SUPREME COURT NO. 97762-3
COA NO. 36648-1-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRACEY KIMBERLY BAILEY,

Petitioner.

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

The Honorable Christine Schaller, Judge
The Honorable James J. Dixon, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Tracey Bailey asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Bailey requests review of the decision in State v. Tracey Kimberly Bailey, Court of Appeals No. 36648-1-III (slip op. filed September 10, 2019), attached as an appendix to the present petition.

C. ISSUE PRESENTED FOR REVIEW

Whether the police officer lacked reasonable suspicion to conduct an investigative detention for possible trespass, thereby violating petitioner's constitutional right to privacy and requiring suppression of the evidence obtained from the illegal seizure?

D. STATEMENT OF THE CASE

1. CrR 3.6 Suppression Hearing

After being charged with possession of a controlled substance, Tracey Bailey moved to suppress evidence obtained from a warrantless seizure initiated by police, arguing the officer's Terry [1] stop was unsupported by reasonable suspicion of criminal activity. CP 77-83; 84-93. The following evidence was produced at the CrR 3.6 hearing.

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

Deputy Esslinger of the Thurston County Sheriff's Office received a call-out at 1:39 a.m. regarding "an unwanted person." 1RP[2] 7-8. An address was provided. 1RP 8. In route to the location, Esslinger received information from dispatch for "the nature of the call, updated information from the conversation between the 911 call receiver and the person calling, which I believe was named David." 1RP 8. The caller made a comment that "she's back in the house." 1RP 9. One thing that stood out to Esslinger was that "when the person complained about the person who showed up that wasn't wanted there, they showed up via taxi and they had a mattress." 1RP 8. Esslinger was given a description: "the name of Tracey, black female, approximately five-ten and wearing a multi-colored sweater." 1RP 9. Dispatch relayed "he had allowed her to stay a few times but now . . . no longer wanted her there." 1RP 10. Also, "he had told the call receiver that she had once crawled in a window." 1RP 10. The last report was that the woman had left the property. 1RP 9.

As Esslinger drove to the address, he observed a person walking along the road that matched the description given by dispatch. 1RP 10-11. She was about .2 miles away from the address. 1RP 15-16. Esslinger stopped his vehicle and made contact. 1RP 11. He was at minimum

[2] Citation to the verbatim report of proceedings is as follows: 1RP - 8/14/17; 2RP - 1/29/18, 1/30/18; 3RP - 3/20/18.

investigating a trespass when he stopped the woman. 1RP 22. He was also "concerned about domestic disturbance issues and possibly burglary." 1RP 22. There was no indication that there was any violence involved. 1RP 14, 22-23.

The headlights and rear amber lights of the patrol vehicle were on. 1RP 12, 17. He did not remember if he pulled in front of her or behind her. 1RP 17. He was in uniform. 1RP 13. He got out of his vehicle and, instead of walking up to her, "had her come over to me." 1RP 18. He said "Tracey, come here." 1RP 18. He asked if her name was Tracey. 1RP 11. She said "yes." 1RP 11. He asked for identification. 1RP 12.

He continued talking in an effort identify her and received more information. 1RP 18, 20. After getting her name, Esslinger went back to his vehicle and entered the information into his computer, which showed two arrest warrants. 1RP 13. Esslinger had Bailey stand in front of the patrol vehicle while he attempted to confirm the warrants. 1RP 20-21. She was illuminated by the headlights. 1RP 21. Deputy Rose arrived on the scene. 1RP 13, 20. Esslinger arrested Bailey. 1RP 14. Deputy Rose later contacted "David" and learned no crime was committed. 1RP 23-24.

The State acknowledged the deputy conducted a Terry stop but claimed the deputy had reasonable suspicion for it. 1RP 27-29, 34-35. The trial court denied the motion to suppress, concluding the deputy had

reasonable suspicion to stop Bailey for committing criminal trespass. 1RP 38; CP 105-06.

2. Trial

At trial, the deputy testified that during a search incident to arrest, he found a small zip-lock bag containing a white powder, which was folded within some paper currency. 2RP 70. A crime lab analyst identified the substance as methamphetamine. 2RP 133-34. Bailey testified that she did not know the substance was in her possession. 2RP 170-71. The jury returned a verdict of guilty. CP 40.

3. Appeal

On appeal, Bailey argued the warrantless seizure violated her constitutional right to privacy because it was unsupported by reasonable suspicion of criminal activity, requiring suppression of the evidence. The Court of Appeals held the officer had reasonable suspicion. Slip op. at 1. In reaching that holding, the Court of Appeals made its own findings of fact regarding the reliability of the 911 caller. Slip op. at 15. The Court of Appeals did not believe its review was limited to whether the trial court's findings of fact supported its conclusions of law. Slip op. at 10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT AND WHETHER REASONABLE SUSPICION SUPPORTS THE WARRANTLESS SEIZURE PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW FOR REVIEW.

The specific and articulable facts known to the deputy, as measured by the trial court's factual findings, do not establish a reasonable suspicion that Bailey had engaged in criminal activity. In concluding otherwise, the Court of Appeals decision conflicts with published decisions showing the appellate court, in reviewing a suppression ruling, cannot go beyond the trial court's findings to uphold a search or seizure. For this reason, review is warranted under RAP 13.4(b)(2). Further, whether U.S. Supreme Court precedent justified the warrantless seizure in this case, as held by the Court of Appeals, presents a significant question of constitutional law warranting review under RAP 13.4(b)(3).

a. To be lawful, an investigative detention must be based on specific and articulable facts supporting a reasonable suspicion of criminal activity.

The Court of Appeals did not disturb the State's concession that the deputy's encounter with Bailey amounted to a Terry stop. Slip op. at 6; 1RP 27, 30-31. 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).

"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 a challenge to the validity of a Terry stop, article I, section 7 generally tracks the Fourth Amendment analysis." State v. Z.U.E., 183 Wn.2d 610, 617, 352 P.3d 796 (2015). "However, because article I, section 7 provides for broader privacy protections than the Fourth Amendment, our state constitution generally requires a stronger showing by the State." Id. at 218. "The State must show by clear and convincing evidence that the Terry stop was justified." Doughty, 170 Wn.2d at 62.

b. The Court of Appeals found its own facts to supplement the facts found by the trial court and justify the detention, in contradiction to precedent.

"When the State successfully resists a motion to suppress, it is obligated to procure findings of fact and conclusions of law that, *standing on their own,* will withstand appellate scrutiny." State v. Watson, 56 Wn. App. 665, 666, 784 P.2d 1294, review denied, 114 Wn.2d 1028, 793 P.2d 974 (1990) (citing State v. Poirier, 34 Wn. App. 839, 841, 664 P.2d 7 (1983)); accord State v. Young, 86 Wn. App. 194, 203, 935 P.2d 1372 (1997), aff'd, 135 Wn.2d 498, 957 P.2d 681 (1998).

Even where "the evidence adduced at the suppression hearing arguably would support different and stronger findings . . . we must accept the facts as reflected in the findings prepared by the State and entered by the suppression judge." Poirier, 34 Wn. App. at 840-41. "Where a defendant contends evidence was taken in violation of his constitutional rights, and makes an appropriate challenge to the suppression court's findings . . . we are required to look behind the formal findings. When, however, the facts found do not support the conclusion to suppress, it is the state not the defendant who would seek to expand or enlarge upon its own product." Id. at 841.

The Court of Appeals discarded this precedent in a single paragraph without citation to any contrary authority. Slip op. at 10. It

dispensed with the principle established in the above case law by stating that Poirier cited to CrR 3.6 and "CrR 3.6, assuming it once did, no longer supports this principle. The 1983 version of the criminal rules might have contained the proposition. But, by 1984, CrR 3.6 did not support the statement, nor has any version of the rule since supported the principle." Slip op. at 10. This is a curious statement. First, it shows the Court of Appeals did not bother to find out what the 1983 version of the rule actually stated. Second, it betrays a woeful misunderstanding of the role of the appellate court in this context.

As for the rule, the 1983 version of CrR 3.6 required the trial court to enter findings of fact and conclusions of law following a hearing.[3] The current version CrR 3.6, as amended in 1997, retains the findings and conclusions requirement but also subjects the movant to certain procedural requirements.[4] The requirement that the court enter findings of fact has remained unchanged since its inception.

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[3] Former CrR 3.6 (1978) provides: "At the conclusion of a hearing, upon a motion to suppress physical, oral or identification evidence the trial court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) the court's findings as to the disputed facts; and (4) the court's reason for the admissibility or inadmissibility of the evidence sought to be suppressed."

[4] CrR 3.6 (1997) provides: "(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a

As for the substance of the rule, it accords with basic principles of appellate review that undeniably operate today. "When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). And when there is no challenge to factual findings, review is simply "limited to a de novo determination of 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).

The appellate court does not independently evaluate the facts. State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994). For example, "an appellate court does not independently evaluate the testimony to embellish the findings." State v. Reid, 98 Wn. App. 152, 157, 988 P.2d 1038 (1999). Rather, "[t]he function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must

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memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.
(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law."

defer to the factual findings made by the trier-of-fact." Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041, 233 P.3d 888 (2010). This has been a bedrock rule of appellate review for at least 60 years. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959).

Yet the Court of Appeals in Bailey's case felt free to go beyond the trial court's findings of fact made by the trial court. The Court of Appeals found its own facts in holding the 911 caller was sufficiently reliable: "Although not contained in the court's findings, substantial evidence in the record supports the conclusion that the caller was an eyewitness." Slip op. at 15. The Court of Appeals decision, in repudiating the Poirier line of cases and making its own factual findings, conflicts with that precedent and cannot be reconciled with basic principles of appellate review.

c. The specific and articulable facts known to the officer do not amount to reasonable suspicion that Bailey had engaged in criminal activity.

"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." Z.U.E., 183 Wn.2d at 618 (quoting State v. Bliss, 153 Wn. App. 197, 204, 222 P.3d 107 (2009)). The trial court concluded the deputy had reasonable suspicion that Bailey committed criminal trespass.

CP 106. The Court of Appeals agreed the trial court's factual finding that the reporting party "had asked Tracy to leave" is unsupported by substantial evidence. Slip op. at 9; CP 105 (FF 2). The remaining findings do not support the conclusion that Deputy Esslinger had reasonable suspicion.

A person is guilty of criminal trespass if he or she knowingly enters or remains unlawfully in a building or on other premises. RCW 9A.52.070(1); RCW 9A.52.080(1). "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010.

The deputy knew "Tracey" was "unwanted" and she had returned to the house. CP 105 (FF 2). Without being told to leave, and without any other finding showing that Bailey knew she did not have permission to be inside the house, there is no evidence that she knowingly entered or remained unlawfully. Bailey had entered through a window in the past (CP 105) but did not on the night in question, so the mode of entry cannot be used to support an inference that she did not have permission to be there.

But even if the above facts can be interpreted to show a reasonable suspicion of trespass, they do so only if the 911 caller's tip relaying those facts is deemed reliable. "When an officer bases his or her suspicion on an informant's tip, the State must show that the tip bears some 'indicia of

reliability' under the totality of the circumstances." Z.U.E., 183 Wn.2d at 618. The trial court did not find the 911 caller was reliable. The trial court did not find the caller was an eyewitness to the events described. Nor did the trial court find the 911 caller identified himself or that the deputy knew the caller from prior experience.

"While known citizen informants are generally presumed to be reliable, the same presumption is not available to anonymous informants." State v. Saggers, 182 Wn. App. 832, 840, 332 P.3d 1034 (2014). In State v. Lesnick, 84 Wn.2d 940, 941, 530 P.2d 243 (1975), for example, the Supreme Court held an anonymous tip alleging that the defendant was attempting to sell illegal gambling "punchboards" out of his van did not justify stopping the van because the tipster did not identify himself and did not provide any information as to the source of his knowledge.

The court's findings here do not show the 911 caller made his identity known. Nor did the deputy have any information as to the source of the caller's knowledge. Officers may not presume an informant's tip is an eyewitness account. State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784, review denied, 120 Wn.2d 1018, 844 P.2d 436 (1992). The findings do not establish the 911 caller was an eyewitness to the described behavior. The findings do not show how the caller acquired the information that the person was unwanted and had returned to the house.

The Court of Appeals, however, determined Deputy Esslinger "did not merely presume David Brown to be an eyewitness," finding its own facts to arrive at this conclusion: "Although not contained in the court's findings, substantial evidence in the record supports the conclusion that the caller was an eyewitness. While on the phone with 911, David Brown stated that Bailey had left the premises. The dispatcher continued to gather information when the caller commented that Tracey was 'back in the house.' RP (Aug. 14, 2017) at 9. *The caller could not know whether Bailey had returned to the house unless he was an eyewitness who was present to see Bailey reappear*. The information supplied by the caller showed an ongoing view of activity." Slip op. at 15 (emphasis added).

The Court of Appeals holding on reliability is undermined by its reliance on facts not found by the trial court, in contravention to the Poirier line of cases and the unassailable principle that appellate courts are not factfinders. But even if the Court of Appeals could legitimately supplement the trial court's facts with its own facts, its reasoning is infirm.

An anonymous informant can make up anything, including a false description of an eyewitness account. An unreliable tipster is just as capable of creating or relaying a fabricated report that the person returned to the house. The tipster's basis of knowledge must be established. Vandover, 63 Wn. App. at 755-56, 759-60. After all, "[i]t makes no sense

to require some 'indicia of reliability' that the informer is personally reliable but nothing at all concerning the source of his information, considering that one possible source would be another person who was totally unreliable." Id. at 759 (quoting 3 W. LaFave, Search and Seizure § 9.3(e) at 481 (1987)). A caller may provide any number of details that could be based on someone else's hearsay or someone else's fabrication. "[E]stablishing the basis for the informant's knowledge is vital in establishing the reliability of the tip on which the reasonableness of the investigatory stop depends." Id.

In Vandover, police responded to a radio report that "a man in a gold colored Maverick was brandishing a sawed-off shotgun" in front of a restaurant in downtown Port Angeles. Id. at 755. The report was based on an anonymous telephone tip. Id. "The record did not indicate whether the informant's tip was based on an eyewitness account." Id. Police located the vehicle in question and, following a traffic stop, discovered cocaine in the vehicle. Id. at 756. In the absence of corroborating police observation of criminal activity, there was no reasonable suspicion to justify the investigative detention. Id. at 759-60.

As in Vandover, the record in Bailey's case does not show the basis of the reporting party's information that the female was unwanted and had returned to the house. The evidence does not show the caller was an

eyewitness to the event described. The basis of knowledge is not established in this case, which undercuts the reliability of the caller's report. An unreliable caller can just as easily claim that a person is returning to a house without personally witnessing the event as someone can claim a man was brandishing a shotgun, as in Vandover.

The deputy testified that the 911 caller gave his name as "David." 1RP 8. Even where an unknown but named telephone informant is deemed adequately reliable, "this reliability by itself generally does not justify an investigatory detention." State v. Sieler, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980). "[T]he State generally should not be allowed to detain and question an individual based on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention." Id. "Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made." Id.

Sieler recognized "[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." Id. The fact that the reporting party in Bailey's case is a

911 caller does not automatically turn him into a reliable informant. This Court's decision in Z.U.E. makes the point clear, where police lacked reasonable suspicion based on a 911 call where the caller's basis of knowledge was not established. Z.U.E., 183 Wn.2d at 622-23.

Bailey's case is different from Navarette v. California, 572 U.S. 393, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), a Fourth Amendment case relied on by the Court of Appeals. In Navarette, the caller's report that the defendant's pickup truck ran her off the road was sufficient to support a stop of the suspected drunk driver. Id. at 404. The Court of Appeals concluded "[a]ll of the Navarette v. California factors blanket David Brown's call to emergency dispatch," identifying the factors as "the caller was an eyewitness, she made the report contemporaneously to the incident, and she called the emergency 911 line, making her accountable for the provided information since police can trace those calls." Slip op. at 15-16.

Even assuming the caller in Bailey's case could be determined to be an eyewitness, the Court of Appeals overlooked the critical feature of Navarette that distinguishes it from Bailey's case. The officer in Navarette did not need to corroborate the caller's allegations prior to pulling over the truck because, as a matter of policy, officers should not be required to use less intrusive means to investigate a possible drunk driver: "allowing a drunk driver a second chance for dangerous conduct could have disastrous

consequences." Navarette, 572 U.S. at 404. "[O]fficers must be afforded some leeway; when a tip involves a serious crime or potential danger, less reliability may be required for a stop than is required in other circumstances." Z.U.E., 183 Wn.2d at 623. The Z.U.E. court interpreted "the United States Supreme Court's decision in Navarette — that a single anonymous 911 call may justify pulling over a reported drunk driver — as largely turning on this factor." Id. at 624.

That crucial factor is missing from Bailey's case, which the Court of Appeals ignored. The deputy was investigating whether Bailey committed a trespass based on conduct that had already occurred before he conducted the stop. The deputy knew she had already left the property, having encountered her walking .2 miles away from the address. CP 105 (FF 3); 1RP 9. The alleged trespass was over and done before the deputy initiated the seizure. Trespass is not a serious or violent crime. The deputy admitted there was no indication that this person was violent. 1RP 14. There was no ongoing imminent threat based on specific, articulable facts that calls for a weakened standard of reasonable suspicion. See Z.U.E., 183 Wn.2d at 624 (officers had no reason to suspect that the female suspect posed any kind of threat to the public because she reportedly disarmed herself by handing off the gun and there was no

indication that the seized car posed a threat to others). There never was such a threat.

It is the State's burden to produce and prove the facts showing an exception to the warrant requirement exists. Doughty, 170 Wn.2d at 62; State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008). In Bailey's case, the caller did not offer factual support for the assertion that the person was unwanted and had returned to the house. The key question, which this record does not answer, is how the caller acquired this knowledge. Did the caller personally see the female show up and observe her try to enter? Or did the caller rely on someone else's report of what was going on? It cannot be ascertained how the caller knew about the female's actions. The caller made a conclusory allegation that the female was "unwanted" without providing a factual basis for the conclusion. Without circumstances showing reliability or corroborative observation, a conclusory assertion that a certain individual is engaged in criminal activity does not provide reasonable suspicion to stop the individual. Lesnick, 84 Wn.2d at 944.

Independent police corroboration may create reasonable suspicion where it would not otherwise exist. Z.U.E., 183 Wn.2d at 623. The Court of Appeals did not dispute there was no corroboration in this case, content to rely, mistakenly, on its conclusion that the tip was reliable. Based on

the totality of circumstances, including the tip, the deputy did not have reasonable suspicion to believe Bailey was involved in criminal activity. Her seizure was therefore unlawful.

d. The evidence gathered because of the unlawful stop must be suppressed, requiring reversal of the conviction.

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Evidence derived from an unlawful search or seizure must be suppressed under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Here, the unlawful seizure — Bailey's coerced continued presence — led to the discovery of the methamphetamine. See State v. Ellwood, 52 Wn. App. 70, 71-72, 74-75, 757 P.2d 547 (1988) (where police conducted unlawful investigatory stop, evidence found after arresting the person for a subsequently discovered warrant was excluded as tainted by initial seizure); State v. Rife, 133 Wn.2d 140, 142, 148-51, 943 P.2d 266 (1997) (where police illegally seized a person to run a warrants check, evidence discovered during search incident to arrest for outstanding warrant needed to be suppressed).

Without the methamphetamine uncovered as a result of the illegal seizure, there is no remaining evidence to support the conviction. For this

reason, the conviction must be reversed and the charge dismissed with prejudice. See State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for unlawful possession conviction where motion to suppress evidence of cocaine should have been granted).

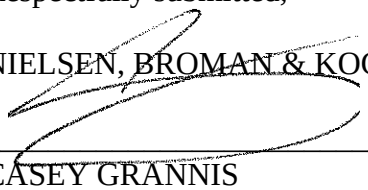
F. CONCLUSION

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

DATED this 10th day of October 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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CASE # 366481
State of Washington, Respondent v. Tracey K. Bailey, Appellant
THURSTON COUNTY SUPERIOR COURT No. 141010048

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

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

STATE OF WASHINGTON, Respondent, v. TRACEY KIMBERLY BAILEY, Appellant.	)))))))))	No. 36648-1-III UNPUBLISHED OPINION

FEARING, J. — We review a common question of whether a law enforcement officer possessed reasonable articulable suspicion when conducting a *Terry* stop. We hold the officer had reasonable suspicion and affirm appellant Tracey Bailey's conviction. We remand for correction of her offender score and the striking of some legal financial obligations.

FACTS

Since Tracey Bailey challenges her seizure by a law enforcement officer, we garner our facts from a motion to suppress hearing. On June 29, 2014, at 1:30 a.m., David Brown called Thurston County's 911 service to report an unwanted person at his

home. Brown identified his address. Emergency dispatch immediately sent Thurston County Sheriff Deputy James Esslinger to Brown's residence. Brown continued to speak to dispatch, and dispatch forwarded the information to Deputy Esslinger.

David Brown reported to emergency dispatch that a black female named Tracey, approximately five foot ten inches and wearing a multi-colored sweater, arrived, with mattress in hand, at his residence via taxi. Brown added that he had earlier allowed Tracey to stay at his residence, but that she was no longer welcome. Brown then reported that Tracey had left the vicinity, but soon thereafter commented that "she's back in the house." Report of Proceedings (RP) (Aug. 14, 2017) at 9. Brown also claimed that Tracey had once crawled in a window to gain access to the residence. Brown never suggested that Tracey was violent.

Deputy James Esslinger last heard that Tracey had left the property by foot. As he proceeded, he deemed himself investigating a trespass and perhaps a domestic violence incident or a burglary. He sometimes delivers trespass warnings to citizens.

Two-tenths of a mile from David Brown's residence, Deputy James Esslinger observed a person, matching the description Brown gave to dispatch, walking along the road. The road lacked sidewalks but maintained dirt shoulders. Deputy Esslinger stopped his vehicle. He does not remember if he stopped in front of the woman or behind her. The deputy's front headlights shined. Deputy Esslinger stepped from his patrol car

and asked the woman: "Are you Tracey?" RP (Aug. 14, 2017) at 18. The woman replied affirmatively, so Esslinger asked her to come to him.

When Tracey approached Deputy James Esslinger, he asked her for identification. Tracey indicated she lacked any identification. She volunteered her full name, Tracey Bailey, and date of birth. Deputy Esslinger returned to his patrol car, and he entered the information Bailey provided into his computer. Bailey remained illuminated by the car's headlights, as she stood in front of the patrol vehicle, such that she kept within Esslinger's line of sight. Deputy James Esslinger did not then place Bailey in handcuffs nor otherwise restrain her freedom of movement. Esslinger had not directed Bailey to remain in front of the car or told her she could not leave.

Deputy James Esslinger's computer search revealed two outstanding warrants for Tracey Bailey. Deputy Esslinger asked dispatch to confirm the warrants. He then exited his car and spoke again to Bailey.

Thurston County Sheriff Deputy Micah Rose responded to the scene while Deputy James Esslinger waited for confirmation from dispatch of the arrest warrants. Dispatch confirmed one of the warrants, so Deputy Esslinger placed Tracey Bailey under arrest. Esslinger searched Bailey's person incident to the arrest. In Bailey's right rear pants pocket, Deputy Esslinger found wadded bills, inside which lay a small Ziploc "baggie"

containing a white powdery substance. A crime lab analyst later identified the substance as methamphetamine.

Deputy James Esslinger asked Deputy Micah Rose to travel to the reported address, speak with David Brown, and ascertain whether a trespass occurred. The sheriff deputies later concluded that Tracey Bailey had not committed a crime against Brown.

PROCEDURE

The State of Washington charged Tracey Bailey with unlawful possession of a controlled substance, methamphetamine. The State brought no charges for trespass. Bailey moved the court to suppress the evidence recovered from her seizure by Deputy James Esslinger and to dismiss the charge of unlawful possession of a controlled substance.

At the suppression motion hearing, the State asserted that Deputy James Esslinger conducted a *Terry* stop, rather than a community caretaking encounter. The parties disagreed on whether reasonable suspicion supported the *Terry* stop. The trial court concluded that Deputy Esslinger held reasonable suspicion to contact Tracey Bailey and denied the motions to suppress and dismiss.

In response to the motion to suppress, the superior court entered findings of fact under CrR 3.6. One finding reads:

> 2. On June 29, 2014, dispatch received a 911 call to report an unwanted person in the 5600 block of Old Highway 410. Dispatch reported the unwanted person an African-American female, 5 foot, 10 inches, named "Tracey," and wearing a multi-colored sweater. The report was that she had arrived at the reporting party's house via a taxi, carrying a mattress. *The reporting party stated he had asked Tracy [sic] to leave,* then after she had left, she returned. The reporting party also stated, she had entered his house via a window in the past.

Clerk's Papers (CP) at 105 (emphasis added).

At trial, Tracey Bailey testified that she did not know she possessed the methamphetamine. The trial court instructed the jury on the defense of unwitting possession. The jury found Bailey guilty.

Based on an offender score of eight, the trial court sentenced Tracey Bailey to a standard range sentence of sixteen months' confinement. The sentencing court imposed legal financial obligations, including a $200 criminal filing fee and a $100 DNA collection fee. Earlier, in 2015, the court had ordered Bailey to pay a $100 warrant service fee. The trial court found Bailey indigent and allowed her to appeal at public expense.

LAW AND ANALYSIS

Tracey Bailey challenges her conviction and her sentence. We address her conviction first.

Validity of Stop

In an effort to reverse her conviction for possession of a controlled substance, Tracey Bailey argues that Deputy James Esslinger unlawfully seized her. Therefore, according to Bailey, the discovery of the methamphetamine flowed from an unlawful seizure such that the superior court should have suppressed the evidence. Bailey does not deem her arrest after Deputy Esslinger learned of the arrest warrant to constitute the unlawful seizure. She instead identifies Esslinger's approaching her and asking her questions as the unlawful seizure.

We question whether Deputy James Esslinger ever seized Tracey Bailey within the meaning of the state and federal constitutions. Esslinger never told Bailey she could not leave his presence and never took from Bailey any identification card while researching her name in his patrol car's computer. *State v. Knox*, 86 Wn. App. 831, 838, 939 P.2d 710 (1997), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003); *State v. Hansen*, 99 Wn. App. 575, 577, 994 P.2d 855 (2000). A law enforcement officer needs no cause to question a citizen unless the officer seizes the citizen. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Still, the State agrees that James Esslinger performed a *Terry* stop, considered to be a seizure. Thus, we ask whether Esslinger held cause to conduct the stop.

Tracey Bailey's assignment of error raises two distinct questions. First, did the information provided by David Brown supply reasonable suspicion of a crime in order to support an investigative *Terry* stop? Second, did law enforcement possess reason to believe the caller, David Brown, to be a reliable source of information?

Reasonable Suspicion of Crime

In general, warrantless seizures are per se unconstitutional, and the burden falls on the State to demonstrate that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). Courts purportedly jealously and carefully construe the exceptions. *State v. Doughty*, 170 Wn.2d at 61.

A brief investigatory seizure, commonly referred to as a *Terry* stop, constitutes an exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under this exception, a police officer may, without a warrant, briefly detain an individual for questioning if the officer possesses reasonable and articulable suspicion that the person is engaging or is about to engage in criminal activity. *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). A reasonable, articulable suspicion means 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).

A valid *Terry* stop requires that the officer have a well-founded, reasonable suspicion that criminal activity is afoot based on specific and articulable facts. *State v.*

Fuentes, 183 Wn.2d at 158. This court looks at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer's suspicion. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Subsequent evidence that the officer was in error regarding some of the facts will not render a *Terry* stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). A *Terry* stop also is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

Washington courts have repeatedly held that a person's walking at night, even in a high crime area, does not, by itself, give rise to a reasonable suspicion to detain that person. *State v. Fuentes*, 183 Wn.2d at 161 (2015); *State v. Doughty*, 170 Wn.2d at 62; *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980). Instead, the circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so. *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006). An inarticulate hunch does not warrant police intrusion into a person's life. *State v. Doughty*, 170 Wn.2d at 63. Innocuous facts do not justify a stop either. *State v. Armenta*, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997).

When evaluating investigative stops, this court must determine whether the initial interference with the suspect's freedom of movement was reasonably related in scope to

the circumstances that justified the interference. *Terry v. Ohio*, 392 U.S. at 19-20 (1968). In determining the proper scope of the intrusion, the court considers the purpose of the stop, the amount of physical intrusion, and the length of time the law enforcement officer detains the suspect. *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Doughty*, 170 Wn.2d at 62.

Courts recognize that crime prevention and crime detection are legitimate purposes for investigative stops. *Terry v. Ohio*, 392 U.S. at 22-23. Here, the relevant concern was crime detection rather than crime prevention. A typical *Terry* stop entails a frisk for weapons and brief questioning. *State v. Mitchell*, 80 Wn. App. 143, 145, 906 P.2d 1013 (1995).

Tracey Bailey challenges finding of fact two that "[t]he reporting party stated, he had asked Trac[e]y to leave, then after she had left, she returned." CP at 105. Bailey argues that substantial evidence does not support this finding because no testimony supports that David Brown asked Bailey to leave his premises. We agree. Brown informed the 911 dispatcher of an unwanted person at his residence, but no testimony established that Brown told Bailey to leave.

Tracey Bailey subsequently argues that, without the erroneous portion of finding of fact two, the remaining findings do not support the conclusion that Deputy James

Esslinger held reasonable suspicion of criminal trespass. To support her argument, Tracey Bailey cites *State v. Watson*, 56 Wn. App. 665, 666, 784 P.2d 1294 (1990), wherein the court wrote:

> When the State successfully resists a motion to suppress, it is obligated to procure findings of fact and conclusions of law that, *standing on their own*, will withstand appellate scrutiny.

To support its proposition, the *Watson* court cited *State v. Poirier*, 34 Wn. App. 839, 841, 664 P.2d 7 (1983). In *State v. Poirier*, the court cited to CrR 3.6 for the rule that findings of fact standing alone must withhold appellate scrutiny. Nevertheless, CrR 3.6, assuming it once did, no longer supports this principle. The 1983 version of the criminal rules might have contained the proposition. But, by 1984, CrR 3.6 did not support the statement, nor has any version of the rule since supported the principle.

Even if the findings do not state that David Brown asked Tracey Bailey to leave his premises, we still conclude that Deputy James Esslinger held reasonable suspicion for a *Terry* stop. A person is guilty of criminal trespass in the first degree, if he or she *knowingly* enters or remains unlawfully in a building. RCW 9A.52.070(1). A person commits second degree trespass if he or she knowingly enters or remains unlawfully on premises of another. RCW 9A.52.080(1).

Tracey Bailey cites no law stating that a police officer must gather incontrovertible evidence of a crime during the investigation stage. To the contrary, the purpose of an

investigation and an investigatory stop is to assess whether a suspect committed a crime. The standard for reasonable suspicion is whether an objective view of the facts led the officer to believe the substantial possibility of a crime being committed. Deputy James Esslinger knew that an "unwanted person" had returned to a residence. This person had previously entered the home through a window. The report could lead one to reasonably deduce a substantial possibility of a trespass to investigate.

Deputy James Esslinger's stop of Tracey Bailey was reasonable because it was limited in nature. The officer never handcuffed Tracey Bailey. Esslinger only asked for identification and then researched her name in his computer. Bailey could have ignored Esslinger. Instead, Bailey voluntarily provided her full name and birthdate.

Reliability

Tracey Bailey also argues that the trial court's findings of fact do not show the reliability of the 911 caller's tip. In response, the State contends this appeals court cannot review Bailey's reliability argument because she did not raise the assertion before the superior court. The State avers that Bailey limited her legal position below to the information supplied failing to support reasonable articulable suspicion.

We agree that legal argument at the suppression hearing centered on the sufficiency of the information. The State, however, addressed the 911 caller's reliability in its briefing to the superior court by citing *Navarette v. California*, 572 U.S. 393, 134 S.

Ct. 1683, 188 L. Ed. 2d 680 (2014). Both parties cited to *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) for the proposition that a *Terry* stop is justified only with a substantial possibility that criminal activity occurred, and Bailey maintains that *Kennedy* also addressed the reliability of an informant as part of its analysis.

When the issue raised for the first time on appeal arguably relates to issues raised in the trial court, this court may exercise its discretion to consider newly articulated theories for the first time on appeal. *Wilcox v. Basehore*, 189 Wn. App. 63, 90, 356 P.3d 736 (2015), *aff'd*, 187 Wn.2d 772, 389 P.3d 531 (2017). The reliability of the 911 caller intrinsically intertwines with the circumstances a court considers when assessing the constitutionality of a stop based on an informant's tip. Finally, this court may address, for the first time on appeal, a manifest constitutional error. RAP 2.5(a)(3). Therefore, we determine to address the informant reliability issue raised by Tracey Bailey.

When an officer bases his or her suspicion on an informant's tip, the State must show that the tip bears some indicia of reliability under the totality of the circumstances. *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015). We require either (1) circumstances establishing the informant's reliability, or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion. *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). The corroborative observations do not need to

be of blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual's appearance or clothing. *State v. Wakeley*, 29 Wn. App. 238, 241-43, 628 P.2d 835 (1981).

Known citizen informants are generally presumed to be reliable, but this presumption does not extend to anonymous informants. *State v. Saggers*, 182 Wn. App. 832, 840, 332 P.3d 1034 (2014). The reliability of an anonymous telephone informant is similar to the reliability of a named but unknown telephone informant because such an informant could fabricate an alias and thereby remain, like an anonymous informant, unidentifiable. *State v. Sieler*, 95 Wn.2d at 48 (1980). Officers may not presume an informant's tip is an eyewitness account. *State v. Vandover*, 63 Wn. App. 754, 759, 822 P.2d 784 (1992).

Tracey Bailey relies on a series of Washington decisions that we now discuss: *State v. Z.U.E.*, 183 Wn.2d 610 (2015), *State v. Sieler*, 95 Wn.2d 43 (1980), and *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243 (1975).

In *State v. Lesnick*, 84 Wn.2d 940, the Supreme Court held that an anonymous tip alleging that the defendant was attempting to sell illegal gambling punchboards out of his van did not justify stopping the van because the tipster did not identify himself and did not provide any information as to the source of his knowledge.

In *State v. Sieler*, 95 Wn.2d 43, an identified caller to emergency dispatch reported a drug sale in a school parking lot. The informant gave a description of the car involved in the sale, but did not provide any factual basis for his belief that a sale had occurred. Based on this tip alone, officers stopped a car located near the school that matched the given description. Even though the informant provided his name, the Supreme Court characterized the informant as essentially anonymous and concluded the informant's report lacked sufficient indicia of reliability because neither its veracity nor its factual basis could be established.

In *State v. Z.U.E.*, 183 Wn.2d 610, police officers stopped a car to investigate a minor in possession of a firearm. A person identifying herself as Dawn made a 911 call reporting the crime. The 911 call was made contemporaneous to the unfolding of the events. The caller's allegation that the female was 17 years old and, therefore, a minor was the only fact that potentially made the girl's possession of the gun unlawful. Nevertheless, the caller did not disclose the basis for her believing the girl to be underage or the basis for concluding the girl possessed a gun. The court followed *Sieler* and held the 911 caller's assertion did not created a sustainable basis for a *Terry* stop.

Based on these three decisions, Tracey Bailey argues that Sheriff Deputy James Esslinger lacked any information regarding the source of David Brown's knowledge and the superior court's findings did not establish that the caller eyewitnessed Bailey's

behavior. Nevertheless, Deputy James Esslinger did not merely presume David Brown to be an eyewitness. Although not contained in the court's findings, substantial evidence in the record supports the conclusion that the caller was an eyewitness. While on the phone with 911, David Brown stated that Bailey had left the premises. The dispatcher continued to gather information when the caller commented that Tracey was "back in the house." RP (Aug. 14, 2017) at 9. The caller could not know whether Bailey had returned to the house unless he was an eyewitness who was present to see Bailey reappear. The information supplied by the caller showed an ongoing view of activity.

We rely in part on *Navarette v. California*, 572 U.S. 393 (2014). In *Navarette*, the caller's report that the defendant's pickup truck ran her off the road sufficed to support a stop of the suspected drunk driver. Several factors supported the caller's reliability: the caller was an eyewitness, she made the report contemporaneously to the incident, and she called the emergency 911 line, making her accountable for the provided information since police can trace those calls.

All of the *Navarette v. California* factors blanket David Brown's call to emergency dispatch. David Brown called the emergency 911 line. Brown called contemporaneously to the incident. He provided an address and a description of the woman who was thereafter found .2 miles away from the address. Brown stated he had allowed Bailey to stay at the residence in the past. Thus, the information available to the

deputy supports the conclusion that the caller was the alleged victim of the unwanted person on his property.

Tracey Bailey also emphasizes that no independent police corroboration supported reasonable suspicion. Nevertheless, police corroboration is not necessary. The Washington Supreme Court requires either circumstances establishing the informant's reliability *or* some corroborative observation. *State v. Z.U.E.*, 183 Wn.2d at 618 (2015). Sufficient facts supported the informant's reliability and the substantial possibility of criminal behavior.

Sentence

Offender Score

Tracey Bailey contends the trial court erred when it included a prior conviction for attempted forgery in her offender score. The completed crime of forgery is a class C felony. RCW 9A.60.020(3). But, pursuant to RCW 9A.28.020(3)(d), an attempt to commit a crime is a gross misdemeanor when the crime attempted is a class C felony. Gross misdemeanors are not added to the offender score. Accordingly, Bailey's offender score should have been seven, not eight.

The State concedes that the trial court erred by including the gross misdemeanor offense in Bailey's offender score. Yet, the State argues the error is harmless because it did not affect Bailey's standard range. The State emphasizes that the crime of possession

of a controlled substance, methamphetamine, has a seriousness level of drug offense level one so that the standard range remains the same with an offender score between six and nine. RCW 9.94A.525(7); RCW 9.94A.517.

Divisions One and Two of this court disagree as to whether an incorrect offender score can be harmless. In *State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996), Division One held that an erroneous offender score that does not affect the standard range is harmless. In *State v. McCorkle*, 88 Wn. App. 485, 945 P.2d 736 (1997), *aff'd*, 137 Wn.2d 490, 973 P.2d 461 (1999), Division Two held that the State's failure to prove six prior out-of-state convictions were comparable to Washington felonies and resulted in the trial court's miscalculation of the offender score. The State argued that establishing nine prior felonies rather than 13 was harmless error since the standard range for an offender score of nine is the same as the standard range for an offender score of 13. The court held the error was not harmless because "the record does not clearly indicate that the sentencing court would have imposed the same sentence without the prior unclassified prior convictions and the resultant change in offender score." *State v. McCorkle*, 88 Wn. App. at 499-500.

We choose to follow *State v. McCorkle*. We also deem the error harmful in that, in the event of another conviction, the State may argue that Bailey is bound by the court's determination of our offender score in this prosecution.

Although Tracey Bailey originally requested a remand for resentencing, Bailey now notes her release from custody. Therefore, resentencing is no longer required. As will be explained below, the trial court must strike legal financial obligations from the judgment and sentence so the erroneous offender score could be corrected at the same time with minimal effort. The remedy for an incorrect offender score based on a scrivener's error is correction of the score. *State v. Calhoun*, 163 Wn. App. 153, 169-70, 257 P.3d 693 (2011).

Discretionary Costs

At sentencing, the trial court imposed on Tracey Bailey a $200 criminal filing fee and a $100 DNA fee. At that time, the fees were mandatory. As explained in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), due to legislative changes, the fees are no longer mandatory. In fact, the new legislation "categorically prohibit[s] the imposition of any discretionary costs on indigent defendants." *State v. Ramirez*, 191 Wn.2d at 739. The trial court found Tracey Bailey indigent.

The Supreme Court held that the new amendments apply prospectively to cases pending on direct appeal because the imposition of legal financial obligations is governed by the statutes in effect at the termination of the case, and those cases were not final at the time the statute was enacted. *State v. Ramirez*, 191 Wn.2d at 749-50. Defense counsel states Bailey's DNA sample was previously collected based on other felony

convictions. Thus, *Ramirez* supports the conclusion that a remand to the trial court is necessary so it can strike the two fees. The State agrees to an order requiring the court to strike the fees.

Tracey Bailey also argues a $100 warrant service fee should be struck. Bailey notes the discretionary nature of the fee: "Expenses incurred for serving of warrants for failure to appear . . . *may* be included in costs the court *may* require a defendant to pay." RCW 10.01.160(2) (emphasis added); *see State v. Malone*, 193 Wn. App. 762, 764, 376 P.3d 443 (2016). The State does not oppose striking the warrant service fee. Nevertheless, we do not accept the State's concession on this obligation.

The trial court imposed the warrant service fee in 2015. Imposition of the fee is not included nor mentioned on the judgment and sentence from which Bailey currently appeals. As a result, the imposition of the fee is final and is not at issue in this appeal. *State v. Ramirez* is inapplicable to this fee.

CONCLUSION

We affirm the superior court's denial of Tracey Bailey's motion to suppress evidence of the methamphetamine. We affirm her conviction. We remand to the trial court to correct Bailey's offender score and to strike the imposition of the DNA collection fee and the criminal filing fee.

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.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Pennell, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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