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COA NO. 51466-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

TRACEY BAILEY,

Appellant.

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

The Honorable Christine Schaller, Judge
The Honorable James J. Dixon, Judge

BRIEF OF APPELLANT

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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.

3. The court erred in entering this CrR 3.6 finding of fact: "The reporting party stated, he had asked Tracy to leave, then after she had left, she returned." CP (FF 2).¹ CP 105.

4. The court erred in entering this CrR 3.6 conclusion of law: "This was a *Terry* stop, with reasonable articulable suspicion for a possible trespass violation. . . . There was criminal activity to investigate a criminal trespass violation." CP 106.

5. The court erred in calculating the offender score.

6. The \$200 criminal filing fee is unauthorized by statute. CP 67.

7. The \$100 DNA fee is unauthorized by statute. CP 68.

8. The \$100 warrant service fee is unauthorized by statute. CP 113.

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 without a warrant lacked reasonable suspicion to conduct an investigative detention for possible trespass, thereby violating appellant's constitutional right to privacy and requiring suppression of the evidence obtained from the illegal seizure?

2. Whether the court erred in including a prior attempted forgery conviction in the offender score because that offense is a gross misdemeanor, not a felony?

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

4. 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 her DNA has already been collected?

5. Where the new statute prohibiting imposition of discretionary costs against indigent defendants applies to cases pending on direct appeal, whether the \$100 warrant service fee must be vacated?

B. STATEMENT OF THE CASE

Tracey Bailey appeals from her conviction and sentence for methamphetamine possession. CP 74.

a. Suppression Hearing

Bailey 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 77-83; 84-93. The State opposed the motion. CP 94-104. The following evidence was produced at the CrR 3.6 hearing on the matter.

Deputy Esslinger of the Thurston County Sheriff's Office was working when he received a call-out at 1:39 a.m. regarding "an unwanted person." 1RP³ 7-8. An address was provided. 1RP 8. In route to the location, Esslinger received information from dispatch for "the nature of the call, updated information from the conversation between the 911 call receiver and the person calling, which I believe was named David." 1RP 8. The caller made a comment that "she's back in the house." 1RP 9. One thing that stood out to Esslinger was that "when the person complained about the person who showed up that wasn't wanted there, they showed up via taxi and they had a mattress." 1RP 8. Esslinger was given a

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 - 8/14/17; 2RP - 1/29/18, 1/30/18; 3RP - 3/20/18.

description of the "unwanted" person: "the name of Tracey, black female, approximately five-ten and wearing a multi-colored sweater." 1RP 9. Dispatch relayed "he had allowed her to stay a few times but now that he no longer wanted her there." 1RP 10. Also, "he had told the call receiver that she had once crawled in a window." 1RP 10. The last report Esslinger had was that the woman had left the property by foot. 1RP 9. There was no indication that she was violent. 1RP 14.

As Esslinger drove to the address, he observed a person walking along the road that matched the description given by dispatch. 1RP 10-11. She was about .2 miles away from the address. 1RP 15-16. Esslinger stopped his vehicle and contacted the woman. 1RP 11. Esslinger testified that he was at minimum investigating a trespass when he stopped the woman. 1RP 22. He was also "concerned about domestic disturbance issues and possibly burglary." 1RP 22. There was no indication in the call that there was any violence involved. 1RP 22-23.

The headlights and rear amber lights of his vehicle were on. 1RP 12, 17. He did not remember if he pulled in front of her or behind her. 1RP 17. He was in uniform. 1RP 13. He got out of his patrol vehicle and, instead of walking up to her, "had her come over to me." 1RP 18. He said "Tracey, come here." 1RP 18. He also testified that after he asked her name and she gave it to him, he "asked her to come here." 1RP 18-19. He

asked if her name was Tracey. 1RP 11. She said "yes." 1RP 11. He asked for identification but she did not have any. 1RP 12.

He continued talking in an effort identify her and received more information. 1RP 18, 20. After getting her name, Esslinger went back to his vehicle and entered the information into his computer, which showed two arrest warrants. 1RP 13. While talking with her, dispatch confirmed one of the warrants. 1RP 13-14. Bailey stood in front of the patrol vehicle while Esslinger attempted to confirm the warrants: "If I had her come over, that's where we have her stand is in front of the vehicle, which is safer than behind the vehicle." 1RP 20-21. One reason for having her stand in front of the vehicle was so that the deputy could keep an eye on her as he ran the warrant check. 1RP 21. She was illuminated by the headlights. 1RP 21. Deputy Rose arrived on the scene. 1RP 13, 20. Esslinger arrested Bailey. 1RP 14. Afterwards, Deputy Rose contacted "David" and learned no crime was committed. 1RP 23-24.

The State acknowledged the deputy conducted a Terry stop; it expressly disclaimed that this was a community caretaking encounter. 1RP 27. It argued the deputy had reasonable suspicion to stop Bailey. 1RP 27-29, 34-35. Defense counsel agreed with the State that Bailey was seized via a Terry stop. 1RP 30-31. Counsel disagreed that reasonable suspicion supported the stop. 1RP 31-33. The court denied the motion to

suppress, ruling the deputy had reasonable suspicion to stop Bailey for committing criminal trespass. 1RP 38; CP 105-06.

b. Trial and Sentencing

The State charged Bailey with possession of a controlled substance — methamphetamine. CP 2. At trial, the deputy testified that during a search incident to arrest, he found a small plastic zip-lock bag containing a white powder, which was folded within some paper currency. 2RP 70. A crime lab analyst identified the substance as methamphetamine. 2RP 133-34. Bailey testified that she did not know the substance was in her possession. 2RP 170-71. The court gave an unwitting defense instruction. CP 37. The jury returned a verdict of guilty. CP 40.

Based on an offender score of 8, the court sentenced Bailey to a standard range sentence of 16 months. CP 65; 3RP 8. The court also imposed legal financial obligations, including a \$200 criminal filing fee and \$100 DNA fee. CP 67-68. The court previously ordered Bailey to pay a \$100 warrant service fee. CP 113. Bailey moved for appeal at public expense and the court entered an order of indigency. CP 42-43, 44-49, 55-57, 58-59. This appeal follows. CP 74.

C. ARGUMENT

1. **THE WARRANTLESS SEIZURE VIOLATED BAILEY'S CONSTITUTIONAL RIGHT TO PRIVACY BECAUSE IT WAS UNSUPPORTED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY, REQUIRING SUPPRESSION OF THE EVIDENCE.**

The deputy seized Bailey without a warrant. The specific and articulable facts known to the deputy, as measured by the court's findings or the evidence produced at the suppression hearing, do not establish a reasonable suspicion that Bailey had engaged in criminal activity. The discovery of methamphetamine flows from the unlawful seizure and must be suppressed under the exclusionary rule. Without that evidence, the conviction cannot stand.

a. **To be lawful, an investigative detention must be based on specific and articulable facts supporting a reasonable suspicion of criminal activity.**

The State conceded the deputy's encounter with Bailey amounted to a Terry stop and there was no dispute that Bailey was seized. 1RP 27, 30-31. The dispute is whether the deputy's warrantless seizure was illegal. 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." State v. Doughty, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010) (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). "In a challenge to the validity of a Terry stop, article I, section 7 generally tracks the Fourth Amendment analysis." State v. Z.U.E., 183 Wn.2d 610, 617, 352 P.3d 796 (2015). "However, because article I, section 7 provides for broader privacy protections than the Fourth Amendment, our state constitution generally requires a stronger showing by the State." Id. at 218.

b. The findings entered by the court do not, standing alone, support its conclusion of law that reasonable suspicion justified the stop.

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).

In support of its conclusion that Deputy Esslinger had reasonable suspicion, the court entered these findings under CrR 3.6:

1. The testimony given by Deputy Esslinger was creditable, and he had a very good memory and recall of the facts from the incident involving this defendant on June 29, 2014.
2. On June 29, 2014, dispatch received a 911 call to report an unwanted person in the 5600 block of Old

Highway 410. Dispatch reported the unwanted person was an African-American female, 5 foot, 10 inches, named "Tracey," and wearing a multi-colored sweater. The report was that she had arrived at the reporting party's house via a taxi, carrying a mattress. The reporting party stated, he had asked Tracey to leave, then after she had left, she returned. The reporting party also stated, she had entered his house via a window in the past.

3. Deputy Esslinger drove toward the reporting party's residence, when he saw a female who matched the description of Tracey, walking .2 miles from the reported location of the unwanted person.

4. Deputy Esslinger pulled his vehicle over near the female, and asked her if she was Tracey. She affirmed she was Tracey, and the Deputy asked if she would speak to him in front of his patrol vehicle. The overhead lights on his patrol vehicle were not activated, at most his amber lights were activated for safety purposes.

5. Deputy Esslinger, got Tracey's full name and date of birth. He asked her to wait in front of his patrol car. The Deputy ran a warrants check on Tracy [sic], which returned two warrants for her arrest. The Deputy then asked to have the warrants confirmed, and the Thurston County warrant was confirmed. CP 105-06.

Challenged findings entered after a CrR 3.6 suppression hearing are reviewed for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists only where there is sufficient quantity of evidence in record to persuade fair-minded, rational person of the truth of the finding. Id.

Bailey challenges this finding as unsupported by substantial evidence: "The reporting party stated, he had asked Tracy to leave, then after

she had left, she returned." CP 105 (FF 2). There is no testimony that the 911 caller asked Bailey to leave. This allegation first appeared in the State's argument on the suppression motion. 1RP 34. The State's argument is not evidence. The deputy testified that the 911 caller indicated there was an "unwanted person," that she was "back in the house," and the person was "no longer wanted there." 1RP 8-10. But there is no evidence that the 911 caller asked the person to leave. The court's finding to the contrary cannot be used to support its conclusion of law that reasonable suspicion justified the Terry stop.

The trial court entered this conclusion of law: "This was a *Terry* stop, with reasonable articulable suspicion for a possible trespass violation. . . . There was criminal activity to investigate a criminal trespass violation." CP 106 (Conclusion of Law 1). The remaining findings do not support the conclusion that the deputy had a reasonable suspicion of criminal trespass.

"When the State successfully resists a motion to suppress, it is obligated to procure findings of fact and conclusions of law that, *standing on their own*, will withstand appellate scrutiny." State v. Watson, 56 Wn. App. 665, 666, 784 P.2d 1294, review denied, 114 Wn.2d 1028, 793 P.2d 974 (1990). Even where "the evidence adduced at the suppression hearing arguably would support different and stronger findings . . . we must accept

the facts as reflected in the findings prepared by the State and entered by the suppression judge." State v. Poirier, 34 Wn. App. 839, 840-41, 664 P.2d 7 (1983). "Where a defendant contends evidence was taken in violation of his constitutional rights, and makes an appropriate challenge to the suppression court's findings . . . we are required to look behind the formal findings. When, however, the facts found do not support the conclusion to suppress, it is the state not the defendant who would seek to expand or enlarge upon its own product." Id. at 841.

"A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1).⁴ "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010.

The findings supported by substantial evidence do not support the conclusion that Deputy Esslinger had reasonable suspicion to stop Bailey for criminal trespass. The deputy knew "Tracey" was "unwanted" and she had returned to the house. CP 105 (FF 2). Without being told to leave, and without any other finding showing that Bailey knew she did not have permission to be inside the house, there is no evidence that she *knowingly*

⁴ Second degree criminal trespass occurs when a person "knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." RCW 9A.52.080(1).

entered or remained unlawfully in the house. As a result, there is no evidence showing the crime of trespass had been committed.

The court found "The reporting party also stated, she had entered his house via a window in the past." CP 105. While entry through a window may generally allow for the inference that the person so entering knew she did not have permission to enter, there is no finding that Tracey entered the house in this manner during the criminal incident under investigation. She entered through the window "in the past," not the night in question.

Nor do the findings show the reliability of the 911 caller's tip. "When an officer bases his or her suspicion on an informant's tip, the State must show that the tip bears some 'indicia of reliability' under the totality of the circumstances." Z.U.E., 183 Wn.2d at 618. The court did not find the 911 caller identified himself or that the deputy knew the caller from prior experience. "While known citizen informants are generally presumed to be reliable, the same presumption is not available to anonymous informants." State v. Saggars, 182 Wn. App. 832, 840, 332 P.3d 1034 (2014).

The Supreme Court has held an anonymous tip alleging that the defendant was attempting to sell illegal gambling "punchboards" out of his van did not justify stopping the van because the tipster did not identify

himself and did not provide any information as to the source of his knowledge. State v. Lesnick, 84 Wn.2d 940, 941, 530 P.2d 243 (1975). The court's findings here do not show the 911 caller made his identity known to the deputy. Nor did the deputy have any information as to the source of the caller's knowledge. Officers may not presume an informant's tip is an eyewitness account. State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784, review denied, 120 Wn.2d 1018, 844 P.2d 436 (1992). The findings do not establish the 911 caller was an eyewitness to Tracey's behavior. The findings do not show how the caller acquired the information that the person was unwanted and that she had returned to the house.

Bailey's case is different from Navarette v. California, 572 U.S. 393, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), a Fourth Amendment case. Although Navarette was a "close case," the caller's report that the defendant's pickup truck ran her off the road was sufficient to support a stop of the suspected drunk driver. Id. at 404. The Court cautioned tips in 911 calls are not per se reliable. Id. at 401. But several factors supported the caller's reliability in that case: the caller was an eyewitness, she made the report contemporaneously to the incident, and she called the emergency 911 line, making her accountable for the provided information, since police can trace those calls. Id. at 399-401. The officer did not need

to corroborate the caller's allegations prior to pulling over the truck because, as a matter of policy, officers should not be required to use less intrusive means to investigate a possible drunk driver: "allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences." Id. at 404.

"[O]fficers must be afforded some leeway; when a tip involves a serious crime or potential danger, less reliability may be required for a stop than is required in other circumstances." Z.U.E., 183 Wn.2d at 623. The Washington Supreme Court interpreted "the United States Supreme Court's decision in Navarette — that a single anonymous 911 call may justify pulling over a reported drunk driver—as largely turning on this factor." Id. at 624.

That factor is missing from Bailey's case. The deputy was investigating whether Tracey committed a trespass based on conduct that had already occurred before he conducted the stop. The deputy knew she had already left the property, having encountered her walking .2 miles away from the address. CP 105 (FF 3); 1RP 9. The alleged trespass was over and done before the deputy initiated the seizure. And trespass is not a serious or violent crime. First degree criminal trespass is a gross misdemeanor. RCW 9A.52.070(2). Further, the deputy admitted there was no indication that this person was violent. 1RP 14. There was no ongoing

imminent threat based on specific, articulable facts that calls for a weakened standard of reasonable suspicion. See Z.U.E., 183 Wn.2d at 624 (officers had no reason to suspect that the female suspect posed any kind of threat to the public because she reportedly disarmed herself by handing off the gun and there was no indication that the seized car posed a threat to others). There never was such a threat. Further, unlike Navarette, the findings here do not show the basis for the 911 caller's knowledge of the reported activity.

"Absent circumstances sufficiently establishing the reliability of the tip," police officers must be able to independently corroborate either the presence of criminal activity or that the informer's information was obtained in a reliable fashion. Z.U.E., 183 Wn.2d at 623 (quoting State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)). The findings here do not establish independent police corroboration of criminal activity or that the caller's information was obtained in a reliable fashion. The findings do not show how the caller obtained his information. And while the court found the deputy encountered a woman who matched the description given by the caller walking near the address, CP 105 (FF 3), confirming a subject's description, location or other innocuous facts does not satisfy the corroboration requirement. Z.U.E., 183 Wn.2d at 618-19, 623; Lesnick, 84 Wn.2d at 943 (the fact that informant accurately described the

defendant's vehicle is not sufficient corroboration for a stop); State v. Hart, 66 Wn. App. 1, 9, 830 P.2d 696 (1992) (officer's observation of defendant confirming informant's description and defendant's location did not satisfy the corroboration requirement); State v. Hopkins, 128 Wn. App. 855, 859, 865-66, 117 P.2d 377 (2005) (insufficient corroboration where officers observed a man who resembled the informant's description at the described location).

- c. **Even if this Court looks beyond the trial court's findings, the specific and articulable facts known to the officer as presented at the suppression hearing do not amount to reasonable suspicion that Bailey had engaged in criminal activity.**

Reasonable suspicion did not justify the stop even if this Court, in contravention to Poirier and Watson, looks to the evidence produced at the CrR 3.6 hearing to supplement facts not found by the trial court.

As pointed out above, there is no evidence that the 911 caller told Bailey to leave the house and therefore the information known to the deputy does not show Tracey knowingly entered or remained without permission. Without such knowledge, no criminal trespass has occurred. RCW 9A.52.070(1). Dispatch relayed "he had allowed her to stay a few times but now that he no longer wanted her there." 1RP 10. She had been given permission to stay in the past and, although she was no longer

wanted there at present, there is no report that this changed desire was communicated to Bailey.

Moreover, the tip from the 911 caller does not show the requisite indicia of reliability. The deputy therefore could not rely on it to justify the investigative seizure. The circumstances must either establish the informant's reliability or there must be "some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." Z.U.E., 183 Wn.2d at 618.

The deputy testified that the 911 caller gave his name as "David." IRP 8. But even where an unknown but named telephone informant is deemed adequately reliable, "this reliability by itself generally does not justify an investigatory detention." Sieler, 95 Wn.2d at 48. "[T]he State generally should not be allowed to detain and question an individual based on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention." Id. "Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made." Id.

Sieler held "[t]he reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown

telephone informant. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable." Id. Consistent with Sieler, this Court in Hopkins held providing the name and cell phone number of a 911 caller unknown to officers is insufficient to establish reliability and cannot by itself justify an investigative stop. Hopkins, 128 Wn. App. at 863-64.

Here, the evidence shows a 911 caller provided a first name and an address to be investigated. The deputy knew nothing else about the caller. Under Sieler and Hopkins, the absence of any information regarding the informant beyond basic identification precludes a finding of reliability.

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 record must show the basis of knowledge; there is no presumption that the tip is based on an eyewitness account. Vandover, 63 Wn. App. at 755-56, 759-60. "It makes no sense to require some 'indicia of reliability' that the informer is personally reliable but nothing at all concerning the source of his information, considering that one possible source would be another person who was totally unreliable." Id. at 759 (quoting 3 W. LaFave, Search and Seizure § 9.3(e) at 481 (1987)). A caller may provide any number of details that could be based on someone else's hearsay or

someone else's fabrication. "[E]stablishing the basis for the informant's knowledge is vital in establishing the reliability of the tip on which the reasonableness of the investigatory stop depends." Id.

In Vandover, police responded to a radio report that "a man in a gold colored Maverick was brandishing a sawed-off shotgun" in front of a restaurant in downtown Port Angeles. Id. at 755. The report was based on an anonymous telephone tip. Id. "The record did not indicate whether the informant's tip was based on an eyewitness account." Id. Police located the vehicle in question and, following a traffic stop, discovered cocaine in the vehicle. Id. at 756. In the absence of corroborating police observation of criminal activity, there was no reasonable suspicion to justify the investigative detention. Id. at 759-60.

As in Vandover, the record in Bailey's case does not show the basis of the reporting party's information that the female was unwanted and had returned to the house. There is no indication that the informant was an eyewitness to the event described. The basis of knowledge is not established in this case, which undercuts the reliability of the caller's report.

Sieler is also instructive. Sieler involved a dispatch call advising the police officers that a named but otherwise unknown informant reported a drug sale in a school parking lot. Sieler, 95 Wn.2d at 45. The informant

gave a description of the car involved in the sale but did not provide any factual basis for his belief that a sale had occurred. Id. Based on this tip alone, the officers pulled over a car located near the school that matched the given description. Id. Even though this informant provided his name, the Supreme Court concluded the informant's report lacked sufficient indicia of reliability because neither its veracity nor its factual basis could be established. Id. at 48-50. The Supreme Court in Z.U.E. characterized the informant in Sieler as "essentially anonymous." Z.U.E., 183 Wn.2d at 621.

In Z.U.E., the officers stopped a car to investigate a minor in possession of a firearm. Id. at 622. A person identifying herself as "Dawn" made a 911 call reporting this crime. Id. at 614. The 911 call was made contemporaneous to the unfolding of the events, it came through an emergency 911 line rather than the police business line, and the caller provided her name and contact information, all of which bolstered the reliability of the tip. Id. at 622. The key part of the analysis, however, was that "the officers' alleged suspicion hinged on a named, but otherwise unknown, 911 caller's assertion that the subject was engaged in criminal activity." Id. The caller's allegation that the female was 17 years old, and therefore a minor, was the only "fact" that potentially made the girl's possession of the gun unlawful. Id. The problem was that "the caller did

not offer any factual basis in support" of the allegation that a minor possessed a firearm. Id. at 622. The officers could not ascertain how the caller knew the girl was 17 years old. Id. at 622-23. The Supreme Court followed Sieler and held the 911 caller's assertion did not create a sustainable basis for a Terry stop. Id.

In Bailey's case, the caller did not offer factual support for the assertion that the person was unwanted and had returned to the house. The key question, which this record does not answer, is how the caller acquired this knowledge. Did the caller personally see the female show up and observe her try to enter? Or did the caller rely on someone else's report of what was going on? It cannot be ascertained how the caller knew about the female's actions. The caller made a conclusory allegation that the female was "unwanted" without providing a factual basis for the conclusion. Without circumstances showing reliability or corroborative observation, a conclusory assertion that a certain individual is engaged in criminal activity does not provide reasonable suspicion to stop the individual. Lesnick, 84 Wn.2d at 944.

Independent police corroboration may create reasonable suspicion where it would not otherwise exist. Z.U.E., 183 Wn.2d at 623. But here, the evidence does not show the deputy made any corroborative observations suggesting Bailey had engaged in criminal activity. The

deputy only observed Bailey walking along the road near the address identified in the 911 call and noticed she matched the description of the person given by the 911 caller. Confirming a subject's description, location or other innocuous facts does not satisfy the corroboration requirement. Z.U.E., 183 Wn.2d at 618-19, 623; Hopkins, 128 Wn. App. at 859, 865-66.

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 available facts must substantiate more than a mere generalized suspicion that the person detained is 'up to no good'; the facts must connect the particular person to the *particular crime* that the officer seeks to investigate." 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." State v. Thompson, 93 Wn.2d 838, 843, 613

P.2d 525 (1980) (quoting Brown v. Texas, 443 U.S. 47, 52, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979)). Based on the totality of circumstances, including the tip, the deputy did not have reasonable suspicion to believe Bailey was involved in criminal activity. Her seizure was therefore unlawful.

d. 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 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 seizure — Bailey's coerced continued presence — led to the discovery of the methamphetamine. See State v. Ellwood, 52 Wn. App. 70, 71-72, 74-75, 757 P.2d 547 (1988) (where police conducted unlawful investigatory stop, evidence found after arresting the person for a subsequently discovered warrant was excluded as tainted by initial seizure); State v. Rife, 133 Wn.2d 140, 142, 148-51, 943 P.2d 266 (1997) (where police illegally seized a person to run a warrants check, evidence discovered during search incident to arrest for outstanding warrant needed to be suppressed). Without the

methamphetamine uncovered as a result of the illegal seizure, there is no remaining evidence to support the conviction. 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 unlawful possession conviction where motion to suppress evidence of cocaine should have been granted); State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charge of unlawful manufacture of marijuana after suppressing marijuana).

2. THE COURT ERRED IN INCLUDING A PRIOR GROSS MISDEMEANOR CONVICTION IN THE OFFENDER SCORE.

By statute, Bailey's prior conviction for attempted forgery is a gross misdemeanor, not a class C felony. As a matter of law, that conviction cannot be included in the offender score.

An offender score is the sum of points accrued under RCW 9.94A.525, which includes points for prior convictions and points for other current offenses. "The sentencing judge must calculate, in a mathematical fashion, an offender score for each offense. This score determines the sentencing range applicable to the offender." In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 6, 100 P.3d 805 (2004). A sentencing court's calculation of an offender score is reviewed de novo. State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

Where the present conviction is for a nonviolent offense, each adult prior felony conviction counts as one point. RCW 9.94A.525(7). The State's criminal history statement as well as the judgment and sentence list seven prior adult felonies, including an attempted forgery conviction. CP 52-54, 64. The offender score of 8 points was calculated by including these seven convictions and adding an additional point for a current conviction of criminal impersonation, an offense for which she was sentenced the same day. CP 54, 63; 3RP 3.

The completed crime of forgery is a class C felony. RCW 9A.60.020(3). But under RCW 9A.28.020(3)(d), "An attempt to commit a crime is a . . . Gross misdemeanor when the crime attempted is a class C felony." Bailey's previous conviction for attempted forgery is therefore a gross misdemeanor, not a felony. Misdemeanors generally do not contribute to the offender score. State v. Arndt, 179 Wn. App. 373, 389 n.1, 320 P.3d 104 (2014).⁵ "[A]ny anticipatory offenses counted in an offender's score must be felonies themselves, not merely associated with other crimes that are felonies." State v. Wilson, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). The court here therefore erred in including the attempted forgery offense, a gross misdemeanor, in the offender score. Id. at 684-85

⁵ The exceptions are for prior domestic violence offenses and serious traffic offenses. See RCW 9.94A.525(11); RCW 9.94A.525(21)(d).

(trial court wrongly included gross misdemeanor conviction for attempted violation of uniform controlled substance act in offender score).

"A defendant may challenge an offender score calculation for the first time on appeal because the sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score." State v. Jackson, 150 Wn. App. 877, 891, 209 P.3d 553, review denied, 167 Wn.2d 1007, 220 P.3d 210 (2009). This case must be remanded for resentencing with a lower offender score. Wilson, 170 Wn.2d at 691 (resentencing is remedy for miscalculated offender score).

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

The court imposed a \$200 criminal filing fee and a \$100 DNA fee. CP 67-68. The filing fee must be stricken because Bailey is indigent and the recently amended statute, which prohibits imposition of the filing fee against indigent defendants, applies to cases pending on appeal. Further, Bailey has already had her DNA sample collected based on prior felony convictions. 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. The \$100 warrant service fee ordered by the court is also discretionary and must be stricken because Bailey is indigent. CP 113.

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.

Bailey's indigency is established in the record. The court found Bailey was eligible for a public defender at no expense. CP 109, 112. The trial court also found Bailey indigent for appeal. CP 42-43, 58-59. The motion in support of indigency shows Bailey had a monthly income of \$750 and monthly living expenses of \$739. CP 47. She had no assets,

including no saved money. CP 47. She had \$21,000 in other debts. CP 47; see Ramirez, 2018 WL 4499761 at *5 (looking at motion for indigency in determining indigency status). Bailey 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).⁶ The criminal filing fee must be stricken because Bailey is indigent. Ramirez, 2018 WL 4499761 at *8.

For similar reasons, the \$100 DNA fee must 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. Bailey has previous felony convictions. CP 64. She would necessarily have had her DNA sample collected pursuant to RCW 43.43.754(1)(a).

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

⁶ 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. 21, 2018).

"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 Bailey's DNA sample was previously collected based on other felony convictions, 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 9.94A.760(1), which now provides "Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. 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)." See also RCW 10.64.015 (2018) ("The court shall 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).").

As argued, Bailey meets the indigency standard under RCW 10.101.010(3)(c). And she has previously had her DNA sample collected. Reading the current, applicable version of RCW 43.43.7541 in conjunction with RCW 9.94A.760(1), the court lacked authority to impose the \$100 DNA fee because Bailey is indigent.

Finally, the court imposed a warrant service fee as part of a bench warrant order: "The defendant shall pay a warrant service fee of \$100.00." CP 113. The warrant service fee is a discretionary cost under RCW 10.01.160. RCW 10.01.160(2) ("Expenses incurred for serving of warrants for failure to appear . . . may be included in costs the court may require a defendant to pay."); State v. Malone, 193 Wn. App. 762, 764, 376 P.3d 443 (2016) (recognizing discretionary nature of fee). Under the new version of RCW 9.94A.760(1) and RCW 10.64.015, the court is prohibited from ordering an indigent defendant to pay costs as described in.

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

Bailey 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 Bailey'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 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, Bailey requests reversal of the conviction. In the event this Court declines to reverse the conviction, Bailey alternatively requests remand for resentencing based on the correct offender score and to strike the challenged costs.

DATED this 29th day of September 2018

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

APPENDIX A

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SUPERIOR COURT
THURSTON COUNTY, WA

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14-1-01004-8
FNFL 69
Findings of Fact and Conclusions of Law
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**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

vs.

TRACEY KIMBERLY BAILEY,

Plaintiff,

Defendant.

NO. 14-1-01004-8

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
CrR 3.6**

On August, 14, 2017, on the above titled matter, a hearing was held regarding the Defense's motion to suppress evidence under CrR 3.6 before the Honorable Christine Schaller. Present were the defendant, defense counsel, Eric Pilon, counsel for the State, Shawn Horlacher, and witness for the State, Thurston County Deputy, James Esslinger. The court heard arguments and finds the following facts:

I. FINDINGS OF FACT

1. The testimony given by Deputy Esslinger was creditable, and he had a very good memory and recall of the facts from the incident involving this defendant on June 29, 2014.
2. On June 29, 2014, dispatch received a 911 call to report an unwanted person in the 5600 block of Old Highway 410. Dispatch reported the unwanted person was an African-American female, 5 foot, 10 inches, named "Tracey," and wearing a multi-colored sweater. The report was that she had arrived at the reporting party's house via a taxi, carrying a mattress. The reporting party stated, he had asked Tracy to leave, then after she had left, she returned. The reporting party also stated, she had entered his house via a window in the past.
3. Deputy Esslinger drove toward the reporting party's residence, when he saw a female who matched the description of Tracey, walking .2 miles from the reported location of the unwanted person.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

JON TUNHEIM
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4. Deputy Esslinger pulled his vehicle over near the female, and asked her if she was Tracey. She affirmed she was Tracey, and the Deputy asked if she would speak to him in front of his patrol vehicle. The overhead lights on his patrol vehicle were not activated, at most his amber lights were activated for safety purposes.
 5. Deputy Esslinger, got Tracey's full name and date of birth. He asked her to wait in front of his patrol car. The Deputy ran a warrants check on Tracy, which returned two warrants for her arrest. The Deputy then asked to have the warrants confirmed, and the Thurston County warrant was confirmed.

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II. CONCLUSIONS OF LAW

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1. This was a *Terry* stop, with reasonable articulable suspicion for a possible trespass violation. While there were not sufficient facts to support a domestic violence allegation, and not necessarily a burglary allegation. There was criminal activity to investigate a criminal trespass allegation.
 2. The defense's motion to suppress evidence was denied.

12 Wherefore based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED
13 that: the defense's Motion to suppress evidence is denied.

14 DONE IN OPEN COURT THIS 16 day of Aug., 2017.

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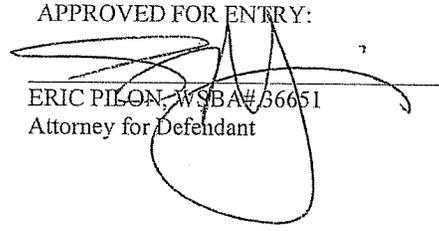
JUDGE CHRISTINE SCHALLER

PRESENTED BY:



SHAWN HORLACHER, WSBA #45064
Deputy Prosecuting Attorney

APPROVED FOR ENTRY:



ERIC PILON, WSBA #36651
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