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Court of Appeals  
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No. 51466-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TRACEY K. BAILEY  
Appellant.

---

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

The Honorable Judge Christine Schaller, Judge  
The Honorable James J. Dixon, Judge  
Cause No. 14-1-01004-8

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 2

    1. The trial court properly denied Bailey’s motion to suppress evidence where the investigative stop was based on specific and articulable facts supporting a reasonable suspicion of criminal activity. ..... 2

    2. Substantial evidence supported the trial court’s findings of fact regarding the suppression hearing...... 6

    3. This Court should not consider Bailey’s argument that the informant’s information was unreliable because that issue was never raised during the suppression motion; however, if the issue is considered, the record clearly demonstrates the reliability of the 911 call...... 7-8

    4. While the State does not concede any error in the trial court’s findings of fact and conclusions of law, if any error occurred, the error was harmless...... 10

    5. The State concedes that the trial court erred by including the gross misdemeanor offense of attempted forgery in Bailey’s offender score; however, that error was harmless because it did not affect Bailey’s standard range...... 12

    6. The State concedes that the \$200 criminal filing fee and \$100 DNA fee and \$100 warrant fee should be stricken pursuant to the recent decision of the State Supreme Court in *State v. Ramirez*. ..... 14

D. CONCLUSION..... 15

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>State v. Banks</u> 149 Wn.2d 38 (2003) .....	11
<u>State v. Bobenhouse</u> 166 Wn.2d 881, 888-897, 214 P.3d 907 (2009) .....	13
<u>State v. Duncan</u> 146 Wn.2d 166, 171, 43 P.3d 513, 515 (2002) .....	2, 3, 4, 12
<u>State v. Gaddy</u> 152 Wn.2d 64, 73, 93 P.3d 872 (2004) .....	9
<u>State v. Glover</u> 116 Wn.2d 509, 514, 806 P.2d 60 (1991) .....	4
<u>State v. Hill</u> 123 Wn.2d 641, 644, 647, 879 P.2d 313 (1994) .....	6
<u>State v. Kinzy</u> 141 Wn.2d 373, 393, 5 P.3d 668, 680 (2000) .....	2
<u>State v. Kirkman</u> 159 Wn.2d 918, 926, 155 P.3d 125 (2007) .....	8
<u>State v. Lesnick</u> 84 Wn.2d 940, 944, 530 P.3d 243 (1975) .....	10
<u>State v. Mail</u> 121 Wn.2d 707, 710, 854 P.2d 1042 (1993) .....	14
<u>State v. McCraw</u> 127 Wn.2d 281, 289 898 P.2d 838 (1995) .....	13
<u>State v. Mendez</u> 137 Wn.2d 208, 214, 970 P.2d 722 (1999) .....	6, 7

<u>State v. Ramirez</u> 191 Wn.2d 732, 426 P.3d 714 (Sept. 20, 2018).....	1, 14, 15, 16
<u>State v. Seagull</u> 95 Wn.2d 898, 908, 632 P.2d 44 (1981) .....	4
<u>State v. Williams</u> 102 Wn.2d 733, 739, 740, 689 P.2d 1065 (1984) .....	2, 3
<u>State v. Wilson</u> 170 Wn.2d 682, 684-685, 244 P.3d 950 (2010) .....	13
<u>State v. Z.U.E.</u> 183 Wn.2d 610, 618, 352 P.2d 796(2015) .....	10

### **Decisions Of The Washington Court Of Appeals**

<u>State v. Aase</u> 121 Wn. App. 558, 564, 89 P.3d 721 (2004).....	7
<u>State v. Amos</u> 147 Wn. App. 217, 230, 195P.3d 564 (2008).....	13
<u>State v. Anderson</u> 51 Wn. App. 775, 780, 755 P.2d 191 (1988).....	4
<u>State v. Argo</u> 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).....	13
<u>State v. Connor</u> 58 Wn. App. 90, 96, 791 P.2d 261, <i>review denied</i> , 115 Wn.2d 1020(1990) .....	9, 10
<u>State v. Mackey</u> 117 Wn. App. 135, 139, 69 P.3d 375, 377 (2003).....	4
<u>State v. Mitchell</u> 80 Wn. App. 143, 145, 906 P.2d 1013, 1015 (1995).....	3, 4
<u>State v. Smith</u> 76 Wn. App. 9, 16, 882 P.2d 190 (1994).....	11

## U.S. Supreme Court Decisions

<u>Navarette v. California</u> 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed. 2d 680 (2014).....	10
<u>Neder v. United States</u> 527 U.S. 1, 7, 110 S.Ct. 1827, 144 L.Ed. 2d 35 (1999).....	11
<u>Terry v. Ohio</u> 392 U.S. 1, 19-20, 88 S.Ct. 1968, 1878-79, 20 L.Ed.2d 889 (1968).....	2, 3, 4, 6, 12, 15

## Statutes and Rules

Laws of 2018, ch. 269, § 17 .....	14
RAP 2.5(a)(3).....	8
RCW 9A.60.020(3).....	13
RCW 9A.28.020(3)(d) .....	13
RCW 9.94A.517 .....	14
RCW 9.94A.518 .....	13
RCW 9.94A.525(7).....	13
RCW 9.94A.585 .....	14
RCW 10.01.160.....	14
RCW 10.101.010(3)(a) through (c).....	14
RCW 36.18.020(2)(h).....	14
RCW 43.43.7541.....	14

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied Bailey's suppression motion where the investigative stop was clearly based on specific and articulable facts supporting a reasonable suspicion of criminal activity.
2. Whether substantial evidence supported the trial court's findings of fact that Bailey had been told to leave and returned where the Deputy testified that the 911 caller reported that "Tracey" was an unwanted person at his residence, and stated, "she is back in the house" while talking to the call receiver.
3. Whether this Court should consider the issue of whether the 911 caller was reliable when that issue was never raised in the trial court, but the evidence clearly supports the reliability of caller.
4. Whether harmless error analysis applies to any error that may have occurred in the trial court's entry of findings of fact with regard to the suppression hearing.
5. Whether miscalculation of the offender score as 8, when the correct score is 7, is harmless error when the standard range is the same for offender scores between 6 and 9.
6. State v. Ramirez applies prospectively such that the Superior Court is required to strike the \$200 filing fee \$100 DNA fee and \$100 warrant fee.

B. STATEMENT OF THE CASE.

The State accepts the statement of facts contained in the appellant's opening brief with additional facts contained within the State's argument.

### C. ARGUMENT.

1. The trial court properly denied Bailey's motion to suppress evidence where the investigative stop was based on specific and articulable facts supporting a reasonable suspicion of criminal activity.

Generally, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513, 515 (2002). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Kinzy, 141 Wn.2d 373, 393, 5 P.3d 668, 680 (2000). In evaluating investigative stops, the court must determine: (1) whether the initial interference with the suspect's freedom of movement was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place. Terry v. Ohio, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 1878-79, 20 L.Ed.2d 889 (1968); State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In determining the proper scope of the intrusion, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion,

and (3) the length of time the suspect is detained. Williams, 102 Wn.2d at 740.

Courts generally recognize that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. See Terry v. Ohio, 392 U.S. 1 (1968). Thus, exceptions to the warrant requirement exist to provide for those cases where the societal costs of obtaining a warrant, such as danger to officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate. Duncan, 146 Wn.2d at 171. These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. Id. at 171-2. The State must show that the particular search or seizure in question falls within one of these exceptions. Id. at 172. A typical *Terry* stop entails a frisk for weapons and brief questioning. State v. Mitchell, 80 Wn. App. 143, 145, 906 P.2d 1013, 1015 (1995).

To justify a seizure on less than probable cause, *Terry* requires a reasonable suspicion based on the totality of the circumstances that the person seized has committed or is about to commit a crime. Duncan, 146 Wn.2d at 172. The court determines

the existence of such reasonable suspicion based on an objective view of the known facts. Mitchell, 80 Wn. App. at 147.

The court takes into account an officer's training and experience when determining the reasonableness of a *Terry* stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 60 (1991). Subsequent evidence that the officer was in error regarding some of the facts will not render a *Terry* stop unreasonable. State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) ("The Fourth Amendment does not proscribe 'inaccurate' searches only 'unreasonable' ones"). A *Terry* stop also is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

The means of investigation need not be the least intrusive available, but police must reasonably try to identify and pursue less intrusive alternatives. State v. Mackey, 117 Wn. App. 135, 139, 69 P.3d 375, 377 (2003). Further, an officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information. Duncan, 146 Wn.2d at 172.

In this case, Deputy James Esslinger received a call out at approximately 1:39 AM indicating that an unwanted person was in the 5600 block of Old 410 Highway SW. 1 RP 7-8.1 As he was responding to that location, he was given more information regarding the nature of call. The caller, who he remembered as "David" stated that the unwanted person showed up at the residence in a taxi and had a mattress. 1 RP 8. The caller indicated that the unwanted person was a "black female, approximately five-ten and wearing a multi-colored sweater," named Tracey. 1 RP 9. The caller indicated that she had left the property on foot. 1 RP 9.

Deputy Esslinger believed that she had been at the residence at least twice because while the call receiver was gathering information, the caller indicated "she's back at the house." 1 RP 9. Deputy Esslinger was informed that the caller had allowed her to stay a few times, but now that he no longer wanted her there, and she had once crawled through a window. 1 RP 10.

With that information, Deputy Esslinger observed a female matching the description provided walking in the vicinity. 1 RP 10-11. Deputy Esslinger pulled his car over and contacted her by

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1 Consistent with the Brief of Appellant, the Verbatim Report of Proceedings will be cited as follows: 1 RP- 8/14/17; 2 RP- 1/29/18, 130/18; 3 RP – 3/20/18.

asking if her name was Tracey. 1 RP 11. She provided a name and date of birth which Deputy Esslinger ran through his mobile computer and found that she had two warrants for her arrest. 1 RP 12-13.

Given the information that was known to Deputy Esslinger at the time, he had a reasonable suspicion that a criminal trespass may have occurred which justified the *Terry* stop that he conducted. Once he learned that Bailey had warrants for her arrest, he had a proper basis to expand the nature of the detention. The trial court properly denied Bailey's motion to suppress the evidence found subsequent to Bailey's arrest.

2. Substantial evidence supported the trial court's findings of fact regarding the suppression hearing.

Bailey argues that the trial court's finding of fact number 2, that the reporting party stated "he had asked Tracey to leave, then after she left, she returned," was unsupported by the evidence presented. CP 105. When reviewing a denial of a suppression motion, a reviewing court first decides whether substantial evidence supports the findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); State v. Hill, 123 Wn.2d 641, 644, 647, 879 P.2d 313 (1994). Conclusions of law are reviewed de novo.

Mendez, 137 Wn.2d at 214. If the findings of fact and conclusions of law are supported by substantial but disputed evidence, the trial court's ruling will stand. Credibility determinations are not reviewable. State v. Aase, 121 Wn.App. 558, 564, 89 P.3d 721 (2004).

Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 644. Here, the evidence presented was sufficient to persuade a fair-minded, rational person that the reporting party had asked Tracey to leave and she returned. Deputy Esslinger testified that following the initial call that the unwanted person was at the residence, the caller indicated "she's back in the house," while talking to the call receiver. 1 RP 9. The caller further stated he had previously allowed her to stay at the property, but no longer wanted her there, and she had crawled through the window in the past. 1 RP 10. This supports the finding that the caller had asked her to leave and during the call to 911, Bailey returned to the residence. The trial court's specific finding of fact was supported by the record.

3. This Court should not consider Bailey's argument that the informant's information was unreliable because that issue

was never raised during the suppression motion; however, if the issue is considered, the record clearly demonstrates the reliability of the 911 call.

Bailey's argument that the information from the 911 caller in lacked sufficient reliability to be relied upon by law enforcement to justify the initial investigative stop was never raised in the trial court. Bailey's defense argued only that the information provided was insufficient to for the Deputy to for a reasonable suspicion that a crime may have occurred. 1 RP 33, CP 17-19.

Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Here, the issue that was before the trial court was whether the information available to the officer at the time of the stop justified the stop. The defense never raised, and therefore, the trial court was not required to consider whether the information was reliable. In fact, the defense argument at the suppression hearing accepted the facts provided and argued that they were insufficient to justify the stop. 1 RP 32-33. Not once did

defense counsel argue that the statements made to law enforcement lacked reliability.

If this Court does consider the issue of whether the 911 caller was reliable, the record presented at the suppression hearing clearly supports that the 911 caller was reliable. "Citizen informants are deemed presumptively reliable." State v. Gaddy, 152 Wn.2d 64, 73, 93 P.3d 872 (2004). Moreover, a citizen informant reporting a crime can be "inherently reliable for purposes of a *Terry* stop, even when calling on the telephone rather than speaking to the police in person." State v. Conner, 58 Wn.App. 90, 96, 791 P.2d 261, *review denied*, 115 Wn.2d 1020 (1990).

The 911 caller in this case was identified as "David," provided an address, provided the description of an unwanted person, indicated during the 911 call that she was back at the house, and indicated that he had allowed her to stay in the past, but no longer wanted her there. 1 RP 8, 9, 10. The police report attached to the defense motion to suppress indicated that the reporting party was "David Brown," and provided an address. CP 20. Deputy Esslinger was heading toward the address that had been provided when he made contact with Bailey. 1 RP 16-17.

The information available to Deputy Esslinger established that the caller was the alleged victim of the unwanted person on his property. The detail provided justified a conclusion that the information was obtained in a reliable fashion, from the alleged victim himself. Conner, 58 Wn.App. at 97.

Unlike the informant in State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.2d 796 (2015), the record here establishes that reliability of the caller. Importantly, in Z.U.E., the caller failed to explain how she knew the suspect was a minor. Id. at 622-623. Here, the caller was describing an unwanted person at his property. It is well settled that the reasonableness of police action when making an investigatory stop must be reviewed on a case by case basis. State v. Lesnick, 84 Wn.2d 940, 944, 530 P.3d 243 (1975). Here, the caller was an eyewitness, made the report contemporaneously to the incident, made the call to the 911 system, and was the alleged victim. The facts clearly establish the reliability of the caller. See Navarette v. California, 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed. 2d 680 (2014).

4. While the State does not concede any error in the trial court's findings of fact and conclusions of law, if any error occurred, the error was harmless.

Deficient findings of fact not automatically require reversal.

State v. Banks, 149 Wn.2d 38 (2003)(addressing error in findings of fact at a bench trial). An error is subject to harmless error analysis unless the error is “so intrinsically harmful as to require automatic reversal. Neder v. United States, 527 U.S. 1, 7, 110 S.Ct. 1827, 144 L.Ed. 2d 35 (1999). Harmless error analysis applies to findings of fact in suppression hearings, even when the Court fails to enter written findings. State v. Smith, 76 Wn.App. 9, 16, 882 P.2d 190 (1994)(failure to enter written findings of fact and conclusions of law following a suppression hearing is harmless error if the court’s oral opinion and the record of the hearing are clear and comprehensive).

In this matter, the findings of fact and conclusions of law did not make specific findings regarding the reliability of the 911 caller because that issue was not raised at the hearing. The State contends that any omission in that regard is not error because the reliability of the caller was not at issue at the hearing. If, this Court believes such a finding should have been included, as argued above, the evidence clearly demonstrated that the 911 caller was reliable and there is no reasonable probability that the outcome of the suppression hearing would have changed if there had been an expressed finding in that regard.

If this Court finds that the trial court erred in entering finding of fact 2, which is the finding that Bailey specifically assigned error to, the trial court's oral ruling and the record clearly support the trial court's conclusion of law that "this was a *Terry* stop, with a reasonable articulable suspicion for a possible trespass violation." CP 105-106. As argued above, the finding was supported by the facts presented. The caller had indicated that "Tracey" was an unwanted person and during the call, the caller indicated, "she's back in the residence." 1 RP 8-10. Clearly, under the totality of the circumstances, Deputy Esslinger had a reasonable suspicion that a criminal trespass may have occurred. State v. Duncan, 146 Wn.2d at 172.

If there was any error in the findings of fact, they were clearly harmless and did not affect the overall conclusion that Deputy Esslinger was justified in his brief investigative stop of Bailey.

5. The State concedes that the trial court erred by including the gross misdemeanor offense of attempted forgery in Bailey's offender score; however, that error was harmless because it did not affect Bailey's standard range.

The parties and the trial court incorrectly added one count of attempted forgery to Bailey's offender score. 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). Bailey correctly notes that a charge of attempted forgery was incorrectly counted in her offender score. Attempted forgery is a gross misdemeanor. RCW 9A.60.020(3) and RCW 9A.28.020(3)(d). Reviewing the agreed statement of criminal history and the judgment and sentence, it appears that the attempted forgery was improperly included in the offender score to arrive at an offender score of 8. CP 52-54; CP 64.

In general, the remedy for a miscalculated offender score is resentencing with a correct offender score. State v. Wilson, 170 Wn.2d 682, 684-685, 244 P.3d 950 (2010). However, an erroneous offender score that does not affect the standard range is harmless. State v. Amos, 147 Wn.App. 217, 230, 195 P.3d 564 (2008); State v. Argo, 81 Wn.App. 552, 569, 915 P.2d 1103 (1996); State v. Bobenhouse, 166 Wn.2d 881, 888-897, 214 P.3d 907 (2009).

Here, Bailey's offender score should have been calculated as seven. RCW 9.94A.525(7). However, the crime of possession of a controlled substance methamphetamine has a seriousness level of drug offense level 1. RCW 9.94A.518. As such, the standard range remains the same with an offender score between 6

and 9. RCW 9.94A.517. The mistaken calculation does not affect Bailey's offender score. A sentence within the standard range shall not be appealed. RCW 9.94A.585; *see also*, State v. Mail, 121 wn.2d 707, 710, 854 P.2d 1042 (1993). Because Bailey was sentenced within the correct standard range, the error is harmless and does not require resentencing.

6. The concedes that the \$200 criminal filing fee and \$100 DNA fee and \$100 warrant fee should be stricken pursuant to the recent decision of the State Supreme Court in *State v. Ramirez*.

The trial court imposed a \$200 filing fee and a \$100 DNA fee as part of the judgment and sentence. CP 67-68. Following a failure to appear while this case was pending, the trial court imposed a \$100 warrant service fee. CP 113. Legislative amendments to RCW 43.43.7541 and RCW 36.18.020(2)(h), which took effect on June 7, 2018, require that costs as described in RCW 10.01.160, which include the \$200 filing fee and \$100 warrant service fee, "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c), and that the \$100 DNA fee not be collected if the State has previously collected the offender's DNA as a result of a prior conviction. Laws of 2018, ch. 269, § 17.

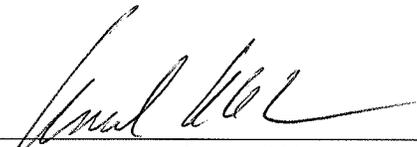
The amendments apply prospectively to defendants whose appeals were pending when the amendment was enacted. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (Sept. 20, 2018). In this matter, the trial Court specifically found that Bailey was indigent. CP 42-43, 58-59, 109, 112. Further, the record demonstrates that Bailey has multiple prior felony convictions, each of which would have ordered that she submit a DNA sample. CP 52-54, CP 64. The notice of appeal in this matter was filed on February 8, 2018, and the appeal is still pending. CP 50. Therefore, in light of Ramirez, the State does not oppose an order requiring the Superior Court to strike the \$200 filing fee, \$100 warrant service fee and \$100 DNA fee that were imposed.

#### D. CONCLUSION.

The trial court properly denied Bailey's Motion to Suppress and Dismiss. The evidence presented at the suppression hearing clearly demonstrated that the totality of the facts known to Deputy Esslinger at the time he contacted Bailey justified an investigative *Terry* stop. The trial court's findings of fact in regard to the suppression motion were supported by the evidence and supported the conclusions of law. The issue of reliability of the 911 caller was

never raised or litigated, however, the record clearly demonstrated that reliability of the caller. The crime of attempted forgery was incorrectly included in Bailey's offender score; however, this error did not change the offender score and was harmless. The State respectfully request that this Court affirm the trial court's holding in regard to the suppression motion, and therefore affirm Bailey's conviction and sentence. Given State v. Ramirez, the State does not oppose an order striking the \$200 filing fee, \$100 DNA fee, and the \$100 warrant fee.

Respectfully submitted this 26 day of November, 2018.

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 26<sup>th</sup> day of November, 2018, at Olympia, Washington.

  
\_\_\_\_\_  
JENA GREEN, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**November 26, 2018 - 11:11 AM**

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