liable" for a $200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 712-13, 355 P.3d 1093 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[1]

[1] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

The Court should make clear that *Blazina* supersedes *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) to the extent they are inconsistent.[2] The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs.").

It would be particularly problematic to require indigent defendants like Mr. Bewick to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants. *Cf. Blazina*, 182 Wn.2d at 857 (noting significant disparities in administration of LFOs across counties). This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider

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[2] Almost 25 years ago, this Court apparently assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Curry*, 118 Wn.2d at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 183 Wn.2d at 712 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor").

General Rule 34, also supports consideration of ability to pay.[3] This Court has noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Jafar v. Webb*, 177 Wn.2d 520, 522-23, 527-30, 303 P.3d 1042 (2013). Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal cases.

To construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600

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[3] That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

(1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. *See Jafar,* 177 Wn.2d at 528-29; *Blazina*, 182 Wn.2d at 857.[4]

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller,* the Fourteenth Amendment is satisfied

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[4] The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar,* 177 Wn.2d at 528-29 (noting that "principles of due process or equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Bewick concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like him is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to pay was willful" and

not due to indigence. *Id.* at 241. This assumption was not borne out.[5]

These constitutional implications also warrant this Court's review. RAP 13.4(b)(3).

E. CONCLUSION

The Court should grant review because the lower courts' decisions inflate law enforcement's authority to conduct and continue warrantless seizures and because the imposition of LFOs plus interest against indigent defendants contravenes the courts' statutory authority, this Court's opinion in *Blazina*, and our constitutions.

DATED this 5th day of August, 2016.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

[5] *See, e.g.*, Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008), *available at* http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf; *Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).

APPENDIX

FILED
July 7, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 33598-4-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
BRYAN D. BEWICK,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, A.C.J. — Bryan Bewick appeals his conviction on two counts of possession of a controlled substance. He argues the trial court erred in denying his motion to suppress. He also argues the trial court erred in assessing mandatory legal financial obligations (LFOs) against him. Finding no error, we affirm.

FACTS

The State charged Mr. Bewick with two counts of possession of a controlled substance. Prior to trial, Mr. Bewick filed a motion to suppress. The motion appended written summaries of officer testimonies produced by the State in discovery. The parties indicated there were no questions of fact. Based on the written summaries, the trial court made the following findings of fact that are not contested on appeal:

On February 19, 2015, the United States Marshal's Violent Offender's Task Force was searching for a wanted person in the area of 12114 E. Cataldo Avenue in Spokane County. The subject being sought was a white male known as Brent Graham, known to be staying in apartment 17 at the above address.

The officers observed the defendant coming down a stairway from the general area of apartment 17. The defendant was wearing sunglasses and a hoodie covering his head. The officers could not discern the defendant's features beyond his physical stature and ethnicity.

The officers, who were wearing protective body armor with the word "POLICE" on the front, approached the defendant who was now getting into a vehicle with a white female. Upon seeing the officers, the defendant began running from the scene. The defendant was stopped after a short foot pursuit and identified as Bryan D. Bewick with a date of birth of May 7, 1986.

Mr. Bewick began accessing or attempting to access his left front pocket, which the officers determined, based on their training and experience, was furtive and appeared to be an attempt to discard or conceal contraband. When questioned about the behavior, Mr. Bewick admitted he had illicit drugs in his pocket. The officers then retrieved a baggie containing a white crystalline substance that had the appearance of

methamphetamine, and a vial containing what appeared to be black tar heroin. A field test confirmed the substances to be methamphetamine and heroin. A status check then revealed that Mr. Bewick was wanted on a warrant issued by the Washington State Department of Corrections. Mr. Bewick was arrested because of the warrant and his possession of illegal drugs.

From the above findings of fact, the trial court concluded the officers acted lawfully in determining if Mr. Bewick was the person they were looking for, and that Mr. Bewick's immediate flight was an additional circumstance that justified the seizure and detention to determine his identity. The trial court also concluded that Mr. Bewick's furtive behavior justified further investigation and checking for warrants once his identity was discovered. The trial court ultimately concluded that the officers' observations and reasonable conclusions rendered the stop and subsequent discovery of the contraband lawful.

Following a stipulated facts trial, the trial court found Mr. Bewick guilty of both counts of possession of a controlled substance. At sentencing, the trial court imposed LFOs in the form of a $500 victim assessment, a $200 criminal filing fee, and a $100 DNA[1] fee. Mr. Bewick timely appealed.

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[1] Deoxyribonucleic acid.

ANALYSIS

A. INITIAL DETENTION

Mr. Bewick first argues law enforcement did not have a reasonable, articulable suspicion to initially detain him. Because Mr. Bewick does not challenge any of the trial court's findings of fact, we review de novo whether the trial court derived proper conclusions of law from those findings. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Warrantless seizures are generally presumed to be unconstitutional. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The rule against warrantless seizures is subject to a few "jealously and carefully drawn exceptions." *Gatewood*, 163 Wn.2d at 539; *Coolidge*, 403 U.S. at 455. The burden is on the State to prove that an exception to the warrant requirement applies. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996); *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

One such exception is a *Terry*[2] stop. *Ladson*, 138 Wn.2d at 349. A *Terry* stop permits an officer to briefly detain and question a person reasonably suspected of criminal

[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

activity. *State v. Smith*, 102 Wn.2d 449, 452, 688 P.2d 146 (1984). A *Terry* stop is evaluated using a two-part inquiry, "'First, was the initial interference with the suspect's freedom of movement justified at its inception? Second, was it reasonably related *in scope* to the circumstances which justified the interference in the first place?'" *State v. Sweet*, 44 Wn. App. 226, 229, 721 P.2d 560 (1986) (quoting *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984)).

For the stop to be valid, the officer must have "'a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*.'" *Gatewood*, 163 Wn.2d at 539 (quoting *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (citing *Terry*, 392 U.S. at 21). The suspicion of criminality must be focused specifically on the individual seized, and not on the area in which the individual is found. *Smith*, 102 Wn.2d at 452-53; *Ybarra v. Illinois*, 444 U.S. 85, 90-91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979). When reviewing a *Terry* stop, a court must examine the totality of the circumstances presented to the investigating officers. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Here, the officers were searching for a wanted person, Mr. Graham, in the vicinity of 12114 East Cataldo Avenue in Spokane Valley. The officers knew Mr. Graham was staying in apartment 17. The only description the officers had of Mr. Graham was that he

was a white male of medium build. While surveilling the apartment, the officers observed Mr. Bewick coming down the stairs from the general area of apartment 17. Mr. Bewick was wearing a hoodie, with the hood up, and sunglasses. The officers could only discern that he was a white man of medium build, which matched Mr. Graham's physical characteristics. At that point, the officers decided to make contact with Mr. Bewick to determine if he was in fact Mr. Graham. The officers, wearing tactical vests with the word "POLICE" on them, approached Mr. Bewick to speak with him. When Mr. Bewick saw the officers approaching, he immediately fled. After Mr. Bewick began to flee, one of the officers shouted a verbal command for him to stop.

Mr. Bewick asserts he was seized when the officers approached him wearing tactical vests. However, at that point the officers were doing nothing more than trying to contact Mr. Bewick to identify him. Law enforcement officers are permitted to approach a citizen and ask for identification as part of a casual conversation. *State v. Bailey*, 154 Wn. App. 295, 300, 224 P.3d 852 (2010). Mr. Bewick fled before any conversation could be initiated. At that point, he was ordered to stop. Mr. Bewick was seized when one of the officers ordered him to stop. *See Sweet*, 44 Wn. App. at 230; *State v. Friederick*, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

Mr. Bewick's seizure was based on the following facts known to the officers:

(1) the officers were searching for a wanted person, Mr. Graham, in the vicinity of 12114 East Cataldo Avenue in Spokane Valley, (2) the officers knew Mr. Graham was staying in apartment 17, (3) Mr. Graham was a white man of medium build, (4) the officers saw Mr. Bewick coming down the stairs from the general area of apartment 17, (5) Mr. Bewick was wearing a hoodie, with the hood up, and sunglasses, and the officers could only discern that he was a white man of medium build, and (6) when Mr. Bewick saw the officers approaching him, he immediately fled.

Mr. Bewick argues that none of these facts are sufficient to justify a *Terry* stop. However, when reviewing a *Terry* stop, a court must examine the totality of the circumstances presented to the investigating officers. *Glover*, 116 Wn.2d at 514. It is true that facts such as an individual's presence in a high-crime area, or a vague description of a suspect do not, *on their own*, justify a *Terry* stop. *See, e.g., State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); *Smith*, 102 Wn.2d at 454. But the critical fact here is that Mr. Bewick fled as soon as he saw the officers. Mr. Bewick's flight from the officers, in addition to the fact he matched the vague physical description of Mr. Graham and was seen leaving the vicinity of Mr. Graham's apartment, gave the officers "a reasonable, articulable suspicion" that Mr. Bewick was Mr. Graham. *See Gatewood*, 163 Wn.2d at 539. We conclude the officers had a sufficient reasonable,

articulable suspicion to initially detain Mr. Bewick to determine whether he was Mr. Graham.

B. SCOPE AND PURPOSE OF LAWFUL *TERRY* STOP

Mr. Bewick next argues the officers exceeded the scope and purpose of a lawful *Terry* stop when they continued to detain him after they identified him.

A lawful *Terry* stop is limited in scope and duration to fulfilling the investigative purpose of the stop. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (citing *Williams*, 102 Wn.2d at 739-41); *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *Acrey*, 148 Wn.2d at 747. But, if the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged. *Id.* (citing *Williams*, 102 Wn.2d at 739-40).

Here, the scope and purpose of the *Terry* stop was to determine if Mr. Bewick was Mr. Graham. The trial court's findings imply that Mr. Bewick was identified prior to making any furtive movements. Nevertheless, Mr. Bewick's initial flight from the officers and refusal to obey an officer's command to stop justified the officers' cautious decision to perform a status check to assure that Mr. Bewick was not Mr. Graham.

Although dispatch eventually verified that Mr. Bewick's identification was accurate, this verification did not occur until after Mr. Bewick admitted to having the illegal drugs. We conclude that the officers did not exceed the lawful scope and purpose of the *Terry* stop when they performed a status check to verify that Mr. Bewick was not Mr. Graham.

C. IMPOSITION OF MANDATORY LFOS

For the first time on appeal, Mr. Bewick argues the trial court erred in imposing LFOs because (1) the court did not inquire into his ability to pay, and (2) the mandatory LFOs imposed on him violate substantive due process and equal protection. Mr. Bewick also argues the State should not be awarded appellate costs if it is the substantially prevailing party here. RAP 14.2.

a. The Blazina *ability to pay inquiry*

State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015) holds that appellate courts have discretion under RAP 2.5(a) whether to review unpreserved claims of LFO errors. We exercise our discretion and decline to review the claimed error here. This is largely because no statutory or decisional authority supports Mr. Bewick's argument, and his argument is contrary to *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) ("[F]or *mandatory* [LFOs], the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations.").

b. Constitutionality of mandatory LFOs

In addition to his general objection to the imposition of LFOs, Mr. Bewick argues that imposition of LFOs without an assessment of ability to pay violates his substantive due process rights and equal protection. These constitutional arguments fail for the reasons set forth in *State v. Mathers*, No. 47523-5-II, 2016 WL 2865576 (Wash. Ct. App. May 10, 2016).[3]

D. APPELLATE COSTS

Mr. Bewick asserts his indigency and requests this court to exercise its discretion and not award the State appellate costs should it prevail on appeal. The State did not respond or object to this request.

RAP 14.2 states, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." Mr. Bewick was declared indigent for the purposes of appeal. His motion to seek review at public expense indicates he does not have many assets. Because Mr. Bewick is likely still indigent and because the State did

[3] Mr. Bewick also asserts the disparate handling of criminal filing fees across Washington counties implicates the fundamental constitutional right to travel. However, he provides no support for his contention nor does he provide much in the way of reasoned legal argument. We therefore decline to consider his argument. *See* RAP 10.3(a)(6); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

not respond or object to Mr. Bewick's request, we decline to award appellate costs to the State.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Siddoway, J.

Pennell, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 33598-4-III
	)	
BRYAN BEWICK,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] BRYAN BEWICK 889137 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF AUGUST, 2016.

X_____

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