

NO. 49242-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SARAH J. SEWARES,

Appellant.

AMENDED BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained after illegally detaining the defendant without a reasonably articulable suspicion that she was involved in criminal conduct and when they exceeded the scope of any valid *Terry* stop.

2. If the state substantially prevails on appeal this court should exercise its discretion and refuse to impose costs on appeal.

Issues Pertaining to Assignment of Error

1. Should a trial court grant a defendant's motion to suppress evidence the police obtain by illegally detaining a defendant without a reasonably articulable suspicion that she was involved in criminal conduct and when the police exceed the scope of any valid *Terry* stop?

2. In a case in which the defendant is convicted of possession of methamphetamine and in which the trial court determines that the defendant has a "chemical dependency" and is indigent should the court on appeal exercise its discretion and refuse to impose appellate costs should the state substantially prevail?

STATEMENT OF THE CASE

In December of 2015, Centralia Detective Adam Haggerty received information from a confidential informant that a person by the name of Christopher Neff would be traveling from the Puget Sound area in his silver-gray Series 5 BMW to the Motel Six on Belmont Avenue in Centralia to deliver multiple ounces of heroin to a local buyer who had rented room 254. RP 4-7¹. The informant provided Detective Haggerty with a physical description for Mr. Neff that matched police records the detective was able to review. RP 6-7. According to Detective Haggerty the informant had been working with state and federal police agencies for about two months in order to obtain the dismissal of his own charges and he had provided reliable information that aided in the arrest of other drug dealers and the seizure of relatively large amounts of illegal drugs. RP 4-6. As a result, Detective Haggerty believed the informant reliable even though the informant had not yet participated in any controlled buys of narcotics. RP 18. While Detective Haggerty believed the informant reliable, he did not say anything about how the informant came by his claimed information concerning Mr. Neff and his alleged illegal activities. RP 4-38.

¹“RP” refers to the transcript of the suppression motion held on 6/22/16 in this case. “RP 7/13/16” refers to the stipulated facts trial held on date indicated and “RP 7/27/16” refers to the sentencing hearing held on the date indicated.

Based upon the informant's claims, Detective Haggerty and a number of other officers set up surveillance at the Motel Six on December 23, 2015. RP 8-9. While stationed in the area the officers watched a white Cadillac DeVille drive into the Motel Six parking lot near room 254 after having picked up food from a local drive-through restaurant. *Id.* A female the officers did not know was driving the car. *Id.* The officers later identified her as Jasmine Hammond. RP 11-12. Mr. Neff was one of the passengers, as was the defendant Sarah Sewares, who was unknown to the officers at the time. RP 8-9. Once Ms Hammond parked the vehicle she, Mr. Neff and the defendant got out and walked toward room 254. *Id.* Ms Hammond was carrying a black back pack that the officers thought might have the suspected heroin in it. RP 9. The defendant was carrying a purse. RP 42-43. No officer claimed to believe that the purse contained any heroin. RP 4-68.

As Ms Hammond, Mr. Neff and the defendant walked toward room 254 Detective Haggerty and a number of officers surrounded the trio with guns drawn and ordered them to stop. RP 10, 41-43. The officers then put each of the three in handcuffs while taking the back pack from Ms Hammond. *Id.* At this point the officers obtained permission from Ms Hammond to search the backpack. RP 11-12. Inside they found multiple ounces of heroin, methamphetamine, scales and other paraphernalia. *Id.* Other officers then asked the defendant if she had any drugs or weapons. RP

42-43. According to the officers the defendant responded that she had some methamphetamine in her purse. *Id.* With her permission the officers searched her purse, found the methamphetamine, and then placed her under arrest. *Id.*

After her arrest, the Lewis County Prosecutor charged the defendant with one count of possession of the methamphetamine the officers found in her purse. CP 1-2. The defendant responded with a motion to suppress that evidence, arguing that (1) the officers had violated her rights under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when they detained her without a reasonable basis to believe that she was involved in criminal conduct; and (2) the officers exceeded the scope of a valid *Terry* stop when they questioned her. CP 19-27. The court later held a hearing on that motion during which the state called Officer Haggerty along with two other officers as its only witnesses. RP 1-67; CP 28-29. Following their testimony and argument by counsel the court denied the motion, later entering the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.1 On December 23, 2015, Detective Adam Haggerty, Detective Chad Withrow, and Special Agent Hernan Rios were working in their capacity as law enforcement officers in Centralis, Washington.

1.2 Detective Haggerty was contacted by a confidential informant about Christopher Neff arriving in Centralia on December 23, 2015 to deliver a large quantity of heroin to a specific hotel room at the Motel 6.

1.3 This confidential informant had previously provided law enforcement with information related to narcotics distribution in the months prior to December 23, 2015, that had been corroborated through police investigation.

1.4 This confidential informants had also worked with federal authorities in other jurisdictions that led to the arrest of multiple individuals and the seizure of several pounds of cocaine.

1.5 This confidential informant provided law enforcement with a firearm that they claimed was involved in an unrelated offense.

1.6 This confidential informant was acting as an informant in consideration for pending criminal charges at the time the information about Neff was given to Detective Haggerty

1.7 This confidential informant also provided information about the location of Neff just prior to his arriving at the Motel 6 that was verified by observations of law enforcement, namely being at Arby's within minutes of his arrival.

1.8 Neff exited a vehicle with two female companions, Jasmine Hammond and Sara Sewares, and all went to the hotel room the confidential informant told law enforcement Neff would be going to.

1.9 When she exited the vehicle, Hammond was in possession of a backpack that was not physically unique or specifically delineated as belonging to any one person.

1.10 Neff, Hammond, and Sewares were contacted by law enforcement outside the hotel room the confidential informant indicated Neff would be going to.

1.11 Hammond and Sewares were perceived as accomplices to Neff at the time of their initial contact by law enforcement.

1.12 While all persons were detained in handcuffs outside the hotel room, nobody was placed under arrest when initially contacted by law enforcement.

1.13 Sewares was in possession of a purse at the time she was detained.

1.14 Detective Withrow contacted Sewares and asked if she was in possession of any controlled substances.

1.15 Sewares stated that there was methamphetamine in her purse.

1.16 Detective Withrow asked for consent to remove the methamphetamine from her purse, which was granted.

1.17 Sewares's purse was open when Detective Withrow contacted her.

1.18 Detective Withrow was able to see inside the purse without manipulating it and saw a topless pill bottle containing a large piece of what he recognized as methamphetamine.

1.19 When asked, Sewares stated the crystalline substance in the pill bottle was methamphetamine.

1.20 Sewares granted consent a second time for Detective Withrow to remove the methamphetamine.

1.21 Sewares was advised of Miranda warnings at this point by Detective Withrow.

1.22 Sewares again admitted to possessing the methamphetamine located in her purse.

1.23 Sewares was transported to a nearby police facility and asked about her involvement with Neff in this case.

1.24 Sewares provided details of what she knew about his case to Detective Withrow.

CONCLUSIONS OF LAW

- 2.1 The detention of all persons was lawful.
- 2.2 Sewares's detention was a lawful Terry stop.
- 2.3 The confidential informant in this case is credible and reliable.
- 2.4 A reasonable basis existed to contact and detain Hammond and Sewares about their involvement in this case.
- 2.5 Statement made by Sewares to Detective Withrow do not violate the Miranda rule.

CP 33-35.

The defendant later submitted to conviction upon stipulated facts and received a standard range sentence. CP 36, 37-40, 41, 44-52. As part of the judgment and sentence the court found the defendant suffered from a "chemical dependency" that "contributed to the offense." CP 45. The court also ordered the defendant to undergo a chemical dependency evaluation and successfully complete the treatment recommended. CP 48. Following imposition of sentence the defendant filed timely notice of appeal. CP 53-62.

After the defendant filed her notice of appeal, the trial court entered a finding that the defendant was indigent, did not have the financial ability to retain an attorney or pay costs on appeal on appeal. CP 67-68. As a result the court entered an Order of Indigency appointing counsel on appeal. *Id.* The court entered this order based upon the defendant's affirmation, which

stated that she was employed, made about 1,400.00 per month, that her rent and electric bill were \$975.00 per months, that she owed \$9,000.00 in court files, and that she did not own a motor vehicle or any other assets. CP 63-66.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED AFTER ILLEGALLY DETAINING THE DEFENDANT.

In this case at bar appellant argues that the trial court erred for two reasons when it denied her motion to suppress the contraband the police found in her purse. The first argument is that the officers did not have a reasonable articulable suspicion based upon objective facts sufficient to justify a *Terry* stop of the defendant. Thus, the permission they obtained to search was the fruit of their illegal detention of the defendant. The second argument is that the officers exceeded the scope of a valid *Terry* stop when they asked the defendant's questions unrelated to Mr. Neff's suspected possession of heroin. Thus, the trial court erred when it denied the defendant's motion to suppress. The following sets out these two arguments.

(1) The Police Detained the Defendant Without a Reasonably Articulable Suspicion Based upon Objective Facts That She Was Engaged in Criminal Conduct.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various "jealously and carefully drawn"

exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988); *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a “reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) (emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392 U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. *See generally* R. Utter, *Survey of Washington Search and Seizure Law: 1988 Edition*, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point “the limited violation of individual privacy” is outweighed by the public’s “interests in crime prevention and detection” *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

In this case the officers testified that they made a *Terry* stop of the defendant, Mr. Neff and Ms Hammond based upon information provided by an informant who was working with the police in return for leniency and who had provided accurate information since his arrest two months previous. An

informant's tip can provide police such a reasonable suspicion sufficient to justify an investigatory stop. *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980); *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243, *cert. denied*, 423 U.S. 891 (1975). However, the informant's tip must be reliable and the informant must have a basis of knowledge for his or her claims of illegal activity. *Sieler*, 95 Wn.2d at 47; *Lesnick*, 84 Wn.2d at 943. A tip from an informant is "reliable" and there is a basis of knowledge if the state establishes that (1) the informant has previously proved reliable or has a motive to provide correct information, and (2) the informant's tip contains enough objective facts to justify the detention of the suspect or the non-innocuous details of the tip have been corroborated by the police, thus suggesting that the information was obtained in a reliable fashion. *State v. Hart*, 66 Wn.App. 1, 830 P.2d 696 (1992).

In a 2015 decision, *State v. Z.U.E.*, 183 Wn.2d 610, 352 P.3d 796 (2015), the Washington Supreme Court modified this analysis and adopted a "total circumstances test" in which both reliability and basis of knowledge are still important factors but not exclusive. In *Z.U.E.* the court addressed the issue of when the police may base a *Terry* stop upon information provided by 911 callers. In that case a number of 911 callers reported seeing a bald, shirtless man carrying a gun "in a ready position" through a park in Tacoma that had a reputation as a gang hangout. A subsequent 911 caller, who

identified herself as Dawn, stated that she had seen a 17-year-old female hand off a gun to the shirtless man. She gave a description of the female.

Upon hearing these reports two officers drove to the park, arriving within six minutes of the initial dispatch. Although the officers did not find anyone present, they did talk to a person who lived next to the park who told them that there had been a big fight involving a number of people. A short time later the officers found a vehicle in the vicinity with a female in the back matching the description of the 17-year-old who the 911 caller named Dawn stated had handed the gun to the bald, shirtless man. There were three other persons in the car. The officers then made a “felony” stop on the vehicle and arrested the 17-year-old for obstructing when she failed to follow the officer’s orders. A search incident to arrest revealed that she had marijuana on her person.

The state later charged the 17-year-old with obstructing and possession of marijuana. The defense then brought a motion to suppress, arguing that the officers did not have the authority to detain the defendant based upon the uncorroborated claims of the 911 callers, who were themselves essentially anonymous. Although the court denied the motion it did find her not guilty on the obstructing charge. The defendant then appealed her conviction for possession of marijuana. On review the court of appeals reversed, finding that

[T]he 911 calls lacked sufficient “indicia of reliability” to justify the stop because (1) the callers were essentially unknown callers, (2) the officers did not know the factual basis supporting the caller’s assertion of criminal activity, (3) the officers did not corroborate the assertion of criminal activity, and (4) the officers could not corroborate that the information was obtained in a reliable manner.

State v. Z.U.E., 183 Wn.2d at, 616-17.

The Court of Appeals also concluded that the officers’ public safety concerns did not justify their decision to act on the less than reliable information.

Following entry of the Court of Appeals decision the state sought and obtained review before the Washington Supreme Court. However, the Supreme Court affirmed, holding as follows concerning the state’s claim that the officers could rely upon the information provided by the 911 callers:

Similar to the facts in *Sieler* and *Navarette*, the officers’ alleged suspicion hinged on a named, but otherwise unknown, 911 caller’s assertion that the subject was engaged in criminal activity. Specifically, the caller alleged that the female was 17 years old, and therefore a minor, which is the only “fact” that potentially makes the girl’s possession of the gun unlawful for the articulated crime. However, because the caller did not offer any factual basis in support of that allegation, the officers could not ascertain how the caller knew the girl was 17 rather than, say, 18 years old. The officers knew nothing about Dawn (aside from her contact information), Dawn’s relationship with the female, or why Dawn suspected that the girl had committed a crime in the first place. Although we presume that Dawn reported honestly, the officers had no basis on which to evaluate the accuracy of her estimation. We follow our holding in *Sieler* and conclude that this 911 caller’s assertion cannot create a sustainable basis for a *Terry* stop.

State v. Z.U.E., 183 Wn. 2d at 622-23.

Similarly, in the case at bar, the officers did not provide the trial court with any factual basis to support the informant's claim of the alleged criminal activity. For all the trial court knew, and for all this court knows, the informant had simply heard a rumor that Mr. Neff would be transporting heroin to Lewis County. In addition, the police did not corroborate any of the claims of illegal conduct. Thus, in this case, there was no basis upon which to conclude that the informant had a basis of knowledge to support his claim of criminal activity. As a result, the trial court erred when it found that there was a basis for a *Terry* stop because the totality of the circumstances did not support a reasonable belief that anyone was involved in criminal conduct.

In addition, even were there a basis to make a *Terry* stop on Mr. Neff in this case, this fact does not translate to a basis for a *Terry* stop on the defendant. At the time multiple officers approached the defendant with guns drawn, and at the time they handcuffed the defendant, they had never seen her before and they had no reason to believe that she had been involved in any criminal activity at all. At worst she was merely in the proximity of a person whom they suspected possessed heroin. The defendant had not driven the vehicle that brought Mr. Neff to the hotel. Neither was she carrying the backpack in which the police suspected Mr. Neff had placed the suspect heroin. Thus, in this case and separate from the issue of basis of knowledge, there was no basis to make a *Terry* stop of the defendant. As a result the trial

court erred when it denied the defendant's motion to suppress evidence.

(2) The Police Exceeded the Scope of a Valid Terry Stop When They Asked the Defendant Questions Unrelated to Mr. Neff's Suspected Possession of Heroin.

A lawful Terry stop is limited in scope and duration to fulfilling the investigative purpose of the stop. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (citing *State v. Williams*, 102 Wn.2d 733, 739-41, 689 P.2d 1065 (1984)); *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *Acrey*, 148 Wn.2d at 747. But, if the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged. *Id.* (citing *Williams*, 102 Wn.2d at 739-40).

In addition, "[a]n officer making a Terry stop may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of *Miranda*." *State v. Heritage*, 152 Wn.2d 210, 219, 95 P.3d 345, 349 (2004) (citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). However, when an officer exceeds the limited scope of a *Terry* stop, the detention becomes illegal.

For example, in *State v. Saggors*, 182 Wn.App. 832, 847, 332 P.3d 1034, 1042 (2014), at about 2:45 in the morning a police officer received a

call from a person who stated that he was outside the defendant's residence and that he wanted the police to respond for a civil standby so the caller could retrieve property from the garage. The officer told the caller to make his request at a more reasonable hour. The caller then became agitated and said something about "people having guns with domestic violence stuff" although he did not claim there were firearms in the residence. The call ended around 3:00 a.m.

Thirteen minutes after the first called ended, a man identifying himself as Abraham Anderson called 911 and reported that five minutes earlier while walking his dog, he witnessed a man having an argument with a woman over a drug transaction in front of the defendant's address, that the man hit the woman, went inside, got a shotgun, came back outside and threatened the woman. The caller claimed that the woman drove away in a green Toyota and that there was a red and grey Suburban truck parked outside of the residence.

In response to the second call a number of officers went to the defendant's house, ordered him out with a loudspeaker, handcuffed him, placed him in a patrol vehicle, went into the home and woke up the other residents. During their search of the home the police did not find a woman and they did not find any evidence corroborating the second 911 call. Also, although there was a Suburban in the driveway, it was blocked by another

vehicle. Eventually the police concluded that the first and second callers had been the same person and that he had fabricated the second claimed incident because he was mad the police would not respond to his request for a civil standby.

After coming to the conclusion that the second incident had been fabricated and just before letting the homeowner out of the patrol vehicle to return inside his home, the police asked him if he had any firearms in the house. The homeowner responded that he did and the police then retrieved the firearm with the homeowner's permission and arrested him for unlawful possession because he had a conviction that precluded his possession of firearms.

After being charged the defendant moved to suppress the evidence seized, arguing that the police had exceeded the scope of a valid *Terry* stop when they asked him the question about his possession of firearms because by that time they had no further reason to detain him. The court denied the motion, and the defendant was later convicted. The defendant then appealed.

On review the Court of Appeals reversed, holding as follows:

Under the total circumstances test, a 911 phone call from an unknown caller who gives a contemporaneous eyewitness account of a serious offense presenting an exigent threat to public safety may provide a valid basis for a *Terry* stop. It is also understandable that officers faced with such a report would pursue an investigation. But here, police officers had good reason to question the reliability of the 911 call, and any suspicion of an exigent circumstance dissipated

before an officer inquired whether Saggars had a shotgun in his house. The State does not establish that Saggars' admission that he had a shotgun in his home and his consent to police to retrieve the shotgun were within the scope of a valid *Terry* stop.

State v. Saggars, 182 Wn.App. 832, 847, 332 P.3d 1034, 1042 (2014)

In *Saggars* the court reversed the defendant's conviction upon its holding that the police had exceeded the scope of a valid *Terry* stop when the asked the defendant if he had a firearm and asked for permission to search after determining that there was no further basis for a detention. Similarly, in the case at bar, when the police detained the defendant at gun point and with handcuffs, they had no basis to believe that she had been involved in any criminal activity at all. In fact, they testified they believed the suspected heroin was in the backpack the other woman was carrying. However, to the extent that there was a valid *Terry* detention of the defendant, it only involved the officers' belief that Mr. Neff was transporting heroin to sell to someone in the motel. They had no basis to believe that the defendant possessed any drugs at all, particularly given the fact that they had found the suspected heroin in the back pack the other woman was carrying. Thus, their question to the defendant about her possession of drugs and their request for permission to search her purse exceeded the scope of any valid *Terry* stop. As a result, in the same manner that the trial court in *Saggars* erred when it denied the defendant's motion to suppress, so the trial court in the case at bar

erred when it denied the defendant's motion to suppress.

II. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found Sarah Sewares indigent and entitled to the appointment of counsel at the appellate level. CP 67-68. In the same matter this Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate

court itself. The Supreme Court noted:

Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” *Supra*.

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is

assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *State v. Sinclair*, 192 Wn. App. at 388. Thus, “it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra*. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, “[i]t is entirely appropriate for an appellate court to be mindful of these concerns.” *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was “unable by reason of poverty to pay for any of the expenses of appellate review” and that the defendant “cannot contribute anything

toward the costs of appellate review.” *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant’s indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

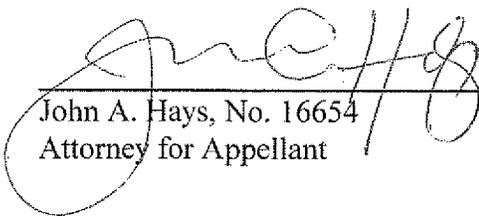
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant is a 28-year-old woman with prior drug convictions whom the court specifically found suffered from a “chemical dependency.” As a result of this conviction the defendant must now obtain a chemical dependency evaluation and successfully complete the treatment recommended. In addition, the defendant’s affirmation given in support of her Motion for Order of Indigency reveals that she is employed, makes about \$1,400.00 per month, that her rent and electric bill were \$975.00 per month, that she owed \$9,000.00 in court files, and that she did not own a motor vehicle or any other assets. CP 63-66. Given these facts alone it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

This court should vacate the defendant's conviction and remand to the trial court with instructions to grant the defendant's motion to suppress. In the alternative, if the state substantially prevails on appeal this court should exercise its discretion and refrain from imposing any costs on appeal.

DATED this 22nd day of November, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

vs.

**SARAH J. SEWARES,
Appellant.**

NO. 49242-3-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jonathan Meyer
Lewis County Prosecuting Attorney
345 West Main Street
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2. Ms Sarah J. Sewares
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Mountlake Terrace, WA 98043

Dated this 22nd day of November, 2016, at Longview, WA.



Donna Baker

HAYS LAW OFFICE

November 22, 2016 - 10:17 AM

Transmittal Letter

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Court of Appeals Case Number: 49242-3

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Amended Brief of Appellant - Sarah J. Sewares

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