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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICO DAVIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court err in finding that law enforcement had reasonable suspicion to detain Mr. Davis?
2. Did the warrantless frisk of Mr. Davis violate his constitutional privacy rights?
3. Did the trial court err in finding that the search of Mr. Davis was a strip search, not a body cavity search, and that it was done in sufficient privacy?
4. Does RCW 10.79.130(2), which authorizes strip searches, violate article I, section 7, of Washington's constitution?

II. STATEMENT OF THE CASE

On May 14, 2018, at approximately 3:30 a.m., Officer Zimmerman of the Spokane Police Department responded to 3116 South Mt. Vernon, Apt. #59, on a suspicious circumstance call. CP 22, 36. Dispatch advised that a complainant reported two males were on the apartment balcony, attempting to enter through the sliding door, causing fear in the apartment's two inhabitants, a younger woman and an older woman. CP 22-23. The complainant was calling on behalf of the women, who were not entirely fluent in English.

While on route to the scene, dispatch advised that one of the two males attempting to enter the apartment was Mahammad Jalhoom;

Mr. Jalhoom had an outstanding Department of Corrections (DOC) warrant for his arrest. CP 23. Officers arrived on scene and took Mr. Jalhoom into custody. CP 23. The older woman then pointed towards the living room of the apartment and requested officers escort the other individual out of the apartment, saying “the other man is up the stairs.” CP 23; Ex. 1. Officers proceeded into the darkened living room to find this person seated on the couch and holding a bottle. CP 23, 70; Ex. 1.

Officers asked that individual, Mr. Davis, to put down the bottle and he complied. CP 23. Mr. Davis offered to leave the apartment, but officers asked for his identification. Ex. 1. Mr. Davis provided the officers a name they soon determined to be false; Mr. Davis did not match the physical description of the individual whose name and date of birth he provided. CP 23, 37. Officer Zimmerman accused Mr. Davis of lying, and Mr. Davis did not contradict him but just said “I don’t know, man.” Ex. 1 at 21:00.

Because Mr. Davis could not provide officers with any better or more satisfactory answers to their questions, Officer Zimmerman detained him saying, “I do not want to get in a fight with you; you’re a big guy.” Ex. 1. He then frisked Mr. Davis. Upon feeling a wallet in Mr. Davis’ pocket, the officer asks, “so you got a wallet right here?” Ex. 1 at 23:33. When Mr. Davis confirmed that was the case, the officer asked, “is there an ID in there? Is that going to be your real name in there?” Ex. 1 at 23:37.

When Mr. Davis replied, “yes,” Officer Zimmerman asked, “so you want to tell me your real name?” Mr. Davis then provided his true name and told officers he had a warrant for his arrest. CP 23. The officers then escorted Mr. Davis out of the apartment and placed him under arrest on two warrants, (1) for a burglary charge and (2) a DOC warrant based upon a conviction for possession of a controlled substance. CP 37-38. Officers did not charge Mr. Davis with trespass or any similar crime, concluding that Mr. Davis had not “kicked” his way in to the apartment, but had been let in by the women living there. Ex. 1 at 26:22.

Officers transported Mr. Davis to the Spokane County Jail where he was turned over to Corrections Officers (CO) for booking. CP 38. CO Keller searched Mr. Davis at the jail; during a strip search, CO Keller located two baggies between Mr. Davis’ buttocks. CP 71. CO Keller provided these baggies to Officer Zimmerman. CP 18-19. Officer Zimmerman observed a crystalline substance in each baggie that, based on his training and experience, he recognized as methamphetamine. CP 71. He field-tested the crystalline substance, which tested positive for methamphetamine. CP 71. Officer Zimmerman then booked Mr. Davis into the jail on a charge of possession of a controlled substance. CP 71.

The baggies and their contents were sent to the Washington State Patrol Crime Laboratory for testing; analysis confirmed the material contained in the baggies was methamphetamine hydrochloride. CP 71-72.

The State charged Mr. Davis with possession of a controlled substance based on the methamphetamine found in the baggies on his person. CP 1. He moved the court to suppress the drug evidence against him as fruit of an unlawful seizure, arguing he was unlawfully detained by Officer Zimmerman after he had offered to leave the apartment. CP 6.

At the suppression motion, Officer Zimmerman testified and his body camera footage was played for the court. 1 RP¹ 4, 11. Officer Zimmerman was asked why he did not cite Mr. Davis for providing a false statement to law enforcement. He stated, "I just didn't think about it honestly. I -- it was -- warrants are warrants, so I didn't think about hitting him with a new charge because I knew the warrant was probably more harsh than a new charge." 1RP 13.

The Honorable Maryann Moreno found that the officers were authorized to detain and identify Mr. Davis because they reasonably suspected him to be engaged in criminal activity. CP 23-24. The officers, upon learning Mr. Davis' true name, placed him under arrest for his

¹ For ease of reference, the verbatim report of proceedings will be referred to in the same manner as used in appellant's brief.

warrants, which led to his search in the jail. The motion was denied. CP 24; 1RP 21-25.

Three months later, Mr. Davis again moved the court to suppress the drug evidence, marshalling three main arguments. CP 27. First, he argued the drugs were found as the result of an unlawful body cavity search. CP 28. Second, he argued that even a strip search in this case was unlawful in three ways: (1) because it was not done privately, (2) because the search was not based on individualized, reasonable suspicion that Mr. Davis was concealing contraband, and (3) because that the statute authorizing strip searches for burglary arrests did not apply to him because he was arrested on his burglary warrant many months after the charge against him was filed. CP 29-31. Third and finally, he argued that the statute authorizing strip searches is unconstitutional under article I, section 7, of the Washington Constitution. CP 31. Prior to the motion hearing, the trial court was provided two affidavits to consider: Mr. Davis' affidavit that stated, "the officer inserted his fingers into my rectum" and CO Keller's affidavit, which stated, "I did not need to enter the rectum of Mr. Davis to retrieve the plastic baggies." CP 35, 101.

The Honorable Julie McKay denied the motion stating she found the search was not a body cavity search. CP 38; 2RP 27. She found that the strip search was proper based on Mr. Davis' arrest on his DOC warrant for a

possession of a controlled substances conviction. CP 38; 2RP 28-29. She was satisfied that Mr. Davis' privacy during the search was protected based on the description of the bathroom in which Mr. Davis was required to disrobe. 2RP 29. Finally, the court rejected Mr. Davis' article I, section 7, argument, determining that current case law provided proper guidance to the court, and denied the motion to suppress. 2RP 30.

Mr. Davis waived his right to a jury trial and the parties had a bench trial based on stipulated facts. CP 41-43; 3RP. The Honorable John Cooney found Mr. Davis guilty of possession of a controlled substance beyond a reasonable doubt. 3RP 11.

Mr. Davis timely appeals.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN CONCLUDING OFFICER ZIMMERMAN POSSESSED SUFFICIENT REASONABLE SUSPICION TO DETAIN MR. DAVIS.

This Court reviews the denial of a suppression motion to determine whether substantial evidence supports the trial court's findings and whether those findings support the conclusions. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). This court reviews a trial court's conclusions of law de novo; whether police conduct amounted to a seizure is also reviewed de novo. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008); *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

All police seizures of a person, including brief detentions, must be tested against the Fourth Amendment guaranty of freedom from unreasonable searches and seizures. U.S. CONST. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 648, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). A citizen is seized when his freedom of movement is restrained and he would not believe that he is free to leave or decline an officer's request to do something. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The test is objective. *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

A warrantless seizure is considered per se unreasonable unless it falls within one of the few exceptions to the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); *O'Neill*, 148 Wn.2d at 574. An investigative stop or detention is an exception to the warrant requirement and is based upon less evidence than is needed for probable cause to make an arrest. *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991) (citing *Terry v. Ohio*, 392 U.S. 1, 25-26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

An investigative detention occurs when the police briefly seize a person for questioning based on specific and articulable, objective facts that give rise to a reasonable suspicion that the person has been or is about to be involved in a crime. *State v. Dorey*, 145 Wn. App. 423, 429, 186 P.3d 363 (2008), *as amended* (July 22, 2008) (quoting *Terry*, 392 U.S. at 21). To this

end, an officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information. *State v. Miller*, 91 Wn. App. 181, 184, 955 P.2d 810 (1998), *as amended*, 961 P.2d 973 (Aug. 28, 1998).

Here, Officer Zimmerman arrived at an apartment where the residents had reported two men entering from the sliding glass door on the balcony. One was known to have a warrant and the other was a stranger to the apartment's inhabitants. Officer Zimmerman requested Mr. Davis identify himself and did not allow Mr. Davis to leave the apartment when he volunteered to leave. Objectively, these actions restrained Mr. Davis' freedom of movement. As Judge Moreno noted, if Mr. Davis had given his true name, and if there had not been warrants for his arrest, he likely would have been allowed to leave. 1RP 25. However, Mr. Davis was a stranger in the apartment and the women living in the apartment had asked for law enforcement's assistance in removing him.

Mr. Davis makes much of the fact that the women had not asked him to leave, so he was unaware that his presence was unwelcome; this, however, discounts the obvious fear the women had for Mr. Davis and their understandable aversion to a direct confrontation with a stranger who entered the apartment by the balcony door at 3 a.m. and sat in a darkened room holding a bottle. The trial court found that "given the circumstances,

it would have been unreasonable for the officers to leave the apartment at that point [after the arrest of Mr. Jalhoom]. They ask Mr. Davis for identification so they can complete their investigation of the situation.” CP 23. It was reasonable for the officers to ask for Mr. Davis’ identification; it was reasonable to believe they were investigating a trespass or similar crime. *See Miller*, 91 Wn. App. at 184. When Mr. Davis provided the officers with a false name and date of birth, this only added to the officers’ reasonable suspicion that a crime had been committed or was being committed in their presence and extended the contact. CP 23-24. For this same reason, it did not exceed the scope of the *Terry* stop to continue to detain Mr. Davis even if the officers were told he had been “let in,” as they also knew Mr. Davis’ presence was against the will of the apartment’s inhabitants and his entrance into the home had been under suspicious circumstances.

Mr. Davis relies on the split opinion in *State v. Creed*, 179 Wn. App. 534, 319 P.3d 80 (2014), for the proposition that the officer “lacked lawful authority to proceed with these actions [detaining a suspect] once he realized that he lacked reasonable suspicion.” *Id.* at 545. In *Creed*, a police officer mistakenly read the defendant’s license plate number, believed the car to be stolen, and conducted a traffic stop; while he was approaching the vehicle, he observed Ms. Creed toss drug paraphernalia

into the back seat. *Id.* at 537-38. This Court held that the mistaken license plate did not provide a reasonable articulable suspicion sufficient to justify a traffic stop of vehicle, and the police officer's act of viewing a baggie with a tar-like substance on the floor of the backseat of defendant's vehicle did not provide an independent basis for officer's investigatory stop of vehicle. *Id.* at 545.

Creed, however, is inapplicable here. In *Creed*, the officer's suspicion that the car was stolen was based on his own error and *Creed* addresses when an officer can rely on his or her own mistaken belief of fact to justify a *Terry* stop. Indeed, an officer may not reasonably rely on his own error leading to a mistaken assessment of material facts, but may rely on his subjective impression of facts correctly perceived. *State v. Glossbrener*, 146 Wn.2d 670, 681, 49 P.3d 128 (2002).

Here, there is no indication Officer Zimmerman was laboring under a misunderstanding or mistake of his own making. He knew Mr. Davis had entered the apartment in a suspicious manner, that his presence was contrary to the wishes of apartment's inhabitants who were afraid of him and so asked officers for assistance in getting him to leave, and that Mr. Davis provided a false name and date of birth when asked. The fact that Officer Zimmerman eventually learned that Mr. Davis had been "let in" by the women in the apartment does not necessarily mean that Mr. Davis' entry

or presence was lawful or obtained lawfully; this is the trespass, or similar crime, that Officer Zimmerman was investigating when he detained Mr. Davis until he was properly identified—a process Mr. Davis complicated with his obvious fabrications. For these reasons, the trial court did not err in finding that Officer Zimmerman’s detention of Mr. Davis was lawful.

B. OFFICER ZIMMERMAN LAWFULLY SEARCHED MR. DAVIS.

“As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.” *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). In particular, the Fourth Amendment “protects against unreasonable searches that intrude on a citizen’s subjective and reasonable expectation of privacy.” *State v. Harlow*, 85 Wn. App. 557, 564, 933 P.2d 1076 (1997). Article I, section 7, provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” *State v. VanNess*, 186 Wn. App. 148, 155, 344 P.3d 713 (2015). But there are a few exceptions to the warrant requirement. *Garvin*, 166 Wn.2d at 249. The State must demonstrate that a warrantless search falls within one of these

exceptions. *Id.* at 250. Two of these exceptions are *Terry* frisks and searches incident to arrest. *Id.*

1. Errors raised for the first time on appeal need not be considered by this Court.

The general rule is that an appellate court will not consider an issue that was not initially presented to the trial court. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Even when the issue presented involves a question of manifest constitutional error, one of the limited exceptions to the general rule, the issue cannot be considered unless the record adequately presents the issue. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995).

Mr. Davis argues on appeal that his trial counsel never raised the issue of an unlawful *Terry* frisk. He then argues that pursuant to an exception to RAP 2.5, he should be permitted to raise the issue of the frisk or, in the alternative, argue his trial counsel's ineffective assistance of counsel for failing to raise the issue.

Here, there is no court finding concerning the search following Mr. Davis' initial detention because no explicit challenge was raised in the trial court. Mr. Davis did, albeit imprecisely, request the trial court consider the search issues in his first suppression motion where he argued he was unlawfully detained by requesting the court "suppress illegally *seized*

evidence” (emphasis added). CP 5-6. Thus, while the record contains Officer Zimmerman’s body camera footage, which captured the entire incident, neither of the two sets of the trial court’s written findings and conclusions from the suppression hearings, nor the stipulated facts from the bench trial, include any facts, at all, about the frisk that followed Mr. Davis’ detention. That search simply did not raise any issue, legal or otherwise, for the trial court who was thoroughly aware of how that search was conducted. Because Mr. Davis requested a stipulated facts trial, facts were not developed regarding the search. In reviewing the stipulations, the court found no need to develop any facts related to that search before rendering its verdict.

In short, because the record does not contain sufficient facts necessary to adjudicate Mr. Davis’ claimed error, no actual prejudice can be shown and the error is not manifest. RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 333. This Court should decline to consider these arguments.

If this Court chooses to consider Mr. Davis’ arguments on this point, the State presents the following arguments.

2. Officer Zimmerman’s contact with Mr. Davis was a valid and lawful *Terry* stop and frisk.

A “*Terry* stop” is one exception to the Fourth Amendment warrant requirement. *Terry*, 392 U.S. at 21-24. This exception allows an officer to

stop and frisk a suspect, subject to certain limitations. *Miller*, 91 Wn. App. at 184.

During a permissible *Terry* stop, an officer may frisk a suspect for weapons if: “(1) he justifiably stopped the person before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk’s scope is limited to finding weapons. The failure of any of these makes the frisk unlawful and the evidence seized inadmissible.” *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008) (citation omitted). Even so, “[a] founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.” *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989). When reviewing whether a search was reasonable, “courts are reluctant to substitute their judgment for that of police officers in the field.” *Id.* at 601.

a. Officer Zimmerman justifiably detained Mr. Davis prior to the frisk.

As discussed in the previous section, Mr. Davis was “justifiably stopped,” meeting the first prong.

b. Officer Zimmerman had a reasonable concern of danger sufficient to justify a Terry frisk.

The standard for frisking one who is the subject of a *Terry* stop is that the “officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would

be warranted in the belief that his safety or that of others was in danger.” *Terry*, 392 U.S. at 27. In determining whether the officer acted reasonably in such circumstances, due weight must be given, not to the officer’s inchoate and unparticularized suspicion or “hunch,” but to the specific reasonable inferences the officer is entitled to draw from the facts in light of the officer’s own experience. *Id.* A frisk must not be undertaken as a result of the product of the officer’s “volatile or inventive imagination” or “simply as an act of harassment”; rather, the record must evidence “the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.” *Id.* at 28.

Here, based on all the facts and circumstances known to Officer Zimmerman, it was prudent to frisk for weapons. Mr. Davis entered the apartment through the balcony door. He was sitting in a darkened room holding a bottle. He provided officers with a name proven false. He was a stranger to the inhabitants of the apartment who spoke little English, were afraid of him, and wanted police to escort him out. Finally, only after Mr. Davis continued to refuse to identify himself even when faced with his patent falsehoods, Officer Zimmerman informed Mr. Davis he would be detaining him in handcuffs because the situation was becoming tense and Officer Zimmerman wished to avoid a “fight” with Mr. Davis, “a big guy.”

These facts warranted a belief of sufficient danger and made a search for weapons a prudent choice. *See Terry*, 392 U.S. at 27-28.

Mr. Davis relies on *Setterstrom*, 163 Wn.2d 621, to argue that Officer Zimmerman did not have a reasonable concern of danger, noting that in *Setterstrom*, the court held that officers must have some basis beyond nervousness and lying to justify an investigatory frisk. Mr. Davis argues that like in *Setterstrom*, he cooperated with the officers' requests, did not appear to be under the influence of drugs, and did not make any threatening gestures. But the situation in *Setterstrom* is quite different from what occurred in this case.

In *Setterstrom*, the court concluded that the officer did not have a reasonable belief that Mr. Setterstrom was armed and presently dangerous when he was sitting in a public area of a DSHS building, filling out a benefits form. 163 Wn.2d at 626-27. This was not, according to the *Setterstrom* court, "a situation where the officers encountered Setterstrom in a dark alley in a crime-ridden area." *Id.* at 627.

Here, Deputy Zimmerman detained Mr. Davis under significantly different conditions than those in which law enforcement contacted Mr. Setterstrom: Mr. Davis was initially reported as an intruder in a private home at 3:30 a.m. and, when contacted by law enforcement, was in a darkened room holding a potential weapon. He was a "big guy" with whom

officers had reached an impasse because of Mr. Davis' repetition of proven falsehoods, and officers detained him to prevent the situation from escalating into physical violence. Mr. Davis was not carrying on his business in public and in the light of day, as was Mr. Setterstrom. Officer Zimmerman proceeded to frisk Mr. Davis because based on these facts and circumstances, Officer Zimmerman had a reasonable concern of danger.

c. Officer Zimmerman's frisk of Mr. Davis was lawful and limited in scope

Following a lawful *Terry* frisk, the discovery of an unidentified "bulge" in the course of the pat-down entitles an officer to assure himself that what he feels is not a weapon. *State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980). After determining the "bulge" is not a weapon, the officer has no valid reason to further invade the suspect's right to be free of police intrusion *absent reasonable cause to arrest. Id.* (emphasis added).

Like in *Allen*, Officer Zimmerman found what he felt to be a wallet in Mr. Davis' pocket. By asking Mr. Davis if the wallet contained his identification, Officer Zimmerman continued to investigate Mr. Davis' behavior that could have led to charges of obstruction or false statement to a law enforcement officer. At this point, Mr. Davis admitted his true name to officers, and stated there was a warrant—and a warrant provided

Officer Zimmerman reasonable cause to arrest.² Because this chain of events happened in this particular order, Officer Zimmerman did not invade Mr. Davis' right to be free from police intrusion; instead, Mr. Davis provided officers the information they validly sought from the beginning of their contact.

Discussion of the content of the wallet was proper, as it was pertinent to the investigation at hand. Though officers had a legitimate reason to arrest Mr. Davis for obstruction or false statement to a law enforcement, investigation into those crimes apparently ceased when Mr. Davis admitted his true name and warrant status. As Officer Zimmerman testified, "I didn't think about hitting him with a new charge because I knew the warrant was probably more harsh." IRP 13. Once Mr. Davis admitted his true name, it became clear the officers were taking him into custody solely on those outstanding warrants. The warrants constituted a legitimate reason to arrest Mr. Davis.

3. Officer Zimmerman conducted a lawful search incident to arrest of Mr. Davis' person.

Another exception to the warrant requirement is a search of a person incident to a lawful arrest of that person. *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015). Under this exception, an officer making a lawful

² Arguably, so did the false statement; only leniency prevented the charge.

custodial arrest has authority to search the person being arrested, as well as articles of the arrestee's person such as clothing and personal effects. *State v. Byrd*, 178 Wn.2d 611, 617-18, 621, 310 P.3d 793 (2013) (citing *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)). An article immediately associated with the arrestee's person may be searched if the arrestee has actual possession of it at the time of a lawful custodial arrest. *Id.* at 621. This rule is referred to as the "time of arrest" rule. *Id.* at 620-21.

A search of an arrestee's person or articles in his or her possession does not require a case-by-case determination that a warrantless search is necessary for officer safety or evidence preservation. *Brock*, 184 Wn.2d at 154-55. Such a search is reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." *Robinson*, 414 U.S. at 235. Instead, "[t]he authority to search an arrestee's person and personal effects flows from the authority of a custodial arrest itself." *Byrd*, 178 Wn.2d at 618.

For this reason, once Mr. Davis admitted his true name and warrant status to officers, the further search of his person pursuant to his arrest on those warrants was permissible under *Byrd*.

4. Because the search was lawful, Mr. Davis did not receive ineffective assistance from his trial counsel for failing to raise the issue.

Mr. Davis challenges his trial counsel's performance, alleging ineffective assistance of counsel for failing to seek suppression of "the evidence resulting from a frisk that was unwarranted by any reasonable suspicion and that exceeded the scope of a pat-down for weapons." Br. of Appellant at 29.

Ineffective assistance of counsel claims are adjudged under the standards of *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-92. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Id.* at 689-91. When pursuing an ineffective assistance argument on the basis that counsel was deficient for failing to seek suppression of evidence, the defendant must establish that a motion to suppress likely would have been granted. *McFarland*, 127 Wn.2d at 333-34.

Mr. Davis cannot prevail on his claims of ineffective assistance of counsel. As discussed above, during the first motion to suppress, trial counsel argued Mr. Davis was unlawfully detained, had the opportunity to

address the body camera footage (played for the court), and requested suppression of evidence. A motion to suppress based on an unlawful search would have been based on identical evidence as the motion to suppress based on an unlawful detention. The bodycam footage showed the search of Mr. Davis. Mr. Davis cannot demonstrate how a motion to suppress based on an unlawful search would have succeeded where the motion to suppress based on an unlawful detention failed, when the court had been presented with the video evidence of how that search was conducted. Trial counsel filed the appropriate motion based on the initial contact between Officer Zimmerman and Mr. Davis.

Additionally, following the first motion to suppress, the trial court found that Officer Zimmerman's detention of Mr. Davis' was lawful because it was reasonable to require Mr. Davis to identify himself. Once Mr. Davis accurately identified himself, he was placed under lawful arrest for his warrants. Officer Zimmerman's search of Mr. Davis, incident to arrest, was lawful. It is unlikely an additional motion to suppress filed separately and explicitly on the basis of an unlawful search would have been granted, once the court made the finding the detention was lawful. *See McFarland*, 127 Wn.2d at 333-34. There was no deficient performance on the part of trial counsel and no proof of resulting prejudice to Mr. Davis.

C. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE STRIP SEARCH OF MR. DAVIS WAS LAWFUL.

Mr. Davis argues that the strip search of his person was unlawful because it was more akin to a body cavity search, was not conducted in private, and lacked reasonable suspicion. Here, the trial court correctly found that the search was not a body cavity search and was conducted with the requisite privacy. Though the trial court found that Mr. Davis' arrest on his DOC warrant for an underlying charge of possession of a controlled substance provided corrections officers the legal basis to perform a warrantless strip search, it was, in fact, Mr. Davis' status as a person subject to post-conviction supervision that permitted the warrantless search of Mr. Davis' person.

1. The search at issue in this case is a strip search and not a body cavity search.

A "strip search" is a search in which a person must remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person, while a "body cavity search" means the touching or probing of a person's body cavity, whether or not there is actual penetration of the body cavity. RCW 10.79.070(1)-(2). Pertinent here, a strip search requires a person to permit a visual inspection of their buttocks and anus.

Statute provides for limitations and protections of the person being strip searched. For one, persons conducting a strip search shall not touch the person being searched except as reasonably necessary to effectuate the strip search of the person. RCW 10.79.100(1). Furthermore, a strip search “shall occur at a location made private from the observation of persons not physically conducting the search.” RCW 10.79.100(3). This privacy, however, is limited to account for “the safety of those persons conducting the search.” RCW 10.79.100(4).

Here, the trial court properly found that a body cavity search did not occur. CP 38. Pursuant to statute, Mr. Davis may be lawfully asked to use his own hands to permit corrections officers to visually inspect his person. The trial court weighed the competing affidavits regarding the removal of the baggies of methamphetamine from Mr. Davis’ buttocks and found there was no body cavity search. 2RP 27. Removing an object without touching or probing the body, as was done here, is not a body cavity search. The trial court found Mr. Davis was subject only to a strip search; this was a proper finding based on sufficient evidence.

The trial court also properly found that the strip search was conducted with sufficient privacy safeguards to comply with RCW 10.79.100. CO Keller’s declaration reads, “Mr. Davis was asked to enter a bathroom with the door remaining open so that his actions could be

monitored by myself.” CP 100. RCW 10.79.100 anticipates that safeguards for both the person searched and person overseeing the search are required. Here, there is no indication that anyone other than CO Keller monitored Mr. Davis’ actions and having a door open to allow CO Keller to view Mr. Davis is essential to the exercise. It would have defeated the purpose to allow Mr. Davis to disrobe with the door closed, because then CO Keller could not have monitored his actions or called for help if needed. The trial court made a proper finding in regard to the privacy of the search.

2. Strip searches are regulated pursuant to RCW 10.79.120; however, these protections do not apply to arrestees in detention pursuant to a court order.

Specific protections apply to certain individuals subject to strip searches. These protections are elucidated in RCW 10.79.130 through 10.79.160³ and apply to certain categories of persons:

RCW 10.79.130 through 10.79.160 apply to any person in custody at a holding, detention, or local correctional facility, *other than a person committed to incarceration by order of a court*, regardless of whether an arrest warrant or other court order was issued before the person was arrested or otherwise taken into custody unless the court issuing the warrant has determined that the person shall not be released on personal recognizance, bail, or bond. RCW 10.79.130 through 10.79.160 do not apply to a person held for post-conviction incarceration for a criminal offense.

³ Only the protections of RCW 10.79.130 and 10.79.140 are at issue here.

RCW 10.79.120 (emphasis added). The protections of this statute apply to some, not all arrestees: they do not apply to persons who are in detention pursuant to a court order. *State v. Audley*, 77 Wn. App. 897, 901, n.1, 894 P.2d 1359 (1995).

In *Plemmons v. Pierce Cty.*, 134 Wn. App. 449, 140 P.3d 601 (2006), *as corrected* (Oct. 31, 2006), the court determined that RCW 10.79.120 was ambiguous because it was unclear what the phrase “committed to incarceration by order of a court” meant. *Id.* at 460. The *Plemmons* court therefore looked to legislative history to determine legislative intent, and quoted from the synopsis of the Final Bill Report for RCW 10.79.120, which states:

Restrictions are placed on the conduct of strip searches. The restrictions affect which persons in custody may be searched and under what circumstances they may be searched. *The restrictions do not apply to persons held for post-conviction supervision.* They do apply to any other person in custody at a holding, detention or local correctional facility other than any person not to be released on personal recognizance or bail.

1986 Final Legislative Report, 49th Wash. Leg. at 39-40 (emphasis added). The Legislature intended that persons held for post-conviction supervision be in the category of persons “committed to incarceration by order of a court” who may be strip searched without a warrant or reasonable suspicion. *Plemmons*, 134 Wn. App. at 460-62.

This analysis aligns with the well-settled law that probationers do not enjoy constitutional privacy protection to the same degree as other citizens. *State v. Olsen*, 189 Wn.2d 118, 125, 399 P.3d 1141 (2017). Probationers have a reduced expectation of privacy because they are “persons whom a court has sentenced to confinement but who are serving their time outside the prison walls.” *State v. Jardinez*, 184 Wn. App. 518, 523, 338 P.3d 292 (2014).

Here, as a person on post-conviction supervision, Mr. Davis’ incarceration is by court order. Therefore, the warrant requirements of RCW 10.79.130 and the reasonable suspicion threshold of RCW 10.79.130 and .140 do not apply to searches of his person upon his being booked into jail.

3. The protections of RCW 10.79.130 and 10.79.140 do not apply to Mr. Davis as a person subject to DOC supervision.

For those individuals in custody but not committed by court order, then RCW 10.79.130 applies; it states:

No person to whom this section is made applicable by RCW 10.79.120 may be strip searched without a warrant unless:

- (a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility;
- (b) There is probable cause to believe that a strip search is necessary to discover other criminal evidence concealed on

the body of the person to be searched, but not constituting a threat to facility security...

(2) For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:

(a) A violent offense as defined in RCW 9.94A.030 or any successor statute;

(b) An offense involving escape, burglary, or the use of a deadly weapon; or

(c) An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.

Therefore, reasonable suspicion is deemed present when the person to be searched is arrested for an offense involving possession of drugs.

RCW 10.79.130(2)(c).

Further protections are elucidated in RCW 10.79.140. Here, if a person has not been arrested for a crime specified in RCW 10.79.130(2), they may “be strip searched, but only upon an individualized determination of reasonable suspicion or probable cause.” RCW 10.79.140(1). “The determination of whether reasonable suspicion or probable cause exists to conduct a strip search shall ... be based on a consideration of all information and circumstances known to the officer authorizing the strip search,” and the officer may consider information that includes, but is not limited to, the following factors:

(a) The nature of the offense for which the person to be searched was arrested; [and]

(b) The prior criminal record of the person to be searched...

RCW 10.79.140(2).

Because Mr. Davis, subject to post-conviction supervision, was arrested on his DOC warrant he was committed to incarceration by order of a court and RCW 10.79.130 and .140 do not apply. Mr. Davis is not merely an arrestee, presumed innocent, and in custody prior to a determination of detention or release on personal recognizance or bail. *See* RCW 10.79.120. No warrant, probable cause, or reasonable suspicion was required to effectuate the strip search.

4. The trial court found the strip search was properly authorized under RCW 10.79.130(2) as his DOC arrest warrant was predicated on his conviction for possession of a controlled substance.

This Court may affirm the trial court on any ground the record supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Because Mr. Davis was required to permit a visual inspection of his buttocks and anus, a warrantless strip search *did* occur. *See* RCW 10.79.070(1)-(2). The trial court, acting under the assumption that the protections of RCW 10.79.130 and .140 applied to Mr. Davis, found that the strip search qualified for the warrant exception outlined in RCW 10.79.130(2); that is, the fact that Mr. Davis had been arrested on his DOC warrant for a possession of a controlled substance conviction. The trial court did not, therefore, err in concluding that the evidence of Mr. Davis

being in possession of the methamphetamine found on his person during the search was admissible.

It is also arguable, that looking to RCW 10.79.140, the trial court believed, as the State the argued, that reasonable suspicion existed to search Mr. Davis based on his extensive prior history of convictions for possession of a controlled substance. CP 66.

This Court can affirm the trial court on any proper basis supported by the facts and the law. As discussed above, Mr. Davis, subject to DOC supervision at the time of his arrest, is an individual to whom RCW 10.79.130 and .140, which place limits on strip searches of arrestees, are not applicable. Based on the explicit legislative history of the strip search statute, there was a legal basis to search Mr. Davis regardless of the crime of his arrest or the amount of reasonable suspicion present. There is no warrant requirement for the in-custody strip search of someone subject to DOC supervision. The strip search was authorized by law, and this Court may properly affirm the trial court on this basis.

D. IS THE SUSPICIONLESS STRIP SEARCH STATUTE, RCW 10.79.130(2), UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 7, OF THE WASHINGTON CONSTITUTION?

As he posited to the trial court, Mr. Davis again argues that RCW 10.79.130(2) is unconstitutional to the extent it permits warrantless and suspicionless strip searches of individuals arrested for violent offenses,

escape, burglary, or possession of a controlled substance. He argues *Audley* holds that under article I, section 7, of the Washington constitution, warrantless strip searches of these individuals must be based on individualized suspicion because in 1995, when *Audley* was written, the Fourth Amendment to the U.S. Constitution also required individualized suspicion for warrantless strip searches of arrestees.

Mr. Davis posits that since the release of *Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010), and *Florence v. Board of Chosen Freeholders of the Cty of Burlington*, 566 U.S. 318, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012), Fourth Amendment jurisprudence has shifted to permit suspicionless strip searches of all persons admitted to either “general population” of a jail or otherwise “classified for housing” based on a reasonable balance between inmate privacy and the security needs of the institution.

Mr. Davis concludes, following an analysis undertaken pursuant to *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), that article 1, section 7, of the Washington constitution has not shifted with the Fourth Amendment jurisprudence, and provides more protection to Washington’s inmates than does the federal Constitution.

The State deems Mr. Davis’ case as not the proper set of facts upon which to bring this constitutional challenge. Mr. Davis’ status as a DOC

probationer means he was not strip searched pursuant to RCW 10.79.130(2). This court need not consider his arguments on this point.

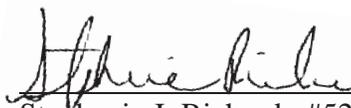
Furthermore, this Court in *State v. Barron*, 170 Wn. App. 742, 753, 285 P.3d 231, 236 (2012), relied on the guidance in *Audley* when holding that reasonable suspicion did not exist sufficient to support a warrantless strip search and reversed the resulting conviction, an indication that *Audley* is still the law in Washington for pre-conviction arrestees held in custody, regardless of the holdings in *Bull* or *Florence*. A *Gunwall* analysis is not appropriate or necessary here.

IV. CONCLUSION

For the foregoing reasons, the State requests this Court affirm the decisions of the trial courts in all respects, ultimately affirming Mr. Davis' conviction for possession of a controlled substance.

Dated this 12th day of December, 2019.

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Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

RICO DAVIS,

Appellant.

NO. 36561-1-III

CERTIFICATE OF MAILING

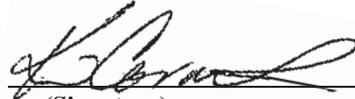
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Jennifer Sweigert

sweigertj@nwattorney.net; sloanej@nwattorney.net

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