NO. 33598-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BRYAN BEWICK,

Appellant.

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

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT IN REPLY

The fact that in the middle of the day Bryan Bewick, a white male of medium build, was in the suspected vicinity of a known felon, Brent Graham, also a white male of medium build, is not a basis for concluding Mr. Bewick was engaged in criminal activity. Nonetheless, three armed U.S. Marshals seized Mr. Bewick and held him well beyond the time they confirmed he was not the known felon Brent Graham. The evidence seized pursuant to the unlawful seizure, during a detention that extended beyond the scope of the stop, should have been suppressed.

B. ARGUMENT IN REPLY

1. The State's attempt to pile on circumstances does not satisfy its burden to show law enforcement had reasonable, articulable suspicion to detain Mr. Bewick, a Caucasian of medium build seen in the same suspected area as an alleged fugitive.

The State bears the heavy burden of demonstrating an exception to the warrant requirement by clear and convincing evidence. *City of Seattle v. Pearson*, __ Wn. App. __, 2016 WL 783911, *3 (Feb. 29, 2016) (citing *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009)). The State fails to meet its "heavy burden" here. *Garvin*, 166 Wn.2d at 250.

Mr. Bewick was a white male of medium build at an apartment complex in the middle of the day. CP 14, 27, 58 (finding 3). He ran when approached by a dark GMC Tahoe with three U.S. Marshals wearing tactical vests. CP 20, 27, 28, 58 (finding 6). 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."); *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010); *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

Mr. Bewick's flight from law enforcement is insufficient to justify the detention because the officers lacked other individualized suspicion. *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980). The fact that Mr. Bewick, apparently like the fugitive Graham, is a Caucasian of medium build, is not individualized suspicion of criminal activity. *State v. Lee*, 97 Wis.2d 679, 685, 194 N.W.2d 547 (1980) ("This description [Caucasian of medium build] is so general that it fits

a very large group of ordinary young men."). 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 detain him. *State v. Gatewood*, 163 Wn.2d 534, 541, 182 P.3d 426 (2008).

Apparently recognizing this shortcoming, the State seems to argue that law enforcement "saw [Mr. Bewick] accessing or attempting to access his front pocket" before they effectuated a seizure. Resp. Br. at 9. But the undisputed record reflects that the officers first stopped Mr. Bewick, then ruled him out as the fugitive Graham, then saw him access or attempt to access his front pocket. CP 58 (finding 6: "The defendant was stopped by the officers after a short foot pursuit and identified as Bryan D. Bewick with a date of birth of 05/07/86."; in the following finding, number 7, the court finds "The defendant began accessing or attempting to access his left front pocket . . .").[1] Thus, Mr. Bewick's contact with his pockets—which occurred after the stop—cannot be used to justify the warrantless stop that had already occurred.

[1] The record supports these findings, as U.S. Border Patrol Agent Eric Carlson attested contraband was found on Mr. Bewick after he was identified. CP 28.

Because it cannot otherwise succeed, the State attempts to supersede the written order with court's oral ruling. Resp. Br. at 3 (quoting from oral ruling but attributing quote to both written order and oral ruling), 6, 9 (arguing, without citation, a chronology that is unsupported by written order), 10-11. The State's argument fails. The written findings and conclusions do not incorporate the court's oral ruling. CP 57-59. "A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); *accord State v. Hessock*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999) (citing cases); *State v. A.M.*, 163 Wn. App. 414, 423-25, 260 P.3d 229 (2011). The trial court did not incorporate its oral opinion into its formal written findings and conclusions. CP 57-59. The oral ruling was subject to "further study and consideration," to alteration, modification, or to complete abandonment. *Hessock*, 98 Wn. App. at 606; *accord Mallory*, 69

Wn.2d at 533-34. In short, it has no final or binding effect. The written order controls.[2]

The State's attempt to use the oral ruling to interpret the written order is impermissible on the additional basis that it contradicts the chronology in the written order. *See State v. Kull*, 155 Wn.2d 80, 88-89, 118 P.3d 307 (2005) (oral finding that contradicts written order cannot be relied upon to satisfy state's burden). The written order presents the findings in chronological order, indicating Mr. Bewick's identity became known before any movements to the pocket took place. CP 57-58. This is consistent with the evidence. CP 28 (officer Carlson's statement). Parts of the oral ruling that are inconsistent with this chronology cannot be relied on to satisfy the State's burden. *Kull*, 155 Wn.2d at 88-89; *State v. Bryant*, 78 Wn. App. 805, 812-13, 901 P.2d 1046 (1995) ("because the trial court's oral ruling . . . is not consistent with the trial court's written findings and conclusions, we are prevented from considering it"); *State v. Moon*, 48 Wn. App. 647, 650, 739 P.2d1157 (1987) ("An appellate court is permitted to use the trial court's oral decision to interpret findings of fact and conclusions of law <u>if there is no inconsistency</u>." (emphasis added)).

[2] The State understandably does not contest the validity of the written ruling, as the prosecutor drafted it. CP 59; 5/14/15 RP 14.

The State bears the heavy burden to show a warrantless intrusion was justified. Any ambiguity in the court's order must be construed against the State. "In the absence of a finding on a factual issue [appellate courts] must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *Armenta*, 134 Wn.2d at 14. The court's order does not find that the officers saw movements to Mr. Bewick's pocket before they learned his identity. This Court "must indulge the presumption" that the State "failed to sustain its burden on this issue." *Id*.

The State's reliance on *State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996), is also unavailing. Resp. Br. at 11-12. In *Graham*, the Court affirmed probable cause for arrest where officers with extensive narcotics experience and training "saw the defendant carrying a large amount of cash and a small packet containing what looked like rock cocaine[,]" which the defendant "quickly conceal[ed]" and hid "in his front pants pockets" and then "ignored the officers' request to stop, . . . looked very nervous and was sweating profusely." 130 Wn.2d at 725-26. The circumstances here are far thinner. Mr. Bewick was a Caucasian male of medium build who used a stairway in an apartment building associated with a known fugitive. When he was approached

by three U.S. Marshals in tactical vest, he ran. But the U.S. Marshals quickly caught up with and detained him. Later, Mr. Bewick made a motion towards his front pants pocket. Unlike in *Graham*, the officers here did not have probable cause for arrest on drug charges or any other offense when they initiated the seizure.

On this court's de novo review of the legal conclusions based on the uncontested facts, the undisputed findings do not amount to clear and convincing evidence that the police had reasonable, articulable suspicion that Mr. Bewick was engaged in criminal activity. The stop was unlawful.

2. Because law enforcement had learned Mr. Bewick was not the fugitive Brent Graham, the detention should have ended before law enforcement searched Mr. Bewick.

Even if the officers properly apprehended Mr. Bewick, the subsequently seized evidence must be suppressed because the search exceeded the scope of the initial detention. After the stop, the police quickly learned that Mr. Bewick was not the fugitive Graham. CP 58 (finding 6) (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"). The officers' suspicions, if previously sufficient, were thereby dispelled and the scope of the detention had been exhausted.

Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). The officers had ascertained Mr. Bewick was not Brent Graham, the fugitive subject of the warrant. Mr. Bewick should have been released, and any subsequently obtained evidence should have been suppressed. *See Garvin*, 166 Wn.2d at 254.

The trial court's written order confirms that police saw Mr. Bewick accessing or attempting to access his pocket only after they had determined he was not the fugitive Graham. CP 58 (findings 7, 8); *see* CP 28 (officer's attestation that contraband was detected after Bewick's identity was known). The search of his pocket exceeded the scope of the initial detention and was without authority.

3. Obstruction does not provide a sufficient basis for the police's detention of Mr. Bewick.

The State argues that even if the initial stop of Mr. Bewick was without authority, the seizure became lawful because the officer's gained probable cause to arrest Mr. Bewick for obstruction. Resp. Br. at 13-17. The State's argument is specious. "Obviously, once an individual is 'seized,' no subsequent events or circumstances can retroactively justify the 'seizure.'" *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999) (quoting *State v. Stinnett*, 104 Nev. 398, 760

P.2d 124, 126 (1988)). The State's argument, if followed, would allow the exception to swallow the rule.

Probable cause for obstruction can exist only if law enforcement had a lawful basis to detain Mr. Bewick when they effectuated the seizure. Otherwise, law enforcement could effectuate unlawful, warrantless seizures and then turn the unlawful invasion of privacy into a lawful detention if the subject turned and walked away. In other words, while an individual should be free to peaceably walk away from or decline to talk to officers without lawful authority to intrude upon their liberty, the State's rule would turn this right on its head. An officer without lawful basis for a stop would gain a lawful basis from an individual's going about his or her own business. The obstruction statute "cannot be used to make an 'end run' around constitutional limitations on searches and seizures." *State v. Williams*, 171 Wn.2d 474, 486, 251 P.3d 877 (2011) (quoting *State v. White*, 97 Wn.2d 92, 106-07, 640 P.2d 1061 (1982)).

Our Supreme Court rejected the State's argument here in *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999). In that case, the Court held that officers need an independent officer-safety based concern in order to lawfully exert control over a passenger's movement

after a lawful traffic stop relating to the driver; the Court also held police did not have reasonable suspicion to seize the passenger when he did not comply with unlawful requests to stop moving. 137 Wn.2d at 218-20, 223-25. The Court explained, "Flight from officers where the officers have grounds for a *Terry* stop and a refusal to halt at their order may constitute obstruction of a public servant." *Id*. at 223. However, because the officers lacked reasonable suspicion to detain Mr. Mendez, there was insufficient basis to find he obstructed law enforcement. *Id.* at 224. In other words, officers cannot generate obstruction charges out of an unlawful request to stop.

Tellingly, here, Mr. Bewick was not charged with obstruction. 5/14/15 RP 7. And although the State argued below that the police had probable cause to seize Mr. Bewick for obstruction, after they initiated the stop, the court did not find that basis in either its written or oral findings. 5/14/15 6-7, 8-14; CP 25-26, 57-59.

The cases relied upon by the State also do not support the breadth of the State's argument. In *State v. Little*, the majority upheld obstruction convictions where the initial basis for a *Terry* stop was also held sufficient. 116 Wn.2d 488, 496, 497, 806 P.2d 749 (1991). *Little* does not stand for the proposition that obstruction charges, or continued

detention based on probable cause for obstruction, may follow from an unlawful seizure. In *City of Spokane v. Hays*, the court also upheld the validity of the *Terry* stop that led to obstruction charges. 99 Wn. App. 653, 659-60, 995 P.2d 88 (2000). Obstruction was not used as a basis to justify a prior unlawful stop in *Hays* or in *Little*.

As our Supreme Court stated in *Mendez*, the rule advocated for by the State here cannot be adopted because a seizure must be justified at its inception. 137 Wn.2d at 224. It cannot be justified retroactively by subsequent events or circumstances. *Id.*

The State's reliance on *State v. Mierz* is also misplaced. 127 Wn.2d 460, 901 P.2d 286 (1995); Resp. Br. at 13-14. The *Mierz* court addressed charges that the defendant assaulted (not obstructed) police officers. 127 Wn.2d at 465-66, 473. In that case, the court considered "whether a person confronted with an allegedly unreasonable search or seizure may assault law enforcement officers and then rely on the exclusionary rule to foreclose admission of evidence pertaining to the assaultive behavior." 127 Wn.2d at 463. That question is patently distinct from the issue here: whether law enforcement may justify an unlawful stop by asserting probable cause later arose to hold the individual for obstruction when that individual did not heed the

unlawful request to stop. The *Mierz* court's interpretation of *Little*, moreover, relied on by the State, is at best dicta. *Id*. at 488; Resp. Br. at 13-14. It does not support the conclusion the State asserts here.

4. No costs should be assessed against Mr. Bewick because he lacks the ability to pay.

In his opening brief, Mr. Bewick argued the trial court erred in imposing 800 dollars in legal financial obligations. Op. Br. at 16-29. Mr. Bewick argued that the appearance of mandatory language in the statutes does not absolve the trial court from determining whether the defendant has the ability to actually pay these costs. Op. Br. at 18-27. The State does not respond to these specific arguments, it merely cites *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). Resp. Br. at 17-18. But Mr. Bewick discussed at length why *Lundy* cannot be read to hold that certain costs can be imposed irrespective of the defendant's ability to pay them. Op. Br. at 18-27.

Our Supreme Court recently reaffirmed that "the record must reflect that the superior court conducted an individualized inquiry into the defendant's present and future ability to pay" before imposing costs. *State v. Marks*, __ Wn.2d __, 2016 WL 743944, *1 (Feb. 25, 2016) (citing *State v. Blazina*, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015)). Boilerplate findings of ability to pay are inadequate. *Id*. For

this reason and under the arguments made in Mr. Bewick's opening brief, this Court should hold the costs cannot be imposed absent showing the defendant has the ability to pay the costs. *See* Op. Br. at 18-27.

Moreover, as set forth in the opening brief, Mr. Bewick did not waive this issue. In *Blazina*, the Supreme Court exercised discretionary review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand" it. *Blazina*, 182 Wn.2d at 835. This case raises the same concern. In addition, RAP 1.2(a) requires the appellate rules be interpreted liberally to promote justice and facilitate decision making on the merits. *Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a) counsels for consideration of the LFO issue for the first time on appeal). The Court should review the issue and strike the costs imposed by the trial court.

The State did not respond to Mr. Bewick's additional argument that in the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* Op. Br. at 29. The Court should treat the State's lack of argument as a concession on this issue. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (State concedes issue by failing to respond to it). Further, since the

filing of the opening brief, Division One of this Court published an opinion in which the panel exercised its discretion to decline to assess costs on appeal against an indigent appellant. *State v. Sinclair*, __ Wn. App. __, 2016 WL 393719, *2-7 (Jan. 27, 2016). If the State substantially prevails, this Court should follow *Sinclair* and decline to assess appellate costs against Mr. Bewick, an indigent appellant.

C. CONCLUSION

The State cannot meet its burden to show the police had reasonable articulable suspicion of criminal activity to stop Mr. Bewick in the middle of the day outside an apartment complex thought to contain a known fugitive. Even if the police had authority to stop Mr. Bewick without a warrant that authority vanished once the police confirmed Mr. Bewick was not the wanted fugitive. The subsequently-seized evidence must be suppressed.

DATED this 2nd day of March, 2016.

Respectfully submitted,

s/ Marla L. Zink

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Marla L. Zink – WSBA 39042
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101
Telephone: 206-587-2711
Fax: 206-587-2710
E-mail:
wapofficemail@washapp.org

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	)	
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	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** 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 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MARCH, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710