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Division II
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NO. 54048-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RACHELLE LEIGH BEARD,

Appellant.

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

The Honorable Jennifer Forbes, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Rachelle Beard was unlawfully seized, in violation of her rights under the Fourth Amendment and article I, section 7 of the Washington Constitution.

2. The trial court erred in entering Finding of Fact (FF) 20:

The conversation between the passengers and the officers was causal in nature, the officers did not demand anything from the passengers, and there was no show of force by the officers towards the car or passengers.

Clerk's Papers (CP) at 47.

3. The trial court erred in entering Conclusion of Law 7, that "the contact between the police and the defendant was not elevated to the level of a seizure" and that "[u]nder the totality of the circumstances, the defendant was not seized." CP at 49-50.

4. The trial court erred in entering Conclusion of Law 9 that the vehicle was not pulled over and that the vehicle was not subject to a traffic stop. CP at 50.

5. Whether the trial court erred in taking judicial notice of facts subject to reasonable dispute.

6. The Department of Corrections supervision fee in the judgment and sentence is no longer authorized pursuant to the Supreme Court's decision in *State v. Ramirez* and after enactment of House Bill 1783 and should be stricken.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1) Ms. Beard was a passenger in a car which was followed by a patrol car into a gas station parking lot at 1:40 a.m. after the police car executed a U turn to follow the car. Was Ms. Beard illegally seized when a total of three officers in two patrol cars were present at the scene, where one deputy illuminated the rear of the car with a spotlight, and also looked inside the car using a flashlight, and where a drug sniffing dog was deployed to search the perimeter of the car, all without reasonable, individualized suspicion of criminal activity? Assignments of Error 1-4.

2) Whether the court erred in taking judicial notice that Viking Avenue in Poulsbo, Washington, the street on which the gas station is located where the traffic stop took place, is in “an urban area” and is a “well-traveled road,” where this purported fact is subject to reasonable dispute? Assignment of Error 5.

3) Should the case be remanded to the trial court to strike the DOC community supervision assessment in the judgment and sentence? Assignment of Error 6.

C. STATEMENT OF THE CASE

While driving southbound on Viking Avenue in Poulsbo, Washington at approximately 1:45 a.m. on April 19, 2019, Poulsbo Police Officer Craig Keller saw a Honda Accord approaching his vehicle while traveling northbound. CP at 4, 44; Finding of Fact (FF) 1. The Honda was traveling

approximately half a vehicle width across the fog line. CP at 4, 44; FF 1. Officer Keller turned around and caught up with the Honda. Report of Proceedings¹ (RP)(7/22/19) at 17; CP at 4, 45; FF 2. After the officer caught up with the Honda, the car turned into gas station and parked near a gas pump. RP (7/22/19) at 16; CP at 4, 45; FF 3. Officer Keller pulled in behind the car and parked about a half car length behind the Honda and activated the rear-facing emergency lights. RP (7/22/19) at 28. CP at 4, 45; FF 5 and 6.

The driver, identified as Jake Hernandez, got out of the Honda and was standing near the rear of the car and appeared to be starting the procedure to pump gas as Officer Keller parked his vehicle and approached the Honda. CP at 4, 45; FF 8. Ms. Beard was sitting in the front passenger seat and two other people were seated in the rear seats. CP at 4, 45; FF 9. Officer Keller talked with Mr. Hernandez, who provided his identification to the officer. Officer Keller then returned to his patrol car with the identification. CP at 4, 45; FF 10. After returning to his vehicle, Officer Keller illuminated the rear window of the Honda with his vehicle's spotlight. CP at 46; FF 11.

Officer Keller then directed Mr. Hernandez to walk to the front of the patrol car and asked whether he had a valid driver's license. RP (7/22/19) at 21; CP at 46; FF 12. Mr. Hernandez said that he thought his license was

¹The record of proceedings consists of the following transcribed hearings: July 22, 2019 (CrR 3.6 suppression hearing); July 25, 2019 (ruling on suppression hearing); August 2, 2019 (entry of findings and conclusions); August 5, 2019 (stipulated facts trial); August 23, 2019; and September 13, 2019 (sentencing).

suspended. CP at 4, 46; FF 12.

Poulsbo police officers Bell and Kennedy arrived and parked behind Officer Keller's vehicle. CP at 46; FF 13.

Officer Keller handcuffed Mr. Hernandez while waiting for information from dispatch to determine if Mr. Hernandez's driver's license was suspended. CP at 4, 46; FF 14. Officer Keller asked Mr. Hernandez if anyone else in the car were eligible to drive, and Mr. Hernandez said that the male passenger could do so. CP at 46; FF 14.

While waiting for information from dispatch regarding Mr. Hernandez's driving status, Officer Bell and Officer Keller approached the Honda while Officer Kennedy remained with Mr. Hernandez. CP at 46; FF 15.

Officer Keller asked the occupants of the Honda through an open window if any of them had a valid driver's license, and Jerry Dodge, who was sitting in the back seat of the car, responded that he had a valid license. RP (7/22/19) at 21; CP 4; 46-47; FF 16, 17. Officer Keller told the occupants that he was waiting for confirmation regarding Mr. Hernandez's license. CP at 46-47; FF 17. Mr. Dodge held his license up to the window and Officer Bell wrote down information from the license. CP at 46-47; FF 17, 18. At the same time, Officer Keller shined his flashlight into the interior of the Honda and radioed the VIN to dispatch. RP (7/22/19) at 22; CP at 47; FF 18. Ms. Beard was scratching lottery tickets while seated in the car, and Officer Keller

asked her if she had won anything and Mr. Beard stated that she had not won. CP at 47; FF 19.

Officer Keller and returned to his car and dispatch confirmed that Mr. Hernandez had a warrant for and that his license was suspended. CP at 4, 47; FF 23. Mr. Hernandez was placed under arrest and Officer Keller put him in the back his patrol car. CP at 4, 47; FF 23. Officer Keller then removed his K-9 narcotics detection dog from the partitioned back seat of the car and walked the dog around the perimeter of the car, which took approximately 60 seconds. CP at 4, 47, 48; FF 24, 25, 26. The dog “alerted” to the front passenger side door. CP at 48; FF 26. After the dog “alerted,” Officer Keller requested identification from both back-seat passengers. CP at 4, 48; FF 26, 27. Officer Bell walked to the front passenger side of the car and directed Ms. Beard to provide her identification and Ms. Beard complied and identified herself. CP at 48; FF 28.

Ms. Beard had two active warrants and was ordered out of the car, placed under arrest, and put in the back of the second police vehicle by Officer Kennedy. CP at 48; FF 29.

Officer Keller found methamphetamine from the side of the passenger seat where Ms. Beard was sitting, and two pipes were found in the passenger door pocket. CP at 4. Ms. Beard was transported to Kitsap County Jail and suspected methamphetamine was found on her person while she was being booked into the jail. CP at 5.

Ms. Beard was charged in Kitsap County Superior Court on May 16, 2019 with possession of methamphetamine, contrary to RCW 69.50.4013. CP at 1-5.

Defense counsel moved to suppress the methamphetamine found by the search of the car and in Ms. Beard's possession, contending that it was found attendant to her unlawful seizure. CP at 13-18, 21-30. The CrR 3.6 motion was heard by Honorable Jennifer Forbes on July 22, and July 25, 2019. RP (7/22/19) at 3-39; RP (7/25/19) at 39-68.

The State entered a police body cam video as Exhibit 1. RP (7/22/19) at 15. No witness testimony was presented.

The State argued that the officer's interaction with the occupants was "social contact," that Ms. Beard was not seized, that Officer Keller did not use his emergency lights that would cause the driver to pull over and that the driver had "already stopped" before Officer Keller arrived, and that the officer "didn't stop the vehicle." RP (7/22/19) at 17. The State argued that there was no show of authority by Officer Keller and that Ms. Beard was not seized and could have walked away from the car. RP (7/22/19) at 27-28.

The defense argued that the contact was the result of a "traffic stop" and that everyone in the car was seized under *Brendlin v. California*² and *Arizona v. Johnson*.³ RP (7/25/19) at 18-19, 22, 25, 29. Defense counsel argued that the incident was at closed gas station at 1:40 a.m., that the

² 551 U.S. 249, 263, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

occupants of the car were not told they were free to leave and that Ms. Beard could not have reasonably been expected to just walk away from the car. RP (7/22/10) at 22, 24-25, 29.

The police and car occupants waited for long duration—ten to fifteen minutes—while waiting to determine if Mr. Hernandez was going to be arrested. RP (7/22/19) at 35. After the officers confirmed from dispatch that Mr. Hernandez had warrants and he was searched incident to arrest and placed in Officer Keller’s vehicle. RP (7/22/19) at 23; CP at 4. The defense argued that Ms. Beard was unlawfully seized and that the reason for the original stop was entirely traffic-related and that the arrest of Mr. Hernandez concluded the reason for the initial stop. RP (7/22/19) at 23.

The court heard further argument on July 25, 2019. RP (7/25/19) at 39. During the hearing, Judge Forbes stated that “Viking Way is a very well-travelled road in an urban area” and that it is “not in a rural area,” that there are sidewalks on both sides of the road, and that she “runs on that road on a regular basis” RP (7/25/19) at 47, 48. Defense counsel voiced opposition to the court’s characterization of Viking Avenue and the area around the gas station as being “in an urban area” and “well-travelled,” stating “[n]ow I think we’re getting outside the facts of what is presented to the court.” RP (7/25/19) at 49. Judge Forbes continued, stating “[b]ut I am intimately familiar with this road. I lived in Poulsbo for 18 years and am a regular runner of that area.” RP

³ 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009).

(7/25/19) at 49. Defense counsel tactfully suggested that the judge was be mistaken about the location of the incident when taking judicial notice of the area stating: “Your Honor, another issue I would like to raise is I know what area that you think that you’re talking about. There’s two gas stations on that—there’s one that’s further up.” RP (7/25/19) at 50. The court asked counsel: “when you say further up, what are you talking about?” Defense counsel stated that there is another gas station on Viking Way. The court disagreed, stating that it was not the gas station that counsel mentioned and that “I can tell because there’s a car dealership in the back and I was able to orient myself because, again, I know that area.” RP (7/25/19) at 50.

The court denied the suppression motion and made findings supporting the ruling of denial of the motion. RP (7/25/19) at 46-68.

During the hearing for entry of the findings and conclusions, the court made an additional finding that the vehicle was not moving and “I guess I would say it’s not a traffic stop.” RP (8/2/19) at 71. Findings of fact and conclusions of law were entered at the hearing. CP at 44-51.

Finding of Fact 20 states:

The conversation between the passengers and the officers was casual in nature, the officers did not demand anything from the passengers, and there was no show of force by the officers towards the car or passengers.

CP at 47.

Conclusion of Law 7 states in relevant part:

Here, the contact between the police and the defendant was not

elevated to the level of a seizure. [. . .] [T]here was no use or display of force by the officers, [. . .] Under the totality of the circumstances, the defendant was not seized.

CP at 49-50.

Conclusion of Law 9 states in relevant part:

In this case, the vehicle was not pulled over. There was no show of force typical of a traffic stop. The vehicle was not subject to a traffic stop as the term is used in *Johnson and Brendlin*.

CP at 50.

The State argues that it was social contact due to the quip by Officer Keller about the lottery tickets, but the police were not engaged in social contact: Officer Keller was shining light inside car in order to obtain the VIN to determine if the plate matched the car. FF 18.

The case proceeded to a stipulated facts trial on August 5, 2019. RP (8/5/19) at 73-79. Ms. Beard signed a Verdict on Submission of Stipulated Facts on August 5, 2019, containing the following stipulated facts:

- (1) On April 19, 2019, Defendant was seated in the front passenger of a Honda Accord that was parked at the Mobil Gas Station in Poulsbo, Washington located in Kitsap County.
- (2) While the vehicle was parked at the gas station, Officer Craig Keller of the Poulsbo Police Department deployed his canine around the vehicle to sniff for the presence of narcotics.
- (3) Officer Keller's canine alerted to the area of the front passenger seat where Defendant was sitting.
- (4) After the canine alerted, Officer Bell of the Poulsbo Police Department obtained Defendant's information and it was discovered that Defendant had a felony warrant. Defendant was then placed under arrest.
- (5) The vehicle was searched by law enforcement after all the occupants were removed and a small bag of methamphetamine

- was found next to the passenger seat where Defendant was sitting.
- (6) As a result of the arrest warrant and the suspected methamphetamine found in the vehicle, Defendant was transported to the Kitsap County Jail. At the jail, Defendant was searched, and a bag of suspected methamphetamine was recovered from her person. Defendant was questioned about the suspected methamphetamine found on her person and she admitted it was given to her by the driver of the Honda Accord.
 - (7) The substance found on Defendant's person was tested by the Washington State Patrol crime laboratory on July 30, 2019 and found to contain methamphetamine.

CP at 53-54.

The court found Ms. Beard guilty of possession of methamphetamine.

RP (8/5/19) at 78; CP at 74.

At sentencing, the court granted the joint recommendation for residential Drug Offender Sentencing Alternative (DOSA) and imposed a \$500 crime victim assessment. RP (9/13/19) at 5; CP at 80, 85. The judgment and sentence provides that the defendant shall that "pay DOC monthly supervision assessment." CP at 79.

Ms. Beard filed timely notice of appeal on September 13, 2019. CP at 89-103.

D. ARGUMENT

- 1. MS. BEARD WAS UNLAWFULLY SEIZED WHEN POLICE USED A DRUG DETECTION DOG TO SEARCH THE EXTERIOR OF THE CAR AND WHEN SHE WAS ORDERED TO IDENTIFY HERSELF, AND THE EVIDENCE OBTAINED DURING THE SUBSEQUENT SEARCH OF HER PERSON AND CAR INTERIOR INCIDENT TO ARREST MUST BE SUPPRESSED.**

Police officers invaded Ms. Beard's private affairs without authority of law. Without reasonable, articulable suspicion, they subjected Ms. Beard to a full investigatory stop under *Terry*. The police's unlawful actions tainted the subsequent search by the drug sniff by the drug detection dog. The trial court erred by denying her motion to suppress the evidence obtained after the search by the drug detection dog and her arrest because the search of her person following the arrest was the result of an unlawful seizure. The trial court erred because she was either unlawfully seized when the police began a drug investigation by use of a drug detection dog and when she was directed to identify herself. Accordingly, Ms. Beard asks that her conviction be reversed, that the unlawfully obtained evidence against her be suppressed, and that this matter be remanded for dismissal of the charge with prejudice.

a. **Ms. Beard was unlawfully seized without reasonable, individualized suspicion of criminal activity, violating her constitutional rights under article I, section 7 and the Fourth Amendment**

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibits unreasonable seizures. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

A seizure of a person occurs if, in full view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554, 100

S.Ct. 1870, 64 L.Ed.2d 497 (1980); *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). Previous Washington cases adopted the *Mendenhall* test of a seizure to analyze a disturbance of a person's private affairs under article I, section 7. See *State v. Stroud*, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981); accord *State v. Thorn*, 129 Wn.2d 347, 351-52, 917 P.2d 108 (1996), overruled on other grounds by *State v. O'Neill*, 148 Wn.2d 564, 570, 62 P.3d 489 (2003).

A warrantless search or seizure is per se unconstitutional under the Fourth Amendment and article I, section 7, unless it falls under one of the narrow exceptions to the warrant requirement. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citing *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999)).

Article I, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996).

A seizure occurs under article I, section 7 when, by means of physical force or a show of authority, freedom of movement is restrained and a reasonable person would not believe she is either free to leave, given all the circumstances, or free to otherwise decline the officer's request and terminate

the encounter due to an officer's use of force or display of authority. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003); *State v. Johnson*, 8 Wn. App. 2d 728, 737, 440 P.3d 1032 (2019); *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). This standard is a purely objective one, looking to “the officer's actual conduct and whether the conduct appears coercive.” *Id.*; *State v. Carriero*, 8 Wn. App. 2d 641, 655, 439 P.3d 679 (2019). As such, “[t]he relevant question is whether a reasonable person in the individual's position would feel he or she was being detained.” *Harrington*, 167 Wn.2d at 662. The focus of the inquiry is not on whether the defendant's movements are confined due to circumstances independent of police action, but on whether the police conduct was coercive. *Thorn*, 129 Wn.2d at 353. Thus, the question is not merely whether the defendant felt free to leave, but “whether he felt free to terminate the encounter, refuse to answer the officer's question, or otherwise go about his business.” *Thorn*, 129 Wn.2d at 353.

The party asserting an unlawful seizure bears the burden of establishing it. *Young*, 135 Wn.2d at 510. If the defendant establishes that a seizure occurred, the State bears the burden of showing the seizure falls within one of the “jealously and carefully drawn exceptions” to the warrant requirement, such as a *Terry* traffic stop. *State v. Duncan*, 146 Wn.2d 166,

171-72, 43 P.3d 513 (2002).

A traffic stop is a seizure for the purposes of constitutional analysis—it is analogous to a brief investigative detention and must be based on reasonable suspicion. *Ladson*, 138 Wn.2d at 350. The authority for a warrantless investigative detention is derived from *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Kennedy*, 107 Wn.2d at 5-6. A *Terry* stop is justified if an officer can articulate a reasonable suspicion that the person stopped has been or is about to be involved in criminal activity. *State v. Acrey*, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). An officer has the authority to conduct a brief, investigative detention that is reasonably related to the purposes of the stop provided that the amount of physical intrusion and the length of time a detainee is stopped are limited. *State v. Wheeler*, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987). The length of this *Terry* stop may change: officers may reasonably extend the length of the stop if their suspicions are either confirmed or further aroused. *Acrey*, 148 Wn.2d at 747. *Terry* stops must be analyzed on a case-by-case basis. *United States v. Mendenhall*, 446 U.S. 544, 561, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (Powell, J., concurring).

b. Standard of review

When a trial court denies a motion to suppress, Washington courts

review the lower court's conclusions of law de novo. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); *State v. Smith*, 165 Wn.2d 511, 516, 199 P.3d 386 (2009). Challenged findings of fact are reviewed for substantial evidence, which is enough evidence to persuade a fair-minded, rational person of the truth of the finding. *State v. Shuffelen*, 150 Wn. App. 244, 252, 208 P.3d 1167 (2009). The surviving findings of fact must support the conclusions of law. *Id.*

c. Validity of the initial traffic stop

The court concluded that the car was not subject to a traffic stop as the term is used in *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009) and *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). CP at 50; CL 9. There is no question that that the initial traffic stop was supported by reasonable suspicion; Officer Keller saw the Honda traveling over the fog line, turned around and followed the car to the Mobil station where the driver parked the car. CP at 4, 45; CL 2. The officer was following the Honda with the intent of stopping the car. CP 2. Perhaps in anticipation of the traffic stop, Mr. Hernandez pulled into the station and got out of the Honda and was standing by the gas pump when Officer Keller parked and approached on foot. CP at 45; CL 8, 10. The driver voluntarily pulled into the station before being directed to pull over by Officer

Keller by use of overhead lights. However, it is clear from the officer's "narrative" filed in conjunction with the Information, Officer Keller saw the car driving partially on the shoulder, and he "turned around and caught up with the Honda Accord." CP at 4. Once the patrol car was behind the car, it "immediately turned into the Mobil" station and the driver got out the car as Officer Keller pulled into the station. CP at 4. Mr. Hernandez acknowledged that he knew he was driving on the shoulder. CP at 4. This differentiates the traffic stop from cases in which the officer approaches an already-parked vehicle. The car in which Ms. Beard was a passenger is was parked under circumstances different from cases in which officer approached a stationary, lawfully parked vehicle. For instance, in *State v. Johnson*, Division 3 considered the stop of a car to be a traffic stop in a situation where, as the officer was "preparing to turn onto another highway when dispatch advised him that the registered owner's license was suspended. [The Officer] then *initiated a traffic stop as Ms. Johnson was pulling into a gas station parking lot.* *Johnson*, 155 Wn.App. 270, 274, 229 P.3d 824 (2010) (emphasis added). Similarly, in this case Mr. Hernandez was aware of the officer following him and acknowledged that he was driving on the shoulder of the road. Mr. Hernandez pulled into the Mobil station before Officer Keller activated his emergency lights, but it is clear that the officer's intent was to stop the vehicle.

The contact between the driver and passengers and Officer Keller was the result of a traffic stop, albeit a stop effectuated before the officer to turn on his overhead lights.

d. The seizure was unlawful because the officers lacked reasonable, individualized suspicion of criminal activity.

To justify an intrusion under *Terry*, an officer must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.” *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (quoting *Terry*, 392 U.S. at 21). Specific and articulable facts mean that the circumstances must show “a substantial possibility that criminal conduct has occurred or is about to occur.” *Kennedy*, 107 Wn.2d at 6. An officer's objective basis for suspicion must be particularized because the “demand for specificity in the information upon which police action is predicated is the central teaching of [the Supreme] Court's Fourth Amendment Jurisprudence.” *Terry*, 392 U.S. at 22 n.18.

When police have a particularized reasonable suspicion of criminal activity, they may detain the person, ask for identification, and ask the individual to explain his or her activities. *State v. Alcantara*, 79 Wn. App. 362, 365, 901 P.2d 1087 (1995) (citing *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991)). In situations involving traffic stops, police may not

detain a vehicle passenger unless (for investigatory interactions) police have reasonable suspicion the passenger is engaged in criminal activity or (for reasons of officer safety) police objectively and reasonably believe control over a passenger's movements is necessary. *State v. Flores*, 186 Wn.2d 506, 511-525, 379 P.3d 104 (2016); *State v. Mendez*, 137 Wn.2d 208, 220-221, 970 P.2d 722 (1999), abrogated on other grounds by *Brendlin v. California*, 551 U.S. 249, 255-263, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

In this case Judge Forbes found that Ms. Beard was not seized, and that the car was not subject of a “traffic stop.” CP at 49; CL 7. This is incorrect. Officer Keller saw the car travelling over the fog line, turned around and followed the car with the intent to stop the car and contact the driver. CP at 4; CL 1, 2. Mr. Hernandez, the suspect of the investigation, pulled into a gas station, got out of the car and was standing by a gas pump by the time the officer parked and walked over to him. CL 8. Perhaps a reasonable passenger in the Honda would have felt free to leave at this point as Officer Keller engaged Mr. Hernandez. But Officer Keller called in two more officers in a second marked vehicle. CL 13. Officer Bell and Officer Kennedy exited their patrol car and Officer Bell walked toward the Honda and took a position on the passenger side of the Honda. CP 16.

Police actions are more likely to rise to a seizure with the presence of

more than one officer. *State v. Guevera*, 172 Wn. App. 184, 188, 286 P.3d 1167 (2012). No reasonable person would have felt free to leave or otherwise terminate the encounter in this case once two additional officers arrived, and stood in the vicinity of the Honda, and where an officer illuminated the back of the Honda with the spotlight of his patrol car. Moreover, Officer Keller looked into the car using a flashlight, alerting Ms. Beard that her own movements were visible and under scrutiny. Under these circumstances, no reasonable passenger would feel free to simply open the vehicle door, exit in the direction of the nearby officers, and leave. Mr. Hernandez's subsequent arrest would have added to the reasonable perception that this was a serious situation in which passengers would be expected to remain in the car and follow directions until it was resolved.

Here, three officers were on the scene. The rear-facing overhead lights of Officer Keller's car were flashing, and a spotlight illuminated the back of the Honda. The circumstances are most analogous to that of *Johnson*, 8 Wn. App. 2d 728, 440 P.3d 1032 (2019), discussed below. Here, the officers detained Ms. Beard and ultimately used a drug sniffing dog to search the outside of the car, although they did not see any drug paraphernalia before doing so. Under similar circumstances, the *Johnson* court held the officers unlawfully seized the driver. *Johnson*, 8 Wn. App. 2d at 744-45.

Similarly, Ms. Beard was under no legal duty to answer the officer's questions or identify herself. See *Larson*, 93 Wn.2d at 775 (the circumstances preceding detention must justify a reasonable suspicion that the detained individual was involved in criminal conduct) (citing *Brown v. Texas*, 433 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)). When Officer Keller looked inside the car using the flashlight and when he initiated a brief conversation with Ms. Beard about lottery tickets, the officer did not observe any signs of criminal activity. The officers were not aware of anything that constituted a reasonable, articulable suspicion of potential criminal activity.

Here, the State did not establish specific and articulable facts justifying a warrantless intrusion, i.e., a substantial possibility passengers of the car had been involved in criminal activity. *Williams*, 102 Wn.2d at 739; *Kennedy*, 107 Wn.2d at 6.

e. The officers' interaction with Ms. Beard cannot be classified as a "social contact."

The State asserts that the encounter was a social contact, rather than a seizure. RP (7/22/19) at 16, 17. Washington courts have distinguished an investigative detention from a social contact. See *State v. O'Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003); *State v. Mote*, 129 Wn.App. 276, 290, 120 P.3d 596 (2005). A social contact is a type of interaction that "occupies an amorphous area ... resting someplace between an officer's saying 'hello' to a

stranger on the street and, at the other end of the spectrum, an investigative detention.” *Harrington*, 167 Wn.2d at 664–65. Without more, engaging an individual in conversation in a public place does not raise the encounter to an investigatory detention requiring an articulable suspicion of wrongdoing. *Young*, 135 Wn.2d at 511; *State v. Ellwood*, 52 Wn.App. 70, 73, 757 P.2d 547 (1988). Likewise, no seizure occurs when an officer approaches a parked car, asks an occupant to roll the window down, and asks questions or asks for identification. See, e.g., *O’Neill*, 148 Wn.2d at 579–81 (occupant not seized when officer asked him to roll down the window, asked him to try to start his vehicle, then asked for identification); *Mote*, 129 Wn.App. at 292 (no seizure when officer asked occupants of a parked car what they were doing and for identification). The focus is not on whether the defendant’s movements are confined due to circumstances independent of the police action, 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. Moreover, when applying this test, the Supreme Court has found that interaction that begins as a social contact can escalate to an unlawful seizure. *Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009) (finding that what started as a social contact between a pedestrian and officer became progressively intrusive, escalating to an unlawful seizure when the officer asked to frisk the

pedestrian for officer safety).

In this case, the State asserts that the encounter regarding Ms. Beard was a social contact, rather than a seizure, because none of the officers' actions or statements amounted to a show of authority that would cause a reasonable person to feel not free to leave the scene or to disregard the officers' requests. RP (7/22/19) at 16, 17, 27. The trial court characterized the interaction between the officers and Ms. Beard as a lawful social contact that was not elevated to the level of a seizure. CP at 45; CL 7.

Washington courts have not "set in stone" a definition for the so-called "social contact." *Harrington*, 167 Wn.2d at 664. However, the seizure analysis is a cumulative one, "not a 'divide-and-conquer' analysis." *State v. Johnson*, 8 Wn. App. 2d 728, 745, 440 P.3d 1032 (2019) (quoting *United States v. Arvizu*, 534 U. S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); *State v. Marcum*, 149 Wn. App. 894, 907, 205 P.3d 969 (2009)). "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." *Carriero*, 8 Wn. App. 2d at 657.

In *State v. Johnson*, Johnson was sitting in the driver's seat of a vehicle parked in a parking lot, with vehicles parked on either side. 8 Wn. App. 2d 728, 742, 440 P.3d 1032 (2019). There was a grass median in front of

the vehicle, so Johnson could only have exited the stall by backing out. *Id.* Two police officers approached Johnson's vehicle, one standing on each side, resulting in neither Johnson nor his passenger being able to open the car doors “without the officers moving or giving way.” *Id.* The officers then asked Johnson questions about the car that suggested they were conducting an ongoing investigation. *Id.* at 742-43. They proceeded to inquire about Johnson's identity, which “further advanced the impression that a police investigation was ongoing, and that Johnson was a suspect.” *Id.* at 743. Division One held the totality of these circumstances amounted to a seizure. *Id.* at 744-45. The Court emphasized “officers need not create a complete obstruction of an individual's movements in order for the encounter to become a seizure.” *Id.* at 741. The presence of two officers “flanking the vehicle” afforded Johnson limited movement and putting his car in reverse would likely “constitute an aggressive move.” *Id.* at 744. Combined with the questioning, which suggested an ongoing criminal investigation, a reasonable person would not have considered “ignoring the officer's requests, terminating the encounter, or leaving the scene” to be “viable options.” *Id.*

The *Johnson* court distinguished *State v. Thorn*, 129 Wn.2d at 349, where a single police officer approached a parked vehicle and asked Thorn a single question. *Johnson*, 8 Wn. App. 2d at 740-41. Likewise, in *State v.*

Mote, 129 Wn. App. 276, 292, 120 P.3d 596 (2005), no seizure occurred where a single officer approached Mote parked in a public place and asked only for his identification. Consistent with this distinction, the *Harrington* court noted “[a] second officer's sudden arrival at the scene would cause a reasonable person to think twice about the turn of events.” 167 Wn.2d at 666.

In view of all of the circumstances surrounding this stop, a reasonable person could conclude she was not free to leave while the police investigated the driver. Where, as in this case, when a driver stops after a passing police car executes a U turn and follows the car into a gas station at 1:40 a.m. in the morning, and where the officer is joined by two other officers, with one standing near the side of the vehicle—and where one officer is challenging the driver's ability to legally drive the vehicle and another officer is looking into the interior of the car using a flashlight—a reasonable person would not expect that police would allow a passenger to open her door and walk away.

In addition, just as the passenger in *Rankin*, when the driver of the vehicle was detained by the officers, Ms. Beard did “not have the realistic alternative of leaving the scene as does a pedestrian.” 151 Wn.2d at 697. It was not reasonable to believe that Ms. Beard could have walked away from the car, as argued by the State. RP (7/25/19) at 27. The contact with police was at 1:40 a.m. and took place at a closed gas station. At the very least,

realistic safety concerns and common-sense dictate that a female passenger could not safely leave the gas station and walk away alone at that time of the morning.

A reasonable person in Ms. Beard's situation would not have felt free to simply exit the Honda and walk away during the investigation.

Moreover, because officers did not have particularized reasonable suspicion at that time, the seizure was unlawful. The circumstances thereafter - including the drug dog sniff and discovery of the warrant for Mr. Beard's arrest - could not be used to justify that seizure. The circumstances here, therefore, were very different than those presented in social contact cases, in which both the driver and passenger are free to leave at any time. See *Mote*, 129 Wn.App. at 290.

e. Finding of Fact (FF) 20 was not supported by substantial evidence.

The court made an erroneous finding regarding the nature of the contact and show of force by the officers toward the occupants of the car. FF 20 said that “there was no show of force by the officers towards the car or passengers.” CP at 44. This assertion is not supported by substantial evidence. The car was initially followed into the gas station by a police car, which stopped one and half car lengths behind the Honda. CP at 45; FF 4. The Honda was approached by an armed, uniformed officer who had activated

rear-facing emergency lights on his vehicle. CP at 44; FF 6. The officer “spotlighted” the rear of the Honda after he returned to his vehicle to check the driver’s identification. CP at 45; FF 11. A second patrol car containing two additional officers arrived at the scene. CP at 45; FF 12. Officer Keller shined a flashlight into the interior of the car and obtained the VIN, which was radioed to dispatch. CP at 46; FF 18. A drug sniffing dog was deployed and searched the parameter of the car. CP at 46; FF 25. The driver was detained in handcuffs. FF 14.

The trial court's conclusions of law 7 and 9 are also erroneous. CP at 49, 50. In making its ruling, the court relied on erroneous conclusion that the contact was “social” in nature, that it was “casual,” that there was “no use or display of force,” that the vehicle was not subject of a traffic stop, and that under the totality of the circumstances, Ms. Beard was not seized. CL 7 and 9. The totality of the evidence shows a substantial display of force by the officer’s indicative of a seizure of the driver as well as the passengers.

f. Because Ms. Beard was unlawfully seized, the evidence obtained during the subsequent search of her person and car must be suppressed, and her case dismissed.

If police unconstitutionally seize an individual prior to arrest, the exclusionary rule mandates suppression of evidence obtained via the government's illegality. *Harrington*, 167 Wn.2d at 664; *Duncan*, 146 Wn.2d

at 176. This includes the unlawfully seized individual's identity. See, e.g., *State v. Ellwood*, 52 Wn. App. 70, 72, 74-75, 757 P.2d 547 (1988) (suppressing Ellwood's name, discovered as a result of an unlawful detention). When an individual is unlawfully seized, the appropriate remedy is suppression of the evidence obtained during the subsequent search. *Rankin*, 151 Wn.2d at 699-700. Ms. Beard was convicted of possession of methamphetamine, which was found during the subsequent search of the vehicle and of her person. Any evidence derived directly or indirectly from this illegal seizure must be suppressed unless sufficiently attenuated to be purged of the original taint. *Wong Sun v. United States*, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); *State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479 (1995); *State v. Chapin*, 75 Wn. App. 460, 463, 879 P.2d 300 (1994), review denied, 125 Wn.2d 1024 (1995). The courts apply a “but-for analysis.” *State v. Aranguren*, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985). But for the unlawful seizure, there would have been no knowledge of Ms. Beard's outstanding warrant, no discovery of drugs and no conviction. See *State v. Ellwood*, 52 Wn. App. 70, 74-75, 757 P.2d 547 (1988) (coerced continued presence at scene requires suppression of controlled substance evidence found incident to arrest on outstanding warrant).

2. THE COURT ERRED IN TAKING JUDICIAL NOTICE OF FACTS REASONABLY SUBJECT TO DISPUTE

The appellant argues that the trial judge erroneously took judicial notice of the disputed facts regarding the area surrounding the Mobil gas station and Viking Avenue, where the station is located. The fact in question here – whether the gas station where police contacted the occupants of the Honda was in a densely populated area, and whether a passenger could reasonably be expected to safely exit the car and walk away. The geographical location of the gas station and surrounding roads meets neither criteria.

Judge Forbes believed she could take judicial notice of whether the road on which the gas station was in an urban area. RP (7/25/19) at 47. This exercise of judicial notice by the trial court was in error. The propriety of taking judicial notice is governed by ER 201. *State v. Anderson*, 80 Wn. App. 384, 390, 909 P.2d 945 (1996). ER 201(b) provides that a “judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” When judicial notice is taken of facts that are disputed below, a reviewing court will look to the record to determine if adequate facts exist to support the finding. See *State v. Payne*, 45

Wn. App. 528, 531, 726 P.2d 997 (1986) (appellate court stated that it could not find evidence in the record supporting the trial court's finding of particular vulnerability when the judge had taken judicial notice of the victim's size, but a physical description was not in the record and the prosecutor and defense counsel disagreed). A trial court's ruling on a question of taking judicial notice presents a question of law reviewed de novo. *State v. Kunze*, 97 Wn.App. 832, 988 P.2d 977 (1999).

Here, Judge Forbes extensively discussed Viking Avenue and the area around the Mobil station, saying:

I suppose I'm making an observation that might be considered judicial notice in the sense that Viking Way is a very well-travelled road in an urban area. It's not in the middle of nowhere. It's not a rural area. And when you read the cases, it's important that that distinction be made.

So I'm going to make sure that I point out all the facts relevant on both sides of this particular issue. And if either party disagrees with the court's assessment of that since it's more of a judicial notice, I used to live in Poulsbo until recently, so it's hard not to know where this is that this occurred. If you wish to dispute that fact you're entitled to do so. But I believe that's pretty clear even from the video that it's an urban area.

RP (7/25/19) at 47.

Defense counsel stated that he had concerns about the court's statement and said that:

it is not a gas station where there is a neighborhood around it. I think if you take right at that road there's some houses down there, but it's

not an area that's in the middle of a neighborhood or a lot of houses. It's kind of by itself.

RP (7/25/19) at 48.

After further discussion, Judge Forbes stated:

I don't define urban or rural as where there's a lot of houses nearby. It's more that there are a lot of things around. It's not in the middle of nowhere. It's not out on a highway or out in Seabeck, for example, where anything around you is going to be quite a ways to get to it.

RP (7/25/19) at 48.

The court also stated

In any event, my point is that it's not in the middle of the countryside, and it's not on a highway. It's in an urban area. Whether there's sidewalks or not is not of really importance in terms of the case. And I'm just stating the facts at this point. It's important to note. But I am intimately familiar with this road. I lived in Poulsbo for 18 years and am a regular runner of that area.

RP (7/25/19) at 49.

Defense counsel stated that he disagreed with the court's judicial notice of the characteristics of the area around the gas station and indicated that the judge may have been referring to the wrong gas station. RP (7/25/19) at 50. No testimony was presented regarding the volume of traffic on the road early in the morning, whether there was cell phone service available, whether any ride services were available at that time of the morning, whether there was any place within reasonable walking distance that Ms. Beard could safely, or

whether there were businesses in the area that were open at that time of the morning. The judge’s comments that the road is “well-travelled” and in an “urban area” go directly to bolster the State’s argument that the gas station is in an area where a passenger could reasonably be expected to walk away from the car, and therefore Ms. Beard was not “seized.” The court’s judicial notice of a disputed issue—whether the location of the gas station was in an area where it was reasonable to believe that Ms. Beard should have simply left the car after contacted by police if she was not seized pertained to a disputed, material fact. The court erred in taking judicial notice of this purported fact that is the subject of reasonable dispute. Without the disputed fact, the State’s argument that she as a passenger could have walked away is refuted, demonstrated that under the totality of the circumstances, Ms. Beard was “seized” during the traffic stop.

3. THIS COURT SHOULD STRIKE THE DOC SUPERVISION FEE PROVISION BECAUSE MS. BEARD IS INDIGENT

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

The recently amended statute on legal financial obligations (LFOs) prohibits the imposition of discretionary costs on indigent defendants. Here, the court imposed the cost of Department of Corrections supervision. CP at 79. Because Ms. Beard is indigent, this discretionary cost must be stricken.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court “may require the defendant to pay costs.” RCW 10.01.160(1). Recent amendments to the LFO statute prohibit the imposition of discretionary costs on indigent defendants. “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). This language became effective on June 7, 2018. Ms. Beard was sentenced on September 13, 2019. CP at 74.

The statute defines “indigent” as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines. RCW 10.101.010(3).

b. Remand is necessary to strike DOC supervision fee

The record indicates that Ms. Beard was indigent under RCW 10.101.010(3) at the time of the sentencing hearing. The sentencing court found Ms. Beard indigent and allowed this appeal at public expense. CP at 106-07. In her declaration prepared in support of her motion for order of indigency, Ms. Beard stated that she has previously been found to be indigent on June 10, 2019, and has had no change in her financial circumstances since that time. CP at 105; See *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (relying on financial statement in declaration

of indigency as evidence of indigency at time of sentencing).

At sentencing, the court did not inquire into Ms. Beard's ability to pay discretionary LFOs. RP (9/13/19) at 4. This is required before discretionary LFOs may be imposed. *Ramirez*, 191 Wn.2d at 744-45. But, in any event, the record establishes Ms. Beard's indigency at the time of sentencing. Other than supervision fees, the trial court imposed mandatory legal financial obligations only. RP (9/13/19) at 2-4; CP at 79. Despite the trial court's finding of indigency during the sentencing hearing for purposes of appellate review, in the judgment and sentence the court directed Ms. Beard to pay a community supervision fee to the Department of Corrections. CP at 79. This language was imposed in pre-printed text, in a block paragraph requiring no affirmative "check mark" by the trial court. CP at 79.

RCW 9.94A.703(2)(d) provides that this is discretionary: "Unless waived by the court ... the court shall order an offender to ... [p]ay supervision fees as determined by the department." Since the supervision fees are waivable by the trial court, they are discretionary LFOs. *State v. Lundstrom*, 6 Wn.App.2d 388, 396 n. 3, 429 P.3d 1116 (2018). In *Lundstrom*, this Court noted the sentencing court intended to impose only mandatory fees, yet imposed discretionary community custody costs, apparently through an oversight. *Lundstrom*, at 396, n.3,

Discretionary costs cannot be imposed on an indigent defendant.

RCW 10.01.160(3). When legal financial obligations are impermissibly imposed, the remedy is to strike them. *Ramirez*, 191 Wn.2d at 749-50. Here, the court found she was “indigent” and waived the non- mandatory LFOs and left other spaces for various costs and fees blank. CP at 79. Under the section marked “standard” in the judgment and sentence on community custody conditions, the requirement that Ms. Beard “pay DOC monthly supervision assessment” is buried in a lengthy paragraph on community custody. CP at 79. This strongly suggests it was not the court's intention to impose DOC supervision costs. This shows the discretionary community custody fee was likely imposed through mere oversight, just as in *Lundstrom*. Where, as here, the cost violates recent statutory amendments, the court should remand to strike the unauthorized cost. *Ramirez*, 191 Wn.2d at 746.

E. CONCLUSION

Ms. Beard was unlawfully seized without reasonable suspicion of criminal activity. All evidence discovered following the illegal seizure must be suppressed. Ms. Beard's conviction must be reversed. In the alternative, Ms. Beard respectfully requests this Court to remand for resentencing with instructions to strike the DOC supervision fee.

DATED: July 27, 2020.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 27, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Randall Sutton, Kitsap County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 27, 2020.



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