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Supreme Court No. 99886-8
(COA No. 53522-0-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CASHUNDO BANKS,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

"[T]he vast majority of people—whether white or Black—do not feel free to leave when approached by police." *United States v. Knights*, 989 F.3d 1281, 1294 (11th Cir. 2021) (Rosenbaum, J., concurring). In addition, "Black people often tread more carefully around law enforcement than the Court's hypothetical reasonable person does because of the grave awareness that a misstep or discerned disrespectful word may cause the officer to misperceive a threat and escalate an encounter into a physical one." *Id.* at 1297. Courts must employ a reasonable person standard that reflects these realities.

Two armed, uniformed police officers approached Cashundo Banks, a Black man asleep in a car, to check on his welfare. After they verified Mr. Banks was okay and did not need any assistance, police continued to question Mr. Banks, asked what he was doing, requested identification, and asked for his name and date of birth.

No reasonable person in this position would feel free to ignore the police's questions or drive away. Yet the Court of Appeals held this was not a seizure, engaging in the delusion that reasonable people feel no compulsion to comply in these circumstances.

This Court should accept review and jettison the legal fiction that a reasonable person feels free to ignore police officers who corner and

question them. A reasonable person would view such an encounter as a compulsory demand, not a voluntary request.

Finally, this Court should accept review to clarify that courts must take race into account in the totality of circumstances analysis. No reasonable Black man in Mr. Banks's position would have felt free to refuse the police's requests, and any reasonable Black man would know he would be risking his life if he failed to submit.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Cashundo Banks, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals opinion, filed May 18, 2021, terminating review.[1] RAP 13.3(a)(1); RAP 13.4(b)(1)-(4).

C. ISSUES PRESENTED FOR REVIEW

1. Police seize a person when they restrain an individual's freedom of movement and a reasonable person would not believe he or she was free to leave or decline a request due to an officer's use of force or display of authority. Two uniformed police officers hovered over Mr. Banks's car, asked him if he was okay, ignored his affirmative response and asked what he was doing, requested identification, and asked for his name and date of birth. Did the police encounter constitute a seizure

[1] The court issued the original opinion on February 9, 2021. It granted Mr. Banks's motion for reconsideration, on May 4, 2021, and issued a new opinion on May 18, 2021.

because no reasonable person would have felt free to ignore the police's requests, and should this Court accept review to jettison the legal fiction that a reasonable person would feel free to leave in such circumstances?

2. Empirical evidence demonstrates race is a significant factor in assessing what reasonable people believe they are free to do in the face of police action. The idea that any reasonable person in Mr. Banks's circumstances, particularly a reasonable Black man, would feel free to sit mute and ignore the police's pointed inquiries or would feel free simply to drive away assumes a reasonable person is ignorant of the history and reality of the role race plays in police encounters. Should this Court accept review and hold courts must consider race as a factor in the totality of the circumstances when applying the reasonable person standard?

D. STATEMENT OF THE CASE

Three armed, uniformed police officers responded to a call from Safeway to remove "unwanteds" from the store entrance. 5/23/19RP 8, 45. While the police were addressing that unrelated matter, an employee from a private security company patrolling the parking lot requested they check on a parked car. 5/23/19RP 9, 45-46. The car was not in a marked parking spot but was parked in an area that was not in the way. 5/23/19RP 10, 38; Exs. 4, 5.

Officers Hannah Bush and Deanna Ramos approached the car. 5/23/19RP 12-13. Cashundo Banks, a middle aged Black man, was asleep in the driver's seat. 5/23/19RP 11, 70; CP 59. Officer Bush did not see Mr. Banks engage in any criminal activity. 5/23/19RP 27. Officer Bush's purpose in approaching the car was "to check on him to see if he was okay." 5/23/19RP 27; *see also* 5/23/19RP 17, 23.

Officer Bush knocked on the window, identified herself, and shined her flashlight on her uniform. 5/23/19RP 12, 31-32. She knocked a few times because Mr. Banks did not immediately respond. 5/23/19RP 12, 29. She asked Mr. Banks to roll down the window. 5/23/19RP 13. Officer Bush was standing directly outside of Mr. Banks's window. 5/23/19RP 12. Officer Ramos was also present at the car. 5/23/19RP 12, 31.

Once Mr. Banks responded, Officer Bush asked Mr. Banks if he was okay. 5/23/19RP 13-14, 30. Officer Bush ascertained that Mr. Banks was indeed okay. 5/23/19RP 30. She determined Mr. Banks did not need medical attention. 5/23/19RP 30.

After Officer Bush established Mr. Banks was fine and not in need of any assistance, she persisted in the encounter. Officer Bush told Mr. Banks store security sent her and asked what he was doing there. 5/23/19RP 14, 30. Mr. Banks responded that he was waiting for someone.

5/23/19RP 30-31. Rather than end her questioning, Officer Bush continued her inquiry and asked Mr. Banks for identification. 5/23/19RP 15, 31. When he told her he did not have identification, she told him to state his name, to spell his name, and to give his date of birth. 5/23/19RP 15; 6/4/19RP 18.

After Mr. Banks gave Officer Bush his name and date of birth as requested, Officer Bush immediately radioed Mr. Banks's identifying information and requested the police run a records check on him. 5/23/19RP 16, 31. Officer Bush continued to stand outside of Mr. Banks's window while she radioed her request. 5/23/19RP 16; 6/4/19RP 18-19.

Officer Bush learned that Mr. Banks had a warrant and radioed Officer Aaron Lucas for backup. 5/23/19RP 16-17, 31, 48-49. Once Officer Lucas arrived, Officer Bush asked Mr. Banks to get out of the car while they waited for confirmation as to whether the warrant was active. 5/23/19RP 32-34, 48-50.

In response to the request to get out of the car, Mr. Banks told the officers he had a firearm in his waistband. 5/23/19RP 18-19, 50. Officer Lucas grabbed Mr. Banks's arm as he got out of the car, handcuffed him,

grabbed the firearm, and put Mr. Banks in his patrol car.[2] 5/23/19RP 18, 50-51, 60.

Mr. Banks moved to suppress all property and statements as the fruits of his unlawful seizure and to dismiss the charges. CP 5-16; 5/23/19RP 1-121. He argued police unlawfully seized him when they approached the vehicle, began to question him, and requested his identification. 5/23/19RP 73-85, 101-06; CP 8-16.

The trial court denied the motion in its entirety. CP 24-30. The court found the police approached Mr. Banks as part of their community caretaking function and did not seize Mr. Banks until they asked him to get out of the car. CP 28-29.

The Court of Appeals affirmed. Slip op. at 4-9. The court ruled the officer "simply asked [Mr.] Banks if he was okay and asked him for information" and held the encounter was not a seizure. Slip op. at 8. The court determined Officer Bush's unyielding questioning of Mr. Banks and request for identification and identifying information was not a seizure because it "did not amount to a show of authority that would make [Mr.]

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[2] Police later recovered methamphetamine in a bag they retrieved from the car. 5/23/19RP 54-55. The Court of Appeals reversed the conviction for possession of a controlled substance under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), and remanded for the trial court to vacate and dismiss that count and to resentence Mr. Banks on the remaining count with a new offender score. Slip op. at 9-10.

Banks believe that he was not free to leave or to decline Bush's request." Slip op. at 9.

In addition, although the trial court relied on the police's community caretaking function to justify the warrantless intrusion into Mr. Banks's private affairs, the Court of Appeals rejected Mr. Banks's argument that the encounter exceeded its permissible scope once police verified Mr. Banks was okay. CP 28-29; Slip op. at 9. The Court held that because the police did not seize Mr. Banks, it need not consider the community caretaking exception. Slip op. at 9.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should accept review to reject the Court of Appeals' legal fiction that a reasonable person would believe they were free to ignore the police or to leave when armed, uniformed police persist in questioning and request identifying information after verifying a person does not need assistance.

The police did not end their encounter with Mr. Banks once they fulfilled their purpose for approaching him. Instead, Officer Bush continued to question Mr. Banks while standing outside of his car door. For every answer he gave, she asked another question. Officer Bush ultimately asked for identification and identifying information, which she used to conduct a records check as she continued to stand outside of the car door. The progressive intrusion of Officer Bush's actions after the

purpose for the interaction concluded exceeded her community caretaking function and escalated the encounter into a seizure without cause.

a. The police encounter was a seizure because a reasonable person in Mr. Banks's position would not feel free to leave or to refuse the police's requests.

Police seize a person when they restrain the person's freedom of movement by a show of authority such that a reasonable person would not feel free to leave or to decline the police's request. *State v. Harrington*, 167 Wn.2d 656, 666-68, 222 P.3d 92 (2009); *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). An interaction with police evolves into a seizure at the point a reasonable person "feels compelled to remain . . . [or] obliged to respond to the officer's requests." *State v. Carriero*, 8 Wn. App. 2d 641, 655, 439 P.3d 679 (2019). Courts must consider the totality of the circumstances in determining whether an encounter is a seizure. *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). "A totality of the circumstances analysis is a cumulative analysis, not a 'divide-and-conquer' analysis." *State v. Johnson*, 8 Wn. App. 2d 728, 745, 440 P.3d 1032 (2019).

An officer's request for identification is one consideration in the totality of the circumstances analysis that may elevate an encounter into a seizure. *Harrington*, 167 Wn.2d at 664-69; *Johnson*, 8 Wn. App. 2d at 742-45; *Carriero*, 8 Wn. App. 2d at 659-62; *State v. Crane*, 105 Wn. App.

301, 309-10, 19 P.3d 1100 (2001); *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993). While a request for identification standing alone may not turn every encounter into a seizure, it may be the factor that "snowball[s]" the "progressive intrusion" of the encounter into a seizure. *Harrington*, 167 Wn.2d at 666.

For example, in *Johnson*, uniformed police approached a person parked in a car, shined flashlights, and engaged him in conversation. 8 Wn. App. 2d at 733. The court found the initial approach and conversation permissible. *Id.* at 734-35. However, the court found the officer's close physical proximity to the car, use of a ruse in questioning Mr. Johnson, and request for identification changed the encounter from a permissible contact into a seizure because a reasonable person would no longer feel free to leave or ignore the officer's requests. *Id.* at 744. "[T]he request for proof of Johnson's identity became the tipping point at which the weight of the circumstances transformed a simple encounter into a seizure." *Id.* at 745.

Other cases also focus on the request for identification as the factor that solidifies the encounter as a seizure. *Rankin*, 151 Wn.2d at 697 ("a mere request for identification from a passenger for investigatory purposes constitutes a seizure unless there is a reasonable basis for the inquiry"); *Carriero*, 8 Wn. App. 2d at 659 (considering request for identification in

holding encounter was seizure); *State v. Coyne*, 99 Wn. App. 566, 574, 995 P.2d 78 (2000) (holding even where initial detention of individual was justified under community caretaking function, "the officer's further detention and request for identification" was not justified).

b. The Court of Appeals misconstrued article I, section 7 and analyzed the encounter using a reasonable person divorced from reality when it held a reasonable person would feel free to leave in response to continued questioning and requests for identifying information.

Officer Bush's persistent questioning and request for Mr. Banks's identification escalated the encounter into an unlawful seizure. A reasonable person in Mr. Banks's situation would not have felt free to ignore Officer Bush's questions. A reasonable person would not have felt free to drive away from two uniformed police officers standing immediately outside of his window. Officer Bush's testimony and the court's conclusion that Mr. Banks was free to drive away while Officer Bush was standing directly outside of Mr. Banks's driver side window, questioning him, is not supported by the evidence or common sense. Officer Bush's actions constitute a seizure.

The Court of Appeals ruled the police did not seize Mr. Banks, despite questioning him and asking for identification after they verified he did not need assistance, because, "There was no show of authority or any command or demand that [Mr.] Banks respond." Slip op. at 8. The

court's conclusions that the encounter presented "no show of authority" and that a reasonable person would feel free to terminate the encounter demonstrates a complete disregard for current events and reality. Slip op. at 8-9; CP 28 (Reason 5). The idea that a reasonable person would believe they were free to sit mute or to drive away is simply incredible. Instead, a reasonable person in Mr. Banks's position would feel compelled to answer and feel unable to leave the encounter; therefore, the encounter was a seizure. *Johnson*, 8 Wn. App. 2d at 737.

c. <u>This Court should accept review and jettison the legal fiction that reasonable people in today's society feel free to ignore police questioning or to leave and should hold such encounters are seizures.</u>

Court decisions, empirical evidence, and evolving social perceptions more frequently question the premise that reasonable people feel free to disregard inquiries and requests from uniformed police officers. For example, in *Harrington*, this Court recognized "people feel compelled to comply with authority figures" and cited a study concluding "most people would not feel free to leave when they are questioned by a police officer on the street." 167 Wn.2d at 665 n.4 (quoting David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51, 62, 73 (2009)). Similarly, in *Carriero*, Judge Fearing acknowledged the reasonable

appellate judge experiences a far different reality than reasonable disadvantaged individuals living in neighborhoods labeled a "high-crime area" by law enforcement and that such citizens may reasonably feel pressured to comply with officer requests. 8 Wn. App. 2d at 667 (Fearing, J., concurring).

Various studies also recognize that reasonable people feel compulsion to consent to police requests and question whether compliance with such requests may accurately be classified as "voluntary." Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. 1962, 2006-2020 (2019); Kessler, *supra*, at 51, 62, 73. Encounters with police "pose real dangers for the individual stopped," as well to the police, and reasonable people are aware of that when they consider appropriate options in response to police action. *United States v. Delaney*, 955 F.3d 1077, 1084 (D.C. Cir. 2020).

The Court of Appeals ignored that a reasonable person in the real world would not feel free to leave or refuse to comply at the point when Officer Bush continued to question Mr. Banks and asked for identification. Two officers were standing at his window. 5/23/19RP 12, 29; CP 25. At least one stood immediately outside Mr. Banks's door. 5/23/19RP 29; CP 25, 27. Officer Bush determined he was okay and that he did not need any

medical assistance, ending her purpose in contacting him. 5/23/19RP 14, 30. But she did not relent. Officer Bush continued to question Mr. Banks. 5/23/19RP 29-31. Officer Bush told him they had been sent there by security, suggesting they were investigating him or the car. 5/23/19RP 14. *Johnson*, 8 Wn. App. 2d at 744 (manner of questioning would suggest to reasonable person they were subject of criminal investigation). She asked him what he was doing there. 5/23/19RP 13, 30. She asked him for identification. 5/23/19RP 15, 31. When he told her he had none, she asked him for his name and directed him to spell it. 5/23/19RP 15. She immediately initiated a warrant check in his presence. 5/23/19RP 16, 31.

During the entire encounter, the officers were armed and in uniform. 5/23/19RP 14 (armed), 31 (uniformed). Both officers were present at the car, and Officer Bush was located immediately outside of the driver side window where Mr. Banks sat.[3] 5/23/19RP 12, 29; CP 25-27. Officer Bush questioned Mr. Banks continuously from the moment of approach until he was handcuffed.

Officer Bush persisted in her actions, asking questions and requesting Mr. Banks's identification, regardless of what Mr. Banks did.

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[3] The court did not make a finding as to the exact location of Officer Ramos. CP 27. The evidence suggested either both Officers Bush and Ramos were at Mr. Banks's driver side door or Officer Bush was at his driver side door and Officer Ramos was in front of the car. 5/23/19RP 12, 26, 29, 31-32, 39 (Officer Bush), 5/23/19RP 45, 58-59 (Officer Lucas), 5/23/19RP 68-69, 71-72 (Mr. Banks); CP 27.

Officer Bush's persistence after fulfilling the initial reason for her approach – verifying Mr. Banks was okay – was a progressive intrusion into Mr. Banks's privacy. Article I, section 7 does not tolerate such a "progressive intrusion" into an individual's privacy. *Harrington*, 167 Wn.2d at 660.

The Court of Appeals disregarded opinions of this Court and the Court of Appeals that recognize requests for identification may turn an encounter into a seizure. RAP 13.4(b)(1)-(2). It also misapplied the broad protections of article I, section 7 and its narrow exceptions. RAP 13.4(b)(3). Finally, the Court of Appeals failed to consider the totality of the circumstances properly and analyzed the encounter using a reasonable person who in no way comports with the reality in which we live. RAP 13.4(b)(4).

This Court should accept review and jettison the legal fiction that reasonable people in today's society feel free to ignore police questioning or to leave. The Court should refine the reasonable person standard to comport with reality and reflect evolving notions of what is reasonable and should hold the encounter was a seizure.

2. Substantial public interest favors review because the trial court did not consider race as part of the totality of the circumstances when it determined what a reasonable person would believe they were free to do in response to police actions.

Mr. Banks is a middle aged Black man. CP 59. Race is necessarily a relevant factor in assessing encounters between police and civilians. This Court should accept review and hold trial courts must consider race in analyzing the totality of the circumstances and what a reasonable person would believe.[4]

Race is a crucial consideration in assessing the views of a reasonable person. As now-retired Minnesota Supreme Justice Alan C. Page,[5] the first African-American elected to that court, recognized, a reasonable person who is a Black male would not believe they are free to terminate an encounter or disregard the police's inquiry. In criticizing the majority for failing to "take into account whether an innocent young African-American male would feel free to refuse the police officer's request," Justice Page explained, "I speak from the perspective of an African-American male who was taught by his parents that, for personal safety, when in an unplanned encounter with law enforcement officers, it

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[4] Neither the courts nor the parties in the superior court or in the Court of Appeals addressed Mr. Banks's race as a consideration in the totality of the circumstances in assessing whether a reasonable person would believe they were free to terminate the encounter or ignore the police. CP 24-30; slip op. at 1-9. However, it is undisputed that Mr. Banks is Black. CP 59.

[5] https://mncourts.libguides.com/Page

is best to comply carefully and without question to the officer's request." *State v. Harris*, 590 N.W.2d 90, 106 & 106 n.4 (Minn. 1999) (Page, J., dissenting); *see also Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2070, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting) (describing "The Talk"). Similarly, Judge Julia Cooper Mack,[6] the first Black woman appellate judge in the country, observed, "[N]o reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away" from police in many circumstances. *In re J.M.*, 619 A.2d 497, 513 (D.C. Cir. 1992) (Mack, J., dissenting).[7]

In assessing the reasonable person standard under the Fourth Amendment, at least one federal judge has also admitted the undeniable role race plays in assessing what a reasonable person would believe under the totality of the circumstances when analyzing a police encounter.[8]

> [A]s a matter of the commonsense reality of police-citizen interactions, Black individuals from every background have

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[6] The Honorable Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 How. L.J. 645, 647 (2010).

[7] A reasonable Black man dealing with the Tacoma Police Department would perhaps be even less likely to believe he were free to ignore police demands without putting himself in grave danger. News Release: AG Ferguson Charges Three Officers in the Killing of Manuel Davis (May 27, 2021), available at https://www.atg.wa.gov/news/news-releases/ag-ferguson-charges-three-officers-killing-manuel-ellis; Stacia Glenn, 3 Tacoma Officers Involved in Manuel Ellis' Death Charged with 2nd-Degree Murder, Manslaughter, The News Tribune (May 27, 2021), available at https://www.thenewstribune.com/news/local/article250316639.html.

[8] Article I, section 7 is more protective than the Fourth Amendment, *Young*, 135 Wn.2d at 510-11, but Judge Rosenbaum's insights are relevant nonetheless.

> long expressed that race can and does affect whether a citizen feels "free to leave" a police encounter.

United States v. Knights, 989 F.3d 1281, 1295-96 (11th Cir. 2021) (Rosenbaum, J., concurring); *accord United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015) (recognizing "the relevance of race in everyday police encounters").

Judge Rosenbaum referenced the studies demonstrating the disproportionate rates of deadly encounters in police interactions with Black versus white civilians to conclude, "[I]t seems pretty clear that a shared historical Black experience can cause Black Americans to view their ability to leave a police interaction very differently than white Americans." *Knights*, 989 F.3d at 1298 (Rosenbaum, J., concurring). Rather than ignore "Black Americans' lived experiences" and how that experience makes them "materially less likely than white Americans to believe they have the freedom to leave an interaction with the police," we should consider that collective experience as a factor in the reasonable person analysis. *Id.* at 1296.

This Court, too, has admitted that "'bias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice even-handedly.'" *State v. Saintcalle*, 178 Wn.2d 34, 42 n.1, 309 P.3d 326 (2013) (quoting Task

Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System at 6 (2011)[9] (alteration in original) (quoting Wash. St. Minority & Justice Comm'n, 1990 Final Report at xxi (1990)[10])). This Court recognizes the "racialized policing" that is part of our society. Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. (June 4, 2020).[11] It has acknowledged:

> We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole.

Id.

But in order to take the necessary steps to address racialized policing and biases in the court system analyzing police encounter, we must acknowledge the reality that race matters in police encounters. We must consider race as a relevant factor in assessing what a reasonable person would believe. Unless the Court requires consideration of this

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[9] Available at https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4715&context=wlr

[10] Available at https://www.courts.wa.gov/committee/pdf/TaskForce.pdf

[11] Available at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf#search=june%204%2C%202020

undeniable factor, parties and courts are free to whitewash the record, and the role of race in an encounter escapes meaningful appellate review.

Race is relevant to a reasonable person's perception of their freedom to ignore or end a police interaction. This Court should accept review to clarify that race is a factor courts must consider in assessing whether a reasonable person would feel free to terminate an encounter with the police.

F. CONCLUSION

This Court should accept review under RAP 13.4(b).

DATED this 14th day of June, 2021.

Respectfully submitted,

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APPENDIX A

May 18, 2021, Opinion

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CASHUNDO SCOTT BANKS, aka CASHUNDO S. BANKS DONALD EUGENE IRVING Appellant.	No. 53522-0-II UNPUBLISHED OPINION

MAXA, P.J. – Cashundo Banks appeals his conviction of first degree unlawful possession of a firearm and unlawful possession of a controlled substance – methamphetamine.

The conviction arose from an incident in which a police officer approached Banks to make sure he was okay because he was asleep in a car parked in a Safeway parking lot with the engine running. After confirming that Banks did not need assistance, the officer asked Banks for his name and identification. The officer then conducted a records check, learned that there was an outstanding warrant for Banks's arrest, and discovered that he had possession of a firearm and methamphetamine. Banks filed a motion to suppress the firearm and the methamphetamine on the grounds that he was unlawfully seized when the officer asked him for identification. The trial court denied the motion.

We hold that (1) the trial court did not err when it denied Banks's motion to suppress because the officer's request for identification did not constitute a seizure under the totality of the circumstances, and (2) Banks's unlawful possession of a controlled substance conviction must be vacated under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Accordingly, we affirm Banks's first degree unlawful possession of a firearm conviction, but we reverse his unlawful possession of a controlled substance conviction and remand for the trial court to vacate that conviction and for resentencing.[1]

FACTS

Officer's Encounter with Banks

On February 7, 2019, officers Hannah Bush and Aaron Lucas responded separately to a grocery store in Tacoma regarding unwanted individuals who were in front of the store. During the contact, a security guard asked Bush to check on a car parked in the store parking lot. The security guard stated that a man – later identified as Banks – was asleep in the car, the engine was running, and the car had been there for several hours.

Bush approached the vehicle by foot. Another officer, Deanna Ramos-Campos, also was present, but the trial court could not determine her location. Banks was in the driver's seat with his eyes closed, apparently asleep. Bush knocked on the driver's side window and identified herself as a police officer. It took a few knocks for Banks to respond, and then he opened his eyes. Bush illuminated her uniform with her flashlight.

[1] Banks also challenges the imposition of community custody supervision fees as determined by the Department of Corrections as a legal financial obligation. Because we remand for resentencing, we do not address this issue.

Using a normal tone of voice, Bush asked Banks to roll down his window and then motioned for him to roll down the window. Bush did not order or demand that Banks roll down his window. Bush's weapon was not drawn and she did not have her hand on her weapon.

Bush asked Banks if he was okay and said that security had told her that he had been parked in his car for a while. Banks said that he was okay and that he was waiting for someone. Bush also asked, "Hey, can I get your name so I know who I'm talking to?" Report of Proceedings (RP) (May 23, 2019) at 14. Banks provided his name. Bush also asked Banks for identification, but he was unable to provide any. She used a normal tone of voice when she asked Banks for his name and did not demand or order him to provide identification. The tone was conversational with no hostility.

Bush used the information that Banks provided to run a records check while Banks remained seated in his car. She did not retain Banks's license or any identifying documents. Bush learned that Banks had an outstanding felony warrant and a suspended driver's license. She then requested backup from Lucas, who approached on foot.

Bush asked Banks to step out of the vehicle. Banks informed Bush and Lucas that he had a firearm in his waistband, which Lucas removed. Banks also asked the officers to retrieve a brown bag from his vehicle. When Lucas transported Banks to jail, he searched the bag and discovered a substance that later was identified as methamphetamine.

During the encounter, there were no patrol cars blocking Banks's ability to drive away and none of the patrol vehicles had their emergency lights activated. It is unclear where Ramos-Campos's car was parked, but the trial court found that it likely was not blocking Banks's car.

The State charged Banks with first degree unlawful possession of a firearm and unlawful possession of a controlled substance – methamphetamine.

CrR 3.6 Hearing

Banks filed a motion to suppress evidence of the firearm, methamphetamine, and his statements regarding the items, arguing that they all were obtained unlawfully through a warrantless seizure. The trial court denied the motion. The court entered extensive findings stating the facts summarized above. The court concluded that Bush checked on Banks and asked him for identification as part of her community caretaking function. The court further concluded that a seizure did not occur until Banks was asked to get out of the vehicle, and by that time Bush had learned of the outstanding warrant and therefore the seizure was lawful.

Bench Trial and Sentencing

After a bench trial, the trial court found Banks guilty of first degree unlawful possession of a firearm and unlawful possession of a controlled substance. At sentencing, the trial court determined that Banks's offender score for the two convictions was 9, based on the current convictions and several prior convictions, including a conviction for attempted unlawful possession of a controlled substance.

Banks appeals his convictions.

ANALYSIS

A. WARRANTLESS SEIZURE

Banks argues that Bush unlawfully seized him when she asked for identification, and therefore the trial court erred in denying his CrR 3.6 motion to suppress the evidence discovered after the seizure. We disagree.

1. Standard of Review

When reviewing a denial of a motion to suppress evidence, we determine whether substantial evidence supports the trial court's findings of fact and review de novo the trial court's

conclusions of law based on those findings. *State v. Tysyachuk*, 13 Wn. App. 2d 35, 42, 461 P.3d 403 (2020). Evidence is substantial when it can persuade a fair-minded person of the truth of the stated premise. *Id.* We treat unchallenged findings of fact as verities on appeal. *Id.*

2. Legal Principles

Article I, section 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs . . . without authority of law." However, article I, section 7 does not prohibit all interactions between law enforcement officers and private persons. *See State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009); *State v. Johnson*, 8 Wn. App. 2d 728, 736, 440 P.3d 1032 (2019). Whether a law enforcement officer's encounter with a person violates article I, section 7 depends on whether a "seizure" has occurred. *See Harrington*, 167 Wn.2d at 663.

Under article I, section 7, a seizure occurs when " 'considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.' " *Id.* at 663 (quoting *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)). "The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained." *Harrington*, 167 Wn.2d at 663. This determination is made by looking at the officer's actions using an objective standard. *Id.*

The court in *Harrington* noted a nonexclusive list of actions that likely would result in a seizure: " 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.' " *Id.* at 664 (internal quotation marks omitted) (quoting *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998)).

" 'In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.' " *Harrington*, 167 Wn.2d at 664 (internal quotation marks omitted) (quoting *Young*, 135 Wn.2d at 512).

The person claiming an unconstitutional seizure bears the burden of proving that a seizure occurred. *Harrington*, 167 Wn.2d at 664.

3. Challenged Findings of Fact

Banks assigns error to three findings of fact:

> 2. During this contact, . . . store security came up and asked Officer Bush to check on a vehicle which was parked on the left side of the parking lot, backed in, and not in a legal parking spot. . . .
> . . . .
>
> 9. Officer Bush testified that she requested identifying information so she would know who she was talking to. The driver was still seated in the vehicle at this time. Bush used a normal tone of voice when asking the driver for his name and did not demand or order him to provide identification.
>
> 10. The defendant voluntarily provided his name to Bush. During this time, the contact with the driver was completely conversational with no hostility.

Clerk's Papers at 24-26.

Regarding finding of fact 2, Banks argues that the person who requested that Bush check Banks's car was a private security guard, not a store security guard. Banks is correct, but this fact is immaterial to this appeal and therefore is of no legal consequence. *State v. Coleman*, 6 Wn. App. 2d 507, 510, 516, 431 P.3d 514 (2018).

Regarding finding of fact 9, Banks does not explain why substantial evidence does not support this finding. There is no indication in the record that Bush "demanded" or "ordered" Banks to provide identification. Bush testified that she casually asked for Banks's name in a

normal tone of voice. She then asked him for identification. Bush never yelled, and the tone was conversational without hostility.

Regarding finding of fact 10, Banks argues that substantial evidence does not support the finding that he "voluntarily" provided his name. He emphasizes that no reasonable person would feel free to say nothing in this situation. However, there is no evidence that Bush somehow compelled Banks against his will to provide his name. Bush testified that she asked Banks for his name and he provided it voluntarily. She stated that he was cooperative.

We conclude that substantial evidence supports the three challenged findings of fact. The remaining unchallenged findings are verities. *Tysyachuk*, 13 Wn. App. 2d at 42.

4. Request for Identification

The issue here is whether Bush unlawfully seized Banks when she asked him for his name and identification. The Supreme Court repeatedly has stated the rule that "a police officer's conduct in engaging a defendant in conversation in a public place and *asking for identification* does not, alone, raise the encounter to an investigative detention." *State v. Armenta,* 134 Wn.2d 1, 11, 948 P.2d 1280 (1997) (emphasis added). This statement was quoted in *Young*, 135 Wn.2d at 511; *State v. O'Neill*, 148 Wn.2d 564, 580, 62 P.3d 489 (2003); and *Harrington*, 167 Wn.2d at 665.

The court in *O'Neill* also confirmed that no seizure occurs when an officer questions a person who is sitting in the driver's seat of a vehicle. 148 Wn.2d at 570, 579. The court stated that "no unreasonable intrusion by police occurs when an officer approaches the driver of an automobile parked in a public parking lot and engages him or her in conversation." *Id.* at 579.

However, a request for identification can rise to the level of a seizure based on the extent of any "show of authority" by the officer. *Id.* at 577. The court in *O'Neill* explained:

> "Where an officer *commands* a person to halt or demands information from the person, a seizure occurs. But no seizure occurs where an officer approaches an individual in public and *requests* to talk to him or her, engages in conversation, or *requests* identification, so long as the person involved need not answer and may walk away."

Id. at 577-78 (quoting *State v. Cormier*, 100 Wn. App. 457, 460-61, 997 P.2d 950 (2000)).

Here, Bush simply asked Banks if he was okay and asked him for identification. There was no show of authority or any command or demand that Banks respond. The trial court made unchallenged findings or findings supported by substantial evidence that Bush (1) approached Banks's car on foot, (2) did not draw or have her hand on her weapon, (3) used a normal tone of voice when trying to get Banks's attention, (4) did not order or demand that Banks roll down his window, (5) used a normal tone of voice when asking Banks for his name, (6) did not demand or order Banks to provide identification, and (7) used a conversational tone with no hostility. The court also found that the officers' patrol cars were not parked in a manner that would have prevented Banks from leaving.

Banks cites to a number of cases in which the court found seizures when officers asked for identification. But these cases involved facts not present here and are distinguishable. *See, e.g.*, *Harrington*, 167 Wn.2d at 665-70 (officer requested that defendant keep his hands out of his pockets and requested to frisk him while another officer arrived and stood by); *Johnson*, 8 Wn. App 2d at 742-45 (two officers stood at the driver and passenger doors of defendant's vehicle and created the impression that they were conducting an ongoing investigation concerning the vehicle); *State v. Carriero*, 8 Wn. App. 2d 641, 659-62, 439 P.3d 679 (2019) (two police vehicles approached a car in a narrow, dead end alley and parked their cars in a way that blocked any exit, and other factors were present); *State v. Beito*, 147 Wn. App. 504, 507, 510, 195 P.3d

1023 (2008) (officer stood outside the defendant's door, preventing him from exiting, and said no when the defendant asked to leave).

Based on the totality of the circumstances, Bush's request for identification did not amount to a show of authority that would make Banks believe that he was not free to leave or to decline Bush's request. As a result, we conclude that Bush's request for identification from Banks did not constitute a seizure and hold that the trial court did not err in denying Banks's suppression motion.

5. Exceeding the Scope of the Encounter

Banks argues that his encounter with Bush became a seizure because she exceeded the scope of the community caretaking function. He claims that once Bush found out that he was okay, her community caretaking function ended and she had no justification for requesting identification.

However, the community caretaking function is an exception to the warrant requirement. *State v. Boisselle*, 194 Wn.2d 1, 10, 448 P.3d 19 (2019). But no warrant is required if there is no seizure. Because the request for identification was not a seizure, there is no need to determine whether Bush's action was justified by the community caretaking function exception to the warrant requirement.[2] Therefore, we reject this argument.

B. UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

Banks challenges his unlawful possession of a controlled substance conviction following the Supreme Court's decision in *Blake*. The State concedes that Banks's conviction must be

[2] Contrary to Banks's discussion of *Beito*, the court in that case did not address whether the interaction between the police officers and the defendant had exceeded the scope of the community caretaking function. *Beito*, 147 Wn. App. at 508-10.

vacated. We reverse and remand for the trial court to vacate Banks's conviction and for resentencing.

In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, RCW 69.50.4013(1), violates state and federal due process clauses and therefore is void. 197 Wn.2d at 195. As a result, any conviction based on that statute is invalid. *See In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) (a judgment and sentence is invalid on its face when a defendant is convicted of a nonexistent crime). And a conviction based on an unconstitutional statute must be vacated. *See Blake*, 197 Wn.2d at 195; *State v. Carnahan*, 130 Wn. App. 159, 164, 122 P.3d 187 (2005) (vacating a conviction that was based on a statute that the Supreme Court held was unconstitutional). Therefore, Banks's conviction for unlawful possession of a controlled substance must be vacated.

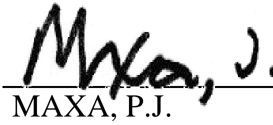
In addition, a conviction based on an unconstitutional statute cannot be considered in calculating the defendant's offender score. *See State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). Therefore, Banks's offender score must be amended to not include the vacated conviction and any prior unlawful possession of a controlled substance conviction.

Finally, without the current and prior unlawful possession of a controlled substance convictions, Banks's offender score will be lower than 9, the offender score the trial court used at sentencing. The lower offender score will reduce the standard range sentence. *See* RCW 9.94A.510. Therefore, Banks is entitled to be resentenced.

CONCLUSION

We affirm Banks's unlawful possession of a firearm conviction, but we reverse his unlawful possession of a controlled substance conviction and remand for the trial court to vacate that conviction and for resentencing.

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.


MAXA, P.J.

We concur:

SUTTON, J.

CRUSER, 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. 53522-0-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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