No. 29916-3-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CHAD EDWARD DUNCAN,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Blaine G. Gibson, Suppression Hearings
Honorable James C. Lust, Trial/Sentencing Hearings

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# REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

**1. The State has failed to refute that the stop of Mr. Duncan's car was not justified at its inception as a Terry stop because there was no reasonable and articulable suspicion of criminal conduct and the intrusion was not supported by probable cause.**

Standard of Review. The standard of review is *not* abuse of discretion. *See* Brief of Respondent ("BOR") 4–5 In reviewing the denial of a suppression motion, substantial evidence must support the challenged findings and the findings in turn must support the conclusions of law. State v. Ross, 145 Wn.2d 1016, 41 P.3d 483 (2002). Appellant *has* challenged certain findings from the suppression motion. Brief of Appellant 1 at Assignment of Error 2; c*f.* BOR 4. The remaining findings are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The conclusions of law are reviewed de novo. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

Appellant incorporates by reference his argument on this issue. Brief of Appellant 10–20; *see* RAP 18.14(c).

The State overall responds "Office [sic] Ely [*did*] ha[ve] reasonable, articulable suspicion to seize the defendant". BOR 5

[insertion and emphasis added]. It cites State v. Rowell[1] as having a set of facts "similar to those in this case". The State presents a lengthy general quote from Rowell (about how the level of articulable suspicion necessary to support an investigatory detention will be evaluated by a court) and then asserts: "[a]s set forth above the facts in this case are even more substantial than in Rowell." BOR 5–6. The State recites several facts and then in conclusory fashion says, "This is far more substantial than in Rowell." BOR 6. The State fails to tell the court what issue the Rowell court was addressing, how it turned out, and if relevant to this case what makes it relevant. The proffered concept of "substantial" is meaningless in a vacuum of basic factual information.

Next mentioning "Mr. Rowell's apparent flight was reasonably suspicious to both the officer and the trial court", the State cites purported authority that flight is "generally accepted as evidence of guilty activity." BOR 7. Nothing more is said about flight. Is this just a remnant from another brief? The trial court made no finding that Mr. Duncan was fleeing from the scene. *See* CP 202–06. The State fails to establish the relevancy of Rowell or flight to this case.

[1] 144 Wn. App. 453, 182 P.3d 1011 (2008), *rev. denied*, 165 Wn.2d 1021, 203 P.3d 380 (2009).

The State next offers quotations from six cases (appearing to provide general "sound bite" concepts relevant to investigative (*Terry*[2]) stops),[3] followed by a lengthy quotation from this trial court's ruling,[4] followed by another "sound bite" concept from yet another case,[5] and another lengthy quotation from the ruling of this trial court,[6] and another one-sentence reference to a case.[7] The State then makes the conclusory statement that "[t]hese are specific, articulated, suspicious facts justifying a lawful *Terry* investigative stop. BOR 11.

Appellant does not disagree that the trial court referred to certain "facts" in its ruling. For purposes of this appeal of the denial of a suppression motion, however, only the court's actual findings of fact are the "relevant" facts and the State does not cite anywhere in its motion to any written finding(s) of fact made by the court. BOR 1–26. In any event, Mr. Duncan argues on appeal the facts of the case do not justify a permissible investigatory stop or amount to probable cause to arrest, and therefore the stop was unlawful. Brief of Appellant 15–20. The State has not refuted appellant's position with legal argument and analysis.

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[2] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[3] BOR 7–9.
[4] BOR 9–10.
[5] BOR 10.
[6] BOR 10–11.
[7] BOR 11.

The State next claims, "The appellant relies on State v. Williams[8] … however in contrast to Williams the officers in this case had specific articulable suspicion to detain the defendant and his vehicle." BOR 11. Period. The State develops no argument to establish the supposed "contrast" to Williams. Mr. Duncan cites to Williams eight times in support of his argument on appeal (Brief of Appellant 10, 22, 13, 14, 15, 17, 18, 19) and again—as above, the State has not refuted appellant's position with legal argument and analysis.

The State next presents four lengthy quotations from cases, prefaced and interspersed with the following remarks:

> Neither Williams nor State v. Belieu … hold that use of drawn firearms convert a Terry stop into an arrest. (quotation)
>
> 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 [sic] one person had been shot in the head, probably is armed. (quotation)
>
> As was so aptly pointed by appellant citing State v. O'Cain … (quotation)
>
> The actions of the officers are supported by the facts and the law. Further as set out in State v. Randall … (quotation)
>
> 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

[8] State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).

> 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.

BOR 11–15.

As to "use of drawn firearms", both Williams and Belieu[9] state that the use of felony stop procedures with drawn guns *can* turn an investigative stop into an arrest. *See* Brief of Appellant 12, 17. In part, appellant argues that is what happened in this case. Brief of Appellant 15–20. The State presents no contrary authority or legal analysis to refute it.

Furthermore, simply saying the actions of the officers "are supported by the facts and the law" and are "justified" do not make the statements true. And the State offers no argument or legal analysis how fear and information in a dispatch report purportedly refute appellant's fundamental position—the stop was illegal because there was no reasonable and articulable suspicion of criminal conduct and the police intrusion was not otherwise supported by probable cause. Brief of Appellant 10–20.

Finally, the State presents a lengthy quotation[10] from State v. Snapp, a recent Washington Supreme Court case (April 5, 2012)[11].

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[9] State v. Belieu, 112 Wn.2d 587, 773 P.2d 46 (1989).
[10] The State fails to provide a page citation for the quoted material.
[11] 174 Wn.2d 177, 275 P.3d 289 (2012).

Without any discussion of the facts in Snapp or its legal analysis concerning Mr. Wright's particular issue, the State ends its argument on the Terry issue by simply speculating "[i]t is inconceivable that our Supreme [C]ourt 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." BOR 15–16.

The quoted material does not disclose that Mr. Wright (the defendant in the companion case to State v. Snapp[12]) was contesting a stop arising from a traffic infraction, as the State asserts in support of its speculation. Nor does the quoted material relay any of the facts involved in Mr. Wright's situation.

Further, the State makes no attempt to apply the legal authority cited in any of its quoted material from other cases to the facts of this case. And as noted above, the State has never "discussed" in a meaningful and relevant fashion the trial court's Findings of Fact/Conclusions of Law or its oral ruling in this Brief of Respondent. Simply inviting this Court to draw and make its own comparison of the facts and law involved in other

[12] Id.

cases with the facts in this case is an inexcusable lack of reasoned argument and insufficient to merit judicial consideration. Holland v. City of Tacoma, 90 Wn. App. at 538.

For the above reasons and those set forth in his opening brief, the stop of Mr. Duncan's car was not justified as a *Terry* stop because there was no reasonable and articulable suspicion of criminal conduct and the intrusion was no supported by probable cause. The subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980)). The firearm, bullets, shell casings and any other physical evidence obtained during the search of the vehicle, as well as any statements or testimony obtained from Mr. Duncan and/or the passengers in his car as a result of the search of the car must be suppressed and the matter remanded for retrial.

**2. The warrantless search of Mr. Duncan's car violated Const. article I, section 7 because Mr. Duncan had been arrested and was not able to access a weapon or destroy evidence, and the State has failed to establish any other exception to the search warrant requirement.**

Appellant incorporates by reference his argument on this issue. Brief of Appellant, 20–24; *see* RAP 18.14(c).

The Washington State Constitution does not permit warrantless vehicle searches after the arrest of a recent occupant of that vehicle, even when law enforcement has reasonable belief—or even probable cause to believe— that evidence relevant to the crime of arrest might be found in the vehicle. Snapp, 174 Wn.2d at 190–91, 195–97. Here, Mr. Duncan and his passengers were handcuffed and locked into the back seats of patrol cars when police searched his vehicle. 1 RP 71–72, 91–92. Because the warrantless vehicle search incident to their effective arrests was unlawful under Snapp, all evidence stemming from the search—including the firearm—must be suppressed.

The State dismisses the application of Snapp to this case, asserting Snapp, "and most of the cases were [sic] Snapp has subsequently been applied"—and also referencing State v. Ringer, State v. Valdez, State v.

Buelna Valdez [sic] and State v. Patton[13]—as involving "routine traffic stop" situations based on "relatively minor criminal act[s] that had occurred", and "standard" searches incident to arrest. BOR 16–17. The State cites no facts from the referenced cases to support its conclusory statements that (1) "this case is factually distinguishable from all of these cases to an extent that Snapp is truly inapplicable", (2) "the exigency of this case is factually distinguishable from the line [sic] of case [sic] such as Gant and Snapp", (3) "once again this case is distinguishable from Snapp and Patton, et al purely and simply on the facts", and (4) "this was not as stated above a "routine traffic stop." BOR 16–18. Nor does the State cite any legal authority *or* reasoned analysis to support its conclusory statement that the prohibition of Snapp does not apply to the case at hand. BOR 16–18.

The Snapp court acknowledges its holding "does not affect the application or availability of other recognized exceptions to the warrant requirement under Const. art. 1, § 7, *depending upon the situation in a particular case"*. Snapp, 174 Wn.2d at 196 n. 13 (emphasis added). The State bears the burden of establishing an exception to the warrant requirement applies. Id. at 188. Herein, the State claims the search

[13] Citations to these cases are found at BOR 16.

"would also fall under the exigent circumstance exception" to the search warrant requirement. It cites a case which provides a general description of the exception. The State makes no legal argument with supporting facts from the record to support its claim. BOR 18–19. Appellant briefed and supported its argument on this sub-issue with citation to relevant law and the record. Brief of Appellant 21–23. The State has not refuted the argument.

The State next claims both the "open view" and "plain view" exceptions to the warrant requirement apply. BOR 19–22.

Under the "open view" doctrine, an officer standing in a public place who observes contraband in a car has not "searched" the car for purposes of Const. art. I, § 7. The officer's right to *seize* the contraband, however, must be justified by a warrant or valid exception to the warrant requirements if the items are in a constitutionally protected place. Kennedy, 107 Wn.2d at 10; State v. Swetz, 160 Wn. App. 122, 134, 247 P.3d 802 (2011); State v. Lemus, 103 Wn. App. 94, 102, 11 P.3d 326 (2000). *See* State v. Ferro, 64 Wn. App. 181, 182, 824 P.2d 500 (1992) ("Absent a warrant, the observation of contraband is insufficient to justify intrusion into a constitutionally protected area for the purpose of examining more closely, or seizing the evidence which has been

observed."), *rev. denied*, 119 Wn.2d 1005 (1992). Here, Snapp controls—the car could not be entered and the gun seized without a warrant or a valid search warrant exception. The officers did not obtain a search warrant. And as discussed in the initial brief, there were no exigent circumstances making it impractical for police to obtain a warrant prior to the search of the car. Brief of Appellant 21–23. The "open view" doctrine does not apply to the facts herein.

The "plain view" doctrine allows officers to seize an item without a warrant if, *while acting in the scope of an otherwise authorized search*, they acquire probable cause to believe that the item is evidence of a crime. State v. Johnson, 104 Wn. App. 489, 501, 17 P.3d 3 (2001) (emphasis added). As set forth above, the officers had no authority to enter the car under Snapp and there were no exigent circumstances to otherwise avoid the warrant requirement. The "plain view" doctrine likewise does not apply to the facts herein.

There is a more fundamental problem in that the "open view" and "plain view" doctrines should not even be considered by this Court. The State acknowledges the doctrines were not argued to the trial court. BOR 19. RAP 2.5(a) provides, "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record

has been sufficiently developed to fairly consider the ground." "We may affirm the trial court on an alternative theory, even if not relied on below, if it is established by the pleadings and supported by proof." State v. Flowers, 57 Wn. App. 636, 620-41, 789 P.2d 333 (1990) (probable cause to arrest plus exigent circumstances supported warrantless entry). This Court, in State v. Sondergaard, stated, "[W]e may affirm a trial court's decision on a different ground *if the record is sufficiently developed to consider the ground fairly*." 86 Wn. App. 656, 657–58, 988 P.2d 351 (1997) (emphasis added), *rev. denied,* 133 Wn.2d 1030, 950 P.2d 477 (1998).

Here, consideration of the two doctrines requires the establishment of at least two basic facts: where the officer was physically when he saw the gun and when in the sequence of events he saw it. Appellant submits the record below is not sufficiently developed to establish these facts.

According to the trial court's findings of fact, officers found the gun "during the protective, … by the front seat, between the door and the seat. CP 205 (¶ 12). Officers performed the "sweep … of the interior of the car … to ensure that the[y] were not going to be towing a car with a handgun inside … ." Id. In the conclusions of law, the court struck language as follows: "Second, the presence of an unsecured firearm ~~which~~

~~was visible from outside the vehicle~~ … ." CP 207 (¶ 6). It therefore appears the gun was not visible or seen before the officers began searching the interior of the car.

Testimony from the suppression hearing suggests one officer did not see the gun before it was found. Officer Ely, one of the two responding officers testified:

> [OFFICER ELY]: [W]e did a frisk of the … interior [and] locate[d] a handgun of [sic] the front passenger seat between the door and the seat.
> …
> [PROSECUTOR]: So at what point in time did you find the handgun?
> [OFFICER ELY]: It was shortly after we observed the shell casings on the floorboard after making sure the car was cleared.

2-14-11 RP 72. The use of the royal "we" does not establish that Officer Ely in fact saw the gun before it was found.

The other responding officer, Officer Sherzinger, apparently saw the gun only after opening the door[14] to begin searching the interior. The officer testified:

> [PROSECUTOR]: So once you had her in the back seat of your patrol car, did you do anything other -- what else did you do with regard to the suspect vehicle?
> [OFFICER SCHERZINGER]: Uh, I helped in doing a protective sweep of it.

[14] Appellant's fundamental position is that the opening of the door is impermissible under Snapp.

> [PROSECUTOR]: Okay. And did you observe -- did you observe anything else on the vehicle or about the vehicle before you were inside the cab of the vehicle?
> [OFFICER SCHERZINGER]: I did observe a handgun and shell casings on the floorboard.
> [PROSECUTOR]: Okay. Where did you observe that from?
> [OFFICER SCHERZINGER]: Outside the driver's side door.

2-14-11 RP 93.

The officer testified further:

> [OFFICER SCHERZINGER]: Uhm, well, that was me after I saw further. But, uhm, that's when I located the pistol on the floorboard of the passenger side.
> [PROSECUTOR]: And you were standing outside the vehicle at the time?
> [OFFICER SCHERZINGER]: That is correct.

2-14-11 RP 97.

On cross-examination, Officer Sherzinger clarified:

> [DEFENSE ATTORNEY]: Okay. Now, in your testimony earlier under direct examination, you testified that you had observed the gun in the car from the driver side. You said that --
> [OFFICER SCHERZINGER]: That is correct. That was from my memory, yes.

2-14-11 RP 99.

> [DEFENSE ATTORNEY]: When you located the gun, you testified earlier that you were standing outside the car; is that correct?
> [OFFICER SCHERZINGER]: That's correct.
> [DEFENSE ATTORNEY]: Okay. But you actually opened the door on the front passenger side door to look inside the car; is that correct?
> [OFFICER SCHERZINGER]: That's correct.

2-14-11 RP 101–02.

Thus, the trial testimony appears to corroborate the written findings. If so, the "open view" and "plain view" doctrines do not apply as discussed *supra*. If the testimony instead is unclear—as well may be the case since the two doctrines were not argued to the trial court—then the record is insufficiently developed and the court should refuse to consider the theories being argued for the first time on appeal. State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997); In re Detention of Ambers, 160 Wn.2d 543, 558 n.6, 158 P.3d 1144 (2007); Sondergaard, 86 Wn. App. 656, 657–58.

Here, Mr. Duncan and his passengers were handcuffed and locked into the back seats of patrol cars when police searched his vehicle. Under Snapp and Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the warrantless search incident to their effective arrest was unjustified. Since the State has failed to establish any other exception to the search warrant requirement, all fruits of the illegal search of the car and trunk must be suppressed and the matter remanded for retrial.

**3. Appellant accepts the State's concession that community custody was imposed without authority and must be stricken from the Judgment and Sentence.**

The State concedes this issue. BOR 1 at Answer 3, 22–23. The complete remedy is to reverse the imposition of 12 months community custody on Count 7 (CP 180), and remand for striking of the special finding at ¶ 2.2 (CP 178) and the statutorily unsupported term of community custody on Count 7.

**4. The State appears to concede the findings regarding payment of legal financial obligations are unsupported, but the parties disagree on the remedy required by law.**

As an initial matter and contrary to the State's position, (1) Mr. Duncan is appealing factual findings made by the trial court in its final Judgment and Sentence. Thus his appeal is a matter of right under RAP 2.2(1) and does not implicate RAP 2.5(a).

Furthermore, (2) the trial court made the findings that Mr. Duncan has the means to pay the assessed legal financial obligations of $2,905.54 as well as costs of incarceration and medical care, but there is no evidence

in the record to support the findings.[15] CP 179, 181; Vol. 7 (4/29/11) RP 987–94. Despite the underlying premise of the State's position, Mr. Duncan is not challenging the *imposition* of these costs. He is disputing the entry of factual findings— made without supporting evidence—that he has the present or future ability to pay these costs. Mr. Duncan is most certainly an aggrieved party, and the lack of evidence is not "purely academic" or moot because this court can "provide effective relief" by striking the findings as clearly erroneous. State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011); *see* Yacobellis v. Bellingham, 55 Wn. App. 706, 709, 780 P.2d 272 (1989), *rev. denied*, 114 Wn.2d 1002 (1990). *Cf.* BOR 4–7. *Cf.* BOR 23.

Appellant maintains the trial court made findings unsupported by any evidence. State v. Bertrand, 165 Wn. App. at 405, says the findings must be stricken, and this remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition

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[15] Nor is the boilerplate language at ¶2.7 (CP 179) sufficient "evidence" of actual consideration by the trial court. The Court in Bertrand rejected such a notion:

> The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, *the record* before us on appeal *contains no evidence to support the trial court's finding number 2.5* that Bertrand has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding number 2.5 was clearly erroneous.

Bertrand, 165 Wn. App. 393, 267 P.3d at 517 (footnote omitted, emphasis added).

of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). Counsel is aware of no authority holding that it is it appropriate to send a finding without support in the record back to a trial court for purposes of "fixing" it with the taking of new evidence. *Cf.* State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

The State suggests the constitutional and case law requirements that a judicial finding must be supported by substantial evidence does not apply where a defendant was allegedly unruly. BOR 24–25. The State defines the term but cites no authority holding that the doctrine of "invited error" applies to a court's factual finding that an offender has or does not

have the ability to pay legal financial obligations. Argument for which no authority is cited nor supported may not be considered on appeal. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 717, 846 P.2d 550 (1993). The failure to cite authority constitutes a concession that the argument lacks merit. State v. McNeair, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997).

This Court should decline to consider the State's unsupported and completely undeveloped argument. Remand for introduction of new evidence is improper. Souza, 60 Wn. App. at 541. "The meaningful time to examine [Mr. Duncan's] ability to pay is when the government seeks to collect the obligation." Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). If and when the Department of Corrections or the county clerk decides to enforce collection of costs will be the meaningful time to examine Mr. Duncan's ability to pay. Until then, the issue is controlled by settled law and the unsupported findings should be stricken. Bertrand, 165 Wn. App. at 405.

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, the matter should be remanded for retrial after suppression of all fruits of the illegal stop and warrantless search or alternatively for resentencing

Respectfully submitted on December 2, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 2, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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