No. 46168-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Charles Sorensen,**

Appellant.

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Kitsap County Superior Court Cause No. 13-1-01268-3

The Honorable Judge Jay B. Roof

# Appellant's Opening Brief

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## ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Sorensen's convictions for attempting to elude, driving while suspended, and reckless driving violated his Fourteenth Amendment right to due process.

2. The state introduced insufficient evidence to prove beyond a reasonable doubt that Mr. Sorensen drove in a reckless manner during the brief pursuit.

3. The trial court erred by concluding that Mr. Sorensen drove in a reckless manner.

4. The trial court erred by entering a verdict of Guilty regarding the charge of attempting to elude.

   **ISSUE 1:** A conviction for attempting to elude requires proof that the accused person drove in a reckless manner. Here, the stipulation submitted by the parties did not include evidence that Mr. Sorensen drove in a rash or heedless manner, indifferent to the consequences. Did the conviction for attempting to elude violate Mr. Sorensen's Fourteenth Amendment right to due process because the evidence failed to establish an essential element of the offense?

5. The trial court erred by denying Mr. Sorensen's suppression motion.

6. The officers violated Mr. Sorensen's Fourth and Fourteenth Amendment right to be free from unreasonable seizures when they seized him without probable cause or reasonable suspicion.

7. The officers invaded Mr. Sorensen's right to privacy under Wash. Const. art. I, § 7 by seizing him without probable cause or reasonable suspicion.

8. The evidence admitted against Mr. Sorensen at trial was fruit of the unconstitutional seizure.

9. The officer stopped the car without specific and articulable facts sufficient to provide a reasonable suspicion that he was attempting to elude a pursuing police vehicle.

10. The court erred by finding the following "Factual Background" in its Memorandum Opinion:

    The defendant then fled in his car, traveling at 50 mph, weaving in and out of the centerlines, making turns without turn signals and almost crossing over an embankment. CP 251.

11. The court's "Analysis" in its Memorandum Opinion is erroneous. CP 251-256.

12. The court erred by finding the following "Conclusion" in its Memorandum Opinion:

    In conclusion, the requisite elements for a finding of attempting to elude have been met. Therefore, the ultimate seizure was proper, given that the defendant fled from the Trooper's attempted *Terry* stop, and did so in a reckless manner. It is of no consequence that the initially attempted *Terry* stop was ultimately going to be unlawful, because *Duffy, Malone* and *Mather* hold that this is not material. Defendants motion is denied. CP 256.

> **ISSUE 2:** A traffic stop constitutes an unlawful seizure unless the officer has specific, articulable facts creating the reasonable belief that the driver is breaking the law. Here, the police lacked a basis to pull Mr. Sorensen over, and his subsequent driving did not give rise to a reasonable suspicion that he was attempting to elude a pursuing police vehicle. Did the traffic stop violate Mr. Sorensen's rights under the Fourth and Fourteenth Amendments and art. I, § 7?

13. The order imposing $1135 in attorney fees violated Mr. Sorensen's Sixth and Fourteenth Amendment right to counsel.

14. The trial court erred by imposing attorney fees in the absence of any evidence showing that Mr. Sorensen had the present or likely future ability to pay.

15. The court erred by adopting Finding of Fact No. 4.1 in the Judgment and Sentence.

> **ISSUE 3:** A trial court may only order an offender to pay attorney fees upon finding that s/he has the present or likely future ability to pay. Here, the court imposed $1135 in costs for court-appointed counsel without any evidence that Mr.

Sorensen had the ability to pay them. Did the trial court violate Mr. Sorensen's Sixth and Fourteenth Amendment right to counsel?

16. The trial court erred by imposing costs that were not authorized by statute.

**ISSUE 4:** A court exceeds its authority by ordering payment of legal financial obligations beyond what is permitted by statute. The court ordered Mr. Sorensen to pay a $100 contribution to an "expert witness fund." Did the sentencing court exceed its statutory authority?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jack Kimbrel was driving in rural Kitsap County on Banner Road after dark. RP (3/5/14) 8, 54. He saw a vehicle go through a stop sign and "hit" the ditch or driveway and called 911 to report it. RP (3/5/14) 54, 57; CP 250-251. There are two different Banner roads in the area, and he didn't specify in his call which he was on. RP (3/5/14) 17, 34.

Trooper Barraclough was dispatched to investigate. He was told about a car in a ditch and went to one of the Banner roads. RP (3/5/14) 6-8, 17, 34. He did not get any description of the vehicle. RP (3/5/14) 16.

When he was on one of the Banner roads, he saw a truck with one of its front tires off the roadway. RP (3/5/14) 28. It was perpendicular to the road, pointing toward a depression (the officer said that it could be considered a ditch, though it was more accurately just a depression). RP (3/5/14) 9, 23, 42. The truck backed up, and then went forward in the westbound lane. RP (3/5/14) 10, 27. As the truck went past the trooper's car, Barraclough noticed that there were branches and leaves on the front bumper.[1] RP (3/5/14) 10.

The trooper turned around and followed the vehicle, with lights activated. RP (3/5/14) 10. As he followed the truck, he saw that it

weaved within its lane and made a wide turn. RP (3/5/14) 11. The speed limit on the road they traveled was 45 mph. RP (3/5/14) 38-39. Barraclough was able to follow the truck at the speed limit. RP (3/5/14) 38-39. The truck also "almost drove over an embankment" and crossed the fog line. CP 250-251. After some time, the truck pulled over and the driver Charles Sorenson was arrested. RP (3/5/14) 11.

The state charged Mr. Sorenson with driving under the influence with special allegations of four or more priors and a breath test refusal. The state also charged attempting to elude, driving while license suspended 2, operating a motor vehicle without ignition interlock, and obstructing. Both felony counts also carried aggravating factor allegations of rapid recidivism and unscored history rendering a standard range sentence too lenient. CP 174-201.

The defense moved to suppress the stop and seizure. CP 1-7, 8-36, 37-173, 202-222, 223-249. The court held an evidentiary hearing and took testimony from Barraclough and Kimbrel. RP (3/5/14) 4-60.

Both parties asked Barraclough for specifics about where exactly the truck was when he first saw it. There was a driveway where the truck had been, and Barraclough acknowledged that the truck could have been

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[1] When the trooper went back to the area the next day, he found no property damage. RP (3/5/14) 13, 18.

pulled into the driveway. RP (3/5/14) 21-22, 29. He said the truck was facing north in the westbound lane with one of the front tires off the road. RP (3/5/14) 9, 28. He said that the bed of the truck was in the lane until the vehicle reversed and drove away (in the correct lane). RP (3/5/14) 9, 31.

Barraclough testified that he turned on his lights to stop the vehicle for several reasons: to make sure that the driver was ok, to see that there was no property damage, and because the truck's tire was off the roadway and it had blocked the lane. RP (3/5/14) 10, 34. He also testified there was no traffic in the area and that no vehicles were actually blocked. RP (3/5/14) 33, 34.

The court denied suppression. The trial judge found that the initial seizure, by the turning on of lights for a stop, was not lawful. But the court ruled that Mr. Sorenson's subsequent eluding rendered the evidence admissible. CP 250-256.

The parties submitted the case on stipulated facts. CP 257-299. The court found Mr. Sorenson guilty of all counts. Regarding the eluding count, the judge found that Mr. Sorenson drove 3 minutes, or 2.7 miles, at 50 mph in a 45 mph zone. The court further found that there was no other traffic in the area. CP 250-252; RP 10.

The court imposed attorney fees of $1135.00, and an expert witness fee of $100. CP 300-312. After sentencing, Mr. Sorenson timely appealed. CP 300-312, 315.

## ARGUMENT

### I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. SORENSEN OF ATTEMPTING TO ELUDE.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

B. No rational trier of fact could have found Mr. Sorensen guilty of attempting to elude a pursuing police vehicle.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

To be sufficient, evidence must be more than substantial. *Vasquez,* 178 Wn.2d at 6. On review, inferences drawn in favor of the prosecution may not rest on evidence that is "patently equivocal." *Id.,* at 8. To establish even a *prima facie* case, the prosecution must present evidence that is consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006).

To prove eluding, the state is required to establish that the accused person drove in a "reckless manner," defined as a "rash or headless manner, with indifference to the consequences." RCW 46.61.024; *State v. Naillieux*, 158 Wn. App. 630, 644, 241 P.3d 1280 (2010) (internal quotation marks omitted); *State v. Roggenkamp,* 153 Wn.2d 614, 622, 106 P.3d 196 (2005). In this case, the stipulation did not include facts establishing that Mr. Sorensen drove in a reckless manner.

The evidence tending to show imperfect driving consisted of evidence that Mr. Sorensen:

> - Drove his vehicle through a stop sign and off the roadway, prior to the trooper's arrival.
> - Drove 50 mph in a 45 mph speed zone.
> - Wove within his lane, touching the centerline and fog line.
> - Made a wide turn without signaling and "almost drove over an embankment"
> - Subsequently crossed the center line and fog line.
>
> CP 250-251.

In the absence of any other vehicle or pedestrian traffic, this evidence is insufficient to prove that Mr. Sorensen drove in a reckless manner. Although Mr. Sorensen's driving was less than perfect, it did not rise to the level of rash or heedless driving. *Naillieux*, 158 Wn. App. at 644. Nor did it show indifference to consequences. *Id.*

Because the evidence was insufficient to prove that Mr. Sorensen drove in a reckless manner, his conviction must be reversed. *Vasquez*, 178 Wn.2d at 6. The charge must be dismissed with prejudice. *Id.*

## II. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OBTAINED IN VIOLATION OF MR. SORENSEN'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 7.

### A. Standard of review

Appellate courts review *de novo* the issue of whether a warrantless seizure violates the constitution. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011).

### B. The officer unlawfully seized Mr. Sorensen in the absence of a reasonable suspicion of criminal activity.

The federal and state constitutions both protect against unlawful seizure of persons. U.S. Const. Amends. IV, XIV; Wash. Const. art. I, § 7; *Diluzio*, 162 Wn. App. at 590. Unlike the Fourth Amendment, the analysis under art. I, § 7 "focuses on the rights of the individual rather than

on the reasonableness of the government action." *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

Warrantless seizures are *per se* unreasonable. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). The state bears the burden of proving that a warrantless seizure falls into one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Id.* The exclusionary rule requires suppression of all evidence obtained pursuant to a person's unlawful seizure. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

A traffic stop must be justified by suspicion that is well-founded, reasonable, and based on specific and articulable facts. *Doughty*, 170 Wn.2d at 62. In this case, the trial court found that Trooper Barraclough lacked a basis to stop Mr. Sorensen when he first encountered him and activated his lights. CP 253. Because the trooper lacked a basis to stop Mr. Sorensen, the seizure was unlawful. *Doughty,* 170 Wn.2d at 62.

When a person is unlawfully seized, "the fruits obtained as a result must be suppressed." *Doughty*, 170 Wn.2d at 65. Under art. I, § 7 there is a limited class of exceptions to the exclusionary rule in extreme situations involving a severe threat to the officer or the public.[2]

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[2] Certain exceptions recognized under the federal constitution do not apply under art. I, § 7. *See. e.g. State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (inevitable

For example, the exception applies when the suspect responds to an unlawful arrest by assaulting the officer. *See State v. Mierz*, 127 Wn.2d 460, 471-475, 901 P.2d 286 (1995). Under such circumstances, the suspect is not given immunity for the assaultive behavior, even if provoked by an unlawful arrest. *Id.* Similarly, the exception applies when a suspect takes flight in a manner that "demonstrates a wanton and willful disregard for the life and property of others." *State v. Duffy*, 86 Wn. App. 334, 340-41, 936 P.2d 444 (1997).[3] Under such circumstances, the risk of harm to the public is too great. *Id.,* at 341 (Courts addressing the issue have been "concerned with the safety of police officers and the public if individuals were permitted to flee from legal or illegal stops with wanton or reckless disregard.")

But these exceptions do not apply to all suspects who refuse to immediately submit to an unlawful seizure.[4] A suspect's failure to immediately submit to an unlawful request does not provide an independent basis for arrest, even though it may create a reasonable suspicion to investigate the crime of obstructing. A detention or arrest for

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discovery exception); *State v. Afana*, 169 Wn.2d 169, 181, 233 P.3d 879 (2010) (good faith exception).

[3] *See* also *State v. Mather,* 28 Wn. App. 700, 703-04, 626 P.2d 44 (1981); *State v. Malone,* 106 Wn.2d 607, 611, 724 P.2d 364 (1986).

[4] Although *Duffy* and other similar cases involve a suspect's attempts to elude, the cases all predate the 2003 amendments to RCW 46.61.024, removing the "wanton or willful disregard" language from the statute.

obstructing cannot be justified by the suspect's conduct during an unlawful seizure. *State v. Barnes*, 96 Wn. App. 217, 978 P.2d 1131 (1999).

For example, evidence must be suppressed when seized from a person who refuses an unlawful order to stop, even though the refusal might provide reasonable suspicion of obstructing. *State v. Gatewood*, 163 Wn.2d 534, 541, 182 P.3d 426 (2008); *see also State v. Cardenas-Muratalla*, 179 Wn. App. 307, 310, 319 P.3d 811 (2014). Similarly, a passenger in an unlawfully seized vehicle does not become subject to lawful arrest by "not responding to instructions." *State v. Z.U.E.*, 178 Wn. App. 769, 777, 315 P.3d 1158 (2014).

Here, as in *Gatewood,* Mr. Sorensen did not stop when unlawfully signaled to do so. As in *Gatewood,* he did not respond with assaultive behavior or by endangering life or property. Because of this, his response does not provide an independent basis for a constitutional seizure. *Gatewood,* 163 Wn.2d at 540-542. His case is therefore unlike *Duffy* and other cases predating the 2003 amendments to the eluding statute: in each of those cases, the defendant drove in with a wanton and willful disregard for the lives and property of others. Here, there was no allegation or evidence that Mr. Sorensen exhibited such disregard.

Mr. Sorensen's convictions must be reversed. The case must be remanded for suppression of the evidence. *Gatewood,* 163 Wn.2d at 540-542.

## III. THE COURT ERRED BY ORDERING MR. SORENSEN TO PAY LEGAL FINANCIAL OBLIGATIONS BEYOND WHAT IS PERMITTED BY THE CONSTITUTION AND BY STATUTE.

### C. Standard of Review.

Reviewing courts assess constitutional issues and questions of law *de novo*. *Zillyette,* 172 Wn.2d at 161; *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013).

### D. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). This includes errors based on a sentencing court's failure to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[5]

[5] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenged to LFOs. *Id.* The cases do not govern Mr. Sorensen's claim that the court lacked constitutional and statutory authority.

E. The court violated Mr. Sorensen's right to counsel by ordering him to pay the cost of his court-appointed attorney without first considering his present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d

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can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

642 (1974). Under *Fuller,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[6] *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court

[6] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation…. [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the accused has the present

or future ability to repay the cost of court-appointed counsel before ordering him/her to do so. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he

cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). Here, none of the parties provided the court with information about Mr. Sorensen's present or likely future ability to pay. *See* RP; CP *generally.* Although the court made a finding that Mr. Sorensen "has the ability or likely future ability to pay,"[7] this finding is not supported by anything in the record. Indeed, the court found Mr. Sorensen indigent at beginning and at the end of the proceedings. Order Appointing Attorney, Supp. CP; CP 316. Mr. Sorensen's felony convictions and lengthy incarceration will also negatively impact his prospects for employment.

The trial court ordered Mr. Sorensen to pay $1135 in attorney fees. CP 307. This violated his right to counsel. Under *Fuller,* the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at

[7] CP 307.

53. The order requiring Mr. Sorensen to pay attorney fees must be vacated. *Id*

F. The court exceeded its authority by ordering Mr. Sorensen to pay $100 into an "expert witness fund."

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011).[8] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

The court may order an offender to pay "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). The court may not order an offender to pay LFOs that are not authorized by statute. *Hathaway*, 161 Wn. App. at 651-653. Nor may the court order payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160.

The court exceeded its authority by ordering Mr. Sorensen to pay $100 into a general expert witness fund. No statute authorizes imposition

[8] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

of such costs. There is no indication that any expert witness was involved in this case.[9]

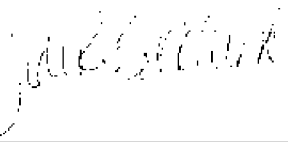
For these reasons, the assessments for the expert witness fund must be vacated, and Mr. Sorensen's case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

## CONCLUSION

Because the evidence was insufficient to prove that Mr. Sorensen drove in a reckless manner, his conviction for eluding must be reversed. Also, the case should be remanded for suppression of the evidence. Finally, the court should order attorney fee and expert fees stricken.

Respectfully submitted on September 29, 2014,

**BACKLUND AND MISTRY**



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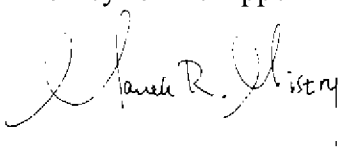

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Attorney for the Appellant

[9] Furthermore, the costs of operating the state crime lab were not "specially incurred by the state in prosecuting" Mr. Sorensen. RCW 10.01.160(2).

# CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Charles Sorensen, DOC #368871
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

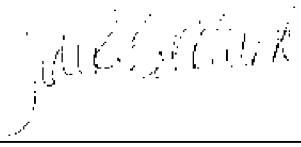
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 29, 2014.



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# BACKLUND & MISTRY

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

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A copy of this document has been emailed to the following addresses:

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