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COA NO. 51284-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE HICKMAN,

Appellant.

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

The Honorable Anna Laurie, Judge
The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. The police officer's warrantless seizure violated appellant's right to privacy under article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution.

2. The court erred in denying appellant's CrR 3.6 motion to suppress evidence obtained from the unlawful seizure. CP 99-100, 141-44.

3. The court erred in entering CrR 3.6 conclusions of law "III" and "IV." CP 143-44.¹

4. The court violated appellant's constitutional right to a unanimous jury verdict.

5. The court erred in ordering appellant to "Forfeit all seized property referenced in the discovery to the originating law enforcement agency unless otherwise stated." CP 194-95.

6. The \$200 criminal filing fee imposed as part of the sentence is unauthorized by statute. CP 194.

7. The \$100 DNA fee imposed as part of the sentence is unauthorized by statute. CP 194.

¹ The trial court's written findings of fact and conclusions of law entered pursuant to CrR 3.6 are attached to this brief as appendix A.

Issues Pertaining to Assignments of Error

1. Whether the police officer that stopped appellant's vehicle without a warrant lacked reasonable suspicion to conduct an investigative detention, thereby violating appellant's constitutional right to privacy and requiring suppression of the evidence obtained from the illegal seizure?

2. Whether appellant's constitutional right to jury unanimity was violated by the lack of unanimity instruction and the failure of the prosecutor to elect a specific victim whose property was stolen as the basis for the charge?

3. Must the court's forfeiture order be vacated because there is no statutory authority for it?

4. Where the new statute prohibiting imposition of discretionary costs against indigent defendants applies to cases pending on direct appeal, whether the \$200 criminal filing fee must be vacated?

5. Where the new statutory provisions governing imposition of a DNA fee against those who have already provided a DNA sample apply to cases pending on direct appeal, whether the \$100 DNA fee must be vacated because appellant is indigent and his DNA was previously collected?

B. STATEMENT OF THE CASE

Michael Hickman appeals from his conviction for first degree trafficking in stolen property. CP 199.

a. Suppression Hearing

Hickman moved to suppress evidence obtained from a warrantless seizure initiated by police, arguing the officer's Terry² stop was unsupported by reasonable suspicion of criminal activity. CP 86-98. The State opposed the motion. CP 210-21. The following evidence was produced at the CrR 3.6 hearing on the matter.

On May 21, 2012, Mrs. McQueary called 911 at about 5 a.m. and reported that she could hear trees being cut with a chainsaw on her property. CP 141 (FF I); 2RP³ 11-12, 14. Deputy Langguth of the Kitsap County Sherriff's Office came to the area but did not hear or see anything of significance. CP 141 (FF I); 2RP 10, 14. Later that day, Deputy Watson explored the McQueary property with Mr. McQueary and saw several maple trees had been cut. CP 141-42 (FF II); 2RP 34-36. There were unpaved trails in the area. 2RP 36. The deputy noticed tire tracks and brush that had been run over. CP 142 (FF II); 2RP 36. The tracks

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

³ This brief cites to the verbatim report of proceedings as follows: 1RP - 9/23/13; 2RP - 11/19/13; 3RP - two consecutively paginated volumes consisting of 11/25/13, 11/26/13, 1/27/13, 12/2/13; 4RP - 12/6/17.

indicated the tree cutter likely gained access to the McQueary property by getting through or around a locked gate on Apex Road, which was located behind the McQueary property. CP 142 (FF II).

On May 22 at about 2 a.m., Mrs. McQueary reported to the sheriff's office that she heard chainsaws on her property again. CP 142 (FF III); 2RP 14-15. Deputy Langguth spoke to her about the evidence discovered by Deputy Watson the day before. CP 142 (FF III); 2RP 15.

Deputy Langguth arrived on Apex Road at 2:28 a.m. and heard an axe being used in the wooded area. CP 142 (FF IV); 2RP 13, 16; Pre-Trial Ex. 2. He parked his patrol vehicle on Apex Road at a point below the location of the access gate. CP 142 (FF IV); 2RP 13, 15-16. Specifically, he parked next to a housing development located about 120 feet from a driveway, which turned out to be the driveway leading to Scott Yoder's residence. CP 142 (FF IV); 2RP 63-64; Pre-Trial Ex. 2.⁴ The officer's location was at the corner of Apex Road and Dickey Road. 2RP 22-24, 26. A map of the area was admitted into evidence as Pre-Trial Exhibit 3. 2RP 24. There is a residential area along Apex Road consisting of about 60 houses. 2RP 13. At one end, Apex Road leads to an airport runway. CP 142 (FF IV); 2RP 13.

⁴ Pre-Trial Exhibit 3 is attached as Appendix B.

A short time later, the deputy saw a pickup truck driving on Apex Road, from the direction of the area where the sound originated. CP 142 (FF V); 2RP 15-16, 26. There was no other traffic on the road. 2RP 17. The deputy did not turn on his vehicle's headlights and would only have been able to see the truck for mere seconds. CP 142 (FF V); 2RP 27, 30, 52, 63. It was very dark. CP 142 (FF V); 2RP 26, 64.

The deputy drove behind the truck and used the emergency lights to cause the truck to stop. CP 142 (FF VI); 2RP 17, 63. The truck pulled into Yoder's driveway. CP 142 (FF V); 2RP 17, 29-30. As the deputy approached the truck, he got a closer look and saw little white flowers all over the truck, consistent with the truck being in a brushy area. CP 142 (FF V); 2RP 17-18. The deputy peered under the canopy covering the back of the pickup and saw cut wood. CP 142 (FF VI); 2RP 18, 56.

The deputy spoke to the men inside the truck, Yoder and Hickman, for a few minutes. CP 142 (FF VII); 2RP 18-19. He questioned them about their knowledge of the tree cutting. CP 142-43 (FF VII); 2RP 20-21. They admitted they were up there cutting trees. 2RP 21. The deputy let them go on their way. CP 143 (FF VII); 2RP 21.

Defense counsel argued individualized reasonable suspicion did not justify the Terry stop. 2RP 68-75, 79-80. The State argued the deputy had reasonable suspicion. 2RP 75-78. The trial court denied the

suppression motion, concluding reasonable suspicion justified the stop. CP 143-44 (CL IV). Counsel moved for reconsideration. CP 101-16. The court denied this motion without substantive comment. CP 99-100.

b. Trial

The McQueary property, which is a little over seven acres, has second growth fir, alder and maples on it. 3RP 114-15. Anderson Hill Road runs in front of the McQueary property; Apex Road runs behind it. 3RP 114, 117. Scott Delhaute's property, which is much larger, lies between McQueary's property and Apex Road. 3RP 116-19, 228-29. Two maps of the area were admitted as Exhibit 33 at trial, with the hand drawn square representing McQueary's property.⁵ 3RP 117-20.

Gregory McQueary testified he woke up on May 21, 2012 at 5 a.m. to the sound of chainsaws in his woods out back. 3RP 121. He had not given anyone permission to cut down trees on his property. 3RP 122, 135-36. Deputy Watson and McQueary walked the property later that day. 3RP 123-24. McQueary saw two "spalted" maple trees were cut down on his property, 30 feet from the property line. 3RP 125, 129, 145; Ex. 20, 21. Spalted maple has a wavy grain and is used for furniture and musical instruments. 3RP 125, 137. Using photos admitted into evidence, McQueary identified trees he thought were on his property and those he

⁵ Trial Exhibit 33 is attached as appendix C.

thought were on Delhaute's property. 3RP 126-28, 131-32; Ex. 1-15, 20-21, 25, 28. McQueary said Delhaute knew where the property line was located because they walked the property together in the past. 3RP 144-45. McQueary did not have any professional education or experience in land surveys. 3RP 138-39.

Yoder rented property from Delhaute. 3RP 230-31. Delhaute gave permission for Yoder to cut firewood on his property if the trees were already down. 3RP 231. He did not give permission to Yoder or Hickman to cut standing trees on his property. 3RP 232-33, 239.

Delhaute was familiar with the two maple trees that were cut down. 3RP 236. According to Delhaute, no survey had been done where the two properties border. 3RP 236. Delhaute testified he was "not certain" if the two cut trees were "on the McQueary property or mine." 3RP 237. They were very near the property line. 3RP 237. He made Yoder pay him \$500 for cutting the two trees down because "that was what he sold some of the maple that he had cut for." 3RP 237-28. The prosecutor later asked, "Do you believe some of the trees that you saw that were cut were, in fact, on your property?" 3RP 239. Delhaute answered "I know they were." 3RP 239. Jeff Grose testified that he helped Yoder cut down two maple trees on Delhaute's property. 3RP 251-53, 255-56.

Deputy Langguth's trial testimony was consistent with his CrR 3.6 testimony. 3RP 158-69. After stopping the truck, the deputy asked Yoder if he was cutting maple trees. 3RP 169. Yoder said they cut down two trees at 5 a.m. the day before and then went back to retrieve them the following night. 3RP 169-70, 183-84. Hickman nodded his head as Yoder said this. 3RP 184. The deputy asked Hickman why he was cutting trees and Hickman replied that he was just helping Yoder. 3RP 184. Yoder said the property belonged to his boss, Scott Delhaute, that Delhaute knew Yoder cut wood on his property, and that he had a key to the locked gate on Delhaute's property. 3RP 187.

Deputy Watson's trial testimony was consistent with his CrR 3.6 testimony. 3RP 193-200. Walking the woods, he saw fallen maple trees, chainsaw oil, a hammer and a soda bottle. 3RP 197. As he continued walking, he saw additional trees cut down. 3RP 198. Some stumps were covered up with debris as if someone were trying to hide them. 3RP 198, 202-03. The deputy said maple wood is valuable. 3RP 200-01. The wood is cut into rectangular blocks when the wood is cut for selling, which is consistent with the fallen trees that the deputy saw on his excursion. 3RP 201, 225.

After receiving Deputy Langguth's report and speaking with Delhaute, Deputy Watson spoke with Yoder. 3RP 203-04. Watson saw

maple woodblocks at Yoder's residence that appeared to have been processed for sale. 3RP 205-06. After arresting Yoder, the deputy contacted Hickman at his home. 3RP 206. Hickman told the deputy that he helped Yoder cut maple on Delhaute's property and on the property north of Anderson Hill Road. 3RP 209. He was going to sell the wood for Yoder. 3RP 209. The deputy recovered a chainsaw from Hickman's residence, which Hickman said he used to cut the wood. 3RP 217-18. Hickman also said he sold some of the maple to a place in Elma. 3RP 211. A permit is needed to harvest and sell wood. 3RP 210. Hickman said he had a permit for a Pierce County location. 3RP 210. When asked if he knew the wood was stolen, Hickman denied it. 3RP 224.

In closing argument, the State told the jury that this case was about the properties owned by McQueary and Delhaute. 3RP 286. The State argued Hickman had no permission to go on the land owned by either one of those people and cut down trees. 1RP 287. The State asked "How would Mr. Hickman have known that this was stolen? He knew it wasn't his property. Property belonged to either Mr. McQueary or belonged to Mr. Delhaute, but it did not belong to him." 3RP 292.

The defense argument was that Hickman did not know the property was stolen. 3RP 295. In rebuttal, the State emphasized Hickman did not have permission from either Delhaute or McQueary to take their maple

trees. 3RP 309. "They are both the victim, and there's nothing in the elements that the Court has given you in the instruction that says you have to find which tree goes where." 3RP 309-10.

The to-convict instruction required the State to prove "That on or about the period of May 20th, 2012 to May 22, 2012, the defendant or an accomplice knowingly trafficked in stolen property" and "That the defendant acted with knowledge that the property had been stolen." CP 164 (Instruction 12).

The jury returned a general verdict of guilty. CP 172. At sentencing, Hickman informed the court he was a "Stage IV carcinoma cancer patient," he had a 40 percent chance of living the next five years, and the sentence sought by the State was a "death sentence." 4RP 5; CP 275. The court expressed sympathy but sentenced Hickman to 63 months in confinement. 4RP 8; CP 190. This appeal follows. CP 199.

C. ARGUMENT

1. THE WARRANTLESS SEIZURE VIOLATED HICKMAN'S CONSTITUTIONAL RIGHT TO PRIVACY BECAUSE IT WAS UNSUPPORTED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

The police officer seized Hickman without a warrant. The specific and articulable facts known to the officer at the inception of the traffic stop did not provide a reasonable suspicion that the truck's occupants had

engaged in criminal wrongdoing. The trial court erred in concluding otherwise. Coincidental proximity to criminal activity does not strip away the constitutionally protected right to privacy. All of the State's evidence tying Hickman to the charged crime flows from the unlawful seizure and must be suppressed under the exclusionary rule. Without that evidence, the conviction cannot stand.

a. The standard of review is de novo.

There are no disputed findings of fact. They are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Hickman disputes the conclusions of law drawn from the facts. The trial court's conclusions of law are reviewed de novo. State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). Whether a Terry stop passes constitutional muster is thus a question of law reviewed de novo. State v. Bailey, 154 Wn. App. 295, 299, 224 P.3d 852, review denied, 169 Wn.2d 1004, 236 P.3d 205 (2010). This means the trial court's ruling receives no deference on appeal. State v. Kunze, 97 Wn. App. 832, 854, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 404 (2000).

b. The specific and articulable facts known to the officer at the inception of the seizure do not amount to reasonable suspicion that Hickman had engaged in criminal activity.

"A traffic stop is a seizure for purposes of constitutional analysis." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). There is no dispute that Deputy Langguth seized Hickman. The deputy stopped the truck Hickman was in by activating his emergency lights for the purpose of investigating whether the truck's occupants were involved in criminal activity. See State v. DeArman, 54 Wn. App. 621, 624, 774 P.2d 1247(1989) (seizure occurred when an officer activated his emergency lights behind vehicle).

The dispute is whether the deputy's warrantless seizure was illegal. As a general rule, a warrantless seizure is per se unlawful under both the Fourth Amendment and article I, section 7 unless it falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). These exceptions are jealously and carefully drawn. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). "The Terry stop — a brief investigatory seizure — is one such exception to the warrant requirement." Doughty, 170 Wn.2d at 61-62 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

"A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct." Doughty, 170 Wn.2d at 62. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from

those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. A reasonable, articulable suspicion means that there "is a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "In reviewing the propriety of a Terry stop, a court evaluates the totality of the circumstances." State v. Snapp, 174 Wn.2d 177, 198, 275 P.3d 289 (2012). "The State must show by clear and convincing evidence that the Terry stop was justified." Doughty, 170 Wn.2d at 62.

When a party claims both state and federal constitutional violations, this Court addresses the state constitutional claim first. State v. Patton, 167 Wn.2d 379, 385, 219 P.3d 651 (2009). Article I, section 7 provides greater protection than the Fourth Amendment because it focuses on the disturbance of private affairs rather than unreasonable searches and seizures. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Although the reasonable suspicion standard under either constitutional analysis requires that the suspicion be grounded in "specific and articulable facts," the Washington Constitution "generally requires a stronger showing by the State." State v. Z.U.E., 183 Wn.2d 610, 617-18, 352 P.3d 796 (2015).

With these standards in mind, Hickman challenges this conclusion of law:

Deputy Langguth had a reasonable suspicion based on articulable facts, that the truck he saw coming down Apex Road from the direction of the suspect gate and the illegal cutting, on a road lightly used, and on that morning not being used by any other vehicle at that time, might be connected with the wood cutting. The coincidence of the time, location and very recent tree cutting made it reasonable and appropriate for the deputy to engage the truck, and the defendant, in a brief stop to make inquiries concerning his suspicions. The flowers on the truck that the deputy saw immediately after the stop were consistent with the truck having very recently been in a brushy area. The cut wood in the back of the truck was also consistent with someone having been in the woods cutting wood. CP 143-44.

While the reviewing court evaluates the totality of the circumstances to determine whether a reasonable suspicion of criminal activity exists, it must do so by carefully evaluating whether each fact identified by the officer indeed contributes to the suspicion. State v. Fuentes, 183 Wn.2d 149, 159, 352 P.3d 152 (2015). The first step is to clarify what circumstances were known to Deputy Langguth when he stopped the vehicle. This matters because, for a Terry stop to be valid, "an officer must have 'reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop.'" State v. Weyand, 188 Wn.2d 804, 811, 399 P.3d 530 (2017) (quoting Fuentes, 183 Wn.2d at 158).

In its conclusion of law determining the stop was supported by reasonable suspicion, the trial court noted "The flowers on the truck that the

deputy saw *immediately after the stop* were consistent with the truck having very recently been in a brushy area. The cut wood in the back of the truck was also consistent with someone having been in the woods cutting wood." CP 144 (CL IV).⁶ The court erred in relying on these facts to support reasonable suspicion because the deputy was unaware of these facts before he stopped the vehicle. The deputy testified he did not see the flowers on the truck until after he stopped the truck and approached it. 2RP 17-18. He did not see the cut wood in the back of the truck until after he stopped the truck and peered inside. 2RP 18.

Circumstances arising after the seizure begins cannot inform the analysis of the initial seizure. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). What police learn after the unlawful seizure takes place cannot be used to retroactively justify the seizure. State v. Mendez, 137 Wn.2d 208, 224, 970 P.2d 722 (1999), abrogated on other grounds, Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). As a result, the deputy's observation of the flowers on the truck and cut wood in the back of the truck cannot be used to show reasonable suspicion. The trial court erred in concluding otherwise.

⁶ Conclusion of Law III repeats the quoted portion of conclusion of Law IV verbatim. CP 143 (CL 3).

In this regard, the deputy's testimony about seeing what he thought was sawdust on the truck deserves comment. The deputy claimed he saw tan sawdust on the tan truck before the stop. 2RP 15-17, 30-31. The State emphasized this circumstance below to show physical evidence tied the truck to the woods before the deputy made the stop. 2RP 76-78.

But the court rejected the deputy's testimony on this point: "It is not likely that in the dark the deputy was able to see any sawdust, or flowers, on the truck before he stopped the truck." CP 143 (CL III). The court expressly declined to make a finding in support of the deputy's testimony that he saw what he thought was sawdust before the stop. 3RP 69; CP 142 (FF IV) (striking proposed language). For this reason, the sawdust is not a fact that can be used in deciding whether reasonable suspicion existed to justify the stop. It is the State's burden to produce and prove the facts showing an exception to the warrant requirement exists. Doughty, 170 Wn.2d at 62; State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008). The State did not prove the deputy could see what he thought was tan sawdust on a tan truck in the dark of night passing by in mere seconds. That alleged circumstance is off the table.

What, then, is left? Not enough. The remaining specific facts known to the officer at the inception of the stop are: (1) someone was cutting down trees on the McQueary property late at night; (2) there is a gate on Apex

Road that could be used to access the area of the McQueary property where the trees were cut; (3) the officer arrived on Apex Road and heard an axe in the woods; (4) a short time later, the officer saw a truck driving down Apex Road from the direction of the gate and the illegal cutting; (5) the road was not being used by any other vehicle at that time.

The trial court concluded the "coincidence of the time, location and very recent tree cutting made it reasonable and appropriate for the deputy to engage the truck, and the defendant, in a brief stop to make inquiries concerning his suspicions." CP 143-44. When properly analyzed, these facts do not amount to reasonable suspicion because they show nothing more than coincidental physical and temporal proximity to criminal activity. What is lacking, and what is needed to justify the seizure, are specific facts tying the individuals in the truck to that illegal activity.

Hickman and Yoder were not doing anything inherently suspicious before they were seized. No wood was seen sticking up out of the truck bed before the stop. They were not speeding or driving in any way out of the ordinary. They were driving on a public road. Yes, it was late at night with no other traffic. But Apex Road runs alongside a residential area. 2RP 13. This is significant because it provides a basis for residents who live in the area to be on that road late at night while returning home from some innocent, late night activity. The court found there are a "limited

number" of homes on Apex Road. CP 142 (FF IV). "Limited" is a relative concept. The evidentiary basis for that finding is that there were nearly 60 houses along the road. 2RP 13. Deputy Langguth was parked next to a residential development, near where Yoder and Hickman lived. 2RP 17, 29-30, 58-59.

A person driving on that road late at night could easily be coming home from visiting a neighbor. People drive home after other innocent, late night activities as well. Apex Road dead ends at the airstrip, but before it does so, multiple roads branch off and provides access to other areas. Pre-Trial Ex. 3; Trial Ex. 33. Further, many people do not work 9 to 5 jobs. They go to and from work late at night and use a public roadway to do so. Driving in an ordinary manner on a public road late at night is an innocuous fact. Innocuous facts do not support reasonable suspicion. State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997) (citing State v. Tijerina, 61 Wn. App. 626, 629, 811 P.2d 241, review denied, 118 Wn.2d 1007 (1991)).

Which brings up the next point: "The suspicion must be individualized to the person being stopped." Weyand, 188 Wn.2d at 812. If the "coincidence of the time, location and very recent tree cutting" (CP 143-44) made the stop lawful, then any vehicle driving on that road at that time could have been lawfully seized by the officer. This is dragnet logic.

If a crime occurs, then everyone in the vicinity is seized and investigated, including those who live in the area and are just going about their everyday lives. That is not individualized suspicion. That is grasping suspicion latching upon anyone who happens to come along.

While the totality of the circumstances as they reasonably appeared to police at the time of the stop must be considered, that is not the end of the analysis. "The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process . . . must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Merely associating with a person suspected of criminal activity or a place where criminal activity has occurred "does not strip away" individual constitutional protections. State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982), abrogated on other grounds, Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

Comparison with drug house cases is instructive because they address proximity to criminal activity and what is or is not reasonable suspicion for a stop in that context. In Doughty, the defendant approached a suspected drug house at 3:20 a.m., stayed for two minutes, and then drove away. Doughty, 170 Wn.2d at 60. Although officers did not see

what Doughty may have done in the house, they stopped Doughty for suspicion of drug activity. Id.

The Terry stop was unlawful: "A person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." Id. at 62. More importantly, "a person's 'mere proximity to others independently suspected of criminal activity does not justify the stop.'" Id. (quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). Doughty requires Terry stops to be based on individualized suspicion, not simply association with a location where suspected criminal activity takes place at a late hour. The facts relied on by the deputy in Hickman's case show Hickman was near a location where criminal activity had taken place shortly before the stop occurred. Under Doughty, that is not enough to justify a warrantless seizure.

Fuentes provides a contrast to Doughty and further illuminates why reasonable suspicion is lacking in Hickman's case. In Fuentes, officers surveilled an apartment where illegal drugs were sold. Fuentes, 183 Wn.2d at 156. On the night of the arrest, police saw 10 people enter and leave the apartment within two hours, each staying inside for between 5 and 20 minutes. Id. Officers testified that this behavior indicated narcotics activity was taking place in the residence. Id. Around midnight, officers saw Fuentes park her car outside the apartment, enter the

apartment, stay about five minutes, and return to her car. Id. Fuentes then removed a plastic bag from her trunk, reentered the apartment, stayed for 5 minutes, and returned to her car with a bag that had noticeably less content in it than before. Id. at 156-57. Based on those observations, officers conducted a Terry stop. Id. at 157. The Court held reasonable suspicion justified the stop. Id. at 157, 164.

In Fuentes, the reasonable inferences drawn from specific facts showed criminal drug activity was presently taking place at the residence, the defendant went into the house where that activity was occurred, and there was a substantial possibility the defendant participated in that illegal activity, as shown by the altered bag she carried upon leaving the house.

Compare those circumstances with Hickman's case. Similar to Fuentes, police knew criminal activity had recently occurred. But unlike Fuentes, Hickman was not seen entering or leaving the specific location where that criminal activity occurred. Police did not see Hickman on the McQueary property or in the woods. Police did not see Hickman leaving the access gate. At best, the deputy could say he saw the truck driving down Apex Road from the direction of the access gate and the illegal cutting. That is mere proximity. Coming from that "direction" is a loose connection between the truck and criminal activity. Unlike in Fuentes, where the defendant's movements were pinpointed to the location of the

illegal activity, maps of the area show a large geographic area from which the truck could have come from. Pre-Trial Ex. 3; Trial Ex. 33. From an objective standpoint, a truck traveling down Apex Road need not have come from the access gate.

Comparison with Kennedy further illustrates what is missing in Hickman's case. In Kennedy, the officer went to investigate neighbor complaints early in the morning about short-stay foot traffic going in and out of Rob Smith's house. Kennedy, 107 Wn.2d at 3. The officer had information from a reliable informant that Smith used this house to sell drugs, Kennedy bought marijuana from Smith at this house, and Kennedy drove a maroon car. Id. Based on this information, the officer stopped Kennedy on suspicion of purchasing marijuana after seeing Kennedy leave the house and get into a maroon car. Id. at 3, 8. The Supreme Court held reasonable suspicion supported the stop. Id. at 8-9.

In Kennedy, the police officer saw the suspect enter and then leave the house associated with illegal activity and knew that the defendant himself had a history of engaging in criminal activity at that location. No comparative evidence is present in Hickman's case. The deputy did not know who he was stopping. The deputy did not see the truck enter or leave the woods where the criminal activity took place.

"The available facts must substantiate more than a mere generalized suspicion that the person detained is 'up to no good.'" Z.U.E., 183 Wn.2d at 618 (quoting State v. Bliss, 153 Wn. App. 197, 204, 222 P.3d 107 (2009)). A hunch does not warrant police intrusion into people's everyday lives. Doughty, 170 Wn.2d at 63. When the standard for showing individualized, reasonable suspicion is not strictly enforced by requiring specifically articulated facts to justify a seizure, the exception swallows the rule and "the risk of arbitrary and abusive police practices exceeds tolerable limits." Thompson, 93 Wn.2d at 843 (quoting Brown v. Texas, 443 U.S. 47, 52, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979)). Coincidental proximity to a location associated with criminal activity late at night is insufficient to support a reasonable suspicion that the detained person is engaged in criminal activity. The deputy did not have reasonable suspicion to seize Hickman.

c. The evidence gathered because of the unlawful stop must be suppressed, requiring reversal of the conviction.

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Evidence derived from an unlawful search or seizure, including inculpatory statements of the defendant, must be

suppressed under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Here, the unlawful stop provided the basis for tying Hickman to the crime. Because of the seizure, Deputy Langguth observed cut wood in the back of the truck and obtained incriminating admissions from Hickman and Yoder that they had cut down the wood. 3RP 169-70, 183-84. This, in turn, led to further police investigation by Deputy Watson, which yielded incriminating statements from Hickman that he cut the wood for sale and the discovery of cut maple blocks from Yoder's residence. 3RP 203-09, 217-18. Without the evidence uncovered as a result of the unlawful seizure, there is no remaining evidence that identifies Hickman as the perpetrator. For this reason, the conviction must be reversed and the charge dismissed with prejudice. See State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (same).

2. THE LACK OF UNANIMITY INSTRUCTION VIOLATED HICKMAN'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. Wash. Const., art. 1, § 21. "[A] defendant may be convicted only when a unanimous jury concludes that the criminal act

charged in the information has been committed." State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Hickman's right to jury unanimity was violated in the absence of a unanimity instruction or election from the prosecutor regarding which victim's property was stolen. The conviction must be reversed because the State cannot prove the unanimity error was harmless beyond a reasonable doubt.

Hickman did not raise the unanimity error below, but "[a]n appellate court will consider error raised for the first time on appeal when the giving or failure to give an instruction invades a fundamental constitutional right of the accused, such as the right to a jury trial." State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980). It is well established that the failure to require a unanimous verdict amounts to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009); State v. Greathouse, 113 Wn. App. 889, 916, 56 P.3d 569 (2002), review denied, 149 Wn.2d 1014, 69 P.3d 875 (2003) (citing State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991)). "An alleged violation of the right to a unanimous jury verdict is a constitutional challenge that this court reviews de novo." In re Detention of Keeney, 141 Wn. App. 318, 327, 169 P.3d 852 (2007).

In multiple acts cases, several acts are alleged and any one of them could constitute the crime charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure jury unanimity in a multiple acts case, either the State must elect the act upon which it will rely for conviction or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt. Id.; Petrich, 101 Wn.2d at 572. There was no unanimity instruction here.

In the absence of a unanimity instruction, the State must specifically elect the criminal act it relies upon to establish guilt. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). The right to a unanimous jury verdict includes the right to have the jury unanimously find which of two alleged people were the victim of a crime. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); Williams, 136 Wn. App. at 496. The State did not elect an act related to one victim, but instead expressly invited the jury to convict based on tree thefts from two different victims. 3RP 286-87, 292, 309-10. The State went so far as to suggest it did not need to be unanimous as to whose trees Hickman knowingly stole. 3RP 309-10.

In Stephens, the defendant was charged with one count of assault but the to-convict instruction listed the names of the victims in the disjunctive: that the jury must find "the defendant knowingly assaulted Richard Heieck

or Norman Jahnke." Stephens, 93 Wn.2d at 189. The instruction was impermissible "because it allowed conviction if, e.g., six jurors believed Stephens assaulted Jahnke and six believed he assaulted Heieck." Id. at 190.

The instruction "related to the fact of whether the charged crime had been committed, not to alternative modes of commission," and "in effect, split the action into two separate crimes (assault against Jahnke and assault against Heieck), while the information charged only one." Id. The Supreme Court reversed because the instruction violated the right to jury unanimity and was not harmless beyond a reasonable doubt. Id. at 190-91.

In Williams, the court erred in not instructing the jury that in order to find Williams guilty of the charged crime of first degree burglary it must unanimously agree as to which of two alleged victims he assaulted. Williams, 136 Wn. App. at 490. The to-convict instruction required the State to prove "That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged assaulted *a person*." Id. at 492. "[T]wo distinct criminal acts were alleged, the assault against Johnson and the assault against Otis." Id. at 496. The two assaults were not alternative means of committing the charged crime but rather distinct criminal acts for which a unanimity instruction was required. Id. at 497-98. The State failed to specifically elect which victim it relied on to prove the charged crime. Id. at 497. As a result, the court violated the

right to jury unanimity in failing to instruct the jury that it must be unanimous as to which person the defendant assaulted. Id. at 499.

Williams and Stephens demonstrate a court violates the right to jury unanimity when two victims are alleged for a single charged crime, the jury is not instructed on the need to be unanimous as to the identity of the victim, and the State does not elect one victim as the basis for the charge. As argued, the court in Hickman's case did not instruct the jury that it needed to unanimously agree that Hickman trafficked in McQueary's stolen property or unanimously agree that Hickman trafficked in Delhaute's stolen property. In closing argument, the State did not select one victim as the basis for the charge but rather exhorted the jury to convict based on Hickman's crime against both men.

The conviction must be reversed unless the unanimity error is harmless beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). In the context of a multiple victim case, the error is harmless beyond a reasonable doubt only if the evidence necessarily establishes that both alleged victims had the crime committed against them. In Stephens, the unanimity error was prejudicial because the evidence did "not necessarily establish beyond a reasonable doubt that Stephens assaulted both men." Stephens, 93 Wn.2d at 191. From the evidence, "one might conclude" that one man alone was assaulted. Id.

Application of that reasoning to Hickman's case show the unanimity error is not harmless. McQueary testified he found two spalted maple trees that were cut down on his property. 3RP 125, 129-30. Delhaute testified he was uncertain whether the two maple trees were on his property or McQueary's property, leaving open the possibility that the trees were cut on his property. 3RP 236-37. Delhaute later testified he knew some of the trees that he saw cut were on his property. 3RP 239. Consistent with that testimony, the prosecutor argued "there were more than two trees that were cut down. Remember, Mr. McQueary talked about there were two trees that he said fell down on his property, but there were additional trees that fell down on Delhaute's property or cut down on his property." 3RP 310. From the evidence, a trier of fact could conclude that the two spalted maples were on Delhaute's property, not McQueary's property. The evidence does not necessarily show that Hickman or an accomplice cut the trees that formed the basis for the trafficking in stolen property charge from each man's property. As a result, the unanimity is not harmless beyond a reasonable doubt and the conviction must be reversed.

3. THE COURT LACKED STATUTORY AUTHORITY TO ORDER FORFEITURE OF PROPERTY AS PART OF THE JUDGMENT AND SENTENCE.

A boilerplate provision in the judgment and sentence states: "☒
FORFEITURE - Forfeit all seized property referenced in the discovery to

the originating law enforcement agency unless otherwise stated." CP 194-95. This provision must be vacated because it is not authorized by statute.

"A trial court has no inherent power to order forfeiture of property in connection with a criminal conviction." State v. Roberts, 185 Wn. App. 94, 96, 339 P.3d 995 (2014). "The authority to order forfeiture of property as part of a judgment and sentence is purely statutory." Id. Review is de novo. Id.

This Court has held the trial court erred by ordering forfeiture of seized property as a sentencing condition because there was no statutory authority for such a provision. State v. Rivera, 198 Wn. App. 128, 131-32, 392 P.3d 1146 (2017), review denied, 188 Wn.2d 1023, 398 P.3d 1141 (2017); Roberts, 185 Wn. App. at 96-97. In other cases, the Kitsap County Prosecutor's Office has conceded the exact provision at issue here must be stricken. State v. Hughes, 2018 WL 2437295, at *4-5 (2018) (unpublished); State v. Christopher, 194 Wn. App. 1044, 2016 WL 3598988, at *4 (2016) (unpublished).⁷ The forfeiture provision in Hickman's case must likewise be struck from the judgment and sentence.

**4. DISCRETIONARY COSTS MUST BE STRICKEN
BASED ON INDIGENCY.**

⁷ GR 14.1(a) permits citation to unpublished decisions for their persuasive value.

The court imposed a \$200 criminal filing fee and a \$100 DNA fee. CP 194. The filing fee must be stricken because Hickman is indigent and the recently amended statute, which prohibits imposition of discretionary costs against indigent defendants, applies to cases pending on appeal. Further, Hickman has already had his DNA sample collected due to a prior felony conviction. Under recently amended statutes that apply to cases pending on appeal, imposition of a DNA fee in that circumstance is discretionary, and discretionary fees cannot be imposed against indigent defendants. These challenged legal financial obligations (LFOs) must be stricken from the judgment and sentence.

The current, amended version of RCW 36.18.020(2)(h), effective June 7, 2018, states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), of which the filing fee provision is a part, applies prospectively to cases currently pending on direct appeal. State v.

Ramirez, __ Wn.2d __, __ P.3d __, 2018 WL 4499761 at *6-8 (slip op. filed Sept. 20, 2018). The amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Id. at *8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id.

Hickman's indigency is established in the record. The declaration in support of appeal at public expense shows Hickman was unemployed and had no income or assets. CP 201-02. He owes \$5,160 in restitution. CP 206-07. The court found Hickman indigent for appeal. CP 203-05. Hickman is currently incarcerated and does not have an income at or above 125 percent of the federal poverty level, which is currently \$15,175 (125 percent of the current federal guideline of \$12,140).⁸ The criminal filing fee must be stricken because Hickman is indigent. Ramirez, 2018 WL 4499761 at *8.

For similar reasons, the \$100 DNA fee must also be stricken. Under RCW 43.43.754(1)(a), a biological sample must be collected for purposes of DNA identification analysis from every adult or juvenile convicted of a felony. Hickman has previous felony convictions. CP 188-

⁸ See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, Poverty Guidelines (2018), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited Sept. 28, 2018).

89. He would necessarily have had his DNA sample collected pursuant to RCW 43.43.754.

RCW 43.43.7541, meanwhile, was amended by HB 1783 to read, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*" Laws of 2018, ch. 269, § 18 (emphasis added). Again, HB 1783 applies to all cases pending on appeal. Ramirez, 2018 WL 4499761 at *6-8. HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Id. at *6.

Because Hickman's DNA sample was previously collected based on a prior felony conviction, the DNA fee in the present case is not mandatory under RCW 43.43.7541. The fee is discretionary. RCW 10.01.160 addresses discretionary costs. HB 1783 amended RCW 10.01.160(3), which now provides "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)."⁹

⁹ See also RCW 9.94A.760(1) (2018) ("The court may not order an offender to pay costs as described in RCW 10.01.160 if the court finds that the offender at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)."); RCW 10.64.015 (2018) ("The court shall

Hickman meets the indigency standard under RCW 10.101.010(3)(c). And he has previously had his DNA sample collected. Reading the current, applicable version of RCW 43.43.7541 in conjunction with RCW 10.01.160(3), the court lacked authority to impose the \$100 DNA fee because Hickman is indigent.

When legal financial obligations (LFOs) are impermissibly imposed, the remedy is to strike them. Ramirez, 2018 WL 4499761 at *8. The criminal filing fee and DNA fee must therefore be stricken from the judgment and sentence.

Hickman did not object to these costs below, which is understandable because HB 1783 was not yet in effect at the time they were imposed. The errors became extant only after HB 1783 became law and Hickman's case remained pending on appeal. Under these circumstances, RAP 2.5(a) is no hurdle to considering the LFO errors for the first time on appeal because "the purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d

not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).").

535, 547, 919 P.2d 69 (1996). Here, there was no error to correct at the time these costs were imposed because the new statutory provisions had not yet taken effect. The failure to properly object may be excused where it would have been a useless endeavor. State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996); see also State ex rel. Clark v. Hogan, 49 Wn.2d 457, 461, 303 P.2d 290 (1956) ("A fundamental rule in American jurisprudence is that the law requires no one to do a thing vain and fruitless.").

D. CONCLUSION

For the reasons stated, Hickman requests reversal of the conviction, vacature of the forfeiture order and the challenged LFOs.

DATED this 3rd day of October 2018

Respectfully Submitted,

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