

FILED  
Court of Appeals  
Division II  
State of Washington  
7/3/2019 2:30 PM  
NO. 51404-4-II

---

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DEJONE DEWAYNE MICHAEL SIMPSON, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Karena Kirkendoll, Judge

No. 17-1-01174-8

---

**Brief of Respondent**

---

MARY E. ROBNETT  
Prosecuting Attorney

By  
KRISTIE BARHAM  
Deputy Prosecuting Attorney  
WSB # 32764

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. INTRODUCTION..... 1

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 2

    1. Were the defendant's due process rights violated by any delay in the post-conviction competency evaluation where he did not have a liberty interest in being free from incarceration because he was being held on a no-bail hold pending sentencing? (Appellant's Assignments of Error 1, 2). ..... 2

    2. Did the trial court properly deny the defendant's motion to suppress where the officer had a reasonable, articulable suspicion that the defendant was engaged in criminal activity at the time he was initially approached, and ultimately had probable cause for the defendant's seizure? (Appellant's Assignments of Error 3-8). ..... 2

    3. Should this Court remand for the trial court to strike discretionary legal financial obligations that were imposed at sentencing where the defendant was indigent? (Appellant's Assignment of Error 9). ..... 2

C. STATEMENT OF THE CASE..... 2

    1. PROCEDURE..... 2

    2. FACTS ..... 4

D. ARGUMENT..... 7

    1. DISMISSAL WITHOUT PREJUDICE IS INAPPROPRIATE WHERE THE DEFENDANT CANNOT SHOW THAT HIS DUE PROCESS RIGHTS WERE VIOLATED OR THAT HE WAS PREJUDICED BY THE DELAY IN OBTAINING A POST-CONVICTION COMPETENCY EVALUATION..... 7

|    |   |    |
|----|---|----|
| 2. | THE TRIAL COURT PROPERLY DENIED THE<br>DEFENDANT’S MOTION TO SUPPRESS.....  | 15 |
| 3. | THIS COURT SHOULD REMAND FOR THE TRIAL<br>COURT TO STRIKE THE FILING FEE AND DNA FEE<br>IN THE JUDGMENT AND SENTENCE..... | 24 |
| E. | CONCLUSION.....   | 25 |

## Table of Authorities

### State Cases

|  |               |
|--|---------------|
| <i>State v Kidder</i> , 197 Wn. App. 292, 389 P.3d 664 (2016) .....          | 13, 14        |
| <i>State v. Acrey</i> , 148 Wn.2d 738, 747, 64 P.3d 594 (2003).....          | 17            |
| <i>State v. Alexander</i> , 5 Wn. App. 2d 154, 160, 425 P.3d 920 (2018)..... | 16            |
| <i>State v. Cardenas</i> , 146 Wn.2d 400, 408, 47 P.3d 127 (2002).....       | 23            |
| <i>State v. Gantt</i> , 163 Wn. App. 133, 257 P.3d 682 (2011) .....          | 22            |
| <i>State v. Gatewood</i> , 163 Wn.2d 534, 539, 182 P.3d 426 (2008).....      | 15, 16        |
| <i>State v. Hand</i> , 192 Wn.2d 289, 291, 429 P.3d 502 (2018) .....         | 9, 10, 12, 13 |
| <i>State v. Hornback</i> , 73 Wn. App. 738, 743, 871 P.2d 1075 (1994) .....  | 23            |
| <i>State v. Martin</i> , 106 Wn. App. 850, 856-62, 25 P.3d 488 (2001).....   | 23            |
| <i>State v. O’Neill</i> , 148 Wn.2d 564, 574, 62 P.3d 489 (2003) .....       | 19-20, 21     |
| <i>State v. Ramirez</i> , 191 Wn.2d 732, 747, 426 P.3d 714 (2018).....       | 24, 25        |
| <i>State v. Ross</i> , 106 Wn. App. 876, 880, 26 P.3d 298 (2001).....        | 15            |
| <i>State v. Seagull</i> , 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981).....      | 23            |
| <i>State v. Vickers</i> , 148 Wn.2d 91, 116, 59 P.3d 85 (2002) .....         | 15            |
| <i>State v. Weyand</i> , 188 Wn.2d 804, 811, 399 P.3d 530 (2017) .....       | 16            |
| <i>State v. Williams</i> , 102 Wn.2d 733, 736, 689 P.2d 1065 (1985).....     | 16            |

Federal and Other Jurisdiction

*Oregon Advocacy Center v. Mink*, 322 F.3d 1101,  
1120-21, (2003)..... 8-9, 12

*State v. Mendenhall*, 466 U.S. 544, 554-55, 100 S. Ct. 1870,  
64 L. Ed. 2d 497 (1980)..... 20

*Terry v. Ohio*, 392 U.S. 1, 99 S. Ct. 1868,  
20 L. Ed. 2d 889 (1968)..... 16, 18, 21

*Trueblood v. Washington State Dept. of Social and Health Services*,  
73 F. Supp. 3d 1311 (2014) ..... 4, 8

*Trueblood v. Washington State Dept. of Social and Health Services*,  
822 F.3d 1037 (2016)..... 8, 9, 11, 12

Constitutional Provisions

Article 1, section 7, Washington State Constitution..... 16, 19

Fourth Amendment, United States Constitution..... 15

Sixth Amendment, United States Constitution ..... 11

Statutes

Engrossed Second Substitute House Bill 1783, 65th Leg.,  
Reg. Sess. (Wash. 2018) ..... 24, 25

RCW 10.77.010(15)..... 8

RCW 10.77.050 ..... 7-8

RCW 10.77.060(1)(a) ..... 8

RCW 10.77.060(1)(c) ..... 8

RCW 36.18.020(2)(h) ..... 24

RCW 9.94A.760..... 24

Rules and Regulations

CrR 3.5 ..... 3, 5

CrR 3.6 ..... 3, 5, 20

CrR 8.3(b) ..... 11

A. INTRODUCTION.

The State charged Dehone Simpson with one count of unlawful possession of a stolen vehicle. He was convicted at trial and placed on a no-bail hold pending sentencing. Prior to sentencing, defense counsel moved to have the defendant's competency evaluated. The evaluator requested further evaluation at Western State Hospital. After a delay awaiting the post-conviction evaluation, the defendant was transported and evaluated. The defendant was found to be competent, and he proceeded to sentencing.

The defendant's due process rights were not violated by any delay awaiting a further post-conviction competency evaluation because he had already been convicted of a crime, he was on a no-bail hold pending sentencing, and thus he had no liberty interest to compete with the State's interest in keeping him incarcerated. Therefore, the defendant cannot establish he suffered a due process violation or prejudice, and the facts do not warrant dismissal.

Further, the trial court properly denied the defendant's motion to suppress because the officer had reasonable, articulable suspicion the defendant was engaged in criminal activity when he initially approached the defendant and briefly questioned him about the car. Almost immediately after the initial contact, dispatch advised the officer that the car was stolen. The officer then lawfully seized the defendant and placed him under arrest

for unlawful possession of a stolen vehicle. Finally, the State agrees that this Court should remand for the trial court to strike the filing fee and DNA fee in the defendant's judgment and sentence.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were the defendant's due process rights violated by any delay in the post-conviction competency evaluation where he did not have a liberty interest in being free from incarceration because he was being held on a no-bail hold pending sentencing? (Appellant's Assignments of Error 1, 2).
2. Did the trial court properly deny the defendant's motion to suppress where the officer had a reasonable, articulable suspicion that the defendant was engaged in criminal activity at the time he was initially approached, and ultimately had probable cause for the defendant's seizure? (Appellant's Assignments of Error 3-8).
3. Should this Court remand for the trial court to strike discretionary legal financial obligations that were imposed at sentencing where the defendant was indigent? (Appellant's Assignment of Error 9).

C. STATEMENT OF THE CASE.

1. PROCEDURE

The State charged Dejone Simpson ("defendant") with one count of unlawful possession of a stolen vehicle. CP 3. In April 2017, defense counsel requested a competency evaluation for the defendant, and he was found competent following a timely evaluation. CP 13-20, 23-28.

The parties held a CrR 3.5/3.6 hearing to determine the admissibility of defendant's statements. 07/17/17 RP 75. Officer Michael Russell testified at the hearing. 07/17/17 RP 75-76. Finding that Russell had a reasonable, articulable suspicion to contact the defendant, the court denied the defendant's motion to suppress and dismiss. 07/17/17 RP 124.

A jury found the defendant guilty at trial. 07/18/17 RP 96. The court placed the defendant on a no-bail hold pending sentencing. 07/18/17 RP 100. Prior to sentencing, defense counsel again raised concerns regarding the defendant's competency. 09/15/17 RP 2. On September 15, 2017, the court ordered a second competency evaluation. 09/15/17 RP 4. The evaluation was completed on September 22, 2017. CP 176-82. On September 28, 2017, the court ordered an inpatient competency evaluation at the evaluator's request and indicated that the defendant shall be admitted within seven days of the order. CP 182-89.

On October 4, 2017, the defendant moved for a show cause hearing because Western State Hospital (WSH) had not completed the evaluation. CP 191. At the show cause hearing, the defendant asked the court to find him to "be a member of the Trueblood class," and impose sanctions against WSH. 10/08/17 RP 261. A representative for the Department of Social and Health Services briefed the court, clarifying that WSH was operating at its highest level, and there would not be room for the defendant to be evaluated

until November 20th. CP 250-57; 10/08/17 RP 261. The court found that the defendant was a member of the *Trueblood*<sup>1</sup> class, held WSH in contempt, and imposed sanctions against WSH. 10/08/17 RP 263-64. On December 6, 2017, the defendant was transported to WSH and evaluated. CP 310-19. The evaluator found the defendant had the capacity to understand the nature of the proceedings against him and the capacity to assist in his own defense. CP 318. The court concluded that the defendant was competent to proceed with sentencing. CP 378-79.

On January 19, 2018, the court sentenced the defendant to thirty-five months. 01/19/18 RP 24; CP 340. The court also ordered the following legal financial obligations: \$500 crime victim assessment fee, \$100 DNA collection fee, and \$200 criminal filing fee. CP 334-46. The court entered an order of indigency for purposes of appeal. CP 367-68. This timely appeal follows. CP 369.

## 2. FACTS

On March 18, 2017, Francisco Santiago woke up to someone stealing his 1994 beige Nissan Sentra from his apartment parking space. 07/18/17 RP 14-18. He tried to locate the car but was unsuccessful. 07/18/17 RP 18. He called the police to report his car stolen. 07/18/17 RP 18. He still

---

<sup>1</sup> *Trueblood v. Washington State Dept. of Social and Health Services*, 73 F. Supp. 3d 1311 (2014).

had the keys to the car. 07/18/17 RP 26. The car was then listed as a stolen vehicle with law enforcement records. 07/18/17 RP 28.

a. CrR 3.5/3.6 Hearing

The following week, Lakewood Police Officer Michael Russell was patrolling the Rancho Villa Mobile Home Park at approximately 9:00 a.m. when he noticed a car in the driveway of trailer 22. 07/17/17 RP 78, 83; CP 352-56. At the CrR 3.5/3.6 hearing, Officer Russell testified that a male was underneath the dash and his feet were sticking out of the partially opened door. 07/17/17 RP 78, 83; CP 352-56. Based on prior experience with vehicle prowls in that area, familiarity with the housing complex, and particular familiarity with that specific trailer, the unknown male's behavior seemed unusual to the officer, particularly given the time of day. 07/17/17 RP 79, 97. The officer had been to the trailer approximately 30-40 times in the past and noted that it was unusual for a person to be working on a car at that time of day. 07/17/17 RP 79, 83-84, 115. Further, based on the officer's general law enforcement experience, he believed that the male was possibly stealing the stereo or altering the ignition. 07/17/17 RP 79; CP 352-56.

The officer approached the man in the car, who he subsequently identified as the defendant. 07/17/17 RP 81. Per protocol, the officer gave dispatch the license plate number as he approached the car and the defendant. 07/17/17 RP 81; CP 352-56. Officer Russell called out to the

defendant and asked what he was doing. 07/17/17 RP 81-84; CP 352-56. The defendant exited the car and said that he was changing out the stereo. 07/17/17 RP 81-84; CP 352-56. Almost immediately, dispatch notified Officer Russell that the car was stolen. 07/17/17 RP 84; CP 352-56. At that point, the defendant was not under arrest, handcuffed, or otherwise restrained from free movement. 07/17/17 RP 84-85.

Once Officer Russell learned the car was stolen, he placed the defendant under arrest. 07/17/17 RP 85; CP 352-56. The officer placed the defendant in handcuffs and read his *Miranda* rights. 07/17/17 RP 85-87. The defendant subsequently reported that he purchased the car for \$100 from someone named “Josh” but that he lost the key to the car. 07/17/17 RP 85-88.

b. Trial.

Officer Russell testified to largely the same information at trial as he did in the pretrial hearing. He was patrolling the mobile home park when he noticed an unfamiliar Nissan Sentra at trailer 22. 07/18/17 RP 33-34. He patrols that home park daily. 07/18/17 RP 33-34. As he passed, he noticed the defendant under the dash of the car and was concerned that the defendant was stealing the car’s stereo. 07/18/17 RP 33-34. After approaching the car and calling the license plate into dispatch, Officer Russell received confirmation that the car was stolen. 07/18/17 RP 37. The defendant insisted

he had purchased the car from someone for \$100 and had simply lost the keys. 07/18/17 RP 38.

Upon inspection of the car, Officer Russell noticed the ignition had been tampered with and looked like someone had used a shaved key or screwdriver to try to start the car. 07/18/17 RP 39. The defendant was arrested for possession of a stolen vehicle. 07/18/17 RP 48. He was subsequently convicted at trial. 07/18/17 RP 96.

D. ARGUMENT.

1. DISMISSAL WITHOUT PREJUDICE IS INAPPROPRIATE WHERE THE DEFENDANT CANNOT SHOW THAT HIS DUE PROCESS RIGHTS WERE VIOLATED OR THAT HE WAS PREJUDICED BY THE DELAY IN OBTAINING A POST-CONVICTION COMPETENCY EVALUATION.

The defendant's due process rights were not violated by any delay in his post-conviction competency evaluation. First, the defendant did not have a liberty interest in being free from incarceration as he was subject to a no-bail hold pending sentencing as a result of his conviction after trial. Second, he was not held in jail awaiting competency restoration treatment. Thus, there was no due process violation, and dismissal is not an appropriate remedy.

No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues. RCW

10.77.050. A person is incompetent when he lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect. RCW 10.77.010(15). If, during the pendency of a criminal case, the defendant's competency is in doubt, the trial court shall order a competency evaluation. RCW 10.77.060(1)(a). If the evaluator assesses the defendant and determines a period of inpatient commitment is necessary to complete an accurate evaluation, the defendant shall be transported to a secure mental health facility. RCW 10.77.060(1)(c). If a defendant is found to be competent, the criminal proceedings resume. *See* RCW 10.77.050.

In *Trueblood v. Washington State Dept. of Social and Health Services*, 73 F. Supp. 3d 1311 (2014), a class action lawsuit, the court determined that jailed pretrial detainees awaiting competency evaluations or treatment were experiencing unconstitutionally long delays in receiving such services, which violated their due process rights. *Id.* at 1313, 1317. In *Trueblood v. Washington State Dept. of Social and Health Services*, 822 F.3d 1037 (2016), a subsequent action still addressing due process violations for jailed pretrial detainees awaiting competency evaluations, the court explained the relevant due process inquiry balances a person's "liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state." *Id.* at 1043 (citing *Oregon Advocacy*

*Center v. Mink*, 322 F.3d 1101, 1120-21, (2003)). Under these cases, a *Trueblood* class member is defined as:

All persons who are now, or will be in the future, charged with a crime in the State of Washington and: (a) who are ordered by a court to receive competency evaluation or restorative services through DSHS; (b) who are waiting in jail for those services; and (c) for whom DSHS receives the court order.

*Trueblood*, 822 F.3d at 1041.

While *pretrial* detainees who are jailed waiting competency evaluations or restorative treatment may experience a due process violation by an extended delay, those delays do not always require reviewing courts to dismiss their cases without prejudice. In *State v. Hand*, 192 Wn.2d 289, 291, 429 P.3d 502 (2018), Anthony Hand was charged with unlawful possession of a controlled substance. Following a court-ordered competency evaluation, the court found Hand was not competent and ordered a 45-day commitment to WSH for competency restoration within 15 days. *Id.* at 292.

Hand was not transferred to WSH for restoration for more than two months because WSH had a backlog of referrals. *Id.* at 292-93. While Hand waited to be transferred for competency restoration, he made numerous motions to dismiss his case for substantive due process violations; he also made a motion to show cause why WSH should not be held in contempt for

failing to abide by the court's order to transfer him for restoration. *Id.* at 292.

The court denied Hand's motions to dismiss but held WSH in contempt for failing to abide by the court's order to transfer Hand to WSH for restoration within 15 days. *Id.* at 292-93. WSH admitted Hand for restoration 76 days after the court entered the competency restoration order. *Id.* at 293. The trial court subsequently found Hand competent to stand trial. *Id.* He was found guilty after a stipulated facts trial. *Id.* Hand appealed the trial court's denial of his motion to dismiss on substantive due process grounds. *Id.*

Following an unsuccessful appeal, the Washington Supreme Court accepted review of Hand's case and held that while Hand's substantive due process rights were violated by the 76-day delay, dismissal with prejudice was not an appropriate remedy. *Id.* at 298-302. In applying the balancing test to determine whether the "nature and duration of Hand's detention [was] reasonably related to the purpose for which he was committed," the Supreme Court explained that Hand, who was incompetent and was awaiting restorative treatment, suffered a due process violation because detaining an incompetent defendant in jail for months without treatment likely worsens the defendant's mental state, and is therefore contrary to the State's interest in restoring his competency to stand trial. *Id.* at 296, 298-99.

Thus, because Hand was incompetent, the balance of Hand's liberty interests against the State's interest in restoring his competency was tilted in Hand's favor, and his due process rights were violated.

Here, the defendant was evaluated to determine his competency for sentencing, and the evaluator requested an inpatient competency evaluation to further assess the defendant. CP 176-82. On September 28, 2017, the court ordered that the defendant be transported to WSH within seven days for further evaluation. CP 183-89. After the defendant was not transported to WSH within seven days, the defendant moved to have WSH held in contempt and asked for dismissal under CrR 8.3(b) and the Sixth Amendment right to a speedy trial.<sup>2</sup> CP 192-93, 195-249. At the hearing, the defendant abandoned his motion to dismiss and instead argued only that the court should hold WSH in contempt. 10/08/17 RP 260-61. The court determined the defendant was a member of the *Trueblood* class, held WSH in contempt, and imposed sanctions. 10/08/17 RP 264.

The defendant was transported to WSH on December 6th. *See* CP 318, 325-32. The evaluator subsequently determined that the defendant had the capacity to understand the nature of the proceedings against him and to assist in his defense. CP 310-19. Based on that evaluation, the court

---

<sup>2</sup> The defendant's memorandum in support of his motion for contempt and dismissal requested relief under the Sixth Amendment, even though he had already been convicted. *See* CP 195-249.

determined that the defendant was competent to proceed to sentencing. CP 323-24.

Although sixty-nine days elapsed between the court's order for a further evaluation and the defendant's transport to WSH, the defendant had already been convicted of a crime and was being held in jail on a no-bail hold pending sentencing. The facts of the defendant's case are not analogous to *Trueblood* or *Hand*, both of which involved *pretrial* detention and individuals who had a liberty interest in being free from incarceration. Here, the defendant had no such liberty interest.

*Trueblood* involved a due process violation for pretrial detainees who had been incarcerated awaiting competency evaluations. *Trueblood*, 822 F.3d at 1039. The court explained the relevant due process inquiry balances a person's "liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state." *Id.* at 1043 (citing *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1120-21, (2003)). As explained, *Hand* also dealt with a defendant who was transferred for restorative treatment pretrial. Here, the defendant is not similarly situated to the defendants in *Trueblood* or *Hand*. The defendant was already convicted at the time he was ordered for further evaluation and he had been placed on a no-bail hold pending sentencing. 07/18/17 RP 100. He was not a pretrial detainee and, accordingly, he had no liberty interest to weigh.

Moreover, the policy reasons presented in *Hand*—the delay in treatment and holding an incompetent person in jail—do not apply in the defendant’s case. *See Hand*, 192 Wn.2d at 295-96. Here, the defendant was never in need of restorative treatment and therefore had no liberty interest in receiving restorative treatment. And because he was required to be in jail pending sentencing based on the no-bail hold, he did not have a liberty interest in freedom from incarceration. Unlike the defendant in *Hand*, the nature and duration of the defendant’s detention was reasonably related to the purpose for which he was committed, and there was no due process violation. *See id.* at 296-97.

The defendant cites to *State v Kidder*, 197 Wn. App. 292, 389 P.3d 664 (2016) for his claim that he is entitled to dismissal without prejudice. Brief of Appellant, at 17-20. His reliance on *Kidder* is misplaced. *Kidder* involved the trial court’s dismissal of charges after Kidder, an incompetent defendant, was not transported for restorative treatment within a reasonable time. *Kidder*, 197 Wn. App. at 299-300, 309. Here, the defendant was neither deemed to be incompetent nor subject to restoration treatment.

In *Kidder*, Darla Kidder was charged with arson in the first degree. *Id.* at 295. After a competency evaluation, the court found Kidder was not competent to stand trial and ordered her committed for 90 days for competency restoration at WSH. *Id.* at 299-300. After 104 days, Kidder was

transported to WSH. *Id.* at 309. Kidder filed a motion to dismiss the case during the delay period on due process grounds. *Id.* at 306. The court dismissed Kidder's charges without prejudice because it found that Kidder was incompetent and unlikely to become competent within a reasonable period of time. *Id.* at 310. On appeal, the Court of Appeals affirmed, holding that Kidder's due process rights were violated when the State failed to provide restorative treatment within a reasonable time. *Id.* at 317. Here, the defendant's case is distinguishable from *Kidder* because he was never found incompetent nor was he subject to restorative treatment. Thus, dismissal is not an appropriate remedy.

Further, the defendant has not shown any prejudice from the delay in obtaining a further competency evaluation at WSH. When the court ordered the evaluation, the defendant had already been convicted at trial for unlawful possession of a stolen vehicle and was awaiting sentencing on a no-bail hold. 07/18/17 RP 100. He was facing a sentencing range of 33-43 months. CP 334-46. Given the length of the defendant's sentence, he would have been incarcerated for the duration of the delay period. Thus, the defendant's due process rights were not violated, and dismissal is not warranted under the facts of this case. This Court should affirm.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

The trial court properly denied the defendant's motion to suppress because the officer had reasonable suspicion of criminal activity when he contacted the defendant. *See* CP 352-56. When reviewing a trial court's ruling on a motion to suppress, the reviewing court examines whether substantial evidence supports the challenged findings and whether those findings support the conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). The defendant bears the burden of demonstrating a finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 85 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* Unchallenged findings of fact are verities on appeal, and conclusions of law are reviewed de novo. *Ross*, 106 Wn. App. at 880.

- a. The stop was lawful because it was based on a reasonable, articulable suspicion that the defendant was engaged in criminal activity.

The officer's approach and brief questioning of the defendant was lawful because it was based on a reasonable, articulable suspicion that the defendant was engaged in criminal activity.

The constitutionality of a warrantless stop is a question of law reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The Fourth Amendment of the United States Constitution and

article 1, section 7 of the Washington State Constitution protect a person from unlawful searches and seizures. But warrantless searches and seizures are constitutional if they meet an exception to the warrant requirement. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1985). The State bears the burden of showing a warrantless search or seizure falls into one of the narrowly drawn exceptions. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). One of these is a *Terry*<sup>3</sup> stop, which allows an officer to briefly detain a person for questioning, without a warrant, if the officer has reasonable suspicion that the person is or is about to be engaged in criminal activity. *Weyand*, 188 Wn.2d at 811.

To conduct a valid *Terry* stop, 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.” *Id.* (citing *Gatewood*, 163 Wn.2d at 539-40). In evaluating the reasonableness of the officer’s suspicion, courts consider the totality of the circumstances known to the officer. *Weyand*, 188 Wn.2d at 811; *State v. Alexander*, 5 Wn. App. 2d 154, 160, 425 P.3d 920 (2018). “The determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.” *Alexander*, 5 Wn. App. 2d at 160. “Courts consider factors such as the

---

<sup>3</sup> *Terry v. Ohio*, 392 U.S. 1, 99 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." *Id.*; *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

If the initial stop dispels the officer's suspicions, the investigative stop must end. *Acrey*, 148 Wn.2d at 747. But if it confirms or further arouses the officer's suspicions, the officer may lawfully extend the scope and duration of the stop. *Id.*

Officer Russell regularly patrols the Rancho Villa Mobile Home Park. 07/17/17 RP 101. He has contact with the residents of trailer 22 daily. 07/17/17 RP 101. The officer is familiar with the cars that are parked at trailer 22, and the people associated with those cars. 07/17/17 RP 102. He also knows the times the residents of trailer 22 generally are awake or asleep based on his experience with them. 07/17/17 RP 115. Based on his experience with that neighborhood and that particular residence, Officer Russell found it unusual for an unknown person to be working on that unknown car at that time of morning. 07/17/17 RP 97. In addition to the initial behavior being inconsistent with the day-to-day activities at that trailer, the fact that the defendant was positioned under the dash appeared to Officer Russell, based on his experience, to be consistent with stealing the stereo or altering the ignition of the car. 07/17/17 RP 79, 98.

Additionally, Officer Russell had knowledge of a number of vehicle prowls in that area. 07/17/17 RP 79. These facts, taken together, provided a reasonable, articulable basis to at least approach and question the defendant about his activities.

The defendant argues that the facts known to Officer Russell amounted to a “hunch” by claiming that his suspicion was unfounded, and that it is not unusual to see a person working on a car at that time of day. Brief of Appellant, 26. This argument ignores the crucial fact that Officer Russell was particularly familiar with the residence, the persons and cars associated with the residence, and their day-to-day activities. All of this supports his reasoning that the activity was unusual to *that residence*. Accordingly, based on his experience and knowledge of the residence, the officer had reasonable suspicion of criminal activity to justify the stop.

Further, almost immediately after Officer Russell approached the defendant and while the defendant was still free to leave, dispatch notified him that the car was a confirmed stolen vehicle out of Pierce County. That notification provided probable cause to arrest the defendant.

The officer’s questioning of the defendant was a limited, brief stop and it was proper under *Terry*. The stop was based on the officer’s training and experience in law enforcement, as well as his personal experience with the particular residence and its occupants. The stop was limited both in

scope and duration, and the stop was only expanded after dispatch informed the officer that the car was stolen. The trial court based its conclusion on the totality of the circumstances, concluding that: the officer had a reasonable, articulable suspicion that a crime was occurring in open view as he saw someone altering the stereo or ignition of the car; the officer was able to point to specific and articulable facts to demonstrate the defendant's conduct was, in the officer's opinion, consistent with criminal conduct; and the officer's observations permitted him to stop and contact the defendant. CP 352-56. Accordingly, the trial court properly determined that the stop was lawful and properly denied the defendant's motion to suppress. This Court should affirm.

- b. The defendant was not seized until he was arrested for possession of a stolen motor vehicle.

While the initial stop was based on reasonable, articulable suspicion of criminal activity, the defendant was not seized until he was arrested for possession of a stolen motor vehicle, and this Court should affirm. Under article 1, section 7 of the Washington Constitution, a person is seized "only when, by means of physical force or a show of authority," his freedom of movement is restrained, and a reasonable person would not have believed he is (1) free to leave, given all the circumstances, or (2) free to otherwise decline the officer's request and terminate the encounter. *State v. O'Neill*,

148 Wn.2d 564, 574, 62 P.3d 489 (2003). The standard looks objectively at the officer's actions. *Id.* Further, a defendant has the burden of proving that any seizure is unconstitutional. *Id.*

There is no issue of physical force in this case, so the inquiry looks at the second means of seizure: show of authority. Our Supreme Court has given examples of circumstances that may indicate a seizure has occurred based on an officer's show of authority, including the threatening presence of several officers, the display of a weapon, physical touching, or the use of language that indicates compliance with the officer's request might be compelled. *Id.* "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* (quoting *State v. Mendenhall*, 466 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

Defendant challenges only Findings of Fact 8 and 11 from the CrR 3.6 hearing, so the other unchallenged findings of fact become verities on appeal. *See O'Neill*, 148 Wn.2d at 571; *see* Brief of Appellant, 1; *see* CP 352-56. The defendant challenges Finding of Fact 11, by arguing that the finding "implied...that Officer Russell had not seized Mr. Simpson because he 'did not instruct the defendant where to stand nor did he tell him he was not free to leave.'" Brief of Appellant, 23. Finding of Fact 11 is a proper

*factual* finding that is supported by the record, and this Court should reject the defendant's attempts to read inferences into findings of fact.

Here, there was no show of authority rising to the level of a seizure until the defendant was placed under arrest. At that time, the officer had probable cause for the defendant's seizure—probable cause supersedes the reasonable, articulable suspicion standard.

The defendant argues that the officer's initial approach and questions about the car constituted a show of authority sufficient to warrant a seizure. Brief of Appellant, 24. But "the reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority to rise to the level of a *Terry* stop." *O'Neill*, 148 Wn.2d at 581.

The unchallenged Findings of Fact establish that as the officer approached the trailer, he saw the legs of an unknown individual, who was apparently under the dash, sticking out from the car door parked in the driveway; the officer thought this was unusual behavior and believed the person was possibly attempting to remove the car stereo or disassemble the ignition; the officer asked the defendant whose car it was and what he was doing, and the defendant responded it was his car. CP 352-56. Moreover, the fact that the officer did not instruct the defendant where to stand or tell

him he was not free to leave help establish that there was no show of authority sufficient to conclude there was a seizure. CP 352-56. Based on these facts, there was no seizure.

The defendant compares his interaction with Officer Russell to the interaction between the arresting officer and defendant in *State v. Gantt*, 163 Wn. App. 133, 257 P.3d 682 (2011). This comparison is misplaced. In *Gantt*, the court held a seizure occurred where the officer activated his emergency lights – a show of authority – before asking the defendant questions. *Id.* at 141. *Gantt* is distinguishable from this case because there was no comparable show of authority when Officer Russell engaged the defendant in a short conversation about the car. During their conversation, the defendant was not handcuffed, under arrest, or otherwise restrained from moving, and the officer's emergency lights were not activated. 07/17/17 RP 84-85. Additionally, the defendant had the ability to close the car door and walk away. 07/17/17 RP 107. After the defendant informed the officer that he owned the car and was working on it, dispatch informed the officer that the car was stolen. The only show of authority amounting to a seizure, where the officer sought to control the defendant's actions, was after dispatch notified the officer that the car was stolen, and he arrested the defendant.

The defendant has failed to establish that any seizure was unconstitutional. The officer had probable cause to arrest the defendant at

the time he was seized. Thus, the trial court made no error in its denial of the defendant's motion to suppress, and this Court should affirm.

- c. The trial court's ruling that the license plate was subject to the open view doctrine was proper where the officer lawfully stood in the driveway of a residence.

This Court should affirm the trial court's ruling that the license plate was subject to the open view doctrine. When challenged evidence is observed from an area the constitution does not protect, the "open view doctrine" applies. *State v. Seagull*, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981). Under the open view doctrine, if an officer detects something by using one or more of his senses, while lawfully present at the vantage point where those senses are used, no search has occurred. *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127 (2002). Further, law enforcement officers are permitted to enter access routes leading to a residence, including a driveway. *State v. Hornback*, 73 Wn. App. 738, 743, 871 P.2d 1075 (1994). Law enforcement may also run random computer checks on license plates, because license plate numbers are freely available to the public. *State v. Martin*, 106 Wn. App. 850, 856-62, 25 P.3d 488 (2001).

*Hornback* is instructive. In that case, two police officers drove up Hornback's driveway, stopped, and went closer to the house. *Hornback*, 73 Wn. App. at 740-41. The Court held that the officer's presence on Hornback's property was lawful where they did not enter or depart from an

area of curtilage not open to the public, and the observations leading to the defendant's arrest were from a lawful vantage point. *Id.* at 744. Here, the officer was lawfully in the defendant's driveway when he saw the license plate in open view, before ever speaking to the defendant. CP 353-54. Accordingly, the trial court properly determined that the officer's observation of the license plate was lawful.

3. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE FILING FEE AND DNA FEE IN THE JUDGMENT AND SENTENCE.

The defendant was found indigent at sentencing; thus, the trial court should not have imposed the \$200 filing fee. Further, the defendant has been previously convicted of felonies, and the State's records indicate that the defendant's DNA has previously been collected. Thus, the State concedes this Court should remand to strike the filing fee and DNA fee.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) amended the legal financial obligation (LFO) system in Washington State. The bill is now codified as RCW 9.94A.760 and prohibits courts from imposing costs on indigent defendants. RCW 9.94A.760; *see also* RCW 36.18.020(2)(h) (\$200 filing fee shall not be imposed on indigent defendants).

Our Supreme Court held in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), that House Bill 1783 applies to cases that are pending

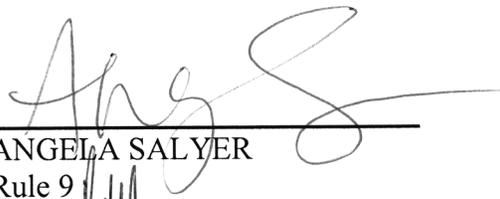
on appeal. The defendant's case, like *Ramirez*, is still pending on direct appeal and is therefore subject to the provisions of House Bill 1783. Accordingly, the State agrees that this Court should remand for the trial court to strike the filing fee and DNA fee from the defendant's Judgment and Sentence.

E. CONCLUSION.

For the above stated reasons, the State requests this Court affirm the defendant's conviction and remand for the trial court to strike the filing fee and DNA fee in the Judgment and Sentence.

DATED: July 3, 2019

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

  
\_\_\_\_\_  
ANGELA SALYER  
Rule 9

  
\_\_\_\_\_  
KRISTIE BARHAM  
Deputy Prosecuting Attorney  
WSB # 32764

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*efie*

7/3/19 *J. Johnson*  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**July 03, 2019 - 2:30 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51404-4  
**Appellate Court Case Title:** State of Washington, Respondent v. Dejone D. Simpson, Appellant  
**Superior Court Case Number:** 17-1-01174-8

**The following documents have been uploaded:**

- 514044\_Briefs\_20190703143019D2420483\_8361.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Simpson Response Brief.pdf*
- 514044\_Designation\_of\_Clerks\_Papers\_20190703143019D2420483\_3783.pdf  
This File Contains:  
Designation of Clerks Papers - Modifier: Supplemental  
*The Original File Name was Simpson Supp Designation.pdf*

**A copy of the uploaded files will be sent to:**

- bleigh@tillerlaw.com
- ptiller@tillerlaw.com

**Comments:**

---

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

**Filing on Behalf of:** Kristie Barham - Email: kristie.barham@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7875

**Note: The Filing Id is 20190703143019D2420483**