

FILED  
Court of Appeals  
Division III  
State of Washington  
12/4/2017 11:54 AM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35305-2-III

---

STATE OF WASHINGTON, Respondent,

v.

ISMAEL TARANGO, Appellant.

---

**APPELLANT'S BRIEF**

---

Andrea Burkhart, WSBA #38519  
Two Arrows, PLLC  
PO Box 1241  
Walla Walla, WA 99362  
Phone: (509) 876-2106  
Andrea@2arrows.net  
Attorney for Appellant

**TABLE OF CONTENTS**

**AUTHORITIES CITED**.....ii

**I. INTRODUCTION**.....1

**II. ASSIGNMENTS OF ERROR**.....1

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** .....2

**IV. STATEMENT OF THE CASE**.....2

**V. ARGUMENT**.....7

1. Tarango’s motion to suppress should have been granted because police lacked a reasonable suspicion of criminal activity justifying a Terry stop when the information provided established only that a person in a vehicle was in possession of a firearm, but was not engaging in any unlawful activity with it .....7

2. When Tarango was not seen in possession of the second firearm and was merely in proximity to it, the evidence was insufficient to show that he constructively possessed it.....14

3. If Tarango does not prevail, appellate costs should not be imposed.....17

**VI. CONCLUSION**.....20

**CERTIFICATE OF SERVICE** .....21

**AUTHORITIES CITED**

**Federal Cases**

*Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).....10

*District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).....11

*Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).....8

*Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000).....13

*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....8

**State Cases**

*City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988).....10

*State v. Aase*, 121 Wn. App. 558, 89 P.3d 721 (2004).....7

*State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).....18

*State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).....15, 16

*State v. Cardenas-Muratella*, 179 Wn. App. 307, 319 P.3d 811 (2014).....10, 11, 12

*State v. Chavez*, 138 Wn. App. 29, 156 P.3d 246 (2007).....16

*State v. Cote*, 123 Wn. App. 546, 96 P.3d 410 (2004).....15

*State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009).....7

*State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).....7

*State v. Hobart*, 94 Wn.2d 437, 617 P.2d 429 (1980).....9

*State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002).....16

*State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013).....11

*State v. King*, 89 Wn. App. 612, 949 P.2d 856 (1998).....9

*State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986).....10

*State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).....9, 10

*State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984).....10

<i>State v. Olivarez</i> , 63 Wn. App. 484, 820 P.2d 66 (1991).....	15
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	9
<i>State v. Randecker</i> , 79 Wn.2d 512, 487 P.2d 1295 (1971).....	15
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	15
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980).....	10
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	19
<i>State v. Stump</i> , 185 Wn.2d 454, 374 P.3d 89 (2016).....	19
<i>State v. Tadeo-Mares</i> , 86 Wn. App. 813, 939 P.2d 220 (1997).....	15
<i>State v. Tibbles</i> , 169 Wn.2d 364, 236 P.3d 885 (2010).....	9
<i>State v. White</i> , 97 Wn.2d 95, 640 P.2d 1061 (1982).....	8

**Constitutional Provisions**

U.S. Const. Amend. 2.....	11
U.S. Const. Amend. 4.....	8, 9, 10
Wash. Const. art. I, sec. 7.....	9, 10
Wash. Const. art. I, sec. 24.....	11

**Statutes**

RCW 9.41.270.....	11
-------------------	----

**Court Rules**

RAP 14.2.....	19, 20
RAP 15.2(f).....	18

## **I. INTRODUCTION**

Police stopped an SUV in which Ismael Tarango was riding as a passenger based upon a tip received from a citizen informant that Tarango had been holding a firearm in his lap inside the SUV in a grocery store parking lot, without displaying it or issuing any threat with it. A subsequent search of the vehicle uncovered two firearms on the floorboard behind the passenger seat. The trial court denied Tarango's motion to suppress evidence resulting from the stop and search of the vehicle, and a jury subsequently convicted him of two counts of unlawful possession of a firearm as well as escape from community custody. Tarango now appeals, arguing that it was error to deny his motion to suppress and the evidence was insufficient to support his conviction for possession of the second firearm found in the SUV.

## **II. ASSIGNMENTS OF ERROR**

ASSIGNMENT OF ERROR NO. 1: The trial court erred in denying Tarango's motion to suppress evidence.

ASSIGNMENT OF ERROR NO. 2: Findings of fact 4 and 5 are unsupported by substantial evidence.

ASSIGNMENT OF ERROR NO. 3: Insufficient evidence supports the conviction as to Count No. 2.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE NO. 1: Was the tip police received that an unidentified man had been seen holding, but not brandishing, a firearm in his lap inside a vehicle sufficient to justify a warrantless stop of the vehicle?

ISSUE NO. 2: Are findings of fact 4 and 5 erroneous when no evidence was presented at the suppression hearing and the 911 caller testified at trial that he called 911 before entering the store?

ISSUE NO. 3: Was the evidence of Tarango's proximity to a second firearm inside a vehicle that did not belong to him and in which he was riding as a passenger sufficient to establish that he constructively possessed the firearm?

### **IV. STATEMENT OF THE CASE**

On the afternoon of March 7, 2016, Carlos Matthews went to the Bargain Giant in Spokane to buy groceries. I RP<sup>1</sup> 35-36. He pulled in

---

<sup>1</sup> The Verbatim Reports of Proceeding in this case consist of one volume dated July 21, 2016 containing argument on the defendant's motion to suppress, one volume dated August 11, 2016 containing the court's ruling on the defendant's motion to suppress, and three volumes, consecutively paginated, containing the trial and sentencing proceedings. For clarity, this brief will refer primarily to the trial volumes as "(Vol. No.) RP (page number)" and to the other volumes as "RP (date of hearing) (page number)."

next to an SUV and saw the male passenger staring at him with a “mean-mugging” expression. Matthews looked down and saw the man had a gun in his right hand, resting on his right thigh. I RP 36, 40, 53. He described the gun as a black semi-automatic firearm in a “boxy Glock” style or maybe a 1911. I RP 45-46, 55. The man did not say anything to him or point the gun in his direction. I RP 56.

Matthews continued toward the store and called 911 to report a suspicious man with a gun in his hand. I RP 38-39, 57. After making the call, Matthews continued with his shopping and as he was waiting at the cashier, he saw Tarango and a female walk inside. I RP 39. Tarango looked in his direction and made a “shh” gesture with his finger to his mouth. I RP 39, 61. Matthews saw upon leaving the store that the police had not arrived, so he positioned his car to follow the SUV if it left before they got there. I RP 40, 62. Eventually he saw police officers approaching the SUV, but it pulled out before they made contact and both the police car and Matthews followed. I RP 41, 63-64. The SUV drove a few blocks before police stopped it and removed Tarango at gunpoint. I RP 42.

Police contacted the Department of Corrections (DOC) when Tarango was identified because he was under active supervision and had a

warrant for his arrest. I RP 73, 93-94. Before DOC arrived, the police did not see any weapons or items of interest in the SUV. I RP 86, 87-88. The DOC officers proceeded to search the area within reach of the passenger seat where Tarango had been sitting. I RP 95. During the search, a DOC officer saw a grip of a firearm behind the passenger seat partially covered by a canvas bag. As he moved the bag to get a better view of the gun, a second handgun fell out of the bag. I RP 97. The officer also located ammunition that might have been in the bag, but was not sure. I RP 126. One box of ammunition was the same caliber as the gun Matthews had described in Tarango's lap. II RP 239-40. After the guns were located, police took possession of the vehicle and obtained a search warrant. I RP 156, II RP 215.

The State charged Tarango with two counts of unlawful possession of a firearm in the first degree, as well as one count of escape from community custody. CP 6-7. Before trial, Tarango moved to suppress evidence resulting from the traffic stop, arguing that police lacked reasonable suspicion of criminal activity and that the search of a non-probationer's vehicle exceeded DOC's authority. CP 9, 11. The State did not present evidence at the hearing on the motion, and the parties argued based upon the facts set forth in the incident reports. RP (7/21/16) 3. In an oral ruling, the trial court concluded that because the 911 caller was not

anonymous, the facts and circumstances were sufficient to support the stop and additionally found that the driver had given police consent to search the vehicle.<sup>2</sup> RP (8/11/16) 5-6. Formal findings of fact and conclusions of law were entered. CP 74-76.

The case then proceeded to a jury trial, in which the defense presented testimony from several witnesses. First, Lacey Hutchinson, Tarango's girlfriend, testified that the SUV was hers (although registered to her brother) and she had been out running errands with a friend that morning. II RP 339-42. Their plans changed and they did not make it to all of the places they intended before returning to the friend's house and picking up Tarango. II RP 343-44. Next, the friend testified that she had asked Hutchinson to take her to a man's house to return the .40 Glock and bullets that she had borrowed from him. II RP 353-54. She described placing the guns behind the passenger seat as they were found. II RP 355-56. The man who owned the gun also corroborated the friend's story, testifying that he had loaned her his .40 Glock. II RP 396, 398. The parties stipulated that Tarango had previously been convicted of a serious offense. III RP 450.

---

<sup>2</sup> This finding is supported by one of the incident reports contained in the record at CP 43 and is not challenged on appeal.

In its closing argument, the State acknowledged that convicting Tarango for possessing the second firearm required “an analytical leap” but suggested that the fact that the Glock ammunition was in the bag with the second gun, as well as the fact that because the Glock was found under the bag, Tarango would have had to move the bag, was sufficient to find he possessed the second gun in the bag. III RP 461-62. The jury convicted Tarango on all counts. III RP 490; CP 153-55. The trial court imposed a Drug Offender Sentencing Alternative sentence of 39 months in prison and 39 months’ community custody based upon an agreed offender score of “7.” CP 222, 261. Only mandatory legal financial obligations were imposed. CP 263-64.

Tarango now appeals, and has been found indigent for that purpose. CP 274, 282.

## V. ARGUMENT

1. Tarango's motion to suppress should have been granted because police lacked a reasonable suspicion of criminal activity justifying a Terry stop when the information provided established only that a person in a vehicle was in possession of a firearm, but was not engaging in any unlawful activity with it.

At the time police stopped the vehicle in which he was riding, the only information they had was that an unknown man had been seen sitting in a car holding a gun. Because possessing a firearm in public is not a crime, police lacked a valid justification for stopping the vehicle. Accordingly, the motion to suppress should have been granted.

In reviewing the denial of a defendant's motion to suppress evidence, the Court of Appeals determines whether the factual findings are supported by substantial evidence and reviews *de novo* the trial court's conclusions of law. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). Unchallenged findings are treated as verities on appeal so long as they are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is "substantial" when it is sufficient to persuade a fair-minded person of the truth of the proposition. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

First, Tarango challenges findings of fact number 4 and 5 as contrary to the evidence. Those findings state that Matthews called 911 after seeing Tarango in the store, when Tarango made a “shh” gesture toward him. CP 75-76. But Matthews, who did not testify at the suppression hearing, testified at trial that he called 911 immediately after seeing Tarango in the parking lot, before he entered the store and before Tarango made the “shh” gesture. I RP 38-39, 57, 61. The trial court’s findings reverse this order of events, and a contrary to the sworn testimony about how the events unfolded.

Second, Tarango challenges the court’s legal conclusion that the police were justified in stopping the SUV for investigatory purposes. Under the Fourth Amendment to the U.S. Constitution, law enforcement officers may not seize an individual unless there is probable cause to believe the person has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 207-08, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). However, under the U.S. Supreme Court’s decision in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer may briefly detain a person whom he reasonably suspects of criminal activity for limited questioning. *State v. White*, 97 Wn.2d 95, 105, 640 P.2d 1061 (1982) (“[T]o justify the initial stop the officer must be able to point to specific and articulable facts that give rise to a reasonable suspicion that there is

criminal activity afoot.”); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998) (“[I]t is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot.”).

Under article I, section 7 of the Washington Constitution, the right to be free from unreasonable intrusions into private affairs extends to vehicles and their contents. *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). However, a few “jealously and carefully drawn” exceptions will overcome the warrant requirement when societal interests outweigh the rationale for prior recourse to a neutral magistrate. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). As with the Fourth Amendment, an exception exists for *Terry* investigative stops. *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010).

Washington courts have long interpreted article I, section 7 as more protective of privacy interests in vehicles than the Fourth Amendment. *See Parker*, 139 Wn.2d at 496 (recognizing that vehicle passengers have independent, constitutionally protected privacy interests that they do not lose merely by entering a vehicle with others). Unlike the Fourth Amendment, article 1, section 7 “recognizes an individual’s right

to privacy with no express limitations.” *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). Washington courts have established that the article 1, section 7 analysis is not based on whether the defendant possessed a reasonable expectation of privacy in the area to be searched, but whether the State has intruded into the defendant’s private affairs. *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).

While an officer may conduct a *Terry* stop on a vehicle, the stop is proper only if it was justified at its inception. *Ladson*, 138 Wn.2d at 351. To be valid, the officer must show “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A random stop to check a driver’s license and vehicle registration or to investigate criminal activity, without any reasonable suspicion that the law is being violated, is contrary to both the Fourth Amendment to the U.S. Constitution and article 1, section 7 of the Washington State Constitution. *See generally Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988).

To be justified, the information known to police must “suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.” *State v. Cardenas-Muratella*, 179 Wn. App.

307, 309, 319 P.3d 811 (2014). Standing alone, the presence of a firearm in public without actual or threatened use, is insufficient to support an investigatory stop. *Id.* at 313.

Americans possess an “individual right to possess and carry firearms in case of confrontation” under the Second Amendment to the U.S. Constitution. *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). Washington’s Constitution provides broader protections of both individual privacy and the right to own firearms for self-defense. *See State v. Jorgenson*, 179 Wn.2d 145, 152-156, 312 P.3d 960 (2013) (applying *Gunwall* analysis to article I, section 24 of the Washington Constitution). Carrying a firearm in public may constitute a crime if it is displayed in a manner tending to show intent to intimidate others, or warranting alarm for public safety. RCW 9.41.270. But absent information suggesting an intent to use a firearm in an unlawful manner, possessing a firearm is not only lawful, it is a constitutionally protected right.

Here, the information available to police when they stopped the vehicle was only that an unidentified man had a gun in his lap inside a car in the Bargain Giant parking lot. He did not raise the gun, point the gun, draw attention to the gun, or use the gun to threaten anybody. Under these

facts, there was insufficient information to believe a crime was imminent or that public safety was jeopardized in any way.

*Cardenas-Muratalla*, a Division II decision from 2014, is directly on point. In that case, police responded to a 911 call that a Hispanic man in a high crime area displayed a gun, but did not point it or threaten anybody with it. *Cardenas-Muratella*, 179 Wn. App. at 310. Police located the man, who looked surprised to see a police car and “fluffed” his sweatshirt, leading police to believe he was concealing something in his waistband. *Id.* They attempted to detain him, and when he continued to shuffle away from the officers, one of them shot him with a taser. He then began to move toward another officer, who shot him with a gun. At that point, police handcuffed him and recovered an unloaded gun from the defendant’s waistband. *Id.* at 311.

In evaluating the legality of the detention, the *Cardenas-Muratalla* court observed that the 911 caller’s identity was unknown and the tip did not report any criminal activity. *Id.* at 316-17. As in this case, the caller reported only that the man had a gun, but indicated he had not been threatened by it. *Id.* at 317. Moreover, the police officers’ observations did not corroborate any suspicions of criminal activity. *Id.* Consequently, the court reversed the conviction. *Id.* at 318.

A similar result was reached in *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). In that case, an anonymous caller called the police to report that a young black male at a bus stop wearing a plaid shirt was carrying a gun. Police, responding to the bus stop, located a black male wearing a plaid shirt, frisked him, and recovered a gun from his pocket. *Id.* at 268. In holding the frisk invalid, the Supreme Court noted that reasonable suspicion “requires that a tip be reliable in its assertion of illegality” and concluded that corroboration of innocuous details, such as a person’s location and clothing, “does not show that the tipster has knowledge of concealed criminal activity.” *Id.* at 272. The Supreme Court also soundly rejected a “firearm exception” to the *Terry* requirement of reasonable suspicion, concluding that such an exception would inevitably swallow the rule. *Id.* at 272-73.

While the citizen informant in the present case was not anonymous, nevertheless, the information he provided to police lacked reliable indicia that illegal activity was afoot. Under *J.L.*, police do not have *carte blanche* to conduct protective stops and searches based solely on belief that a firearm might be present. The officers in this case had no information about who Tarango was or any threat that he posed. As in *Cardenas-Muratalla*, the tip did not allege any illegal activity, and the police officers’ observations before conducting the stop did not

corroborate any criminal conduct. Because the mere allegation that a person peacefully possesses a firearm in a public place consistent with his constitutional rights does not establish a reasonable suspicion of criminal behavior justifying a *Terry* stop. Accordingly, the motion to suppress should have been granted and Tarango's conviction should be reversed.

2. When Tarango was not seen in possession of the second firearm and was merely in proximity to it, the evidence was insufficient to show that he constructively possessed it.

Although Matthews' testimony that he saw Tarango holding a firearm in his lap was sufficient to support Tarango's conviction for possessing that gun, the State also charged Tarango with possessing a second firearm that was found behind the seat of the SUV in which he was a passenger. Because the firearm Matthews identified was found underneath a bag containing the second firearm, the State's theory was that Tarango would have had to have picked up the bag containing the second firearm at least temporarily when he put the first firearm behind the seat. Additionally, the State argued that the second firearm was found in a bag containing ammunition for both firearms, suggesting Tarango had used the bag in which the second firearm was found. But this evidence, at best, shows only the kind of temporary and momentary handling that is

legally insufficient to show possession. Consequently, the second conviction for unlawfully possessing a firearm should be reversed.

In reviewing a challenge to the sufficiency of the evidence, the court considers the evidence in the light most favorable to the State. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). The verdict should be reversed if, after reviewing the evidence, the court cannot conclude that any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

Because the second firearm was not in Tarango's actual possession, proving that he possessed it required proof of dominion and control over it. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Exclusive control need not be shown to establish possession, but mere proximity is insufficient. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). While dominion and control over the premises where a controlled substance is found is one factor in determining whether the defendant has dominion and control over the substance, it is not a crime to have dominion and control over premises where contraband is found. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997) (*citing State v. Olivarez*, 63 Wn. App. 484, 486, 820 P.2d 66 (1991)). In

evaluating the sufficiency of the evidence to show constructive possession, the court considers the totality of the circumstances to evaluate whether the defendant may immediately reduce the object to actual possession. *State v. Chavez*, 138 Wn. App. 29, 35, 156 P.3d 246 (2007) (citing *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)).

The present case falls well within the constraints of *Callahan*. In that case, the defendant was a guest on a houseboat for a number of days where police located a large amount of drugs. *Callahan*, 77 Wn.2d at 28. At the time the police entered, the defendant was sitting at a desk in close proximity to syringes, pills, and a cigar box filled with various drugs, and the defendant admitted handling some of the drugs earlier in the day. *Id.* Despite the admission, the Washington Supreme Court held that the evidence established only “a passing control which is only a momentary handling,” not the actual control required to sustain a charge of possession. *Id.* at 29. Furthermore, there was no evidence that the defendant had dominion and control over the houseboat where the drugs were found, when he had only some personal items inside and did not own the boat or reside in it. *Id.* at 31. Lastly, a third person testified without contradiction by the State that the items belonged to him and he had sole control over them. *Id.*

Similarly here, the State's theory that Tarango had to have handled the bag in which the second firearm was contained because the bag was found on top of the gun Matthews identified as the one he was holding in the parking lot establishes only a momentary, passing handling, not actual control over the bag or its contents. Likewise, the fact that ammunition for both firearms was found in the same bag fails to establish that Tarango placed the ammunition there, or that it was placed there after the firearm was already inside. Finally, as in *Callahan*, a third-party testified that she had borrowed the firearm from a friend and placed it in the SUV that morning to return it. In all material respects, the facts here are indistinguishable from *Callahan*.

Because the evidence failed to establish more than proximity and momentary handling of the second firearm, it was insufficient as a matter of law to support Tarango's conviction for possessing it. Accordingly, the conviction should be reversed and dismissed.

3. If Tarango does not prevail, appellate costs should not be imposed.

Pursuant to the General Court Order dated June 10, 2016 and the Rules on Appeal, Tarango respectfully requests that due to his continued indigency, the court should decline to impose appellate costs in the event he does not prevail.

In *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015), the Washington Supreme Court responded to growing national attention to the societal burdens associated with imposing unpayable legal financial obligations on indigent defendants, including “increased difficulty in reentering society, the doubtful recoument of money by the government, and inequities in administration.” Under Washington’s system, unpaid obligations accrue interest at 12% per annum and can be subject to collection fees, creating the perverse outcome that impoverished defendants who pay only \$25 per month toward their obligations will, on average, owe more after ten years than at the time of the initial assessment. *Id.* at 836. As a result, unpaid financial obligations can become a burden on gaining (and keeping) employment, housing, and credit rating, and increase the chances of recidivism. *Id.* at 837.

Tarango was found to lack sufficient funds to prosecute an appeal and was found indigent for that purpose by the trial court. CP 115-17. The presumption of indigence continues throughout review. RAP 15.2(f). Furthermore, his report as to continued indigency, filed contemporaneously herewith, shows that he has no assets or income, supports three children, and has only a G.E.D. with some college credits. In light of his financial circumstances and his continuing incarceration,

there is nothing in the record to suggest Tarango has the ability to pay the costs of the appeal.

The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Lastly, the Washington Supreme Court recently amended RAP 14.2 to provide that costs should not be imposed if the commissioner determines the offender does not have the current or likely future ability to pay such costs. When the offender has been found indigent for appeal, that presumption continues unless the commissioner determines that the offender's financial circumstances have significantly improved since the last determination of indigency. Because Tarango has been found indigent for this appeal, it is presumed he is unable to pay an appellate cost award unless the State presents evidence of a significant improvement in his financial condition.

Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs.

**VI. CONCLUSION**

For the foregoing reasons, Tarango respectfully request that the court REVERSE his convictions and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 4 day of December,  
2017.

  
\_\_\_\_\_  
ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Ismael Tarango, DOC #733818  
Monroe Corrections Complex - WSR  
PO Box 777  
Monroe, WA 98272

And, pursuant to prior agreement of the parties, I served via e-mail a copy of the foregoing Appellant's Brief to the following:

Brian O'Brien, Deputy Prosecuting Attorney  
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 4 day of December, 2017 in Walla Walla,  
Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**December 04, 2017 - 11:54 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35305-2  
**Appellate Court Case Title:** State of Washington v. Ismael M. Tarango  
**Superior Court Case Number:** 16-1-00923-0

**The following documents have been uploaded:**

- 353052\_Briefs\_20171204115349D3654646\_6896.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Appellants Brief.pdf*
- 353052\_Financial\_20171204115349D3654646\_2512.pdf  
This File Contains:  
Financial - Other  
*The Original File Name was Report as to Continued Indigency - Tarango.pdf*

**A copy of the uploaded files will be sent to:**

- bobrien@spokanecounty.org
- scpaappeals@spokanecounty.org

**Comments:**

---

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net  
Address:  
PO BOX 1241  
WALLA WALLA, WA, 99362-0023  
Phone: 509-876-2106

**Note: The Filing Id is 20171204115349D3654646**