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NO. 51872-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN THORNTON,

Appellant.

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

The Honorable Timothy L. Ashcraft, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not suppressing evidence obtained during a search where there was insufficient proof of a nexus between the items to be seized and the place searched.

2. Appellant's constitutional rights against unlawful search and seizure were violated when the police obtained evidence by searching outside the scope of the search warrant.

3. There was insufficient evidence to sustain appellant's convictions for possession of a stolen firearms.

4. There was insufficient evidence to sustain appellant's convictions for possession of a stolen motor vehicle.

5. The \$200 criminal filing fee and \$100 DNA fee should be stricken from the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Based on guns discovered in a storage unit pursuant to a search warrant, the State charged appellant with thirty-two counts of unlawful possession of a firearm and possession of a stolen firearm. The warrant affidavit sought to establish a nexus between the storage unit and the illegal activity through the information provided by an informant. However, the affidavit failed to properly establish the informant was reliable under the Aguilar-

Spinelli standard.¹ Facts independently known to officers did not sufficiently corroborate the tip or establish independently the necessary nexus between the items to be seized (the firearms) and the location to be searched (the storage unit). Was the search of the storage unit unconstitutional?

2. Seventeen charges in this case arise from firearms obtained by police breaking into locked safes found in a storage unit. The search warrant affidavit expressly referred to searching and seizing safes. Yet, the warrant issued by the judge does not include safes either as an item to be seized or a place to be searched. Under the exclusion by negative implication doctrine – which Washington courts have applied when determining the scope of search warrants – was the search of the safes outside the scope of the warrant?

3. Appellant was convicted of nine counts of possession of a stolen firearm. To sustain the convictions, the State needed to prove appellant knew the firearms were stolen. No evidence was presented regarding the manner in which appellant obtained the guns. No evidence was presented suggesting appellant knew anything about the firearms being stolen. Indeed, the firearms had

¹ 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)).

been stolen from multiple owners, at different times, from several different places. The serial numbers remained visible on the firearms, and they were kept interspersed with numerous other firearms that were not stolen. Was the evidence insufficient to establish beyond a reasonable doubt appellant knew the guns were stolen?

4. Appellant was convicted of one count of possession of a stolen vehicle. To sustain the conviction, the State needed to prove appellant knew the vehicle was stolen. Appellant stated he was towing the dirt bike for a friend. No evidence was presented regarding the manner in which appellant obtained the dirt bike. No evidence was presented suggesting appellant knew anything about how the dirt bike was stolen. There were no signs on the vehicle suggesting it was stolen, such as a punched out ignition or the like. There was no evidence appellant did anything to conceal the vehicle such as change the license plates, alter its appearance, or even cover it. Instead, this dirt bike was found on appellant's trailer out in the open, unaltered, and located next to a dirt bike that appellant rightfully owned. Was the evidence insufficient to establish beyond a reasonable doubt appellant knew the vehicle was stolen?

5. Under the Supreme Court's recent decision in State v. Ramirez,² must the DNA and criminal filing fees be stricken?

B. STATEMENT OF THE CASE

1. Procedural History

On August 4, 2016, the Pierce County prosecutor charged appellant Steven Thornton with eight counts of possession of a stolen firearm, nineteen counts of unlawful possession of a firearm, and one count of unlawful possession of a stolen vehicle. CP 6-15. The information was later amended, with the prosecutor charging nine counts possession of a stolen firearm, twenty-four counts of unlawful possession of a firearm, and one count of unlawful possession of a stolen vehicle. CP 24-37. A jury found Thornton guilty as charged. CP 192-225. He was sentenced to serve a total of 212 months. CP 3-13. He was also ordered to pay a DNA fee and a criminal filing fee. CP 241. He appeals. CP 283-313.

2. Substantive Facts

Detective Eric Barry of the Puyallup Police Department received information from a confidential informant that Thornton had bragged about storing stolen dirt bikes and guns in a particular storage unit. Appendix A at 2; RP 25, 305. It was illegal for

² State v. Ramirez, 191 Wn 2d 732, 426 P.3d 714 (2018).

Thornton to possess guns. CP 92-101. The storage unit had been rented by Steven Sands, a friend of Thornton's, and it was used by several people to store their own belongs. RP 286, 293, 888-89. Barry asked the storage unit owner to call if he saw Thornton at the unit. RP 308.

On July 7, 2016, Thornton arrived at the storage unit on a motorcycle. RP 496. Shortly afterward, Thornton's girlfriend Kassandra Wells arrived in a red pick-up truck, parking outside the storage unit. RP 507, 521. Attached to the truck was a trailer with two dirt bikes on it. RP 507, 521. The trailer was registered to Thornton, as was one of the dirt bikes. RP 327.

The storage unit owner called Barry as requested. RP 309. Barry enlisted the help of Detective Greg Massey to surveil the location. RP 310. They observed Thornton go in and out of the storage unit several times while working on one of the dirt bikes. RP 91, 310. The storage unit door remained open. RP 310. Through the unit's open door, they saw two dirt bikes and numerous boxes with personal items. RP 326-27.

At some point, Barry decided to arrest Thornton on an outstanding warrant for a DOC violation. RP 92. Wells was also detained. RP 95. While questioning them, officers observed a firearm in the pick-up truck. RP 99. Officers also discovered one of the dirt bikes on the trailer was stolen. RP 101.

Thornton told police he was hauling the dirt bike for a friend, and he did not know it was stolen. RP 100, 102. He said there were currently no firearms in the storage unit, although he had seen some hunting rifles there previously. RP 102. He explained the firearms had belonged to his cousin Calvin Larsen. RP 103. Thornton said he did not know what else was in the unit because most of the items belonged Larsen. RP 331.

Wells told police she and Thornton both use the pick-up truck she had arrived in, but Thornton usually drives it. RP 886-87. Wells said that nothing in the unit belonged to Thornton or herself. Appendix A at 3. She said one of the dirt bikes on the trailer belonged to Thornton, but the other belonged to a friend. RP 890.

Detective Barry sought a search warrant. RP 458. In his warrant affidavit, Barry referred to having received information from a source who said there was stolen property and firearms inside the storage unit. Appendix A at 2. However, the affidavit Barry

submitted did not include sufficient language as to the reliability and credibility of the unnamed informant. Appendix A. In a subsequent interview, Barry said he treated the source as a citizen complainant. RP 25. However, Massey stated in his interview that the source was a confidential informant who was working with Barry. RP 25.

Barry took steps to obtain a warrant to search the pick-up truck, trailer, and storage unit. Appendix A. He sought to search and seize a variety of things, specifically including: "Safes and Boxes/areas where Stolen Property and firearms could be kept." Id. at 1.

Barry drove the warrant affidavit to the judge's house. RP 458. They conversed, but Barry's exchange with the judge was not recorded and he could not later remember what was said. RP 7. However, Barry remembered that he read the affidavit to the judge, the judge "cross out stuff he didn't like," and then the judge added information. RP 7; CP 42.

The warrant affidavit shows the judge personally altered the contents, writing into it information that was key to establishing the reliability of the informant. Appendix A at 2. Then the judge initialed the altered text himself. Id.; RP 18. Barry never initialed these changes. Appendix A at 2.

Based on the altered warrant affidavit, the judge issued the warrant. Appendix B. It did not include any language authorizing the search or seizure of safes. Id.

Officers executed the warrant, finding no stolen dirt bikes but locating numerous firearms in the back of the storage unit. RP 378-411. They also discovered two locked safes. RP 339. One was pried open. RP 421, 580. The other was a professional gun safe with a digital access code entry and a back-up key lock. RP 566. Officers found the key to the safe attached to the ring left in the truck ignition, and they used this to open the second safe. RP 350, 421. Seventeen of the total convictions appealed herein pertain to guns found in the safes. RP 374, 387, 390, 393, 395, 397-99, 402-03, 492, 407.

Prior to trial, Thornton moved to suppress the evidence as the fruit of an unlawful search. CP 38-54. He argued the need for a Franks³ hearing, attacking the warrant affidavit as containing deliberate omissions regarding the unnamed source. CP 46-54. Alternatively, he argued that even looking at the four corners of the affidavit, the facts asserted did not meet the Aguilar-Spinelli

³ Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L.Ed.2d 667 (1978).

standard, and thus there was not probable cause to support searching the storage unit. RP 25.

The trial court denied the motion to suppress. It found that any Aguilar-Spinelli defects in the affidavit were cured by the warrant affiant's own observations. CP 267. Thus, the warrant was supported by probable cause. CP 267.

C. ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT THAT WAS NOT SUPPORTED BY PROBABLE CAUSE AS TO THE STORAGE UNIT.

A judicial officer may not issue a search warrant unless he or she determines probable cause supports it. U.S. Const. amend. IV; Const. art. I, § 7⁴; CrR 2.3(c); State v. Fry, 168 Wn.2d 1, 5–6, 228 P.3d 1 (2010) (citing State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). Probable cause is established if the affidavit supporting

⁴ Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment provides that

[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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

the warrant sets forth sufficient facts to lead a reasonable person to conclude there is a probability the defendant is involved in criminal activity and that evidence of the criminal activity will be found at the place to be searched. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). “[P]robable cause requires a nexus between: (1) criminal activity and the item to be seized, and (2) between the item to be seized and the place to be searched.” State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996) (emphasis added)); see also, Zurcher v. Stanford Daily, 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) (“The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.”).

As explained below, probable cause was not shown here because (1) the informant's information was not established as reliable under the Aguilar-Spinelli test, and (2) without that information, the affidavit failed to establish a nexus between the items to be seized (firearms and stolen property) and the storage unit.⁵

(i) The Aguilar-Spinelli Requirements Were Not Met.

If relying on an informant to establish probable cause, police must establish that informant's reliability under the two-pronged Aguilar-Spinelli test. State v. Jackson, 102 Wn.2d 432, 436, 438, 688 P.2d 136 (1984). Under this approach, to create probable cause based on an informant's tip an officer's affidavit must establish (1) the reliability of the informant's basis of knowledge, and (2) the veracity of the informant. Jackson, 102 Wn.2d at 435.

The "basis of knowledge" prong requires that the officer explain to the magistrate how the informant claims to have come by the information. The "veracity" prong requires the officer explain to the magistrate why the officer concluded the informant was credible or the informant's information was reliable in this instance. The

⁵ A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed de novo. In re Det. of Petersen, 145 Wn.2d 789, 800, 42 P.3d 952 (2002).

“basis of knowledge” prong can be satisfied by the informant's direct personal observations. The “veracity” prong can be satisfied by establishing the informant's “track record” or by establishing that the information is reliable because it is a declaration against interest. Either prong may be satisfied by independent police investigatory work that corroborates the informant's tip. Jackson, 102 Wn.2d at 438.

In its written order, the trial court made clear that it found probable cause based solely on the “affiant’s own observations” and that this cured any defects in the affidavit under Aguilar-Spinelli. CP 267. This suggests the trial court found reliability under Aguilar-Spinelli had not been established. While the trial court’s oral ruling suggests it initially believed the Aguilar-Spinelli test was met, a closer look at the trial court’s oral ruling reveals that that was not so. RP 31. The trial court found only that the State had proved “the identification of the informant, and the veracity of the informant.” RP 31. It never expressly found that the State had established the informant’s basis of knowledge. RP 31. Hence, the trial court disregarded the informant’s information in its written ruling. CP 267.

There was good reason not to rely on the informant's information and instead rely on the affiant's own observations. First, there was the problem of the judge personally augmenting the contents of the affidavit. The affidavit – as typed and presented by Barry – did not contain sufficient information about the informant to satisfy either the knowledge or reliability prong. Appendix A at 2. Instead, the judge wrote in information relevant to the reliability of the informant, and then he initialed this information himself. Id.; RP 18. Importantly, Barry never initialed the changes himself. Appendix A at 2. And there is no other information on the face of the affidavit specifying the affiant adopted those statements as his own. Appendix A.

Second, even with the information added to the affidavit by the judge, there is still not enough to establish the veracity prong under Aguilar-Spinelli. An informant's track record may establish the informant's reliability for purposes of a probable cause determination. See, State v. Woodall, 100 Wn.2d 74, 76–78, 666 P.2d 364 (1983) (reliability is sufficiently shown if the informant has given information in the past that has led to a conviction). However, the mere statement that an informant is credible is generally not sufficient unless information previously given has led

to arrests and convictions. State v. Fisher, 96 Wn. 2d 962, 965, 639 P.2d 743, 745–46 (1982). Additionally, an informer's tips may be reliable if they are declarations against penal interest. Jackson, 102 Wn.2d at 437; See, State v. Lair, 95 Wn.2d 706, 711, 630 P.2d 427 (1981). An informant's willingness to give his or her name also is considered under the veracity prong. State v. Chamberlin, 161 Wn. 2d 30, 42, 162 P.3d 389, 395 (2007).

None of these factors are found in the affidavit here. Appendix A at 2. All that is known is that the affiant knows the informant. Id. There is no information about his or her track record. Id. Indeed, there is not even a general statement by the affiant that the informant is credible. Id. The informant did not make statements against penal interests. Id. There is no indication that the source was willing to forgo his or her confidential status. Id. As such, there was simply not enough in the affidavit to establish the veracity of this informant under Aquilar-Spinelli. Hence, for the probable cause finding to stand, the affiant's independent observations alone must establish probable cause to search the storage unit.

(ii) The Search Warrant Affidavit Did Not Establish the Necessary Nexus Between the Items to Be Seized and the Storage Unit.

Once the information provided by the informant is excluded, the facts in the search warrant affidavit fail to establish a nexus between the storage unit and suspected evidence of firearms or stolen property. Hence, the warrant was issued upon an insufficient showing of probable cause as to the storage unit, and the trial court erred when it did not suppress the evidence found there.

Even if there is a reasonable probability that a person has committed a crime in one location, this does not necessarily give rise to probable cause to search a different property. State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994). Probable cause to search a person's home (or in this case storage unit) is also not established just because probable cause exists to search a person's vehicle. Goble, 88 Wn. App. at 512.

Police independently established sufficient probable cause to merit the search of appellant's pick-up truck and trailer because they had independently observed the gun in the truck and the stolen dirt bike on the trailer. However, without the informant's information, the warrant affidavit did not contain the facts necessary

to show a nexus between the items sought (stolen property and firearms) and the storage unit.

First, without the informant's statements there was no one reporting that Thornton currently stored stolen goods or firearms in that unit. Although Thornton stated he had previously seen some hunting rifles belonging to Calvin Larson in the unit, no facts in the affidavit indicated that this was currently the case. Indeed, Thornton stated there were no firearms in the unit at that time. Thus, Thornton's prior observation of firearms in the unit merely established stale probable cause for which a warrant may not be issued. State v. Lyons, 174 Wn.2d 354, 360-61, 275 P.3d 314 (2012).

Second, police made no independent observations indicating the presence of stolen goods or firearms in the storage unit. They observed no firearms. Although they saw dirt bikes, there was no indication these were probably stolen. Appendix A at 3. The affiant did not allege that the vehicles had been reported stolen, that there were any physical signs indicating they were stolen (i.e. a punched ignition), or that there was any attempt to alter them as a means of concealing them. Id. Indeed, the only information in the affidavit that establishes a reason to believe the dirt bikes in the storage unit

might be stolen came from the informant. Hence, there was no independent observation made by police to corroborate the notion that there was stolen property or firearms in the storage unit. C.f., State v. Olson, 73 Wn. App. 348, 350, 869 P.2d 110 (1994) (an anonymous caller told officers drugs were in the residence and officers smelled marijuana at the residence).

Third, although officers had seen Thornton go in and out of the storage unit several times, they never observed him take suspected stolen goods or firearms in or out. As such, Thornton's moving in and out of the unit constituted an innocuous fact that does not rise to the level of providing the required nexus. See, Olson, 73 Wn. App. at 357 (finding innocuous the fact that defendant drove his car from a house containing a marijuana grow operation to his own residence and concluding there was insufficient probable cause to search the residence).

In sum, without the informant's tip, the contents of the affidavit did not establish probable cause to search the storage unit because police did not establish a nexus between that storage unit and the items sought. Consequently, the trial court erred when it denied Thornton's motion to suppress with respect to the firearms found in the storage unit. This Court should, therefore, reverse

convictions in counts 2 through 33.

II. THE SEARCH OF THE LOCKED GUN SAFES
EXCEEDED THE SCOPE OF THE WARRANT.

When police execute a search under a valid warrant, the search must be strictly within the scope of that warrant. State v. Figueroa Martines, 184 Wn.2d 83, 94, 355 P.3d 1111 (2015); U.S. CONST. amend. IV; Article I, section 7. Applying the doctrine of exclusion by negative implication to the facts of this case, it is apparent police exceeded the scope of the warrant when they searched the locked gun safes.

Exclusion by negative implication is a canon of statutory interpretation that applies when the circumstances support a sensible inference that the term left out was meant to be excluded. See, Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81, 122 S.Ct. 2045, 153 L.Ed. 2d 82 (2002). Washington courts have applied the exclusion by negative implication doctrine when evaluating the scope of a search warrant. State v. Witkowski, 3 Wn.App.2d 318, 327, 329-30,415 P.3d 639 (2018), review denied, 191 Wn. 2d 1016, 426 P.3d 747 (2018); State v. Llamas-Villa, 67 Wn. App. 448, 452, 836 P.2d 239 (1992); State v. Kelley, 52 Wn. App. 581, 762 P.2d 20 (1988).

A warrant may exclude by negative implication items or locations listed in the affidavit but omitted from the warrant itself. Id. For example, in State v. Kelley, the warrant affidavit included outbuildings, but these locations were not included in the warrant as places to be searched. 67 Wn. App. at 452. Applying the doctrine of exclusion by negative implication, Division Two upheld the suppression of evidence found in the outbuildings because the warrant affidavit specifically included these places, but the warrant did not. Id., at 585-86.

While it is the general rule that a premises warrant authorizes a search of containers found there that could reasonably hold the objects of the search, this rule does not apply if such containers are excluded from the warrant by negative implication. Witkowski, 3 Wn.App.2d at 330-31 (explaining the exclusion by negative inference doctrine would have properly applied had the warrant affidavit specified gun safes as a place to be searched but the warrant did not); Llamas-Villa, 67 Wn. App. at 452 (reasoning that if the warrant affidavit had specified the container in question as a location to be search and that was not included in the warrant, this would support an inference that the container was intentionally excluded from the warrant).

Applying the exclusion by negative inference doctrine here, police were not authorized to search the safes. The warrant affidavit lists as one of the places or things police sought to search and seize as "Safes and Boxes/areas where Stolen Property and firearms could be kept."⁶ Appendix A at 1. Yet, the warrant was silent as to safes. Appendix B. As such, the doctrine of exclusion by negative implication applies. The search of the safes found in the storage unit was beyond the scope of the warrant.

In sum, the doctrine of exclusion by negative implication is properly used to determine the scope of a warrant. Applying that doctrine here, the search of the gun safes found in the storage unit exceeded the scope of the warrant, and all evidence found there should have been suppressed. Kelley, 52 Wn. App. at 585-86. Consequently, the convictions in counts 14-17, 21, 23, 25-33, all pertaining to guns found in the safes, must be reversed.

⁶ While this was listed under the section titled "Items Sought in the execution of search warrant," the affiant expressly characterized this also as a place or thing to be searched by referring to the safe and boxes as "areas where stolen property and firearms could be kept. Appendix A at 1.

III. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE ESTABLISHING THORNTON POSSESSED FIREARMS HE KNEW TO BE STOLEN.

To convict for possession of a stolen firearm under RCW 9A.56.310, the State must prove beyond a reasonable doubt that the defendant knew the firearm in his possession was stolen. State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284 (2010). The State failed to do so in this case.

A person is guilty of possessing a stolen firearm if he possesses, carries, delivers, sells, or is in control of a stolen firearm. RCW 9A.56.310. The definition of “possessing stolen property” under RCW 9A.56.140 applies to the crime of possessing a stolen firearm. RCW 9A.56.310(4). Under RCW 9A.56.140(1), “[p]ossessing stolen property” means “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” (emphasis added). Hence, the State must prove beyond a reasonable doubt that the defendant knew the gun was stolen. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d

368 (1970) (holding State must establish beyond a reasonable doubt of every fact necessary to constitute the charged crime).

“Bare possession of stolen property is insufficient to justify a conviction.” McPhee, 156 Wn. App. at 62 (citation omitted). In fact, mere proof of possession of stolen property does not even raise a presumption of law which a defendant is required to rebut. State v. Portee, 25 Wn.2d 246, 252, 170 P.2d 326 (1946) (citation omitted). Thus, it is the State’s burden to prove not only possession but also knowledge by offering proof of inculpatory circumstances from which the jury might conclude the defendant possessed the goods knowing them to be stolen. State v. Khlee, 106 Wn. App. 21, 24, 22 P.3d 1264 (2001).

Here, the State proved nothing more than Thornton’s bare possession of the stolen guns. Thornton never offered a false or improbable story of how he obtained the guns. No evidence was presented regarding the manner in which Thornton obtained the firearms at issue. The State failed to present facts demonstrating Thornton knew anything about the burglaries or firearms’ stolen status. In fact, the evidence showed that the guns had been stolen at different times and locations. For example, one burglary had occurred New York state in 2014. RP 451. Other guns had been

stolen from several unrelated locations in Washington, with the dates of theft ranging from April 2016 and reaching as far back as far as March 2015. RP 450-52, 902-4, 907-8, 911-13, 1014.

There was no evidence Thornton took any special actions to conceal these particular weapons differently than the other firearms in his possession that were not stolen. They were found commingled with the other firearms found in the storage unit and safes.

The serial numbers on these particular firearms remained visible rather than obliterated. And there were also no forged documents attempting to falsely ownership. Moreover, given the numerous charges Thornton was facing that had nothing to do with stolen guns, one cannot reasonably infer that general statements of his that might arguably indicate a guilty conscious establish Thornton felt guilty because he knew some of the guns were stolen.

Finally, while Thornton's status as a convicted felon might mean he could not procure a gun from a dealer through the regular licensing process, it does not necessarily follow that any gun he possessed must be stolen. Proof that someone illegally possesses a gun is simply not proof he knows the gun is stolen.

For the reasons stated above, this Court should find the State failed to produce sufficient evidence to establish Thornton knew the firearms were stolen. Hence, it should reverse his conviction for counts 1 through 9.

IV. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE ESTABLISHING THORNTON POSSESSED A MOTOR VEHICLE HE KNEW TO BE STOLEN.

RCW 9A.56.068(1) criminalizes possession of a stolen vehicle. Just as with possession of a stolen gun, the definition of “possessing stolen property” under RCW 9A.56.140(1) applies to the crime of possessing a stolen vehicle. Hence, the State was required to prove beyond a reasonable doubt Thornton possessed the vehicle knowing it had been stolen. RCW 9A.56.140(1); Winship, 397 U.S. at 364. It did not do so here.

Again, the State proved nothing more than Thornton’s bare possession of a stolen dirt bike. No evidence was presented regarding the manner in which Thornton obtained the vehicle. The State failed to present facts demonstrating Thornton knew anything about its theft or its stolen status. There were no physical signs that would outwardly indicate the vehicle might be stolen, such as a punched ignition. There was no evidence Thornton took any

special actions to conceal the dirt bike such as changing the license plates, painting it, or placing it under cover. Indeed, he had it sitting uncovered on top of his trailer in an open public space right next to a dirt bike he properly owned.

Based on this record, the evidence was insufficient to prove Thornton knew the dirt bike was stolen. As such, the State failed to meet its burden and the conviction for count 34 must be reversed.

V. THE \$200 FILING FEE AND \$100 DNA FEE MUST BE STRICKEN BASED ON INDIGENCY.

In State v. Ramirez, the Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, 191 Wn.2d at 745-47.

HB 1783 "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 as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, 191 Wn.2d at 746; 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)."). 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.

HB 1783 also amends RCW 36.18.020(2)(h), which now 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. This 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. Ramirez, 191 Wn.2d at 749. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id.

Here, the record indicates Thornton is indigent under RCW 10.101.010(3). RP 272-73. Because HB 1783 applies prospectively to his case, the sentencing court similarly lacked authority to impose the \$200 filing fee.

The \$100 DNA fee also must be stricken. HB 1783 amends RCW 43.43.7541 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). HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, 191 Wn.2d at 745-47.

RCW 43.43.754(1)(a) requires collection of a biological sample for purposes of DNA identification analysis from every adult or juvenile convicted of a felony or certain other crimes. Thornton has previous felony convictions. CP 239. He would necessarily have had his DNA sample collected pursuant to RCW 43.43.754(1)(a). Because Thornton's DNA sample was previously collected, the DNA fee in the present case is not mandatory under RCW 43.43.754. The fee is discretionary. And, under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. The sentencing court lacked authority to impose the \$100 DNA fee.

For the reasons stated above, this Court should strike the \$200 filing fee and \$100 DNA fee.

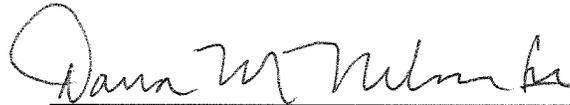
D. CONCLUSION

For reasons stated above, this Court should reverse appellant's convictions as identified in each section above and it should remand for correction of the LFO order.

DATED this 27th day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Dana M. Nelson".

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