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JAN 12, 2017

Court of Appeals
Division III
State of Washington

34077-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

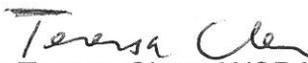
WENDELL MUSE,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	2
V. <u>ARGUMENT</u>	6
A. <u>The Superior Court Did Not Err In Denying The Motion To Suppress Challenging The Lawfulness Of The Protective Frisk</u>	6
B. <u>This Court Must Decline To Review A Suppression Challenge Raised For The First Time On Appeal</u>	9
C. <u>This Court Should Impose Appellate Costs On The Defendant If The State Substantially Prevails On Appeal</u>	11
VI. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

State Cases

Page No.

State v. Belieu,
112 Wn.2d 587, 773 P.2d 46 (1989) 7

State v. Blazina,
182 Wn.2d 827, 344 P.3d 680 (2015) 12, 13, 14, 15

State v. Duncan,
146 Wn.2d 166, 43 P.3d 513 (2002) 8

State v. Garbaccio,
151 Wn. App. 716, 214 P.3d 168 (2009) 10

State v. Gould,
58 Wn. App. 175, 791 P.2d 569 (1990) 10

State v. Harper,
33 Wn. App. 507, 655 P.2d 1199 (1982) 8

State v. Ibrahim,
164 Wn. App. 503, 269 P.3d 292 (2011) 7, 8

State v. Lee,
162 Wn. App. 852, 259 P.3d 294 (2011) 10

State v. Mierz,
127 Wn.2d 460, 901 P.2d 286 (1995) 10

State v. Robinson,
171 Wn.2d 292, 253 P.3d 84 (2011) 11

State v. Serrano,
14 Wn. App. 462, 544 P.2d 101 (1975) 8

United States Supreme Court Case

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)..... 7

Ninth Circuit Case

United States v. Barrett,
703 F.2d 1076, (9th Cir. 1983)..... 10

Statutes and Rules

Page No.

CrR 3.6.....	9
GR 34.....	12, 13
RAP 2.5.....	10
RAP 14.1.....	15
RAP 14.2.....	15
RCW 10.01.160.....	12, 15, 17
RCW 10.73.160.....	15
RCW 10.82.090.....	16

Secondary Authority

ABA Criminal Justice Standard 21-2.3, <i>ABA Standards for Criminal Justice: Prosecution and Defense Function</i> , 3d ed. (1993).....	15-16
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant. If the State substantially prevails on appeal, costs should be awarded.

III. ISSUES

1. Did the superior court err in denying the motion to suppress based on a challenge to the protective frisk?
2. May the Defendant raise a new suppression challenge (regarding probable cause to arrest) for the first time on appeal?
3. If the State substantially prevails on appeal, should the Defendant not be assessed any appellate costs merely because he is represented on appeal by the OPD?

IV. STATEMENT OF THE CASE

The Defendant Wendell Muse has been convicted by a jury of possessing methamphetamine. CP 62.

On August 24, 2015, Detective Pettijohn and Officer D'Aquila of the Pasco Police Department were talking on the side of the road after responding to a call, when they observed the Defendant operating his bicycle erratically and down the middle of a busy, downtown roadway in the dark and against traffic. CP 7; 1RP¹ 4-5, 18-20; 2RP² 9-10, 17. The detective stops people for bike infractions 20-25 times a week -- generally to educate them on traffic laws and occasionally to ticket them. 1RP 14-15. He activated his lights and stopped the Defendant for unlawfully operating his bicycle on the roadway. CP 7; 1RP 4-5; 2RP 18.

The Defendant was slow to stop, which from the detective's experience suggested that the Defendant may attempt to flee. CP 7; 1RP 6. The Defendant had small items in his hands, and the pockets of his shorts were bulging. CP 8; 1RP 6. Officer D'Aquila heard the detective repeatedly instruct the Defendant to keep his hands on the bike, but the Defendant disobeyed and reached into his pockets

anyway. CP 8; 1RP 6-7, 18; 2RP 19. Again the detective instructed the Defendant to put his hands on the handlebars. 1RP 7. Again, the Defendant disobeyed. 1RP 7. With his body blocking the detective's view, the Defendant appeared to both officers to be reaching with his right hand into the front of his own waistband or across his body into his left pocket. CP 8; 1RP 7, 11, 18.

To me, it looked like he was shielding with his body – using his body to shield my view of what he was doing. And it looked, to me, like he was trying to access something. I actually thought he was accessing a weapon.

1RP 7-8; CP 8. The Defendant's repeated furtive movements and non-compliant behavior caused the detective to be concerned for his own safety as well as the safety of the numerous people who were nearby. CP 8; 1RP 13-14, 16. The detective's reaction was also informed by the time of day and the fact that they were in an area where the detective had only recently investigated several homicides involving hand guns. 1RP 12-13. Officer D'Aquila was similarly concerned. 1RP 18-19. "Noncompliance and not showing the hands, that generally isn't a good combination." 1RP 23.

When the detective grabbed the Defendant and gave him clear

¹ 1RP refers to the 10/20/2015 transcript of the suppression hearing.

instructions, Officer D'Aquila observed that, instead of complying, the Defendant tensed up and started pull away. 1RP 8, 18; 2RP 19. The detective has handcuffed hundreds, perhaps thousands, of people, and he found the Defendant's reaction to be very uncommon. 1RP 14. It "made me even more concerned that he's trying to access something – to hurt either myself or someone in the area." 1RP 8.

It was a concern that I couldn't risk. So I, again, instructed what he should do and I was able to get his hands behind his back and start frisking him for weapons.

1RP 8.

In frisking the Defendant, the detective felt and immediately identified a meth pipe in the Defendant's shorts pocket. CP 8; 1RP 8-9 ("The instant I felt it, I knew exactly what it was because I've been a police officer over ten years. There was no questions what it was."); 2RP 10. The detective arrested the Defendant for unlawful possession of drug paraphernalia. CP 8; 1RP 9. Incident to arrest, the detective searched the Defendant's shorts and backpack. CP 8; 1RP 9; 2RP 11-12. He found three baggies of methamphetamine and a small digital scale to weigh small items in grams or ounces. CP 8;

² 2RP refers to the 12/16/2015 trial transcript.

1RP 9; 2RP 10-11. The burn marks on the bowl of the pipe and the white residue inside indicated it had been used to ingest methamphetamine. 1RP 9; 2RP 11.

The Defendant challenged the frisk. CP 4. The superior court judge stated,

There is no question in my mind that the initial stop was legitimate, while the frisk was limited for protective purposes.

It did appear to me that the defendant was at last possibly trying to hide something on the left side of his body, his left understand. I can understand why a police officer would want to do a very minimal frisk, so I am gonna deny the motion.

RP 35.

At sentencing, the 51 year old Defendant informed the court that he had completed his schooling and gone to trade school. 3RP³ 8, 13. He was employed at the time of his arrest. 3RP 14. After his release from incarceration and a short period of homelessness, he reported that he was “able to stand on [his] feet” again and seeking to return to work. 3RP 13. The court found the Defendant had the ability or likely future ability to pay the legal financial obligations of \$1886. CP 65, 66; 3RP 14.

³ 3RP refers to the 1/13/2016 transcript of the sentencing hearing.

Counsel advised the Defendant in court that if he appealed from his conviction, he would be risking additional appellate costs. 3RP 16-17.

V. ARGUMENT

A. THE SUPERIOR COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS CHALLENGING THE LAWFULNESS OF THE PROTECTIVE FRISK.

Prior to trial, the Defendant filed a motion to suppress arguing that he had not put his hands in his pockets, and therefore there should have been no basis for a frisk. CP 4 (“There is no objectively reasonable belief that he is armed and dangerous, and because of that we ask the court to suppress the fruits of that search.”). This issue is preserved for appeal and raised to this Court. AOB at 2.

A police officer may make limited searches for the purposes of protecting the officer’s safety during an investigative detention.

... [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in

the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884–85, 20 L. Ed. 2d 889 (1968). “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Terry v. Ohio*, 392 U.S. at 27.

And while *Terry* uses the words armed and presently dangerous, the actual measure appears to be more modest; absolute certainty is not required. Our Supreme Court has suggested that courts should be reluctant to substitute their judgment for that of the officer on the scene.

State v. Ibrahim, 164 Wn. App. 503, 509, 269 P.3d 292, 294 (2011) (citations omitted). “A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.” *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) (quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966)). A valid frisk is one in which (1) the initial stop is legitimate; (2) there is a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to protective

purposes. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

Courts have found a weapons frisk to be justifiable when a person refuses to keep his hands in plain view during police contact. *State v. Ibrahim*, 164 Wn. App. at 509-10 (suspects continued to place their hands in their pockets or out of the officer's sight despite his requests that they keep their hands visible and turned sideways away from the officer); *State v. Harper*, 33 Wn. App. 507, 509, 511, 655 P.2d 1199 (1982). The officer's right to act will not be invalidated, because it turned out, after the fact, that the pocket contained contraband instead of a weapon. *State v. Serrano*, 14 Wn. App. 462, 469, 544 P.2d 101 (1975).

The Defendant argues that Detective Pettijohn's belief that that the Defendant was armed and presently dangerous was not objectively reasonable. AOB at 5. The Defendant appears to argue that the detective did not provide specific and articulable facts, because the Defendant's furtive movements prevented the detective from seeing with certainty precisely what the Defendant was doing. AOB at 5, 6.

The detective and the officer both clearly articulated that they were concerned the Defendant had a weapon in his waistband or pocket, because he refused repeated orders to keep his hands on his bike and because he sharply pulled away from the detective. The Defendant's movements were furtive (away from the officers' view and hidden behind his person) and non-compliant. They took place in a busy location and time such that the detective had the safety of others' in mind. And the location was known to the officer as recently dangerous. These are specific and articulable facts both as to what they observed and what they believed. The frisk was limited to the Defendant's pockets. The frisk was valid.

B. THIS COURT MUST DECLINE TO REVIEW A SUPPRESSION CHALLENGE RAISED FOR THE FIRST TIME ON APPEAL.

For the first time on appeal, the Defendant challenges the lawfulness of his arrest. AOB at 3. This was not raised at the trial level, where the only suppression motion regarded the lawfulness of the frisk. CP 4; 1RP 32-34. Accordingly, it has been waived.

The defendant has the burden to request a suppression hearing and identify all suppression issues for the trial court. CrR 3.6;

State v. Gould, 58 Wn. App. 175, 185-86, 791 P.2d 569 (1990). *State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995) (A defendant's "failure to move to suppress evidence he contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence...."). Failure to do so prevents the State from developing the facts around the suppression issue.

A defendant waives the right to raise an issue on appeal if he failed to move for suppression *on that basis* in the trial court. *State v. Garbaccio*, 151 Wn. App. 716, 731, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027, 230 P.3d 1060 (2010) (because defendant's "present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, we will not consider it for the first time on appeal."); *United States v. Barrett*, 703 F.2d 1076, 1086 n. 17, (9th Cir. 1983) (refusing to address grounds for suppression not raised at trial level).

Defendant correctly does not claim a right to review challenge reviewable under RAP 2.5(a) or the Robinson rule. *State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011), *review denied*, 173 Wn.2d 1017, 272 P.3d 247 (2012) (quoting *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994)) ("Under RAP 2.5(a), a party

may raise manifest error affecting a constitutional right for the first time on appeal. 'A failure to move to suppress evidence, however, constitutes a waiver of the right to have it excluded.' ”); *State v. Robinson*, 171 Wn.2d 292, 305, 253 P.3d 84 (2011) (requiring a retroactive change in controlling constitutional interpretation occurring after the completion of trial).

The Court must deny review of this challenge where the record was not properly developed by a motion which would have preserved error for review. The challenge has been waived.

C. THIS COURT SHOULD IMPOSE APPELLATE COSTS ON THE DEFENDANT IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL.

The State objects to the Defendant's request to waive costs. The only argument the Defendant makes in support of his argument that this Court should “deny any appellate costs requested” is that he was determined to be “indigent for purposes of this appeal.” AOB at 13. Defendant's counsel would have this Court presume, in the absence of the Indigency Report required by this Court's General Order (June 10, 2016), that he will always be indigent. AOB at 13. Not only is such a presumption inappropriate, but (1) the indigency

described in *Blazina* is not the type found here and (2) indigency alone is not sufficient information for the Court to decide the Defendant's ability to pay.

The Defendant appears to believe the *Blazina* court held that courts cannot impose costs on a person who is found indigent for purposes of appointment of criminal defense counsel. Such a holding is nowhere to be found in the opinion. In *State v. Blazina*, 182 Wn.2d 827, 838-39, 344 P.3d 680, 685 (2015), the Washington Supreme Court recommended that, *when determining ability to pay under RCW 10.01.160(3)*, superior courts "should" consider factors like incarceration and other debt and "should also look to the comment in court rule GR 34 for guidance." GR 34 explains when a court may find a *civil litigant* indigent for the purpose of waiving a civil filing fee. GR 34 does not address indigency for the purposes of hiring a criminal defense attorney. It does not regard the paying of LFO's or appellate costs.

The *Blazina* court referenced this rule (addressing indigency for the purposes of paying civil filing fees), because it contains a section⁴

⁴ GR 34(a)(3) indicates that a person is indigent for civil filing fee purposes if receiving assistance under a needs-based, means-tested program like TANF, GAU, SSI, or FSP or their income is below 125% of the federal poverty guideline.

with a clear definition of “needs-based, means-tested assistance programs.” *State v. Blazina*, 182 Wn.2d at 838. The court suggested that if a person were currently receiving this kind of public assistance, “courts should serious question that person’s ability to pay LFO’s.” *State v. Blazina*, 182 Wn.2d at 839. Here there has been no showing that Mr. Muse would be found indigent under the GR 34 standard. There is no record that the Defendant is receiving public assistance. Nor has the Defendant provided any information about his past, present, or future income for this Court’s review.

At the sentencing hearing, the superior court both found an ability to pay and entered an order of indigency for appellate purposes. These are consistent rulings. A criminal court will enter an order of indigency in order to safeguard a criminal defendant’s right to counsel on significantly less information than is sought in the comment to GR 34. A person may not be able to come up with the thousands of dollars to retain an attorney in the time necessary to begin an appeal. But that same person may be able to pay a few dollars every month toward a reasonable legal financial obligation.

It is important to note that even if a defendant were indigent under the GR 34 standard, indigency for purposes of hiring an

attorney is not dispositive of ability to pay. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680, 685 (2015) (instructing sentencing courts to look to the comment to GR 34 “for guidance” only).

The significant (although not determinative) factor is not whether a criminal appellant is *currently* indigent, as incarcerated people tend to be, but whether he is *chronically* indigent, and, if so, what causes that condition. Chronic indigency due to disability (whether physical, mental, or developmental) or even addiction is different from chronic indigency due to criminal activity or contumacious refusal to seek employment.

In this case, there is no record that the Defendant has been chronically indigent, but only that he was looking for work and housing after his release from incarceration.

The Defendant admitted recent employment and the likelihood of re-employment. He is not chronically indigent. Prior to his arrest, he was employed. Based on his own representation, the Defendant will be able to pay LFO's.

Criminal defendants are and will be motivated to file frivolous appeals at great expense to the public when there is neither cost nor risk of cost to them. Accordingly, the rules of appellate procedure

discourage frivolous appeals by presuming costs will be paid to the substantially prevailing party. RAP 14.1(c) (“In all other circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a)"); RAP 14.2 (court “will” award costs to substantially prevailing party). RCW 10.73.160 is the relevant statute. Unlike RCW 10.01.160 which was construed in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), RCW 10.73.160 does not require an appellate court to consider financial resources and the nature of the burden before imposing costs.

In this case and in all challenges to costs premised on a criminal defendant’s ability to pay, this Court should consider the ABA Criminal Justice Standard 21-2.3.⁵ *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993). These black letter standards explain that the criminal justice system unacceptably induces an appeal when there is no risk of costs for frivolous appeals.

Standard 21-2.3. Unacceptable inducements and deterrents to taking appeals

⁵ Also available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_tocold.html

(a) Administration of a system of elective appeals presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons.

(b) Examples of unacceptable inducements for defendants to appeal are:

(i) absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal;

(ii) automatic release from custody, on bail or recognizance, following a sentence to a term of confinement; and

(iii) automatic detention of the appellant who is confined pending appeal in a facility substantially different in quality and regimen from those in which inmates serving sentences are normally held.

In some cases, a nominal imposition of costs may avoid this impropriety. In the instant case, if the State substantially prevails and absent new information, the Court should impose the full appellate costs on the Defendant. Such imposition is appropriate because,

- the Defendant has the ability to earn and to pay;
- the clerks will collect the LFO's under a reasonable and always negotiable payment plan without interest and under RCW 10.82.090; and

- if his circumstances change, the Defendant can always and repeatedly seek remission under RCW 10.01.160(4).

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: Jan. 11, 2017.

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED January 11, 2017, Pasco, WA

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