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State of Washington  
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NO. 51886-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN MARK SHELLABARGER,

Appellant.

---

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

---

OPENING BRIEF OF APPELLANT

---

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## A. INTRODUCTION

Trooper Michael Farkas pulled Stephen Shellabarger over and issued him a ticket for changing lanes without signaling. After the traffic stop was over, Trooper Farkas continued to detain him without reasonable suspicion, calling in a fourth officer to conduct a canine sniff of his truck in the hopes of obtaining probable cause for a search warrant. When the canine sniff produced only a “weak alert,” the officers employed coercive tactics to get Mr. Shellabarger to consent to a search of his truck, to which he finally acquiesced. Trooper Farkas then exceeded the scope of this claimed consent to search the truck when he seized the bag that Mr. Shellabarger had removed from the truck and searched its contents without Mr. Shellabarger’s permission. Trooper Farkas found methamphetamine in a closed tin inside the paper bag.

This Court should reverse Mr. Shellabarger’s conviction because the evidence was seized without valid consent and as a result of his illegal detention. This Court should also reverse the imposition of discretionary and mandatory legal financial obligations because Mr. Shellabarger’s only source of limited income was from social security disability.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering finding of fact #1.6, absent substantial evidence in the record.<sup>1</sup>
2. The trial court erred in entering finding of fact #1.7, absent substantial evidence in the record.
3. The trial court erred in entering finding of fact #1.10, absent substantial evidence in the record.
4. The trial court erred in entering finding of fact #1.13, absent substantial evidence in the record.
5. The trial court erred in entering finding of fact #1.14, absent substantial evidence in the record.
6. The trial court erred in entering finding of fact #1.16, absent substantial evidence in the record.
7. The trial court erred in entering finding of fact #1.19, absent substantial evidence in the record.
8. The trial court erred in entering finding of fact #1.22, absent substantial evidence in the record.
9. The trial court erred in entering finding of fact #1.25, absent substantial evidence in the record.

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<sup>1</sup> The Court's Findings of Fact and Conclusions of Law on the CrR 3.6 hearing are attached as an appendix.

10. The trial court erred in concluding that Mr. Shellabarger provided voluntary consent to search his vehicle.

11. The trial court erred in concluding that the police officer's search of the paper bag that was removed from the truck was within the scope of Mr. Shellabarger's consent to search the truck.

12. The trial court erred in concluding that the search of the closed tin located within the paper bag that was removed from Mr. Shellabarger's truck was within the scope of consent to search the truck.

13. The trial court erred in concluding that the officers' prolonged detention of Mr. Shellabarger was lawful.

14. The trial court erred in imposing court fees on Mr. Shellabarger, whose only source of income is social security disability.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Warrantless searches are prohibited under both the Federal and State Constitutions unless one of the narrow exceptions to the warrant requirement applies. U.S. Const. amends. IV, XIV; Const. art. I, §7. Consent is one of the jealously guarded exceptions to the warrant requirement, which the State has the burden of proving was voluntarily given. Here, was Mr. Shellabarger's acquiescence to the officers' third request for consent to search his truck involuntary, where he was

surrounded by three officers, questioned, and told that officers would search inside his vehicle, with or without his consent?

2. Article I, section 7 and the Fourth Amendment limit the scope of consent to the specific areas for which consent was given. Did police exceed the scope of Mr. Shellabarger's consent to search his truck when they searched a bag and its contents that he had removed from the vehicle without obtaining his consent to search it?

3. Police may not detain a driver to conduct a canine sniff of his vehicle beyond the time needed to complete a traffic stop absent reasonable suspicion. U.S. Const. amend. IV; Const. art. I, §7. Here the officer prolonged Mr. Shellabarger's detention beyond the conclusion of the traffic stop based on Mr. Shellabarger having a prior drug conviction from an unknown date, an Altoids tin in the center console, his refusal to consent to a search, and Mr. Shellabarger's explanation of where he was driving from. Do these observations fail to establish reasonable suspicion required for the officer to extend Mr. Shellabarger's stop beyond the initial purpose of the traffic stop?

4. Courts are prohibited from imposing discretionary legal financial obligations, such as a court filing fee, on indigent persons like Mr. Shellabarger. Courts are also prohibited from imposing a DNA fee if a person's DNA has already been collected as a result of a prior felony

conviction. Did the trial court err by imposing these discretionary fees on Mr. Shellabarger? And did the court err by imposing a \$500 victim penalty assessment where Mr. Shellabarger's sole source of income is social security disability?

#### D. STATEMENT OF THE CASE

a. Trooper Farkas pulled Mr. Shellabarger over for poor driving and issued him a traffic ticket.

Stephen Shellabarger was driving south on Interstate 5 from Tacoma around 10:00 in the morning when Trooper Michael Farkas pulled his truck over for speeding and changing lanes without signaling. 4/9/18 RP 29-30. Mr. Shellabarger took several minutes to find his driver's license and registration because the inside of his truck was messy with various tools and garbage. 4/9/18 RP 18; FF #1.5. Mr. Shellabarger was the only person in the vehicle. 4/9/18 RP 17; FF #1.4.

Trooper Farkas took Mr. Shellabarger's license and registration back to his police vehicle and ran his name. 4/9/18 RP 18. A computer-aided dispatch (CAD) report indicated that Mr. Shellabarger had a previous controlled substance (VUCSA) violation, but Trooper Farkas claimed he did not look at the date of the conviction on the CAD report. 4/9/18 RP 19, 32; FF #1.8. This conviction was from 2001. 5/9/18 RP 86.

Trooper Farkas radioed Trooper Evan Clark, requesting back up. Trooper Farkas stated that Mr. Shellabarger has been “pretty cooperative,” but his driving was “crap.” Exhibit 1<sup>2</sup>; 10:08:20. He also noted that Mr. Shellabarger said he was coming from a friend’s house in Tacoma. Ex. 1; 10:08:17. At that time, Trooper Farkas noted “a couple little things that don’t look right,” like a mint tin in the center console, and Mr. Shellabarger’s VUCSA conviction. Ex. 1; 10:09:23.

Trooper Farkas told Trooper Clark that he was going to go back and “go for consent first.” Ex. 10:09:40. Depending on how that goes, he said he would pull Mr. Shellabarger out to do field sobriety tests. Ex. 1; 10:09:46. No matter what, Trooper Farkas said he was going to give Mr. Shellabarger a ticket for changing lanes without a signal. Ex. 1; 10:09:45.

Trooper Farkas had trouble with his printer and e-mailed the ticket to Trooper Zach Walsh to print. Ex. 1; 10:12:19. Trooper Farkas additionally noted that when he went back to Mr. Shellabarger’s truck, he was going to see if a “bunch of stuff was moved,” which would be a “good sign.” Ex. 1; 10:12:00.

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<sup>2</sup> Exhibit 1 refers to Trooper Farkas’s front dash cam video of the stop.

b. Trooper Farkas continued his contact with Mr. Shellabarger to try to obtain consent to search his truck and conduct field sobriety tests.

After sending the traffic ticket to print, Trooper Farkas returned to talk to Mr. Shellabarger, followed by Troopers Clark and Walsh. Ex. 1; 10:13:11; FF # 1.11. Trooper Farkas asked Mr. Shellabarger if he had weapons or anything in the car. Ex. 1; 10:14:02. Mr. Shellabarger said he only had a cedar bark pipe. Ex. 1; 10:14:45. Trooper Farkas asked if he could look inside the vehicle, informing Mr. Shellabarger that he could refuse, revoke, or restrict his consent at any time. Ex. 1; 10:14:59.

Mr. Shellabarger asked if he would be arrested if he said no, and Trooper Farkas said they would “talk about that in a minute.” Ex. 1; 10:15:14; FF #1.12. Trooper Farkas then told Mr. Shellabarger that he wanted him to do field sobriety tests, and had Mr. Shellabarger exit his truck. One of the other troopers peered inside Mr. Shellabarger’s truck with a flashlight while Trooper Farkas had Mr. Shellabarger do field sobriety testing. Ex. 1; 10:18:24-10:20:41.

Trooper Farkas has a 99% percent success rate when it comes to assessing DUI impairment and drug recognition evaluation. 4/9/18 RP 15. He determined that Mr. Shellabarger’s ability to operate a motor vehicle was not impaired. FF #1.13.

c. After Trooper Farkas failed to obtain consent to search and confirmed Mr. Shellabarger was not impaired, he continued to detain him for an officer to bring a drug sniffing dog.

After Trooper Farkas completed his DUI investigation and twice failed to obtain consent to search from Mr. Shellabarger, he radioed for Deputy Van Wyck to come and walk his drug sniffing dog around the truck in the hope of getting probable cause for a search warrant. Ex. 1: 10:26:20.

In Trooper Farkas's radio communication with Deputy Van Wyck, he said the basis for detaining Mr. Shellabarger for a canine sniff was Mr. Shellabarger's repeated refusal to grant consent to search the truck; his prior VUCSA conviction; his statement that he woke up at a rest area at 5 am and started driving; and his failure to provide more details about the friends he was visiting. Ex. 1; 10:26:20; CP 20; FF #1.10. Trooper Farkas told Deputy Van Wyck he was not going to arrest Mr. Shellabarger for DUI. Ex. 1; 10:27:29; 4/9/18 RP 33.

Trooper Farkas had Mr. Shellabarger stand back with him near his patrol car, where he administered a portable breathalyzer test, asked about previous DUIs, and discussed his traffic ticket until Deputy Van Wyck and his drug sniffing dog arrived about four minutes later. Ex. 1; 10:29:14-10:33:31.

When Deputy Van Wyck and his canine arrived, the discussion about the ticket was nearly complete. Ex. 1; 10:33:31. Trooper Farkas had Mr. Shellabarger stand back with him at his patrol car while Deputy Van Wyck circled the truck with his canine. While the canine circled Mr. Shellabarger's truck, Trooper Farkas talked to Mr. Shellabarger about various topics, including Mr. Shellabarger's limited social security income and the driftwood products he sells for a little bit of extra income. Ex. 1; 10:33:34.

After about four minutes, Deputy Van Wyck approached Mr. Shellabarger and asked him what he had inside his truck, insisting "there's something in there." Ex. 1; 10:38:09. Trooper Farkas asked Mr. Shellabarger if he had "an old pipe" or something like that. Ex. 1; 10:38:10. Mr. Shellabarger said he just had food. Ex. 1; 10:38:24.

Deputy Van Wyck and his canine then again returned to the driver side door where the dog jumped up onto the truck. Ex. 1; 10:38:40. Meanwhile Troopers Farkas and Clark started to question Mr. Shellabarger about his history of drug use. Ex. 1; 10:38:40. When Deputy Van Wyck returned to speak with Trooper Farkas, away from Mr. Shellabarger, he informed the trooper that the dog gave only a "weak alert." Ex. 1; 10:39:55. Deputy Van Wyck noted there was a McDonald's

bag in the truck, and the dog wanted to hop in there and get it. 4/9/18 RP 44; Ex. 1; 10:40:21.

Deputy Van Wyck stated that it would be a lot better if he could get inside the truck with the dog. Ex. 1; 10:40:34; 4/9/18 RP 44. The officers decided to try to get Mr. Shellabarger to consent to search a third time. Ex. 1; 10:40:09.

d. Mr. Shellabarger finally relented to the officers' third request to search his truck, but they searched the items Mr. Shellabarger removed from the truck without his consent.

Trooper Farkas, flanked by Troopers Clark and Walsh, told Mr. Shellabarger that “the dog thinks there is something in there.” Ex. 1; 10:41:16. He told Mr. Shellabarger, “any time we have a suspicion we want to follow through with it.” Ex. 1; 10:41:29. Mr. Shellabarger was again asked to give consent to search his truck, which he was told he could limit, revoke, or refuse at any time. 4/9/18 RP 38; Ex. 1; 10:41:42.

In response, Mr. Shellabarger asked “what’s going on?” 4/9/18 RP 46; Ex. 1; 10:41:55. He did not understand why they kept asking for consent to search. 4/9/18 RP 46; Ex. 1; 10:41:55. Another officer told him that at this stage, they would not walk away; they will either get consent or a search warrant, or search by some other means. Ex. 1; 10:42:16. Mr. Shellabarger finally acquiesced to the search of truck. Ex. 1; 10:42:52; 4/9/18 RP 47.

Deputy Van Wyck asked that the McDonalds bag be removed. Ex. 1; 10:46:01. Mr. Shellabarger retrieved the McDonalds bag from the truck, and an officer grabbed it from him, saying, “here I will carry your garbage.” Ex. 1; 10:46:21; FF# 1.25. While the dog entered Mr. Shellabarger’s truck to search, Trooper Farkas and another officer searched the bag without Mr. Shellabarger’s permission. Ex. 1; 10:46:52. Inside, they found a closed Altoids tin. Again, without asking Mr. Shellabarger for consent to search, Trooper Farkas opened the tin and found methamphetamine. Ex. 1; 10:46:52; 4/9/18 RP 29.

The officers immediately arrested Mr. Shellabarger for possession of a controlled substance. Ex. 1; 10:46:52. He was charged with one count of possession of methamphetamine. CP 3. The trial court denied Mr. Shellabarger’s CrR 3.6 motion to suppress, concluding that the length of the detention was justified, that Mr. Shellabarger provided valid consent to search the truck, and that this consent to search extended to the McDonalds bag that was removed from the truck. Conclusions of Law # 2.2, 2.3, 2.4.

e. The court imposed court costs even though Mr. Shellabarger’s only source of income is social security disability.

Mr. Shellabarger was convicted at a stipulated bench trial of possession of a controlled substance, reserving his right to appeal the trial

court's denial of his motion to suppress. CP 34, 37. He had no prior offense that qualified for scoring,<sup>3</sup> and the court sentenced him to serve 30 days in jail based on his offender score of "0." CP 38-40.

Mr. Shellabarger informed the court that he had very limited social security income and serious medical issues, including a recently broken hip that required surgery. 5/9/18 RP 87. Mr. Shellabarger asked to serve the recommended 30 days on electronic home monitoring rather than in jail, in part based on his doctor's letter stating a concern about Mr. Shellabarger's medication and medical issues. 5/9/18 RP 87. The Court declined his request because Mr. Shellabarger did not have qualifying employment, and ordered to him to serve 30 days in jail. 5/9/18 RP 90. The court also imposed a \$100 DNA fee without confirming whether Mr. Shellabarger had already submitted his DNA for testing, and imposed a \$200 criminal filing fee despite finding he had no ability to pay the costs, in addition to the "mandatory" \$500 crime victim assessment fee. CP 41-42.

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<sup>3</sup> The only evidence of Mr. Shellabarger's prior VUCSA offense was the prosecutor's statement that he had a washed out VUSCA offense from 2001. 5/9/18 RP 86.

## E. ARGUMENT

**1. Mr. Shellabarger did not provide voluntary consent to search his truck, and police exceeded the scope of any purported consent when they searched the closed tin inside the paper bag that Mr. Shellabarger removed from his truck prior to the canine search.**

a. Consent to search is a jealously guarded exception to the warrant requirement under the Fourth Amendment and article I, section 7.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution prohibit warrantless searches and seizures unless one of the narrow exceptions to the warrant requirement applies. *State v. Hendricks*, 4 Wn. App.2d 135, 140, 420 P.3d 726 (2018) (citing *State v. Ladson*, 138 Wn.2d 343, 348-350, 979 P.2d 833 (1999)); Const. amends. IV, XIV; Const. art. I, §7.

Consent to search is one of these “jealously and carefully drawn exceptions” to the warrant requirement. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (internal citations omitted).

The State bears a “heavy burden” to establish the exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). It must show the consent was “in fact, freely and voluntarily given.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed 2d 854 (1973). When, as here, the State seeks to rely on consent to justify the lawfulness of its warrantless

search it must establish (1) the consent was voluntary, (2) the person granting consent had authority to consent, and (3) the search did not exceed the scope of the consent. *Reichenbach*, 153 Wn.2d at 131(citing *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004)).

Here the State cannot meet the first and third requirements because Mr. Shellabarger's consent to search was not voluntary, and the officer's search of items that he took from Mr. Shellabarger, which were located outside of the vehicle, were outside the scope of any consent to search his truck.

A superior court's ruling upholding a warrantless search of a vehicle is reviewed de novo on appeal. *State v. Monaghan*, 165 Wn. App. 782, 789, 266 P.3d 222 (2012). There must be substantial evidence to support the trial court's findings of fact and these findings must support the court's conclusions of law. *Hendricks*, 4 Wn. App.2d. at 140. Here, the trial court's conclusions that Mr. Shellabarger gave valid consent, and that the scope of this consent included the bag that was removed from the truck prior to the search, are not supported by substantial evidence and are erroneous as a matter of law. Conclusions of Law #2.3. 2.4.

b. Mr. Shellabarger did not voluntarily consent to the search of his truck.

Whether a person gives voluntary consent is a question of fact that depends on the totality of the circumstances. *State v. Russell*, 180 Wn.2d 860, 871, 330 P.3d 151 (2014). Voluntariness is not determined by a single controlling criterion—it must be determined from a “careful scrutiny of the all the surrounding circumstances.” *Schneckloth*, 412 U.S. at 226.

Consent may not be coerced, either explicitly or implicitly, by “implied threat or covert force.” *Schneckloth*, 412 U.S. at 228. Consent obtained by “threats or force, or granted only in submission to a claim of lawful authority” is invalid. *State v. O’Neill*, 148 Wn.2d 564, 589, 62 P.3d 489 (2003) (citing *Schneckloth*, 412 U.S. at 233).

Here, Mr. Shellabarger did not provide voluntary consent to search his vehicle because of the coercive conduct of the police officers in trying to gain his consent to search, which included asking Mr. Shellabarger three times for consent to search, the third time while surrounded by three officers who detained and questioned him about drug use and told him they would not leave without searching his truck by one means or another.

*i. The threatening presence of three officers who detained and questioned Mr. Shellabarger about his drug history and the officers' repeated efforts to obtain consent made Mr. Shellabarger's consent involuntary.*

The repeated requests for “consent” while Mr. Shellabarger was detained and questioned by officers made his eventual consent involuntary.

In the context of a traffic stop, factors that generally indicate involuntary consent include the “threatening presence of several officers,” the “use of aggressive language or tone of voice indicating that compliance with an officer’s request is compulsory,” the “prolonged retention of a person’s personal effects” and an “officer’s failure to advise the defendant that she is free to leave.” *United States v. Ledesma*, 447 F.3d 1307, 1314 (10th Cir. 2006). An officer’s repeated requests for consent are another indicator that the consent was not voluntary, as is whether the person was physically restrained. *O’Neill*, 148 Wn.2d at 589- 591.

Trooper Farkas did not ask Mr. Shellabarger’s permission to have the canine dog come and sniff his truck. Ex. 1; 10:29:14. Mr. Shellabarger was not free to leave when the canine and Deputy Van Wyck arrived; to the contrary, he was physically commanded to stand back with Trooper Farkas while the dog sniffed so that he would not be attacked by the dog.

Ex. 1; 10:29:14-10:37:51. *O'Neill*, 148 Wn.2d at 589 (restraint is factor to consider in determining if consent was voluntary).

Mr. Shellabarger was extensively questioned about his drug use and whether he had drugs in the truck. After circling Mr. Shellabarger's truck with his canine, Deputy Van Wyck approached Mr. Shellabarger and asked him what was in his truck and insisted, "there's something in there." Ex. 1; 10:38:09. Trooper Farkas asked Mr. Shellabarger if he had "an old pipe" or something like that. Ex. 1; 10:38:10. Mr. Shellabarger said he just had food. Ex. 1; 10:38:24.

Deputy Van Wyck and his canine then again returned to the driver side door where the dog was jumping up and around the truck. Ex. 1; 10:38:37. Meanwhile Trooper Farkas started to question Mr. Shellabarger about his history of drug use, including the last time he used and whether his "friends used." Ex. 1; 10:38:43. Trooper Clark then approached Mr. Shellabarger and asked him about his "drug of choice," and his felony drug charges from 10-15 years ago. Ex. 1; 10:39:02.

Deputy Van Wyck and his canine then again returned to the driver side door where the dog continued to jump up onto the truck. Ex. 1; 10:38:40. When Deputy Van Wyck returned to speak with Trooper Farkas, away from Mr. Shellabarger, he informed the trooper that his dog gave only a "weak alert." Ex. 1; 10:39:55. Deputy Van Wyck noted there was a

McDonald's bag in the truck, and the dog wanted to hop in there and get it. 4/9/18 RP 44; Ex. 1; 10:40:27. This "weak alert" prompted the officers to again try to obtain consent to search Mr. Shellabarger's truck. Deputy Van Wyck specifically said he would join Trooper Farkas in trying to obtain consent a third time. Ex. 1; 10:40:13.

The traffic stop started with one officer but turned into four officers and a canine by the time Mr. Shellabarger was asked to consent to a search for the third time. The third time they tried to get his consent to search, three officers stood in front of Mr. Shellabarger, who had been restrained from returning to his vehicle, and questioned him about drug use. Ex. 1; 10:38:12. This aggressive questioning, restraint of Mr. Shellabarger's liberty and repeated, escalating request for consent was coercive. *See O'Neill*, 148 Wn.2d at 591; *Ledesma*, 447 F.3d at 1314.

*ii. The officers' claim of lawful authority further invalidated Mr. Shellabarger's consent to search the vehicle.*

The officers' claim that they would search Mr. Shellabarger's truck, without or without his consent, was a claim of lawful authority that further invalidated any consent obtained as a result.

In *O'Neill*, when the driver refused the officer's request for consent, telling him he needed a warrant to search, the officer responded that he did not need a warrant, and that he could simply search O'Neill

incident to arrest. *O'Neill*, 148 Wn.2d at 589. But the officer did not arrest O'Neill, who continued to refuse consent to search. *Id.* Only after the officer "repeatedly pressed the issue did O'Neill relent and give consent." *Id.* The court noted that the officer's conduct reflected that he had no intention of searching incident to arrest, and had he done so would not have needed O'Neill's consent to search. *Id.* The court determined that the officer's claim that he could search with or without O'Neill's consent was used "to pressure O'Neill to consent, i.e., to give in because it was futile not to." *Id.* at 591. The fact that the officer repeated this statement rendered this claim of lawful authority even more coercive. *Id.* at 591.

Like in *O'Neill*, here, the officers claimed authority to search Mr. Shellabarger's truck regardless of whether he consented. After circling the truck and getting only a weak canine alert, three officers surrounded Mr. Shellabarger to try to obtain consent. Ex. 1; 10:41:11. Mr. Shellabarger was told that "the dog thinks there is something in there." Ex. 1; 10:41:17. Trooper Farkas informed Mr. Shellabarger that when they have a suspicion, they want to follow through on it. Ex. 1; 10:41:30. A second officer told Mr. Shellabarger that they had passed "phase one," which was bringing the dog to his vehicle. Ex. 1; 10:41:23. He told Mr. Shellabarger they were now at "phase two," where the "dog smelled something." *Id.* The officer said at this point, they are not "going to turn around and walk

away.” *Id.* He told Mr. Shellabarger they had to find out what was inside the truck. *Id.* The officer told Mr. Shellabarger that there were “a number of different ways” they could do that, including getting his consent or a search warrant. *Id.*; CP 22. But Mr. Shellabarger was told the officers would not at this point turn away. *Id.* The officers’ claim of authority told Mr. Shellabarger that he had no real choice, which is reflected in Mr. Shellabarger’s acquiescence, where he said, “well go ahead and search then, I knew this was coming anyway.” Ex. 1; 10:42:42; CP 22.

“‘Consent’ that is the product of official intimidation or harassment is not consent at all.” *Florida. v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388, 115 L. Ed. 2d 389 (1991). Here, the officers’ repeated threats to search regardless of whether he consented to the search informed Mr. Shellabarger that it was futile to refuse consent, rendering his eventual “consent” involuntary. *O’Neill*, 148 Wn.2d at 591.

c. Mr. Shellabarger did not give consent to search the bag or its contents that he removed from his truck.

Even if the consent to search the truck was voluntary, Trooper Farkas’s search of the bag and the tin located within the bag that Mr. Shellabarger removed from his truck exceeded the scope of any consent Mr. Shellabarger gave to search the truck, which provides an independent basis for reversal.

*i. Consent to search is limited to the area to which consent was given.*

When law enforcement officers rely on consent as a basis to conduct a warrantless search, they have only the authority that has been granted to them by the consent. *State v. Cotten*, 75 Wn. App. 669, 679, 879 P.2d 971 (1994) (citing 3 Wayne R. LaFare, *Search and Seizure* § 8.1(c), at 160 (2d ed. 1987)). “A consensual search may go no further than the limits for which the consent was given.” *Reichenbach*, 153 Wn.2d at 133. “The scope of a search is generally defined by its expressed object.” *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991) (citing *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L.Ed.2d 572 (1982)). The scope of consent may be expressly or impliedly limited in “duration, area, or intensity.” *State v. Davis*, 86 Wn. App. 414, 423, 937 P.2d 1110 (1997) (citing *Cotten*, 75 Wn. App. at 679) (internal citations omitted).

The standard for measuring the scope of a person’s consent under the Fourth Amendment is that of “objective” reasonableness—“what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *Jimeno*, 500 U.S. at 251.

However, unlike the Fourth Amendment and its reasonableness determination, the protections of article I, section 7 are not “confined to

the subjective privacy expectations of modern citizens.” *Monaghan*, 165 Wn. App. at 788. Instead, article I, § 7, protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *Id.* A warrantless search may not exceed the scope of consent given. *Id.*

*ii. Mr. Shellabarger removed the bag from the truck and did not consent to a search of its contents.*

In *Jimeno*, the Court determined it was objectively reasonable for police to interpret general consent to search the vehicle to include containers *within* the car that might contain drugs. *Jimeno*, 500 U.S. at 251 (emphasis added). Here, police interpreted that Mr. Shellabarger provided consent to search his truck. But Mr. Shellabarger removed the bag from his truck, which excluded the items in the bag from the consent to search the truck itself. 4/9/18 RP 27.

In *Monaghan*, the officer exceeded the scope of the person’s consent to search a car when the officer also searched a locked container in the automobile trunk without specifically requesting permission to search the locked container. *Monaghan*, 165 Wn. App. at 791, 794. Likewise, here, Trooper Farkas exceeded the scope of any consent Mr. Shellabarger gave to search his truck when Officer Farkas said, “let’s grab the McDonald’s bag real quick. That way, if the dog comes back, and he

doesn't notice anything, we'll know it was just the McDonald's." Ex. 1; 10:46:09. Trooper Farkas admitted during the CrR 3.6 hearing that based on his training and experience, "we don't remove anything after consent's been given, but [Deputy Van Wyck] made that determination." 4/9/18 RP 51.

Mr. Shellabarger's privacy right under article I, section 7 included the contents of his truck, including the bag he removed from it. *O'Neill*, 146 Wn.2d at 584; *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990) (even the garbage people place in trash cans is protected from warrantless governmental intrusion). Mr. Shellabarger retrieved the McDonald's bag from the truck and was holding it when an officer grabbed it from him saying, "here I will carry your garbage." Ex. 1; 10:46:21; FF# 1.25. The officers did not obtain consent from Mr. Shellabarger to take the bag and separately search it, and most certainly did not obtain consent to search the Altoids tin inside it. Ex. 1; 10:46:21.

The exchange between Trooper Farkas and Mr. Shellabarger further supports the conclusion that Mr. Shellabarger did not consent to the search of items he removed from the vehicle, where Trooper Farkas told Mr. Shellabarger that he could limit any part of the search. Ex. 1; 10:41:02. This is precisely what Mr. Shellabarger did when he removed his private affairs from the truck prior to the search. *O'Neill*, 146 Wn.2d at

584; *Boland*, 115 Wn.2d at 578. It is objectively unreasonable to think that Mr. Shellabarger consented to a search of items located outside of the vehicle. *Jimeno*, 500 U.S. at 251.

The trial court found that the scope of Mr. Shellabarger's consent encompassed the McDonald's bag outside the vehicle because "the bag was not a locked container," and "was a continuation of the search of the vehicle that Shellabarger had consented to." Conclusions of Law #2.3, 2.4. The trial court made no specific written finding as to the Altoids container located within the McDonald's bag that the Trooper searched without obtaining consent. CP 30-31.

The officer's search of the bag that Mr. Shellabarger removed from the area of consent specifically fails under article I, section 7, which is not grounded in notions of reasonableness, but rather "prohibits any disturbance of an individual's private affairs without authority of law." *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). This must include Mr. Shellabarger's McDonald's bag and its contents that he removed from the truck.

The trial court's expansive interpretation of consent is contrary to the state and federal law that explicitly limits a consensual search to "no further than the limits for which the consent was given." *Reichenbach*, 153 Wn.2d at 133. And its broad reading of consent is contrary to the rule that

exceptions to the warrant requirement must be “carefully drawn and narrowly applied.” *Snapp*, 174 Wn.2d at 194.

d. The remedy is reversal and suppression of the evidence.

When the legal basis for the search is consent, but the consent is involuntary, the evidence seized is inadmissible. *O’Neill*, 148 Wn.2d at 588. The officers’ false claim of lawful authority to search, the increased officer presence, physical restraint of Mr. Shellabarger, and the officers’ incriminatory questions were a form of coercion that vitiated the voluntariness of the consent to search that the officers eventually extracted from Mr. Shellabarger. *Id.* at 591. Because Mr. Shellabarger’s consent was involuntary, and police claimed authority to search based on this this involuntary consent, reversal and remand for suppression of the evidence seized is required. *Id.* at 593.

And because the State cannot establish that the scope of Mr. Shellabarger’s consent extended to a bag and its contents that were removed from the truck, seized by the officer, and searched without his consent, the State cannot establish the legality of this warrantless seizure. This provides an additional basis for suppression of the evidence seized without a warrant. *Id.*

**2. The officers detained Mr. Shellabarger beyond the permissible scope of the traffic stop without reasonable suspicion, requiring suppression of the evidence seized under the Fourth Amendment and article I, section 7.**

Mr. Shellabarger was detained well beyond the purpose of the traffic stop without reasonable suspicion, providing an independent ground for suppression of evidence seized pursuant to this illegal detention.

a. Trooper Farkas detained Mr. Shellabarger beyond the scope of the traffic stop in order to conduct a canine sniff.

Article I, section 7 and the Fourth Amendment prohibit police from detaining a person beyond the time needed to complete the traffic stop absent reasonable suspicion justifying the prolonged detention. *Rodriguez v. United States*, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015); *State v. Allen*, 138 Wn. App. 463, 470, 157 P.3d 893 (2007) (citing *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999)); U.S. Const. amend. IV; Const. art. I, § 7.

In determining whether police exceed the scope of the traffic stop, the critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff “‘prolongs’— i.e., adds time to—‘the stop.’” *Rodriguez*, 135 S. Ct. at 1616. Calling a canine unit to sniff around the car is not “an ordinary incident of a traffic

stop;” it is “a measure aimed at detecting evidence of ordinary criminal wrongdoing.” *Id.* at 1615 (internal citations omitted).

In *Rodriguez*, the purpose of the traffic stop was over when the officer asked for permission to walk his dog around Rodriguez’s vehicle. *Rodriguez*, 135 S. Ct. at 1613. The officer then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. *Id.* Rodriguez complied, and an officer arrived soon after with a K-9 dog, which alerted to the presence of drugs. *Id.* This additional time from when the written traffic warning had been issued to when the canine alerted to the presence of drugs was seven or eight minutes. *Id.* The *Rodriguez* court held that where police lacked reasonable suspicion of wrongdoing, the prolonged detention was unlawful. *Id.* at 1612.

Mr. Shellabarger’s detention beyond the traffic stop is nearly identical to *Rodriguez*, except his detention was more prolonged. In the CrR 3.6 hearing, Trooper Farkas said that he called the canine unit before having Mr. Shellabarger do field sobriety testing, but the video of the incident reveals that he did not call for the unit until after he had completed the field sobriety testing. 4/9/18 RP 21-22, 37; Ex. 1; 10: 26:20.

Trooper Farkas called for the canine to come sniff around Mr. Shellabarger’s truck about 26 minutes into the stop. At the end of

discussing the ticket with Mr. Shellabarger, about eight minutes later, Deputy Van Wyck arrived with his drug sniffing dog. FF #1.17; Ex. 1; 10:33:34. The purpose of the traffic stop was complete by the time the canine arrived. 4/9/18 RP 42. The total duration of Mr. Shellabarger's prolonged detention was a minimum of about eleven minutes, which is beyond the seven to eight minutes that was deemed too long in *Rodriguez*. *Rodriguez*, 135 S. Ct. at 1612.

There is thus no question that Mr. Shellabarger's detention was prolonged beyond the purpose of the traffic stop for the sole purpose of conducting a dog sniff for drugs; the only question is whether the officers possessed reasonable suspicion to justify this prolonged detention.

*Rodriguez*, 135 S. Ct. at 1612.

b. Trooper Farkas lacked reasonable suspicion to detain Mr. Shellabarger to conduct the canine sniff.

The reasons Trooper Farkas cited for calling Deputy Van Wyck and his canine to conduct a sniff around Mr. Shellabarger's truck did not amount to reasonable suspicion justifying the prolonged detention.

A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." *State v. Lee*, 147 Wn. App. 912, 916, 199 P.3d 445 (2008) (citing *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

A suspicion is only “reasonable” if the State can “point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.” *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). The suspicion must be individualized to the person stopped. *State v. Weyand*, 188 Wn.2d 804, 812, 399 P.3d 530 (2017). This means that the officer must be able to articulate specific facts from which it could be reasonably suspected the person was engaged in criminal activity. *State v. Henry*, 80 Wn. App. 544, 550, 910 P.2d 1290 (1995). An officer’s “inchoate and unparticularized suspicion or ‘hunch’” is insufficient to give rise to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed.2d 1 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)).

A court evaluates the totality of the circumstances to determine whether a reasonable suspicion of criminal activity existed, “examining each fact identified by the officer as contributing to that suspicion.” *Weyand*, 188 Wn.2d at 812 (citing *State v. Fuentes*, 183 Wn.2d 149, 159, 352 P.3d 152 (2015)).

When Trooper Farkas detained Mr. Shellabarger for the canine unit to come sniff around his truck, the only suspicions he articulated to Deputy Van Wyck to justify this prolonged detention were that Mr.

Shellabarger twice denied him consent to search the truck, he had a prior VUCSA conviction, his explanation that he was visiting friends, with no other details, other than that he woke up at a rest stop and started driving early that morning. Ex. 1; 10:26:20; FF #1.10; 4/9/18 RP 37-38, 62.

*i. A previous VUCSA conviction from an unknown date does not provide reasonable suspicion that a crime is currently being committed.*

The general fact that Mr. Shellabarger had a prior drug conviction did not provide a basis for reasonable suspicion; if it did then that would mean that, “any person with any sort of criminal record... could be subjected to a *Terry*-type investigative stop by a law enforcement officer at any time without the need for any other justification at all.” *United States v. Sandoval*, 29 F.3d 537, 543 (10th Cir. 1994); *see also State v. Neth*, 165 Wn.2d 177, 185-86, 196 P.3d 658 (2008) (If a prior conviction alone provided probable cause to search, then “anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches”). Because Trooper Farkas did not investigate whether this was a recent offense, this offense did not give him reasonable suspicion that a crime had occurred or was about to occur. *Weyand*, 188 Wn.2d at 812; *Lee*, 147 Wn. App. at 916.

The date of a person’s prior conviction comes up on the CAD report that Trooper Farkas viewed. 4/9/18 RP 32. But he testified that he

did not look at this available information at the time of the traffic stop. 4/9/18 RP 32. Mr. Shellabarger was over fifty five years old at the time of the stop, and this was a 2001 conviction that had washed out for purposes of sentencing. 5/9/18 RP 86; CP 37. Without establishing the date or nature of the prior offense at the time of the stop, Trooper Farkas's general knowledge of a prior drug conviction was not individualized enough to establish reasonable suspicion. *Weyand*, 188 Wn.2d at 812; *Armenta*, 134 Wn.2d at 14.

*ii. Mr. Shellabarger's previous refusal to consent to a search cannot form the basis for reasonable suspicion.*

Courts firmly reject the proposition that police can prolong a traffic stop based on the detainee's refusal to consent to a search. *United States v. Boyce*, 351 F.3d 1102, 1110 (11th Cir. 2003); *see also Thomas v. Dillard*, 818 F.3d 864, 884 (9th Cir. 2016), *as amended* (May 5, 2016) (an individual's steadfast refusal to consent to a search absent other specific facts cannot be claimed as a basis for reasonable suspicion). This is because if "refusal of consent were a basis for reasonable suspicion, nothing would be left of Fourth Amendment protections." *United States v. Santos*, 403 F.3d 1120, 1126 (10th Cir. 2005). This Court must reject this as a basis for the officer's continued detention of Mr. Shellabarger.

*ii. An Altoids tin in his center console, absent any other suspicious characteristic, does not provide a basis for reasonable suspicion.*

Nor does an Altoids tin, without other suspicions signs, support reasonable suspicion. As Trooper Farkas admitted, such tins can be used for purposes other than holding narcotics. 4/9/18 RP 34. Indeed, Altoids tins are widely recognized to have myriad legal uses,<sup>4</sup> including holding Altoids. *See Neth*, 165 Wn.2d at 185 (“Innocuous objects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search.”).

Because Trooper Farkas could not articulate any specifically suspicious characteristics about this Altoids tin, it should not be factored into a reasonable suspicion analysis. *C.f. United States v. Van Leeuwen*, 397 U.S. 249, 252, 90 S. Ct. 1029, 1032, 25 L. Ed. 2d 282 (1970) (seizure of package justified based on “the nature and weight of the packages, the fictitious return address, and the British Columbia license plates of respondent who made the mailings in this border town”); *see also Prewitt v. Com.*, 341 S.W.3d 604, 609 (Ky. Ct. App. 2011) (the court cites to

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<sup>4</sup> Green Eco Services, “Top 50 Ways to Reuse Altoids Tins” (October 2011) <http://www.greenecoservices.com/top-50-ways-to-reuse-altoids-tins> (last accessed 11/14/18).

Postal Service's "drug package profile test" for analysis of whether reasonable suspicion authorized seizure of package for canine sniff).

*iv. Resting at a rest stop and coming from Tacoma do not provide an articulable basis that support reasonable suspicion.*

Trooper Farkas earlier noted to Trooper Clark that Mr. Shellabarger's "story" was he was coming from Tacoma. Ex. 1; 10:09:10. Trooper Farkas also learned that Mr. Shellabarger was visiting friends and started driving that morning after waking up at the rest stop. Ex. 1; 10:26:23. Absent articulation for why these facts are suspicious, this flies in the face of the general rule that "travel to and from a source city," is an "innocent behavior trait." *United States v. Saperstein*, 723 F.2d 1221, 1228 (6th Cir. 1983); *see also United States v. Urrieta*, 520 F.3d 569, 576 (6th Cir. 2008) (travel between population centers is a relatively weak indicator of illegal activity because there is almost no city in the country that could not be "characterized as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center."). Nor was there a conflicting account of events to arouse the officer's suspicion. *See Fuentes*, 183 Wn.2d at 159 (no conflict in driver's and passenger's stories to support reasonable suspicion).

The officer articulated nothing particularly suspicious about Tacoma or resting at a rest stop that would create reasonable suspicion to detain Mr. Shellabarger. *See e.g. Fuentes*, 183 Wn.2d at 161 (not even the fact that driver was visiting the apartment of a suspected drug dealer late at night in a high-crime area, without more, justified a *Terry* stop).

*v. Additional suspicions not articulated at the time and which were dispelled by the time Trooper Farkas called for the canine to come sniff Mr. Shellabarger's truck cannot be a basis for the prolonged detention.*

Though the trial court did not make an explicit finding of whether Trooper Farkas possessed a reasonable suspicion sufficient to detain Mr. Shellabarger after the conclusion of the traffic stop, the court did make findings regarding Trooper Farkas's suspicions justifying the detention for field sobriety testing early in the stop when he called Trooper Clark for back up. FF #1.7, 1.10; 4/9/18 RP 72. At this time, the basis for Trooper Farkas's suspicion of Mr. Shellabarger was a prior VUCSA conviction, movements in the vehicle, "tins," and "fast driving." FF #1.10.

Trooper Farkas also claimed at the CrR 3.6 hearing that he initially believed that Mr. Shellabarger showed signs of stimulant use, including "bloodshot watery eyes and fast speech, rapid speech, very quick body movements," and claimed that he could tell that Mr. Shellabarger had consumed a "foreign substance." 4/9/18 RP 18, 22. But this was not an

articulable suspicion by the end of the traffic stop when he called for the canine unit. Contrary to Trooper Farkas's later testimony during the CrR 3.6 hearing, he specifically informed Deputy Van Wyck at the time that Mr. Shellabarger was not too impaired to drive, and though he had poor balance, his "eyes aren't really dilating;" "he's just a big dude." Ex. 1; 10:27:29; 4/9/18 RP 39. Thus it cannot be argued that the court's finding of fact that Trooper Farkas perceived recent drug use contributed to a claim of reasonable suspicion justifying Trooper Farkas's prolonged detention of Mr. Shellabarger after the traffic stop. FF #1.7. After Trooper Farkas's DUI investigation was complete he expressly stated that Mr. Shellabarger did not show symptoms of intoxication when he requested the canine unit. FF #1.7; Ex. 1; 10:27:29.

Trooper Farkas also cited to a number of different observations during the CrR 3.6 hearing that he did not make at the time of the stop when communicating over his radio with other officers requesting back up. For instance, at the CrR 3.6 hearing, Trooper Farkas said he saw a metal pipe and several tin containers in Mr. Shellabarger's truck that in his training and experience he believed could contain "objects" such as drug paraphernalia. 4/9/18 RP 19. He claimed to have smelled marijuana and that he saw "dab" containers, used to hold marijuana, in the truck. 4/9/18 RP 20.

But in his radio dispatch requesting additional officers, Trooper Farkas reported only one metal thing and a tin next to it in Mr. Shellabarger's center console. Ex. 1; 10:09:23. And the trooper did not mention the additional items he later claimed to have seen in either his police report, or in his lengthy radio conversations with the other officers at any time during the stop. 4/9/18 RP 41. The video from the traffic stop reveals that when Trooper Farkas called for a canine unit, he did not mention the smell of marijuana or other marijuana related containers—only the VUCSA conviction and the tin container, as noted in the court's finding of fact. FF #1.10; Ex. 1; 10:27:27.

Trooper Farkas stated during the CrR 3.6 hearing that Mr. Shellabarger was making “furtive movements” that caused him safety concerns, which the court adopted as a finding of fact. 4/9/18 RP 17; FF #1.10. This finding cannot be a basis for reasonable suspicion of drug activity warranting Mr. Shellabarger's prolonged detention. At the CrR 3.6 hearing, Officer Farkas admitted that “furtive movements” can be used to describe any movement, including a person reaching into their glove box to look for their vehicle registration. 4/9/18 RP 30. This is why, when courts examine whether an officer had an objectively reasonable belief that he was in danger based on furtive movement, the most significant factor is that “the searches in those cases were conducted at the first

opportunity after the officer observed the furtive movement.” *State v. Glossbrener*, 146 Wn.2d 670, 683, 49 P.3d 128, 134 (2002).

In Trooper Farkas’s radio communications, he described Mr. Shellabarger as “cooperative,” and the movements in the truck were limited to his suspicion of drug possession, not officer safety. Ex. 1; 10:08:20. Trooper Farkas ordered Mr. Shellabarger out of his truck and asked if he had any weapons, but did not pat him down. Ex. 1; 10:13:21.

Thus insofar as the court cited to the safety concerns or suspicion about drug consumption, these perceptions were entirely dissipated by the time Trooper Farkas detained Mr. Shellabarger for a canine sniff, and cannot be cited as an articulable basis for reasonable suspicion justifying Trooper Farkas’s prolonged detention.

c. All fruits obtained as a result of this illegal detention must be suppressed.

A prior VUCSA conviction from an unknown date, a metal Altoids tin in a center console, and an unarticulated suspicion about a driver’s point of origin, when considered under the totality of the circumstances, cannot provide reasonable suspicion to detain a driver beyond completion of a traffic stop. The officers’ detention of Mr. Shellabarger extended well beyond the scope of the initial traffic stop without reasonable suspicion,

requiring suppression of the fruits seized as a result of this illegal detention. *Rodriguez*, 135 S. Ct. at 1616; *Weyand*, 188 Wn.2d at 817.

**3. Because Mr. Shellabarger's only source of income is social security disability, this Court should strike the discretionary and mandatory fees.**

Mr. Shellabarger's sole income is \$740 a month in social security disability, which he supplements with his hobby of wood working. 5/9/18 RP 88-89. The trial court recognized that Mr. Shellabarger's limited income made him indigent. 5/9/18 RP 90; CP 59. The trial court nevertheless imposed a \$500 victim assessment fee and a \$200 court filing fee. CP 41. The court also imposed a \$100 DNA fee knowing that he had a previous felony that had washed out. CP 38, 42.

a. *State v. Ramirez* prospectively applied the Legislature's 2018 amendments to pending cases on appeal, thus prohibiting the imposition of the DNA and criminal filing fee.

The legislature recently changed the law as to legal financial obligations. Under *State v. Ramirez*, these changes apply to cases on appeal. Applying the law in effect, this Court should strike the \$200 filing fee and \$100 DNA fee imposed on Mr. Shellabarger.

The 2018 changes to the law on legal financial obligations now make it categorically impermissible to impose any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). This includes the previously mandatory \$200 filing fee. LAWS OF 2018, ch. 269, §

17(2)(h). It is also improper to impose the \$100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction.

LAWS OF 2018, ch. 269, § 18.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 426 P.3d 714, 722 (2018). In other words, the statute applies to cases pending on appeal even though the statute was not in effect at time of the trial court's decision to impose legal financial obligations. *Id.* Applying the change in the law, *Ramirez* ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.* The same must be true in Mr. Shellabarger's case, where the court found him to be indigent, but imposed a \$200 filing fee. CP 41. The trial court also imposed a \$100 DNA fee without confirming that this was already collected through the 2001 felony drug offense that had washed out. CP 42; 5/9/18 RP 86.

*Ramirez's* prospective application of these legislative changes applies to Mr. Shellabarger's pending appeal, requiring that the \$100 DNA fee and \$200 court filing fee be stricken from his judgment and sentence.

b. This Court should strike the imposition of mandatory financial legal obligations because Mr. Shellabarger’s sole source of income is social security, or in the alternative, stay decision of this issue pending the Supreme Court’s decision in *State v. Catling*.

The Social Security Act provides benefits for those whose disability is so severe that they are unable to “engage in any other kind of substantial gainful work which exists in the national economy.” *Cleveland v. Policy Management Systems Corp.*, 565 U.S. 795, 797, 119 S.Ct. 1597, 143 L. Ed. 2d 966 (1999); 42 U.S.C. § 1382. Mr. Shellabarger’s sole source of income was social security disability, a meager income that he received because he was unable to work due to disability. 5/9/18 RP 88-89.

*i. The anti-attachment provision of the Social Security Act prohibits the State from using “legal process” to take a person’s limited social security income.*

Congress enacted the anti-attachment provision of the Social Security Act to protect a person’s limited social security income from creditors. *Mason v. Sybinski*, 280 F.3d 788, 793 (7th Cir. 2002). The Act thus prohibits the “execution, levy, attachment, garnishment, or other legal process” of a person’s social security disability payments. 42 U.S.C. § 407(a). “Legal process” typically involves, “the exercise of some sort of judicial or quasi-judicial authority to gain control over another's property” and includes court orders. *Washington State Dep’t of Soc. & Health Servs.*

*v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385-386, 372, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003). This applies to states seeking to recoup money from a person’s social security funds. See *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973).

*ii. Courts cannot order social security disability recipients to pay discretionary legal financial obligations when SSDI is the person’s sole source of income; the same should be true for mandatory legal financial obligations.*

In *City of Richland v. Wakefield*, the Washington State Supreme Court prohibited courts from imposing discretionary legal financial obligations on a person like Mr. Shellabarger, whose sole source of income is social security disability benefits (SSDI). *City of Richland v. Wakefield* , 186 Wn.2d 596, 609, 380, P.3d 459 (2016). This is because a court’s order requiring payment of legal financial obligations met the definition of “other legal process” and was thus prohibited under the anti-attachment provision of 42 U.S.C. § 407(a) where this was the person’s sole source of income. *Wakefield*, 186 Wn.2d at 609. The same legal principle must apply where, as here, the Court imposes “mandatory” legal financial obligations on a person whose sole source of limited income is SSDI, as in Mr. Shellabarger’s case.

The Supreme Court accepted review to decide whether *Wakefield* should also prohibit a court order requiring the payment of mandatory

legal financial obligations where the person's sole source of income is SSDI. *State v. Catling*, No. 95794-I. Mr. Shellabarger asks this Court to either strike the mandatory fees or stay decision on this issue pending the Supreme Court's decision in *Catling*.

#### F. CONCLUSION

Police engaged in coercive tactics that invalidated the consent that officers relied on to search Mr. Shellabarger's truck. Officers far exceeded the scope of any consent Mr. Shellabarger might have given to search his truck when they grabbed the bag that Mr. Shellabarger had removed from his truck, and without asking Mr. Shellabarger for consent, searched its contents, including a closed Altoids tin located inside the bag.

Officers further violated Mr. Shellabarger's right to be free from illegal search and seizure by detaining him without reasonable suspicion for a canine unit to investigate after the traffic stop was over. These violations of his constitutional rights under the Fourth Amendment and article I, section 7 require suppression of the evidence seized as a result of this illegal police activity. Should this Court not reverse, Mr. Shellabarger's fines and fees should be stricken from his judgment and sentence.

DATED this 14th day of November 2018.

Respectfully submitted,

/s Kate Benward  
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# APPENDIX



FILED  
Lewis County Superior Court  
Clerk's Office

APR 25 2018

Scott Tinney, Clerk

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

IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

STEPHEN MARK SHELLABARGER,

Defendant.

No. 17-1-00628-21

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER FROM CRR 3.6  
MOTION TO SUPPRESS EVIDENCE.

On April 9, 2018, a motion to suppress evidence, made pursuant to CrR 3.6, was held in this Court before the Honorable James Lawler. In his motion to suppress evidence, the Defendant challenged the voluntariness of his consent to search his vehicle, Trooper Farkas exceeding the scope of that consent by looking into a bag that was removed from the Defendant's vehicle, the expansion of the stop beyond the initial purpose of the stop, and the length of the stop. The Defendant was present with his attorney of record, Jacob Clark. The State was represented by Deputy Prosecuting Attorney Paul Masiello. The Court considered the testimony of Trooper Michael Farkas as well as dashcam videos from Trooper Michael Farkas and Trooper Evan Clark's patrol vehicle. The Defendant did not testify at the hearing. The Court made the following findings of fact, conclusions of law, and order:

**FINDINGS OF FACT**

- 1.1 On September 28, 2017, Trooper Michael Farkas was working as a Trooper for the Washington State Patrol. Trooper Farkas has extensive training as a law enforcement officer, a Drug Recognition Expert (DRE), and has the ability to detect impaired drivers.

- 1 1.2 On that day, Trooper Farkas observed a vehicle travelling above the posted  
2 speed limit and change lanes without signaling while he was on patrol in Lewis  
3 County.
- 4 1.3 Based on the observed driving, Trooper Farkas conducted a traffic stop on that  
5 vehicle.
- 6 1.4 Trooper Farkas identified the driver and sole occupant of the vehicle as Stephen  
7 Shellabarger.
- 8 1.5 It took several minutes for Shellabarger to be able to produce his license,  
9 registration, and proof of insurance, specifically his vehicle registration.
- 10 1.6 The inside of Shellabarger's vehicle was disorderly, but Trooper Farkas did note  
11 that there were several Altoids tins inside the vehicle that he knew were  
12 commonly used to store drug paraphernalia. There were also dab containers  
13 inside the vehicle that are commonly used to store marijuana as well as also an  
14 odor of marijuana coming from the vehicle. There was also a metal pipe (non-  
15 drug related) inside the vehicle.
- 16 1.7 While having contact with Shellabarger, Trooper Farkas noted that  
17 Shellabarger's movements and speech were fast, and his eyes were bloodshot  
18 and watery, leading Trooper Farkas to believe that Shellabarger may have  
19 recently used stimulants.
- 20 1.8 After obtaining Shellabarger's license and registration, Trooper Farkas went back  
21 to his patrol vehicle to run a check on him, which revealed a prior conviction for  
22 possessing a controlled substance.
- 23 1.9 While in his patrol vehicle, Trooper Farkas observed Shellabarger moving around  
24 a lot inside the vehicle.
- 25 1.10 Trooper Farkas called Trooper Clark to come help him with the stop. Trooper  
26 Farkas believed Shellbarger may have controlled substances in the vehicle  
27 based on his history, the movements in the vehicle, the tins in the vehicle and the  
28 fast driving. *THE MOVEMENTS IN THE VEHICLE CAUSED TROOPER FARKAS SAFETY CONCERNS* JFC JLE
- 29 1.11 After additional units arrived (Trooper Evan Clark, Deputy and Trooper Zach  
30 Walsh), Trooper Farkas had Shellabarger exit the vehicle and perform field

1 sobriety tests – horizontal gaze nystagmus, walk and turn, and one-leg stand.  
2 Trooper Farkas explained each test prior to having Shellabarger conduct each  
3 test.

4 1.12 Prior to conducting the field sobriety tests, Trooper Farkas asked for consent to  
5 search the inside of Shellabarger's vehicle, which was denied.

6 1.13 After conducting the field sobriety tests, Trooper Farkas concluded that  
7 Shellabarger had consumed a foreign substance but that his ability to operate a  
8 motor vehicle was not impaired.

9 1.14 Trooper Farkas went to his patrol vehicle to issue Shellabarger an infraction for  
10 speeding, but was having issues with the printer in his vehicle, likely due to it  
11 being a new vehicle. Trooper Farkas was able to send the ticket to Trooper Clark  
12 and have him print it out.

13 1.15 After the ticket was issued, Trooper Farkas went over the ticket with  
14 Shellabarger.

15 1.16 During their contact, Shellabarger asked multiple questions about the ticket and  
16 spoke on a number of different topics with Trooper Farkas.

17 1.17 Towards the very end of the interaction regarding the specifics of the infraction  
18 ticket that was issued, Deputy VanWyck arrived with his K9 partner.

19 1.18 Deputy VanWyck deployed his K9 partner at a moment when Trooper Farkas  
20 was responding to a question from Shellabarger. When Deputy VanWyck began  
21 the deployment, Shellabarger interrupted Trooper Farkas's response to his  
22 question. Trooper Farkas explained the K9 search to Shellabarger, and the two  
23 watched while the K9 was deployed.

24 1.19 During the K9 deployment, a noticeable change in behavior was detected by  
25 Deputy VanWyck, indicating that there was something inside the vehicle.

26 1.20 Deputy VanWyck observed a McDonald's bag inside the vehicle and asked that  
27 the bag be removed to ensure that his K9 was not alerting on the bag.

28 1.21 Trooper Farkas advised Shellabarger of *Ferrier* warnings and again asked for  
29 consent to search the vehicle.  
30

1 1.22 After a short back and forth between Shellabarger and law enforcement, consent  
2 was granted to search the vehicle.

3 1.23 Prior to the vehicle being searched, Shellabarger was asked to remove the  
4 McDonald's bag that was inside his vehicle.

5 ~~1.24 Before removing the bag, Shellabarger was observed placing a number of other~~  
6 ~~items inside the bag, one of which was an Altoids container that Trooper Farkas~~ *JUL*  
7 ~~had observed earlier inside the vehicle.~~

8 1.25 Trooper Farkas said "I'll carry the that", and took the McDonalds bag from  
9 Shellabarger, and then placed the bag on the hood of his patrol vehicle.

10 1.26 Trooper Farkas opened the McDonalds bag and saw the Altoids tin, he then  
11 looked inside the Altoids tin and observed an item consistent with  
12 methamphetamine.

13 1.27 From the traffic stop to the arrest took approximately 45 minutes.

#### 14 CONCLUSIONS OF LAW

15 2.1 The expansion of the stop beyond the investigation of the observed infractions  
16 was justified given Trooper Farkas's observations of impairment.

17 2.2 The length of detention for the entire stop was reasonable given all that was  
18 taking place from the time the vehicle was pulled over.

19 2.3 Shellabarger's consent to search the vehicle was valid under the totality of the  
20 circumstances.

21 2.4 The scope of Shellabarger's consent was not violated by searching the  
22 McDonald's bag outside the vehicle because the bag was not a locked container  
23 and was a continuation of the search of the vehicle Shellabarger had consented  
24 to.

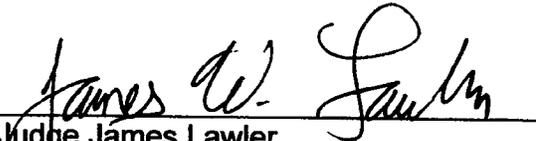
25 2.5 The K9 search was reasonable since the processing of the citation had not been  
26 completed when the search began.

#### 27 ORDER

28 The defendant's motion to suppress evidence is denied.

29 DATED this 25 day of April, 2018.

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\_\_\_\_\_  
Judge James Lawler

Presented by:

Copy received; Approved as to form  
Notice of Presentation waived:

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



\_\_\_\_\_  
Paul E. Masiello, WSBA #33039  
Deputy Prosecuting Attorney



\_\_\_\_\_  
Jacob Clark, WSBA #387686  
Attorney for Defendant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 51886-4-II
	)	
STEPHEN SHELLABARGER,	)	
	)	
Appellant.	)	

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[X] STEPHEN SHELLABARGER 93027 LABECK RD ASTORIA, OR 97103	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2018.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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# WASHINGTON APPELLATE PROJECT

November 14, 2018 - 4:18 PM

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**Appellate Court Case Number:** 51886-4  
**Appellate Court Case Title:** State of Washington, Respondent v. Stephen M. Shellabarger, Appellant  
**Superior Court Case Number:** 17-1-00628-3

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