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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CASHUNDO BANKS,

Appellant.

---

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

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BRIEF OF APPELLANT

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## **A. INTRODUCTION**

Cashundo Banks was asleep in a car parked in a Safeway parking lot with the engine running. Two uniformed police officers approached Mr. Banks at the request of security to check on him. Mr. Banks was not engaged in any observable criminal activity.

Officer Hannah Bush knocked on the window and asked Mr. Banks if he was okay. The officer verified Mr. Banks was fine and did not need medical attention. Rather than end the encounter, the police continued to question Mr. Banks and requested identification. When told he had none, the officer directed him to spell his name. After checking his name and criminal history, police found a warrant and arrested him.

These actions exceeded the scope of the police's community caretaking function and turned the permissible welfare check into an unlawful seizure. All evidence obtained as a result of the unlawful seizure must be suppressed.

## **B. ASSIGNMENTS OF ERROR**

1. The court erred in denying the motion to suppress the evidence obtained after Mr. Banks was unlawfully seized, searched, and subjected to a prolonged detention in violation of the Fourth Amendment and article I, section 7.

2. The court erred in entering Finding of Fact (FOF) 2. CP 24.

3. In the absence of sufficient evidence, the court erred in entering FOF 9. CP 25-26.

4. In the absence of sufficient evidence, the court erred in entering FOF 10. CP 26.

5. In the absence of sufficient evidence, the court erred in entering Reason 5.<sup>1</sup> CP 28.

6. The court erred in entering Reason 7. CP 28.

7. In the absence of sufficient evidence, the court erred in entering Reason 9. CP 29.

8. In the absence of sufficient evidence, the court erred in entering Reason 10. CP 29.

9. If unlawful possession is a strict liability crime without a knowledge element, the law violates the presumption of innocence and due process of law, and the court erred by entering the judgment and sentence.

10. If unlawful possession is interpreted to require proof of knowing possession, the court erred in failing to find the prosecution proved this essential element beyond a reasonable doubt and in entering the judgment and sentence.

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<sup>1</sup> The court referred to its conclusions of law as “reasons for admissibility or inadmissibility of evidence.” CP 27. To the extent some of the reasons contain findings of fact, Mr. Banks assigns error to them.

11. The court erred in ordering Mr. Banks to pay costs of his community custody where it found he was indigent.

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

1. Police seize a person when they restrain an individual's freedom of movement and a reasonable person would not believe he or she was free to leave or decline a request due to an officer's use of force or display of authority. Two uniformed police officers approached Mr. Banks, who was asleep in a car, to check on his welfare. After they verified Mr. Banks was okay and not in need of medical attention or assistance, the officer continued to question Mr. Banks, asked him for identification, and asked for his name. Did the police unlawfully seize Mr. Banks, requiring suppression of the firearm and methamphetamine found after the seizure and statements Mr. Banks made after the seizure?

2. The community caretaking function allows officers to check on a person's health and safety but does not permit the police to investigate potential criminal conduct. Here, police approached Mr. Banks to make sure he was okay but continued to question him and asked for identification after they determined he was okay. Did the police exceed the scope of their community caretaking function, requiring suppression of the firearm and methamphetamine found and statements made after the police fulfilled their community caretaking function?

3. The possession of a controlled substance statute does not expressly require proof that the possession was knowing, but courts must construe statutes to avoid constitutional deficiencies. If construed to be a strict liability crime without a knowledge element, the statute is unconstitutional because it violates the presumption of innocence and due process of law. Consistent with the constitutional-doubt canon, must the possession statute be read to require proof of knowledge?

4. To convict a defendant of a crime, the finder of fact must find all essential elements of the offense beyond a reasonable doubt. Properly construed, knowledge is an element of the crime of possession of a controlled substance. Did the court err by failing to find the State proved Mr. Banks knowingly possessed a controlled substance beyond a reasonable doubt?

5. Before imposing discretionary fees, the court must analyze the defendant's ability to pay. RCW 9.94A.703 provides a court may waive community custody supervision fees, making it discretionary. Here, the court found Mr. Banks was indigent and lacked the ability to pay discretionary costs but nonetheless ordered he pay supervision fees. Must this Court strike the discretionary fee from Mr. Banks's judgment and sentence?

#### **D. STATEMENT OF THE CASE**

Three uniformed police officers responded to a call from Safeway to remove “unwanted” from the store entrance. 5/23/19RP 8, 45. While addressing that matter, an employee from Securitas, a private security company patrolling the parking lot, requested the officers check on a car parked in the Safeway parking lot. 5/23/19RP 9, 45-46. The car was not in a marked parking spot but was parked in an area that was not in the way. 5/23/19RP 10, 38; Exs. 4, 5.

Officers Hannah Bush and Deanna Ramos approached the car. 5/23/19RP 12-13. Officer Bush walked around the car and noticed it lacked displayed license plates. 5/23/19RP 26. Cashundo Banks was asleep in the driver’s seat, and the engine was running. 5/23/19RP 11, 70. Officer Bush did not see Mr. Banks engage in any criminal activity. 5/23/19RP 27. Officer Bush’s purpose in approaching the car was “to check on him to see if he was okay.” 5/23/19RP 27; *see also* 5/23/19RP 17, 23.

Officer Bush knocked on the window, identified herself, and shined her flashlight on her uniform. 5/23/19RP 12. She knocked a few times because Mr. Banks did not immediately respond. 5/23/19RP 12, 29. She asked Mr. Banks to roll down the window. 5/23/19RP 13. Officer

Bush was standing directly outside of Mr. Banks's window. 5/23/19RP 12. Officer Ramos was present at the car as well. 5/23/19RP 12, 31.

Once Mr. Banks responded, Officer Bush asked Mr. Banks if he was okay. 5/23/19RP 13-14, 30. Officer Bush ascertained that Mr. Banks was okay. 5/23/19RP 30. She determined Mr. Banks did not need medical attention. 5/23/19RP 30. Officer Bush told Mr. Banks store security sent her and asked Mr. Banks what he was doing there. 5/23/19RP 14, 30. Mr. Banks responded that he was waiting for someone. 5/23/19RP 30-31. Officer Bush asked Mr. Banks for identification. 5/23/19RP 15, 31. When he told her he did not have identification, she persisted, telling him to state his name, to spell his name, and to give his date of birth. 5/23/19RP 15; 6/4/19RP 18.

After Mr. Banks gave Officer Bush his name and date of birth, Officer Bush radioed Mr. Banks's information to run a records check on him. 5/23/19RP 16, 31. Officer Bush continued to stand outside of Mr. Banks's window while she radioed her request to run Mr. Banks's name. 5/23/19RP 16; 6/14/19RP 18-19.

Officer Bush learned that Mr. Banks had a warrant, and Officer Bush radioed Officer Aaron Lucas for backup. 5/23/19RP 16-17, 31, 48-49. Once Officer Lucas arrived, Officer Bush asked Mr. Banks to get out

of the car while they were waiting for confirmation as to whether the warrant was active.<sup>2</sup> 5/23/19RP 32-34, 48.

In response to the request to get out of the car, Mr. Banks told the officers he had a firearm in his waistband. 5/23/19RP 18-19, 50. Officer Lucas grabbed Mr. Banks's arm as he got out of the car, handcuffed him, grabbed the firearm, and put Mr. Banks in his patrol car. 5/23/19RP 18, 50-51, 60. While in the patrol car, Mr. Banks asked for a brown satchel bag from inside of the car. 5/23/19RP 52. Officer Lucas had one of the other two officers retrieve the bag from the car and bring it to his patrol car. 5/23/19RP 63-64. When Officer Lucas took Mr. Banks to the jail, he searched the bag and found methamphetamine. 5/23/19RP 54-55.

Mr. Banks moved to suppress the firearm, methamphetamine, and all statements as the fruits of his unlawful seizure and moved to dismiss the charges. CP 5-16; 5/23/19RP 1-121. He argued he was seized when the police approached the vehicle, began to question him, and requested his identification. 5/23/19RP 73-85, 101-06; CP 8-16.

The court denied the motion in its entirety. CP 24-30. The court found the police approached Mr. Banks as part of their community caretaking function and did not seize Mr. Banks until they asked him to

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<sup>2</sup> Both Officers Bush and Lucas testified they told Mr. Banks to get out of the car. 5/23/19RP 17, 32 (Bush), 50, 59 (Lucas). However, the court only made a finding that Officer Bush told Mr. Banks to get out of the car. CP 26 (FOF 16).

get out of the car. CP 28-29. The court found this seizure was lawful because, when the police asked Mr. Banks to get out of the car, they knew he had an outstanding warrant. CP 29. Therefore, the firearm, methamphetamine, and statements were lawfully obtained. CP 29.

The court rejected Mr. Banks's argument that he was seized when the police questioned him and asked him for identification. CP 28-29. And the court specifically found Officer Bush asked Mr. Banks for identification "as part of the community caretaking function." CP 29.

Mr. Banks waived his right to a jury trial. CP 31. Following a bench trial, the court found Mr. Banks guilty of both offenses as charged. CP 36-41. The court imposed a prison-based drug offender sentencing alternative and sentenced Mr. Banks to 50.75 months confinement and 50.75 months community custody on count one and 12 months confinement and 9 months community custody on count 2. CP 52-53.

## **E. ARGUMENT**

### **1. The court improperly denied Mr. Banks's motion to suppress the fruits of his unlawful seizure.**

Two uniformed police officers approached Mr. Banks to check on him and to make sure he was okay. This was a permissible encounter undertaken as a community caretaking function. But once the officers verified Mr. Banks was okay and not in need of assistance, they fulfilled

their community caretaking function. However, the police continued to question Mr. Banks and asked him for identification. This exceeded their community caretaking function and escalated the encounter into a seizure. The police had no cause to seize Mr. Banks. Mr. Banks's statements, the firearm found on his person, and the methamphetamine found in a bag must be suppressed as fruits of the unlawful seizure, the convictions must be reversed, and the charges dismissed.

- a. A police encounter constitutes a seizure when a reasonable person would not feel free to leave or to refuse an officer's request.

Article I, section 7 “prohibits any disturbance of an individual’s private affairs ‘without authority of law.’” *State v. Buelna Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Unlike the Fourth Amendment, which prohibits “unreasonable searches and seizures,” the Washington Constitution does not confine its protections to “notions of reasonableness.” *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). Article I, section 7 provides citizens greater protection than the Fourth Amendment. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Under article I, section 7, a warrantless seizure is per se unconstitutional unless it falls within a narrowly drawn exception to the warrant requirement. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

A seizure occurs when police restrain someone’s freedom of movement by means either of physical force or a show of authority such that a reasonable person would not feel free to leave or to decline the police’s request. *Rankin*, 151 Wn.2d at 695; *State v. Johnson*, 8 Wn. App. 2d 728, 737, 440 P.3d 1032 (2019). If a reasonable person would not “feel free ‘to disregard the police and go about his business,’” a seizure has occurred. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)). Under Article I, section 7, Washington courts employ an objective standard to determine if a seizure has occurred and assess the totality of the circumstances. *State v. Young*, 135 Wn.2d 498, 501, 510, 957 P.2d 681 (1998) (rejecting Fourth Amendment’s mixed objective and subjective standard).

This Court reviews de novo the trial court’s determination of when Mr. Banks was seized. *Harrington*, 167 Wn.2d at 662.

- b. A request for identification is one factor that, in the totality of the circumstances, may escalate an encounter into a seizure.

Persisting in an encounter with a citizen without cause may escalate what began as a consensual encounter into a seizure. *State v. Young*, 167 Wn. App. 922, 930-33, 275 P.3d 1150 (2012). While no single action considered alone may be dispositive of a seizure, police

actions viewed collectively may “add[] to the officer’s progressive intrusion and move[] the interaction further from the ambit of valid social contact.” *Harrington*, 167 Wn.2d at 667.

In *Harrington*, for example, the court discussed the “progressive intrusion” by police that escalated the social contact into a seizure. In that case, a uniformed officer stopped the defendant, who was walking down the street at night. *Id.* at 660-61. He did not obstruct the defendant with his person or his car. *Id.* at 661. He asked the defendant where he was coming from and asked him to keep his hands out of his pockets. *Id.* When a second officer arrived, police asked the defendant if he could pat him down while advising him he was not under arrest. *Id.* The court found the arrival of the second officer, the request to remove his hands from his pocket, and the request to frisk were a “progressive intrusion” into the defendant’s privacy that “snowballed quickly” and escalated the encounter into a seizure. *Id.* at 666

An encounter, sometimes called “a social contact,” becomes a seizure when a reasonable person “would not [feel] free to leave the scene, to disregard the officer’s requests, to ignore the officers, or to otherwise terminate the encounter.” *Johnson*, 8 Wn. App. 2d at 745. For example, in *Johnson*, uniformed police approached the defendant, who was parked in a car, shined flashlights, and engaged him in conversation. 8 Wn. App.

2d at 733. The court found the initial approach and conversation permissible. *Id.* at 734-35. However, the court found the officer's close physical proximity to the car, use of a ruse in questioning the defendant, and request for identification changed the encounter from a permissible contact into a seizure because a reasonable person would no longer feel free to leave. *Id.* at 742-45. "Taken in their totality, the circumstances existing at the moment . . . would have caused a reasonable innocent person to believe that ignoring the officer's requests, terminating the encounter, or leaving the scene were not viable options." *Id.* at 744.

This Court found a seizure in similar circumstances in *State v. Carriero*, 8 Wn. App. 2d 641, 439 P.3d 679 (2019). In *Carriero*, two uniformed officers approached a parked car and asked several questions of the occupants. 8 Wn. App. 2d at 648-49. The police also asked the occupants for identification. *Id.* The court recognized an initial contact "may 'mature' or 'transform' into a seizure if the officer's actions ultimately create a situation when the individual no longer feels free to leave." *Id.* at 657. The court emphasized that "the officer seizes the citizen not only when the citizen feels compelled to remain still but also when the citizen deems himself obliged to respond to the officer's requests." *Id.* at 655. The court ultimately held the encounter was a

seizure, viewing the circumstances and police actions cumulatively. *Id.* at 659-62.

In assessing the totality of the circumstances that identified the encounter as a seizure, the court noted the show of authority from “the two uniformed officers,” even though their guns were holstered. *Id.* at 659. The court recognized the officer’s location “immediately adjacent to the car doors” and noted that, by standing next to the door, the officer blocked the defendant’s ability to exit the car without the defendant hitting the officer with the car door. *Id.* In addition, the police never told the defendant he could ignore the officer’s request for identification, nor did the officer tell the defendant he could leave. *Id.* The court held the blocking of the car, along with the request for identification, created a seizure.<sup>3</sup> *Id.* at 661-62.

A request for identification, standing alone, may not always indicate a seizure. *State v. O’Neill*, 148 Wn.2d 564, 580, 62 P.3d 489 (2003); *Young*, 135 Wn.2d at 511; *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). However, under a totality of the circumstances, a request for identification may escalate an encounter to a seizure. For

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<sup>3</sup> In *Carriero*, the police not only stood outside of the defendant’s door, blocking his ability to open the door and leave the car without physically running into the officer, but the police car also blocked the exit to the alley where the defendant’s car was parked. 8 Wn. App. 2d at 660.

example, in *Johnson*, it was the police’s act of requesting identification from the defendant that the court found was “the tipping point at which the weight of the circumstances transformed a simple encounter into a seizure.” 8 Wn. App. 2d at 745.

Similarly, in *State v. Crane*, this Court recognized a request for identification after a show of authority can escalate an encounter into a seizure. 105 Wn. App. 301, 309-10, 19 P.3d 1100 (2001), *overruled on other grounds by O’Neill*, 148 Wn.2d 564. In *Crane*, an officer approached several people walking up the driveway of a house for which police were retrieving a search warrant. 105 Wn. App. at 304. After asking the people to stop, the officer requested identification and ran a warrant check. *Id.* at 304-05. This Court found the encounter a seizure because, once the officer requested identification,

the circumstances would cause a reasonable person to conclude that he was not free to leave or to terminate contact until the officer completed the warrant check and found [the defendant] had a clear record.

*Id.* at 311. Although in *Crane* the officer took physical possession of the defendant’s identification card, the court focused on the request for identification and the subsequent warrant check, not on the physical taking of the identification card.

Similarly, in *Rankin*, the court held a seizure occurs when an officer requests identification from a vehicle passenger. 151 Wn.2d at 697. In that case, police stopped a car for a noncriminal traffic offense but then requested identification from all occupants, including the passenger. *Id.* at 692. The court found the officer’s permissible actions – conversing with the passenger – developed into a seizure when the officer asked the passenger for identification without an independent basis to support the request. *Id.* at 698-700; *see also State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) (finding car stop does not justify request for passenger identification); *State v. Moore*, 129 Wn. App. 870, 882, 120 P.3d 635 (2005) (finding police asking car passenger for identification amounted to a seizure).

Finally, in *State v. Gleason*, an officer called out to an individual walking by the police car “can I talk to you a minute,” asked him why he was in the area, and asked him for identification. 70 Wn. App. 13, 17, 851 P.2d 731 (1993). The court found this amounted to a seizure because “[a] reasonable person in Mr. Gleason’s position would have believed he was not free to disregard the officers and go about his business.” *Id.*

c. The police seized Mr. Banks when Officer Bush requested his identification.

A reasonable person would not feel free to leave or refuse to comply at the point when Officer Bush asked Mr. Banks for identification. Two uniformed officers were standing at his window. 5/23/19RP 12, 29; CP 25. At least one, Officer Bush, stood immediately outside Mr. Banks's door. 5/23/19RP 29; CP 25, 27. Officer Bush asked if he was okay. 5/23/19RP 14, 30. She determined he was and that he did not need any medical assistance. 5/23/19RP 30. But Officer Bush continued to question Mr. Banks. 5/23/19RP 29-31. Officer Bush told him they had been sent there by security,<sup>4</sup> suggesting they were investigating him or the car. 5/23/19RP 14. *See, e.g., Johnson*, 8 Wn. App. 2d at 744 (noting manner of questioning defendant would have suggested to a reasonable person they were the subject of a criminal investigation). She asked him what he was doing there. 5/23/19RP 14, 30. She asked him for identification. 5/23/19RP 15, 31. When he told her he had none, she asked him for his name and directed him to spell it. 5/23/19RP 15.

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<sup>4</sup> The totality of the evidence in the record demonstrates the request to check on the car came not from Safeway store security but from Securitas, a private security company. 5/23/19RP 45-46, 107. The court's findings that Safeway requested the police to approach the car are unsupported by sufficient evidence. CP 24 (FOF 2), 28 (Reason 7). The court did enter accurate findings following the bench trial. CP 32, 37.

During the entire encounter, both Officers Bush and Ramos were armed and in uniform. Both officer were present at the car, and Officer Bush was located immediately outside of the driver side window where Mr. Banks sat.<sup>5</sup> 5/23/19RP 12, 29; CP 25-27. Officer Bush questioned Mr. Banks consistently and persistently from the moment of approach until he was handcuffed.

Officer Bush persisted in her actions, continuing to ask questions and requesting Mr. Banks's identification, regardless of what Mr. Banks did. A reasonable person would not feel free to leave or refuse but would instead feel compelled to comply. The court's findings to the contrary are unsupported by sufficient evidence and contrary to the weight of the evidence. CP 25-29 (FOFs 9, 10, Reasons 5, 9, 10).

Officer Bush's persistence after fulfilling the initial reason for her approach – verifying Mr. Banks was okay as part of her community caretaking function – was a progressive intrusion into Mr. Banks's privacy. Article I, section 7 does not tolerate a “progressive intrusion” into an individual's privacy. *Harrington*, 167 Wn.2d at 660. The court's

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<sup>5</sup> The court did not make a finding as to the exact location of Officer Ramos. CP 27. The evidence suggested either both Officers Bush and Ramos were at Mr. Banks's driver side door or Officer Bush was at his driver side door and Officer Ramos was in front of the car. 5/23/19RP 12, 26, 29, 31-32, 39 (Officer Bush), 5/23/19RP 45, 58-59 (Officer Lucas), 5/23/19RP 68-69, 71-72 (Mr. Banks); CP 27. The court declared, based on its personal experience, it was more likely one officer would have been at Mr. Banks's driver side door and the other at the passenger side door, but found the evidence did not support such a finding. CP 27.

finding that Mr. Banks “voluntarily” answered Officer Bush’s questions and gave his identification information to Officer Bush is not supported by substantial evidence or common sense. CP 26 (FOF 10). Moreover, the court’s conclusions that the encounter presented “no show of authority” and that a reasonable person would feel free to terminate the encounter is erroneous. CP 28 (Reason 5). The idea that a reasonable person would have felt free to sit mute or to drive away is incredulous.<sup>6</sup> Where a reasonable person in the individual’s position would feel compelled to answer or feel unable to leave the encounter, they have been seized. *Johnson*, 8 Wn. App. 2d at 737.

The court found significant that the police did not “obtain or retain” an actual license or identification card. CP 26. However, courts

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<sup>6</sup> Indeed, Washington courts are more frequently questioning the premise that reasonable people feel free to disregard inquiries and requests from uniformed police officers. For example, in his concurrence in *Carriero*, Judge Fearing acknowledged the reasonable appellate judge experiences a far different reality than reasonable disadvantaged citizens living in neighborhoods labeled a “high-crime area” by law enforcement and that such citizens may feel pressure to comply with officer requests. 8 Wn. App. 2d at 667 (Fearing, J., concurring); *see also Harrington*, 167 Wn.2d at 665 n.4 (recognizing “people feel compelled to comply with authority figures” and citing study concluding “most people would not feel free to leave when they are questioned by a police officer on the street”) (quoting David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. Crim. L. & Criminology 51, 62, 73 (2009)); Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. 1962, 2006-2020 (2019) (discussing compulsion reasonable people feel to consent to searches and whether such compliance with requests can accurately be classified as “voluntary”). Judge Fearing also reflected on the difficulty of a test turning on when “a reasonable person” would feel free to leave where the courts offer no guidance on how to assess this hypothetical reasonable person’s feelings. *Carriero*, 8 Wn. App. 2d at 666-67 (Fearing, J., concurring).

have found the *request* for identification, not the *physical taking* of an identification card, to be the significant action that can transform an encounter into a seizure.<sup>7</sup> Casual social encounters between people rarely involve requests for identification. For example, in *Johnson*, “the *request* for proof of Johnson’s identity became the tipping point at which the weight of the circumstances transformed a simple encounter into a seizure.” 8 Wn. App. 2d at 745 (emphasis added); see *Rankin*, 151 Wn.2d at 697 (“a mere *request* for identification from a passenger for investigatory purposes constitutes a seizure unless there is a reasonable basis for the inquiry”) (emphasis added); *State v. Coyne*, 99 Wn. App. 566, 574, 995 P.2d 78 (2000) (holding even where initial detention of individual was justified under community caretaking function, “the officer’s further detention and *request* for identification” was not justified) (emphasis added).

Here, as in *Harrington*, Officer Bush’s persistence was a “progressive intrusion” into Mr. Banks’s privacy that “snowballed quickly.” 167 Wn.2d at 666. Viewed cumulatively, a progressive intrusion into an individual’s privacy constitutes a seizure where a

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<sup>7</sup> An officer’s physical taking of one’s identification card may also be a relevant factor in determining whether an encounter has ripened into a seizure. *State v. Coyne*, 99 Wn. App. 566, 573, 995 P.2d 78 (2000) (“[C]ases have found permissive encounters ripening into seizures when an officer commands the defendant to wait, retains valuable property, or blocks the defendant from leaving.”).

reasonable person would not feel free to leave or refuse. *Id.* at 668-69. A reasonable person would not have felt free to leave or ignore the request when Officer Bush asked Mr. Banks for identification.

- d. Police actions that exceed the scope of their original purpose for the encounter may also escalate the encounter into a seizure.

Where police have a concern for someone's safety or believe they may need to render aid or assistance through a health and safety check, they are engaged in their community caretaking function. *State v. Kinzy*, 141 Wn.2d 373, 385-89, 5 P.3d 668 (2000). An officer's community caretaking function permits officers "to approach citizens and *permissively* inquire as to whether they will answer questions." *Kinzy*, 141 Wn.2d at 387-88 (quoting *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993)). "[A] police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting that information necessary to perform that function has not 'seized' the citizen." *Gleason*, 70 Wn. App. at 16. Thus, an encounter is not a seizure where an officer is furthering community caretaking purposes.

In addition, a police officer's community caretaking function is also a recognized exception to the warrant requirement and may justify either a warrantless seizure. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). The community caretaking function "allows for the

limited invasion of constitutionally protected rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety.” *Id.* at 802.

Like a social interaction, an encounter that begins based on the police’s concern for a citizen’s safety and welfare “may ripen into a seizure” when police actions extend beyond their community caretaking functions. *State v. Beito*, 147 Wn. App. 504, 509, 195 P.3d 1023 (2008). For example, in *Beito*, uniformed officers approached the defendant as he sat in a car parked in a store parking lot. 147 Wn. App. at 506. Police were initially concerned “for the individual’s welfare and [the] premises’ safety.” *Id.* at 507. Police asked the defendant several questions and eventually asked for identification. *Id.* When told he did not have identification, police asked for his name and date of birth. *Id.* Police used the information to run a records check and discovered an outstanding warrant. *Id.*

Because their concerns were allayed, the continued investigation and encounter ripened it into a seizure without cause. *Id.* at 509-11. The court found that even though the police never physically took possession of the defendant’s identification card (because he had none), the totality of the circumstances demonstrated the defendant did not feel free to leave. *Id.* at 510. The court considered multiple factors, including the officer

standing outside of the defendant's car door, questioning the defendant, asking for identification, asking for his name, and continuing to stand outside of the defendant's car door while conducting a warrant check. *Id.* at 510. "Under the totality of the circumstances, a reasonable person would not have felt free to terminate the encounter or refuse to answer [the officer's] questions. This amounts to a seizure." *Id.*

Thus, the community caretaking function only permits officers to "conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. *The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled.*" *Kinzy*, 141 Wn.2d at 388 (emphasis added); *State v. DeArman*, 54 Wn. App. 621, 774 P.2d 1247 (1989) (holding once police found car was not disabled and driver was not in need of assistance, community caretaking function justifying stop was fully dispelled, and officer had no reason to request identification). Nor may the police use their community caretaking function as a pretext to engage in an investigatory stop. *State v. Boisselle*, 194 Wn.2d 1, 448 P.3d 19 (2019); *Kinzy*, 141 Wn.2d at 394.

- e. The police exceeded their permissible community caretaking function when they continued to question Mr. Banks after verifying he was okay.

Here, as in *Beito*, Officer Bush initiated her contact with Mr. Banks to confirm the wellbeing of the car's occupant. 147 Wn. App. at 507; CP 28 (FOF 7); 5/23/19RP 13-14, 30. Here, as in *Beito*, two uniformed officers approached the car, and at least one stood immediately outside of the defendant's car door. 147 Wn. App. at 507; CP 25-27; 5/23/19RP 12, 16. Here, as in *Beito*, the police asked the defendant questions after police determined he was fine. 147 Wn. App. at 507; 5/23/19RP 14-15, 29-31. Here, as in *Beito*, the officer asked for identification and, when told the defendant had none, persisted by asking for a name and date of birth.<sup>8</sup> 147 Wn. App. at 507; CP 25-26; 5/23/19RP 15, 29-31. Here, as in *Beito*, the officer continued to stand directly outside of the defendant's car door while performing the record check. 147 Wn. App. at 507; 5/23/19RP 16. Here, as in *Beito*, this conduct amounted to a seizure without cause and, therefore, the evidence recovered as a result of the unlawful seizure must be suppressed. 147 Wn. App. at 510.

Ascertaining Mr. Banks's identity was not part of the community caretaking function the police were fulfilling. *Cf. Moore*, 129 Wn. App. at

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<sup>8</sup> At trial, Officer Bush testified she asked Mr. Banks for both his name and his date of birth. 6/4/19RP 18; CP 37. At the suppression hearing, Officer Bush only testified she asked Mr. Banks for his name and its spelling. 5/23/19RP 15, 31; CP 25.

880-82 (where police were determining whether reported missing person was in car registered to missing person, establishing identities of people in the car was “necessary and strictly relevant” to caretaking function).

Under the facts here, where Officer Bush verified Mr. Banks was okay and not in need of assistance, Officer Bush had no reason to ask Mr. Banks for identification. Her request for identification is the factor that tipped the encounter from a permissible community caretaking function to a seizure.

Because police had successfully accomplished the purpose for initiating the encounter – to check on Mr. Banks and verify his welfare – the police had no further need to engage Mr. Banks. The court’s finding that Officer Bush was engaged in her community caretaking function when she asked Mr. Banks for identification is unsupported by the evidence. CP 25-26 (FOF 9), 29 (Reason 9). When Officer Bush asked Mr. Banks for identification, she had dispelled the community caretaking purpose of her encounter.

The community caretaking function became an investigatory detention when the officer started asking questions unrelated to caretaking and asked Mr. Banks for identification. Once the police determined Mr. Banks was okay and not in need of assistance, their community caretaking purpose was complete. Under these facts and the totality of circumstances, the request for identification escalated the encounter from a

permissible, community caretaking check to an unjustified seizure.

Moreover, the request for identification, as well as Officer's Bush's actions in running Mr. Banks's name through the records check, waiting for results, and then waiting for confirmation unjustifiably extended the duration of what began as a permissible community caretaking stop.

The court erred in finding the request for identification was merely part of the community caretaking function and that it did not escalate the encounter into a seizure. CP 29 (Reason 9). In addition, Officer Bush's testimony and the court's finding that Officer Bush asked Mr. Banks for identification so she would know to whom she was talking is belied by the record. CP 25-26 (FOF 9). Officer Bush did not use Mr. Banks's name to engage him in a more personable conversation. Instead, upon being told he did not have identification, she asked for his name, directed him to spell it, and she immediately ran a warrant check. CP 26.

- f. The seizure was unlawful because the police did not have cause to seize Mr. Banks; therefore, the fruits of the seizure must be suppressed.

Article I, section 7 requires courts to suppress all fruits of an unconstitutional seizure. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). All evidence obtained directly or indirectly through the exploitation of an illegal seizure must be suppressed. *Buelna Valdez*, 167

Wn.2d at 778; *see also Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Here, the firearm taken from Mr. Banks after he was seizure, the methamphetamine recovered from the bag searched following his arrest, and Mr. Banks's statements about these items must be suppressed as fruits of his illegal seizure. This Court should reverse the trial court, suppress the fruits of the illegal seizure, and grant Mr. Banks's motion to dismiss.

**2. Interpreting possession of a controlled substance as a strict liability offense violates the presumption of innocence and due process of law.**

It is fundamental that “wrongdoing must be conscious to be criminal.” *Morrisette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *Rehaif v. United States*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2191, 2196-97, 204 L. Ed. 2d 594 (2019) (recognizing “scienter’s importance in separating wrongful from innocent acts” and interpreting statute to require knowledge of both possession of firearm and knowledge of unlawful status). Washington courts have construed the possession of a controlled substance statute as creating a strict liability crime with no mental element. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). This interpretation conflicts with the presumption of innocence, impermissibly shifts the burden of proof to the defense, and violates due process of law.

This issue was recently considered by the Supreme Court in *State v. A.M.*, although the Court declined to reach it because they reversed on other grounds.<sup>9</sup> 194 Wn.2d 33, 38-44, 448 P.3d 35 (2019). In her concurrence, Justice Gordon McCloud, joined by Justice González, urged the Court to reach the issue of “the ongoing criminalization of innocent conduct in Washington’s war on drugs” created by the absence of a knowledge requirement in the statute. *Id.* at 45 (Gordon McCloud, J., concurring). The two Justices recognized that “the settled interpretation of Washington’s basic drug possession statute offends due process insofar as it permits heavy criminal sanctions for completely innocent conduct” because it permits conviction for possession without knowledge of possession. *Id.* They also found that *Cleppe* and *Bradshaw* both departed from “the common law’s presumption in favor of mens rea,” and therefore erred in declining to read the statute “to require some showing of a guilty mind.” *Id.* at 49. But, because the legislature so created the statute, they found, “The strict liability drug possession statute exceeds the legislature’s authority and offends the Fourteenth Amendment right to due process.” *Id.* at 59.

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<sup>9</sup> The Supreme Court just accepted review of a case presenting the same issues. *State v. Blake*, Case No. 96873-0 (petition for review granted on January 30, 2020); [https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf](https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf). Oral argument is set for June 11, 2020.

As the *A.M.* concurrence recognized, the Court’s interpretation of the drug possession statute as a strict liability offense void of a mens rea element is wrong. In reaching this conclusion, the court relied on the fact the legislature appeared to have omitted a mental element from the statute. *Bradshaw*, 152 Wn.2d at 534-35; *Cleppe*, 96 Wn.2d at 379-80. The “failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.” *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); accord *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). The apparent absence of a mental element from a statute does not mean none is required. *Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown that a legislature intended to exclude a traditional mental element, the courts will infer one. *See, e.g., Anderson*, 141 Wn.2d at 366-67 (declining to interpret unlawful possession of firearm statute as strict liability offense and instead interpreting knowledge element, despite absence of apparent mental intent element in statute). Failure to presume the legislature implied a mens rea element creates the potential to criminalize innocent conduct.

Statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Utter v. Bldg. Indus. Ass’n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); accord *Gomez v.*

*United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question”). Unless interpreted to have a knowledge element, the constitutionality of the statute is dubious in light of fundamental due process principles.

A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” *Nelson v. Colorado*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017). History and tradition provide guidance on when the constitutional line is crossed:

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.

*Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); *see Schad*, 501 U.S. at 650 (Scalia, J. concurring) (“It is precisely the historical practices that *define* what is ‘due.’”).

Due process limits a legislature’s authority to define crimes absent a mens rea element. *See, e.g., Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (holding strict liability offender registration statute violated due process when applied to defendant who had no knowledge of duty to register). Washington appears to be the only state that interprets drug possession as a true strict liability crime. *State v. Adkins*, 96 So. 3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring); *see Bradshaw*, 152 Wn.2d at 534; *Dawkins v. State*, 313 Md. 638, 647 n.7, 547 A.2d 1041 (1988); *State v. Bell*, 649 N.W.2d 243, 252 (N.D. 2002) (legislature changed North Dakota law to require mental element); *Adkins*, 96 So. 3d at 415-16 (Florida applying knowledge requirement to possession, although not exact nature of substance).

That nearly every drug possession offense in this country has a mens rea requirement is unsurprising. As acknowledged in *Bradshaw*, the Uniform Controlled Substances Act of 1970 has a “knowingly or intentionally” requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401(c); *Bradshaw*, 152 Wn.2d at 534. This

element demonstrates the offense of possession of a controlled substance has traditionally required proof of knowledge.

Washington's drug possession law is contrary to the practice of every other state. It is contrary to the tradition of requiring the State prove a mens rea element in drug possession crimes. This indicates the possession statute violates due process. *Schad*, 501 U.S. at 640. Stripped of the traditional mental element of knowledge, there is no "wrongful quality" about a person's conduct in possessing drugs. To conclude otherwise criminalizes the innocent behavior of possessing property. Washington's possession statute is unconstitutional.

If the drug possession statute does not require proof of knowledge, it violates due process principles and is unconstitutional. U.S. Const. amend. XIV; Const. art. I, § 3. As explained, Washington's drug possession statute crosses the constitutional line and criminalizes innocent behavior. For the innocent to avoid a felony conviction, they must disprove the presumption that they were aware of the substance they possessed. This burden shifting scheme for possession of a controlled substance is unlike any in the union. The possession statute turns the presumption of innocence, fundamental to our nation's history and traditions, on its head. This Court should hold the statute unconstitutional. Mr. Banks's conviction should be reversed and the charge dismissed

because the statute is unconstitutional, and unconstitutional statutes are void. *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

**3. The trial court erred when it failed to find the State proved beyond a reasonable doubt Mr. Banks knowingly possessed the controlled substance.**

Due process requires the State to prove every element of an offense to the fact finder beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV. As explained above, to withstand constitutional challenge, RCW 69.50.4013 must be construed to require knowledge of the possession as an essential element. *See* Section E.2 *supra*. If so construed, the court erred in failing to find the State proved beyond a reasonable doubt that Mr. Banks *knew* he possessed the controlled substance.

The failure to find an essential element of an offense is a constitutional error that is presumed prejudicial. Here, the State cannot prove beyond a reasonable doubt that the court's failure to find knowledge did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). There is no uncontroverted evidence that Mr. Banks knew he possessed the substance. As Mr. Banks argued, the State presented no proof the drugs belonged to Mr. Banks. 6/4/19RP 92. Mr.

Banks did not admit to possession of the drugs. Officer Lucas never asked Mr. Banks if the methamphetamine was his. 6/4/19RP 44-46. And the bag in which the police found the drugs was inside of a car belonging to a friend of Mr. Banks, not to Mr. Banks himself. 5/23/19RP 21. The State cannot show the court's failure to find the knowledge element was harmless beyond a reasonable doubt. The conviction must be reversed and a new trial granted.

**4. This Court should strike the imposition of discretionary legal financial obligations from Mr. Banks's judgment and sentence.**

At the time of sentencing, the court found Mr. Banks was indigent and that only "payment of nonmandatory legal final obligations [is] inappropriate." CP 50. The court imposed only those LFOs it believed were mandatory. CP 50 (imposing only \$500 crime victim assessment). However, the court ordered Mr. Banks to "pay community placement fees as determined by DOC." CP 60 (Appendix F, listing conditions of community custody); *see also* CP 54 (imposing conditions of community custody as set forth in Appendix F).

RCW 9.94A.703(2)(d) provides:

Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.

Under the plain language of the statute, community custody fees are discretionary. This Court has already held that community custody costs covered by this statute are discretionary and may only be imposed where a court determines the defendant is able to pay discretionary costs. *State v. Dillion*, Case No. 78592-3-I, Slip Opinion at 25 (Wash. Ct. App. Feb. 3, 2020); *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018).

Consistent with the trial court's intent to waive all discretionary costs, and subject to this Court's decisions in *Dillon* and *Lundstrom*, the Court should strike this condition of community custody. *See State v. Ramirez*, 191 Wn.2d 732, 742-46, 426 P.3d 714 (2018) (ordering discretionary LFOs stricken).

## **F. CONCLUSION**

Police seized Mr. Banks when they continued to question him and asked for identification. Those actions exceeded the scope of the police's permissible community caretaking function. Therefore, the seizure was unlawful, and the firearm, methamphetamine, and statements must be suppressed as fruits of the unlawful seizure.

In addition, the court did not find the State proved Mr. Banks's possession of a controlled substance was knowing, requiring reversal and remand for a new trial. Alternatively, if the statute is not construed to

require proof of knowledge, it violates the presumption of innocence and due process of law and is unconstitutional, and Mr. Banks's conviction must be reversed and dismissed.

Finally, the court erred in imposing discretionary community custody fees where it found Mr. Banks to be indigent, and those costs must be stricken.

DATED this 24th day of February, 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', written in a cursive style.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 53522-0-II
	)	
CASHUNDO BANKS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF FEBRUARY, 2020, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> CASHUNDO BANKS<br>768833<br>OLYMPIC CORRECTIONS CENTER<br>11235 HOH MAINLINE<br>FORKS, WA 98331  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                |

**SIGNED IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2020.**



X \_\_\_\_\_

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