Supreme Court No. 98727-1
(COA No. 51905-4-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RUSHELLE STOKEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Rushelle Stoken asks this Court to review the opinion of the Court of Appeals in *State v. Stoken*, No. 51905-4-II (issued on June 2, 20202). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Police may not seize an individual without a warrant absent the existence of a narrowly drawn exception to the warrant requirement. Officers engaged in their community caretaking function may detain persons for a noncriminal investigation related to that function. However, officers must engage in community caretaking in good faith and must not be motivated by an intent to arrest or search for evidence of a crime. Did the court improperly rely on the community caretaking exception to the warrant requirement where the officer's concerns about Ms. Stoken's health and safety had been fully dispelled by the time she was seized, and where police arrived at the scene and targeted Ms. Stoken specifically to investigate a crime?

2. Police may seize an individual without a warrant where they have reasonable suspicion that the person has committed a crime. The suspicion must be based on specific and articulable facts in existence at the inception of the seizure. Here, Detective Perkinson knew Ms. Stoken did not

resemble the identity theft suspect he was investigating. Did the officer lack reasonable suspicion to seize Ms. Stoken?

3. A trial court abuses its discretion when it denies a defendant's motion to reopen an evidentiary hearing due to a late disclosure of new evidence by the government. Here, the trial court concluded the police had reasonable suspicion Ms. Stoken was involved in an identity theft case at a suppression hearing. A color photograph which the State disclosed to defense nearly a year after the hearing revealed the suspect in the identity theft case was clearly not Ms. Stoken. Before trial, defense moved to reopen the suppression hearing for introduction of the newly discovered evidence, which the court denied. Did the trial court err in denying defense's motions to reopen the suppression hearing and for reconsideration?

4. The trial court abuses its discretion when it fails to exercise its discretion at all. Here, Ms. Stoken requested a drug offender sentencing alternative under the statute, but the court categorically denied the request based on her convictions. Did the court fail to exercise its discretion in sentencing Ms. Stoken?

C. STATEMENT OF THE CASE

On May 12, 2016, Detective Jason Perkinson and another officer arrived at a home in Aberdeen to investigate an identity theft and fraud

case. 4/3/17 VRP 7. The officers had surveillance footage and color photographs of a thin white woman using a credit card fraudulently at an ATM. *Id*. The officers traced the credit card to this residence. *Id*. One of the residents, Melissa Atkinson, answered the door and spoke to the officers. Detective Perkinson determined Ms. Atkinson was not the woman from the photographs. 4/3/17 VRP 12.

Upon the officers' arrival, Detective Perkinson saw a light colored car parked next to the residence. 4/3/17 VRP 11. The car generally resembled the one in which the identity theft suspect drove away. *Id*. After speaking to Ms. Atkinson, the detective went to the passenger side of the car, while Ms. Atkinson went to the driver's side. 4/3/17 VRP 16, 26. Detective Perkinson saw a woman in the car, later identified as Rushelle Stoken, sitting in the driver's seat asleep, leaning towards the passenger seat. 4/3/17 VRP 13-14. He also noticed a jacket in the car with some pink fabric which he thought resembled the clothing worn by the identity theft suspect. 4/3/17 VPR 41.

Detective Perkinson thought Ms. Stoken might require medical attention or be under the influence. 4/3/17 VRP 17. Ms. Atkinson knocked on the driver's side window, and Ms. Stoken woke up and opened the car door. 4/3/17 VRP 16. The detective moved over to the driver's side and asked if Ms. Stoken was okay. 4/3/17 VRP 17. Ms. Stoken stepped out of

the car, and the detective noticed she was sweating and wearing several layers of clothing. *Id*. He directed her to remove her jacket to begin cooling down. 4/3/17 VRP 18. He also noticed a smell of body odor mixed with a vinegary smell he associated with heroin. 4/3/17 VRP 17. Detective Perkinson asked Ms. Stoken if she needed medical aid, which she repeatedly refused. CP 60; 4/3/17 VRP 29. The officer did not request any medical aid for Ms. Stoken.

After establishing Ms. Stoken did not need medical attention, Detective Perkinson continued his investigation, believing Ms. Stoken resembled "the suspect involved in the ID and fraudulent case that [he was] there to speak with." 4/3/17 VRP 18. He detained Ms. Stoken by asking for her identification, which she provided. 4/3/17 VRP 19. Shortly thereafter, Ms. Stoken attempted to flee from the scene and was ultimately arrested, charged, and convicted of one count possession with intent to deliver a controlled substance, and one count of simple possession of a controlled substance. 4/3/17 VRP 22; CP 10-20.

Defense moved to suppress the evidence pursuant to CrR 3.6 based on an unlawful seizure. 4/3/17 VRP 3-56. The trial court concluded Detective Perkinson seized Ms. Stoken when he asked for her identification. 4/3/17 VRP 52. The court found the warrantless seizure was permissible because the detective was engaged in community caretaking

and had reasonable suspicion Ms. Stoken was involved with the identity theft due to her generally similar appearance, the light colored car, and the jacket with pink fabric. 4/3/17 VRP 51-52.

Following the ruling, Ms. Stoken moved to reopen the CrR 3.6 suppression hearing because she learned Detective Perkinson had a color photograph of the identity theft suspect which she sought to introduce. 3/7/18 VRP 20-24. Ms. Stoken argued the photo would demonstrate she was not the woman depicted therein. 3/7/18 VRP 22. The court denied the motion, stating it did not matter whether Ms. Stoken was the same woman or not. *Id.* The court elaborated, "I understand you weren't the attorney at the time, but Mr. Baum, everybody just gets one bite out of the apple, and your client had whoever her attorney was at the time. 3/7/18 VRP 23.

After this hearing, the State informed counsel it had in its possession a color copy of the photo, which it had previously denied possessing. CP 24-27. The State disclosed the photo after the March 7 hearing, nearly a year after the initial 3.6 hearing. *Id.* After receiving the photo, counsel determined the identity theft suspect was "clearly not Ms. Stoken." CP 25. Counsel moved the court for reconsideration to reopen the CrR 3.6 hearing in order to introduce the photograph and relitigate the validity of the seizure in light of this new evidence. CP 24-27. The trial court again denied the motion. 3/7/18 VRP 35; CP 23.

Ms. Stoken was convicted as charged. CP 10-20. At sentencing, she requested a prison-based drug offender sentencing alternative ("DOSA"). 5/11/18 VRP 21-23. The trial court denied the request, stating, "I do not grant DOSAs to people who profit from the sale of heroin. I never have and I'm not going to start today. So the request for a prison based DOSA is denied." 5/11/18 VRP 23.

The Court of Appeals affirmed Ms. Stoken's convictions. Slip Op. at 1-13.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The court erred when it denied Ms. Stoken's CrR 3.6 motion to suppress because the evidence was obtained during an unconstitutional seizure.

a. Both article I, section 7 and the Fourth Amendment prohibit warrantless seizures absent the existence of a narrowly drawn exception.

Article 1, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

"Article I, section 7 of the Washington Constitution is more protective than the Fourth Amendment, particularly where warrantless searches are concerned." *State v. Boisselle*, 3 Wn. App. 2d 266, 277, 415 P.3d 621 (2018) (citing *State v. Smith*, 177 Wn.2d 533, 539, 303 P.3d

1047 (2013)). The language of article I, section 7 "not only prohibits unreasonable searches, but also provides no quarter for ones that, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional." *Id*.

Under these constitutional provisions, a warrantless seizure is per se unreasonable. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). This rule is subject to a few "jealously and carefully drawn exceptions." *Id*. at 349 (internal citations and quotations omitted). The burden is always on the State to prove one of these narrow exceptions by clear and convincing evidence. *Id*. at 350 (citing *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)).

i. Community Caretaking is an exception to the warrant requirement only when it is totally divorced from an criminal investigation and where an officer is not motivated by an intent to arrest or search for evidence.

Police officers may not require a warrant when engaged in community caretaking. *Boisselle*, 3 Wn. App. 2d at 277-78. This exception was first announced in *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), under a Fourth Amendment analysis. There, the United States Supreme Court observed:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, **totally**

> **divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute**.

Cady, 413 U.S. at 441 (emphasis added).

Washington courts have accepted community caretaking as an exception to the Fourth Amendment warrant requirement. *See State v. Houser*, 95 Wn.2d 143, 151, 622 P.2d 1218 (1980); *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). In *Smith*, 177 Wn.2d 533, a plurality of the court agreed that community caretaking may be an exception to article I, section 7's warrant requirement. However, this Court has not specifically considered the bounds of this exception as applied under article I, section 7. *Boisselle*, 3 Wn. App. 2d at 287 (Spearman, J., concurring); *Smith*, 177 Wn.2d at 386-87 (Chambers, J. Pro Tem, dissenting).

Where Washington courts have analyzed the community caretaking exception under the State constitution, they have continued to require a good faith motivation when officers utilize this function. In *State v. Gocken*, for example, the Court noted "police may be required to perform a warrantless search, not as a response to an immediate emergency, but as part of their function of protecting and assisting the public." 71 Wn. App. 267, 276, 857 P.2d 1074 (1993). The Court held that "**[s]o long as it is undertaken in good faith and is not motivated by an**

intent to arrest or search for evidence of a crime, a warrantless search conducted in order to check on an individual's health or safety is a valid exception to constitutional warrant requirements." *Id*. at 277 (emphasis added). The noncriminal community caretaking investigation "must end when reasons for initiating an encounter are fully dispelled." *Kinzy*, 141 Wn.2d at 388.

ii. Officers may seize an individual without a warrant if they have reasonable suspicion the person has committed, or is about to commit, a crime.

Officers may also seize an individual without a warrant during a *Terry*[1] stop. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). For a permissible *Terry* stop, the State must show an officer had a "reasonable suspicion" that the detained person was, or was about to be, involved in a crime. *Id*. (quoting *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003)). Under both the state and federal constitutions, the reasonable suspicion standard requires the officer's suspicion be grounded in "specific and articulable facts." *Id.* (quoting *Terry*, 392 U.S. at 21, 88

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

S.Ct. 1868). Our state constitution, however, requires a stronger showing by the State. *Id.* at 618.

To determine whether an officer's suspicion was reasonable, courts look at the totality of the circumstances known to the officer. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017) (citing *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015)). A *Terry* stop must be justified by specific, articulable facts at its inception. *Id*.

Here, the court found Detective Perkinson seized Ms. Stoken when he requested her identification. 4/3/17 VRP 52. The court found there was "an element of community caretaking" and "reasonable suspicion of a possible connection to [the] identity theft" based on Ms. Stoken's appearance and the similar car. 4/3/17 VRP 51-52. As discussed below, neither exception is applicable here, and the Court of Appeals decision concluding otherwise is incorrect. Slip Op. at 6-11.

b. Detective Perkinson was not engaged in community caretaking when he seized Ms. Stoken; to the extent he was, a warrant was still required because the detective was motivated by an intent to arrest or search for evidence of a crime.

By the time Detective Perkinson asked for Ms. Stoken's identification, his reason for initiating the community caretaking investigation was fully dispelled. He testified Ms. Stoken emerged from the car sweating, and he began asking if she was okay. 4/3/17 VRP 18. He

directed her to remove her jacket to cool herself down. 4/3/17 VRP 18. The detective asked if she needed medical aid several times, which Ms. Stoken assured him repeatedly she did not. CP 60; 4/3/17 VRP 29. Ms. Stoken's symptoms and behavior did not concern the detective enough for him to request medical aid for her over her objection. Detective Perkinson's concerns for Ms. Stoken's wellbeing were fully dispelled before he asked for her identification. He was no longer engaged in community caretaking when he seized Ms. Stoken, and the trial court erred in concluding this exception justified her seizure.

Additionally, to the extent Detective Perkinson was still engaged in community caretaking when he seized Ms. Stoken, he did not engage in this function in good faith. Rather, he arrived at Ms. Atkinson's home specifically to investigate an identity theft and fraud case. 4/3/17 VRP 7. He became suspicious of Ms. Stoken's car because it looked like the one driven by the suspect from the bank. 4/3/17 VRP 7-8, 10, 11. Before even contacting Ms. Stoken, he noted a jacket in the car "had some pink to it" "similar to the picture that was taken from the ATM of the possible other suspect." 4/3/17 VRP 41.

Detective Perkinson's community caretaking function was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," as required by

Cady. 413 U.S. at 441. In addition to checking on Ms. Stoken's wellbeing, he was also contacting her because "she is possibly resembling the suspect involved in the ID and fraudulent case that I'm there to speak with." 4/3/17 VRP 18. The detective was motivated by "an intent to arrest or search for evidence of a crime," which invalidates the community caretaking exception. *Gocken*, 71 Wn. App. at 276.

Because Detective Perkinson was no longer engaged in community caretaking when he seized Ms. Stoken, or alternatively because his community caretaking function was inextricably and impermissibly bound to his criminal investigation, the trial court erred in concluding Ms. Stoken's warrantless seizure was justified by the community caretaking exception.

c. The trial court erred in concluding the Terry *reasonable suspicion exception applied because Detective Perkinson knew Ms. Stoken looked nothing like the identity theft suspect he was investigating.*

i. Still before trial, counsel moved to reopen the suppression hearing after the State provided a photograph showing Ms. Stoken looked nothing like the identity theft suspect.

Detective Perkinson testified at the initial CrR 3.6 hearing that he believed Ms. Stoken "possibly" resembled the identity theft suspect he was investigating. 4/3/17 VRP 18. Although the State had a color photograph of the actual suspect taken from surveillance video, it did not

provide this photograph to defense prior to first CrR 3.6 hearing. 3/26/18 VRP 35. Nearly a year later, substitute counsel moved to reopen the first CrR 3.6 hearing so that the court might review the photo and compare it to Ms. Stoken. The court denied the motion, stating it did not matter for purposes of the suppression hearing whether the court could have found the woman actually depicted in the photo was not Ms. Stoken. 3/7/18 VRP 22. The court further stated, "I understand you weren't the attorney at the time, but Mr. Baum, everybody just gets one bite out of the apple, and your client had whoever her attorney was at that time." 3/7/18 VRP 23.

After the motion to reopen the suppression hearing, the State turned over a color copy of the surveillance photo, and counsel filed a motion for reconsideration based on the newly discovered evidence. CP 24-27. Counsel declared in his motion that the woman depicted in the photo "clearly isn't Ms. Stoken." CP 25. The trial court denied the motion out of hand. 3/26/18 VRP 34-35.

ii. The trial court erred in denying the motion to reopen the suppression hearing and the motion for reconsideration because counsel's inability to present the photograph was precipitated by the State's failure to produce color copy prior the first 3.6 hearing.

The trial court erred by denying Ms. Stoken's motions to reopen the suppression hearing and for reconsideration because the State's failure

to produce the photo resulted in counsel's inability to present the color photo. A trial court's decisions on motions for reconsideration and to reopen a proceeding for new evidence are reviewed for abuse of discretion. *State v. Tyler*, 177 Wn.2d 690, 697, 302 P.3d 165, 169 (2013). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27, 30 (2012) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

No published cases in Washington appear to have found a trial court abused its discretion in denying motions to reopen a suppression hearing or for reconsideration. However, *U.S. v. Chavez*, 902 F.2d 259 (4th Cir. 1990) is instructive here. In *Chavez*, the defendant sought leave to file an untimely motion to suppress owing to the government's delay in turning over a grand jury transcript. *Id.* at 262. The district court denied the motion. *Id*. On review, the Fourth Circuit found the district court abused its discretion because counsel's tardiness in filing the motion to suppress was due to the government's failure to timely provide a necessary transcript. *Id*. at 263-64.

Here, the trial court concluded at the first suppression hearing that Ms. Stoken was seized at the moment Detective Perkinson requested her identification. 4/3/17 VRP 52. The court found the seizure was justified by

the detective's community caretaking function and Ms. Stoken's "generally similar" appearance to the identity theft suspect Detective Perkinson was investigating. *Id.*

As discussed above, the community caretaking exception does not apply in this case. Thus, the only remaining justification for Ms. Stoken's warrantless seizure was her alleged similarity in appearance to the woman depicted the ATM photo. Like in *Chavez*, although the State had a color copy of the photograph in its possession, it did not inform defense counsel of its existence until March 7, 2018, the same day as the second CrR 3.6 hearing. CP 25. The State did not provide the photo to counsel until after that hearing, nearly a year after the first 3.6 hearing. Upon receipt, counsel discovered the woman depicted "clearly isn't Ms. Stoken." CP 25. Counsel then moved for reconsideration of the court's refusal to reopen the initial suppression hearing, which the court denied out of hand. 3/26/17 VRP 35; CP 23.

The trial court's denial of defense's motions to reopen the 3.6 hearing and for reconsideration constitute an abuse of discretion because counsel's inability to present the color photograph at the initial suppression hearing was due solely to the State's failure to provide the photograph in a timely manner. Because counsel's delay was caused by the State's inaction, the trial court abused its discretion by refusing to

reopen the 3.6 hearing to review the photo. For the same reasons, the court abused its discretion in denying the motion for reconsideration after counsel finally received the color copy from the State. The Court of Appeals decision to the contrary is without merit. Slip Op. at 10-11.

iii. Because Detective Perkinson knew Ms. Stoken looked nothing like the identity theft suspect, he lacked reasonable suspicion to support a warrantless seizure of her.

In this case, Detective Perkinson had surveillance videos and color photos of the identity theft suspect he was seeking. 4/3/17 VRP 7, 41. Although the detective claimed Ms. Stoken "possibly" resembled this suspect, defense counsel learned after viewing the photograph that the woman in the photo was clearly not Ms. Stoken. 4/3/17 VRP 18; CP 25. The State did not contest this, and Detective Perkinson later admitted he did not believe the woman in the surveillance photo was Ms. Stoken. 3/27/18 VRP 101. Had the trial court permitted counsel to reopen the 3.6 hearing and introduce the photograph, the court could have determined Detective Perkinson's claim that Ms. Stoken resembled the woman in the photo was unreasonable. Because the detective knew or should have known Ms. Stoken was not the identity theft suspect based on the photograph alone, he lacked reasonable suspicion that she was involved

the identity theft and his warrantless seizure of Ms. Stoken was impermissible.

d. The trial court should have granted Ms. Stoken's motion to suppress. Reveral and dismissal is required.

Under the fruit of the poisonous tree doctrine, all evidence that is the product of a violation of article I, § 7 must be suppressed. *Ladson*\, 138 Wn.2d at 359. Because Detective Perkinson conducted a warrantless seizure of Ms. Stoken, and no exceptions to the warrant requirements are applicable here, all the evidence obtained following the violation must be suppressed. *State v. Ortiz*, 196 Wn. App. 301, 308, 383 P.3d 586 (2016). The convictions should be reversed and the case remanded with order to suppress the illegally obtained evidence. This includes not only the evidence from Ms. Stoken's person, but also the evidence obtained from the car.

2. The trial court abused its discretion by refusing to exercise that discretion to determine whether Ms. Stoken should receive a drug offender sentencing alternative.

The Sentencing Reform Act ("SRA") prescribes the trial court's authority to sentencing in felony cases. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). RCW 9.94A.660 permits a trial court to sentence a defendant to a drug offender sentencing alternative

("DOSA") rather than a standard range sentence. Generally, a court's decision not to impose a DOSA is not reviewable, but a defendant may challenge the procedure by which a sentence was imposed. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

Though the SRA grants trial courts considerable discretion, they are still required to act within its strictures and principles of due process of law. *Id*. at 342 (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). "[E]very defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Id*. (citing *State v. Garcia–Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)) (emphasis in original). A trial court abuses its discretion when "it refuses categorically to consider an exceptional sentence below the standard range under any circumstances." *Id*. (quoting *Garcia-Martinez*, 88 Wn. App. at 330). The failure to consider an exceptional sentence is reversible error. *Id*. "Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." *Id*.

Here, Ms. Stoken requested a DOSA in lieu of a standard range sentence, citing her need to obtain treatment for her opioid addiction. 5/11/18 VRP 23. The court refused to consider the request, stating:

> **I do not grant DOSAs to people who profit from the sale of heroin**. I never have and I'm not going to start today. So the request for a prison based DOSA is denied.

5/11/18 VRP 23 (emphasis added).

The trial court in this case categorically refused to consider whether Ms. Stoken should receive a DOSA. The court declared a general policy that it did not consider DOSAs for an entire class of offenders, i.e. heroin sellers. This categorical refusal to consider Ms. Stoken's requested sentence constituted an abuse of discretion, and the Court of Appeals was incorrect to find the trial court had meaningfully considered Ms. Stoken's request for a DOSA. *Grayson*, 154 Wn.2d at 352; Slip Op. at 11-13.

E. CONCLUSION

Based on the foregoing, Ms. Stoken respectfully requests that review be granted. RAP 13.4(b).

DATED this 2nd day of July day of July 2020.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 2, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RUSHELLE RENEE STOKEN, Appellant.	No. 51905-4-II UNPUBLISHED OPINION

LEE, C.J. — Rushelle R. Stoken appeals her convictions and sentence for possession of a controlled substance (heroin) with intent to deliver and possession of a controlled substance (methamphetamine). Stoken contends the trial court erred in denying her CrR 3.6 motion to suppress, motion to reopen the CrR 3.6 hearing, and motion to reconsider the denial of her motion to reopen. Stoken also contends the trial court erred by denying her request for a prison-based drug offender sentencing alternative (DOSA) sentence and in imposing certain legal financial obligations (LFOs). We affirm Stoken's convictions and standard range sentence, but remand to the sentencing court to reconsider LFOs consistent with the 2018 legislative amendments and *Ramirez*.[1]

[1] *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

FACTS

On May 12, 2016, Aberdeen Police Department Detective Jason Perkinson arrived at a residence to investigate an identity theft and fraud case. From a bank's surveillance footage and photographs, Detective Perkinson knew that the suspect was a "skinny" woman with a "white complexion . . . wearing jackets." Verbatim Report of Proceedings (VRP) (July 14, 2017) at 7. One of the jackets was a pink. (CP 60) He also had footage of a vehicle associated with the subject that was "a late model . . . lighter or mid-color . . . sedan." VRP (July 14, 2017) at 7-8.

When he arrived at the residence, Detective Perkinson noticed a light-colored car parked on the side of the residence. The car resembled the car in the surveillance photographs.

Detective Perkinson knocked on the door and Melissa Atkinson opened the door. Perkinson was able to discern that Atkinson was not the woman from the photographs. Perkinson asked Atkinson about the vehicle parked on the side of the house and Atkinson told him she did not know there was a vehicle parked on the side of her house.

Detective Perkinson then went to the vehicle. He observed a woman inside, later identified as Stoken, who was sitting in the driver's seat and slumped over towards the passenger seat. He also noticed a jacket in the car with some pink fabric which he thought could have resembled the clothing worn by the identity theft suspect.

Detective Perkinson was concerned that Stoken was having a "medical condition . . . or even deceased." VRP (July 14, 2017) at 15. It was a warm, sunny day. He knocked on the window. Stoken woke up and opened the door. Perkinson noticed Stoken was sweating profusely and the detective could smell the "pungent odor that I associate with my training and experience to heroin." VRP (July 14, 2017) at 17. Perkinson asked Stoken to take off her jacket to "start

trying the cooling process." VRP (July 14, 2017) at 18. Perkinson thought that Stoken resembled the suspect he was looking for.

After establishing Stoken did not need medical attention, Detective Perkinson asked her for identification, which she provided. He told her he was investigating a false identity/fraud case. During this time, Stoken was fidgeting with her pockets even though the detective asked her not to.

Detective Perkinson observed a glass pipe sticking out of one of Stoken's pockets. Perkinson also observed a large object in the middle pocket of Stoken's sweatshirt that Stoken repeatedly reached for. Perkinson told her to stop reaching inside the sweatshirt at which point Stoken ran off. Perkinson was able to catch up to Stoken. Stoken threw a large object from inside the sweatshirt pocket right before the detective reached her. The object was a bundle containing multiple baggies of heroin, bags of other controlled substances, and several small baggies. There was "approximately one pound of pure heroin." Clerk's Papers (CP) at 137. Perkinson searched Stoken following her arrest and located the pipe he previously noticed coming out of her pocket with what appeared to be methamphetamine residue based on his training and experience.

The State charged Stoken with possession of a controlled substance (heroin) with intent to deliver and possession of a controlled substance (methamphetamine). [2]

Stoken moved to suppress the evidence based on an unlawful seizure pursuant to CrR 3.6. Detective Perkinson was the only witness who testified at the CrR 3.6 hearing, and he testified as

[2] The State also charged Stoken with two other counts of possession of a controlled substance, but those charges were dismissed.

outlined above. The State argued that the initial contact between Detective Perkinson and Stoken was for community caretaking and that after the detective looked at Stoken and smelled heroin then a brief investigative stop under *Terry*[3] was permitted. The trial court agreed and denied Stoken's motion to suppress. The trial court made the following oral findings of fact and conclusions of law:

> There's clearly an element of community caretaking. [Stoken] was in a locked vehicle on a warm, sunny day. She's wearing a vest on top of a sweatshirt and, basically, sleeping or passed out in her vehicle, and appeared more like a pass-out situation than sleeping. So that's a concern in regards of what the—in regards to anything else the officer was doing.
>
> With the vehicle and her description were generally similar to . . . the reasoning [Detective Perkinson] was at the property at the house. So if we are going to say that she was detained when he asked for her identification, which I think you can make a good argument, once that was done, there was some detention or slight detention there until she identified herself. The officer was standing by the door. It's not clear to me. I don't know if the testimony brought out whether she could have walked away without having the officer having to move. So I think at that point when he asked for identification, she was detained. But I think there's reasonable suspicion of a possible connection to his identity theft. The officer's identity theft investigation with a description of the car, the description of one of the people involved, and that person, [Atkinson], who was somehow identified with that. When that person was identified there at the house, as well as through this photo, that it wasn't the person. So it was clearly somebody else. And they were in—and then this vehicle is in close proximity to [Atkinson's] residence there. So those are facts that gave rise to a reasonable suspicion that [Stoken] may have been involved in that criminal activity. So it gave the officer the right to ask her to identify herself, which she did ultimately do and then shortly after bolted. So and then you add that running from the scene. And I think the officer's development of looking at what's in the vehicle, the drug paraphernalia in the vehicle; the jacket that's located inside the vehicle. That again is another item consistent with what the officer was investigating, along with her physical appearance, the clothing that she was wearing. So I think at that point there was probable cause to arrest when the officer did arrest her.

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

> Therefore, whatever was taken from the arrest and as a result of the arrest in subsequent issuance of a warrant would be admissible. It's not—I'm not going to suppress it.

VRP (July 14, 2017) at 51-53. [4]

Later, Stoken moved to reopen the CrR 3.6 suppression hearing, informing the trial court that she suspected "the police have a color [photograph]" of the identity theft/fraud suspect. 1 VRP (Mar. 7, 2018) at 20. Stoken only had a black and white photograph. Stoken argued that a color photograph would demonstrate that the detective knew Stoken was not the identity theft/fraud suspect. The trial court denied the motion, concluding that it "doesn't matter" if the photograph was color or black and white because the "dispositive" issue is "probable cause" not "proof beyond a reasonable doubt." 1 VRP (Mar. 7, 2018) at 22.

After this hearing, Stoken obtained the color photograph of the suspect from the State. Arguing the woman in the photograph did not look like her, Stoken moved for the trial court to reconsider its denial to reopen the CrR 3.6 hearing. The trial court denied her motion.

The jury found Stoken guilty as charged. Stoken requested a prison-based DOSA sentence. The trial court ordered that Stoken be screened for a DOSA sentence.[5] The trial court ultimately denied Stoken's DOSA sentence request. The trial court stated, "I do not grant DOSAs to people

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[4] The State informed the trial court it would prepare findings of fact and conclusions of law based on the trial court's oral ruling, but no written findings of fact and conclusions of law were entered. The failure to enter written findings of fact and conclusions of law following a suppression hearing is harmless error if the court's oral opinion and the record are "so clear and comprehensive that written findings would be a mere formality." *State v. Smith*, 68 Wn. App. 201, 208, 842 P.2d 494 (1992). Because neither party challenges the adequacy of the trial court's oral ruling, we review the trial court's oral findings of fact and conclusions of law.

[5] While the Department of Corrections provided the trial court with the information it considered in screening Stoken for a DOSA, our record does not contain DOC's actual recommendation.

who profit from the sale of heroin. I never have and I'm not going to start today. So the request for a prison-based DOSA is denied." VRP (May 11, 2018) at 23.

The trial court imposed a standard range sentence of 84 months on the possession of heroin with intent to deliver conviction, plus a 24-month sentence enhancement because the crime took place within 1,000 feet of a school bus route stop, and 12 months on the possession of methamphetamine conviction. The trial court also imposed the following LFOs: $100 deoxyribonucleic acid (DNA) collection fee, $1,625 court-appointed attorney fee, $200 criminal filing fee, $2000 violation of the Uniform Controlled Substances Act (VUCSA) fine, $300 drug task force fee, and $100 crime lab fee. The trial court entered an order of indigency for appeal purposes.

Stoken appeals.

ANALYSIS

A. CrR 3.6 Motion to Suppress

Stoken argues that the trial court erred in denying her CrR 3.6 motion to suppress because she was unlawfully seized. She contends that neither the community caretaking nor reasonable suspicion of criminal activity exceptions applied to her warrantless seizure. (Br. of Appellant at 11-17) We disagree.

1. Standard of Review

Unchallenged findings of fact are verities on appeal. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205, *cert denied*, 549 U.S. 978 (2006). Conclusions of law are reviewed de novo. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025 (2003).

2. Legal Principles

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit warrantless searches and seizures unless an exception to the warrant requirement applies. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The exclusionary rule requires suppression of all evidence obtained pursuant to a person's unlawful seizure. *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

The community caretaking function is an exception to the warrant requirement. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). Another exception is a *Terry* investigative stop. *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015).

3. Community Caretaking Exception

The community caretaking exception to the warrant requirement allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to make a routine check on health and safety. *State v. Boisselle*, 194 Wn.2d 1, 10, 448 P.3d 19 (2019) (citations omitted). "When a warrantless search falls within an officer's general community caretaking function, such as the performance of a routine check on health and safety, courts must next determine whether the search was reasonable." *Id.* at 11-12 (citations omitted). Whether the encounter for a routine check on health and safety is reasonable "'depends upon a balancing of a citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a community caretaking function.'" *Id.* at 12 (internal quotation marks omitted) (quoting *Kinzy*, 141 Wn.2d at 394). "If the public's interest outweighs the citizen's privacy interest, the warrantless search was reasonable and was permissible under our state constitution." *Id.* (citations omitted).

"[I]n order for the community caretaking exception to apply, a court must first be satisfied that the officer's actions were 'totally divorced' from the detection and investigation of criminal activity." *Id.* at 11 (quoting *Kinzy*, 141 Wn.2d at 385). Accordingly, we must determine the threshold question of whether the community caretaking exception was used as a pretext for a criminal investigation before applying the community caretaking exception test.

Here, the trial court found that Stoken "was in a locked vehicle on a warm, sunny day. She's wearing a vest on top of a sweatshirt and, basically, sleeping or passed out in her vehicle, and appeared more like a pass-out situation than sleeping." VRP (July 14, 2017) at 51-52. Stoken argues any contact at this point would be unlawful because Detective Perkinson was at the residence to investigate a crime. But the undisputed evidence shows that the initial contact between Perkinson and Stoken was not to investigate a crime; rather, it was concern for Stoken's health and safety. Since checking on Stoken's health and safety was the basis for Perkinson's initial contact, the contact was not pretextual. Thus, the trial court properly concluded that the initial encounter between Perkinson and Stoken based on the community caretaking function was lawful. We now turn to whether the continued contact was lawful.

4. Reasonable Suspicion of Criminal Activity

Under *Terry*, an officer may "briefly detain a person for questioning, without a warrant, if the officer has reasonable suspicion that the person is or is about to be engaged in criminal activity." *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). "A valid *Terry* stop requires that the officer have reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop." *Fuentes*, 183 Wn.2d at 158. To evaluate the reasonableness of the officer's suspicion, this court looks at the totality of the circumstances

known to the officer. *Id.* "'The totality of circumstances includes the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty.'" *Weyand*, 188 Wn.2d at 811-12 (quoting *Fuentes*, 183 Wn.2d at 158). The officer's suspicion must be individualized to the person being stopped. *Fuentes*, 183 Wn.2d at 159.

Here, the trial court found that Detective Perkinson was involved in an identity theft/fraud investigation that led him to Atkinson's residence. "[T]he vehicle and [Stoken's] description were generally similar to . . . the reasoning he was at the property" VRP (July 14, 2017) at 52. The clothing that Stoken was wearing was also similar to the suspect. And since Perkinson noticed Atkinson did not match the photograph of the suspect, another female in the vicinity of the residence may have been "involved." VRP (July 14, 2017) at 52. These unchallenged findings of fact support the trial court's conclusion of law that Perkinson had "reasonable suspicion that [Stoken] may have been involved in criminal activity." VRP (July 14, 2017) at 52.

Detective Perkinson's continued encounter with Stoken, after checking on her health and safety, was a lawful *Terry* stop. During the *Terry* stop, Perkinson smelled the "pungent odor" that he "associate[d] with [his] training and experience to heroin." VRP (July 14, 2017) at 17. He observed a glass pipe sticking out of one of Stoken's pockets. Perkinson also observed a large object in the middle pocket of Stoken's sweatshirt that Stoken repeatedly reached for. Perkinson told Stoken to stop reaching inside the sweatshirt, at which point Stoken ran off. Perkinson was able to catch up to Stoken. Stoken threw a large object from inside the sweatshirt pocket right before the detective reached her. The object was a bundle containing multiple baggies of heroin, bags of other controlled substances, and several small baggies. Perkinson searched Stoken

following her arrest and located the pipe he previously noticed coming out of her pocket with what appeared to be methamphetamine residue based on his training and experience. Thus, Perkinson had probable cause to arrest, and the search was a lawful search incident to arrest. We hold that the trial court properly denied Stoken's CrR 3.6 motion to suppress.

B. MOTION TO REOPEN CRR 3.6 HEARING/MOTION FOR RECONSIDERATION

Stoken next contends that the trial court erred in denying her motion to reopen the CrR 3.6 suppression hearing and her motion for reconsideration of the denial of her motion to reopen. We disagree.

1. Motion to Reopen

A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court. *State v. Tyler*, 177 Wn.2d 690, 697, 302 P.3d 165 (2013). An abuse of discretion exists when a trial court's exercise of its discretion is based upon untenable grounds or reasons. *State v. Quaale*, 182 Wn.2d 191, 197, 340 P.3d 213 (2014).

Here, Stoken moved to reopen the CrR 3.6 suppression hearing because she suspected "the police [had] a color [photograph]" of the identity theft/fraud suspect and a color photograph would demonstrate that the detective knew Stoken was not the identity theft/fraud suspect. 1 VRP (Mar. 7, 2018) at 20. But, as the trial court correctly pointed out, the *Terry* stop did not need "proof beyond a reasonable doubt." 1 VRP (Mar. 7, 2018) at 22. As discussed above, the vehicle's location next to a residence connected to the identity theft/fraud investigation, Stoken's general resemblance to the suspect, her clothing, and the fact another female at the residence had already been ruled out as being a suspect provided a reasonable suspicion of criminal activity for a *Terry* stop. A color photograph instead of a black and white photograph would not negate this reasonable

suspicion. Accordingly, the trial court did not abuse its discretion in denying Stoken's motion to reopen the case in order to admit into evidence a color photograph of the identity theft/fraud suspect.

2. Motion for Reconsideration

Like a motion to reopen, a motion for reconsideration is left to the sound discretion of the trial court. *Tyler*, 177 Wn.2d at 697. For the same reasons we concluded that the trial court did not abuse its discretion in denying Stoken's motion to reopen the suppression hearing, we also conclude the trial court did not abuse its discretion in denying her motion for reconsideration. Here, a color photograph did not negate reasonable suspicion for a valid *Terry* stop.

C. DOSA

Stoken next contends that the trial court abused its discretion by not exercising its discretion when deciding whether to impose a DOSA sentence. We disagree.

In general, decisions regarding DOSA sentences rest within the trial court's discretion. *State v. Yancey*, 193 Wn.2d 26, 34, 434 P.3d 518 (2019). Ordinarily, a trial court's decision to not impose a DOSA sentence is not reviewable on appeal. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). Exceptions include refusing to exercise discretion at all or relying on an impermissible basis in making the decision. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). "While no defendant is entitled to an exceptional sentence below the standard range–every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A trial court's failure to meaningfully consider a sentencing alternative is reversible error. *Id.*

In *Grayson*, the trial court's stated reason for denying a DOSA request was because it thought the program was underfunded. *Id.* Our Supreme Court held that a court's "categorical refusal to consider [a DOSA] sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." *Id.* The Supreme Court held that the trial court did not meaningfully consider a DOSA sentence because the trial court did not think it was a meaningful option. *Id.* The Supreme Court remanded for the trial court to consider whether Grayson was an appropriate candidate for a DOSA. *Id*. at 343.

Here, the trial court did not deny Stoken's DOSA sentence request because it did not think a DOSA was an option; rather, the trial court considered the option but based on the jury's finding that Stoken was guilty of possession of almost a pound of heroin with intent to deliver, the trial court relied on an adjudicative fact[6] to not order a DOSA sentence. Unlike in *Grayson*, the trial court here did consider Stoken's request for a DOSA sentence and, after looking at the facts of her case, concluded a DOSA sentence was not appropriate. In doing so, it did not abuse its discretion.

D. LFOs

Stoken lastly contends that certain LFOs should be stricken. (Br. of Appellant at 25-26) The State concedes that the imposed LFOs may not "conform with the current state of the law." Br. of Respondent at 13. We accept the State's concession and remand to the sentencing court to reconsider LFOs in light of the 2018 legislative amendments and *Ramirez*.[7]

[6] "[A]djudicative facts are those developed in a particular case" as compared to a legislative fact that is a truth that does not change from case to case. *Grayson*, 154 Wn.2d at 340.

[7] *Ramirez*, 191 Wn.2d at 747.

We affirm Stoken's convictions and standard range sentence, but remand to the sentencing court to reconsider LFOs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Worswick, J.

Melnick. J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 51905-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 2, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

July 02, 2020 - 4:27 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51905-4
Appellate Court Case Title:	State of Washington, Respondent v. Rushelle Stoken, Appellant
Superior Court Case Number:	16-1-00243-1

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