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NO. 53522-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CASHUNDO SCOTT BANKS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Michael Schwartz, Judge, and Bryan Chushcoff, Judge

No. 19-1-00471-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

Banks had been asleep behind the wheel of a running car for several hours when Officer Bush was asked to check on him in the Safeway parking lot. She walked up to the car, which was not parked in a legal parking spot, engaged Banks in conversation, and asked for his name. Officer Bush's patrol car was at the opposite side of the storefront, she was the only officer speaking to Banks, and she did not demand Banks's identification or draw her weapon when making her request. When Banks did not have identification on him, she asked him to spell his name. A subsequent records check revealed that Banks had outstanding warrants. A firearm and methamphetamine were later recovered from his person and his belongings.

As a matter of law, Officer Bush's actions did not rise to the level of a seizure when she asked Banks who he was and how to spell his name. The encounter was a valid social contact. Banks's suppression motion was properly denied on that basis.

Banks was charged with unlawful possession of a firearm in the first degree and unlawful possession of a controlled substance due to the items found in his possession after he was arrested. Because there is no mens rea element to Washington's unlawful possession of a controlled substance statute, the State was not required to prove knowing possession. Banks

contends the statute is unconstitutional, but his challenge has been rejected by the Washington Supreme Court in *State v. Bradshaw*, which this Court is bound by.

Following Banks's convictions for unlawful possession of a firearm and unlawful possession of a controlled substance, the Court sentenced Banks to a prison-based DOSA. Banks waived any argument to the imposition of the supervision assessment when he failed to object to it. However, because the record indicates the trial court intended to waive all discretionary legal financial obligations, should this Court reach his claim, the State agrees the provision should be stricken based on the record. This Court should affirm Banks's convictions.

II. RESTATEMENT OF THE ISSUES

A. Did the trial court properly deny Banks's suppression motion where police contacted him pursuant to a valid, social contact and only seized Banks after they learned he had an outstanding felony warrant for his arrest? (Appellant's Assignment of Error 1).

B. Is this Court bound by Washington Supreme Court decisions which hold that possession of a controlled substance is a strict liability offense? (Appellant's Assignments of Error 2, 3).

C. Should this Court remand for the trial court to strike the supervision assessment in the judgment and sentence where Banks failed to object to the assessment below, but where the trial court intended to waive all discretionary legal financial obligations? (Appellant's Assignment of Error 4).

III. STATEMENT OF THE CASE

Tacoma Police Officer ("Ofc.") Hannah Bush was asked by a security guard to check on a person, later identified as defendant Cashundo Banks, who appeared to be asleep or unconscious in the front seat of a Dodge Magnum, which had been parked in the Tacoma Safeway parking lot for hours with the engine running. 05/23/19 RP 8-12.

Ofc. Bush and Ofc. Lucas had already been at Safeway to confront unwanted loiterers at the front of the store. 05/23/19 RP 8-9. Ofc. Bush broke away to check on Banks. 05/23/19 RP 9-10.

Ofc. Bush approached the running vehicle on foot, leaving her patrol car parked at the opposite side of the parking lot. 05/23/19 RP 25-26. As Ofc. Bush approached the car, she noted that the vehicle lacked both front and back license plates.[1] 05/23/19 RP 26. The vehicle was not parked in a legal parking spot. 05/23/19 RP 10. She knocked on the window a few times before Banks responded to her. 05/23/19 RP 12. Ofc. Bush asked Banks to roll down his window, but the window remained cracked during their conversation. 05/23/19 RP 13, 29-30. Ofc. Ramos joined Ofc. Bush, but Ofc. Bush was unsure where Ofc. Ramos was positioned. 05/23/19 RP 12, 26.

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[1] It is unlawful to operate a vehicle unless license plates are attached as required by statute. *See* RCW 46.16A.200(7)(d); RCW 46.63.020.

Ofc. Bush shined her flashlight on her uniform, identified herself as a Tacoma Police Officer, and asked Banks if he was okay. 05/23/19 RP 14, 27. The officer informed Banks that security was wondering why he was there, stating, "you have been passed out in your car for a while[.]" 05/23/19 RP 14. Ofc. Bush was not attempting to prevent Banks from leaving; had he driven off, Ofc. Bush would not have stopped him[2] because it would have been a "problem solved." 05/23/19 RP 27-28.

With Banks still seated in the car, Ofc. Bush asked, "Hey, can I get your name so I know who I'm talking to?" 05/23/19 RP 14. Banks did not have identification, so Ofc. Bush said, "okay, well, can you just spell your name?" 05/23/19 RP 15. Banks spelled his name for Ofc. Bush, and Ofc. Bush ran a records check as she stood beside the vehicle.[3] 05/23/19 RP 16.

When a records check is run, warrants initially come back as "possible" and must be confirmed. 05/23/19 RP 34. After Ofc. Bush ran Banks through records, she learned that his driving status was suspended in the second degree, and he had a possible felony warrant for his arrest. 05/23/19 RP 16-17. Ofc. Bush radioed Ofc. Lucas for back up due to Banks's potential felony warrant. 05/23/19 RP 16-17.

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[2] Ofc. Bush was concerned that the car did not have license plates and that Banks had been "passed out for about an hour" in a running vehicle. 05/23/19 RP 28. Nevertheless, Ofc. Bush would not have stopped Banks from leaving. 05/23/19 RP 28.

[3] At trial, Ofc. Bush clarified that her radio is equipped with an earpiece, so Banks could not hear the radio. 06/04/19 RP 19.

Ofc. Lucas also approached Banks's car on foot, leaving his patrol car parked in front of the store 60 feet away, and joined Ofc. Bush near the driver's side door.[4] 05/23/19 RP 47, 58. The officers asked Banks to step out of the vehicle. 05/23/19 RP 17. Banks complied and notified the officers that he had a firearm in his waistband. 05/23/19 RP 17. Ofc. Lucas placed Banks in handcuffs and retrieved the firearm. 05/23/19 RP 51, 60. The warrant was confirmed during this process. 05/23/19 RP 50. Once Banks was in Ofc. Lucas's patrol car, he asked the officers to retrieve a brown satchel bag from inside the car to go with him to the Pierce County Jail. 05/23/19 RP 52. Ofc. Lucas searched the bag once at the jail and discovered a clear Ziploc bag containing methamphetamine. 05/23/19 RP 55.

The State charged Banks with unlawful possession of a firearm in the first degree and unlawful possession of a controlled substance, to wit: methamphetamine. CP 3-4. Banks moved to suppress evidence of the firearm and methamphetamine, claiming that Ofc. Bush unlawfully expanded the scope of their contact and he was unlawfully seized. CP 5, 8. Before trial, the parties held a CrR 3.6 hearing where the officers testified

[4] Neither Officers Bush nor Lucas could recall Ofc. Ramos's location. 05/23/19 RP 26 (Bush), 59 (Lucas). Ofc. Bush believed Ofc. Ramos could have been behind her, but she was unsure. 05/23/19 RP 32. The trial court believed, based on its experience with officers and their training for officer safety, that it was unlikely the second officer was behind Ofc. Bush during the conversation. 05/23/19 RP 87; CP 27. Ofc. Bush did not recall Ofc. Ramos having any contact with Banks. 05/23/19 RP 39. Ofc. Ramos did not testify at the CrR 3.6 hearing. 05/23/19 RP 3.

to the above facts. Banks also testified. 05/23/19 RP 67. His account of the conversation differed slightly, namely by asserting that Ofc. Ramos stood at the front of his vehicle, preventing him from leaving. 05/23/19 RP 68-69. The State impeached Banks with a prior conviction from 2017 for taking a motor vehicle without permission. 05/23/19 RP 72.

The trial court denied Banks's motion to suppress and entered the following Findings of Fact related to Ofc. Bush's contact with Banks:

> 1. On February 2, 2019, Officer Hannah Bush responded to the Safeway store at 6201 6th Avenue regarding unwanted individuals who were in front of the store. Officer Aaron Lucas had also responded to the same call and was already on scene.
>
> 2. During this contact, Safeway store security came up and asked Officer Bush to check on a vehicle which was parked on the left side of the parking lot, backed in, and not in a legal parking spot. The security officer pointed out the vehicle which was a blue Dodge Magnum and told Bush that there was a man asleep inside the vehicle and the engine was running. The security officer stated that the vehicle had been there for several hours and asked Bush to check on the man inside and to ask him to leave if he was not going to purchase anything.
>
> 3. After being asked to check on the vehicle and the individual inside, Officer Bush approached the vehicle on foot. Her patrol car was parked in front of the store to the east of the entrance.
>
> 4. As she approached the vehicle, Bush observed that the vehicle was running and that the vehicle did not have a front license plate. Bush walked around the car and observed that there was no rear license plate. An individual was seated in the driver's seat with his eyes closed, apparently asleep. Bush knocked on the window using her hand. It took a few knocks for the driver to respond. Bush identified herself as Officer Bush with Tacoma Police. The driver opened his eyes and stared at Bush. Officer Bush used her flashlight

to illuminate her uniform because she did not want to startle or alarm the driver when he responded.

5. Using a normal tone of voice, Bush asked defendant to roll down his window which was cracked at the time. The driver did not respond and Bush motioned him to roll down the window. At no time did Bush order or demand that the driver roll down his window.

6. Bush's weapon was not drawn and her hand was not on her weapon.

7. When the driver finally responded, Bush asked him if he was OK and told him that security told her that he had been parked there for a while.

8. Bush asked the driver for identification, which he was unable to provide, however, he did provide his name.

9. Officer Bush testified that she requested identifying information so she would know who she was talking to. The driver was still seated in the vehicle at this time. Bush used a normal tone of voice when asking the driver for his name and did not demand or order him to provide identification.

10. The defendant voluntarily provided his name to Bush. During this time, the contact with the driver was completely conversational with no hostility.

11. Bush ran a records check using the information that the driver provided. The driver was still seated in the vehicle and Bush did not obtain or retain any license or other personal identifying documents while she ran the records check.

12. The driver, identified as the defendant, Cashundo S. Banks, had a felony warrant for his arrest and his driver's license was suspended in the second degree.

13. After learning about the warrant, Officer Bush requested back up. Officer Lucas, who was at the Safeway but not present during the initial contact as he was finishing up the unwanted persons call, responded.

> 14. Officer Lucas also approached defendant's vehicle on foot. His patrol vehicle was parked in front of the store approximately 60 feet away.
>
> 15. During the entire contact, neither Officer Bush's nor Officer Lucas' patrol cars were parked near defendant's vehicle in a manner which blocked defendant's vehicle or prevented him from leaving. None of the patrol cars had emergency lights activated.
>
> 16. After learning about the warrant, Officer Bush asked defendant to get out of the car. Her intent was to detain defendant because of the warrant. Defendant told Officers Bush and Lucas that he had a firearm in his waistband. The defendant's statement regarding the firearm was not in response to any questions by either officer regarding weapons.
>
> 17. After defendant stepped out of the vehicle, he was placed in handcuffs and Officer Lucas removed the firearm from his waistband. […]
>
> 20. During the contact with defendant, a third officer, Officer Ramos, was also present. Neither Officer Bush nor Officer Lucas were sure of her position or location of her car during the contact but it was likely that her patrol car was not parked in a manner that blocked defendant in or prevented him from leaving.

CP 24-27. There were two disputed facts:

> 1. Officer Bush testified that she believed Officer Ramos was positioned behind her during the initial portion of the contact. Defendant testified that one officer was at the driver side door of the vehicle he was in and the other officer was at the front end of the car.
>
> 2. Defendant testified that he could not have driven away without hitting the officer at the front end of his car.

CP 27. The court entered the following Findings to the two disputed facts:

> 1. In the court's experience, police officers do not generally back each other up by one standing behind the other, rather they will

> approach on opposite sides of the vehicle of [sic] in a position where he or she has a view of the individual in the vehicle. In this case, there was no testimony that Officer Ramos was positioned on the passenger side of the vehicle and neither Officer Bush nor Officer Lucas could recall where she was positioned.

CP 27.

The court entered the following Conclusions of Law, labeled "Reasons for Admissibility or Inadmissibility of the Evidence:"

> […]
>
> 4. A seizure occurs only when an individual's freedom is restrained and a reasonable person would not feel free to decline the officer's request to speak with him or otherwise terminate the encounter. It is an objective test based on what a reasonable person would feel.
>
> 5. Factors which may indicate a seizure indicate [sic] the threatening presence of several officers, the display of a [sic] weapons, an authoritative tone of voice or some type of physical contact with the individual. The court finds that no show of authority was used in this case such that a reasonable person would not feel free to terminate the encounter.
>
> 6. Police do not need a sufficient basis in order to engage in a social contact, they do not need a basis at all as a social contact does not suggest an investigative component.
>
> 7. The approach by Officer Bush in this case was at the request of a store security officer and was initiated as part of the community caretaking function.
>
> 8. Knocking on the window and shining a flashlight is no more than Officer Bush not wanting the person in the vehicle to believe that she was an intruder or to otherwise startle him.
>
> 9. Officer Bush asked defendant if he was OK and asked for identification as part of the community caretaking function.

> 10. The court finds that under the totality of the circumstances, a seizure did not occur in this case until the defendant was asked to get out of the vehicle.
>
> 11. By the time defendant was asked to get out of the vehicle, Officer Bush learned of the outstanding warrant and therefore the seizure was lawful.[…]

CP 27-29.

Banks waived his right to a jury trial and proceeded to a bench trial. 06/04/19 RP 3; CP 31. The testimony at trial tracked the testimony from the officers during the CrR 3.6 hearing, with two additional witnesses testifying. Forensic scientist Maureena Dudshus testified that she confirmed the substance Ofc. Lucas found was, in fact, methamphetamine. 06/04/19 RP 62-64, 69. Tacoma Police Detective Jacob Martin testified that he test fired the weapon recovered from Banks's waistband, and that the firearm was operable. 06/04/19 RP 73, 75-76. Banks did not testify at trial. 06/04/19 RP 82.

The trial court found Banks guilty of both charges. 06/04/19 RP 94-98; CP 36-41, 45-60. The court sentenced Banks to a prison-based Drug Offender Sentencing Alternative (DOSA) with 50.75 months in custody and 50.75 months on community custody. CP 52-53. As part of Banks's sentence, the court imposed a supervision assessment. CP 54, 60. This appeal follows. CP 61.

IV. ARGUMENT

A. The court properly denied Banks's suppression motion where police contacted him pursuant to a valid, social contact, and he was seized only after officers learned he had an outstanding felony warrant.

Banks was not seized when Ofc. Bush requested his identification as part of a valid, routine social contact, thus the trial court properly denied Bank's CrR 3.6 suppression motion. When reviewing a trial court's denial of a CrR 3.6 suppression motion, the court determines whether substantial evidence supports the challenged findings of fact and whether those findings support the challenged conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence exists when a fair-minded person is persuaded of the truth of the stated premise. *Id*.

Here, Banks assigns error to three of the trial court's CrR 3.6 Findings of Fact and four of the trial court's Reasons for Admissibility, insofar as the Reasons include Findings of Fact. Brief of Appellant, 1-2. Specifically, Banks challenges Finding Nos. 2, 9, 10, and Reason Nos. 5, 9, 10. Brief of Appellant, 1-2. A Finding of Fact denominated as a conclusion of law is treated as a Finding of Fact. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006). The remaining unchallenged Findings of Fact are considered verities on appeal. RAP 10.3(g); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The court reviews de novo conclusions of law from an order pertaining to the suppression of evidence. *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013). Here, Banks substantively challenges only Reason No. 7. Brief of Appellant, 2.

Finally, on review, the court may affirm the trial court on any grounds established by the pleadings and supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *Truck Ins. Exchange v. Vanport Homes, Inc*., 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

Here, no seizure occurred when Ofc. Bush approached Banks's parked car, engaged him in conversation, and asked for his name. Under the Washington Constitution, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1 § 7. Article 1, section 7 of the Washington Constitution provides greater protection of a person's right to privacy than the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). The right to be free of unreasonable governmental intrusion into an individual's private affairs extends to automobiles. *Id*. Banks, as the individual asserting an unconstitutional seizure occurred, bears the burden of establishing that a seizure in fact occurred. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

But not every encounter between a police officer and a private individual constitutes an official intrusion triggering constitutional protections. *United States v. Mendenhall*, 446 U.S. 544, 551-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). For example, as part of their "community caretaking" function, police officers must be able to approach citizens and permissively inquire into whether they will answer questions. *State v. Mote*, 129 Wn. App. 276, 282, 120 P.3d 596 (2005) (citing *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994)). These "social contacts" do not amount to a seizure. *State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009). "An officer's mere social contact with an individual in a public place with a request for identifying information, without more, is not a seizure or an investigative detention." *Mote*, 129 Wn. App. at 282 (citing *Young*, 135 Wn.2d at 511, 957 P.2d 681; *Mendenhall*, 446 U.S. at 555, 100 S. Ct. 1870; *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997)).

The applicable test to determine whether a seizure has occurred is whether an individual's freedom of movement is restrained, and the individual would not believe that he is free to leave, or decline a request, due to an officer's use of physical force or display of authority. *O'Neill*, 148 Wn.2d at 574. This determination is made only by looking objectively at the actions of the law enforcement officer; it is irrelevant whether the

officer subjectively suspects the possibility of criminal activity. *Young*, 135 Wn.2d at 501, 504-05, 510; *O'Neill*, 148 Wn.2d at 574-75.

Encounters between civilians and police are consensual if a reasonable person would feel free to leave. *Harrington*, 167 Wn.2d at 663-64. Such encounters may become "seizures" if accompanied by: (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) physical touching of the defendant by the officer; (4) language or tone indicating mandatory compliance; or (5) a progressive intrusion culminating into a request to frisk. *Id*. at 664 (citing *Young*, 135 Wn.2d at 512, which adopted the factors identified in *Mendenhall*, 446 U.S. at 554-55). This Court reviews de novo whether the facts surrounding a police encounter amount to a seizure. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004).

In determining whether a seizure occurred in violation of article I, section 7 of the Washington Constitution, this Court applies a purely objective standard "'looking to the actions of the law enforcement officer.'" *O'Neill*, 148 Wn.2d at 574 (quoting *Young*, 135 Wn.2d at 501). "[T]he focus of the inquiry is not on whether the defendant's movements are confined due to circumstances independent of police action[, such as occupying a parked vehicle,] but on whether the police conduct was

coercive." *State v. Thorn*, 129 Wn.2d 347, 353, 917 P.2d 108 (1996), *overruled on other grounds by O'Neill*, 148 Wn.2d at 571.

In *O'Neill*, a police officer observed a car parked in front of a business that was closed and had recently been burglarized. 148 Wn.2d at 571-72. The officer pulled behind the car, activated his spotlight, and ran a computer check on the license plate. *Id*. at 572. He learned that the vehicle had been impounded within the previous two months. *Id*. The vehicle's windows were fogged over and the vehicle appeared to be occupied. *Id*.

The officer approached the driver's side of the parked vehicle, shined his flashlight on the driver's face, and asked him to roll down the window. *Id*. The driver, later identified as O'Neill, complied. *Id*. The officer then asked O'Neill what he was doing there, and O'Neill responded that his car had broken down and would not start. *Id*. The officer asked O'Neill to try and start the vehicle. *Id*. O'Neill tried, but the vehicle would not start. *Id*. The officer then asked O'Neill for identification. *Id*. O'Neill responded he had no identification and his license had been revoked, and he gave the officer a name that turned out to be false. *Id*. The officer asked O'Neill to step out of the vehicle, and subsequent events led to O'Neill's arrest. *Id*. at 572-73.

The Washington Supreme Court held that under article I, section 7, O'Neill was not seized until he was asked to step out of the vehicle. *Id.* at

574. Before that point, the officer neither used physical force nor displayed any show of authority. *Id*. at 577-81. The court observed,

> It is important to bear in mind that the relevant question is whether a reasonable person in O'Neill's position would feel he or she was being detained. *The reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a Terry stop.* If that were true, then the vast majority of encounters between citizens and law enforcement officers would be seizures.

Id. at 581 (emphasis added).

Similarly, in *Mote*, a police officer observed two people sitting in a car parked in a residential neighborhood late at night with its rear and dome lights activated. 129 Wn. App. at 279-80. The officer was driving a fully marked police vehicle and wearing a standard police uniform. *Id*. at 279. "Concerned about drug activity and frequent vehicle prowls in the area," the officer parked behind the other vehicle, approached the driver's side, and asked the occupants "what they were up to." *Id*. at 280. The officer also asked the occupants for identification, and they complied. *Id*. at 280-81.

On appeal, the court in *Mote* held that even assuming the officer used a spotlight when he approached the vehicle, his "actions in their entirety, viewed objectively, did not create such a show of authority that there would be a seizure." *Id*. at 292. The court noted that the officer did not activate his vehicle's siren or overhead lights, he did not display his

weapon or make physical contact with the defendant, he was alone when he approached the occupants,[5] and he requested, rather than demanded, the defendant's identification. *Id*.

Here, as in *O'Neill* and *Mote*, Banks was not seized when Ofc. Bush approached Banks's parked vehicle, asked questions, and asked for his name. This was valid social contact. The officer initially was concerned with Banks's well-being, as she had been informed by security that Banks was asleep in the driver's seat of a running car. 05/23/19 RP 9-10; CP 24-30 (Finding of Fact "FoF" No. 2). Ofc. Bush was accompanied by Ofc. Ramos, who had no contact with Banks. 05/23/19 RP 39. Ofc. Bush approached on foot, and her patrol car was parked on the other side of the parking lot. 05/23/19 RP 25-26; CP 24-30 (FoF 3).

Ofc. Bush knocked on the window, causing Banks to wake. 05/23/19 RP 12; CP 24-30 (FoF 4). It took a few knocks for Banks to respond, and even then, Banks just stared back at the officer. 05/23/19 RP 12-13; CP (FoF 4, 5). Ofc. Bush used a normal tone of voice and did not make demands of Banks. 05/23/19 RP 13; CP 24-30 (FoF 5). When Banks finally responded, Ofc. Bush asked him if he was "okay," because security mentioned he had been there for a while. 05/23/19 RP 14; CP 24-30 (FoF

[5] The court noted that other officers arrived on scene, but Officer Cox was alone when he approached the car and asked for Mote's identification. *Mote*, 129 Wn. App. at 292 n. 7.

7). Ofc. Bush then asked Banks for his name, telling him, "Hey, can I get your name so I know who I'm talking to?" 05/23/19 RP 14; CP 24-30 (FoF 9). Ofc. Bush did not demand or order Banks to give his name; she used a normal tone of voice in making her request. 05/23/19 RP 14; CP 24-30 (FoF 9). Banks did not have identification on him but spelled his name for Ofc. Bush. 05/23/19 RP 15. Ofc. Bush then ran a records check on Banks. 05/23/19 RP 16. After she received notification that he might have a felony warrant, Ofc. Lucas responded to the car and contacted Banks. 05/23/19 RP 16-17; CP 24-30 (FoF 13).

There was no show of authority to elevate the officer's social contact into a seizure when she approached Banks's car, engaged him in conversation, and asked for his name. As a matter of law, the request for identification without an additional show of authority cannot amount to a seizure. *Young*, 135 Wn.2d at 511 ("[T]he police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing.") Only Ofc. Bush contacted Banks; she did not display her weapon; she did not touch Banks; she did not demand Banks's identification; she used a normal tone of voice when speaking to Banks; and she never requested to frisk Banks. The use of her flashlight to highlight her uniform was no different than a uniformed officer approaching an individual in daylight. *See O'Neill*, 148 Wn.2d at 578 (use

of spotlight and flashlight did not elevate encounter to a seizure); *Young*, 135 Wn.2d at 512 (deputy turning around, driving toward defendant's car, and shining spotlight on defendant was not a seizure).

Like in *O'Neill* and *Mote*, Ofc. Bush's request for Banks's identification was not accompanied by a show of authority, thus it did not rise to the level of a seizure. The only show of authority occurred when another officer engaged Banks and Banks was asked to step out of the car, at which time officers had reasonable suspicion to detain Banks, if not probable cause for his arrest.

Banks asserts that the request for his identification "tipped the encounter from a permissible community caretaking function into a seizure," because "casual social encounters between people rarely involve requests for identification." Brief of Appellant, 19, 24. As discussed, police are permitted to approach civilians, engage them in conversation, and ask for identification. In fact, police <u>must</u> engage in these types of encounters to adequately perform their duties. *Mendenhall*, 446 U.S. at 553 ("[C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices."); *Young*, 135 Wn.2d at 511-12 ("[e]ffective law enforcement techniques not only require passive

police observation, but also necessitate their interaction with citizens on the street.") (internal citations omitted).

Nevertheless, under the totality of the circumstances test, a request for identification may be a factor to evaluate whether a seizure has occurred. Again, the test turns on whether the individual feels free to leave or decline the request. The request for identification in this case did not render Banks seized under the totality of the circumstances.

Banks cites *State v. Johnson*, 8 Wn. App. 2d 728, 440 P.3d 1032 (2019); *State v. Carriero*, 8 Wn. App. 2d 641, 439 P.3d 679 (2019); *State v. Crane*, 105 Wn. App. 301, 19 P.3d 1100 (2001); *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 689 (2004); and *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993), as examples of cases where the request for identification was the "tipping point" of an encounter turned seizure. But in each of these cases, the police engaged in other acts that emphasized their authority in addition to requesting identification.

In *Johnson*, two officers saw Johnson park his car, but no one exited. 8 Wn. App. 2d at 733. The officers were concerned the occupants were using drugs. *Id*. The officers approached the parked car, which was "flanked on both sides by cars parked in adjoining stalls," each on one side of the vehicle. *Id*. The officers used a ruse to contact Johnson, asking if the car belonged to a fictitious person. *Id*. The officers requested Johnson's

identification, to which Johnson stated he had an identification card. *Id*. at 734. The officers then became suspicious that Johnson did not have a valid driver's license. *Id*. While one officer ran a warrant check on Johnson, the other officer remained "leaning over the driver's side door," when he noticed a handgun. *Id*. The officer alerted the second officer of the handgun, drew his own weapon, and Johnson was removed from the car. *Id*. The court held that the request for Johnson's identification was a seizure, because under the totality of the circumstances, "ignoring the officer's requests, terminating the encounter, or leaving the scene were not viable options." *Id*. at 744. The court reasoned that leaving was not a "viable option," because the vehicle could only back out of the parking space, there were cars parked on either side of the vehicle, and the officers were standing adjacent to the vehicle's doors with minimal space to move, which prevented Johnson or the passenger from opening their doors. *Id*. The court relied on the additional facts to reach its holding:

> The sudden presence of two uniformed officers so soon after the vehicle had parked, the shining of flashlights into the vehicle, the question, repeated, as to whether the vehicle belonged to Taylor Smith, and the request for the driver's name and proof of his identity would lead a reasonable innocent person to believe that the vehicle, and by extension its driver, was the subject of an ongoing criminal investigation.

Id.

Here, the totality of the circumstances does not reach the same show of authority as displayed by the officers in *Johnson*. Looking at the *Mendenhall* factors, there was only one officer speaking with Banks, the officers' patrol cars did not block Banks's vehicle from leaving,[6] and Banks had no reason to believe he was under investigation for criminal activity, unlike the defendant in *Johnson*. Additionally, ignoring the officer's request and terminating the encounter remained viable options for Banks when his identification was requested.

In *Carriero*, two officers responded to a call of a suspicious vehicle in their respective patrol cars. 8 Wn. App. 2d at 646-47. Both officers drove down a dim, block-long, narrow alleyway to approach the car. *Id*. at 647. The patrol cars blocked the defendant's egress from the alley. *Id*. The court held that the officers seized defendant Carriero under the totality of the circumstances, where two patrol cars blocked Carriero's egress from the alley, and two uniformed, armed officers stood immediately adjacent to the car doors, blocking Carriero's egress from the car. *Id*. at 659. The court held these circumstances compelled Carriero to cooperate with law

[6] Only Banks testified at the CrR 3.6 hearing that an officer stood in front of his car, blocking his path of leaving. Ofc. Bush explained that patrol cars were not blocking his ability to leave; all he would have to do is "pull straight out and leave," and Ofc. Bush would not have stopped him. 05/23/19 RP 28, 35-36. The Court found that it was most likely, based on its experience, that the second officer was on the passenger side of the vehicle, but there was no testimony establishing that positioning. CP 27.

enforcement, because "no reasonable person would have ignited his car's engine and sought to maneuver out of a tight alleyway to evade speaking with the officers." *Id*. at 660. *Carriero* is distinguishable from this case, where no patrol cars blocked Banks's vehicle's egress. CP 24-27 (FoF 3, 14, 20). Additionally, Banks was parked in a Safeway parking lot, not a narrow, dimly lit alleyway with only one path of egress. CP 24 (FoF 1, 2). The circumstances in this case are unlike the circumstances that amounted to a show of authority in *Carriero*.

Crane is similarly distinguishable. In *Crane*, a patrol officer was monitoring a house while other officers obtained a search warrant for the residence. 105 Wn. App. at 304. When a car arrived at the house, the officer pulled his car into the driveway, exited his car, and motioned to the occupants to approach him in a "real demanding voice." *Id*. An occupant of the residence exited but was directed to go back inside the house and notified that police were obtaining a warrant. *Id*. The officer asked the car occupants questions and for identification. *Id*. The defendant was arrested for an outstanding warrant. *Id*. at 305. The court found a seizure occurred "at the latest when [the officer] held Crane's identification and ran the warrants check" based on the following: the officer parked his patrol car behind the car the defendant arrived in; requested his identification, and

retained it while he was running a warrant check; and Crane was aware that he entered an area the police had secured. *Id*. at 311.

Here, again, officers did not surround Banks's car with their patrol cars, his identification was not retained, and there was no notification of an ongoing investigation or reason for Banks to believe he was being suspected of criminal activity.[7] The show of authority in *Crane* is far greater than any alleged display of authority in this case.

In *Rankin*, the defendant was already subject to a show of police authority as a passenger in a car that had been pulled over for a traffic stop. 151 Wn.2d at 692. The defendant was subject to a show of authority at the moment the officer stopped the vehicle in which he was riding.[8] The circumstances are not at all analogous to those in this case, where there was no traffic stop or any other initial show of police authority that stopped the defendant's course of action in the manner a traffic stop does.

In *Gleason*, the defendant was in an area known for drug trafficking. 70 Wn. App. at 14. Two officers saw the defendant, made a U-turn in their

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[7] Banks argues that because Ofc. Bush said she was sent by security, a reasonable person would believe they, or their car, was being investigated. Brief of Appellant, 16. The record does not support this assertion. Rather, the record indicates Ofc. Bush told Banks she was sent by security to check on him, not to investigate him for any wrongdoing. 05/23/19 RP 14 ("I just asked him if he was okay, […] I told him the reason I was contacting him, security is wondering why you are here. You have been passed out in your car for a while[.]")

[8] *See Arizona v. Johnson*, 555 U.S. 323, 326, 129 S. Ct. 781, 172 L.Ed.2d 694 (2009); *Brendlin v. California*, 551 U.S. 249, 255, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007) (officers seize everyone in the vehicle during a traffic stop.)

car, and got out as the defendant walked with his back to the officers. *Id*. at 15. One of the officers called out to the defendant and asked to talk to him. *Id*. The officer then asked the defendant why he was there and "demanded identification." *Id*. The court concluded, "the testimony of the officers alone establishes that a seizure took place[.]" But the court did not explain its reasoning in concluding the officer's actions rose to a show of authority amounting to a seizure. One is left to assume that the "demand" for identification would have been the show of authority that the court relied upon.[9] However, Ofc. Bush never demanded Banks's identification. She requested it conversationally. When Banks did not have identification on him, Ofc. Bush asked him to spell his name. These questions cannot be construed on this record as "demands."

Finally, relying on *State v. Beito*, 147 Wn. App. 504, 195 P.3d 1023 (2008), Banks asserts that Ofc. Bush progressively intruded into his private affairs. Under the totality of the circumstances, no progressive intrusion occurred when Ofc. Bush asked Banks who he was. Banks asserts his case is like the facts in *Beito*, because the contact was initiated by Ofc. Bush verifying his wellbeing, she stood outside his door, asked questions after verifying his wellbeing, and continued to stand outside his door while

[9] It is also worth noting that *Gleason* predates the Supreme Court's decision in *O'Neill*.

performing the records check. Brief of Appellant, 23. However, Banks's analysis overlooks an important factor the court relied upon in *Beito*: the driver of the car defendant Beito occupied asked to leave and was told that she could not. *Id*. at 507, 510. Looking at the totality of the circumstances surrounding Banks's encounter with Ofc. Bush, no patrol cars blocked Banks's car from leaving; he was only contacted by Ofc. Bush as another officer stood nearby; and there was no demand or direction for Banks to stay. Banks argues that after Ofc. Bush ascertained he was okay, she had no reason to ask for his identification. Brief of Appellant, 17-18. But as a matter of law, the request for identification without an additional show of authority cannot amount to a seizure. *Young*, 135 Wn.2d at 511.

As argued at length, this was a valid social contact with a request for identification. There was no show of authority to turn the contact into a seizure.

The trial court's Findings of Fact are supported by substantial evidence, and the Findings support the conclusion that no seizure occurred until the officers asked Banks to step out of the car due to his outstanding warrant. Banks challenges Findings of Fact Nos. 2, 9, and 10, and the Findings in Reasons for Admissibility Nos. 5, 9, 10 in the absence of sufficient evidence. Finding No. 9, which states, "Officer Bush testified that she requested identifying information so she would know who she was

talking to. The driver was still seated in the vehicle at this time. Bush used a normal tone of voice when asking the driver for his name and did not demand or order him to provide identification," is supported by substantial evidence. Ofc. Bush testified that she usually asks for individuals' names so she knows who she is talking to, using a conversational tone of voice. 05/23/19 RP 14. Banks was still seated in the vehicle when she made her request. 05/23/19 RP 14. Ofc. Bush testified that the interaction was "completely conversational," implying that Ofc. Bush did not demand or order Banks to provide identification. 05/23/19 RP 16. Accordingly, Finding No. 9 is supported by substantial evidence in the record.

Finding No. 10 is also supported. Finding No. 10 states, "The defendant voluntarily provided his name to Bush. During this time, the contact with the driver was completely conversational with no hostility." As explained above, the record supports that the interaction was completely conversational. 05/23/19 RP 14, 16. Ofc. Bush explained that there was "no hostility," and Banks voluntarily gave her his name. 05/23/19 RP 15-16. Finding No. 10 is supported by substantial evidence in the record.

Banks challenges Finding No. 2 insofar as it states a Safeway security employee asked Ofc. Bush to check on Banks's car. *See* Brief of Appellant. 16 n. 4. Ofc. Bush's testimony indicates that she believed the security employee worked for Safeway. 05/23/19 RP 9 (while at the

Safeway store, security asked for her to check on the vehicle). Ofc. Lucas testified that the security employee worked for Securitas. 05/23/19 RP 45-46. Regardless of who employed the security officer – whether it was Safeway, Securitas, or Safeway contracting Securitas, the thrust of Finding No. 2 is supported by the record – security engaged Ofc. Bush to check on Banks. Who employed the security guard is immaterial to the court's legal determination of whether a seizure occurred. Where only immaterial portions of a challenged finding of fact lack support, it is of no legal consequence. *State v. Coleman*, 6 Wn. App. 2d 507, 510, 431 P.3d 514 (2018).

As argued, the challenged Findings of Fact are supported by substantial evidence in the record. Those Findings support the challenged conclusions of law, which state that no seizure occurred until Banks was asked to get out of the vehicle due to his outstanding warrant. CP 28-29.

The trial court properly denied Banks's suppression motion under *O'Neill* and *Mote* and admitted evidence of the firearm found on Banks's person and the methamphetamine found in his bag. There was no error and this Court should affirm.

B. This Court is bound by Washington Supreme Court decisions which hold that possession of a controlled substance is a strict liability offense.

This Court is bound by our legislature and the Washington Supreme Court's decisions upholding that possession of a controlled substance is a strict liability offense. Possession of a controlled substance is prohibited by RCW 69.50.4013. The statute specifically provides,

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

Statutes are presumed to be constitutional, and a challenger bears the burden of convincing a court that there is no reasonable doubt that the statute is unconstitutional. *State v. Schmeling*, 191 Wn. App. 795, 798, 365 P.3d 202 (2015). Constitutional challenges are reviewed de novo. *Id*.

Banks claims that interpreting possession of a controlled substance as a strict liability offense violates due process and impermissibly shifts the burden of proof to the defendant. Brief of Appellant, 26, 29. These challenges have repeatedly been rejected by reviewing courts,[10] and they should accordingly be rejected by this Court.

[10] The Washington Supreme Court has accepted review of *State v. Blake*, No. 96873-0, on this issue. The State previously moved to stay this matter pending the Supreme Court's decision in *Blake*. The court denied the State's motion to stay.

The legislature has the authority to create strict liability crimes that do not include a culpable mental state. *State v. Bradshaw*, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004); *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); *State v. Rivas*, 126 Wn.2d 443, 452, 896 P.2d 57 (1995).

The Washington Supreme Court has addressed, twice, whether the elements of possession of a controlled substance contain a mens rea element. *Bradshaw*, 152 Wn.2d 528; *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981). In each case, the Supreme Court has held that the legislature deliberately omitted knowledge and intent as elements of the crime and that it would not imply the existence of those elements. *Bradshaw*, 152 Wn.2d at 534–38; *Cleppe*, 96 Wn.2d at 380–81; *see also, State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994) ("The State is not required to prove either knowledge or intent to possess" a controlled substance). Following *Bradshaw*, our legislature rejected an effort to amend the drug possession statute to require the State to prove knowing possession. *See* H.B. 1695, 61st Leg., Reg. Sess. (Wash. 2009).

Similarly, the Supreme Court rejected the argument that strict liability crimes violate due process. *Bradshaw*, 152 Wn.2d at 539. This Court agreed in *Schmeling*, 191 Wn. App. at 801, holding that strict liability crimes, and more specifically, unlawful possession of a controlled substance, did not violate due process. Banks does not argue that *Schmeling*

was wrongly decided or otherwise cite to the opinion. Accordingly, this Court should follow its prior decision.

Finally, the Supreme Court rejected the argument that unlawful possession of a controlled substance impermissibly shifts the burden of proof to a defendant. *Bradshaw*, 152 Wn.2d at 538; *Cleppe*, 96 Wn.2d at 380-81.

Bradshaw and *Cleppe* are binding decisions on this Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Possession of a controlled substance as a strict liability offense does not offend due process or impermissibly shift the burden of proof to the defendant.

Because the State need not prove that Banks knowingly possessed methamphetamine, there was no error when the trial court did not enter a finding of knowing possession. However, even if knowledge is held to be an essential element of unlawful possession of a controlled substance, the proper remedy is not remand and reversal for a new trial as suggested by Banks, but rather remand for subsequent findings of fact and conclusions of law to be entered by the trial court regarding knowledge. *See State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995). This Court should affirm.

C. Banks failed to object to the imposition of the supervision assessment below and is precluded from raising an unpreserved issue for review.

For the first time on appeal, Banks raises an objection to the trial court's imposition of the supervision assessment. Because he has not preserved this issue for review, this Court should decline to reach the merits of his claim.

An appellate court may refuse to review any claim of error that was not raised below. RAP 2.5(a). A defendant who makes no objection at sentencing to the imposition of discretionary legal financial obligations is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Banks did not object below to the imposition of the supervision assessment in his judgment and sentence. Thus, he has not preserved this issue for review, and this Court should decline to reach the merits of his claim. *See id*. at 830.

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. *Blazina*, 182 Wn.2d at 830. Should this Court exercise its discretion to reach the merits of Banks's unpreserved claim, the State agrees that under *State v. Dillon*, __ Wn. App. 2d__, 456 P.3d 1199 (2020), this Court should remand for the trial court to

strike the supervision assessment in the judgment and sentence, because the record shows the trial court intended to waive all discretionary LFOs.

1. If this Court decides to reach Banks's unpreserved claim, the State agrees remand to strike the supervision assessment is the proper remedy.

The law does, indeed, prohibit the imposition of discretionary costs on indigent defendants. RCW 10.01.160(3) provides that the trial court shall not order a defendant to pay costs if a defendant is indigent, as defined in RCW 10.101.010(3)(a)-(c). Similarly, RCW 9.94A.760 provides that a trial court cannot order "costs" as described in RCW 10.01.160 if the defendant is indigent.

But "costs" are limited to "expenses specially incurred by the State in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision." RCW 10.01.160(2).

Here, the trial court found Banks to be indigent. CP 49-50; 06/28/19 RP 125. He was ordered to pay for a supervision assessment under RCW 9.94A.703(2)(d), which provides,

> Unless waived by the court, as part of any term of community custody, the court shall order an offender to: […] pay supervision fees as determined by [the Department of Corrections.]

See CP 53-54, 60. Dicta in *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), states that the supervision assessment is a

discretionary LFO. But discretionary LFOs are not necessarily a discretionary "cost" under RCW 10.01.160(2).

The supervision assessment does not meet the definition of a "cost," because it is not an expense specially incurred by the State to prosecute the defendant, administer a deferred prosecution program, or to administer pretrial supervision. *See State v. Clark*, No. 52330-2-II, 2020 WL 1651477 at *5 (Wash. Ct. App. March 17, 2020) ("Because the supervision assessment is not a cost under RCW 10.01.160, the trial court was not required to conduct an inquiry into Clark's ability to pay under RCW 10.01.160(3)"); *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517 at *1, 10-11 (Wash. Ct. App. November 5, 2019) (holding the "community custody supervision assessment was properly imposed because it was not a cost subject to the recent amendments"); *State v. Estavillo*, No. 51629-2-II, 2019 WL 5188618 at *5-6 (Wash. Ct. App. October 15, 2019).[11]

Under *Dillon*, Banks argues that this Court should strike the supervision assessment from his judgment and sentence to be "consistent with the trial court's intent to waive all discretionary costs." Brief of Appellant, 34; 456 P.3d 1199. In *Dillon*, Division I held that the record indicated "the trial court intended to waive all discretionary LFOs, but

[11] Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

inadvertently imposed supervision fees because of its location in the judgment and sentence." *Id*. at 1209. The court relied on a portion of the record where the trial court waived the DNA fee and the filing fee, and "simply order[ed] $500 victim penalty assessment, which is still truly mandatory, as well as restitution, if any." *Id*.

Here, the supervision assessment is not a "cost" under RCW 10.01.160. But the record in this case indicates that the trial court intended to waive all discretionary LFOs, not just the RCW 10.01.160 costs. Specifically, the trial court ordered, "$500 for the Crime Victim Penalty Assessment. It does appear that he has already had the $100 DNA assessment. I won't impose that. It does appear that he is indigent. I won't impose any other legal/financial obligations." 06/28/19 RP 125. Based on this record and under *Dillon*, the State agrees that this Court should remand for the trial court to strike the supervision assessment in the judgment and sentence.

V. CONCLUSION

Banks was not unlawfully seized when Ofc. Bush approached his car, engaged him in conversation, and asked for his name. A seizure did not occur until Ofc. Bush learned of Banks's outstanding felony warrant and asked him to step out of the car. Pursuant to binding precedent, the crime of possession of a controlled substance does not require a mens rea

element. Banks was properly convicted of unlawful possession of a controlled substance for the methamphetamine that was found in his bag. Finally, should this Court reach Banks's unpreserved claim regarding the supervision assessment, the State agrees that the trial court intended to waive all discretionary LFOs, not just costs under RCW 10.01.160, and remand would be proper for the trial court to strike the provision. This Court should affirm Banks's convictions.

RESPECTFULLY SUBMITTED this 8th day of May, 2020.

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on the date below.

05/08/20 s/Aeriele Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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