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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

BRIEF OF APPELLANT

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A. INTRODUCTION

Kenneth Stephens was arrested without probable cause for third degree theft. Following the arrest, Mr. Stephens was searched incident to arrest and methamphetamine was found on his person. The arresting officer only booked him on third degree theft charges, in the hopes Mr. Stephens would become an informant for the local drug task force. When Mr. Stephens refused, he was charged with trafficking in stolen property and possession of a controlled substance. These felony charges were filed six months after his arrest. In the interim period, the 911 call and the dash camera video of his arrest were both destroyed.

Prior to trial, Mr. Stephens brought a motion to suppress the methamphetamine on the basis there was no probable cause to arrest him. In the alternative, Mr. Stephens moved for dismissal on the basis of prosecutorial mismanagement that resulted in the prejudicial destruction of evidence. The trial court denied both motions. Mr. Stephens was subsequently convicted of the possession charge, but acquitted of trafficking stolen property.

At sentencing, Mr. Stephens requested a residential Drug Offender Sentencing Alternative (DOSA) sentence. The sentencing court denied his request on the basis he had other, unrelated charges pending. The sentencing court also refused to give Mr. Stephens any credit for time

served on the third degree theft charge, and also improperly imposed interest on his legal financial obligations.

These errors require reversal, or, in the alternative, resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court's custodial determination in its order to suppress was unsupported by substantial evidence and the relevant law. CP 173 (Finding of Fact 2.5 and 2.6).

2. The court erred in denying the motion to suppress because there was no probable cause to arrest Mr. Stephens for third degree theft, in violation of Article I, section 7 and the Fourth Amendment.

3. The trial court erred in denying the motion to dismiss based upon the State's six month delay in filing felony charges, which resulted in the prejudicial destruction of critical evidence.

4. There was insufficient evidence to support the possession of a controlled substance conviction.

5. The sentencing court improperly denied Mr. Stephens a residential DOSA on the basis he had other unrelated charges pending.

6. The sentencing court improperly refused to consider giving Mr. Stephens credit for time served.

7. The sentencing court improperly imposed interest on Mr. Stephens' legal financial obligations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Findings of fact must be supported by substantial evidence to be upheld on appeal. Whether an individual is under custodial arrest depends on whether a reasonable person under the same circumstances would consider themselves free to leave. Here, Mr. Stephens was handcuffed, *Mirandized*, and informed he was not free to leave, which would lead a reasonable detainee to consider themselves under full custodial arrest. However, the trial court found Mr. Stephens was merely detained, not arrested, prior to making inculpatory statements. Were these findings supported by substantial evidence in the record as well as the relevant law?

2. Law enforcement must have probable cause to believe a crime has been committed to place someone under arrest. An informant's tip alone does not support probable cause. At the time of arrest, the officer was relying solely on an informant's tip that Mr. Stephens had shoplifted from a store the preceding week. Did the officer lack probable cause to arrest Mr. Stephens and thus have no authority to search him incident to arrest?

3. A court may dismiss a criminal prosecution due to governmental misconduct when there is prejudice to the defendant. It is mismanagement to delay filing charges when the State has all of the

information necessary to file them. Here, the State possessed all the information necessary to file felony charges when Mr. Stephens was arrested, but waited six months to do so. In the interim period, both the 911 call and video dash camera footage of the arrest were destroyed. Due to the missing evidence, Mr. Stephens was unable to raise certain arguments in his motion to suppress. Was the prosecutorial mismanagement prejudicial to Mr. Stephens, warranting dismissal?

4. The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. Wrongdoing must be conscious to be criminal, and due process limits the permissibility of strict liability crimes. The current framework for the crime of unlawful possession requires defendants to bear the burden of proving unwitting possession. This flips the presumption of innocence on its head, shifting the burden of proof for an inherent element of the offense. Here, the State presented no evidence Mr. Stephens knowingly possessed methamphetamine. Should Mr. Stephens' conviction be reversed on the basis of insufficient evidence?

5. Defendants are entitled to ask for an alternative sentence and have the alternative actually considered. The categorical denial of an alternative sentence is reversible error. Here, the sentencing court categorically denied Mr. Stephens' request for a residential DOSA on the

basis that he had other unrelated criminal charges pending. Is Mr. Stephens entitled to resentencing where his request for a residential DOSA is actually considered?

6. A convicted defendant is entitled to credit for time served prior to sentencing. The court may consider time served on other charges in exercising its discretion within the standard range or in imposing an exceptional sentence. Here, the sentencing court erroneously believed it did not have this discretion. Is resentencing required to permit the sentencing court to consider the time Mr. Stephens served for the third-degree theft charges, which were later refiled as felony charges on the same facts?

7. Legal financial obligations excluding restitution do not accrue interest. The court below imposed interest on Mr. Stephens' legal financial obligations "at the rate applicable to civil judgments." Was interest improperly imposed on Mr. Stephens' legal financial obligations?

D. STATEMENT OF THE CASE

1. Mr. Stephens is arrested and charged with third degree theft based on a 911 call.

On April 10, 2017, Wenatchee police responded to a reported theft at Stan's Merry Mart. RP[1] 353–54; CP 99. An employee of Stan's Merry Mart had called 911 after seeing a man in the store they believed had stolen video equipment earlier in the week. RP 346, 349; CP 99. The employee described the man as white and in his mid-thirties, wearing a black baseball cap and a black and gray jacket, riding a bicycle. CP 99–100; RP 355. The employee stated the man had not stolen anything that day, but the store wanted to press charges for the previous thefts, which were captured on security footage. CP 99–100.

Officer Albert Gonzalez responded to the call. RP 353. He received information that the suspect was riding down Mission Street, and so he headed in that direction. RP 354–56. Officer Gonzalez encountered Mr. Stephens, who somewhat matched the description of the suspect, but was significantly older than described—in his late fifties. RP 356–57; CP

[1] The Report of Proceedings includes three volumes that are consecutively paginated and contain pre- and post-trial hearings from November 30, 2017, January 10, 2018, January 22, 2018, April 19, 2018, October 29, 2018, December 3, 2018 and December 31, 2018, as well as the trial transcripts from November 6–7, 2017. Appellant will refer to these volumes simply as "RP." All other hearing transcripts will be referred to by their hearing date.

85 (listing year of birth as 1960). Officer Gonzalez apprehended Mr. Stephens as other officers arrived. RP 357.

According to Officer Gonzalez, he informed Mr. Stephens he was a suspect in a theft case, placed Mr. Stephens in handcuffs, and read him his *Miranda* rights. RP 51, 357–58. Officer Gonzalez testified at trial Mr. Stephens then "admitted to stealing the cameras, and he said he had sold them for $50 to pay a debt." RP 359. Officer Gonzalez also testified Mr. Stephens "said he could get [the cameras] back if we'd let him go." RP 359. Officer Gonzalez then searched Mr. Stephens, finding a couple of plastic baggies and a methamphetamine pipe. RP 359–60. Officer Gonzalez believed the baggies and pipe contained methamphetamine residue. RP 360–61. Officer Gonzalez did not find any stolen property. CP 35 (listing seized evidence).

Officer Gonzalez booked Mr. Stephens on third degree theft charges in district court. RP 387; 1/2/19 RP 25–26. Mr. Stephens was not charged with any drug-related crimes, as Officer Gonzalez hoped Mr. Stephens would become an informant for the local drug task force. RP 386–87. However, the incident report Officer Gonzalez filed that accompanied the criminal citation included allegations Mr. Stephens had admitted to selling the stolen property as well as information about the

suspected methamphetamine found during a search of Mr. Stephens. CP 35–36.

2. Mr. Stephens refuses to become a police informant, is charged with more serious crimes, and is convicted of possession of a controlled substance.

Mr. Stephens refused to become an informant for the local drug task force. 1/2/2019 RP 26. In October 2017, approximately six months after Mr. Stephens was initially arrested, the assistant to the Wenatchee City prosecutor emailed the Chelan County Prosecutor's Office about re-filing Mr. Stephens' charges as felonies. CP 59; 1/2/2019 RP 26. On November 29, 2017, Mr. Stephens was charged with first degree trafficking in stolen property and unlawful possession of a controlled substance. CP 85–86.

Prior to trial, Mr. Stephens' defense attorney learned that the dash camera video of the arrest as well as the 911 call had been deleted because the retention period expired. CP 87. This likely occurred three months after Mr. Stephens' arrest, sometime in July 2017. CP 91, 174. The 911 call was, however, described in a "CAD" (computer-aided dispatch) log. *See* CP 99–100.

Prior to trial, Mr. Stephens moved to suppress the methamphetamine on the basis there was no probable cause to arrest him.

CP 15–19. In the alternative, the defense moved to dismiss the case on the basis of prosecutorial mismanagement. CP 20–28. Mr. Stephens argued the missing dash camera video and 911 call constituted a loss of evidence and the prosecution had caused significant delays in Mr. Stephens' case proceeding to trial, while at the same time trumping up his charges. CP 25.

At the motions hearing, Officer Gonzalez testified "I don't believe there was a [dashcam] video on this at all." RP 76. The prosecutor argued "the State's position is that a dashcam video was never created to begin with." RP 101. While Officer Gonzalez acknowledged he had marked on his police report that video of the arrest was recorded, he "suppose[d] it was a typo." RP 76. Officer Gonzalez subsequently testified at trial the arrest had in fact been recorded, stating "I believe there was [video available] at the time of this report." RP 368–69.

The court denied both the motion to suppress and the motion to dismiss. CP 172–75. After a jury trial, Mr. Stephens was acquitted of

trafficking in stolen property but convicted of the methamphetamine charge. CP 154–55.

3. The court denies a residential DOSA and credit for time served at sentencing.

At sentencing, Mr. Stephens requested a residential DOSA, and the court acknowledged "[m]aybe you'd be appropriate" for the program. RP 509, 511. Nevertheless, the sentencing court decided it would deny the request on the basis Mr. Stephens had another, unrelated case pending in superior court.[2] RP 511. The court acknowledged "who knows how a jury will resolve that . . . but we have that case out that is going to interfere with your ability to participate in a residential DOSA sentence and so I am not going to give that to you." RP 511.

The court subsequently sentenced Mr. Stephens to 14 months, with 12 months of community custody. CP 159–60. The court refused to give any credit for time served, concluding Mr. Stephens had served his jail time on "completely different charges," *i.e.*, the third degree theft charges, "[a]lthough they actually arose from the same situation." 1/2/2019 RP 29. The court also imposed $500 in legal financial obligations, with a

[2] At the time of sentencing Mr. Stephens was facing burglary charges in another case, charged under Superior Court No. 17-1-00189-0. RP 499, 506. That case resulted in a conviction for two counts attempted theft in the third degree, for which Mr. Stephens was sentenced to 180 days in jail, with 150 days suspended. *See* Appendix A, filed simultaneously with this brief; *see also* ER 201(d) (this court must take notice of adjudicative facts if requested by a party and supplied with the necessary information).

stipulation 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." CP 162–63. The court also granted Mr. Stephens bail pending appeal so he could care for his ailing father. 1/2/2019 RP 23, 31–35.

E. ARGUMENT

1. The drugs should have been suppressed because there was no probable cause to arrest Mr. Stephens for third degree theft.

a. Custodial arrest is determined from the viewpoint of a reasonable detainee under the same circumstances.

Whether an individual is under custodial arrest hinges on "whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest." *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004). Factors that suggest custodial arrest include handcuffing, placing the suspect in the back of a police car, and informing the suspect they are under arrest. *Id.*; *see also State v. Gering*, 146 Wn. App. 564, 567, 192 P.3d 935 (2008) (defendant was under full custodial arrest when he was asked to leave a store, handcuffed, and not informed he was free to leave).

Law enforcement must have probable cause to believe a crime has been committed to place someone under arrest. *See State v. Lund*, 70 Wn. App. 437, 444, 853 P.2d 1379 (1993). "[P]robable cause exists 'where the

facts and circumstances within the arresting officers' knowledge, and of which they had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that a crime has been committed.'" *Id.* at 444–45 (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949)).

Full custodial arrest is distinguishable from a *Terry* stop, in which a law enforcement officer may "briefly detain a person for questioning . . . if the officer has reasonable suspicion that the person is or is about to be engaged in criminal activity." *State v. Weyland*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 889 (1968) and *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015)).

b. Mr. Stephens was placed under full custodial arrest when he was handcuffed, *Mirandized*, and told he was not free to leave.

Here, the trial court found that Mr. Stephens was merely "detained" prior to making inculpatory statements, and was only "arrested" after the statements were made. *See* CP 173 (Findings of Fact 2.5 and 2.6). These "factual findings"— which are actually mixed findings of fact and conclusions law—were not supported by substantial evidence in the record. This Court will only sustain findings of fact "if the record contains evidence of sufficient quantity to persuade a fair-minded,

rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 837–38, 755 P.2d 806 (1988) (citations omitted). This Court reviews a trial court's custodial determination *de novo*. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

The record reflects that Officer Gonzalez placed Mr. Stephens under full custodial arrest shortly after contacting him and *before* Mr. Stephens allegedly made any incriminating statements. *See* RP 70–71; CP 35. Officer Gonzalez testified at the suppression hearing he and the other arresting officers decided "within a couple minutes to place [Mr. Stephens] in handcuffs before we go any further and read him his rights . . . because we're not getting anywhere without asking direct questions." RP 71. They also told Mr. Stephens "he was not free to leave." RP 51. Officer Gonzalez' incident report similarly reflects this chain of events. CP 35 ("I informed [Mr. Stephens] of the reason for the contact. [Officer] Bryant arrived at my location and we placed [Mr. Stephens] in handcuffs. I read [Mr. Stephens] his Miranda Rights from my printed card and he stated that he understood."); *see also* CP 100 (CAD log indicating *Miranda* warnings were given approximately one minute after officers contacted Mr. Stephens).

A reasonable detainee placed under these circumstances immediately after contact—handcuffed, *Mirandized*, and informed they

are not free to leave—would consider themselves under full custodial arrest. *See Radka*, 120 Wn. App. at 49; *see also Gering*, 146 Wn. App. at 567. Thus Mr. Stephens was under arrest prior to making any inculpatory statements. *See id.* Accordingly, the key question is whether there was probable cause to arrest Mr. Stephens.[3]

c. <u>The 911 call alone did not provide probable cause for arrest.</u>

The State must prove any exception to the warrant requirement by "clear and convincing evidence." *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The *Terry* stop exception, which is a "brief investigatory detention of a person," requires "'reasonable suspicion' that the detained person was, or was about to be, involved in a crime." *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015) (citations omitted). "When an officer bases his or her suspicion on an informant's tip, the State must show that the tip bears some 'indicia of reliability' under the totality of the circumstances." *Id.* at 618.

[3] The trial court did not address whether there was probable cause to arrest Mr. Stephens. *See* CP 173. Rather, the trial court erroneously focused on whether "Officer Gonzalez had reasonable suspicion based on articulable facts upon which to detain Defendant to investigate the theft." CP 173 (Conclusion of Law 3.3). Although this is the appropriate standard to support a *Terry* stop, Mr. Stephens was immediately placed under arrest, which requires probable cause.

The supreme court has held that "indicia of reliability" requires "(1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." *Id.* (citations omitted). Corroborative observations "do not need to be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual's appearance or clothing." *Id.* at 618–19.

However, circumstances that satisfy this framework will only support reasonable suspicion for a *Terry* stop; the supreme court has *never* held an informant's tip, without more, provides probable cause *for arrest*. *See id.* at 619–21 (collecting cases). Here, the 911 call, as memorialized in the CAD log, does not even satisfy reasonable suspicion justifying a *Terry* stop, let alone rise to the level of probable cause justifying arrest. *See* CP 99–100; *see also State v. Flores*, 186 Wn.2d 506, 379 P.3d 104 (2016) ("an anonymous tip standing alone may not be sufficient to support a *Terry* stop").

First, there is nothing in the CAD log that establishes the informant's reliability. *See Z.U.E.*, 183 Wn.2d at 618. Officer Gonzalez did not know the informant, nor did he have any information that would indicate the informant was a reliable source. *Cf. State v. Kennedy*, 107

Wn.2d 1, 8, 726 P.2d 445 (1986) (informant's tip had "indicia of reliability" because law enforcement "had received tips from the police informant for several months," including one tip that resulted in a warrant and conviction.). Although the informant provided her name—which later turned out to be incorrectly transcribed by dispatch—this is not sufficient to establish reliability. *See State v. Siesler*, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980) ("The reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant."); CP 99; RP 314. Further, it is unclear from the CAD log if the informant's name was even relayed to Officer Gonzalez. *See* CP 99–100. It is also unclear from the CAD log if the informant was providing first-hand knowledge or was relaying information from a third person. *See* CP 99–100. Finally, the value of the stolen goods varies significantly over the course of the phone call without explanation. *See id.* Thus there were no circumstances that established the reliability of the informant. *See Z.U.E.*, 183 Wn.2d at 618.

Second, there was no corroboration of the informant's tip beyond "innocuous facts, such as an individual's appearance or clothing." *See id.* at 618–19. Although Mr. Stephens somewhat matched the physical description of the suspect and was riding a bicycle, these innocuous facts do not substantiate the theft allegations. *See id.*; *see also* CP 35, 119

(Finding of Fact 2.4) In fact, there were no efforts made to corroborate the allegations of theft prior to effectuating an arrest at all; Officer Gonzalez did not conduct a "show up," interview the employees of Stan's Merry Mart, or review security footage until *after* he arrested Mr. Stephens. *See* CP 35–36.

The 911 call was not sufficient to support reasonable articulable suspicion, let alone probable cause for arrest. Further, Mr. Stephens was suspected of shoplifting several days prior to the arrest, and there was no exigency that precluded further investigation due to "threat of physical violence or harm to society or the officers." *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975); *see also Z.U.E.*, 183 Wn. 2d at 623. Although an arrestee may be searched incident to a *lawful* custodial arrest, the arrest here was not supported by probable cause. *See United States v. Robinson*, 414 U.S. 218, 225–26, 94 S. Ct. 467, 38 L. Ed. 427 (1973). Accordingly, the fruits of the unlawful search must be suppressed and the conviction reversed. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

2. The charges should have been dismissed on the basis of prejudicial prosecutorial mismanagement.

A court may dismiss a criminal prosecution "due to arbitrary action or governmental misconduct when there has been prejudice to the rights of

the accused which materially affect the accused's right to a fair trial." CrR 8.3(b). In order to satisfy the CrR 8.3(b) standard, the moving party must show both (1) arbitrary action or governmental misconduct and (2) actual prejudice. *See State v. Wilson*, 149 Wn.2d 1, 9, 65 P.2d 657 (2003); *State v. Martinez*, 121 Wn. App. 21, 29–30, 86 P.3d 1210 (2004). The party moving for dismissal pursuant to CrR 8.3(b) must show governmental misconduct by a preponderance of the evidence. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 431, 403 P.3d 45 (2017). "[G]overmental misconduct need not be of an evil or dishonest nature, simple mismanagement is sufficient." *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980) (internal quotation marks omitted); *see also State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997)).

Here, the trial court concluded the delay in filing felony charges, which resulted in the destruction of evidence, did not constitute government misconduct, and also concluded that there was no prejudice to Mr. Stephens. *See* CP 174–75. This was in error.

a. <u>Similar to *Michielli*, the State had all of the information necessary to file felony charges when Mr. Stephens was first arrested, and its failure to do so for six months was governmental mismanagement.</u>

In *Michielli*, the defendant allegedly stole a rifle, fish-finder, and scanner and pawned the items. 132 Wn.2d at 232. The State filed a

complaint accompanied by a probable cause affidavit that described all of the facts concerning the stolen items and subsequent pawning. *Id.* However, the State initially only charged the defendant with one count of second degree theft. *Id.* at 232–33. Six months later and several days before trial, the State amended the information to include additional, significantly more serious counts, including three counts of first degree trafficking in stolen property. *Id.* at 233. The defense moved to dismiss on the grounds that the State had added the charges in retaliation for the defendant's refusal to plead guilty to the initial theft count. *Id.* The trial court dismissed the charges. *Id.* at 234.

The supreme court affirmed the dismissal, noting "[t]he State expressly admitted to the trial court that it possessed all of the information necessary to file all of the charges when it filed the initial information." *Id.* at 243. The supreme court concluded "[t]hese facts strongly suggest that the prosecutor's delay in adding the extra charges was done to harass Defendant. There appears to be no other reasonable explanation for why the prosecutor waited until five days before trial to add the new charges, when the prosecutor admittedly possessed all the information to support those charges" when it filed the single charge of second degree theft. *Id.* at 244. The court held this delay constituted governmental

mismanagement, and this mismanagement was prejudicial as it forced the defendant to waive his speedy trial right. *Id.* at 245.

Similarly here, the State possessed all of the information necessary to file both the trafficking and controlled substance possession charges when the third degree theft charge was filed. Officer Gonzalez's report contained allegations Mr. Stephens made statements about selling stolen property, as well as allegations that suspected methamphetamine was found during the search incident to arrest and had tested positive in a field test. *See* CP 35–36. Additionally, the felony charges were apparently only filed after a six month delay because Mr. Stephens refused to participate in the local drug task force. RP 388. As defense argued at trial, the State "trump[ed] up the charges and [to] get [Mr. Stephens] for not being a snitch." RP 478.

At best, the six-month delay in filing felony charges constituted simple mismanagement of the case, and at worst indicates an attempt to punish Mr. Stephens for refusing to become an informant. *See Dailey*, 93 Wn.2d at 457. *Michielli* recognizes a "long delay, without any justifiable explanation, suggests less than honorable motives" and thus is government misconduct. 132 Wn.2d at 244. The first prong of CrR 8.3(b) is satisfied.

b. Mr. Stephens was prejudiced by the State's delay in filing felony charges, as the 911 call and the dash camera video were both deleted prior to the charges being filed.

In addition to government misconduct, a defendant must also prove prejudice to prevail on an 8.3(b) motion to dismiss. *See Wilson*, 149 Wn.2d at 9. Prejudice need not be "extreme" in order to support dismissal, but need only "appear unfair to any reasonable person." *Michielli*, 132 Wn.2d at 246. Here, the delay in bringing the additional charges resulted in the destruction of not only the original 911 call but also the dash camera video of Mr. Stephens' arrest. *See* CP 87.

Law enforcement is required to "preserve that which comes into their possession either as a tangible object or a sense impression, if it is reasonably apparent the object or sense impression potentially constitute material evidence." *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984) (citation and quotation marks omitted). "[T]he duty to preserve applies not only to the prosecution but to its agents acting under prosecutorial authority. This includes police as well as private citizens acting under their authority." *State v. Vaster*, 99 Wn.2d 44, 53, 659 P.2d 528 (1983), *overruling on other grounds recognized by State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992)).

As the defense explained during arguments on the pretrial motions, the loss of the 911 call and the dashcam video prejudiced Mr. Stephens'

ability to make certain arguments related to suppression during the 3.6 hearing. RP 102–103. For example, without the dashcam video, Mr. Stephens' ability to challenge Officer Gonzalez's account of the circumstances of the arrest, including the discussion of the drug task force, was constrained.[4] RP 97–98. Mr. Stephens was also limited in his ability to challenge the information provided by the 911 caller, including being able to verify if the information was provided to the caller by a third party. RP 103. This Court should conclude the destruction of evidence was prejudicial to Mr. Stephens and remand with instructions to dismiss with prejudice.[5]

3. The conviction should be reversed because there was insufficient evidence Mr. Stephens knowingly possessed methamphetamine.

"The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld." *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). An appellate court may affirm a

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[4] The trial court's order denying the 3.6 motion only addressed the destroyed 911 call, and did not address the destroyed dash camera video. *See* CP 174–75.

[5] The State and the trial court both applied the incorrect standard to the motion to dismiss, analyzing whether the destroyed evidence was "exculpatory." CP 110 (citing *State v Wittenbarger*, 124 Wn.2d 467, 880 P.2d 517 (1994)); RP 97, 101, 103 –104, 109. However, the exculpatory nature of the destroyed evidence was irrelevant, as Mr. Stephens argued the evidence was prejudicial in the context of the suppression hearing, *i.e.*, was prejudicial to his ability to argue the methamphetamine was unlawfully discovered, not prejudicial to his ability to argue he was innocent of the crime of possession. *See* RP 102–103.

conviction only if it can conclude that a rational trier of fact viewing evidence in the State's favor could find each element beyond a reasonable doubt. *See State v. Hummel*, 196 Wn. App. 329, 352–53, 383 P.3d 592 (2016). "Where sufficient evidence does not support a conviction, such a conviction 'cannot constitutionally stand.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 317–18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Although the supreme court has previously held drug possession is a strict liability crime, the court is currently reviewing whether the possession statute must be interpreted to have a knowledge element to be deemed constitutional. *See State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. A.M.*, No. 96354-1 (argued May 28, 2019).

"[W]rongdoing must be conscious to be criminal." *Morisette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). Although strict liability crimes are constitutionally permissible under certain circumstances, there are due process limits concordant with the presumption of innocence. *See Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228, (1957). Under the current framework, defendants charged with possession of a controlled substance bear the burden of proving the affirmative defense of unwitting possession. *Bradshaw*, 152 Wn.2d at 538. This flips the presumption of innocence on its head, thus "shift[ing] the burden of proof as to what is an inherent

element of the offense." *Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed 2d 555 (1991) (plurality).

Here, the State presented no evidence Mr. Stephens knowingly possessed methamphetamine, and the jury was not instructed it needed to find the element of knowledge in order to convict. *See* CP 150 (Instruction No. 21). Should the supreme court hold knowledge is a required element of the crime of possession of a controlled substance, Mr. Stephens should benefit from that decision and his conviction should be reversed on the basis of insufficient evidence. *See State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018) (defendant's case was on appeal as a matter of right and thus he was entitled to the benefit of changes in the law that came into effect following his conviction); *Hummel*, 196 Wn. App. at 359 (reversal for insufficient evidence is "equivalent to an acquittal" and bars retrial for the same offense) (citations omitted).

4. Mr. Stephens was not fairly sentenced because he was denied meaningful consideration of an alternative sentence and he did not get credit for time served.

a. <u>The sentencing court categorically denied a residential DOSA sentence.</u>

Defendants are entitled to ask for an alternative sentence and to have the alternative actually considered. *See State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). When a trial court refuses to exercise

discretion at sentencing because it erroneously believes it lacks the authority, a defendant may appeal their standard range sentence. *See State v. McGill*, 112 Wn. App. 95, 99–100, 47 P.3d 173 (2002). The failure to consider an available alternative sentence is reversible error. *Grayson*, 154 Wn.2d at 342.

Here, the sentencing court denied Mr. Stephens' request for a residential Drug Offender Sentencing Alternative (DOSA). RP 511. A residential DOSA would permit Mr. Stephens to serve his sentence on community custody and in a residential chemical dependency treatment. *See* RCW 9.94A.664. Although the sentencing court acknowledged Mr. Stephens may be an "appropriate" candidate for treatment, the court noted he had unrelated burglary charges pending and "I don't see any way you're actually going to be able to necessarily complete [a residential DOSA] with another pending case out." RP 511. The sentencing court acknowledged Mr. Stephens could potentially be acquitted, but still denied the DOSA on the basis of the unrelated charges. *See id.*

In *Grayson*, the supreme court reversed the denial of a DOSA based on the sentencing court's reasoning there was inadequate funding to support treatment alternatives. 154 Wn.2d at 342. The supreme court held this was a categorical refusal subject to reversal. *See id.* Similarly here, the sentencing judge categorically refused to grant Mr. Stephens a

residential DOSA without "actually consider[ing]" the alternative sentence. *Compare id.*

Further, the court's decision presumed Mr. Stephens would be found guilty and would serve significant time on the unrelated charge, interfering with his "axiomatic and elementary" constitutional right to be presumed innocent. *State v. Chacon*, 192 Wn.2d 545, 549, 431 P.3d 477 (2018) (citations and internal quotation marks omitted). Indeed, although Mr. Stephens did eventually plead guilty to lesser charges in his other pending case, he received an almost entirely suspended sentence, and thus his ability to participate in a residential DOSA would not have been seriously impaired. *See* Appendix A, filed simultaneously with this brief. Accordingly, resentencing is appropriate.

b. <u>The sentencing court did not credit the time Mr. Stephens served in jail.</u>

Under RCW 9.94A.505(6), "[t]he sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." This statute "simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing." *In re Pers. Restraint of Costello*, 131 Wn.

App. 828, 833, 129 P.3d 827 (2006) (citations and internal quotation marks omitted).

The statutory scheme "does not *authorize* giving credit for time being served on other sentences." *See State v. Watson*, 63 Wn. App. 854, 859, 822 P.2d 327 (1992) (emphasis added). However, the statute does not *preclude* the court from exercising its discretion in giving credit for time served. *See id.* at 859–60. "Insofar 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." *Id.* (emphasis added).

When a sentencing court refuses to exercise its discretion because it erroneously believes it lacks the authority, a defendant may appeal a standard range sentence. *See McGill*, 112 Wn. App. at 99–100. Here, the sentencing court erroneously believed it did not have the discretion to give Mr. Stephens credit on the time he served on the third degree theft charges that were originally filed. 1/2/2019 RP 27–29 ("[T]hese are completely different charges. Although they actually arose from the same situation . . . . So I'm not going to include that credit language, today.") However, the statute did not preclude the court from giving credit for the time already served. *See* RCW 9.94A.505(6); *Watson*, 63 Wn. App. at 859–60. Additionally, as a policy matter, Mr. Stephens should receive credit for

time served on lesser charges that were later refiled as more serious charges without additional factual developments in the case. Accordingly, this Court should remand for resentencing.

c. Interest was improperly imposed on the legal financial obligations.

The judgment and sentence, entered on January 2, 2019, includes a provision 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." CP 163. However, as of a year ago, financial obligations excluding restitution no longer accrue interest. RCW 3.50.100(4)(b); *Ramirez*, 191 Wn.2d at 747. Accordingly, if this Court does not reverse the conviction, it should order the trial court to strike the interest accrual provision. *See id.* at 749–50.

F. 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 13th day of August, 2019.

Respectfully submitted,

/s Jessica Wolfe

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FILED
FEB 13 2019
Kim Morrison
Chelan County Clerk

Superior Court of Washington For Chelan County	No. 17-1-00189-0
State of Washington, Plaintiff, vs. Kenneth Leroy Stephens, Defendant.	**Judgment and Sentence (JS)**

The defendant was found guilty of:

Count	Crime	RCW	Date of Crime
1.	Attempted Theft in the Third Degree	9A.20.020 9A.56.050(1)	3/21/17
2.	Attempted Theft in the Third Degree	9A.56.020(1)(a)	3/24/17

Therefore, the defendant is adjudged guilty and sentenced as follows:

Confinement:

Count 1: 90 days of jail with 75 days suspended and a fine of $1,000 with $1,000 suspended.
Count 2: 90 days of jail with 75 days suspended and a fine of $1,000 with $1,000 suspended.
to run consecutively

☐ Alternative Confinement: ___ days imposed may be served as _____ if eligible to begin _____.
If the defendant is not eligible/qualified for the jail alternative, the time must be served as jail.

Financial Obligations: Defendant shall pay to the clerk of this court:

Court cost	$___	☐ Public defender recoupment	$___
☒ Victim Assessment	$ 250	☒ Other Restitution	$ 69.00
* defendant found indigent		**Total:**	$ 319.00

☒ All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the clerk of the court, commencing 60 days after the later of (1) entry of this Judgment and Sentence or (2) release from confinement: Not less than $ 20 per month. RCW 9.94A.760.
Starting 60 days from today

Additional Conditions of Sentence:
Jail time and fines are suspended for 24 months on the following conditions:

☒ Bench Probation for 24 months.

☒ No criminal law violations.

☒ Keep the court apprised in writing of any changes of address.

☒ Make timely payments on financial obligations.

☐ Do not go upon the property of and have no contact with _____

Other orders: Bail or Bond is Exonerated.

Dated: 2/13/2019

Judge/Commissioner/Pro Tem

I have read the rights, conditions and warnings contained in this J&S and my statement on plea of guilty.

Defendant

Prosecuting Attorney **WSBA No.** **Defense Attorney** **WSBA No** 20117

Judgment and Sentence Form (JS) - Page 1 of 1
CrRLJ 07.0110 (06/2016) CrRLJ 7.2, 7.3

APPENDIX A

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 36542-5-III
	)	
	)	
KENNETH STEPHENS,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF AUGUST, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	DOUGLAS SHAE, DPA [douglas.shae@co.chelan.wa.us] [prosecuting.attorney@co.chelan.wa.us] CHELAN COUNTY PROSECUTOR'S OFFICE PO BOX 2596 WENATCHEE, WA 98807-2596	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X]	KENNETH STEPHENS C/O GENERAL DELIVERY WENATCHEE, WA 98801	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF AUGUST, 2019.

X_____

Washington Appellate Project
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WASHINGTON APPELLATE PROJECT

August 13, 2019 - 4:42 PM

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Appellate Court Case Title:	State of Washington v. Kenneth Leroy Stephens
Superior Court Case Number:	17-1-00690-5

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