

NO. 49684-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

REBECCA LOUISE McINTIRE,

Appellant.

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 based upon objective facts that she was or had been engaged in any criminal conduct.

2. Should the state prevail on appeal this court should exercise its discretion and refuse to impose costs because the defendant does not have the present or future ability to pay.

Issues Pertaining to Assignment of Error

1. Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, may the police detain a person who is not suspected of having committed any crime simply because a hotel clerk wants the police to give that defendant a "trespass" notice?

2. If the state prevails on appeal should costs be imposed when a defendant has neither the present nor future ability to pay?

STATEMENT OF THE CASE

Factual History

At 4:28 pm on October 1, 2016, Officer John Dorff and Sergeant David Clary of the Centralia Police Department went to the King Oscar Motel in Centralia in an attempt to find Natalie Sanchez, who had an outstanding warrant for her arrest. RP 4-5, 17-28¹. The officers had received information from an anonymous informant that Ms Sanchez had rented a specific room at that motel. *Id.* Upon arrival, the officers went to the office and spoke with the clerk, who checked her records at their request and verified that no person my the name of Natalie Sanchez was registered as a guest at the motel. RP 5-6, 18-19. The clerk then told them that a person by the name of Alicia Sanchez² was registered in the room they had identified and that the clerk wanted the officers to go to that room, find out if anyone other than Alicia Sanchez was present, and then kick any such person out if they were present. *Id.*

¹The record on appeal includes to volumes of continuously numbered verbatim reports of the combined CrR 3.5/3.6 hearing held on November 9, 2016, and the combined stipulated facts trial and sentencing hearing held on November 16, 2016. Both volumes are referred to herein as “RP [page #].”

²In the verbatim reports, the court reporter spelled this name as “Elishia Sanchez.” However, in the Findings of Fact and Conclusions of Law the state wrote that name as “Alicia Sanchez.” The latter spelling is used in this brief.

Alicia Sanchez is Natalie Sanchez's sister, and the defendant had gone to the room that afternoon to visit Alicia. RP 11, 30. When the officers went up to the room and knocked on the door, the defendant answered. RP 7, 12, 18-19, 30. Once she opened the door Sergeant Clary immediately recognized her from prior contacts. RP 18-19, 30. Upon seeing her he greeted her by name and asked if Alicia was inside. *Id.* The defendant responded that she was alone in the room. RP 7, 19, 30. At that point the motel clerk walked up and told the officers to kick the defendant out of the room and to give her a trespass notice. RP 8, 19.

Based upon what the clerk said, the officers told the defendant to gather up her belongings and leave. RP 8-9, 19. As she did both officers entered the room with guns drawn³, ostensibly to verify that no other person was present and to verify that the defendant did not have any weapons. RP 8, 19. Once the defendant gathered her possessions, she and the officers walked out of the room with the defendant carrying a bag and a purse. RP 20. When they got outside the room Officer Dorff asked the defendant for identification so he could radio dispatch to enter her name into a "trespass"

³During a suppression motion in this case the defendant testified that when the police officers entered the motel room they did so with guns drawn, which they only holstered after they verified that she was the only person present. RP 30. The state did not call the officers in rebuttal to refute this claim. RP 1-43.

database and run her for warrants. RP 8-9, 14, 20.⁴ The defendant then handed her identification to Officer Dorff, who held it while dispatch ran her for warrants put the information into their “trespass” database. *Id.* At the time, neither officer claimed to have any belief that the defendant had committed a crime or was about to commit a crime and the motel clerk gave no reason for wanting to give the defendant a trespass notice. RP 13.

Once dispatch made the entry into the database they ran her name for warrants, discovering that she had an outstanding misdemeanor arrest warrant. RP 9-10, 20-22. The officers then arrested the defendant and searched the bag she had brought out of the motel room. *Id.* During the search of that bag the officers found a small amount of heroin. RP 10-22.

Procedural History

By information filed October 3, 2016, the Lewis County Prosecutor charged the defendant with one count of possession of heroin. CP 1-2. Following arraignment the defendant filed a motion to suppress, arguing that the officers actions taking her identification constituted an unlawful seizure of her person. CP 6-7. The court later held a hearing on the motion with the

⁴Officer Dorff’s testimony and the subsequent written findings are somewhat confusing about where the parties were at the point Officer Dorff took possession of the defendant’s identification and ran it for warrants. However, Sergeant Clary was specific in his testimony that this occurred after they had all left the room and were outside. *See* RP 20.

state calling Officer Dorff and Sergeant Clary as its witnesses and the defense calling the defendant Rebecca McIntire as its witness. RP 4-17, 17-29, 29-32. Following this testimony and argument from counsel, the court denied the motion, later entering the following findings of fact and conclusions of law.

FINDINGS OF FACT

1.1 Officer John Dorff and Sergeant Doug Clary were employed by the Centralia police department and work in their capacity as law enforcement officers on October 1, 2016.

1.2 At approximately 4:30 pm, Dorff and Clary arrived at the King Oscar Motel in Centralia to look for Natalie Sanchez based on an anonymous tip that she was staying in a particular room at that hotel.

1.3 Natalie had an active warrant for her arrest on October 1, 2016.

1.4 Both Dorff and Clary went to the lobby of the hotel and spoke with the clerk about Natalie staying at the hotel.

1.5 The clerk informed Dorff and Clary that Natalie Sanchez was not registered in that particular room, but Alicia Sanchez was.

1.6 The clerk stated that if anyone other than ALicia Sanchez was in the hotel room, she (the clerk) wanted them trespassed from the hotel.

1.7 The clerk informed Dorff and Clary how to get to the room Alicia was registered in.

1.8 When they arrived at the hotel room, Dorff and Clary knocked on the door, which was answered a short while later by the person Clary visually recognized as Rebecca McIntire.

1.9 Dorff explained to McIntire why he and Clary were at the hotel room, and asked if Natalie was in the room.

1.10 McIntire informed Dorff and Clary that she was the only person in the hotel room.

1.11 Around this same time, the clerk came to the room, observed McIntire, stated that she (McIntire) was not registered to the room, and requested law enforcement trespass McIntire from the room.

1.12 The officers did not obtain any additional information regarding the basis for the clerk's request to trespass McIntire, and their authority to trespass was based on the clerk's request alone.

1.13 When the clerk requested McIntire be trespassed, Dorff and Clary told her to gather her belongings and leave the room.

1.14 While she was gathering her belongings, Dorff and Clary entered the hotel room to ensure Natalie was not present and to make sure McIntire did not pick up any type of weapon.

1.15 During the time McIntire was gathering her belongings, Dorff asked for her driver's license in a normal, non-threatening tone.

1.16 Dorff was in possession of McIntire's license for an unknown length of time.

1.17 That request was for Dorff to enter McIntire's name into the Spillman system to log for future officers to be able to see [that] McIntire was trespassed from the King Ocean Motel.

1.18 An additional purpose for running McIntire's name was to check for any active warrants.

1.19 The entry into Spillman for trespassing notice and the check for warrants are run on the same system and accomplished at the same time.

1.20 McIntire returned as having a misdemeanor warrant from Chehalis.

1.21 McIntire was advised she was under arrest for the warrant.

1.22 When McIntire was advised she was under arrest, she was in possession of her belongings she had gathered from the room.

1.23 When she was advised she was under arrest, McIntire asked if she could return the items to the room.

1.24 When advised that she could not return the items to the room, McIntire stated that the purse she was carrying contained her wallet, cell phone, and her identification, but the purse was not hers and anything else inside the purse she knew nothing about.

1.25 A search of the purse incident to McIntire's arrest revealed a plastic baggie that contained a receipt from Goodwill that was folded up. Inside the receipt was a black, tar-like substance.

1.26 Clary later field-tested this substance, which returned positive for heroin.

CONCLUSIONS OF LAW

2.1 Dorff and Clary were validly trespassing McIntire from the hotel based upon the request of the hotel clerk.

2.2 The request for McIntire's identification was necessary to register her information for trespassing purposes.

2.3 The seizure of McIntire's license was minimally intrusive to accomplish that goal.

2.4 The discovery of the controlled substances in McIntire's purse was pursuant to a lawful search incident to arrest.

2.5 All statements made by McIntire were voluntary and admissible at trial.

CP 27-31.

At a subsequent date the defendant submitted to conviction upon

stipulated facts and was sentenced within the standard range. CP 23-26, 32,
35-42. The defendant thereafter filed timely notice of appeal. CP 43.

ARGUMENT

I. 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 BASED UPON OBJECTIVE FACTS THAT SHE WAS OR HAD BEEN ENGAGED IN ANY 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 the case at bar the police did not have a “reasonably articulable suspicion, based on objective facts,” that the defendant was “involved in criminal activity.” In fact, they were specific in their testimony that they had no reason to believe that the defendant had committed any crime. Thus, there was no legal justification for detaining the defendant by seizing her license and thereby seizing her person

In this case the state argued in part that there had been no seizure of the defendant’s person. The ultimate issue in determining the validity of this question is whether or not, under all of the facts and circumstances of the case, a reasonable person would have felt free to decline the officer’s request and terminate the encounter. *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997). Under the facts of this case a reasonable person in the defendant’s shoes would not have felt that she was free to decline the officer’s request for identification or free to leave. First, in this case two uniformed police

officers had ordered the defendant to gather her belongings and vacate a room where she was a guest of the person who had rented the room. Second, those same two officers entered and searched the room at gunpoint while she was in it. Third, once she left the room one of the officers asked for her identification so he could enter that information in a “trespass” database and run it for warrants. A reasonable person under similar circumstances would not believe that she was free to refuse the request or free to leave, particularly while one of the officers still had possession of her driver’s license.

In fact, the trial court’s third conclusion of law in this case presupposes that the court did find a seizure. That conclusion states:

2.3 The seizure of McIntire’s license was minimally intrusive to accomplish that goal [register the defendant’s identification into a trespass database].

CP 30.

In this finding prepared by the state, the trial court presupposes that there was a seizure of the defendant’s property and her person when Officer Dorff took her driver’s license. Thus, in this case there was a seizure of the defendant’s identification and person. As was stated above, there was no legal justification for this seizure. Although the police felt the “need” to enter her information into a “trespass” database, the state did not cite to any authority under which a police officer may legally detain a person simply because the police wanted to put information into a database for possible

future use. This is particularly so in the case at bar because the motel clerk was apparently acting arbitrarily when she ordered the defendant off of the premises.

While a property owner does have the right to “arbitrarily” order people off of his or her property, what that property owner does not have is the right to use the police as a private security force to unlawfully detain that person. Thus, in the case at bar, the police acted in violation of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when they illegally requested the defendant’s driver’s licence under circumstances in which a reasonable person in the defendant’s position would not feel free to refuse or deny the request. Consequently, in the case at bar the trial court erred when it denied the defendant’s Motion to Suppress.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE COSTS SHOULD THE STATE PREVAIL ON APPEAL BECAUSE THE DEFENDANT DOES NOT HAVE THE PRESENT OR FUTURE ABILITY TO PAY.

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 the defendant indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 534-536. 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 29-year-old heroin addict with three minor children and no income or assets. CP 44-48. The defendant’s

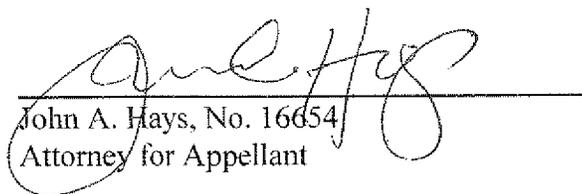
affirmation given in support of her Motion for Order of Indigency reveals that she has no money and currently owes \$30,000.00 in court costs, which she pays for at a rate of \$75.00 per month. CP 44-48. Given these facts it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress evidence the police obtained after illegally detaining the defendant. As a result, this court should reverse the defendant's conviction and remand with instruction to grant the motion. In the alternative, should the state substantially prevail on appeal, this court should exercise its discretion and refrain from imposing costs on appeal.

DATED this 21st day of March, 2017.

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.

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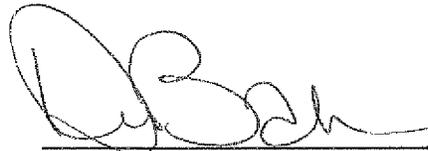
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**AFFIRMATION
OF SERVICE**

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:

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Dated this 21st day of March, 2016, at Longview, WA.



Donna Baker

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