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Division III
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No. 36068-7-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ADRIAN ALLEN COLEMAN,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Jacqueline Shea-Brown, Motions Judge
Honorable Carrie Runge, Stipulated Facts Trial Judge
Honorable Samuel Swanberg, Sentencing Judge

BRIEF OF APPELLANT

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INTRODUCTION

Police conducted a warrantless dog sniff search of Coleman's car one day after his May 13, 2016, arrest in Benton County, Washington, for a felony warrant for his arrest out of the state of Oregon and driving while license suspended, and one day after his car had been impounded. The search results were included in an affidavit for a search warrant, the execution of which resulted in the discovery of a glass pipe containing methamphetamine residue in the car's glove box. Coleman was charged with possession of a controlled substance, a new and separate crime from the one for which he was arrested on May 13.

Coleman now challenges the constitutional propriety of the warrantless search of his impounded car, the lack of probable cause to support the issuance of a search warrant, and of his subsequent conviction based on evidence discovered during that search. He further challenges imposition of certain legal financial obligations and conditions of sentence.

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Coleman's motion to suppress the evidence found during application of a drug-detection dog to his vehicle.

2. The trial court erred when it upheld the warrant to search the vehicle.

3. The defendant was denied effective assistance of counsel.

4. The trial court erred in imposing the \$200 criminal filing fee.

5. The trial court erred in imposing the \$100 felony DNA¹ collection fee.

6. The trial court erred in requiring that payments on the legal financial obligations (LFOs) “commence immediately.”

7. The trial court erred in requiring that non-restitution LFOs bear interest.

Issues Pertaining to Assignments of Error

1. The warrantless application of a drug-detection dog to the outside of a home violates both the Fourth Amendment and art. I, §7. The same is not true for a car under the Fourth Amendment, but art. I, §7 is much more protective of privacy in cars than the Fourth Amendment. Does the non-inventory application of a drug detection dog to a person’s impounded car without a showing of exigent circumstances disturb a private affair, such that art. I, §7 requires a warrant or other “authority of law” prior to the intrusion?

¹ Deoxyribonucleic acid.

2. After excision of the dog sniff results, does the affidavit in support of search warrant fail to provide probable cause to search the vehicle?

3. In failing to move for suppression based on a warrantless search of and/or lack of probable cause to search the impounded vehicle, did counsel fail to provide the effective assistance required under the Sixth Amendment?

4. Whether the trial court erred in imposing the \$200 criminal filing fee, where Coleman was indigent.

5. The legislature recently amended RCW 43.43.7541 to direct the DNA fee not be imposed upon an individual who had previously provided a DNA sample. Under *State v. Ramirez*,² this amendment applies in Coleman's case because his appeal is pending. Where the record reflects Coleman was required by statute to provide a sample in prior criminal cases, should this Court remand with instructions to strike the \$100 felony DNA collection fee from his judgment and sentence?

6. Whether the trial court erred in requiring that payments on the legal financial obligations (LFOs) "commence immediately," where Coleman was indigent.

² *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

7. Whether the trial court erred in requiring that non-restitution LFOs bear interest.

B. STATEMENT OF THE CASE

Prosser Police conducted a late evening traffic stop on the defendant, Adrian Coleman, in Prosser, Benton County, WA on May 13, 2016. Police used a high risk stop due to the fact that Coleman was wanted on a felony warrant and he had apparently resisted arrest in the past. They arrested Coleman for a felony warrant for his arrest out of the state of Oregon and driving while license suspended, and impounded his car. Due to alleged “irregular events of the traffic stop” (as set forth in argument 2 herein), police conducted a warrantless dog sniff search of Coleman’s impounded car the following day, May 14. CP 27, LL 7–8, LL 10–11, LL 14–16, LL 25–27; CP 28, LL 20–21, LL 23–26; CP 30, LL 16–19; CP 107 No.1.

The dog-sniff search results were included in an affidavit for a search warrant, which was granted and executed on May 14. A glass pipe containing methamphetamine residue was found in the impounded car’s glove box. CP 30, LL 16–119; CP 31, LL 20–22; CP 91 No. 6; CP 108 Nos. 7, 8, 10

Coleman was charged with possession of a controlled substance, a new and separate crime from the one for which he was arrested on May 13. CP 1.

Defense counsel motioned to suppress the evidence taken from Coleman's vehicle pursuant to a search warrant, under the authority of *Franks v. Delaware* 438 U.S. 154, 98 S.Ct. 2674 (1978). Counsel alleged knowing false statements were made in the search warrant affidavit. CP 9–25, plus attachments A through E at 26–59. The motions judge denied the motion, concluding the defendant had failed to meet his burden under *Franks v. Delaware* for a further hearing. On November 17, 2017, the court entered written findings of fact and conclusions of law. CP 90–96.

Counsel had asked the court not to rule on claimed error nine in the *Franks* motion (dog-sniff) and reframed it as a motion to suppress addressing whether the warrantless canine search of a vehicle was a violation of Wash. Const. art. I, §7, whether the canine sniff was reliable and meets the requirements for consideration of obtaining a search warrant and, if so, whether the search warrant should have been limited to the trunk where the dog alerted. 6/14/2017 RP 16; CP 60–71, CP 95 No. 21, plus attachments A and B at CP 72–77. Because the State was unsure of counsel's precise arguments, the State's response to defendant's *Franks*

motion included an argument asserting the canine sniff of Coleman's vehicle was not a search requiring a warrant and was a valid basis for the issuance of the search warrant. CP 78, 82–87.

In a letter ruling dated January 9, 2018, the motions judge denied the motion to suppress regarding the canine sniff of the defendant's vehicle. CP 103–06. The court later entered an order denying the motion to suppress. CP 109.

Coleman orally waived his rights to a jury trial, stipulated to facts sufficient for conviction, and was found guilty of possession of a controlled substance. 1/16/2018 RP 18–23; CP 107–08.

Coleman was indigent at the time of sentencing. 4/25/2018 RP 38. Upon inquiry, the court learned Coleman has at least two minor children, has not worked during the pendency of the case since its inception in mid-2016, and was in the middle of the process of getting SSI. 4/25/2018 RP 34–35, 37; CP 1–2.

The court declined to adopt the boilerplate finding that the defendant had present or future ability to pay LFOs imposed at sentencing, and instead made a finding that Coleman is “indigent for purposes of paying legal financial obligations.” 4/25/2018 RP 38; CP 121.

The court struck proposed fees for FTA warrants, court-appointed attorney, sheriff's service, special costs reimbursement, and the VUCSA fine. CP 122, 130. The court imposed a \$500 victim assessment fee, \$200 criminal filing fee, and \$100 Felony DNA collection fee. 4/25/2018 RP 38; CP 122, 130.

Boilerplate language in the judgment and sentence requires Coleman to begin making monthly payments on the LFOs in an unspecified amount "commencing immediately." CP 123 at paragraph 4.1.

The judgment and sentence also contains boilerplate language that "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090." CP 122 and 123 at paragraph 4.1.

Coleman now appeals. CP 132. The trial court entered an Order of Indigency, acknowledging lack of sufficient funds to prosecute an appeal and granting Coleman a right to review at public expense. CP 138–39.

C. ARGUMENT

1. The warrantless non-inventory drug-sniff search of an impounded vehicle without a showing of exigent circumstances violated Coleman's constitutional rights.

Constitutional issues are reviewed de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). When a trial court denies a motion

to suppress, that court's conclusions of law are also reviewed de novo.

State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

In general, police officers must obtain a warrant before intruding into a person's private affairs. U.S. Const. amend. IV; Wash. Const. art. I, §7; *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007).

a. In the absence of any exception to the warrant requirement, the dog sniff was an impermissible search under article I, section 7.

Article I, section 7 has been interpreted as providing greater protections to individual privacy than the Fourth Amendment. *State v. Boland*, 115 Wn.2d 571, 577-578, 800 P.2d 1112 (1990); *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436, 439 (1986); *see State v. Bello*, 142 Wn. App. 930, 936, 176 P.3d 554 (2008) ("It is well established that article 1, section 7 provides greater protection of the privacy interest in a vehicle and its contents than does the Fourth Amendment."), *review denied sub. nom, State v. Lopez*, 164 Wn.2d 1015 (2008). Under art. I, §7, the initial dog sniff of the exterior of Coleman's impounded car constituted a search. The court's decision in *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010), which holds to the contrary, is distinguishable. Because the state has not carried its burden of overcoming the "per se unreasonable" presumption by demonstrating any of the narrow exceptions

to a warrant applied to the drug sniff search of Coleman's vehicle on May 14³, the search was unconstitutional and the trial court should have suppressed all evidence flowing from that search.

i. Under the Fourth Amendment, a dog sniff of a car's exterior requires neither a warrant nor a reasonable suspicion.

A dog sniff of the exterior of a defendant's vehicle conducted during a lawful traffic stop that reveals no information other than the location of a controlled substance does not "rise to the level of a constitutionally cognizable infringement" under the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 838, 160 L. Ed. 2d 842 (2005). As a result, police do not need a search warrant or a reasonable, articulable suspicion of drug possession during a routine traffic stop before subjecting the exterior of a car to a narcotics dog sniff. *Id.*, 543 U.S. at 409–410.

ii. Article I, section 7 provides greater protection than the Fourth Amendment.

Article I, section 7 goes further than the Fourth Amendment and requires actual authority of law before the State may disturb an individual's private affairs. *Day*, 161 Wn.2d at 894 "The warrant requirement is especially important under article I, section 7, of the Washington

³ CP 91 No. 6.

Constitution as it is the warrant which provides the 'authority of law' referenced therein." *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

The privacy protections safeguarded by article I, section 7 are "qualitatively different" from those guaranteed by the Fourth Amendment. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) (quoting *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). While the Fourth Amendment protects only against "unreasonable searches," "article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." *Eisfeldt*, 163 Wn.2d at 634. "Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington." *Id.* at 635.

A *Gunwall*⁴ analysis is no longer necessary before a court undertakes an independent state constitutional analysis under article I, section 7. *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). "The only relevant question is whether article I, section 7 affords enhanced protection in the particular context." *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007).

⁴ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

An article I, section 7 analysis begins by ascertaining whether the challenged state action constitutes an invasion of private affairs. *State v. Miles*, 160 Wn.2d 236, 243-44, 156 P.3d 864 (2007). If the government disturbs a valid privacy interest, the second step is to determine whether "authority of law" justifies the intrusion. *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007); *Miles*, 160 Wn.2d at 244.

Protected "private affairs" are those privacy interests that Washington citizens have held, and should have a right to hold, safe from warrantless state intrusion. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). The analysis begins with an examination of what kind of protection has historically been extended to the asserted interest. *McKinney*, 148 Wn.2d at 27. Even if a court concludes the interest has not been historically protected, it must still decide whether the privacy expectation is one citizens should be entitled to hold. *State v. Lakotiy*, 151 Wn. App. 699, 708, 214 P.3d 181 (2009).

iii. Washington Courts have historically protected a privacy interest in the contents inside a motor vehicle.

Washington courts "have long held the right to be free from unreasonable governmental intrusion into one's 'private affairs' encompasses automobiles and their contents." *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999) (citing cases). Other cases involving

automobile searches illustrate the heightened protections historically enjoyed by Washington motorists. In *Ladson*, the Court held that, despite contrary Fourth Amendment law, "pretextual traffic stops violate article I, section 7, because they are seizures absent the 'authority of law', which a warrant would bring." *Ladson*, 138 Wn.2d at 357-58. The Court observed that "[a]ll cases since *Hehman*⁵ and the decriminalization of the traffic code have forbidden pretext to circumvent the article I, section 7, warrant requirement or expand 'jealously guarded' exceptions." *Ladson*, 138 Wn.2d at 356 & n.8 (citing *State v. Bonds*, 98 Wn.2d 1, 10, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983) and *State v. Orcutt*, 22 Wn. App. 730, 737, 591 P.2d 872 (1979)).

In addition to outlawing pretext searches, our Supreme Court found sobriety checkpoints violative of privacy rights guaranteed by article 1, section 7. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 458, 755 P.2d 775 (1988). Citing a 1922 case,⁶ the *Mesiani* Court emphasized, "From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." *Mesiani*, 110 Wn.2d at 456–57. *Gibbons* set the course for future auto search cases in Washington by holding, that "private affairs" are protected by article I,

⁵ *State v. Hehman*, 90 Wn.2d 45, 578 P.2d 527 (1978).

⁶ *State v. Gibbons*, 118 Wash. 171, 187, 203 P.390 (1922).

section 7, "whether he was within his dwelling, upon the public highways, or wherever he had the right to be." *Gibbons*, 118 Wash. at 187–88.

iv. Application of a drug-detection dog to an impounded vehicle after initial inventory search was an investigative warrantless search in violation of Coleman's constitutional rights.

“Warrantless searches and seizures are per se unreasonable.

Nonetheless, there are a few ‘“jealously and carefully drawn” exceptions’ to the warrant requirement which ‘provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers of the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.’ ” *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (footnotes omitted). “The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. The burden rests with the State to prove the presence of one of these narrow exceptions.” *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996) (citations omitted). The exceptions to the requirement of a warrant are “ ‘jealously and carefully drawn.’ ” *State v. Bradley*, 105 Wn.2d 898, 902, 719 P.2d 546 (1986) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S.Ct. 2022, 2031–32, 29 L.Ed.2d 564 (1971)).

Here, there was no issue of consent, a search incident to a valid arrest, plain view or a *Terry* investigative stop. Exigent circumstances were not present, a fact borne out by the ease with which the State later procured a warrant to search the impounded vehicle and did in fact search the vehicle under authority of the warrant on May 14. CP 91 No. 6. The drug sniff search of Coleman's car was not an inventory search. The impound inventory search actually occurred on May 13 and revealed nothing of significance to police. CP 28, L 14.5. A routine inventory search is a recognized exception to the warrant requirement. *Houser*, 95 Wn.2d at 153.

The drug sniff search was an investigatory search. An investigatory search is a search that occurs upon probable cause of the presence of criminal activity. *Colorado v. Bertine*, 479 U.S. 367, 375, 107 S.Ct. 738, 742–43, 93 L.Ed.2d 739 (1987) (warrantless searches within police discretion so long as they are based on something other than suspicion of criminal activity).

In the context of impounded vehicles, Washington courts have acknowledged art. I, sec. 7 necessitates a more restrictive view of investigatory searches than its federal counterparts and requires adherence to the “per se unreasonable” rule. The *Hendrickson* Court adopted the

view expressed in *State v. Patterson*, 112 Wn.2d 731, 734, 774 P.2d 10 (1989), “where we cited with approval the language of the Oregon Supreme Court in *State v. Kock*, 302 Or. 29, 33, 725 P.2d 1285 (1986):

We nevertheless hold that any search of an automobile that was parked, immobile and unoccupied at the time the police first encountered it in connection with the investigation of a crime must be authorized by a warrant issued by a magistrate or, alternatively, the prosecution must demonstrate that exigent circumstances other than the potential mobility of the automobile exist.”

Hendricksen, 129 Wn.2d at 76.

In *Hendrickson*, the defendant delivered a controlled substance while on work release and his truck was impounded as seized. Police later obtained an anonymous tip that drugs were in truck and conducted a warrantless search based on the tip. The court found that because the search was investigatory and not pursuant to inventory, exigent circumstances or other exception to the requirement of a warrant, a warrant should have been obtained to search the unoccupied, immobile automobile. *Id.*, 129 Wn.2d at 76–77. “Because the State has not carried its burden of overcoming the ‘per se unreasonable’ presumption by demonstrating any of the narrow exceptions to a warrant applied to the search of Hendrickson’s [impounded] vehicle [the day of the warrantless search], we hold the search was unconstitutional and that the trial court

should have suppressed the evidence produced in that search.” *Id.*, 129 Wn.2d at 77.

Here, the application of a drug-detection dog to Coleman’s impounded car constituted an investigative warrantless search which unconstitutionally invaded his private affairs.

Whether a canine sniff constitutes a search remains an unanswered question in Washington. *See* Justice Charles W. Johnson & Justice Debra L. Stephens, Survey of Washington Search and Seizure Law: 2013 Update, 36 Seattle U. L. Rev. 1581, 1585 (2013). However, Washington Courts have rejected a blanket rule that canine sniffs are not searches, focusing instead on the intrusiveness of the sniff and the individual’s reasonable expectation of privacy. *Id.* (citations omitted). Because Coleman had a reasonable expectation of privacy in his impounded vehicle and the State has not met its burden of overcoming the “per se unreasonable” presumption by demonstrating any of the narrow exceptions to a warrant applied to the investigatory search of his vehicle, the warrantless canine sniff was a search in violation of Coleman’s constitutional rights.

"[A] substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search" under article I, section 7. *Young*, 123 Wn.2d at 182–83. Part of the

inquiry considers the extent to which the subject matter is voluntarily exposed to the public. *McKinney*, 148 Wn.2d at 29.

In *Young*, police began an investigation based on an anonymous note stating the defendant operated “a big marijuana grow” and providing his name, address and telephone number. 123 Wn.2d at 176–77. The court held the police use of an infrared thermal detection device to detect heat distribution patterns in Mr. Young’s home was an unconstitutional invasion of privacy under article I, section 7. *Young*, 123 Wn.2d at 184. The device was “particularly intrusive” because it allowed officers to “see through the walls” of the home. *Young*, 123 Wn.2d at 183. The device allows an officer to see things that are not voluntarily exposed to the public, such as which rooms a resident is heating, which may in turn reflect such things as a financial inability to heat the entire home and the existence and location of energy-consuming and heat-producing items. *Young*, 123 Wn.2d at 183–84.

A dog sniff is similar to an infrared thermal detection device because “using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to “ ‘see through the walls’ of the home.” *State v. Dearman*, 92 Wn. App. 630, 635, 962 P.2d 850 (1998) (quoting *Young*, 123 Wn.2d at 183), *review denied*, 137 Wn.2d 1032

(1999); accord, *United States v. Place*, 462 U.S. 696, 719–20, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (Brennan, J., concurring in the result) (A narcotics detection dog “does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and preciously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual’s privacy.”).

In *Dearman*, police acted on a tip that the defendant was involved in drugs. The court held a dog sniff of the door of a garage that was next to his home, from a lawful vantage point, was an unconstitutional search under article 1, section 7. *Dearman*, 92 Wn. App. at 637. Borrowing heavily from the decision in *Young*, the court was swayed by the enhanced capabilities of a dog, stressing that a dog exposes information that cannot be obtained by officers using their senses in the same vantage point. *Dearman*, 92 Wn. App. at 635.

Despite these cases, Washington courts have found in other circumstances that dog sniffs were not "searches" under article I, section 7. *State v. Stanphill*, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (police had prior information of a marijuana shipment through the mail; Held: dog sniff of package seized by post office authorities working with local police

was not a search); *State v. Boyce*, 44 Wn. App. 724, 729–30, 723 P.2d 28 (1986) (acting on information from a confidential informant, dog sniff of bank safety deposit box was not a search where officers had permission to be in the vault area, safety deposit box holder lacked complete control over who would be in the vault area, and sniff of air outside safety deposit box "was minimally intrusive"); *State v. Wolohan*, 23 Wn. App. 813, 818, 598 P.2d 421 (1979) (dog sniff of package in semipublic baggage area of bus station reasonable under Fourth Amendment because package recipient had no reasonable expectation of privacy in area of search, of parcel area, or of air space surrounding package from which the odor of marijuana emanated), *review denied*, 93 Wn.2d 1008 (1980).

One obvious distinction between *Dearman* and *Boyce*, *Stanphill*, and *Wolohan* is that only in *Dearman* did the investigation target a private residence. *See Young*, 123 Wn.2d at 188 (noting that in neither *Boyce*, *Stanphill*, nor *Wolohan* was a home involved). The *Young* Court went one step further, however, suggesting a different result might have obtained had "the object of the search or the location of the search [been] subject[ed] to heightened constitutional protection." *Young*, 123 Wn.2d at 188.

This is a critical distinction between Coleman's case and *Boyce*, *Stanphill*, and *Wolohan*, because "Washington State citizens hold a constitutionally protected privacy interest in their automobiles and the contents therein." *State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009). Because Coleman had a constitutionally cognizable privacy interest in his impounded vehicle, the warrantless dog sniff of the car's exterior was a search and violated article I, section 7.

In denying Coleman's motion to suppress, the trial court relied on *State v. Hartzell*, *supra*. CP 103–06. Because *Hartzell* is distinguishable for several reasons, it does not change the result in Coleman's case. In *Hartzell*, an officer parked in the driveway of a house in response to a report of a man with a gun. Hartzell drove an SUV into the driveway and, after the officer's brief investigation, was arrested. The officer then observed a bullet hole in the passenger side of the SUV. The officer looked into the truck from the outside and saw a .357 SIG spent cartridge on the front passenger-side floor. The officer also found several boxes of .357 SIG ammunition in the rear of the SUV and a .357 SIG bullet in the seam of Hartzell's jacket. 156 Wn. App. at 926–27.

A K-9 officer was summoned to look for the gun that shot the bullet through the door of the SUV. The dog jumped up on the door and

sniffed. The dog then walked down a road and found a loaded .357 handgun. The gun was later identified as the same weapon used to fire bullets into an apartment. Hartzell was convicted of second degree assault while armed with a deadly weapon and first degree unlawful possession of a firearm. *Hartzell*, 156 Wn. App. at 927–28.

On appeal Hartzell argued the dog sniff was a search under article I, section 7. *Id.* at 928. The court in substance relied solely on *Boyce*, upholding the sniff because Hartzell had no "reasonable expectation of privacy in the air coming from the open window of the vehicle[.]" because Hartzell was not in the SUV during the sniff, the dog sniffed from a lawful vantage point, and the "sniff was only minimally intrusive." *Id.* at 929 (citing *Boyce*, 44 Wn. App. at 730).

The first distinction is that the dog sniff in Coleman's case originated after the impoundment and impound-inventory of his vehicle. The vehicle was unoccupied and immobile, and police were actively investigating a potential crime other than the crime for which he was arrested. A warrant or alternatively a demonstration of any of the narrow exceptions to the search warrant requirement was required to search the impounded vehicle. *Hendrickson*, 129 Wn.2d at 76–77. The State has not

overcome the “per se unreasonable” presumption of the search warrant requirement. The sniff was a search and was unconstitutional.

A second distinction is that the sniff in *Hartzell* did not compromise a protected area, such as the contents of Coleman’s vehicle that were not in open view from the outside. Rather, the dog in *Hartzell* smelled either the hole in the door or the spent cartridge, both of which were in open view from the outside of the SUV, which in turn allowed the dog to track the gun that fired the cartridge. In that sense, *Hartzell* is akin to *Stanphill*, *Boyce* and *Wolohan*, but constitutionally different than Coleman's case.

A dog sniff of an impounded car's exterior is particularly intrusive under *Young* and *Dearman* because it allows officers to see or smell what they otherwise could not by using their own senses. By sniffing, a dog can "see" through the protected zone of the contents of an individual’s vehicle not in open view. Further, police were not acting from a “lawful vantage point” where the use of a drug-detecting dog for investigative purposes on an impounded car allowed them to circumvent the warrant requirement.

This Court should hold the dog sniff of Coleman’s unoccupied and immobile impounded car was a search, and that in the absence of any

narrow exception to the warrant requirement, the dog sniff constituted an illegal warrantless search.

b. Failure to challenge the constitutionality of warrantless drug-sniff search of an impounded vehicle constituted ineffective assistance of counsel.

As an alternative argument, defense provided constitutionally ineffective assistance by failing to argue there was no probable cause to support the investigative warrantless search of Coleman's car by use of a drug-detection dog.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063–64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To establish ineffective assistance of counsel, a defendant must satisfy the following two-prong test:

1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)

(citing *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987)).

“Representation of a criminal defendant entails certain basic duties.” *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.3d 237 (2001) (quoting *Strickland*, 466 U.S. at 688). “[D]efense counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *Id.* (quoting *Strickland*, 466 U.S. at 688).

A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

“Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought.” *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Mr. Meckelson’s lawyer was held to have rendered ineffective assistance of counsel because he failed to argue to the trial court that Mr. Meckelson was stopped on the pretext of a minor traffic violation when the reason for the stop was that the accused had given the arresting officer a funny look. *Id.* at 435–36. Here, similar in spirit to *Meckelson*, defense counsel misapprehended the factual issues presented in challenging probable cause to support the warrantless investigative search by a drug-detection dog of Coleman’s impounded car.

Counsel motioned to suppress the dog-sniff on three bases: (1) it was a search in violation of Wash. Const. art. I, §7, (2) the dog sniff's unreliability did not meet the requirements for consideration in obtaining a search warrant, and (3) alternatively even if it did, since the dog "alert" was only to the trunk, the actual search warrant subsequently issued upon Officer Shanafelt's supporting affidavit should have been limited to the trunk of Coleman's vehicle. CP 60–71.

As to basis (1), counsel argued generally that dog sniffs are analogous to thermal imaging, whose warrantless use is unconstitutional; that dog sniffs are invasive intrusions into private affairs; that warrantless use of dog sniffs invites fishing expeditions; and warrants are necessary to provide judicial oversight of dog sniff. CP 62–66.

Counsel failed to apprehend and argue the relevant facts and legal authority. As set forth above, the investigatory search of an impounded car requires a search warrant absent any of the narrow exceptions to the warrant requirement. *Hendrickson*, 129 Wn.2d at 76–77. Here, no such exceptions existed. Application of the drug-detecting dog originated after the impoundment and impound-inventory of Coleman's vehicle. The vehicle was unoccupied and immobile, and police were actively investigating a potential crime other than the crime for which Coleman

was arrested. The State has not overcome the “per se unreasonable” presumption of the search warrant requirement. The sniff was a search and was unconstitutional.

Although the effectiveness of counsel is presumed, the presumption fails if there is no legitimate tactical explanation for his or her actions. *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). There was no legitimate tactical reason for not moving to suppress the dog sniff as an investigatory warrantless search of an impounded car in the absence of any warrant exceptions. The courts have left open the issue of whether a dog sniff could be a search and *Hendrickson* was clear a citizen has a privacy interest in his impounded car that is protected by a search warrant requirement that may only be defeated by existence of one of the narrow exceptions to the warrant requirement. The bases relied upon in the suppression motion counsel *did* make do not explain why a reasonable lawyer would forgo a basis for a suppression motion that could result—as argued below—in suppression of all of the State’s evidence on the charged possession of a controlled substance. For that reason, the failure to make the suppression motion on the given grounds was also prejudicial.

Counsel's failure to assert and challenge the propriety of the investigative warrantless dog-sniff search of the impounded car deprived her client of effective assistance.

2. Without the evidence of the dog “alert,” the officer’s affidavit does not establish probable cause to issue a warrant to search the impounded vehicle.

As a threshold matter, it should be noted that Coleman did not raise this argument at the court below. However, he can raise it for the first time on appeal pursuant to RAP 2.5(a)(3), which provides: “[A] party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.”

Analyzing alleged constitutional error raised for the first time on appeal involves four steps. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court

undertakes a harmless error analysis. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Considering the first step, the issue involves a search without probable cause, which violates the Fourth Amendment and Wash. Const. art I, §7. The introduction into evidence of material unconstitutionally seized creates a manifest error affecting a constitutional right.⁷ RAP 2.5(a)(3); *State v. Swetz*, 160 Wn. App. 122, 128, 247 P.3d 802 (2011), *review denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012).

Second, to raise a manifest constitutional error, an appellant need only make “a plausible showing that the error ... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).⁸ An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). In this case, the erroneous admission of illegally seized evidence had practical and identifiable consequences. *Id.* Without the evidence, the State would have been unable

⁷ The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

⁸ The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

to proceed to trial. Furthermore, the court had a copy of the warrant affidavit and the search warrant, and “could have corrected the error” by suppressing the evidence on any proper grounds. *Id.*

Since the error is manifest, the Court must follow the third step and address the merits of the constitutional issue set forth below. Finally, the error is not harmless because it clearly changes the outcome of the case. The arguments presented here may be raised for the first time on appeal. *Id.*

a. Issuance of a search warrant requires probable cause.

An issuing magistrate's determination that a warrant should issue is reviewed for abuse of discretion. *State v. Remboldt*, 64 Wn. App. 505, 509, 827 P.2d 282, *rev. denied*, 119 Wn.2d 1005 (1992). This determination generally should be given great deference. *Young*, 123 Wn.2d at 195. On review, the court views an application for a search warrant in the light of common sense, with doubts resolved in favor of the warrant. *Young*, 123 Wn.2d at 195. “However, ‘the [reviewing] court must still insist that the magistrate perform his “neutral and detached” function and not serve merely as a rubber stamp for the police.’ ” *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (citations omitted).

A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980). Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Accordingly, probable cause requires (1) a nexus between criminal activity and the item to be seized, and also (2) a nexus between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Generalized statements of belief regarding the common habits of drug dealers are insufficient to support a warrant. *See Thein*, 138 Wn.2d at 138. “An ‘officer’s belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation.’” *Thein*, 138 Wn.2d at 143 (quoting *State*

v. Olson, 73 Wn. App. 348, 357, 869 P.3d 110, *rev. denied*, 124 Wn.2d 1029 (1994)). And, it is unreasonable to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it. *Thein*, 138 Wn.2d at 150.

“[T]he existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, ‘the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness.’ General, exploratory searches are unreasonable, unauthorized, and invalid.” *Thein*, 138 Wn.2d at 150 (internal citations and footnote omitted).

“The requirement that a magistrate issue a search warrant is based on another fundamental principle: the determination of probable cause must be made by a magistrate based on the facts presented to the magistrate, instead of being made by police officers in the field.

The reasons for this rule go to the foundations of the Fourth Amendment The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”

Lyons, 174 Wn.2d at 360 (citations omitted).

The facts set forth in the affidavit must support the conclusion that the evidence is probably at the premises to be searched at the time the warrant is issued. *State v. Partin*, 88 Wn.2d 899, 903, 567 P.2d 1136 (1977).

b. The search warrant affidavit failed to establish probable cause to issue the search warrant because it did not establish that Coleman was engaged in any criminal activity.

Here, the question is whether the facts available to the magistrate, other than the drug dog's alert, justifies a reasonable belief, rather than mere suspicion, that evidence of a crime was located in Coleman's car the evening of his arrest on May 13. The facts listed in Officer Matthew Shanafelt's affidavit for search warrant that he believed were indicative of current drug possession are summarized as follows:

1—Police, having observed a vehicle parked in a Washington rest area and learning through DOC and NCIC the Oregon registered owner was Coleman and that he had a suspended license and outstanding felony warrant out of Umatilla County (original charges included possession of methamphetamine), followed it onto Interstate 82 ["I-82"]. CP 27, LL 12.5–16, 18–19.

2—The NCIC warrant hit had a "caution" warning on it and advised Coleman had resisted arrest in the past. CP 27, LL 16–17.

3—When Coleman approached the stop sign of an exit off I-82 due to re-routing of traffic caused by a vehicle collision, an unidentified female in a vehicle ahead of him waved at and ran towards the officers "aggressively trying to get their attention." CP 27, LL 23–24.

4–Coleman re-entered I-82 at a further on-ramp, at which time police made a high risk vehicle stop due to advisement of an outstanding felony warrant and apparent resisting arrest in the past. CP 27, LL 24–27.

5–While securing Coleman and checking the passenger area and trunk of his car “for people,” police noticed at the end of the on-ramp what appeared to be the same vehicle exited by the unknown female, with its emergency flashers on. CP 28, LL 2–7, 8.5–12.5.

6–In Coleman’s car, police noticed a phone appearing to have an active call on it and heard a female voice repetitively saying “hello.” RP 28, LL 7–8.

7–After verifying his identity and confirming the warrant, police transported Coleman to the Benton County Jail for booking and after conducting an impound inventory, impounded his car with a towing company. CP 28, LL 12.5–14.5, 20–22.

8–After “discussing the irregular events of the traffic stop”, the affiant and unspecified others generally agreed the unknown female was “in fact acting as a chase car,” which together with “Coleman’s [unspecified] criminal narcotics past,” led police “to believe that there may have been a transport of narcotics taking place during or around the time of contact.” CP 28, LL 23–26.

9–The next day, May 14, affiant listened to six jail phone calls between Coleman and a female whose ID on the jail telephone system was listed as “Jennifer Torres.” CP 27, LL 7–11; CP 29, LL 7–12.

10–The overheard conversations included “Coleman directing Torres” to contact people to “get the car out of impound as fast as possible;” Torres alerting Coleman that police “were trying to get in the trunk;” that Coleman had a safe in the car to which Torres had keys; and Coleman “referenced something that comes ‘out of the safe’ ” and “encouraged Torres to sell some of it” to “Maria.” CP 29, LL 13–22; CP 31, LL 12–14.

11–Upon inquiry from affiant, a sergeant from the Hermiston, Idaho police department “immediately recognized” Coleman’s and Torres’ “names and stated that Coleman had extensive narcotics and child prostitution history.” CP 30, LL 3.5–8.5.

12–Detective Stokoe of the local Blue Mountain Enforcement Narcotics Team “stated that Coleman had extensive narcotics history and that he is a well-known narcotics dealer.” The detective “also recognized Torres and stated that she was one of Coleman’s main girls involved in running narcotics and prostitution. Stokes advised that there was a high likelihood of narcotics being present inside [Coleman’s] vehicle. CP 30, LL 11–14.

13–The K-9 (trained to recognize the odor of illegal narcotics excluding marijuana) hit on the unoccupied impounded vehicle in one area. CP 30, LL 21–27; CP 31, LL 1–2, 20–22.

A search warrant affidavit must demonstrate reasonable inferences that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995). A warrant may be overbroad and, therefore, violate the particularity requirement if it authorizes police to search persons or seize things for which there is no probable cause. *See State v. Maddox*, 116 Wn. App. 796, 806, 67 P.3d 1135 (2003), *aff’d*, 152 Wn.2d 499, 98 P.3d 1199 (2004). To avoid overbreadth, there must be "a sufficient nexus between the targets of the search and the suspected criminal activity." *State v. Carter*, 79 Wn. App. 154, 158, 901 P.2d 335 (1995). The affidavit in support of the search warrant must be based on

more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

Here, there is nothing in the warrant affidavit to establish probable cause that Coleman was engaged in any criminal activity.

The facts are unusual and, taken together they may seem odd and perhaps suspicious. *See State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 177 (2008). However, all of these facts are consistent with legal activity, and very few have any reasonable connection to criminal activity. Absent the dog's alert, the only facts that can be said to show a nexus connecting Coleman's car to criminal activity are his criminal history, the actions of an unidentified female in another vehicle attempting to get the attention of the officers, and some jail phone discussion with a known female about getting Coleman's car out of impound and selling something out of the safe in his trunk to a third party.

As a crucial starting point, the affidavit contains no informant's first-hand observation to suggest Coleman had drugs on his person or in the car while he was parked at the Washington rest area or driving on I-82.

A history of the same or similar crimes may be helpful in determining probable cause, but without other evidence, it falls short of

probable cause to search. *Neth*, 165 Wn.2d at 185–86. Some factual similarity between the past crime and the currently charged offense must be shown before the criminal history can significantly contribute to probable cause. *See State v. Stone*, 56 Wn. App. 153, 158, 782 P.2d 1093 (1989) (presence of defendant’s car at crime scene coupled with similarity between current burglary and defendant’s prior burglaries established probable cause to search defendant’s car); *see also Brinegar v. United States*, 338 U.S. 160, 161–62, 176–77, 69 S.Ct. 1302, 93 L.Ed.1879 (1949) (defendant charged with illegal liquor transport in his car; prior arrest for illegal liquor transport in his car was relevant to probable cause determination).

Here, the bare fact that at the time of his arrest, Coleman had an out-of-state fugitive warrant for possession of methamphetamine falls short of probable cause to search his car for drugs in Washington. *Neth*, 165 Wn.2d at 185–86. Similarly, the bare statements of officers with local law enforcement agencies and task forces in the Oregon area where Coleman lived who were familiar with defendant as having “extensive narcotics history” and that he is a “well-known narcotics dealer” do not provide a time frame and, equally important, do not establish a factual similarity between any past crimes and the charged offense of possession

of drugs in his car in Washington. These statements also fall short of probable cause to search his car. *Id.*

The officer further relied on actions of the unidentified female in another vehicle attempting to get the attention of the officers. A freeway driver's attempt to get the attention of officers is reasonably a citizen's innocent effort to seek official help by reporting that a black BMW had passed her at a high rate of speed, as the unidentified female did on this occasion. CP 33 at paragraph 2. Even assuming the female was in fact Jennifer Torres, apparently a known associate of Coleman's at some unspecified time, the affidavit contains no information establishing a recency timeframe of the alleged association for illegal purposes, nor does it detail the relationship or how the relationship worked in the past from which to detect a similarity and reasonably infer Coleman had drugs on his person or in his car on May 13.

The affidavit relays that law enforcement consensus was that the unidentified female was acting as a "chase car" (a phrase the affidavit does not define) and "[t]hat, coupled with Coleman's criminal narcotics past, led us to believe that there may have been a transport of narcotics taking place during or around the time of contact." CP 28, LL 23–27. "A finding of probable cause must be ground in fact. This requirement is

constitutionally prescribed because information that is not sufficiently grounds in fact is inherently unreliable and frustrates the detached and independent evaluative function of the magistrate. *See ... State v. Seagull*, 95 Wn.2d [at 907] ... (it is the duty of the issuing magistrate to independently judge the persuasiveness of the evidence in order ‘to ascertain whether the warrant sought is being reasonably requested and on reasonable grounds.’) ... ” *Thein*, 138 Wn.2d at 147 (some citations omitted). The affidavit establishes no first-hand observation of illegal activity in the first place, and fails to allege and develop any factual similarity between possible past alleged “chase car” events and narcotics history with the charged offense of drugs in Coleman’s car on May 13.

Although the past relationship may have reasonably raised the officer’s suspicions, with little more it did not rise to the level of probable cause that a crime was being committed on May 13. Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Thein*, 138 Wn.2d at 147.

The officer also relied on some jail phone discussions with a known female about getting Coleman’s car out of impound and selling something out of his trunk’s safe to a third party. It does not seem unusual

for an owner to want to get his 2003 Mercedes sedan⁹ out of an impound situation, or to carry valuables such as jewelry, car titles, important papers or cash with him while travelling in a sister state. Absent first-hand observation and lacking some other identified evidence of illicit activity, the officer's suspicions may have reasonably been raised, but with little more these innocuous facts do not rise to the level of probable cause that a crime was being committed on May 13.

In sum, the search warrant affidavit lacked crucial information and did not create probable cause to search Coleman's car. The evidence obtained pursuant to the warrant would have been suppressed. Coleman's conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice.

c. Failure to challenge the constitutionality of the search warrant constituted ineffective assistance of counsel.

As an alternative argument, defense provided constitutionally ineffective assistance by failing to argue there was no probable cause to support the issuance of a search warrant for Coleman's car.

The law regarding ineffective assistance of counsel is set forth in the preceding issue and will not be duplicated here.

⁹ CP 31, L 24.5.

The presumption of effectiveness of counsel fails if there is no legitimate tactical explanation for his or her actions. *Aho*, 137 Wn.2d at 745–46. Here, there was no legitimate tactical reason for not moving to suppress the evidence obtained in the search of Coleman’s car. Although counsel had unsuccessfully sought a *Frank’s* hearing, the deficiencies in the affidavit for search warrant are facially apparent and should have been challenged. Counsel failed to assert a challenge by moving to suppress to the dog-sniff on the basis it was a warrantless non-inventory search in violation of *Hendrickson* which, as argued above, would have been successful. The State’s case depended entirely on evidence seized under the authority of the search warrant. It had no case without the fruits of that search, yet Coleman’s lawyer did not challenge probable cause for the warrant despite a serious question whether there was a sufficient nexus between the information in the possession of police on May 14 and Coleman’s vehicle. Counsel’s conduct was therefore deficient. *Cf. State v. Reichenbach*, 153 Wn.2d 126, 130–31, 101 P.3d 80 (2004).

The failure to make the suppression motion was prejudicial. Where the record demonstrates a motion to suppress would likely be granted, the failure to move for suppression is prejudicial. *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001).

As argued above, in light of *Thein* and other Washington cases establishing the nexus requirement, a motion challenging the existence of probable cause for the search warrant was likely to be successful. The prejudicial effect of counsel's error is viewed against the backdrop of the evidence in the record. *Hendrickson*, 129 Wn.2d at 80. Without the fruits of the search, the State had no evidence of the sole charge—possession of a controlled substance.

Coleman received ineffective assistance of counsel and the failure of representation was prejudicial. The conviction must be reversed and dismissed with prejudice.

3. The trial court erred in imposing the \$200 criminal filing fee, where Coleman was indigent.

At the time Coleman was sentenced, the criminal filing fee was mandatory. Former RCW 36.18.020(2)(h) (2015). A legislative enactment effective June 7, 2018, amended RCW 36.18.020(2)(h) to prohibit imposition of the \$200 criminal filing fee on indigent defendants following conviction. This amendment applies prospectively to cases pending on appeal. *State v. Ramirez*, 191 Wn.2d 732, 745–49, 426 P.3d 714 (2018). This includes Coleman's case. The trial court found Coleman indigent at sentencing. 4/25/2018 RP 38. The trial court erred in imposing

the \$200 criminal filing fee. This fee should be stricken from the judgment and sentence.

4. This Court should strike the \$100 felony DNA collection fee from Coleman’s judgment and sentence.

At Coleman’s sentencing, the court imposed the \$100 DNA fee pursuant to RCW 43.43.7541. CP 122. This fee was mandatory at the time of sentencing. House Bill 1783 amends former RCW 43.43.7541 to prohibit the assessment of a DNA database fee if an offender’s DNA has previously been collected as a result of a prior felony conviction:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender’s DNA as a result of a prior conviction.*

Laws of 2018, ch. 269, § 18 (emphasis added).

The trial court erred in imposing a \$100 DNA collection fee, because Coleman’s lengthy felony record indicates his DNA sample has previously been collected. *See* CP 119–120; *see also* Oregon Revised Statute (ORS) 137.076 (1)-(5) (Any person convicted on or after September 29, 1991, of a felony shall provide a blood sample upon request of, depending upon circumstances, the Department of Corrections or the law enforcement agency attending upon the court, and in any event, the supervising authority must obtain and transmit a sample prior to releasing

the offender from a term of incarceration or probation). The trial court should be directed to strike the \$100 DNA fee from Coleman’s judgment and sentence.

5. The trial court erred in requiring that payments on the legal financial obligations (LFOs) “commence immediately,” where Coleman was indigent.

The implied finding that Coleman has the current or future ability to pay LFOs is not supported in the record and the directive to begin payments “commencing immediately” must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court “*shall not* order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a)

through (c).” RCW 10.01.160(3) (Laws of 2018, ch. 269, § 6(3) (emphasis added)). “In determining the amount and method of payment of costs, the court 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).

Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant’s ability to pay court costs.” 118 Wn.2d at 916. *Curry* recognized, however, that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” *Id.* at 915–16.

Here, the court considered Coleman’s “past, present and future ability to pay legal financial obligations”¹⁰ but made no express finding that he had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid “commencing immediately” after it had considered the “total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the

¹⁰ CP 121 at paragraph 2.5.

likelihood that the defendant's status will change." CP 121 at paragraph 2.5; CP 123 at paragraph 4.1.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' "

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Coleman's financial resources and the nature of the burden of imposing LFOs before ordering that payments towards the LFO balance begin immediately. The record contains no evidence to support the trial court's implied finding in paragraphs 2.5 and 4.1 that Coleman has the present or future ability to pay LFOs. The record instead supports the opposite conclusion: the sentencing court explicitly found Coleman was indigent for purposes of paying LFOs and several weeks later found he continued to be indigent for purposes of pursuing this appeal. 4-25-2018 RP 38; CP 138–39.

The implied finding that Coleman has the present or future ability to pay LFOs that is implicit in the directive to make payments “commencing immediately” is simply not supported in the record. It is clearly erroneous and the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d

632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof). 164 Wn. App. 414, 263 P.3d at 1289–92.

Coleman is not challenging *imposition* of the LFOs. Rather, the trial court made the implied finding that he has the present and future ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Coleman until after a future determination of his ability to pay. It is at a future time when the government seeks to

collect the obligation that “ [t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of [her] obligation and [her] *present ability to pay at the relevant time.*’ ” *Bertrand*, 165 Wn. App. at 405, citing *Baldwin*, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court’s added emphasis and omitting footnote).

6. The requirement that non-restitution LFOs bear interest is not authorized by statute and should be stricken.

Former RCW 10.82.090 was recently amended by the legislature to prohibit the accrual of interest on non-restitution LFOs.

(1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. *As of June 7, 2018, no interest shall accrue on non-restitution legal financial obligations. ...*

(2) The court may, on motion by the offender, following the offender’s release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction as follows:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018; ...

RCW 10.82.090 (emphasis added); *see* Laws of 2018, ch. 269, § 1(1), (2) (effective June 7, 2018).

At the April 25, 2018, sentencing herein, the court entered a judgment and sentence containing boilerplate language stating “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full. CP 122–23 at paragraph 4.1.

By the statutory amendment, accrual of interest on non-restitution LFOs is prohibited after its effective date of June 7, 2018. The amendment further requires a trial court, upon motion, to waive non-restitution interest that has accrued prior to June 7, 2018. Because of Coleman’s acknowledged indigency and to forward the ends of justice, he asks this court to strike the non-restitution interest provision in its entirety from the date of sentencing.

7. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant

or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

The court appointed trial counsel due to Coleman’s indigency and found he remained indigent and was entitled to appointment of counsel and costs of review at public expense. CP 134, 138–39.

In light of his indigent status, and the presumption under RAP 15.2(f), that Coleman remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent,”¹¹ this court should exercise its discretion to waive appellate costs.¹² RCW 10.73.160(1).

D. CONCLUSION

For the reasons stated, the matter should be remanded to vacate the conviction with prejudice. Alternatively, the trial court should be ordered to strike the \$200 criminal filing fee, the \$100 DNA collection fee, the directive to make LFO payments “commencing immediately,” and the non-restitution interest provision. Should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

¹¹ *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

¹² Appellate counsel anticipates filing a report as to Coleman’s continued indigency no later than 60 days following the filing of this brief.

Respectfully submitted on February 4, 2019.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 4, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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