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Division II
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53522-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CASHUNDO BANKS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

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

Officers Bush and Ramos, two uniformed police officers, approached Mr. Banks, who was sitting in a car in a Safeway parking lot, to make sure he was okay. 5/23/19RP 12-13, 17, 23, 27. Officer Bush stood directly next to Mr. Banks's car door at the driver's side window. 5/23/19RP 12, 29. Officer Bush questioned Mr. Banks, decided he was fine, and determined he did not need any sort of assistance. 5/23/19RP 13-14, 30-31.

Rather than end the encounter when she fulfilled her purpose for approaching Mr. Banks, Officer Bush continued to question Mr. Banks. 5/23/19RP 13-16, 29-31. She requested Mr. Banks's identification and directed him to spell his name and provide his date of birth. 5/23/19RP 15, 31; 6/4/19RP 18.

Officer Bush's actions exceeded her community caretaking function and escalated the encounter into a seizure without cause. Therefore, all evidence recovered from the search following the unlawful seizure must be suppressed, and this Court should reverse the conviction and remand for dismissal of the charges. Brief of Appellant at 8-26.

- a. A reasonable person would not feel free to leave when two uniformed police officers stood outside his car window, questioned him, and asked him for identification.

Police seize a person when they restrain the person's freedom of movement by a show of authority such that a reasonable person would not feel free to leave or to decline the police's request. *State v. Johnson*, 8 Wn. App. 2d 728, 737, 440 P.3d 1032 (2019). Courts must consider the totality of the circumstances in determining whether an encounter is a seizure. *Id.* at 744. Courts may consider an officer's physical presence, questioning, and a request for identification. *Id.* at 742-45; *State v. Carriero*, 8 Wn. App. 2d 641, 659-62, 439 P.3d 679 (2019). An interaction with a police officer evolves into a seizure at the point the person "feels compelled to remain . . . [or] obliged to respond to the officer's requests." *Carriero*, 8 Wn. App. 2d at 655.

An officer's request for identification after the reason for the encounter is over may elevate an encounter into a seizure. In *State v. Harrington*, the officer's request for the accused to remove his hands from his pockets and to frisk him "snowballed" the "progressive intrusion" into a seizure. 167 Wn.2d 656, 666-68, 222 P.3d 93 (2009). Here, Officer Bush's persistent questioning and request for Mr. Banks's identification escalated the encounter into an unlawful seizure. It does not matter that each action, viewed alone, is not a seizure. The court must view the

totality of the circumstances. “[A] series of police actions may meet constitutional muster when each action is viewed individually, but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively.” *Harrington*, 167 Wn.2d at 668; *Carriero*, 8 Wn. App. 2d at 656 (courts must focus not on “any one discrete act” but “must consider the totality of circumstances surrounding the encounter”).

The State’s statement of facts and framing of the argument is misleading. The State asserts Officer Bush asked Mr. Banks for his name but frequently omits Officer Bush’s request for Mr. Banks to produce identification. Brief of Respondent at 4, 12, 17-18. The State again minimizes the officer’s actions in its argument, writing, “Here, no seizure occurred when Ofc. Bush approached [Mr.] Banks’ parked car, engaged him in conversation, and asked for his name.” Brief of Respondent at 12. This presentation again omits Officer Bush’s request for identification.

Officer Bush testified, and the court found, Officer Bush approached the car, verified Mr. Banks was not in need of assistance, and only then requested Mr. Banks produce identification. 5/23/19RP 12-15, 29-31; CP 25-26, 29. When he explained he had none, she asked for his name, asked him to spell it, and asked for his date of birth.

In addition to trying to minimize the facts, the State inaccurately claims an officer’s request for identification “*cannot* amount to a seizure.”

Brief of Respondent at 18, 26. Whether an encounter rises to a seizure depends on a variety of factors, one of which is a request for identification. *Harrington*, 167 Wn.2d at 664-69; *Johnson*, 8 Wn. App. 2d at 742-45; *Carriero*, 8 Wn. App. 2d at 659-62; *State v. Crane*, 105 Wn. App. 301, 309-10, 19 P.3d 1100 (2001); *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993). While a request for identification may not turn every encounter into a seizure, it may be enough when other coercive factors accompany the request. “A totality of the circumstances analysis is a cumulative analysis, not a divide-and-conquer analysis.” *Johnson*, 8 Wn. App. 2d at 745 (internal quotation omitted).

A reasonable person in Mr. Banks’s situation would not have felt free to ignore Officer Bush’s questions. A reasonable person would not have felt free to drive away from two uniformed police officers standing immediately outside of his window. Officer Bush’s testimony and the court’s conclusion that Mr. Banks was free to drive away while Officer Bush was standing directly outside of Mr. Banks’s driver side window, questioning him, is not supported by the evidence. Officer Bush’s actions constitute a seizure.

- b. The police exceeded the scope of their community caretaking function when they continued to question Mr. Banks and requested identification after they verified he did not need assistance.

The police approached Mr. Banks to determine whether he needed assistance. 5/23/19RP 13-14, 17, 27, 23, 30. The court found they did so as part of their community caretaking function. CP 28-29. Once they determine he did not need assistance, the purpose of the police encounter was over.

Police may approach people and question them as is necessary to render aid or ensure the person does not need assistance. *State v. Boisselle*, 194 Wn.2d 1, 11-12, 448 P.3d 19 (2019); *Gleason*, 70 Wn. App. at 16. But these welfare checks or community caretaking inquiries do not permit police to engage in any actions they wish. Rather, police may only engage in reasonable conduct necessary for performing the community caretaking function. *State v. Martin*, ___ Wn. App. 2d ___, ___ P.3d ___, 2020 WL 3263730 (June 15, 2020).

Moreover, an encounter that begins as a community caretaking becomes a seizure when the police's actions exceed the scope of their caretaking purpose. *State v. Beito*, 147 Wn. App. 504, 509, 195 P.3d 1023 (2008). This includes police continuing to question a person or asking for identification after they have completed the welfare check. *Id.*

The State fails to explain why Officer Bush needed to continue her questioning of Mr. Banks when she claimed she would have done nothing if he had driven off. The State also fails to offer any legitimate reason why Officer Bush needed Mr. Banks's name, must less his identification, *after* she determined Mr. Banks was fine and not in need of any assistance if Mr. Banks was free to leave.

Once Officer Bush determined Mr. Banks did not need assistance, the encounter did not need to continue. Nothing about a community caretaking function requires police to ask a citizen for identification. Contrary to the State's argument, police do not need to be able to demand identification from every person they approach to "adequately perform their duties." Brief of Respondent at 19. Such an interpretation is inconsistent with "narrowly construed" exceptions to the warrant clause. Const. art. I, § 7; *State v. Buelna Valdez*, 167 Wn.2d 761, 775, 224 P.3d 751 (2009).

Officer Bush's actions in continuing to question Mr. Banks and asking for his identification after she determined he was fine were not reasonably related to her community caretaking function. These actions exceeded the scope of a welfare check and turned the encounter into a seizure.

- c. This Court must suppress the fruits of Mr. Banks's unlawful seizure.

After the police seized Mr. Banks, they took a firearm from his waistband and methamphetamine from a bag in the car. 5/23/19RP 18, 50-51, 54-55, 60. Mr. Banks also made several statements about these items. 5/23/19RP 18-19, 50-52. The firearm, methamphetamine, and statements are all fruits of Mr. Banks's unlawful seizure. This Court should reverse the trial court, suppress the fruits of the illegal seizure, and grant Mr. Banks's motion to dismiss.

2. This Court must reverse Mr. Banks's conviction for possession of a controlled substance.

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

Washington court's interpretation of the possession of a controlled substance statute as a strict liability offense with no mens rea element conflicts with the presumption of innocence, impermissibly shifts the burden of proof to the accused, and violates due process of law. Brief of Appellant at 26-32. "The strict liability drug possession statute exceeds the legislature's authority and offends the Fourteenth Amendment right to due process," rendering the statute unconstitutional. *State v. A.M.*, 194 Wn.2d 33, 59, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring). Because the statute is unconstitutional, this Court must reverse Mr.

Banks's conviction and remand for dismissal of the charge with prejudice.
City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

The State argues precedent requires this Court to interpret the possession of a controlled substance statute as a strict liability offense. Brief of Respondent at 29-31. As argued in the opening brief, *State v. Bradshaw* and *State v. Cleppe* are wrongly decided and should not be followed. 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); 96 Wn.2d 373, 380, 635 P.2d 435 (1981). Moreover, the State's argument that this Court is required to follow its own decision in *State v. Schmeling* is incorrect. Brief of Respondent at 29-31 (citing *State v. Schmeling*, 191 Wn. App. 795, 365 P.3d 202 (2015)). Washington does not follow the doctrine of horizontal stare decisis, and one Court of Appeals panel is not required to follow the opinion of a different panel. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 147-54, 410 P.3d 1133 (2018).

If the Court agrees with the State that it must interpret RCW 69.50.4013 as creating a strict liability offense, devoid of a knowledge requirement, then the statute violates due process of law and is unconstitutional. If the statute is unconstitutional, the Court must reverse and remand for Mr. Banks's conviction to be vacated and the charge dismissed with prejudice.

- b. If the controlled substance statute is interpreted to include a knowledge element, then the court erred when it failed to find the State proved beyond a reasonable doubt that Mr. Banks knowingly possessed the controlled substance.

Alternatively, this Court should apply the statutory construction canon of avoiding constitutional doubt to read the statute to require a knowledge element. Brief of Appellant at 28-31. Here, the State did not prove, and the court did not find, Mr. Banks knowingly possessed the methamphetamine. The court's failure to find an essential element is presumed prejudicial, and this Court must reverse the conviction and remand for a new trial unless the State can prove this constitutional error is harmless beyond a reasonable doubt. *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); *see also A.M.*, 194 Wn.2d at 41-42.

The State does not address whether it can prove the absence of this element is harmless. The State also erroneously argues this constitutional error would not require a retrial but merely a remand for new findings, citing *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995). Brief of Respondent at 31. But *Alvarez* predates the *Neder* and *Brown* line of cases Mr. Banks cites in the opening brief. Brief of Appellant at 32-33. Those cases adopt the constitutional harmless error framework for when an element is omitted in a trial. And unlike *Alvarez*, in which the appellant

argued the court failed to make necessary factual findings under JuCr 7.11, Mr. Banks is not arguing a rules-based error. *Alvarez*, 128 Wn.2d at 15-20. Mr. Banks asserts a constitutional violation.

Because the missing element of knowledge is not supported by uncontroverted evidence, the error here was not harmless. *Neder*, 527 U.S. at 18; *Brown*, 147 Wn.2d at 341. The facts on which the court convicted Mr. Banks here are strikingly similar to the scenario of which the *A.M.* concurrence warned.

A person might pick up the wrong bag at the airport, the wrong jacket at the concert, or even the wrong briefcase at the courthouse. . . . All this conduct is innocent; none of it is blameworthy.

A.M., 194 Wn.2d at 64.

The police found methamphetamine inside of a bag retrieved from a car Mr. Banks did not own. 5/23/19RP 21. The bag contained methamphetamine, but the police did not ask Mr. Banks if it was his. 5/4/19RP 44-46. Mr. Banks did not claim the methamphetamine was his, and the State presented no evidence the drugs belonged to him. 6/4/19RP 92. The State did not prove Mr. Banks knew he possessed the methamphetamine, or even that he knew he possessed the object. The court convicted Mr. Banks of possessing a controlled substance without any evidence he knowingly possessed methamphetamine. Because Mr.

Banks “contested the omitted element and raised evidence sufficient to support a contrary finding,” the error is not harmless, the conviction must be reversed, and the case remanded for a new trial. *Neder*, 527 U.S. at 19.

3. This Court should strike the imposition of discretionary legal financial obligations from Mr. Banks’s judgment and sentence.

The court improperly imposed the cost of community custody supervision, which is a discretionary cost, after finding Mr. Banks indigent and stating it intended to impose only mandatory legal financial obligations (LFOs). Brief of Appellant at 33-34. This Court should strike the impermissible cost. *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 464 P.3d 198 (2020); *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018).

The State concedes the court found Mr. Banks indigent and admits the record demonstrates the court intended to impose only mandatory LFOs. Brief of Respondent at 33-35. The State further agrees community custody supervision costs are a discretionary LFO courts may not impose on indigent defendants. Brief of Respondent at 34-35 (citing *Dillon*). Yet the State argues this Court should not review this admittedly improper cost because it claims Mr. Banks did not preserve the issue. Brief of Respondent at 32-33. For the reasons argued in his opening brief

and below, this Court should remand for the admittedly impermissible cost to be stricken from Mr. Banks's judgment and sentence.

First, the record demonstrates Mr. Banks properly preserved this issue. At sentence, Mr. Banks explicitly asked the court to "waive any discretionary fines and costs." 6/28/19RP 112. After inquiring into Mr. Banks's financial status, the court found Mr. Banks was indigent, declared, "I won't impose any other legal/financial obligations," and informed the parties it was imposing only the \$500 victim penalty assessment. 6/28/19RP 125; CP 50 (finding "payment of nonmandatory [LFOs] inappropriate"). Despite the court's clear directive, it failed to strike the community custody supervision fee from the preprinted judgment and sentence, presumably because it appears in a different part of the form, separate from the rest of the LFOs. *Compare* CP 50 (listing standard LFOs) *with* CP 60 (listing "shall pay community placement fees" among community custody conditions). This is akin to a clerical error. The record demonstrates the court did not intend to impose this cost.

Second, the State tries to distinguish between "costs" barred under RCW 10.01.160 and other fees and assessments. Brief of Respondent at 33-34. The State's reading is too narrow. A legal financial obligation is a "sum of money that is ordered by a superior court" and includes various types of financial assessments. RCW 9.94A.030(31). Statutes imposing

LFOs are simply part of a “cost and fee recovery regime” covering “any other financial obligation” imposed due to a criminal case. *State v. Diaz-Farias*, 191 Wn. App. 512, 518-519, 362 P.3d 322 (2015); RCW 9.94A.030(31). Courts may not force indigent persons to pay discretionary LFOs.

Finally, even if this Court finds the error unpreserved, the Court may consider the improper imposition of LFOs for the first time on appeal. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). In *Blazina*, the Court exercised its discretion under RAP 2.5 to consider an unpreserved challenge to the imposition of LFOs where the court failed to inquire into the defendant’s ability to pay. 182 Wn.2d at 830. The Court ultimately remanded for a new sentence hearing. *Id.*

Starting with *Blazina*, our Supreme Court has consistently demonstrated the highest concern for combating the harm caused by the imposition of LFOs on indigent defendants. *See, e.g., State v. Schwartz*, 194 Wn.2d 432, 443, 450 P.3d 141 (2019) (holding failure to pay LFOs does not prevent washout because such interpretation would be absurd); *State v. Catling*, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019) (remanding and directing court to revise judgment and sentence to eliminate prohibited nonrestitution interest on LFOs); *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018) (finding trial court failed to

conduct adequate inquiry, holding amendments apply retroactively, and striking discretionary LFOs).

Our Supreme Court’s vigilance against the imposition of improper costs on indigent defendants stems from its recognition of the barriers LFOs creates for defendants reentering society. The Court’s liberal review of improper LFOs is consistent with the legislative goal of facilitating reentry. “[I]t is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship” as “an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship.” RCW 9.96A.010. Burdening indigent defendants with debt does not further that goal. *See Blazina*, 182 Wn.2d at 835 (“problems associated with LFOs imposed against indigent defendants ... include increased difficulty in reentering society”); U.S. Commission on Civil Rights, *Collateral Consequences: the Crossroads of Punishment, Redemption, and the Effects on Communities*, BRIEFING REPORT, at 1 (2019)¹ (addressing the collateral consequences individuals face following conviction in regards to employment, housing, and education).

¹ Available at <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.

The State admits that, if this Court reaches the issue, the record reflects the trial court's clear intent not to impose discretionary LFOs, that the community supervision fee is a discretionary LFO. This Court's decision in *Dillon* requires the Court to remand for the trial court to strike the assessment. Brief of Respondent at 35. Consistent with the trial court's clear intent to waive all discretionary costs, and subject to this Court's decisions in *Dillon* and *Lundstrom*, the Court should strike this discretionary LFO from the judgment and sentence. *Ramirez*, 191 Wn.2d at 742-50.

B. CONCLUSION

Officer Bush exceeded the scope of her community caretaking function and unlawfully seized Mr. Banks when she asked Mr. Banks for identification and continued to question him after she ascertained he was fine and not in need of assistance. The fruits of this unlawful seizure must be suppressed. This Court should reverse the order denying Mr. Banks's motion to suppress and remand for suppression of the firearm, methamphetamine, and statements.

In addition, if the possession of a controlled substance statute is a strict liability offense, it violates the presumption of innocence and due process of law, and the Court must reverse Mr. Banks's conviction and remand for dismissal with prejudice. Alternatively, if the possession of a

controlled substance statute has a knowledge element, the court did not find the State proved Mr. Banks knowingly possessed a controlled substance, requiring reversal and remand for a new trial.

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 10th day of July 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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)	
Respondent,)	
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)	
CASHUNDO BANKS,)	
)	
Appellant.)	

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