No. 90188-1

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Court of Appeals
Division III
State of Washington

NO. 29916-3-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHAD EDWARD DUNCAN,

Appellant.

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# AMENDED BRIEF OF RESPONDENT

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1) The stop of Duncan's car was not justified as a Terry stop because there was no reasonable and articulable suspicion of criminal conduct and the stop was not supported by probable cause.
2) The warrantless search of Duncan's car violated Const. article I, section 7 because Duncan had been arrested and was not able to access a weapon or destroy evidence.
3) The sentencing court lacked the authority to impose a sentence of community custody for unlawful possession of a firearm based on the determination by the court that the defendant was a criminal street gang member or associate during the commission of the crime.
4) The findings that Mr. Duncan has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1) The stop of Duncan's car was supported by probably cause.
2) The warrantless search of Duncan's car was fully supported by the facts and the law.
3) Appellant is correct, there was no legal authority for the court to impose the period of community custody.
4) The court did not make inquiry of Duncan on the record with regard to his ability to pay legal financial obligations. This should be remanded for hearing.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State

shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

**FIRST ALLEGATION.**

As noted in the Findings, this was a situation were the officers were responding to numerous calls of shots fired and before the stop was initiated one officer had confirmed that there was an person who had been shot in the head at the location of the shooting. This all occurred at approximately 12:45 AM in a section of Yakima which is known to be claimed by the Sureno Street gang. The information was that the shooting involved an automobile that was fleeing the area of the shooting. That car was described as a mid-sized car either an Impala ore a Subaru type vehicle. Officer Jeff Ely was in the area and was eventually the stopping officer. He determined, based on his knowledge of the area, that he could precede to a specific location and if the fleeing car was occupied by Norteno Street Gang members there was a high probability that they would pass by this location. Shortly thereafter Officer Ely did in fact see a midsize white passenger car traveling past his location and in a direction and manner that would take that car to a section of town known to be frequented by Surenos. This white car was the only white car on the road at that time and in that area.

Another officer backing up this officer testified that he did not see any other white passenger cars while he was responding to the area of the white car in question. Officer Ely was able to observe that there were three people in the car and that the driver was wearing a red hat, a significant fact because it was the color claimed by the rival gang, not the gang that claimed the area of the shooting.

Officer Ely testified that the car he stopped was a late 1990's Ford Taurus. He further testified that this model of car appear similar to some Subaru's.

The time from the initial call out regarding the shooting to the actual stop was only a few minutes.

As Officer Ely was initiating the stop he was informed that thee were possibly two females in the car. After the stop the officer observed two females in the car with the male driver. The officers initiated a high-risk traffic stop on this car based on the information that this car probably was involved in the drive by shooting from which there was a confirmed head wound.

After the occupants of the car were removed and handcuffed the officers, conducted a sweep of the car for safety purposes and to determine if there were any other occupants in the car including the trunk. Officer Ely testified that it was during this "we did a frisk of the

vehicle's interior for weapons only to locate, uhm, a handgun of the front passenger seat between the door and the seat." (RP 72)

The trial court adopted a lengthy set of findings and conclusions none of the findings. Trial counsel for Appellant objected to some conclusions but it would appear from the record that most of those objections were taken into consideration at the hearing and were adopted in the final findings and conclusions which were adopted by the trial court and are now before this court. The findings and conclusions have not been challenged in this court. State v. Handburgh, 61 Wn. App. 763, 766, 812 P.2d 131 (1991); These findings were unassailed by either party on appeal and, consequently, they are verities on appeal. Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986). Our review is, therefore, limited to determining if the trial court's findings support its conclusions of law. Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

In addition, even where a trial court's written findings are incomplete or inadequate, this court can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998). The oral ruling in this case covers some seven pages, RP 115-123, the written finding and conclusions are very clear but this court must

read the oral rulings to fully appreciate the clear understanding the trial court had regarding the actions of the officers and the urgency of the situation.

The actions of the trial court were clearly discretionary in nature. The court received briefing from all parties, based on that information as well as testimony from two officers, the defendant did not testify, made a discretionary decision with regard the suppression of the search in this case. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) is applicable "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. ....Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." (Citations omitted.)

**1. Office Ely had reasonable, articulable suspicion to seize the defendant.**

This court in State v. Rowell, 144 Wn. App. 453, 456-459 (2008) review denied, 165 Wn.2d 1021, 203 P.3d 380 (2009) reviewed a set of facts which were similar to those in this case. In that the officers were

responding to reports of shots fired in a specific area. The stopping officer in Rowell entered the area and observed Rowell on an unlit bicycle trying to leave the area in a hurry. The officer stopped Rowel and subsequently arrested him for outstanding warrants. A subsequent search revealed that he had drugs on his person.

This court in Rowell, supra, stated:

> Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, a police officer may conduct an investigatory stop based on less than probable cause if the officer can "'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" The level of articulable suspicion necessary to support an investigatory detention is "a substantial possibility that criminal conduct has occurred or is about to occur."
>
> When evaluating the reasonableness of an investigatory detention, a court considers the totality of the circumstances known to the officer at the inception of the stop, including the officer's training and experience. If an officer has a well-founded suspicion of criminal activity, he or she may stop a suspect, and ask that person for identification and an explanation of his or her activities. The circumstances must be more consistent with criminal conduct than with innocent behavior. (Citations omitted. )

As set forth above the facts in this case are even more substantial than in Rowell. Here there were not only numerous calls reporting the shot, but confirmation that there was a person who had been shot in the head by those shots, a description of the car that was involved, the

number of occupants and direction of travel but all together in a neighborhood dominated by one street gang claiming both the area and an color. Then the office positioned himself in one of two lanes of travel from the scene of the shooting at approximately 12:24 AM and a car with the correct number of occupants and the correct color shows up within a very brief period of time after the shooting. This is far more substantial than in Rowell.

This court in Rowell said the following regarding the fact that Rowell was leaving the area of the reported shots fired, and it must be noted again this was a report not a confirmed shooting with injuries as we have here; "Mr. Rowell's apparent flight was reasonably suspicious to both the officer and the trial court. Indeed, it is generally accepted as evidence of guilty activity. State v. Price, 126 Wn.App. 617, 645, 109 P.3d 27 (2005)." Rowell at 459.

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. . . . [I]t may be the essence of good police work to adopt an intermediate response." Adams v. Williams, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 92 S. Ct. 1921, 1923 (1972)

See also, State v. Samsel, 39 Wn. App. 564, at 569 n.2 694 P.2d 670 (1985). The Terry stop falls between an arrest which "'is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows", and questioning without restraint which some courts have held does not implicate the Fourth Amendment at all. (Citations omitted.)

A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. State v. Kennedy, 107 Wn.2d 1, 15, 726 P.2d 445 (1986).

Rowell, 144 Wn. App. at 457;

> When evaluating the reasonableness of an investigatory detention, a court considers the totality of the circumstances known to the officer at the inception of the stop, including the officer's training and experience. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). If an officer has a well-founded suspicion of criminal activity, he or she may stop a suspect and ask that person for identification and an explanation of his or her activities. State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). The circumstances must be more consistent with criminal conduct than with innocent behavior. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992)."

State v. Mitchell, 145 Wn. App. 1, 8, 186 P.3d 1071 (2008)

"Other relevant factors to be considered include the seriousness of the

crime being investigated, a reason to believe the person detained had knowledge of material to aid in the investigation of such crime, and the need for prompt action." Quoting 4 *Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment* § 9.2(b) at 289-91 (4th ed. 2004))."

"A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [Citations.]" Adams v. Williams, 407 U.S. 143, 146 (1972).

The court found as follows;

> So with regard to making a Terry stop of the vehicle, Officer Ely certainly had an articulable suspicion that this was the vehicle involved in the crime. There had been a crime reported. It was a very serious crime, so the purpose of the stop was to investigate this serious crime.
>
> I think the amount of physical intrusion that is allowed on a Terry stop is in part a function of the seriousness of the crime suspected. And again, this was a an extremely serious crime. And again, if you just look at this at a Terry stop, the length of the stop itself was really quite short. By the time they -- between the time they stopped the vehicle and the time they had all the passengers out of the car was only about five minutes, so we're not talking about a very long period of time here.
>
> Granted, in a Terry stop, the purpose of a Terry stop is to allow the officer an opportunity to investigate further, but Officer Ely testified that in the process of making this type of high-risk stop where there's been

> known to have been a shooting -- and as I said, he already has an articulable suspicion that this is the vehicle involved in the shooting -- then obviously the conclusion he has to draw from that is that there's a high probability that there is -- that the people involved are armed.
>
> That's the reason for the high-risk stop. That's the reason for having the guns out and making the passengers -- the people in the vehicle get out one at a time to protect -- for purposes of officer safety. So, in terms of the way the stop was handled, I think that was perfectly appropriate given the seriousness of the crime that was reported to have taken place.
> (RP 118-9)

State v. Fore, 56 Wn. App. 339, 783 P.2d 626 (1989) these facts were such that "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed."

The court;

> And so the officers approached the vehicle to examine the interior to see if there were any passenger – anybody else in there. Officer Ely testified that he saw the spent casings in the vehicle from the outside, and he was on the driver's side of the vehicle -- that shows clearly in the video -- and the driver's side door was open. So he had a clear view from the outside of the vehicle in order to be able to see the casings.
>
> So, even assuming that there wasn't probable cause up to that point -- and I'll get back to that in a minute -- there certainly was probable cause by the time he saw the casings. So it shifted at that point from -- if not earlier, it shifted at that point from a Terry stop to an arrest, because there was probable cause at that point.

> And then Officer Ely continued to explain that in order to tow the vehicle they had to check it to see if there were any weapons in it that might be -- might create a danger; for example, a danger of a weapon accidentally firing while the car was being towed. Because when a car is being towed it's frequently lifted up and dropped and moved around, and if a loaded firearm is in a vehicle, then that creates a risk.
>
> So, again, the search of the vehicle for weapons was perfectly reasonable and appropriate under the circumstances for officer safety, for purposes of preparing the car for towing.
>
> With regard to the Terry stop, even if this was considered a Terry stop and even if it never arose to probable cause for arrest until they found the gun, the officers are allowed to search the vehicle, even in a Terry stop, for a weapon.
>
> (RP 120-1)

The Fore court also noted that probable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities. Fore, 56 Wn. App. at 344. These are specific, articulated, suspicious facts justifying a lawful Terry investigative stop.

The appellant relies on State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984) however in contrast to Williams the officers in this case had specific, articulable suspicion to detain the defendant and his vehicle. Neither Williams, nor State v. Belieu, 112 Wn.2d 587, 598-600, 773 P.2d 46 (1989), also cited by appellant, hold that use of drawn firearms convert a Terry stop into an arrest. Belieu at 599:

> There is no bright line standard for determining the degree of invasive force which may convert

> an investigative stop into an arrest. The standard is most frequently stated to be a function of the officers' reasonable fears for their own safety. This fear is reasonable if it is based on "particular facts" from which reasonable inferences of danger may be drawn. The investigative methods must be the least intrusive means reasonably available. The force used should bear some reasonable proportionate relationship to the threat apprehended by the officers. (Citations omitted.)

There is little that one can conceive of that is more reasonable than to fear that the person driving a car in a rival gang neighborhood, wearing the color claimed by the opposing gang, driving the car that matches the description of the car involved in a shooting were one person had been shot in the head, probably is armed.

> The Court of Appeals in this case emphasized it would not require police officers to provide easy targets for dangerous persons, acknowledging that "[w]hen officers have a reasonable belief a car's occupants are armed and dangerous, they may make a stop at gunpoint. (Citations omitted.)
> ...
> The question whether the use of drawn guns is justified in effecting a stop may be analogized to the standard for frisking one who is the subject of a "Terry" stop. That standard 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." (Italics ours.) Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968). 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. Terry, 392 U.S. at 27, 88 S.Ct. at 1883. 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." Terry, at 28, 88 S.Ct. at 1884.

As was so aptly pointed out by appellant citing State v. O'Cain, 108 Wn. App. 542, 549, 31 P.3d 733 (2001);

> Officers who act on the basis of the dispatch are not required to have personal knowledge of the factual foundation, and are not expected to cross-examine the dispatcher about the foundation for the transmitted information before acting on it. Rather, the collective knowledge of law enforcement agencies giving rise to the police dispatch will be imputed to the officers who act on it. If the resulting seizure is later challenged in court, the State cannot simply rely on the fact that there was such a dispatch, but must prove that the dispatch was based on a sufficient factual foundation to justify the stop at issue.

The actions of the officers are supported by the facts and the law. Further as set out in State v. Randall, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994):

> "An important factor comprising the totality of circumstances which must be examined is the nature of the suspected crime. The Washington Supreme Court recognized the significance of this factor in Lesnick, where it affirmed the suppression of evidence seized pursuant to an anonymous tip that the defendant was in possession of gambling devices. Emphasizing the need to consider each case in light of its own facts,
>
> ...
>
> The tip in this case was of an alleged armed robbery, a violent crime posing a significant threat to the safety of the officers and the public in general. An officer acting on a tip involving the threat of violence and rapidly developing events does not have the opportunity to undertake a methodical, measured inquiry into whether the tip is reliable, as does an officer acting on a tip that a nonviolent offense such as possession of drugs has been committed, *see* State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980), or an officer seeking a search warrant based on a tip, *see* State v. Jackson*, supra*. Rather, when acting on a tip that a violent offense has just been committed, as here, the officer must make a swift decision based upon a quick evaluation of the information available at the instant his or her decision is made. To require an officer under these circumstances to stop and undertake an in-depth analysis of the reliability of the information received by the police dispatcher would greatly impede the officer's discharge of duty and would greatly increase the threat to the public safety. Under such circumstances, the officer should be able to rely on the reliability of information disseminated by police dispatch and, when his or her observations corroborate the information and create a reasonable suspicion of criminal activity, to make an investigatory stop.

Officer Ely was justified in relying upon the dispatch report considering the information informed a drive by shooting with the head wound to the victim and was generalized with regard to the vehicle

description and it did not name any particular person like the facts in Randall, supra, making the information reliable. Additionally, shortly after report was received by police dispatch, other officers verified the information that was received. State v. Snapp, ___ Wn.2d.___, 275 P.3d 289 (2012);

> We next turn to additional issues raised by Mr. Wright. Mr. Wright first claims that Officer Gregorio did not have either probable cause or a reasonable suspicion justifying the stop of his vehicle. Insofar as he contends that probable cause is necessary, it is the wrong standard. A valid Terry investigative stop is permissible if the officer can " point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrants the intrusion." Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see State v. Doughty, 170 Wash.2d 57, 62, 239 P.3d 573 (2010) (" [a] Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct" ). A reasonable, articulable suspicion means that there " is a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wash.2d 1, 6, 726 P.2d 445 (1986). Terry ' s rationale applies to traffic infractions. State v. Johnson, 128 Wash.2d 431, 454, 909 P.2d 293 (1996). In reviewing the propriety of a Terry stop, a court evaluates the totality of the circumstances. Doughty, 170 Wash.2d at 62, 239 P.3d 573; State v. Glover, 116 Wash.2d 509, 514, 806 P.2d 760 (1991).

It is inconceivable that our Supreme court would uphold a stop based on a simple traffic infraction and yet it would not uphold the stop in this case based on the facts set forth in the CrR 3.6 hearing and as

memorialized by the trial court both in its Findings of Fact and Conclusions of Law as well as the oral ruling discussed herein.

**RESPONSE TO ALLEGATION TWO – THE SEIZURE OF THE GUN DID NOT ARISE FROM AN ILLEGAL SEARCH.**

State v. Snapp**,** ___Wn.2d ___, 275 P.3d 289 (2012) is the law of this State; but Snapp did not vitiate other theories with regard to search. For lack of a better phrase Snapp, Ringer, and most of the cases were Snapp has subsequently been applied were "routine traffic stop" situations. See also, State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009; State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) ( Patton stated with an attempt to arrest Patton on an outstanding warrant, there was nothing exigent regarding the automobile in question.)

This case is factually distinguishable from all of these cases to an extent that Snapp is truly inapplicable.

This was an emergent situation involving officers responding to a drive-by-shooting which literally had just occurred. They had confirmed that there was a person who had been shot in the head and they had a description of the vehicle involved, the direction of travel of that vehicle and the number of occupants. This information was bolstered by the gang affiliation of the neighborhood and the apparent direction this vehicle was

going in its flight from the scene; the time of day and, the danger to the population with this armed person who has already demonstrate a total disregard for the lives and safety of the citizens.

The exigency of this case is factually distinguishable from the line of case such as Arizona v. Gant, ___, U.S. ___, ___ S.Ct. ___, 173 L.Ed.2d 485 (2009, and Snapp where there was a relatively minor criminal act that had occurred and as a "standard" search incident to that arrest the officer intruded into the passenger compartment of the car operated by the defendant.

Further, the actual observation of the bullets and the gun were done from the exterior of the car. Officer Ely stated that the door was open but he was outside the car when the bullets and the gun were observed. There had been a protective sweep of the car concurrent with this observation, there was not an actual search conducted. Snapp does not stand limit any officer from using this type of sweep to ensure officer safety and the safety of the public. It clearly disallows an actual search conducted for the simple purpose of collecting evidence or information.

Here the initial observation occurred as the officers were attempting to determine if there were other occupants hiding in this car, a car that was highly likely to have been used very recently in a drive-by shooting. Therefore the argument that the occupants could not reach the

contents while valid does not address what actions were actually occurring when the discovery of the shell casings and the gun were made. Once again this case is distinguishable from Snapp and Patton, et al purely and simply on the facts. This is not a case where Snapp is applicable. This was not a situation were the officers created some scenario that allowed then into the car. They had a legitimate basis to approach the car, and did so, with weapons drawn in a high risk stop fashion. This was not as stated above a "routine traffic stop."

The intrusion into the passenger compartment was not this type of "search" initially. The officers did not seize the shells; they only took possession of the weapon. They later took the vehicle to an impound lot, applied for and received a search warrant which has not been challenged here nor was it challenged at the trial court. When the weapon was seized it was done both for officer safety and for the safety of the public as testified to by Officer Ely. The Yakima Police Department would have been clearly negligent to leave that gun in a car, a car that was to be towed across town to an impound lot. The officers had no knowledge of this guns make-up or condition. As the officer testified he did not want any type of accidental discharge as the gun traveled behind the tow truck.

The search would also fall under the exigent circumstance exception, State v. Gibson, 219 P.3d 964, 970-71 (2009): "Washington

courts have long held that ‘ danger to [the] arresting officer or to the public’ can constitute an exigent circumstance." "The need to protect or preserve life, avoid serious injury, or protect property in danger of damage justifies an entry that would otherwise be illegal absent an exigency or emergency." We look at the totality of the circumstances to determine whether exigent circumstances exist.” (Citations omitted)

The officer observed the shell casing from a plain view setting and then seized the gun from a open view setting. He testified that the shell casings were clearly observable on the floor of the car, on the drives side, from “outside the car.” He then stated that the gun was observable from a location outside the car.

While not argued by at the trial court level it is clear that both the “open view” and “plain view” exceptions are applicable here, it is equally well settled this court can affirm a lower court's decision on any basis adequately supported by the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)

The "open view" doctrine and the closely related " plain view" doctrine are exceptions to the general rule that warrantless searches are per se unreasonable. State v. Gibson, 152 Wash.App. 945, 954, 219 P.3d 964 (2009) (citing State v. Seagull, 95 Wash.2d 898, 632 P.2d 44 (1981)). The "open view" doctrine applies when an officer is present in a

constitutionally non-protected area. Seagull, 95 Wash.2d at 901-02, 632 P.2d 44 (citation omitted). In these constitutionally non-protected areas, "[t]he object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution." Seagull, 95 Wash.2d at 902, 632 P.2d 44 (quoting State v. Kaaheena, 59 Hawai'i 23, 29, 575 P.2d 462 (1978)).

Duncan's vehicle was located in on the street during the stop, a constitutionally non-protected public area; the "open view" doctrine applies. Granted it was at that location because of the traffic stop but the officers did not enter the car to make the observations of the shells nor from what the record states the gun.

The record is not very clear as to the amount of actual intrusion into the interior of the car. The trial court stated the following;

> And so the officers approached the vehicle to examine the interior to see if there were any passenger – anybody else in there. Officer Ely testified that he saw the spent casings in the vehicle from the outside, and he was on the driver's side of the vehicle -- that shows clearly in the video -- and the driver's side door was open. So he had a clear view from the outside of the vehicle in order to be able to see the casings.

However, it is also the position of the State that the "plain view" doctrine, also comes into play when the officer lawfully intruded into the interior of the car. The "plain view" doctrine comes into play if the officer

has lawfully intruded into a location where there otherwise is a reasonable expectation of privacy. State v. Seagull, 95 Wash.2d 898, 901, 632 P.2d 44 (1981)

See also State v. Barnes, 158 Wash.App. 602, 243 P.3d 165, 170-71 (2010);

> Evidence discovered in "open view," as opposed to "plain view," is not the product of a "search" within the meaning of the Fourth Amendment. In the "plain view" situation, the view takes place after an intrusion into activities or areas as to which there is a reasonable expectation of privacy. The officer has already intruded and, if his intrusion is justified, the objects of obvious evidentiary value in plain view, sighted inadvertently, may be seized lawfully and will be admissible.
>
> In contrast, in the "open view" situation, "the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public." The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution. It is well established that a person has a diminished expectation of privacy in the visible contents of an automobile parked in a public place. (Citations omitted.)

Officer Ely:

> A Well, we safely detained all the vehicle occupants by initiating a high-risk stop. And then we did a -- basically a clearance of the vehicle. We walked up to make sure there was no other occupants hiding in the vehicle. It's all standard practice when doing these type of stops. And while clearing the vehicle it was evident

> there was aluminum shell casings all over the floorboard and the seat from what appeared to be a small caliber handgun.
> Q Did you observe those from outside the vehicle?
> A From outside the vehicle.
> ...
> ...And after we've done that to all three occupants within the car, then we do a clearance of the car to make sure there's no others hiding inside. And that's when we observed the shell casings onthe floorboard.
> Q Once seeing those shell casings, what did you proceed to do, if anything?
> A Uhm, at that point after we had the shell casings, we had the two females in the car that fit the description, we had the driver where the shell casings were located at his feet with the red hat, they were transported ported to the station where they were interviewed by other officers. Uhm, to make sure we weren't going to, you know, be transporting the car, towing a car with a handgun inside that could possibly discharge, we did a frisk of the vehicle's interior for weapons only to locate, uhm, a handgun of the front passenger seat between the door and the seat. That was safely cleared and placed in my vehicle.
> (RP pg 71-3)

**RESPONSE TO THIRD ALLEGATION**.

Appellant is correct. This portion of the Judgment and Sentence should be struck. This court should remand this to the trial court with an order that can be executed without the necessity of bringing the defendant back from prison. This would appear to have been a scriveners error. It would appear that based on the associations that Duncan had this box was checked. There was no discussion regarding this on the record that the State could find. Subsection 2.2 Special Finding – fifth checked box

should not have been checked. A separate order can be entered with the Clerk of the Superior court indicating that the one portion of Section 2.2 was inappropriately marked.

**RESPONSE TO FOURTH ALLEGATION**.

Duncan challenges the imposition of his legal financial obligations. (LFO) Challenges to LFOs are not properly before this court if there is no evidence that the State has sought to enforce the LFOs. State v. Hathaway, 161 Wn.App. 634, 651, 251 P.3d 253 (2011); *see also* State v. Bunch, 168 Wn.App. 631, 633, 279 P.3d 432 (2012). In Hathaway, the defendant challenged a jury demand fee because it exceeded the statutory maximum. 161 Wn.App. at 651. In Hathaway the court held that the appeal was not properly before it because there was no evidence that the State had enforced the LFOs, citing State v. Smits, 152 Wn.App. 514, 216 P.3d 1097 (2009). Hathaway, 161 Wn.App. at 651. Reasoning that the question was purely legal and that justice would be better served, the Hathaway Court nonetheless exercised its discretion under RAP 1.2(c), waived the rules, and reviewed the LFO challenge. 161 Wn.App. at 651-52. Here, like in Hathaway, there is no evidence that the State has sought to enforce the LFO, so his challenges are not properly before this court on appeal as a matter of right.

This court has seen numerous challenges with regard to this

specific issue. The State has steadfastly argued if this court is going to review these allegations this court should return the question to the trial court for a hearing to allow the question to be determined in an orderly fashion. This case more so than most other cases demands that action from this court.

A review of the sentencing hearing by this court will demonstrate that there was no inquiry by the court of Duncan at the time of his sentencing not due to some oversight as is often the case but because of Duncan's unruly actions in the courtroom he was physically removed from the courtroom. In this specific instance Duncan created this error. Therefore it is the position of the State that State v. Bertrand, 165 Wn.App. 393, 405-6, 267 P.3d 511 (2011) is inapplicable. This "error" was self-induced and is comparable therefore to an invited error. This court should not countenance this type of behavior. If all defendants merely acted as Duncan did during sentencing there would never be any ability to enforce any of the matters set out in the Judgment and Sentence.

In re Personal Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001);

> The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." This court has observed that the invited

> error doctrine "appears to require affirmative actions by the defendant . . . [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine." (Footnotes omitted.)

State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." The outburst by Appellant which forced the judge to have him removed from the courtroom was the very definition of knowing and voluntary. Duncan has five prior felony convictions. He knows the routine and he knew how to work the system to get a result. (CP 177-185)

Therefore the State would request that this portion of this appeal be remanded to the trial court for a sentencing hearing at which time a judge can inquire of Duncan as to his present and future ability to pay for the costs imposed.

IV. CONCLUSION

The facts of this case and the law of the State clearly support that thee was sufficient evidence to allow, at the least, a Terry stop of Duncan's car. It is the position of the State and was the position adopted by the trial court at the suppression hearing that there was probable cause to allow the stop. Thereafter the officers acted within the law when they

observed the shell casings as well as that gun and the seizure of the gun was therefore valid.

The court did not have legal authority to impose the twelve month term of community custody. This should be remanded to the trial court with instructions that an order be entered amending the judgment and sentence to strike that section.

This allegation is not ripe; this court should refuse to review it. however if this court does accept review, the defendant by his actions precluded the trial court from making the proper inquiry into his ability to pay the costs set forth in the Judgment and Sentence therefore this should be remanded for inquiry, not stricken as Duncan argues.

Respectfully submitted this 3rd day of December, 2012,

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DECLARATION OF SERVICE

I, David B. Trefry state that on December 3, 2012, I emailed, by agreement of the parties a copy of the Respondent's Amended brief, to Mrs. Susan Gasch, Gasch Law Office , gaschlaw@msn.com and to Chad E. Duncan DOC# 349049 Washington State Penitentiary 1313 North 13th Avenue Walla Walla WA 99362

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of December, 2012 at Spokane, Washington.

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