

NO. 35210-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMES E. BOYD
Appellant.

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

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The police violated Boyd's constitutional privacy rights by searching and seizing without a warrant, without reasonable suspicion of criminal activity and without a valid exigent circumstance.

2. The trial court erred by denying the motion to suppress the illegally obtained contraband.

3. The trial court erred in denying the motion to dismiss the charges based on the illegal obtaining of the contraband.

4. The state failed to prove the substance analyzed by the crime lab was the same substance retrieved from Boyd.

5. Boyd assigns error to the trial court's findings of fact and conclusions of law following the motion to suppress/dismiss. CP 180-83.

6. The trial court impermissibly imposed legal financial obligations without first determining Boyd's ability to pay.

7. This Court should deny the state appellate costs.

Issues Presented on Appeal

1. Should this Court suppress all evidence seized during a search and seizure of Boyd without a warrant, without

reasonable suspicion of criminal activity and without a valid exigent circumstance?

2. Did the trial court err by denying the motion to suppress contraband obtained under the guise of community caretaking but where no facts supported this exception?

3. Did the trial court err in denying the motion to dismiss the charges where the contraband should have been suppressed as a result of an unlawful search and seizure?

4. Did the state fail to prove the substance analyzed by the crime lab was the same substance retrieved from Boyd where the state could not establish that the substance was not tampered with?

5. Did the trial court err in entering findings of fact not supported by the evidence?

6. Did the trial court err in entering conclusions of law not supported by the evidence?

7. Did the trial court impermissibly impose legal financial obligations without first determining Boyd's ability to pay?

8. Should this Court deny appellate costs where Boyd was and is indigent, he has \$15,000 in debt and no source of

income?

B. STATEMENT OF THE CASE

James Boyd was originally charged with unlawful possession of heroin. CP 1. Later, that charge was amended to unlawful possession of methamphetamine. CP 90. The fire department called the police to respond to a community caretaking response to a person in a hotel who was unresponsive and then combative. RP 102, 118-19.

Spokane Officer Dale Harvey detained Boyd and testified that he arrested Boyd on an unrelated incident, conducted a pat down, stated to Boyd that the object felt like a syringe, and said “awesome”, to which Boyd responded either “yeah” or “yes”. RP 71, 104-105. Harvey conducted a field test on the contents of the syringe and determined the substance to be heroin. RP 107-08, 119. The police property room custodian was informed that the substance was heroin. RP 215, 226.

Spokane Detective Greg Vandenberg, removed the syringe from the police property vault and transferred the contents of the syringe into a vial. RP 180-81. Vandenberg described this transfer as follows:

I took it over to a table area where there are some small vials with lids, very carefully -- my standard procedure is to lay down a piece of paper that's on a roll. And I opened item number 1 by cutting along an untaped edge, removed the syringe very carefully and placed the contents of the syringe into the small vial and seal it.

Q. And at that point what do you do with the syringe?

A. I put it back into what's called a Sharps container --it's a hard plastic container -- and place it back in item number 1 or the envelope it came from and placed evidence tape over the opening that I created in the envelope. And I placed my initials, my personnel number, the date, and a brief explanation, which was "Create item number 001."

RP 183.

Thereafter, Vandenberg sealed the vial, applied evidence tape, placed the vial in a plastic bag and drug envelope, sealed the package, checked the vial in and out of the property room and transported it to the crime lab. RP 184. Vandenberg described his procedure for transferring controlled substances from syringe to vial as his "standard practice". RP 197.

I check out this item, item 1, containing the syringe. I went to a table area in the officer's area. There's --my standard practice is to remove a sheet of paper --brown paper from a roll and place that down. There's a wooden vial holder with some holes drilled in it to support the tapered bottom of one of these vials. I

removed the syringe very carefully, removed the cap from the syringe, and place a small amount of whatever liquid is in a syringe.

A. Created the label, placed the property label on there. I sealed it with evidence tape, put my initials, my personnel number, the date, and I wrote on this one "to lab." And then I returned both of these items to whoever is working the officer's desk area or officer's counter. I advised them this one is staying here; it will be checked back in. And I let them know this one is going to go to the lab.

RP 197-98.

Vandenberg transported the vial to the crime lab in this case along with other vials from other cases. RP 211. Seven other people had access to the crime lab drug vault. RP 228.

Sheri Jenkins, the crime lab toxicologist analyzed the vial and identified that substance to be methamphetamine. RP 259, 263. She also detected "monoacetylmorphine, which is very structurally similar to heroin. So it would test very similarly to heroin in a field test kit." RP 266. Jenkins testified that the syringe must have contained heroin at some point. RP 270.

a. Defense Motions.

Defense objected to the detention of Boyd on grounds that it exceeded the scope of the police community caretaking function.

Id. Pretrial the defense also moved to dismiss and suppress the illegally obtained syringe. 1RP 3, 451. Spokane officer Dale Harvey testified during the motion to suppress that he was dispatched to the Downtowner Motel to help the fire department medics deal with a combative patient who was also unresponsive. 1RP 6-7, 23-24. Upon arrival, the fire department informed Harvey that Boyd immediately calmed down and no one had been assaulted. 1RP 7-8, 20-21, 27.

Harvey did not leave but began to ask the fire department for information about Boyd's identity. 1RP 8. Harvey testified that since he knew that the Downtowner Motel was a drug hotspot he remained to protect the fire department, not Boyd, even though Boyd was calm. 1RP 24. Harvey was also trying to figure out if a crime had occurred. 1RP 25

Harvey obtained Boyd's name and date of birth so he could check for warrants. 1RP 9. A fire department person and "other people" seemed to be informing Harvey that Boyd was possibly in the wrong room. 1RP 9. No one complained or confirmed that Boyd was in the wrong room. 1RP 20. Armed with Boyd's personal

1RP refers to the November 3, 2016 pretrial motion hearing.

information, but stating he (Harvey) was on a community caretaking mission, Harvey detained Boyd with the intent to arrest Boyd while Harvey confirmed Boyd had an outstanding warrant. 1RP 10, 13, 15-16, 22.

Two other officers entered the room and one asked Boyd if had a right to be in the room. Exhibit D102. Boyd had permission to be in the motel room. 1RP 29. He was fast asleep when the fire department rushed the room and asked where he was. 1RP 29-30. Boyd was disoriented from five hours sleep and coming out of a dream. 1RP 30-31. During fire department questioning, Boyd informed the fire department that he took medication for seizures but had not had a seizure. 1RP 33-34.

The court ruled that the police engaged in a “bit of a stall” to detain Boyd until they confirmed a warrant but that was permissible because at some moment in the past Boyd was momentarily combative which in the court’s opinion meant that Boyd could have possibly become combative again. 1RP 58-60. The defense challenged the written findings and conclusions. RP 18-19.

Pretrial, the defense objected to the misuse of the

community caretaking function to obtain evidence of the crime of possession. CP 6-34. Defense counsel objected to the admission of the following findings of fact on grounds the evidence did not support the findings and the findings did not support the conclusions: 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17. RP 11-20; CP 177-83. The findings and conclusions are attached as Exhibit A.

b. 3.6 Hearing.

The defense objected to the trial courts findings and conclusions following the 3.6 hearing. RP 10-20, 39-40, 185-86; CP 19, 177-83. The defense unsuccessfully challenged the chain of custody for the methamphetamine before and during trial. RP 11, 26-29, 129, 142-44, 185-86, 269-73. After the state rested, the defense moved to dismiss for insufficient evidence of the identity of the substance removed from Boyd. RP 286.

(i). Toxicologist.

The defense moved to introduce evidence of prior malfeasance at the Cheney Crime Lab where the toxicologist in this case conducted the analysis of the substance provided by the police in this case. RP 156-169. The court determined that the

information regarding prior ethical lapses and malfeasance by other chemists to be relevant but too prejudicial to the state under ER 403(b). RP 171. The court limited the defense questioning to whether Sheri Jenkin, the current lab toxicologist ever worked with the prior toxicologists who committed malfeasance, and if so, when, and if she ever “experienced personally any circumstances where field opinions coming into the lab were modified by tests and resulted in a different opinion, her opinion or those she worked with”. RP 172-73.

Post-verdict Boyd filed CrR 7.8(b) and CrR 7.5(8) motions for relief from judgment or a new trial based on the trial court impermissibly permitting a trial in violation of RCW 69.50.315(2). The trial court ruled that the police were entitled to detain Boyd to determine if he had an outstanding warrant under the community caretaking exception to the warrant requirement. CP 180-83.

c. Legal Financial Obligations.

Defense counsel informed the court that Boyd was burdened with many other Legal Financial Obligations (LFO's) and requested a \$10 per month payment plan. RP 367. The court did not inquire into Boyd's financial situation but imposed both

discretionary and mandatory LFOs. RP 367; CP 154-167. The court did not check the Judgment and Sentence section 2.5 to indicate that it had inquired into Boyd's ability to pay, but imposed a \$200 filing fee, \$500 victim fee and \$ \$100 DNA fee. CP 154-167. The motion for an order of indigency on appeal noted \$15,000 in debt and no assets or source of income. CP 175-76.

This timely appeal follows. CP 168-69.

C. ARGUMENTS

1. THE POLICE EXCEEDED THE SCOPE OF THE COMMUNITY CARETAKING FUNCTION TO IMPERMISSIBLY OBTAIN EVIDENCE OF A CRIME.

The police detained Boyd without a warrant, reasonable articulable suspicion and without a valid exception to the warrant requirement.

a. Standard of Review Findings/Conclusions.

This Court reviews "the denial of a suppression motion to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law." *State v. Carney*, 142 Wn.2d 197, 201, 174 P.3d 142 (2007). Unchallenged findings are accepted as verities on appeal. *State v.*

Smith, 165 Wn.2d 511, 516, 199 P.3d 386 (2009) (Smith I); *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 386 (2009).

This Court reviews de novo whether the facts support the trial court's conclusion. *Carney*, 142 Wn.2d at 201. Boyd challenges the court's factual findings and conclusions that the police were justified in detaining Boyd inside the motel room to search for warrants after he declined medical assistance from the fire department and based on the fact that Boyd was combative for a brief moment before the police arrived but not at all when the police were present.

b. Limited Exceptions To Warrantless Seizures.

Under the Fourth Amendment, a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351-52, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). Boyd had a reasonable expectation of privacy and a reasonable expectation to be free from unreasonable search and seizure in the motel room. *State v. Jordan*, 29 Wn. App. 924, 928, 631 P.2d 989 (1981).

Generally, warrantless searches are unreasonable per se

under the Fourth Amendment to the United States Constitution. *State v. Kinzey*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). However, courts recognize a few carefully drawn exceptions to this rule. *Id.* The burden is on the state to prove that a warrantless seizure falls into one of these exceptions. *Id.*

The community caretaking function, which is separate and distinct from a criminal investigation, is one such exception to the warrant requirement. *Kinzey*, 141 Wn.2d at 385. This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. *Kinzey*, 141 Wn.2d at 386.

Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. *Kinzey*, 141 Wn.2d at 386-87.

“Whether an encounter made for noncriminal non-

investigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" *Kalmas v. Wagner*, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997) (routine check on health and safety exception).

The Court in *Kinzey* recognized that since there is "a real risk of abuse in allowing even well-intentioned stops to assist[.]" "once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function." *Kinzey*, 141 Wn.2d at 388 (quoting *State v. DeArman*, 54 Wn. App. 621, 626, 774 P.2d 1247 (1989)). It is improper to continue the seizure of the defendant once the reasons for the community caretaking have been "dispelled". *Kinzey*, 141 Wn.2d at 388-89.

"When in doubt, the balance should be struck on the side of privacy because the policy of the Fourth Amendment is to minimize governmental intrusion into the lives of citizens. The community caretaking function should be cautiously applied because of its potential for abuse." *Kinzey*, 141 Wn.2d at 394-95.

In *Kinzey*, the police stopped a young woman as part of a community caretaking function because they mistakenly believed she was between 11-13 years old, and it was 10:00 pm, and she was in a high drug area standing near a man known for narcotics activity. *Kinzey*, 141 Wn.2d at 388-89. When the police approached, Kinzey walked away and the police grabbed her arm to restrain her. This was a seizure. *Kinzey*, 141 Wn.2d at 390.

When Kinzey tried to leave, she was exercising her right to be free from police intrusion. *Id.* The Court held that the police violated Kinzey's right to be free from unreasonable police intrusion because the police "interest in maintaining the safety of children did not outweigh Petitioner's constitutional interests in freedom of association, expression and movement." *Kinzey*, 141 Wn.2d at 391.

The Court's decision in *Kinzey* held that the police may not detain a person to investigate potential illegal activity once the person they seek to assist declines or is no longer in need of assistance. *Id.* Moreover, any doubt must be resolved in favor of protecting privacy rights. *Kinzey*, 141 Wn.2d at 394-95.

Here, law enforcement initially responded to a community care taking function that ceased to be an issue by the time the

police arrived. 1RP 3-60. The fire department terminated contact concluding no medical emergency. There was no indication in the room that there was reason to suspect drug activity. The 911 call did not support suspicion of drug activity. Despite this, law enforcement did not terminate engagement. Three officers were present and Boyd was not free to leave. Officer Harvey remained to conduct a criminal investigation for drugs without an exigent circumstance or reasonable articulable suspicion

Under *Kinzey*, the continued officer presence exceeded the community caretaking function. As discussed in *Kinzey*, once the fire department dispelled the reason for the police request as well as any medical emergency, the police no longer had the right to detain Boyd. *Kinzey*, 141 Wn.2d at 388-89.

Accordingly, under the balancing test protecting individual privacy against non-criminal police interference, once Boyd was no longer in need of medical assistance - which occurred before the police arrived - further detention was impermissible. *Kinzey*, 141 Wn.2d at 388-89. Boyd was illegally detained and the subsequent search produced illegally obtained evidence that must be suppressed as the fruit of an unlawful search. *Kinzey*, 141 Wn.2d

at 393, 395.

2. THE STATE FAILED TO PROVE
BEYOND A REASONABLE DOUBT
THAT BOYD POSSESSED
METHAMPHETAMINE.

Due to significant issues with the chain of custody, the state failed to prove beyond a reasonable doubt that the substance Boyd possessed was methamphetamine.

a. Standard of Review

In every criminal prosecution, due process requires that the state prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 15, 391 P.3d 409 (2017) (*citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). All reasonable inferences from the evidence are drawn in favor of the state and interpreted “most strongly” against the

defendant. *Houston-Sconiers*, 188 Wn.2d at 15; *Salinas*, 119 Wn.2d at 201.

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (Smith II).

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (*citing State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)); see also RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for

the first time in the appellate court ... failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

b. Possession of Methamphetamines

In a drug possession case under RCW 69.50.4013(1), the state must prove the identity of the controlled substance and that the defendant possessed the named controlled substance. *Id.*; *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Where evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. 5 KARL B. TEGLAND, WASH. PRAC. § 402.31 (1999). This is a more stringent test that requires the proponent to establish a chain of custody “with

sufficient completeness to render it *improbable* that the original item has either been exchanged with another or been contaminated or tampered with.” *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989) (emphasis in original).

The court considers the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. *Campbell*, 103 Wn.2d at 21. The court will admit evidence if there are minor discrepancies and uncertainties. *Id.* The chain of custody however cannot survive when one of the links may have been significantly compromised. *State v. Roche*, 114 Wn. App. 424, 437-38, 59 P.3d 682 (2002).

In *Roche*, the Court discussed whether the state could or would proceed to try possession cases involving a Washington State Crime Lab chemist who had unlawfully ingested heroin on the job and had potentially tampered with other evidence. *Id.* A prosecution memorandum provided that due to chain of custody issues, the state would dismiss any delivery case that did not have “*both* a good confession to the identity of the substance *and* a positive field test.” *Roche*, 114 Wn. App. at 440 (quoting Appendix A to State’s Response). “Do NOT have the controlled substance

retested. Our problem is chain of custody. Having the substance retested does not solve the problem and causes more (and wasted) work for the crime lab.” *Roche*, 114 Wn. App. at 439.

The prosecution determined that it would proceed to trial on cases with a “field test and the confession” by arguing that this constituted “sufficient independent evidence to support the conviction.” *Id.* In *Roche*, Roche did not confess to the nature of the substance and the field test and crime lab both identified the substance as methamphetamine. *Roche*, 114 Wn. App. at 440. The Court of Appeals reversed and remanded holding that it even with a confession and even though the lab report supported the field test, due to issues with the lab, it was impossible to determine if the methamphetamine had been tampered with. *Id.*

In Boyd’s case like *Roche*, there was no confession. Unlike in *Roche*, here there was no corroboration because the field test in Boyd’s case tested positive for heroin which did not corroborate the Washington State Crime Lab report identifying methamphetamine. RP 130, 259, 263.

In Boyd’s case there was no direct evidence that the chemist Jenkins tampered with the methamphetamine, but there were

significant issues related to contamination or tampering because the detective did not testify to using sterile equipment or a sterile environment to remove the substance obtained from Boyd, and extract it to a different vial. RP 183-84.

Detective Vandenberg merely testified to using his “standard procedure” which was limited to removing the liquid from the syringe using unknown vials and an unknown extractor over brown paper towels. RP 183-84. This testimony did not establish a sterile environment for handling the syringe retrieved from Boyd. Without establishing a sterile environment, the state could not establish that the evidence the crime lab analyzed was in fact “in substantially the same condition as when the crime was committed.” *Campbell*, 103 Wn.2d at 21; *Cardenas*, 864 F.2d at 1531; 5 KARL B. TEGLAND. Accordingly, this Court must remand for suppression and dismissal because the state failed to prove that Boyd possessed methamphetamine.

3. THE COURT IMPOSED LEGAL FINANCIAL OBLIGATIONS WITHOUT DETERMINING BOYD’S ABILITY TO PAY AND WITHOUT CONSIDERING HIS LONG STANDING INDIGENCY AND DEBT.

Counsel informed the court that Boyd was burdened by significant other debt in the amount of \$15,000 without any source of income. RP 353, 367. There was no discussion on the record of Boyd's ability to pay but there was some unknown discussion off the record. RP 367. Counsel requested a payment fee of \$10 per month. The Court did not inquire into Boyd's ability to pay LFOs and the judgment and sentence section 2.5 did not indicate that the court inquired into Boyd's ability to pay. CP 154-167. Nonetheless, the court imposed LFO's in the amount of \$800: victim's impact fee \$500; \$200 filing fee; and \$100 DNA fee. The court entered an order of indigency for both trial and appellate proceedings. CP 175-76.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." *Id.* In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

Under *State v. Blazina*, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015), the trial court must determine the defendant's ability to pay

prior to imposing LFOs. *Id.*

This Court should decide this issue even if counsel did not fully object during sentencing. *State v. Lee*, 188 Wn.2d 473, 396 P.3d 316 (2017). Several months ago the Supreme Court in *Lee* reiterated that even though appellate courts “may refuse to review any claim of error which was not raised in the trial court,” the Supreme Court routinely exercises its discretion under RAP 2.5(a). *Lee*, 188 Wn.2d at 501-02.

The reason for exercising discretion under RAP 2.5(a) is “reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFO’s.”. *Lee*, 188 Wn.2d at 501 (citations omitted). Accordingly, if this court finds that trial counsel did not adequately object to the imposition of LFO’s it should exercise its discretion to reach merits of this issue by remanding for a hearing to determine Boyd’s present and future ability to pay before imposing the LFO’s sought by the state. *Lee*, 188 Wn.2d at 501-02.

4. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DENY APPELLATE COSTS.

This Court has discretion not to allow an award of appellate costs if the state substantially prevails on appeal. RCW 10.73.160(1); *State v. Sinclair*, 192 Wn.2d 380, 388-89, 367 P.3d 612 (2016); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This Court should exercise its discretion and disallow appellate costs should the state substantially prevail.

The defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. *Sinclair*, 192 Wn.2d at 389. Here, the trial court determined that Boyd is indigent and does not have the ability to pay legal financial obligations. CP 83-84.

The Rules of Appellate Procedure allow the state to request appellate costs if it substantially prevails. RAP 14.2. A "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court held that it allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, *RAP 14.2 affords the appellate court latitude in determining if costs should be allowed*; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but *that rule allows for the appellate court to direct otherwise in its decision*.

Nolan, 141 Wn.2d at 626 (emphases added).

Likewise, the controlling statute provides that the appellate court has discretion to disallow an award of appellate costs. RCW 10.73.160(1). RCW 10.73.160(1) states, “[t]he court of appeals, Supreme Court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *Sinclair*, this Court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the Court should exercise in appropriate cases. *Sinclair*, 191 Wn.2d at 388-89.

Under *Sinclair*, when the defendant raises an objection to the imposition of LFO’s, appellate courts are obligated to exercise discretion to approve or deny the state’s request for costs. *Sinclair*, 191 Wn.2d at 388. Thus, “it is appropriate for this Court to consider the issue of appellate costs in a criminal case during the course of

appellate review when the issue is raised in an appellate brief.”
Sinclair, 191 Wn.2d at 389.

Under RAP 14.2, the Court should exercise its discretion in a decision terminating review...” *Sinclair*, 191 Wn.2d at 389. The Court should deny an award of appellate costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, 191 Wn.2d at 388-89. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Sinclair*, 191 Wn.2d at 391 (citing *Blazina*, 182 Wn.2d 827). “It is entirely appropriate for an appellate court to be mindful of these concerns.” *Sinclair*, 191 Wn.2d at 391.

In *Sinclair*, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at state expense, finding Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review,” and “the defendant cannot contribute anything toward the costs of appellate review.” *Sinclair*, 191 Wn.2d at 391. Given Sinclair’s poverty, combined with his

advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. *Sinclair*, 191 Wn.2d at 393. Accordingly, the Court ordered that appellate costs not be awarded. *Id.*

Similarly here, the trial court again at the end of trial and a matter of months before the filing of the opening brief on appeal, determined that Boyd was indigent for purposes of appeal. CP 170-76. During sentencing the trial court did not determine that Boyd had the ability to pay LFOs but imposed discretionary and non-discretionary LFOs in the amount of \$800, at the same time it acknowledged Boyd's significant debt, drug addiction and lack of any assets or source of income. RP 367; CP 88-89, 170-76.

a. Drug Addiction/Mental Illness

Recently, this Court held that a trial court must inquire into ability to pay when a defendant has mental health issues *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016); RCW 9.94A.777.2 RCW 9.94A.777 requires that a trial court determine

2 (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under

whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, mandatory or discretionary. During sentencing, the trial court knew that Boyd had suffered from substance abuse for over 30 years. RP 348. Substance abuse is a mental disease under the DSM-V. *State v. Klein*, 156 Wn.2d 102, 112-119, 123, 124 P.3d 644 (2005) (insanity acquittee case, Court held that polysubstance abuse is a mental defect or disorder).

Based on the mandatory language in RCW 9.94A.777, and due to Boyd's polysubstance, this Court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed if the state substantially prevails.

D. CONCLUSION

Boyd respectfully requests this Court reverse his conviction and remand for suppression and dismissal based on the illegal

the terms of this section, has the means to pay such additional sums.

(2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777.

search and seizure, reverse for insufficient evidence, vacate the imposition of LFOs and deny the state appellate costs.

DATED this 13th day of September 2017.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office at SCPAappeals@spokanecounty.org a true copy of the document to which this certificate is affixed, on September 13, 2017. Service was made electronically to the prosecutor and to James Boyd by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

APPENDIX A

FILED

MAY 01 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

CN: 201601026282

SN: 63

PC: 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)

Plaintiff,)

v.)

JAMES EDWARD BOYD)
BM 10/24/63)

Defendant(s).)

No. 16-1-02628-2

PA# 16-9-61750-0

RPT# 002-16-0252817

RCW 69.50.4013(1)-F (#56640)

FINDINGS OF FACT AND CONCLUSIONS OF
LAW REGARDING CrR 3.5 HEARING

I. HEARING

Hearing was held on March 6, 2017 with Spokane County Deputy Prosecuting Attorney
KERI JANDA, City of Spokane Police Officer DALE HARVEY, Assistant Public Defender DAVID
LOEBACH, and defendant JAMES BOYD present.

The defendant was advised that he may, but need not testify at the hearing on the
circumstances surrounding the statements; that if he did testify at the hearing he would be
subject to cross examination with respect to the circumstances surrounding the statements and
with respect to his credibility; that if he did testify at the hearing, he did not by so testifying waive
his right to remain silent during the trial; and that if he did testify at the hearing, neither this fact

1 nor his testimony at the hearing would be argued before the finder of fact unless he testified
2 concerning the statements at trial. The defendant did testify at this hearing.

3 **II. FINDINGS OF FACT**

4 After a review of testimony from Officer Harvey and viewing the body camera footage this
5 court FINDS that:

6 2.1 On July 10, 2016, Officer Harvey responded to the Downtowner Motel, room #105
7 in Spokane Washington where he eventually arrested for a Department of
8 Corrections warrant.

9 2.2 Mr. Boyd was handcuffed and led down to Officer Harvey's patrol car.

10 2.3 Officer Harvey searched Mr. Boyd incident to arrest outside the patrol car in the
11 parking lot.

12 2.4 During the pat down search, Officer Harvey felt a syringe in Mr. Boyd's pocket

13 2.5 Officer Harvey made the statement, "that feels like a syringe in your pocket,
14 awesome"

15 2.6 Mr. Boyd responded with one word "yes."

16 2.7 After the search, Mr. Boyd was placed in the patrol car and Officer Harvey advised
17 him of his rights by reading the Miranda warnings on a pre-printed card.

18 2.7 Mr. Boyd stated he understood the rights and chose not to answer any questions.

19 2.8 The Defendant chose to remain silent thus no custodial interrogation occurred.

20 **III. CONCLUSIONS OF LAW**

21 3.1 The Defendant was in custody while he was being searched outside the patrol
22 car.

23 3.2 The statement made by Officer Harvey was related to officer safety and not
24 intended to elicit an incriminating response by Mr. Boyd
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3.3 Officers need to be concerned about injury during a search and continuing without knowing what the object was could negatively impact officer safety

3.4 Mr. Boyd's statement was not in response to a question that amounted to custodial interrogation. It was more in line with identifying something that may be dangerous to Officer Harvey.

3.5 Mr. Boyd's response of "yes" may be elicited in the State's case in chief and will be admissible.

IT IS SO ORDERED THIS 26th day of April, 2017

DATED this 27th day of April, 2017.



JUDGE / COURT COMMISSIONER
LINDA G. TOMPKINS

Presented by:



KERI A. JANDA
Deputy Prosecuting Attorney
WSBA # 29324

Approved:

Approved as to
form only by

DAVID S. LOEBACH
Attorney for Defendant 
WSBA # _____

- 1 2. After determining that no assault occurred, the 911 operator connected the employee to the
2 fire department.
- 3 3. When the fire department arrived on scene the unresponsive person had become
4 combative, and they asked for law enforcement's assistance.
- 5 4. When Officer Harvey of the Spokane Police Department arrived on scene, the fire
6 department stated that Mr. Boyd had calmed down but they were still attending to Mr. Boyd.
- 7 5. The testimony of Mr. Boyd along with the body camera video shows that Mr. Boyd stated to
8 fire personnel that he had previously had grand mal seizures which would indicate that he
9 was not calm when they arrived on scene.
- 10 6. The Fire Department's response to the scene was due to their primary activity which is
11 treatment.
- 12 7. Mr. Boyd refused to be taken to the hospital and denied any drug use. At that point the fire
13 department recognized this was the end of the scope of their authority.
- 14 8. As the fire department was leaving there was a brief conversation with Officer Harvey that
15 this motel/location was the number two place for methamphetamine in downtown Spokane.
- 16 9. While the fire department was still attending to Mr. Boyd, Officer Harvey asked them for Mr.
17 Boyd's name and date of birth.
- 18 10. Officer Harvey testified that this was standard procedure to determine if a person had
19 warrants, mental health concerns or any previous violent contacts.
- 20 11. No questions by law enforcement were directed at Mr. Boyd.
- 21 12. As they were leaving the scene, fire personnel thanked the officers for responding to the
22 scene. This is a clear indication that the fire department called in law enforcement for
23 assistance.
- 24 13. Although Mr. Boyd had calmed down, he was previously combative and could become so
25 again.

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14. The defendant was detained by law enforcement once the fire department left the scene and Officer Harvey was waiting for confirmation of the warrant that was discovered when he ran Mr. Boyd's information through police dispatch.

15. After the fire department left, law enforcement detained Mr. Boyd for a reasonable amount of time to confirm that the warrant was active.

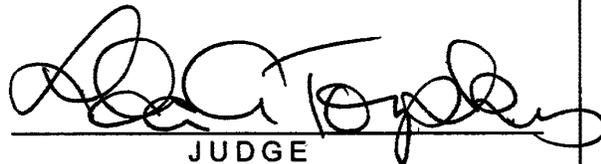
16. This period was "a bit of a stall" but in the overall scope, this was not an improper detention to confirm the warrant that the police were investigating.

17. There was no violation of the scope of the community care taking function because the police authority from the moment they arrived was to assist the fire department in case there was further combative behavior by Mr. Boyd and there was a need for law enforcement intervention.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW

1. Law enforcement responded to the motel room at the request of the Fire Department due to a combative patient
2. It was reasonable for them to remain in the room due to Mr. Boyd's prior combative behavior
3. It was reasonable for law enforcement to briefly detain Mr. Boyd to confirm the warrant.
4. Law enforcement did not exceed the scope of their community care taking functions by remaining in the motel room..



JUDGE
LINDA G. TOMPKINS

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Presented by:



KERI A. JANDA
Deputy Prosecuting Attorney
WSBA # 29324

Defense objects
Approved as to
form only

DAVID LOEBACH
Attorney for Defendant
WSBA #

LAW OFFICES OF LISE ELLNER

September 13, 2017 - 4:41 PM

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