

FILED
Court of Appeals
Division II
State of Washington
4/26/2019 4:17 PM
NO. 52482-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DERRICK SALAS

Appellant.

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

The Honorable Jennifer A. Forbes, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..	2
C. STATEMENT OF THE CASE.....	3
1. <u>Procedural facts</u>	3
a. <i>3.6 Suppression Hearing</i>	4
2 <u>Trial testimony</u>	9
a. <i>Verdict and sentencing</i>	12
D. ARGUMENT	13
1. THE COURT ERRED WHEN IT FAILED TO PROPERLY SUPPRESS EVIDENCE DERIVED FROM AN UNLAWFUL DETAINMENT OF MR. SALAS	13
a. <i>Standard of Review</i>	14
b. <i>The detention of Mr. Salas and request for his driver's license was unlawful where the circumstances which justified the initial stop had been alleviated and no further interference was justified</i>	14
c. <i>This case should be reversed and dismissed for lack of sufficient evidence</i>	18
2. IN THE ALTERNATIVE THE TRAFFIC STOP WAS AN UNCONSTITUTIONAL PRETEXT STOP	18
3. IF MR. SALAS' SUPPRESSION ARGUMENT IS NOT PRESERVED FOR REVIEW, HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY'S FAILURE TO	

ARGUE THAT THE STOP WAS PRETEXTUAL	25
4. THE DISCRETIONARY COSTS MUST BE STRICKEN BECAUSE MR. SALAS IS INDIGENT	29
<i>a. Recent statutory amendments prohibit discretionary costs for indigent defendants</i>	30
<i>b. The community supervision fee LFO is discretionary</i>	30
E. CONCLUSION	33

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999)	27
<i>State v. Arcey</i> , 148 Wn.2d 738,64 P.2d 738 (2003).....	16
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	13,30
<i>State v. Bonds</i> , 74 Wash.App. 533, 299 P.3d 663 (2013).....	2,8
<i>State v. Carter</i> , 151 Wn.2d 118,85 P.3d 887 (2004).....	14
<i>State v. Crawford</i> , 159 Wash.2d 86, 147 P.3d 1288 (2006)	27
<i>State v. DeSantiago</i> , 97 Wn. App. 446, 983 P.2d 1173 (1999)	19,20,21
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	26
<i>State v. Hamilton</i> , 179 Wn. App. 870, 320 P.3d 142 (2014)	27
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015).....	26
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726P.2d 445 (1986).....	14
<i>State v. Klinger</i> , 96 Wn. App. 619, 980 P.2d 282 (1999).....	19,28
<i>State v. Kylo</i> , 166 Wash.2d 856, 215 P.3d 177 (2009)	27
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999) 3,15,19,20,25,28,29	
<i>State v. Lundstrom</i> , 6 Wn.App.2d 388, 429 P.3d 1116 (2018).....	32
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	27,28
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999)	14
<i>State v. Michaels</i> , 60 Wn.2d 638, 374 P.2d 989 (1962).....	20
<i>State v. Myers</i> , 117 Wn. App. 93, 94, 69 P.3d 367 (2003), review denied, 150 Wn.2d 1027 (2004).....	21,22,23,25
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	18
<i>State v. Penfield</i> , 106 Wn.App. 157, 22 P.3d 293 (2001).....	15,16,17,29
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	27,30,32
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	28
<i>State v. Santacruz</i> , 132 Wn.App. 615, 133 P.3d 484 (2006).....	9
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	26
<i>State v Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984)	18
<i>State v. Yeager</i> , 67 Wn.App. 41, 834 P.2d 73 (1992).....	14
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Florida v. Royer</i> , 460 U.S. 491,103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) .	15
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967)	14
<i>Mapp v. Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).....	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674	

(1984)	26,27
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).	15

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW9.94A.703(2)(d)	32
RCW10.101.010(3).....	31
RCW10.101.010(3) (a)-(c).....	31
RCW10.101.010(3)(d).....	31
RCW10.01.160	31
RCW 36.18.020(2)(h)	31
RCW69.50.4013.....	4

<u>OTHER AUTHORITIES</u>	<u>Page</u>
Second Substitute House Bill (SSHB) 1783	30
LAWS OF 2018, ch. 269	30
CrR 3.6	1,2,28

<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. Amend VII	1
U.S. Const. Amend XIV.....	14
Wash. Const. art. I, § 7	1,3, 14
Wash. Const. art. I, § 22	26

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Derrick Salas' motion to suppress evidence obtained as a result of exceeding the lawful scope of an investigative stop.

2. The trial court erred when it failed to suppress evidence that police obtained through the use of a pretextual traffic stop and through an illegal directive that the appellant produce a driver's license in violation of the appellant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment.

3. Trial counsel was ineffective for failing to argue to suppress evidence obtained by the police on the basis that the traffic stop was an impermissible pretextual stop, in violation of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution because had the argument been presented, the trial court would have been required to suppress evidence obtained in the search incident to arrest.

4. The trial court erred in entering CrR 3.6 Finding of Fact III:

That Officers Forbragd and Renfro believed the car's driver was Eric Salas who had a warrant for his arrest.

Clerk's Papers (CP) 70.

5. The trial court erred in entering CrR 3.6 Finding of Fact IV:

That Officer Forbragd recognized Eric Salas because he previously looked at Eric Salas' booking photographs.

CP 71.

6. The trial court erred in entering CrR 3.6 Conclusion of Law

II:

That Officer Forbragd performed a lawful traffic stop under *State v. Bonds*, 74 Wash.App. 533, 299 P.3d 663 (2013). Reasonable suspicion for a warrantless seizure requires only a sufficient probability, not absolutely certainty.

Officers Forbragd and Renfro believed the car's driver was Eric Salas and believed it enough to stop the car. Officer Forbragd previously examined Eric Salas' booking photographs so the seizure was based on specific and articulable facts, not a mere hunch.

CP 71.

7. The sentencing court erred by imposing the discretionary costs of Department of Corrections (DOC) supervision on Mr. Salas who lacks the ability to pay. CP 173.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Could an officer lawfully ask Mr. Salas to produce a driver's license when the basis for the initial stop was ostensibly made on the basis of an incorrect identification by police, after Mr. Salas provided a Washington State Identification Card was correctly identified and further intrusion was unnecessary? Assignment of Error 1.

2. When an officer temporarily detains an individual based on a mistaken belief that the individual driving the car is another person for whom probable cause for arrest exists, should the court grant a motion to exclude

any evidence that was obtained after the officer correctly identified Mr. Salas and the basis for the detention had been alleviated? Assignment of Error 1.

3. Does a trial court err if it refuses to suppress evidence a police officer obtained through the use of a pretext traffic stop in violation of a defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment? Assignments of Error 2, 4, 5, and 6.

4. Was Mr. Salas denied his constitutional right to effective assistance of counsel when his attorney failed to argue for suppression of methamphetamine found in the course of a search incident to arrest on the basis that the initial detention was pretextual and in violation of *State v. Ladson*¹? Assignment of Error 2.

5. Where the trial court found Mr. Salas indigent, but imposed the costs of a monthly DOC supervision assessment, do recent statutory amendments affecting discretionary legal financial obligations (LFOs) require remand to strike the imposition of those costs? Assignment of Error 7.

C. STATEMENT OF THE CASE

1. Procedural facts:

Derrick Salas was charged by information filed January 31, 2017 in Kitsap County Superior Court with one count of possession of

¹138 Wn.2d 343, 979 P.2d 833 (1999).

methamphetamine, contrary to RCW 69.50.4013. Clerk's Papers (CP) 1-5. The State filed an amended information on September 17, 2018, adding one count of obstructing a law enforcement officer (Count II), and driving while license suspended or revoked in the third degree (Count III). CP 99-103.

a. CrR 3.6 suppression hearing

Pursuant to CrR 3.6, defense counsel filed a motion to suppress evidence obtained as the result of a traffic stop of a pickup truck driven by Derrick Salas on January 25, 2017. CP 54-58. The court heard the suppression motion on February 15, 2018. Report of Proceedings² (RP) (2/15/18) at 13-50.

Bremerton police officer Steven Forbragd testified that the Special Operations Group (SOG) of the Bremerton Police Department was serving a search warrant on a house located near 9th and Park in Bremerton, Washington on the afternoon of January 25, 2017. RP (2/15/18) at 16-17. Officer Forbragd and Officer Dennis Hall were at the scene to assist SOG detectives in the execution of the warrant. RP (2/15/18) at 23. Police had probable cause to arrest Eric Salas, who was “an individual associated with

²The record of proceedings consists of the following transcribed volumes: RP – February 2, 2017 (arraignment); RP– March 2, 2017; RP – April 25, 2017; RP – June 26, 2017; RP – August 28, 2017; 1RP – September 7, 2017, September 13, 2017, and September 15, 2017; 2RP – February 15, 2018 (CrR 3.6 motion); RP– July 31, 2017, May 7, 2018, June 19, 2018; RP – October 2, 2017; RP – February 26, 2018; RP – March 19, 2018; RP – September 10, 2018; 1RP – September 18, 2018 (CrR 3.5 motion, jury trial, day 1); 2RP –September 19, 2018 (jury trial, day 2), September 20, 2018 (jury trial, day 3, and sentencing).

the house.” RP (2/15/18) at 17, 18. While standing by to assist the SOG detectives, Officer Forbragd testified that he saw a pickup truck pass the house driven by an individual “who matched the description of the subject” of Eric Salas, the individual associated with the house. RP (2/15/18) at 17. Officer Forbragd stated that he was told by radio by Detective Sergeant Billy Renfro that he “thought it was the same male as well,” and directed Officer Forbragd to stop the vehicle. RP (2/15/18) at 17. Officer Forbragd stated that earlier on the day of the search he had received a verbal description of Eric Salas and had seen the picture of Eric Salas entered as Exhibit 1. RP (2/15/18) at 18-19. Officer Forbragd did not have the picture of Eric Salas up on his computer at the time of the traffic stop. RP (2/15/18) at 26-27. Exhibit 1 also consisted of booking photos of Derrick Salas, Eric Salas’ cousin.

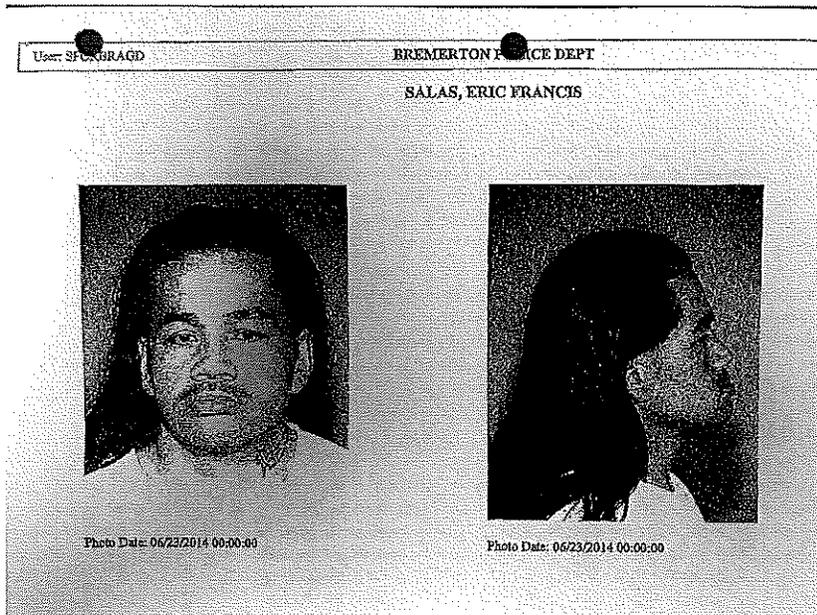




Photo Date: 01/26/2017 00:00:00



Photo Date: 01/26/2017 00:00:00

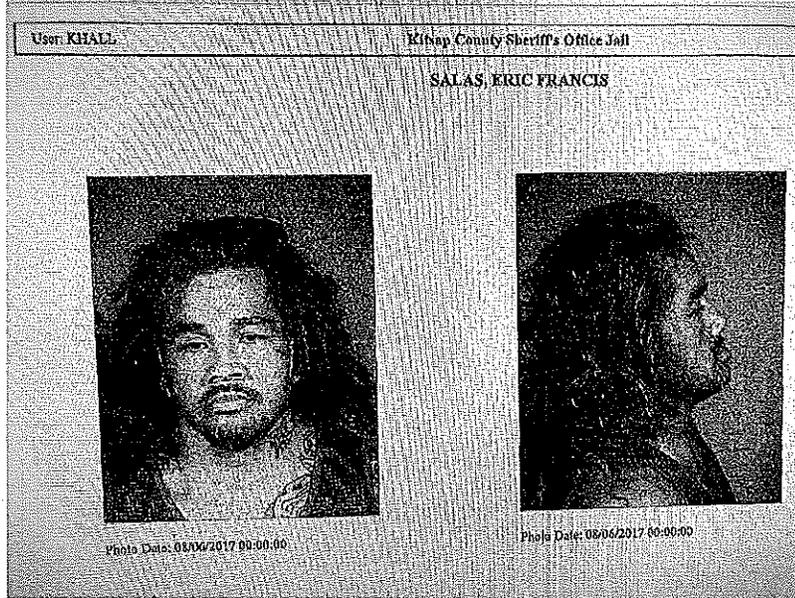
CrR 3.6 Suppression Hearing Ex. 1; RP (2/15/18) at 17-18; CP 205-07.

Officer Forbragd stated that he pulled over the vehicle and told the driver, “Eric, place your hands on the dash or the steering wheel” and that the driver responded by saying “I’m not Eric. I’m Derrick.” RP (2/15/18) at 19. Officer Forbragd testified that Derrick Salas provided a Washington identification card. RP (2/15/18) at 20. He testified that he then asked if he had a driver’s license, and that Derrick Salas is “no.” RP (2/15/18) at 20. After running a records check, Officer Forbragd determined that Derrick Salas had a suspended driver’s license. RP (2/15/18) at 21, 33.

Officer Forbragd acknowledged that the truck was not speeding or was otherwise being driven illegally, and that he stopped it because he thought the driver was Eric Salas and that he had been told by Sergeant

Renfro to stop the truck. RP (2/15/18) at 27.

Booking photos of Eric Salas and Derrick Salas taken in August, 2017, were entered as Exhibit 2. RP (2/15/18) at 25, 33; CP 208-10.



CrR 3.6 Suppression Hearing, Ex. 2; RP (2/15/18) at 25, 33; CP 208-10.

Officer Forbragd confirmed that the booking photo of Eric Salas showed a large neck tattoo and that Derrick does not have neck tattoo. RP (2/15/18) at 24, 25, 35. Officer Forbragd stated that he did not see a neck tattoo when Derrick Salas drove past the house in the truck and that he was wearing “a jacket or something.” RP (2/15/18) at 35.

Sergeant Renfro testified that he saw a pickup truck “related to the house” pass by their location while police were serving the warrant and “believed it could have had our suspect in there.” RP (2/15/18) at 38. Sergeant Renfro testified that he did not remember talking to Officer Forbragd about the truck and he did not mention it in his report. RP (2/15/18) at 39. Sergeant Renfro testified that he “learned that apparently I said something to Officer Forbragd it may have had in him the vehicle,” but “I don’t recall doing that though.” RP (2/15/18) at 38-39.

The State argued that the officers believed that Eric Salas was the driver of the truck and that the initial stop was justified under *State v. Bonds*.³ RP (2/15/18) at 41-42. The State argued that Derrick Salas’ failure to produce a driver’s license justified further investigation, leading to the arrest for driving with a suspended license and search incident to the arrest. RP (2/15/18) at 42. Defense counsel argued that unlike the facts of *Bonds*, where the officers had had contact with the individual, Officer

³ *State v. Bonds*, 174 Wn. App. 553, 299 P.3d 663, review denied, 178

Forbragd had not had contact with either Eric or Derrick Salas. RP (2/15/18) at 43. Counsel also argued that the officer had no right to expand the search to request a driver's license after he provided a Washington identification. RP (2/15/18) at 44. Counsel argued that the purpose of the stop was identification of the driver, and that once he did so, the investigation was complete. RP (2/15/18) at 44. The State argued that the scope of the investigation can be expanded if additional facts come out that raise reasonable suspicion of criminal activity. RP (2/15/18) at 45.

The court, relying on *State v. Santacruz*,⁴ denied the motion to suppress, stating that by producing the Washington identification, the officer was allowed to investigate further by running Mr. Salas' identification, and that the stop was reasonable in its scope and duration. RP (2/15/18) at 48-49. Findings of fact and conclusions of law were entered February 21, 2018. CP 70-72.

2. Trial testimony

The case came on for trial on September 18, 19 and 20, 2018, the Honorable Jennifer Forbes presiding. 1RP (9/18/18) at 3-224, 2RP (9/19/18) at 228-400, 2RP (9/20/18) at 400-418.

After finishing work for the day, Derrick Salas got a call from his wife asking him to pick up a member of her family from an AA meeting. 2RP at 346. While driving on Eighth Street in Bremerton he saw police

Wn.2d 1011 (2013).

officers around a house “doing a raid.” 2RP at 348. He stated that he thought the raid was completed because the police were out in the open and “just walking around.” 2RP at 348. He stated that he recognized the house as belonging to his cousin, Eric Salas. 2RP at 349. After driving by the house Derrick Salas turned left, and when he came to a stop sign he saw two police cars following him. 2RP at 329-50.

Officer Forbragd and Officer Hall were assisting the Bremerton Police Department’s Special Operations Group, who were serving a search warrant at the house on 8th Street in Bremerton. 2RP at 261, 319. Officer Forbragd’s and Officer Hall’s primary duty was to be on the perimeter and stop anyone that may be leaving the area. 2RP at 261. Officer Forbragd stated that police had probable cause to arrest Eric Salas, and as police were walking up to the house to serve the warrant, a vehicle associated with the house drove by their location. 2RP at 261.

Officer Hall testified that “one of the detectives recognized a man driving by” in a small pickup truck and directed Officers Hall and Forbragd “to stop and identify that person because they believed he was associated with the search warrant they were serving.” 2RP at 319-20. Officer Forbragd stated that Sergeant Renfro directed him to stop the truck because the Sergeant believed it was Eric Salas and that the police had probable cause to arrest Eric. 2RP at 272. Officer Forbragd stated that he saw the

⁴ 132 Wn.App. 615, 133 P.3d 484 (2006) .

driver and thought it was Eric Salas. 2RP at 272.

After following the pickup truck a short distance, Officer Forbragd, stopped the truck and Officer Hall pulled in behind the two stopped vehicles. 2RP at 262, 320. After stopped Mr. Salas's vehicle, Officer Forbragd, using a public address system, said: "Eric Salas, get out of the car." 2RP at 350. The driver responded by yelling from the truck, "I'm not Eric, I'm Derrick." 2RP at 350. After Derrick Salas got out of the truck, Officer Forbragd testified that he identified him by a Washington Identification Card. 2RP at 262. He stated that he then asked Mr. Salas for his driver's license, and Mr. Salas said he did not have a license. 2RP at 262, 350. Officer Forbragd ran a records check and determined that Derrick Salas' driver's license was suspended and placed him under arrest for driving with a suspended license. 2RP at 262.

Officer Forbragd testified that as he tried to place Mr. Salas in restraints, Mr. Salas pulled away several times until Officer Hall was able to grab his other arm and they were able to place him in handcuffs. 2RP at 263. Officer Forbragd stated that he kicked at him and said he "did not want me touching his balls," and that it was in response to his claim that the officer "smacked his balls" during the search. 2RP at 286. Mr. Salas testified that Officer Forbragd placed him under arrest for driving while suspended and that while being searched, the officer "hit me in my balls." 2RP at 350. Mr. Salas said that hit was intentional and acknowledged that

he was “struggling” with the officers. 2RP at 351. Officer Forbragd stated that while searching Mr. Salas, he tried to pull away and continued to be uncooperative with the officer, and reared his foot up and attempted to kick at him. 2RP at 264-65.

Officer Forbragd completed his search of Mr. Salas and found a folded up piece of aluminum foil in his pants pocket, which field-tested positive for methamphetamine. 2RP at 265-66, 301. Officer Forbragd stated that Mr. Salas said that the substance was not his and that the police had planted it on him and that the pants did not belong to him. 2RP at 302, 303.

Mr. Salas denied that he had methamphetamine in his pocket. 2RP at 351. Mr. Salas testified that after putting him in the police vehicle, Officer Hall was “teasing me” and said that the substance tested positive. 2RP at 352. He stated that the police took him back to Eric Salas’ house where the search was taking place and waited an hour, and then was transported to the jail by a member of SOG in another car. 2RP at 356-57.

A forensic scientist at the Washington State Patrol Crime Lab testified that the substance, which weighed .02 gram, tested positive for the presence of methamphetamine. 2RP at 305, 310.

a. Verdict and sentencing:

The jury found Mr. Salas guilty as charged. 2RP (9/20/18) at 405-06; CP 164-65.

Based on an offender score of “3,” the court sentenced Mr. Salas within the standard range to six months and a day for Count I, followed by 12 months of community custody. 2RP at 414; CP 170, 171. For the misdemeanor charges, the court sentenced Mr. Salas to six months for Count II and three months for Count III, to be served concurrently. CP 170. Following a *Blazina*⁵ inquiry, the court found that Mr. Salas has extensive financial obligations, has a family of five to support, and that he does not have the current ability to pay LFOs. 2RP (9/20/18) at 413-14; CP 174. The court waived LFOs with the exception of the \$500.00 crime victim penalty assessment. 2RP at 414. The judgment and sentence states in the “Supervision Schedule” that Mr. Salas shall “pay DOC monthly supervision assessment.” CP 173.

Timely notice of appeal was filed September 27, 2018. CP 181. This appeal follows.

D. ARGUMENT

1. THE COURT ERRED WHEN IT FAILED TO PROPERLY SUPPRESS EVIDENCE DERIVED FROM AN UNLAWFUL DETAINMENT OF MR. SALAS

Prior to trial, defense counsel moved to suppress the evidence found on Mr. Salas' person during the search incident to arrest. CP 54-58. The court denied the motion. RP (2/15/18) at 48-49; CP 70-72.

⁵ *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

a. Standard of Review

The court's conclusions of law following a suppression hearing are reviewed de novo and its findings of fact for substantial evidence. *State v. Mendez*, 137 Wn.2d 208,214, 970 P.2d 722 (1999); *State v. Carter*, 151 Wn.2d 118,125, 85 P.3d 887 (2004).

b. The detention of Mr. Salas and request for his driver's license was unlawful where the circumstances which justified the initial stop had been alleviated and no further interference was justified.

The Fourth Amendment to the United States Constitution and Article 1 § 7 of the Washington State Constitution guarantee the right of people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 647, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Wash. Const. art. 1 § 7. Generally, warrantless seizures and searches are considered per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). Whenever an individual's freedom of movement is restrained by a law enforcement officer's show of authority, a seizure has occurred. *State v. Yeager*, 67 Wn.App. 41,47-48, 834 P.2d 73 (1992).

An investigative detention constitutes a seizure, and must therefore be reasonable under the Fourth Amendment. *State v. Kennedy*, 107 Wn.2d

1,4, 726P.2d 445 (1986) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). A seizure is reasonable so long as 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. *Terry*, 392 U.S. at 21-22. In such an instance, an officer may briefly detain an individual, but only long enough to confirm or dispel his suspicions. *Florida v. Royer*, 460 U.S. 491,498-99, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). When an unconstitutional search or seizure occurs, the remedy demands that all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Here, Officer Forbragd and Officer Hall Deputy stopped the vehicle driven by Derrick Salas, ostensibly on the belief that the driver was Eric Salas. The officers initiated the stop and effected a Fourth Amendment seizure.

Mr. Salas argues that *State v. Penfield*, 106 Wn.App. 157,160-61, 22 P.3d 293 (2001) is instructive. In *Penfield*, Division Three held that under the Fourth Amendment an officer may not, without additional grounds for suspicion, proceed with a stop based on a registration check once it is manifestly clear that the driver of the vehicle is not the registered owner.

Penfield, 106 Wn.App. at 162. *Penfield* involved a traffic stop initiated under RCW 46.20.349 when an officer saw a vehicle being driven that was registered to a suspended driver, a woman. *Id.* at 159. However, as the officer approached the stopped vehicle, he saw that the driver was a man. Nonetheless, he obtained the license information from the driver, checked with dispatch, and found that the driver's license also was suspended. A search incident to an arrest for driving while license suspended revealed methamphetamine. *Id.* Division Three ruled that the traffic stop should have ended upon the officer's recognition that the registered owner was not driving. *Id.* at 161–162. The subsequent seizure of *Penfield* by asking for his driver's license violated the Fourth Amendment. *Id.* at 162–163.

Although this case does not involve a registration check, the reasoning in *Penfield* is compelling. Assuming *arguendo* that the officer's initial stop of the truck was valid and not pretextual, the question remains whether the officer's decision to continue the investigation and ask Mr. Salas to produce a driver's license after he produced a valid Washington State Identification Card violated Mr. Salas' right to be free of an unreasonable search and seizure.

Courts consider the totality of the circumstances when evaluating the reasonableness of an investigatory stop. *State v. Arcey*, 148 Wn.2d 738, 747,

64 P.2d 738 (2003). At the time he was initially seized, Mr. Salas was not doing anything illegal; the sole reason for the stop was to either to take Eric Salas into custody or to investigate whether Eric Salas was driving the vehicle. Officer Forbragd had a picture of Eric Salas readily available to him on the computer. It was incumbent on him to avail himself of that information before he made contact and required Mr. Salas to produce a driver's license. Once Mr. Salas produced the ID card and it was established that the driver was in fact Derrick and not his cousin Eric, further injury was prohibited.

Under the totality of the circumstances, the officer's actions were not reasonable. Given that Officer Forbragd had been provided a photo of Eric Salas as well as a verbal description of him, once he observed Derrick Salas and noted that he did not have the large, distinctive neck tattoo clearly shown in Eric's mugshot, he should have known the driver was not Eric Salas, and as was held in *Penfield*, the seizure should have been immediately terminated.

Once Officer Forbragd was assured that Derrick Salas was not Eric Salas, based on the identification card, the validity of the stop ceased. A lawful *Terry* stop is limited in scope and duration to fulfilling the investigative purpose of the stop. If the results of the initial stop dispel the

officer's suspicions, the investigation should cease. *State v Williams*, 102 Wn.2d 733, 739-40, 689 P.2d 1065 (1984). Any information he obtained beyond the permissible scope of the investigatory detention was the fruit of an unlawful seizure.

c. This case should be reversed and dismissed for lack of sufficient evidence

For the reasons stated above, the order denying defendant's motion to dismiss should be reversed. Further, because evidence found on Mr. Salas was fruit of the poisonous tree, the case should be dismissed for insufficient evidence.

2. IN THE ALTERNATIVE, THE TRAFFIC STOP WAS AN UNCONSTITUTIONAL PRETEXTUAL STOP

Article I, Section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. The Supreme Court has stated that "it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999).

Here, the State argued that stop was legitimate because the police maintain that they had probable cause to arrest of Eric Salas and that the

police believed that Eric Salas was the driver of the truck. However, a legitimate-seeming stop of a vehicle may be unlawful if it is done for pretextual reasons. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). “The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving.” *State v. DeSantiago*, 97 Wn. App. 446, 451, 983 P.2d 1173 (1999).

When determining if a stop is based on pretext, trial courts must consider both the officer's subjective motives and the objective reasonableness of the officer's behavior. *Ladson*, 138 Wn.2d at 343. The state bears the burden of proving a seizure was legitimate. *Id.* at 350. If the stop was pretextual, the subsequent search is deemed unlawful and all evidenced seized as a result is suppressed. *Id.* at 360 (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). A police officer's improper subjective motive for seizing a citizen will invalidate an otherwise objectively valid stop. *Ladson*, 138 Wn.2d at 451-53.

“When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” *Ladson*, 138 Wn.2d at 358-59. *Ladson* requires the

court to look beyond the formal justification for the stop and determine the actual one. *Id.* at 353.

An officer's subjective motivation is often inferred from the police function he is serving at the time of the seizure -- i.e. is the officer on regular patrol and using his authority to enforce general laws or is the officer investigating a specific offense. In *Ladson*, the officers were part of a proactive gang patrol when they instigated a traffic stop. *Id.* at 346. They admitted that although they did not make routine traffic stops as part of their gang patrol duties, they did use traffic code violations as a means to initiate contact and question people about unrelated criminal activity. *Id.* The *Ladson* court held the use of a garden-variety offense, such as a traffic violation, as a means of justifying a seizure that is truly intended to facilitate unrelated criminal investigations, violates article 1, section 7. *Id.* at 353 (citing *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962)).

Similarly, in *State v. DeSantiago*, an officer observed the defendant driving away from a building known to be a drug hot-spot. *Desantiago*, 97 Wn. App. 446, 983 P.2d 1173 (1999). Profiling the *DeSantiago* as a drug-dealer, the officer pulled him over for making an illegal left-hand turn. *Id.* *DeSantiago* did not have a license or insurance, and there was an outstanding warrant for his arrest. *Id.* at 449. He was arrested and while

searching his car incident to the arrest police found methamphetamine and a gun. *Id.* **DeSantiago** was convicted of unlawful possession of the methamphetamine and the gun. *Id.* at 448-49. The Court of Appeals, following **Ladson**, held that the stop was pretextual: the officer “was clearly ‘looking for a basis to stop the vehicle’ and subjectively intended to engage in a pretextual stop.” **Desantiago**, *supra*, at 452-453.

In **State v. Myers**, 117 Wn. App. 93, 94, 69 P.3d 367 (2003), review denied, 150 Wn.2d 1027 (2004), the court ruled under the totality of the circumstances the stop there was likewise pretextual. Myers drove past the officer who recognized him as someone whose driver's license had been suspended. *Id.* at 368. The officer checked Myers's driver's license status, but before receiving a reply Myers committed two traffic infractions. The officer testified he stopped Myers in part to contact him and verify his license status. *Id.* Contrary to the officer's suspicion, Myers had a valid license. **Myers**, 117 Wn. App. at 368. The officer then asked a passenger for his identification because of a seat belt violation. *Id.* at 368-69. Because the passenger had an outstanding warrant, the officer arrested him and searched the car incident to the arrest. *Id.* at 369. The officer found methamphetamine in Myers' car and wallet. *Id.* at 369. After obtaining a telephonic warrant, the officer found a methamphetamine laboratory in the car's trunk. *Id.* at 369.

The *Myers* court held the officer's proffered reason for the stop, the traffic infractions, was a pretext for the real reason, which was to investigate for suspected license violation. *Id.* at 368

Here, Officer Forbragd and Sergeant Renfro saw the truck driven by Derrick Salas drive by Eric Salas' house at the time the search was occurring. Sergeant Renfro directed Officer Forbragd to stop the truck, despite the fact that no infractions had been committed and despite the fact there was no showing that the truck had come from the house being searched.

Officer Forbragd and Officer Hall were not on routine patrol; they were specifically at the scene to assist SOG with execution of the search of the house. Officer Forbragd acknowledged that Mr. Salas was not committing a driving offense and stated that the only reason for the stop was because he was told to stop the vehicle by Sergeant Renfro. RP(2/15/18)at 17,23,27; 2RP at 261. The totality of the circumstances shows the stop was clearly a pretext for a criminal investigation. Subjectively, Officer Forbragd had seen no evidence of a driving infraction and acknowledged that he was told by Sergeant Renfro that he thought the truck was associated with the house, and that it was being driven by the probable cause suspect.

Objectively, the officer's actual behavior was unreasonable if the motive was simply to arrest Eric Salas. The trial court made a finding that the reason for the stop was "[t]hat Officers Forbragd and Renfro believed the car's driver was Eric Salas who had a warrant for his arrest.." (CrR 3.6 hearing Finding of Fact III), CP at 70. The court also found that "[t]hat Officer Forbragd recognized Eric Salas because he previously looked at Eric Salas' booking photographs." (CrR 3.6 Finding of Fact IV), CP 71. The record does not support these findings, insofar as it suggests the stop was objectively reasonable.

Sergeant Renfro did not testify that he identified Derrick Salas in the truck; his testimony was that he thought the truck was associated with the house and that it had been parked at the house numerous times. RP (2/15/18) at 39. The officers' testimony at trial contradicted Sgt. Renfro's testimony from the suppression hearing. Officer Forbragd stated that "the sergeant detective in charge asked that I stop the vehicle because he believed it was a probable cause suspect." 2RP at 272. Officer Hall testified that "[o]ne of the detectives recognized a gentleman that drove by in a vehicle, a small pickup, and asked the two marked units, myself and Officer Forbragd, to stop and identify that person because they believed he was associated with the search warrant they were serving." 2RP at 319-20. Officer

Forbragd testified that he was told by Sergeant Renfro that he “observed the male drive by and thought it was the same male as well[,] and “[a]sked me to stop the vehicle.” RP (2/15/18) at 17.

Sergeant Renfro’s testimony significantly differed in this critical aspect: he did not say he saw Eric Salas, but that he saw a truck related to the house pass by and “believed it could have had our suspect in there.” RP (2/15/18) at 38. Sergeant’s Renfro testified that he did not remember talking to Officer Forbragd about the truck and he did not mention it in his report. RP (2/15/18) at 39. Sergeant Renfro testified that he “learned that apparently I said something to Officer Forbragd it may have had in him the vehicle,” but “I don’t recall doing that though.” RP (2/15/18) at 38-39.

It was not objectively reasonable for Officer Forbragd to believe that Eric Salas was driving the pickup truck. Officer Forbragd testified that he thought he recognized Eric Salas as the driver of the truck. The officer, however, had received a verbal description of Eric Salas and had seen his mugshot earlier that day. Ex. 1. Eric Salas, as shown in Exhibit 1, has a distinctive appearance characterized by a neck tattoo, which Derrick Salas does not have.

Looking at the officer’s subjective motive and objective actions, the traffic stop was a pretext to search for evidence of criminal activity. The

State did not present any evidence that the officers were on “routine patrol” or on “traffic patrol.” Sergeant Renfro stated that the truck was “associated” with the house, but no evidence was presented that it was objectively responsible to believe that Eric Salas was the driver. Instead the circumstances strongly suggest that the officers had interest in the vehicle due to its “association” with Eric Salas’ house. The totality of the circumstances reveals the real reason for the stop were to check Mr. Salas for evidence of drug activity, in conjunction with the suspected illegal activity at Eric Salas’ house. The stop was pretextual. *Ladson*, 138 Wn.2d at 360; *Myers*, 117 Wn. App. at 98.

The subsequent search incident to the arrest, was illegal because the initial stop was pretextual. Without the methamphetamine found during the search, the state cannot sustain its burden of proof. Therefore, Mr. Salas’ convictions must be reversed and remanded for dismissal. *Ladson*, 138 Wn.2d at 360; *DeSantiago*, 97 Wn. App. at 453.

3. IF MR. SALAS’ SUPPRESSION ARGUMENT IS NOT PRESERVED FOR REVIEW, HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY’S FAILURE TO ARGUE THAT THE STOP WAS PRETEXTUAL

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to move to

suppress the evidence obtained in the search on the basis of a pretext stop, then both elements of ineffective assistance of counsel have been established.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). See U.S. Const. amend. VI; Const. art. I, § 22. A court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the Strickland test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30.

Prejudice exists if there is a reasonable probability that “but for

counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The defendant must affirmatively prove prejudice and show more than a “ ‘conceivable effect on the outcome’ ” to prevail. *State v. Crawford*, 159 Wash.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). See, also *State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014) (stating “[i]n order to establish actual prejudice, [the defendant] must show that the trial court likely would have granted a motion to suppress the seized evidence based on an unlawful warrantless search of her purse.”) (citing *State v. McFarland*, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995)).

There is a strong presumption that defense counsel's conduct is not deficient. *McFarland*, 127 Wn.2d at 335. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

When arguments to suppress key evidence are available to counsel but not raised, the failure to challenge the evidence is ineffective when it is prejudicial to the defendant's case. See *State v. Reichenbach*, 153 Wn.2d 126, 131-32, 101 P.3d 80 (2004).

The Supreme Court has held that the failure to request a suppression hearing is not deficient performance per se; rather, an appellant claiming ineffective assistance bears the burden of establishing that no legitimate strategic or tactical reason supported counsel's decision. *State v. McFarland*, 127 Wn.2d 322 at 336, 899 P.2d 1251 (1995); *State v. Klinger*, 96 Wn. App. 619, 980 P.2d 282 (1999). In this case, a motion to suppress was made. The charge here was for possession. The evidence resulting from the search incident to arrest provided the entirety of the State's case and without the evidence, the State would have been unable to proceed. As counsel did file a motion to suppress pursuant to CrR 3.6, it is clear that counsel made the correct choice to attempt to suppress the evidence. The failure to argue the correct grounds, however, was ineffective.

Because counsel recognized the appropriateness of challenging its admission on the grounds that it was improperly obtained—as evidenced by trial counsel's argument that the search exceeded the permissible scope of the initial stop—no conceivable tactical reason exists to explain the failure to motion to suppress on the basis of *Ladson*.

As argued in Section 2 above, there is a reasonable likelihood that a motion to suppress on the basis of *Ladson* would have been granted. Failing to bring a motion to suppress evidence can constitute ineffective

assistance. *Reichenbach*, 153 Wn.2d at 137.

Mr. Salas assigns error to the trial court's Findings of Fact III and IV, and Conclusion of Law II, made in his motion to suppress, on the basis that the stop of the vehicle was merely a pretext to search the truck and its driver, inasmuch as police believed the truck was associated with Eric Salas' house. The focus must be on whether the court would have granted a motion to suppress had defense counsel articulated a proper challenge to the admission of the evidence. As noted in Section 1 above, the facts in the record demonstrate that the detention here exceeded its permissible scope. *Penfield*, supra. The facts also strongly suggest that the stop of Mr. Salas' vehicle was pretextual. *Ladson*.

Had counsel moved to suppress on the correct grounds and included all viable arguments, including *Ladson*, there is a reasonable probability that the court would have suppressed the evidence. A motion to suppress on the correct grounds would likely have resulted in suppression of the evidence. This would have resulted in dismissal of the prosecution. Accordingly, the failure to argue the proper grounds for suppression prejudiced Mr. Salas.

4. THE DISCRETIONARY COSTS MUST BE STRICKEN BECAUSE MR. SALAS IS INDIGENT

Mr. Salas was represented by appointed counsel in the trial court and was found to not have the current ability to pay LFOs. 2RP at 414. At sentencing, the court imposed a \$500 victim penalty assessment and properly waived “the mandatory \$1000 drug penalty and found that he does not have the ability to pay. 2RP at 414. However, the court also ordered that Mr. Salas shall “[p]ay [a] DOC monthly supervision assessment.” CP 173; (Judgment and Sentence Supervision Schedule). Because the supervision costs are discretionary and prohibited by statutory amendments, this Court should remand to strike the cost.

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

In 2018, the law on legal financial obligations changed when the legislature enacted *Second Substitute House Bill (SSHIB) 1783*, effective June 7, 2018, which amended several statutes related to the imposition of discretionary costs on indigent defendants and interest on such costs. See *LAWS OF 2018*, ch. 269. In *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018), the Supreme Court held that these amendments applied to cases that are not yet final. *Ramirez*, 191 Wn.2d at 747-50. In *Ramirez*, an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v.*

Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn.2d at 742. Because the defendant in *Ramirez* was indigent, the Supreme Court ordered the filing fee stricken. *Id.* at 748-50.

RCW 10.01.160 both establishes and limits a court's authority to impose legal financial obligations (LFOs) in criminal cases. As amended in 2018, subsection.160(3) now states, “[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3).

Subsection.010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3). The definition of “[i]ndigent” under subsection (3) is contrasted with “[i]ndigent and able to contribute” under subsection (4), defined as a person who “at any stage of the proceeding” has available funds sufficient to contribute to some but not all of the anticipated costs of counsel. RCW 10.101.010(4).

b. The community supervision fee LFO is discretionary

In this case, the sentencing court found Mr. Salas to be indigent and waived nonmandatory financial penalties, including the criminal filing fee and DNA collection fee . CP 174. Shortly after sentencing the court found Mr.

Salas indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 194. In short, when sentenced, Mr. Salas was “indigent” as defined by RCW 10.101.010(3)(d).

In the “Supervision Schedule” contained in the judgment and sentence, the court ordered Mr. Salas to pay “DOC monthly supervision” fees as determined by the DOC. CP 174; (Supervision Schedule, item 6 of the 7-item list). Although the judgment and sentence cites no authority for these costs, a statute allows them as a discretionary community custody condition. RCW 9.94A.703(2)(d). Mr. Salas ordered to have twelve months of community custody. CP 172.

This Court recently made it clear these costs are discretionary. *State v. Lundstrom*, 6 Wn.App.2d 388, 396 n.3, 429 P.3d 1116 (2018) (citing subsection.703(2)(d), which states: “Unless waived by the court, ... the court shall order an offender to: ... (d) Pay supervision fees as determined by the Department.” This court also recognized in *Lundstrom* that while the sentencing court had intended to impose only mandatory fees, it inadvertently imposed this discretionary fee. *Id.* This also appears to have also happened to Mr. Salas.

The legislature passed HB 1783 on March 7, 2018 and it became effective June 7, 2018. *Ramirez*, 191 Wn.3d at 738. Mr. Salas was sentenced September 20, 2018. For the reasons discussed above, this Court should find the current LFO statute prohibits the imposition of the discretionary

community supervision fee and remand to the sentencing court to strike the LFO.

E. CONCLUSION

Based on the foregoing facts and authorities, Derrick Salas respectfully urges this court to reverse the denial of the motion to suppress and dismiss all charges.

In the alternative, Mr. Salas is indigent. Recent amendments to the LFO statute apply retroactively to prohibit the imposition of discretionary costs. This matter should be remanded to the sentencing court to strike the community supervision fee.

DATED: April 26, 2019.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Derrick Salas

CERTIFICATE OF SERVICE

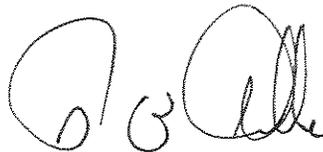
The undersigned certifies that on April 26, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Randall Avery Sutton Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Mr. Randall Avery Sutton
Kitsap Co. Prosecutor's Office
614 Division St
Port Orchard, WA 98366-4614
rsutton@co.kitsap.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Derrick Salas
2596 Fir Avenue #D
Bremerton, WA 98312

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 26, 2019.



PETER B. TILLER

THE TILLER LAW FIRM

April 26, 2019 - 4:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52482-1
Appellate Court Case Title: State of Washington, Respondent v. Derrick F. Salas, Appellant
Superior Court Case Number: 17-1-00140-4

The following documents have been uploaded:

- 524821_Briefs_20190426161303D2897783_6051.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 20190426161330463.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com

Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20190426161303D2897783