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State of Washington  
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NO. 51566-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID HAUG,

Appellant.

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

The Honorable Andrew Toynbee, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence.

2. The arresting officer lacked probable cause to arrest appellant.

3. The trial court erred in entering findings of fact 2, 7, and 8 in support of the order denying the CrR 3.6 motion to suppress.<sup>1</sup> CP 8-11.

4. The trial court erred in entering conclusions of law 2, 3, 4, 5, and 6 in support of the order denying the CrR 3.6 motion to suppress. CP 10-11.

5. The criminal filing fee should be stricken under the Supreme Court's recent decision in State v. Ramirez.<sup>2</sup>

6. For similar reasons, the DNA fee should be stricken.

Issues Pertaining to Assignments of Error

1. Appellant was arrested for suspicion of burglary after being seen by police leaving through the front door of a home that he had rented for several years. Appellant's aunt who owned the home told police that she wanted appellant out of the home and had served him with a notice of

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<sup>1</sup> The court's written findings and conclusions are attached to this brief as an appendix.

<sup>2</sup> State v. Ramirez, \_\_\_ Wn.2d, \_\_\_ P.3d \_\_\_, 2018 WL 4499761 (Sept. 20, 2018).

eviction one-month prior. Appellant denied receiving the notice of eviction and no other evidence of its existence was presented. Appellant was not charged with burglary, but a controlled substance was found inside appellant's wallet during a jail inventory search of his belongings. Did the trial court err in denying appellant's motion to suppress the contents of his wallet as fruit of an unlawful seizure where the information provided by the homeowner did not provide the requisite indicia of reliability, and the facts known to the officer at the time he seized appellant were insufficient to support probable cause to arrest appellant?

2. Under the Supreme Court's recent Ramirez decision, should the \$200 criminal filing fee be stricken?

3. Should the \$100 DNA fee also be stricken as well?

B. STATEMENT OF THE CASE

1. Procedural History.

The Lewis County prosecutor charged appellant David Haug with one count of unlawful possession of suboxone for an incident to alleged to have occurred on December 14, 2017. CP 1-2.

Haug's motion to suppression was denied following a pretrial CrR 3.6 hearing. CP 8-11; RP<sup>3</sup> 46-48. Haug subsequently waived his right to a jury trial. RP 48, 51.

The trial court found Haug guilty as charged following a stipulated facts bench trial. CP 12-14; RP 51. Haug was sentenced to 45 days in jail. The trial court also imposed 12 months of community custody and ordered Haug to complete a chemical dependency evaluation. CP 15-23; RP 53-54.

The court also ordered that Haug pay \$1,300 in legal financial obligations including the \$500 crime victim assessment,<sup>4</sup> a \$100 DNA database fee,<sup>5</sup> a \$200 criminal filing fee,<sup>6</sup> and \$500 VUCSA fine. CP 19.

As part of his notice of appeal, Haug submitted a declaration indicating he had no source of income and \$26,000 in debts. CP 26-28. The superior court found Haug to be indigent and ruled that he was entitled to counsel on appeal at public expense. CP 29-30.

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<sup>3</sup> This brief refers to the consecutively paginated verbatim reports of proceedings for February 14 & March 7, 2018 as "RP".

<sup>4</sup> RCW 7.68.035 authorizes crime victim penalty assessments. In relevant part, RCW 7.68.035(1)(a) provides: "The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor."

<sup>5</sup> RCW 43.43.7541

<sup>6</sup> RCW 36.18.020

The trial court stayed imposition of Haug's jail term pending appeal. CP 24; RP 55.

2. Unlawful Arrest.

Haug was leaving through the front door of a house that he had rented for the last five years when he was stopped by Toledo police officer Coleman Nelson on December 13, 2017. RP 11, 31. Haug's car was also parked outside in front of the house. RP 10-11. Nelson had gone to the house in response to a police station whiteboard notice from December 7, 2017. The notice indicated the home was being sold by the owner and no one was allowed on the property after December 7. RP 10. Nelson said he had confirmed the accuracy of the white board notice with his supervisor. RP 10.

When questioned by Nelson, Haug explained that he lived at the house and "was just picking up a few things." RP 11-12, 23. Nelson told Haug that no one was allowed on the property and that he needed to leave. Haug explained that he had not received any eviction notice. RP 11, 24, 31. By Nelson's own admission, at the time he contacted Haug at the house he was "unsure if it was a civil or criminal issue[.]" RP 12-13, 28. Nelson tried to contact the property owner by telephone but was unsuccessful. RP 11-13. Haug left the premises when told to do so by Nelson. RP 23, 32.

Nelson contacted Megan Littleton, the daughter of property owner, Judith<sup>7</sup>, the next day. RP 13, 26. Littleton told Nelson that she had given Haug a letter of intent to evict on October 30 and told him that he needed to leave the property by November 30. RP 13-14, 16, 18. Littleton also said she posted an eviction notice to the front door of the property. RP 13-14, 16, 26-27. Littleton later told Nelson however, that she had in fact told Haug that he did not need to leave the property until December 7, 2017. RP 14, 16, 18.

Littleton explained to Nelson that she was having difficulty getting Haug out of the home. RP 26, 28. She referenced a text message she received from Haug that indicated the owners would have to take Haug to court to get him to leave the property. RP 26-29. Littleton then told Nelson she wanted to press charges against Haug for burglary. RP 13, 29.

Based on the conversations with Littleton, Nelson went to look for Haug the following day. When Nelson found Haug he arrested him for burglary. RP 15-17. Nelson explained that he believed Haug intended to commit a theft of the property inside the home by remaining on the property after the alleged eviction date. RP 17, 21.

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<sup>7</sup> Neither Littleton, nor Judith were called to testify at the CrR 3.6 hearing.

One week after arresting Haug, Nelson also reviewed the letter of intent to evict<sup>8</sup> Littleton reported they provided to Haug. RP 18, 25. By Nelson's own admission however, the notice of intent was not the same as an actual eviction notice. RP 18, 22. Nelson was not provided with a copy of the actual notice to evict.<sup>9</sup> RP 18, 23-24. While Littleton reported that she had taken a photograph of the notice to evict posted on the front door of the house, the photograph was not admitted as an exhibit and there is no evidence Nelson ever saw such a photograph. RP 16.

Haug denied that he had ever been served with an eviction notice for the property. RP 31. Haug had rented the house from his aunt for about five years. RP 30-31. Haug had paid rent and utilities for the house through the end of December 2017. RP 32. Haug knew that his aunt wanted him out of the home, so she could sell the property, but he wanted her to comply with all legal procedures in order to remove him from the property. RP 31.

Haug was never charged with burglary or criminal trespass based on December 13 incident. During a jail inventory search however, an unopened pack of Suboxone was found inside his wallet. RP 17.

Based on this information, Haug argued Nelson lacked probable cause or reasonable suspicion to arrest Haug for suspicion of burglary. CP

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<sup>8</sup> The letter of intent to evict was not admitted as an exhibit at the CrR 3.6 hearing.

<sup>9</sup> The notice of eviction was not admitted as an exhibit at the CrR 3.6 hearing.

5-7; RP 36-39. Haug noted there was no information about where the material on the police whiteboard originated from. RP 36. Similarly, there was no testimony that Nelson knew either Littleton or Judith or that he believed they were reliable sources of information. RP 42. As Haug argued, "so clearly in mind that is a civil matter that has to be taken care of using the proper procedures, not, 'Hey, I'm going to go arrest him to get him out of the house,' which it sounds like that's what was done." RP 42-43.

The State maintained that Nelson had probable cause to arrest Haug for burglary based on the information provided by the homeowner. RP 32-34, 44; CP 31-34. The State also argued the inventory search incident to arrest was lawful. RP 35, 44.

The trial court began its ruling by noting its concerns:

Well, this case definitely gives me a lot to think about. And I have some trouble with the facts of this case where it's a landlord-tenant situation, and it doesn't sound to me that there's very good proof of notice to Mr. Haug. At least the evidence before me is lacking somewhat.

RP 46.

The trial court nonetheless found that Nelson had probable cause to arrest Haug for residential burglary "because of the statutory inference that if somebody is in a building without lawful authority, then there's a presumption that they're there to commit a crime against a person or

property therein." RP 46. The trial court also concluded that probable cause existed to arrest Haug for first or second degree criminal trespass. RP 47-48; CP 11.

The trial court explained that it was reasonable for Nelson to rely on the information on the police whiteboard and the homeowner. The homeowners were named citizens and had no known criminal history or anything else that would undermine their credibility. Based on this, the trial court concluded that the information satisfied the *Aguilar-Spinelli*<sup>10</sup> factors for reliability. RP 46-47; CP 11.

The trial court denied Haug's motion to suppress but acknowledged "I do think that this is an issue that probably should be looked at by the Court of Appeals." CP 8-11; RP 47-48. In keeping with the trial court's suggestion, Haug timely appeals. CP 25.

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<sup>10</sup> *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969))

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE CONTENTS OF HAUG'S WALLET SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN UNLAWFUL SEIZURE.

Nelson lacked probable cause to arrest Haug on suspicion of burglary because there is insufficient evidence that Haug unlawfully entered or remained in the building. The facts known to Nelson at the time of the incident do not support probable cause. The reliability of the informant was not established, and the police investigation did not otherwise corroborate Littleton's or Judith's tips. Because absent the illegal arrest, insufficient evidence exists to support the unlawful possession conviction, this Court must reverse Haug's conviction and remand for dismissal with prejudice.

a. Standard of review.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,<sup>11</sup> warrantless arrests must be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 104 S. Ct. 111, 78 L.

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<sup>11</sup> The Fourth Amendment provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”

Article 1, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Ed. 2d 112 (1983). The probable cause requirement applies to warrantless felony arrests in public places. State v. Solberg, 122 Wn.2d 688, 696, 861 P.2d 460 (1993). And it applies to warrantless arrests for misdemeanors committed in an officer's presence. State v. Walker, 157 Wn.2d 307, 319, 138 P.3d 113 (2006).

Probable cause exists only "where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a [person] of reasonable caution in a belief that an offense has been . . . committed." State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979) (quoting State v. Gluck, 83 Wn.2d 424, 426-427, 518 P.2d 702 (1974)). Probable cause requires more than "[a] bare suspicion of criminal activity." State v. Terrovana, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). This determination rests "on the totality of facts and circumstances within the officer's knowledge at the time of the arrest." Fricks, 91 Wn.2d at 398. Put differently, probable cause cannot be supported by information police gain following an arrest. State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996).

Officers may detain and arrest a suspect even though the arresting officers did not subjectively believe they had probable cause, so long as probable cause in fact existed to do so. State v. Moore, 161 Wn.2d 880,

888, 169 P.3d 469 (2007). While evidence that establishes guilt beyond a reasonable doubt is not required, the probable cause determination considers "probabilities arising from the facts and considerations of everyday life on which prudent men, not legal technicians, act." State v. Cottrell, 86 Wn.2d 130, 132, 542 P.2d 771 (1975) (quoting State v. Parker, 19 Wn.2d 326, 328-29, 485 P.2d 60 (1971)). Thus, the rule can be described as follows: "Probable cause 'boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime.'" State v. Chesley, 158 Wn. App. 36, 41, 239 P.3d 1160 (2012) (quoting State v. Fisher, 145 Wn.2d 209, 220 n. 47, 35 P.3d 366 (2001)).

"[W]ere a warrantless search or seizure is challenged, the prosecution bears the burden of proof." Mance, 82 Wn. App. at 544. Whether the facts satisfy the probable cause requirement is a question of law this Court reviews de novo. State v. Fuentes, 183 Wn.2d 149, 155-156, 352 P.3d 152 (2015); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

- b. Probable cause did not exist to arrest Haug for burglary because facts known to police did not establish that Haug entered or remained unlawfully in his house with intent to commit a crime therein.

In situations where probable cause rests upon information provided by a citizen informant, that information must satisfy the two-prong Augilar-Spinelli test. State v. Jackson, 102 Wn.2d 432, 443, 688 P.2d 136 (1984). The test is equally applicable to determinations of probable cause to make an arrest without a warrant. State v. Helfrich, 33 Wn. App. 338, 340-41, 656 P.2d 506 (1982) (citing McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); State v. Luellen, 17 Wn. App. 91, 93, 562 P.2d 253 (1977)).

Under the Aquilar-Spinelli test, to establish probable cause the information must demonstrate the informant's (1) basis of knowledge and (2) veracity. State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002). The veracity prong is satisfied if either (1) the informant's credibility is established, or (2) the facts and circumstances surrounding the information may reasonably support an inference that the informant is telling the truth. State v. Duncan, 81 Wn. App. 70, 76-77, 912 P.2d 1090, rev. denied, 130 Wn.2d 1001, 925 P.2d 988 (1996). If either or both parts of the test are deficient, probable cause may yet be satisfied by independent police

investigation corroborating the informant's tip. Vickers, 148 Wn.2d at 112.

When a non-anonymous citizen provides information to the police, the ordinary requirement that the police show evidence of the informant's past reliability is relaxed because the citizen has had no prior opportunity to establish a previous record of reliability. State v. Northness, 20 Wn. App. 551, 554, 582 P.2d 546 (1978) (citing U.S. v. Harris, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971)). The information provided by the citizen may itself establish the citizen's reliability, if the information itself is sufficiently detailed and satisfies the requirement that belief in the reliability of the information is justified. Northness, 20 Wn. App. at 556-57.

Accordingly, while a citizen informant need not establish a history of veracity, facts must still be demonstrated that show how the informant came by his or her information and a basis for the citizen's personal knowledge must be established. Jackson, 102 Wn.2d at 437-38. A deficiency in the informant's information may be overcome by independent police work that provides "probative indications of criminal activity along the lines suggested by the informant." Jackson, 102 Wn.2d at 738 (quoting U.S. v. Canieso, 470 F.2d 1224, 1231 (2d Cir. 1972)). Corroboration of public or innocuous facts is insufficient; instead,

corroboration that is sufficient to confirm the informant's information must tend "to give substance and verity to the report that the suspect is engaged in criminal activity." Jackson, 102 Wn.2d at 438.

Here, the fact that Littleton and Judith were identified by name is not enough to establish their reliability. See Duncan, 81 Wn. App. at 77 (finding that named informant's reliability was not established where police did not check her identity, address, phone number, employment, residence, or family history). Similarly, that Judith allegedly owned the house and wanted Haug to leave the residence colored her information with self-interest. Judith had an incentive for providing information to police in an effort to be as helpful as possible. As Nelson acknowledged, he was uncertain whether the incident was even a criminal issue as opposed to a civil one. RP 11. Judith freely admitted they were having trouble removing Haug from the house and was willing to press criminal charges against Haug in an effort to expedite his removal from the property. See Duncan, 81 Wn. App. at 78 (citing State v. Rodriguez, 53 Wn. App. 571, 575, 769 P.2d 309 (1989) (indicating when a citizen reports accusations to the police merely to spite the defendant, it diminishes the presumption of reliability)).

The information provided by Littleton and her mother, Judith, also failed to show that Haug had no right to be present in the house. The

suspected crime for which Nelson arrested Haug was residential burglary. RP 17, 21. A person is guilty of residential burglary if, "with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle."<sup>12</sup> RCW 9A.52.025. A person unlawfully enters or remains in a building when he is not then "licensed, invited, or otherwise privileged to enter or remain." RCW 9A.52.010(3). There was no probable cause to arrest Haug for burglary because Nelson lacked probable cause that Haug was not "licensed, invited, or otherwise privileged to enter or remain" inside his house. RCW 9A.52.010(3).

Nelson testified that Littleton told him Haug did not have permission to be in the house. Haug disputed that he had been served with a notice of eviction however. To support a reasonable inference that Haug committed the crime of burglary or criminal trespass, an "everyday life" analysis of the facts must show a probability that Haug had entered or remained unlawfully in the house. The evidence available to Nelson fails to support this inference because in the absence of some kind of corroboration, there was no basis for believing that Littleton's claim was more credible than Haug's, especially since Haug was observed exiting the

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<sup>12</sup> Similarly, both first degree and second degree criminal trespass require proof that a person "knowingly enters or remains unlawfully" in a building or other premises. RCW 9A.52.070, .080.

house through the front door and told Nelson that he lived there. At the time of Haug's arrest, Nelson took no steps to attempt to corroborate the veracity of the information provided by Littleton or Judith, either by reviewing the notice of intent to evict, notice of eviction, photographs of the notice that Littleton purported to take, house title, rental lease, or whether Haug had a key to the house.<sup>13</sup>

Moreover, what Nelson and the trial court overlooked is the impact of landlord-tenant law on the issue of probable cause. Based on the evidence presented, Littleton and Judith's termination of Haug's tenancy was without legal effect, such that Haug still had the legal right to enter the premises regardless of whether they permitted it. Haug's entry and presence was therefore lawful.

Because Littleton and Judith did not testify, there was no dispute that they had entered into a rental agreement in which Haug agreed to pay rent in exchange for living in the premises. RP 30-32; CP 10 (finding of fact 13); See also RCW 59.18.200(1)(a).<sup>14</sup> To determine the legality of

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<sup>13</sup> Nelson did not review the letter of intent provided by Littleton until one week after arresting Haug, and thus this information cannot be considered known to Nelson at the time of the arrest in determining whether he had probable cause. Mance, 82 Wn. App. at 542.

<sup>14</sup> "When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable[.]" RCW 59.18.200(1)(a).

Haug's entry and presence in the house, we therefore turn to the Residential Landlord Tenant Act, chapter 59.18 RCW, which sets forth the rights and obligations of tenants and landlords. "Landlord" means "the owner, lessor, or sublessor of the dwelling unit or the property of which it is a part, and in addition means any person designated as representative of the owner, lessor, or sublessor including, but not limited to, an agent, a resident manager, or a designated property manager." RCW 59.18.030(14). A "tenant" is "any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement." RCW 59.18.030(27).

RCW 59.18.290(1) requires a landlord to obtain a court order before removing a tenant from the premises. The statute provides, "It shall be unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing." RCW 59.18.290(1). There is no evidence Littleton or Judith obtained a court order to exclude Haug as a tenant. And even if Littleton or Judith had gone to court, "[a] court has no power to give a landlord relief from a holdover tenancy unless the tenant was accorded proper notice." *Id.* at 85. Haug denied that he was given proper notice and Nelson failed to corroborate any information to the contrary.

State v. Wilson, 136 Wn. App. 596, 603-04, 150 P.3d 144 (2007), is instructive for the legal principle established in that case. There, this Court addressed the issue of "whether entry or remaining in a jointly shared residence, *from which neither party has been lawfully excluded*, is unlawful for purposes of establishing this essential element of the crime of burglary." Id. at 603-04 (emphasis added).

Wilson was the subject of a no-contact order which prohibited him from contacting his girlfriend, Charlene Sanders. The no-contact order listed Sanders' address but did not prohibit Wilson's presence at that address where he and Sanders had been living together. Wilson and Sanders remained living together and Wilson kept his clothing and car at the house. Wilson also had keys to the house. Id. at 600.

Several months after the no-contact order was entered, Wilson and Sanders got into an argument. Wilson left the house without his key but returned a short time later. Angry that he could not enter the home, Wilson broke down the front door, pulled Sanders out of bed by the hair, and kicked her in the stomach. Wilson left the house briefly, but returned, picked up a stick of wood from the broken door, and threatened to kill Sanders. Sanders called police and told them Wilson was living at the home, but "he wasn't supposed to be there." Id. at 601.

The State charged Wilson with first degree burglary, felony harassment, and assault in violation of a protection order. Id. at 601. This Court upheld the dismissal of a burglary conviction because, although the acts Wilson committed inside the residence were unlawful, "his acts of entering and remaining inside were not themselves unlawful because the no-contact order did not exclude him from the residence he shared with [the protected party]." Id. at 604.

Like Wilson, here there is no evidence Haug was ever "lawfully excluded" from the premises. Id. at 603. To determine whether a person's presence is unlawful, "courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises." Id. at 606. Haug maintained a privileged occupancy of the premises. He was still in legal possession of the house as a tenant because there is no evidence his tenancy rights were ever legally extinguished.

As a matter of statutory law, Haug's tenancy was still intact as of December 13, 2017. He still had the right to enter the premises. Any lack of oral permission from Littleton and Judith no effect on Haug's legal right to be there because there is no evidence the tenancy was never terminated in accordance with the law. As a result, Nelson lacked probable cause to suspect that Haug "entered or remained unlawfully in a building." RCW 9A.52.010(3). The trial court's conclusion of law that the police had

probable cause to arrest Haug is incorrect and must be reversed, and the evidence discovered as a result of that unlawful arrest must be suppressed.

- c. In the absence of the illegal seizure insufficient evidence exists to support the conviction.

"Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999) (citing State v. Cyr, 40 Wn.2d 840, 843, 246 P.2d 480 (1952), overruled on other grounds by State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983)). The arrest provides the "authority of law" to search consistent with the protections of article I, section 7. Parker, 139 Wn.2d at 496-97 (citing Cyr, 40 Wn.2d at 843; State v. Michaels, 60 Wn.2d 638, 643, 374 P.2d 989 (1962)); See also, State v. Grande, 164 Wn.2d 135, 139, 187 P.3d 248 (2008) (holding "an arrest gives 'authority of law' to search, except where the arrest itself is unlawful"); State v. Johnson, 71 Wn.2d 239,242,427 P.2d 705 (1967) (lawful arrest is a prerequisite to a lawful search); State v. Miles, 29 Wn.2d 921,933, 190 P.2d 740 (1948) (if arrest is unlawful, search is unlawful).

Without the evidence obtained as a result of the unlawful arrest, there is no basis to sustain the possession of a controlled substance conviction. See State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668

(2000) (no basis remained for conviction where motion to suppress evidence should have been granted), cert. denied, 531 U.S. 1104 (2001); State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (same); Armenta, 134 Wn.2d at 17-18 (dismissal appropriate where unlawfully obtained evidence forms the sole basis for the charge). Reversal and dismissal is required.

2. THE \$200 CRIMINAL FILING FEE SHOULD BE STRICKEN UNDER *STATE V. RAMIREZ*.

Haug is indigent under the applicable statutory criteria. The criminal filing fee should be stricken under the recent Ramirez decision.

In Ramirez, an appellant challenged discretionary legal financial obligations (LFOs) on the grounds that the trial court had not engaged in an appropriate inquiry regarding his ability to pay under State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Ramirez, 2018 WL 4499761 at \*2.

The Supreme Court agreed, setting forth detailed instructions regarding the appropriate inquiry. Id. at \*4-6.

But, based on watershed statutory amendments that took effect while Ramirez's appeal was pending, the Supreme Court ultimately granted relief on statutory grounds.

The Court explained that Laws of 2018, ch. 269, § 6(3) (“House Bill 1783”) made substantial modifications to several facets of Washington’s LFO system. In doing so, the legislature “address[ed] some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.” Ramirez, 2018 WL 4499761 at \*6.

For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, establishes that the DNA database fee is no longer mandatory if the offender’s DNA has been collected because of a prior conviction, and provides that a court may not sanction an offender for failure to pay LFOs *unless* the failure to pay is willful. Ramirez, 2018 WL 4499761 at \*6 (citing Laws of 2018, ch. 269, §§ 1, 18, 7.)

It amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Ramirez, 2018 WL 4499761 at \*6 (citing Laws of 2018, ch. 269, § 6(3)). It also prohibits imposing the \$200 filing fee on indigent defendants. Ramirez, 2018 WL 4499761 at \*6 (citing Laws of 2018, ch. 269, § 17).

As Ramirez further noted, a trial court “shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 2018 WL 4499761 at \*7 (quoting Laws of 2018, ch. 269, § 6(3)). Thus, indigency

may established by three objective criteria. “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.” Ramirez, 2018 WL 4499761 at \*7.<sup>15</sup>

Crucially to this case, the Court also held that the House Bill 1783 amendments applied prospectively to cases not yet final on appeal. Ramirez, 2018 WL 4499761 at \*7-8 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)).

The Supreme Court concluded that the trial court impermissibly imposed discretionary LFOs, as well as the \$200 criminal filing fee, on Ramirez. The Court remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. Ramirez, 2018 WL 4499761 at \*8.

Here, the record indicates Haug is indigent under RCW 10.101.010(3). And House Bill 1783 applies prospectively to his case. This Court should remand or the \$200 filing fee to be stricken.

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<sup>15</sup> If none of these criteria apply, only then must the trial court engage in an individualized inquiry into current and future ability to pay. Ramirez, 2018 WL 4499761 at \*7.

3. THE \$100 DNA FEE SHOULD ALSO BE STRICKEN.

This Court should also strike the DNA fee under House Bill 1783 and Ramirez.

RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was amended under House Bill 1783.

The statute now provides that

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.*

RCW 43.43.7541 (emphasis added.); Laws of 2018, ch. 269, § 18.

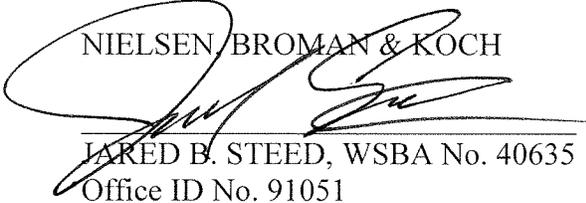
Haug has prior criminal history. CP 15-23. Clearly, the State has previously collected his DNA. Because Haug's case is not yet final, the new statute applies. Ramirez, 2018 WL 4499761 at \*7-8. As a result, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. Thus, the DNA fee should be stricken.

D. CONCLUSION

Absent the illegal seizure, insufficient evidence exists to support the unlawful possession conviction. For the reasons discussed above, this Court should therefore reverse Haug's conviction and remand for dismissal with prejudice. Alternatively, this Court should remand for the \$200 criminal filing fee and the \$100 DNA fee to be stricken.

DATED this 26<sup>th</sup> day of September, 2018.

Respectfully submitted,

  
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JARED B. STEED, WSBA No. 40635  
Office ID No. 91051

Attorneys for Appellant

## **APPENDIX**



FILED  
Lewis County Superior Court  
Clerk's Office

MAR 07 2018

Scott Tinney, Clerk

By \_\_\_\_\_, Deputy

IN THE SUPERIOR COURT OF STATE OF WASHINGTON FOR LEWIS  
COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID WILLIAM HAUG,

Defendant

No: <sup>17</sup>~~18~~-1-00867-21

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
FOLLOWING DEFENDANT'S  
MOTION TO SUPPRESS  
EVIDENCE.**

On February 14, 2018, a suppression hearing pursuant to CrR 3.6 was held in this Court before the Honorable J. Andrew Toynbee. The Defendant was present with his attorney of record, Donald Blair. The State was represented by Deputy Prosecuting Attorney Joel DeFazio. The Court considered the testimony of Officer Coleman Nelson of the Toledo Police Department and the Defendant. The Court made the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Officer Coleman Nelson is a police officer with the Toledo Police Department.
2. On December 7, 2017 Officer Nelson saw a notice on the whiteboard in the Toledo Police Department that stated no persons were allowed at 512 St.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW. Page 1 of 4

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Helens after December 7, 2017. That same day, Officer Nelson confirmed the information on the whiteboard with Toledo Police Chief John Brockmueller and was told the residence was in the process of being sold and not persons were allowed on the property.

3. On December 13, 2017 Officer Nelson went to the residence at 512 St. Helens Street in Toledo, Washington. David Haug, the Defendant, exited the residence through the front door and contacted Officer Nelson.
4. Officer Nelson was informed by Haug that Haug lived at the residence and was picking up his belongings.
5. Haug told Officer Nelson he never got an eviction notice. Haug told Officer Nelson he was told the notice was posted on the front door but he never saw it.
6. Officer Nelson attempted to contact the homeowner by phone, but he was unable to reach her. He left a voicemail asking her to call him back.
7. On December 14, 2017 Officer Nelson received a phone call from the homeowner's daughter, Megan Littleton, who advised that they were having problems getting Haug, who was a former tenant, out of the residence and they wanted to pursue burglary charges against him. The homeowner, Judy Rogers, who was with Ms. Littleton during the phone call, also told Officer Nelson she wanted to pursue charges.
8. Ms. Littleton told Officer Nelson she had gotten an eviction order for the property and she handed Haug an eviction letter that instructed Haug to

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vacate the premises the last day of November 2017. Ms. Littleton also told Officer Nelson she taped the eviction notice to the front door of the residence. Ms. Littleton told Officer Nelson she had agreed to give Haug until December 7, 2017 to move out.

9. Later that same day, Officer Nelson was able to locate Haug and placed him under arrest for burglary. Haug was searched and a spoon with an unknown type of residue was found in his back pocket.

10. Haug was transported to the Lewis County Jail and booked for the burglary charge, a felony.

11. During an inventory of Haug's belongings at the jail, suboxone strips were located in his wallet.

12. There was no evidence indicating whether Haug had the ability to post bail.

13. Haug had paid rent for December, along with paying the utility bills for December.

**CONCLUSIONS OF LAW**

1. The Court has jurisdiction over the Defendant and the present subject matter.
2. Officer Nelson relied on information that was provided by his department, a fellow officer, and by the homeowner and the homeowner's daughter. It was reasonable for Officer Nelson to rely on this information.
3. The homeowner and the homeowner's daughter are named citizens that came forward and cooperated. No evidence was provided about their criminal history or anything else that would undermine their credibility. As citizens who

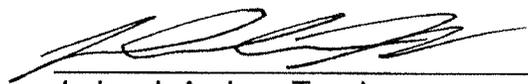
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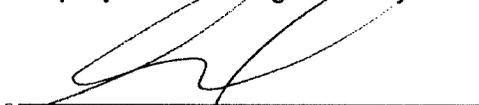
are named and came forward and cooperated and would be available to testify at a trial, there is a presumption that the information they provided is believable and reliable.

4. The source of information relied upon by Officer Nelson met both prongs of *Aguilar-Spinelli*.
5. There was probable cause for criminal trespass in the second degree, criminal trespass in the first degree, and because of the statutory inference of an intent to commit a crime when someone unlawfully enters a residence, residential burglary. Any one of these offenses provided a basis for arrest and would be a basis to search Haug's person.
6. The inventory search of the Defendant at the jail was lawful.
7. The Defendant's motion to suppress evidence is denied.

Dated this 7 day of March, 2018.

  
\_\_\_\_\_  
Judge J. Andrew Toynbee

  
\_\_\_\_\_  
Joel DeFazio, WSBA #48141  
Deputy Prosecuting Attorney

  
\_\_\_\_\_  
Don Blair, WSBA #24637  
Attorney for Defendant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**September 26, 2018 - 2:07 PM**

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**Appellate Court Case Number:** 51566-1  
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**Superior Court Case Number:** 17-1-00867-7

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