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Division III
State of Washington
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No. 36542-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH STEPHENS

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Mr. Stephens was unlawfully arrested.

Mr. Stephens was arrested when Officer Gonzalez placed him in handcuffs, read him his *Miranda* rights, and informed him that he was not free to leave. *See* RP 51, 70–71; CP 35, 100; *see State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1210 (2004) (whether individual is under custodial arrest is judged from the perspective of a “reasonable detainee”); *see also Berkemer v. McCarty*, 468 U.S. 420, 441, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (“The safeguards prescribed by *Miranda* become applicable as soon as suspect’s freedom of action is curtailed to a degree associated with formal arrest.”) (internal alterations, citations, and quotation marks omitted). Officers must have probable cause to arrest someone. *State v. Lund*, 70 Wn. App. 437, 444, 853 P.2d 1379 (1993).

As recognized by the Supreme Court in *State v. Z.U.E.*, an informant’s tip lacking “indicia of reliability” is not sufficient to support reasonable suspicion. 183 Wn.2d 610, 618–19, 352 P.3d 796 (2015). As explained in Mr. Stephens’ opening brief, the informant’s tip here was not reliable enough to satisfy *Z.U.E.*’s requirements for reasonable suspicion, let alone rise to the level of probable cause for an arrest. *See* Brief of Appellant at 14–17. Because Mr. Stephens was unlawfully arrested, the drugs found during the search of his person must be suppressed as fruits of

a poisonous tree. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

The State’s briefing does not directly address the threshold question in determining the lawfulness the search: whether Mr. Stephens was arrested from the outset or merely detained by Officer Gonzalez. *Compare* Brief of Respondent at 8–9 *with* Brief of Appellant at 11–14. The State’s sole argument appears to be that “Stephens was merely detained, and this is a verity on appeal (as well as supported by substantial evidence).” Brief of Respondent at 9; *see also id.* at 7–8. The State fails to support its assertion that Mr. Stephens was temporarily detained, as opposed to arrested, with any substantive analysis.¹ *See id.*

The trial court’s determination that Mr. Stephens was initially detained as opposed to arrested is not a “verity” because Mr. Stephens assigned error to that conclusion in his opening brief. *See* Brief of Appellant at 2 (Assignment of Error #1); *see also* CP 173 (concluding that Officer Gonzalez “detained” Mr. Stephens but did not arrest him until after he made incriminating statements); *cf. State v. Carriero*, 8 Wn. App.

¹ The State also argues that Mr. Stephens “conflates the terms ‘custody,’ ‘arrest,’ and ‘investigatory stop’” in his opening brief. *See* Brief of Respondent at 8. The State further argues that “custody” is only relevant to determining the voluntariness of a defendants’ statements to law enforcement. *See id.* This is untrue. Custody is also relevant to determining the legality of a search incident to arrest, as “a lawful *custodial arrest* supported by probable cause is a constitutional prerequisite to any search incident to arrest.” *State v. Salinas*, 169 Wn. App. 210, 216, 279 P.3d 917 (2012) (emphasis added).

2d 641, 651, 439 P.3d 679 (2019) (“Unchallenged findings of fact entered following a suppression hearing are verities on appeal.”). Further, this Court reviews a custodial arrest determination not for substantial evidence, but *de novo* as a matter of law. *See State v. Gering*, 146 Wn. App. 564, 567, 192 P.3d 935 (2008).

The State does not even attempt to argue Officer Gonzalez had probable cause to arrest Mr. Stephens immediately after making contact. *See* Brief of Respondent at 5–9. The State’s avoidance of this issue is telling. Because the State assumes the fact of Mr. Stephens’ investigatory detention is “a verity,” it focuses exclusively on whether Officer Gonzalez had reasonable suspicion for the detention. *See id.* at 5–7, 9. In doing so, the State does not apply *Z.U.E.*’s reasonable suspicion framework to the facts of this case, relying on pre-*Z.U.E.* case law to assert that the informant was “presumptively reliable.” *See id.* at 6 (citing *State v. Gaddy*, 152 Wn.2d 64, 73, 94 P.3d 872 (2004)). The State rests its argument in bare recitations of the trial court’s findings of fact, providing no other substantive analysis. *See id.* at 6. Again, applying the *Z.U.E.* framework—which is binding on this Court as Supreme Court precedent—the informant’s tip here did not provide Officer Gonzalez with reasonable suspicion, let alone probable cause. *See Z.U.E.*, 183 Wn.2d at 617; *see also* Brief of Appellant at 14–17.

The State’s argument that this Court’s decision in *State v. Conner* is “analogous” is incorrect. *See* Brief of Appellant at 8 (citing *State v. Conner*, 58 Wn. App. 90, 96, 791 P.2d 261 (1990)). In *Conner*, the police received a telephone tip from a car rental lot regarding a theft. 58 Wn. App. at 92–93. Upon arriving at the lot, an officer observed the defendant, who matched the description given by the tipster, talking to a sales representative. *Id.* at 93. The officer waited until the defendant finished his conversation with the representative, and then informed the defendant the officer “needed to talk with him.” *Id.* The officer then patted the defendant down for weapons. *Id.* No questioning took place. *Id.*

This Court correctly recognized that this was a “valid investigatory stop.” *Id.* at 97. In the course of conducting the investigatory stop, the police received additional information from a man who accused the defendant of stealing his wallet. *Id.* at 93. The police then had the defendant empty his pockets, locating the stolen wallet and credit cards. *Id.* This Court recognized that the in-person accusation supported probable cause for the arrest. *See id.* at 97–100.

Unlike the defendant in *Conner*—who was permitted to finish his conversation and invited to “talk” with the officer—Mr. Stephens was handcuffed, *Mirandized*, and informed that he was not free to leave shortly after the point of his initial contact with Officer Gonzalez. *See* RP 51; 70–

71; CP 35, 100. From the perspective of any reasonable person, this was an arrest. *See Radka*, 120 Wn. App. at 49. And at the point of arrest, Officer Gonzalez was relying solely on an informant's tip, which was not sufficient for probable cause. *See Z.U.E.*, 183 Wn.2d at 618–19. *Conner* is distinguishable, and the State's reliance on its authority is misplaced.

The State appears to suggest that any unlawful arrest that occurred at the moment of contact was cured because “[a]t the time of the search incident to arrest, Officer Gonzalez had probable cause.” Brief of Respondent at 9. The State's suggestion ignores the long established “fruit of the poisonous tree” doctrine, which holds that evidence uncovered as the result of an unconstitutional arrest must be suppressed. *See Ladson*, 138 Wn.2d at 359.

The State also devotes considerable efforts to arguing that Mr. Stephens' inculpatory statements to Officer Gonzalez were freely and voluntarily made. *See* Brief of Respondent at 7–8; *see also id.* at 9. However, Mr. Stephens did not challenge the admissibility of his statements to Officer Gonzalez on these grounds. *See* Brief of Appellant at 2 (Assignments of Error). This was for two separate reasons: First, because Mr. Stephens was unlawfully seized shortly after his initial contact with Officer Gonzalez, any subsequent evidence uncovered—including any inculpatory statements Mr. Stephens allegedly made—must

be suppressed. *See Ladson*, 138 Wn.2d at 359; *see also Brown v. Illinois*, 422 U.S. 590, 605, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) (*Miranda* warnings do not automatically “purge the taint of an illegal arrest.”). Second, the statements Mr. Stephens allegedly made concerned trafficking in stolen property, a charge for which he was acquitted. RP 359; CP 154. Accordingly, whether the statements were voluntary is irrelevant to Mr. Stephens’ appeal.

The Brief of Respondent is required to “*answer* the brief of appellant.” *See* RAP 10.3(b) (emphasis added). The State’s response fails to do this in many respects. Most significantly, the State fails to address Mr. Stephens’ argument that he was arrested, not just temporarily detained, when first contacted by Officer Gonzalez. The State’s other arguments are collateral or disregard binding case law. Because Mr. Stephens was unlawfully arrested, the results of the search incident to arrest must be suppressed. *See Ladson*, 138 Wn.2d at 359.

2. The State’s intentional delay in filing charges resulted in the loss of evidence, prejudicing Mr. Stephens.

As explained in Mr. Stephens’ opening brief, the State delayed filing felony charges despite possessing all of the necessary evidence to do so, resulting in the destruction of critical evidence—namely, the 911 call and dash camera video. Brief of Appellant at 17–22. As recognized by

the Supreme Court in *State v. Michielli*, this type of delay constitutes governmental misconduct. 132 Wn.2d 229, 243–44, 937 P.2d 587 (1997). Whether the misconduct is intentional or results from simple mismanagement is of no consequence—although here, there is some indication Mr. Stephens was being punished for refusing to become an informant. *See State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980); RP 388, 478. Mr. Stephens was prejudiced by the loss of evidence, as it limited his ability to make certain suppression arguments. *See* RP 102–103. Due to prosecutorial mismanagement, the charges should have been dismissed. *See* CrR 8.3(b).

The State does not provide any substantive response to Mr. Stephens’ argument that the charges should have been dismissed on the basis of prosecutorial mismanagement. *Compare* Brief of Respondent at 9–10 *with* Brief of Appellant at 17–22. The State’s only response is that Mr. Stephens “failed to not only show any governmental misconduct, but furthermore failed to show any prejudice to his right to a fair trial. While the court recognized that potential evidence may have been lost or destroyed, it was unable to conclude that this was a result of any misconduct by the State.” Brief of Respondent at 10. This summary response not raise any specific legal arguments nor cite any case law that

Mr. Stephens can respond to. Accordingly, Mr. Stephens rests on the strength of his opening brief.

3. Following the resolution of *State v. A.M.*, whether simple possession requires an element of knowledge is still a live issue.

At the time of the filing of Mr. Stephens' opening brief, the Supreme Court was considering the issue of whether the possession statute must be interpreted to have a knowledge element to be deemed constitutional. The court ultimately declined to address that issue by ruling in the petitioner's favor on other grounds. *See State v. A.M.*, ___ Wn.2d ___, 448 P.3d 35, 37 (2019); *see also* Brief of Appellant at 23. However, two concurring justices urged the Court to address this "pressing issue," noting that the current case law criminalizes "innocent conduct in Washington's war on drugs." *A.M.*, 448 P.3d at 42 (Gordon McCloud, J., concurring). The concurring justices acknowledged that imposing strict liability for drug possession violates due process, and labeled the Supreme Court's previous decisions to the contrary "grievously wrong." *Id.* at 42, 50–53 (citing *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) and *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004)).

Washington appears to be the only state in the nation that permits conviction for drug possession on the basis of strict liability. *See State v.*

Adkins, 96 So. 3d 412, 423 & n.1 (Fla. 2012) (Pariante, J., concurring).² Under current Washington law, “[a] person might pick up the wrong bag at the airport, the wrong jacket at the concert, or even the wrong briefcase at the courthouse” and be guilty of the crime of possession. *A.M.*, 448 P.3d at 51 (Gordon McCloud, J., concurring). As argued in the opening brief and in the concurring opinion in *A.M.*, this application of the law is unconstitutional in violation of due process. *See also Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952) (“[W]rongdoing must be conscious to be criminal.”) Because the State presented no evidence of knowledge and the jury was not instructed knowledge was a necessary element, this Court should reverse Mr. Stephens’ conviction.

4. Remand is required so that Mr. Stephens’ request for a DOSA can be meaningfully considered.

The sentencing court denied Mr. Stephens’ request for a DOSA solely on the basis that he had unrelated charges pending, despite acknowledging that Mr. Stephens may be an “appropriate” candidate for treatment. RP 511. However, Mr. Stephens’ other cases have since resolved through a suspended sentence. *See Appendix A to Brief of Appellant.* The sentencing court’s denial of a DOSA on the basis of other

² Florida requires knowledge of possession, but not knowledge of the illicit substance possessed. *See id.* at 415–16.

pending charges was unjust and did not give proper consideration to Mr. Stephens' request for an alternative sentence. *See State v. Grayson*, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005). Additionally, the sentencing court's assumption that the pending charges would interfere with Mr. Stephens' ability to participate in a residential DOSA has since proven incorrect. Mr. Stephens is currently out on bail pending appeal of this case and faces 14 months of incarceration should his conviction stand. 1/2/2019 RP 23, 31–34; CP 159. Accordingly, if this Court does not reverse the conviction, it should remand for resentencing.

The State argues the sentencing court's decision to deny a DOSA is not reviewable because Mr. Stephens received the standard range sentence at the sentencing court's discretion. Brief of Respondent at 11–12. However, the sentencing court must “meaningfully consider” a defendant's request for an alternative sentence. *See Grayson*, 154 Wn.2d at 343. A categorical refusal to consider an alternative sentence is “effectively a failure to exercise discretion and is subject to reversal.” *Id.* at 342. Because the sentencing court categorically refused to consider the request for a DOSA on the basis of Mr. Stephens' pending charges, remand for resentencing is appropriate.

5. The sentencing court had the discretion to grant Mr. Stephens credit for time served within the standard range sentence, but refused to exercise its discretion.

The sentencing court refused to exercise its discretion to give Mr. Stephens credit for the time he served on the third degree theft charges Officer Gonzalez originally booked him on. 1/2/2019 RP at 27–29. Although the court acknowledged that the theft charges “actually arose from the same situation,” the court erroneously believed it lacked the authority to give Mr. Stephens any credit for this time. *See id.* However, as this Court recognized in *State v. Watson*, “[i]nsofar as time served on other charges is relevant, the court may consider that factor in exercising its discretion within the standard range, or in some truly extraordinary case might consider it a reason for an exceptional sentence.” 63 Wn. App. 854, 859–60, 822 P.2d 327 (1992). Because the standard range sentence for Mr. Stephens’ conviction was 12 to 24 months, and he received 14 months, remand for resentencing is appropriate for the sentencing court to properly exercise its discretion. CP 158–59.

The State argues that the sentencing court had “no discretion” to give credit for time served on the third degree theft charge, citing the legislature’s plenary sentencing authority. Brief of Respondent at 13. However, the State does not address *Watson* or acknowledge the wide discretion sentencing courts are afforded in imposing sentences. *See also*

State v. Herzog, 112 Wn.2d 419, 424, 771 P.2d 739 (1989)

(acknowledging that “a trial judge’s discretion when sentencing within the standard range is largely unfettered.”). Because the sentencing court mistakenly believed it lacked the discretion to consider the time Mr. Stephens served on charges arising from the “same situation,” remand is appropriate. *See State v. McGill*, 112 Wn. App. 95, 99–100, 47 P.3d 173 (2002) (defendants may challenge a standard range sentence when a sentencing court refuses to exercise discretion because it believes it lacks the authority).

B. CONCLUSION

This Court should remand with instructions to suppress the methamphetamine and dismiss with prejudice. In the alternative, this Court should remand with instructions to dismiss on the basis of governmental misconduct or insufficient evidence. In the alternative, resentencing is required.

DATED this 12th day of November, 2019.

Respectfully submitted,

/s Jessica Wolfe

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

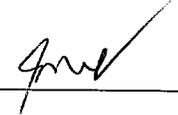
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)	NO. 36542-5-III
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