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No. 51905-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RUSHELLE STOKEN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

---

BRIEF OF APPELLANT

---

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## **A. INTRODUCTION**

Rushelle Stoken moved to suppress evidence in her case as fruits of an illegal seizure. At the hearing on the motion, the trial court improperly relied on the community caretaking exception to the warrant requirement to justify her detention. The court also found officers had reasonable suspicion of criminal activity permitting the seizure. Nearly a year later the State turned over new evidence which was not previously available to defense counsel at the motion to suppress. The evidence was a surveillance photograph of the suspect who was not Ms. Stoken, a fact the detective later admitted. Counsel moved to reopen the suppression hearing to introduce the new evidence, which the court nevertheless denied. The court also denied defense's motion for reconsideration on the matter. For these reasons, reversal of the convictions, suppression of the evidence, and dismissal is required.

Additionally, at sentencing, the trial court failed to exercise discretion by categorically denying Ms. Stoken a drug offender sentencing alternative and failed to consider Ms. Stoken's indigent status before imposing discretionary legal financial obligations. At a minimum, this Court should remand for a new sentencing hearing.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred when it concluded Ms. Stoken's warrantless seizure was justified by the community caretaking exception to the warrant requirement.

2. The trial court erred when it concluded Ms. Stoken's warrantless seizure was a permissible *Terry* stop supported by reasonable suspicion of criminal activity.

3. The trial court erred when it denied defense counsel's motion to reopen the suppression hearing for introduction of new evidence.

4. The trial court erred when it denied defense counsel's motion for reconsideration of the court's refusal to reopen the suppression hearing because the State provided new evidence previously unavailable at the initial suppression hearing.

5. The trial court abused its discretion by failing to exercise any discretion when it categorically denied Ms. Stoken's request for a drug offender sentencing alternative.

6. The trial court erred by failing to engage in a meaningful inquiry into Ms. Stoken's ability to pay discretionary legal financial obligations pursuant to *Blazina* and *Ramirez*.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Police may not seize an individual without a warrant absent the existence of a narrowly drawn exception to the warrant requirement. Officers engaged in their community caretaking function may detain persons for a noncriminal investigation related to that function. However, officers must engage in community caretaking in good faith and must not be motivated by an intent to arrest or search for evidence of a crime. The community caretaking function must be totally divorced from a criminal investigation. Did the court improperly rely on the community caretaking exception to the warrant requirement where the officer's concerns about Ms. Stoken's health and safety had been fully dispelled by the time she was seized, and where police arrived at the scene and targeted Ms. Stoken specifically to investigate a crime?

2. Police may seize an individual without a warrant where they have reasonable suspicion that the person has committed a crime. The suspicion must be based on specific and articulable facts in existence at the inception of the seizure. Here, Detective Perkinson knew Ms. Stoken did not resemble the identity theft suspect he was investigating. Did the officer lack reasonable suspicion to seize Ms. Stoken?

3. A trial court abuses its discretion when it denies a defendant's motion to reopen an evidentiary hearing due to a late disclosure of new evidence by the government. Here, the trial court concluded the police had reasonable suspicion Ms. Stoken was involved in an identity theft case at a suppression hearing. A color photograph which the State disclosed to defense nearly a year after the hearing revealed the suspect in the identity theft case was clearly not Ms. Stoken. Before trial, defense moved to reopen the suppression hearing for introduction of the newly discovered evidence, which the court denied. Did the trial court err in denying defense's motions to reopen the suppression hearing and for reconsideration?

4. The trial court abuses its discretion when it fails to exercise its discretion at all. Here, Ms. Stoken requested a drug offender sentencing alternative under the statute, but the court categorically denied the request based on her convictions. Did the court fail to exercise its discretion in sentencing Ms. Stoken?

5. The trial court must engage in an individualized inquiry into a defendant's ability to pay discretionary legal financial obligations. Additionally, recently-amended RCW 10.01.160(3) prohibits courts from imposing discretionary LFOs or a criminal filing fee on persons

who receive public assistance, are involuntarily committed, or have an income of 125 percent or less of the federal poverty line. These amendments apply prospectively to cases still pending on appeal. Here, the court found Ms. Stoken indigent for purposes of appeal, but checked a box on a preprinted form indicating she had a present and future ability to pay LFOs. The court did not engage in an inquiry on the record regarding Ms. Stoken's ability to pay. Should this Court strike the discretionary LFOs imposed on Ms. Stoken because her income was below the poverty line at the time of sentencing?

**D. STATEMENT OF THE CASE**

On May 12, 2016, Detective Jason Perkinson and another officer arrived at a home in Aberdeen to investigate an identity theft and fraud case. 4/3/17 VRP 7. The officers had surveillance footage and color photographs of a thin white woman using a credit card fraudulently at an ATM. *Id.* The officers traced the credit card to this residence and knocked on the door. *Id.* One of the residents, Melissa Atkinson, opened the door and spoke to the officers. Detective Perkinson was able to discern Ms. Atkinson was not the woman from the photographs. 4/3/17 VRP 12.

Upon the officers's arrival, Detective Perkinson noticed a light colored car parked alongside the residence. 4/3/17 VRP 11. The car generally resembled the car in which the identity theft suspect drove away. *Id.* After speaking to Ms. Atkinson, the detective walked to the passenger side of the car, while Ms. Atkinson went to the driver's side. 4/3/17 VRP 16, 26. Detective Perkinson could see a woman inside the car, later identified as Rushelle Stoken, sitting in the driver's seat asleep, slumped over towards the passenger seat. 4/3/17 VRP 13-14. He also noticed a jacket in the car with some pink fabric which he thought could have resembled the clothing worn by the identity theft suspect. 4/3/17 VPR 41.

Detective Perkinson became concerned Ms. Stoken might require medical attention or be under the influence. 4/3/17 VRP 17. Ms. Atkinson knocked on the driver's side window, and Ms. Stoken woke up and opened the car door. 4/3/17 VRP 16. The detective then moved over to the driver's side and asked if Ms. Stoken was okay. 4/3/17 VRP 17. Ms. Stoken stepped out of the car, and the detective noticed she was sweating and wearing several layers of clothing. *Id.* He directed her to remove her jacket to begin cooling down. 4/3/17 VRP 18. He also noticed a smell of body odor mixed with a vinegary smell he associated

with heroin. 4/3/17 VRP 17. Detective Perkinson asked Ms. Stoken several times if she needed medical aid, which she repeatedly refused. CP 60; 4/3/17 VRP 29. The officer accepted her refusal, and did not request any medical aid for Ms. Stoken.

After establishing Ms. Stoken did not need medical attention, Detective Perkinson believed Ms. Stoken was “possibly resembling the suspect involved in the ID and fraudulent case that I’m there to speak with,” so he continued with his criminal investigation. 4/3/17 VRP 18. He detained Ms. Stoken by asking for her identification, which she provided. 4/3/17 VRP 19. Shortly thereafter, Ms. Stoken attempted to flee from the scene and was ultimately arrested, charged, and convicted of one count possession with intent to deliver a controlled substance, and one count of simple possession of a controlled substance. 4/3/17 VRP 22; CP 10-20.

On April 3, 2017, defense moved to suppress the evidence based on an unlawful seizure pursuant to CrR 3.6. 4/3/17 VRP 3-56. The trial court concluded Detective Perkinson seized Ms. Stoken upon requesting her identification. 4/3/17 VRP 52. The court found the warrantless seizure was permissible because the detective was engaged in community caretaking and he had reasonable suspicion Ms. Stoken

was involved with the identity theft based on her general similarity in appearance, the light colored car, and the jacket with pink fabric. 4/3/17 VRP 51-52.

On March 7, 2018, defense counsel moved to reopen the CrR 3.6 suppression hearing, informing the court he believed Detective Perkinson had a color photograph of the identity theft suspect which he sought to introduce. 3/7/18 VRP 20-24. Counsel argued the photo would demonstrate Ms. Stoken was not the woman depicted therein. 3/7/18 VRP 22. The court denied the motion, stating that it did not matter whether Ms. Stoken was the same woman or not. *Id.* The court elaborated, “I understand you weren’t the attorney at the time, but Mr. Baum, everybody just gets one bite out of the apple, and your client had whoever her attorney was at the time. 3/7/18 VRP 23.

After this hearing, the State informed counsel it had in its possession a color copy of the photo, which it had previously stated it did not have. CP 24-27. The State disclosed the photo after the March 7 hearing, nearly a year after the initial 3.6 hearing. *Id.* After receiving the photo, counsel determined the identity theft suspect was “clearly not Ms. Stoken.” CP 25. Counsel moved the court for reconsideration to reopen the CrR 3.6 hearing in order to introduce the photograph and

relitigate the validity of the seizure in light of this new evidence. CP 24-27. The trial court again denied the motion. 3/7/18 VRP 35; CP 23.

Following trial, Ms. Stoken was convicted as charged. CP 10-20. At sentencing, she requested a prison-based drug offender sentencing alternative (“DOSAs”). 5/11/18 VRP 21-23. The trial court denied the request, stating, “I do not grant DOSAs to people who profit from the sale of heroin. I never have and I’m not going to start today. So the request for a prison based DOSA is denied.” 5/11/18 VRP 23. The court also found Ms. Stoken indigent for the purposes of appeal, but also found she had a present or future ability to pay legal financial obligations. CP 1-3; 12. Without conducting an individualized inquiry into Ms. Stoken’s financial stability, the court ordered \$2125 in discretionary LFOs and imposed an additional \$2100 in fees which the court had discretion to suspend upon a finding of indigency. CP 14-15. The court further imposed the \$100 DNA fee, even though Ms. Stoken has previous convictions for which her DNA would have been collected. *Id.*

## **E. ARGUMENT**

### **1. The evidence should have been suppressed because it was obtained pursuant to an unconstitutional seizure.**

- a. Both article I, section 7 and the Fourth Amendment prohibit warrantless seizures absent the existence of a narrowly drawn exception.*

Article 1, section 7 of the Washington Constitution provides:

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

“Article I, section 7 of the Washington Constitution is more protective than the Fourth Amendment, particularly where warrantless searches are concerned.” *State v. Boisselle*, 3 Wn. App. 2d 266, 277, 415 P.3d 621 (2018) (citing *State v. Smith*, 177 Wn.2d 533, 539, 303 P.3d 1047 (2013)). The language of article I, section 7 “not only prohibits unreasonable searches, but also provides no quarter for ones that, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional.” *Id.*

Under these constitutional provisions, a warrantless seizure is per se unreasonable. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833. This rule is subject to a few “jealously and carefully drawn

exceptions.” *Id.* at 349 (internal citations and quotations omitted). The burden is always on the State to prove one of these narrow exceptions by clear and convincing evidence. *Id.* at 350 (citing *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)).

- i. Community Caretaking is an exception to the warrant requirement only when it is totally divorced from an criminal investigation and where an officer is not motivated by an intent to arrest or search for evidence.

One exception to the warrant requirement is a police officer’s community caretaking function. *Boisselle*, 3 Wn. App. 2d at 277-78. This exception was first announced in *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), under a Fourth Amendment analysis. There, the United States Supreme Court observed:

Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, **totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.**

*Cady*, 413 U.S. at 441 (emphasis added).

Washington courts have accepted community caretaking as an exception to the Fourth Amendment warrant requirement. *See State v.*

*Houser*, 95 Wn.2d 143, 151, 622 P.2d 1218 (1980); *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). In *Smith*, 177 Wn.2d 533, a plurality of the court agreed that community caretaking may be an exception to article I, section 7's warrant requirement. However, our Supreme Court has not specifically considered the allowable contours of this exception as applied under article I, section 7. *Boisselle*, 3 Wn. App. 2d at 287 (Spearman, J., concurring); *Smith*, 177 Wn.2d at 386-87 (Chambers, J. Pro Tem, dissenting).

However, where Washington courts have analyzed the community caretaking exception under the State constitution, they have continued to require a good faith motivation for the exercise of an officer's community caretaking function. In *State v. Gocken*, for example, the Court noted "police may be required to perform a warrantless search, not as a response to an immediate emergency, but as part of their function of protecting and assisting the public." 71 Wn. App. 267, 276, 857 P.2d 1074 (1993). The Court held that "**[s]o long as it is undertaken in good faith and is not motivated by an intent to arrest or search for evidence of a crime**, a warrantless search conducted in order to check on an individual's health or safety is a valid exception to constitutional warrant requirements." *Id.* at 277

(emphasis added). The noncriminal community caretaking investigation “must end when reasons for initiating an encounter are fully dispelled.” *Kinzy*, 141 Wn.2d at 388.

- ii. Officers may seize an individual without a warrant if they have reasonable suspicion the person has committed, or is about to commit, a crime.

Officers may also seize an individual without a warrant during a *Terry*<sup>1</sup> stop. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). For a *Terry* stop to be permissible, the State must show an officer had a “reasonable suspicion” that the detained person was, or was about to be, involved in a crime. *Id.* (quoting *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003)). Under both the state and federal constitutions, the reasonable suspicion standard requires the officer’s suspicion be grounded in “specific and articulable facts.” *Id.* (quoting *Terry*, 392 U.S. at 21, 88 S.Ct. 1868). Our state constitution, however, generally requires a stronger showing by the State. *Id.* at 618.

In determining whether an officer’s suspicion was reasonable, courts look at the totality of the circumstances known to the officer. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017) (citing *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015)). A *Terry*

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

stop must be justified by specific and articulable facts at its inception.

*Id.*

In this case, the court found Ms. Stoken was seized at the moment Detective Perkinson requested her identification. 4/3/17 VRP 52. The court found there was “an element of community caretaking” and “reasonable suspicion of a possible connection to [the] identity theft” based on Ms. Stoken’s appearance and the similar car. 4/3/17 VRP 51-52. As discussed below, neither the community caretaking nor the Terry stop exceptions are applicable here.

*b. The trial court erred in concluding the community custody exception justified Ms. Stoken’s seizure because Detective Perkinson was not engaged in that function when he seized Ms. Stoken; to the extent he was engaged in community caretaking, that exception does not apply where the officer was motivated by an intent to arrest or search for evidence of a crime.*

Here, by the time Detective Perkinson asked for Ms. Stoken’s identification, his reason for initiating the community caretaking investigation was fully dispelled. He testified Ms. Stoken emerged from the car sweating, and he began asking her if she was okay. 4/3/17 VRP 18. He directed her to remove her jacket to cool herself down, which she did. 4/3/17 VRP 18. The detective asked if she needed medical aid several times, which Ms. Stoken assured him repeatedly she did not

need. CP 60; 4/3/17 VRP 29. Ms. Stoken's symptoms and behavior did not concern Detective Perkinson enough for him to request medical aid for her over her objection. Based on this record, Detective Perkinson's concerns for Ms. Stoken's wellbeing were fully dispelled before he asked for her identification. He was no longer engaged in community caretaking when he seized Ms. Stoken, and the trial court erred in concluding this exception justified Ms. Stoken's seizure.

Additionally, to the extent Detective Perkinson was still engaged in community caretaking when he seized Ms. Stoken, he did not engage in this function in good faith. Rather, the detective arrived at Ms. Atkinson's home for the purpose of investigating an identity theft and fraud case. 4/3/17 VRP 7. He became suspicious of Ms. Stoken's car, which was parked on the side of the home, because it matched the car depicted in surveillance photographs from the bank where a stolen ATM card had been used. 4/3/17 VRP 7-8, 10, 11. He noted a jacket in the car "had some pink to it" "similar to the picture that was taken from the ATM of the possible other suspect." 4/3/17 VRP 41.

Detective Perkinson's community caretaking function was not "totally divorced from the detection, investigation, or acquisition of

evidence relating to the violation of a criminal statute,” as required by *Cady*. 413 U.S. at 441. He testified that in addition to checking on Ms. Stoken’s wellbeing, he was also contacting her because “she is possibly resembling the suspect involved in the ID and fraudulent case that I’m there to speak with.” 4/3/17 VRP 18. The detective was motivated by “an intent to arrest or search for evidence of a crime,” which invalidates the community caretaking exception. *Gocken*, 71 Wn. App. at 276.

Because Detective Perkinson was no longer engaged in community caretaking when he seized Ms. Stoken, or alternatively because his community caretaking function was inextricably and impermissibly bound with his criminal investigation, the trial court erred in concluding Ms. Stoken’s warrantless seizure was justified by the community caretaking exception.

- c. *The trial court erred in concluding the Terry reasonable suspicion exception applied because Detective Perkinson knew Ms. Stoken looked nothing like the surveillance photograph of the identity theft suspect he was investigating.*
- i. Still before trial, counsel moved to reopen the suppression hearing after the State provided a photograph showing Ms. Stoken looked nothing like the identity theft suspect.

In this case, Detective Perkinson testified at the initial CrR 3.6 hearing that he believed Ms. Stoken “possibly” resembled the identity

theft suspect he was investigating. 4/3/17 VRP 18. Although the State had a color photograph of the actual suspect taken from surveillance cameras, no color photograph was provided to defense prior to first CrR 3.6 hearing. 3/26/18 VRP 35. Nearly a year later, substitute counsel moved to reopen the first CrR 3.6 hearing in order for Detective Perkinson to bring a color copy of the photo for the court to compare to Ms. Stoken. The court denied the motion, stating it did not matter for purposes of the suppression hearing whether the court could have found the woman actually depicted in the photo was not Ms. Stoken. 3/7/18 VRP 22. The court further stated, “I understand you weren’t the attorney at the time, but Mr. Baum, everybody just gets one bite out of the apple, and your client had whoever her attorney was at that time.” 3/7/18 VRP 23.

After the motion to reopen the suppression hearing, the State turned over a color copy of the surveillance photo, and counsel filed a motion for reconsideration based on the newly discovered evidence. CP 24-27. Counsel declared in his motion that the woman depicted in the photo “clearly isn’t Ms. Stoken.” CP 25. The trial court denied the motion out of hand. 3/26/18 VRP 34-35.

- ii. The trial court erred in denying the motion to reopen the suppression hearing and the motion for reconsideration because counsel's inability to present the photograph was precipitated by the State's failure to produce color copy prior the first 3.6 hearing.

The trial court erred by denying defense's motions to reopen the CrR 3.6 suppression hearing and for reconsideration because counsel's inability to present the color photo was due to the State's failure to produce the photo in the first place. A trial court's decisions on a motions for reconsideration and to reopen a proceeding for introduction of new evidence are reviewed for abuse of discretion. *State v. Tyler*, 177 Wn.2d 690, 697, 302 P.3d 165, 169 (2013). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27, 30 (2012) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

No published cases in Washington appear to have found a trial court abused its discretion in denying motions to reopen a suppression hearing or for reconsideration. However, *U.S. v. Chavez*, 902 F.2d 259 (4th Cir. 1990) is instructive here. In *Chavez*, the defendant sought leave to file an untimely motion to suppress owing to the government's delay in turning over a grand jury transcript. *Id.* at 262. The district

court denied the motion. *Id.* On review, the Fourth Circuit found the district court abused its discretion because counsel's tardiness in filing the motion to suppress was due to the government's failure to timely provide a necessary transcript until a day before the filing. *Id.* at 263-64.

Here, the trial court concluded at the first suppression hearing that Ms. Stoken was seized at the moment Detective Perkinson requested her identification. 4/3/17 VRP 52. The court found the seizure was justified by the detective's community caretaking function and Ms. Stoken's "generally similar" appearance to the identity theft suspect Detective Perkinson was investigating. *Id.*

As discussed above, the community caretaking exception does not apply in this case. Thus, the only remaining justification for Ms. Stoken's warrantless seizure was her alleged similarity in appearance to the woman depicted the ATM photo. Like in *Chavez*, although the State had a color copy of the photograph in its possession, it did not inform defense counsel of its existence until March 7, 2018, the same day as the second CrR 3.6 hearing. CP 25. The State did not provide the photo to counsel until after that hearing, nearly a year after the first 3.6 hearing. Upon receipt, counsel discovered the woman depicted "clearly

isn't Ms. Stoken." CP 25. Counsel then moved for reconsideration of the court's refusal to reopen the initial suppression hearing, which the court denied out of hand. 3/26/17 VRP 35; CP 23.

The trial court's denial of defense's motions to reopen the 3.6 hearing and for reconsideration constitute an abuse of discretion because counsel's inability to present the color photograph at the initial suppression hearing was due solely to the State's failure to provide the photograph in a timely manner. Because counsel's delay was caused by the State's inaction, the trial court abused its discretion by refusing to reopen the 3.6 hearing for Detective Perkinson to bring the photo to court. For the same reasons, the court abused its discretion in denying the motion for reconsideration after counsel finally received the color copy from the State.

- iii. Because Detective Perkinson knew Ms. Stoken looked nothing like the identity theft suspect, he lacked reasonable suspicion to support a warrantless seizure of her.

In this case, Detective Perkinson had surveillance videos and color photos of the identity theft suspect he was seeking. 4/3/17 VRP 7, 41. Although the detective claimed at the first CrR 3.6 hearing that Ms. Stoken "possibly" resembled this suspect, defense counsel learned after viewing the photograph that the woman in the photo was clearly not

Ms. Stoken. 4/3/17 VRP 18; CP 25. The State did not contest this, and Detective Perkinson later admitted he did not believe the woman in the surveillance photo was Ms. Stoken. 3/27/18 VRP 101. Had the trial court permitted counsel to reopen the 3.6 hearing and introduce the photograph, the court could have determined Detective Perkinson's claim that Ms. Stoken resembled the woman in the photo was unreasonable. Because the detective knew or should have known Ms. Stoken was not the identity theft suspect based on the photograph alone, he lacked reasonable suspicion that she was involved the identity theft and his warrantless seizure of Ms. Stoken was impermissible.

*d. The trial court should have granted Ms. Stoken's motion to suppress. Reversal and dismissal is required.*

Under the fruit of the poisonous tree doctrine, all evidence that is the product of a violation of article I, § 7 must be suppressed.

*Ladson*, 138 Wn.2d at 359. Because Detective Perkinson conducted a warrantless seizure of Ms. Stoken, and no exceptions to the warrant requirements are applicable here, all the evidence obtained following the violation must be suppressed. *State v. Ortiz*, 196 Wn. App. 301, 308, 383 P.3d 586 (2016). The convictions should be reversed and the case remanded with order to suppress the illegally obtained evidence.

This includes not only the evidence from Ms. Stoken's person, but also the evidence obtained from the car.

**2. The trial court abused its discretion by refusing to exercise that discretion to determine whether Ms. Stoken should receive a drug offender sentencing alternative.**

The Sentencing Reform Act ("SRA") prescribes the trial court's authority to sentencing in felony cases. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). RCW 9.94A.660 permits a trial court to sentence a defendant to a drug offender sentencing alternative ("DOSA") rather than a standard range sentence. Generally, a court's decision not to impose a DOSA is not reviewable, but a defendant may challenge the procedure by which a sentence was imposed. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

Though the SRA grants trial courts considerable discretion, they are still required to act within its strictures and principles of due process of law. *Id.* at 342 (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). "[E]very defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Id.* (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)) (emphasis in original). A trial court abuses

its discretion when “it refuses categorically to consider an exceptional sentence below the standard range under any circumstances.” *Id.* (quoting *Garcia-Martinez*, 88 Wn. App. at 330). The failure to consider an exceptional sentence is reversible error. *Id.* “Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” *Id.*

Here, Ms. Stoken requested a DOSA in lieu of a standard range sentence, citing her need to obtain treatment for her opioid addiction. 5/11/18 VRP 23. The court refused to consider the request, stating:

**I do not grant DOSAs to people who profit from the sale of heroin.** I never have and I’m not going to start today. So the request for a prison based DOSA is denied.

5/11/18 VRP 23 (emphasis added).

The trial court in this case categorically refused to consider whether Ms. Stoken should receive a DOSA. The court declared a general policy that it did not consider DOSAs for an entire class of offenders, i.e. heroin sellers. This categorical refusal to consider Ms. Stoken’s requested sentence constituted an abuse of discretion.

*Grayson*, 154 Wn.2d at 352. This Court should remand for a new sentencing hearing.

**3. The legislature recently changed the law as to legal financial obligations. Under *Ramirez*, these changes apply to cases on appeal. Applying the law in effect, the Court should order.**

In 2018, the law on legal financial obligations changed. Now, it is categorically impermissible to impose any discretionary costs on indigent defendants. RCW 10.01.160(3). In addition, the previously mandatory \$200 filing fee cannot be imposed on indigent defendants. RCW 36.18.020(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. RCW 43.43.7541. The additional fines enumerated under RCW 69.50.430 should also be suspended upon a finding a defendant is indigent. Likewise, the crime laboratory analysis fee may also be suspended upon a finding of indigency. RCW 43.43.690.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). In other words, that the statute was not in effect at time of the trial court's decision to impose legal financial obligations does not matter. *Id.* Applying the change in the law, our Supreme Court in *Ramirez* ruled the trial court impermissibly imposed

discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.* at 750.

Here, Ms. Stoken is indigent. CP 1-3. She was, and continues to be, represented by appointed counsel. Despite this finding, the trial court checked a box on the preprinted judgment and sentence forms indicating Ms. Stoken had a present or future ability to pay LFOs without conducting any individualized inquiry into her financial status. CP 12. The trial court imposed a \$100 DNA fee, \$1625 in discretionary attorney's fees, a \$200 criminal filing fee, and \$300 in discretionary fees for the Grays Harbor Inter-Agency Drug Task Force. CP 14-15. The court also imposed and refused to suspend a \$2000 VUCSA additional fine and a \$100 crime lab fee. CP 14-15. Finally, the court imposed the mandatory victim penalty assessment of \$500, for a total of \$4825 in LFOs. CP 14-15.

As in *Ramirez*, the changes in the law apply to Ms. Stoken's case because it is on direct appeal and not final. Accordingly, this Court should strike the \$2125 in discretionary LFOs and the \$100 DNA fee because Ms. Stoken has had her DNA collected as a result of a prior conviction. Additionally, this Court should remand for the trial court to

suspend the \$2000 VUCSA additional fine and the \$100 crime lab fee because Ms. Stoken is indigent.

**F. CONCLUSION**

For the reasons stated above, Ms. Stoken's convictions must be reversed and the charges dismissed because the evidence should have been suppressed as the fruit of an illegal seizure. Alternatively, Ms. Stoken is entitled to a new sentencing hearing because the court failed to consider her request for a DOSA, and this Court should instruct the trial court to strike all discretionary LFOs and suspend all remaining non-mandatory fines based on her indigent status.

DATED this 20<sup>th</sup> day of February 2019.

Respectfully submitted,

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# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

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**Appellate Court Case Title:** State of Washington, Respondent v. Rushelle Stoken, Appellant  
**Superior Court Case Number:** 16-1-00243-1

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