COA NO. 44723-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK YOUELL,

Appellant.

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

The Honorable Bryan E. Chushcoff, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to suppress evidence. CP 39-40.[1]

2. Appellant was seized by police in violation of Article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution.

3. The court erred in entering the following CrR 3.6 findings of fact:

a. That portion of Finding of Fact 4 stating "foot traffic in this area at that time of night was minimal to nonexistent." CP 38.

b. That portion of Finding of Fact 4 stating "The defendant appeared to substantially match the suspect description[.]" CP 38.

c. That portion of Finding of Fact 5 stating "The defendant responded that he was just coming from a store at East 56th Street and McKinley Avenue (the location of the reported robbery)." CP 38.

4. The court erred in entering the following CrR 3.6 conclusions of law:

[1] The trial court's written "Findings of Fact and Conclusions of Law for CrR 3.6 Hearing" are attached as appendix A.

a. "Here, the officers did not seize the defendant until they placed him in handcuffs. Prior to that, the officers had engaged the defendant in a voluntary and consensual social contact." CP 39 (CL1).

b. "When the officers handcuffed the defendant, they had a reasonable suspicion of criminal activity justifying the detention, i.e., his possible involvement in the reported armed robbery and his possession of a firearm. The reasonable suspicion of his involvement in the reported armed robbery stemmed from the totality of the circumstances including but not limited to his proximity both temporally and geographically to the reported robbery, his substantially matching the description of the suspect, and his potential possession of a firearm. The reasonable suspicion of his potential possession of a firearm stemmed from the totality of circumstances including but not limited to his excited reaction to being asked to consent to a frisk for weapons." CP 39 (CL 2).

c. "Reasonable suspicion supporting a *Terry*[2] stop existed no later than when the defendant admitted being at the scene where the robbery reportedly occurred." CP 40 (CL 3).

d. "The officers lawfully frisked the defendant for a weapon after his detention. The officers had a reasonable concern for their safety

---

[2] Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

given that they were responding to a reported armed robbery and given the defendant's telling responses when he initially denied possessing a weapon but then began to cry and repeatedly say 'oh my god' after consenting to a frisk of his person for weapons." CP 40 (CL 4).

5. The court erred when it found appellant has the current or future ability to pay legal financial obligations. CP 47.

Issues Pertaining to Assignments of Error

1. Whether police seized appellant without a reasonable suspicion that he had engaged in criminal activity, requiring suppression of the evidence recovered as a result of the seizure?

2. Whether the court erred when it found, absent an inquiry into the appellant's individual circumstances, a current or future ability to pay legal financial obligations?

B. STATEMENT OF THE CASE

The State charged Frank Youell with first degree unlawful possession of a firearm. CP 1. The defense moved to suppress evidence of the firearm, contending Youell was unconstitutionally seized and searched. CP 14-24. Officer Wolfe testified at a CrR 3.6 hearing. 1RP[3]

[3] The verbatim report of proceedings is referenced as follows: 1RP – 12/11/12; 2RP – 4/4/13.

6-23. The court found his testimony credible. CP 39 (FF 9). The following facts are taken from his testimony.

Officers Wolfe and Meeds of the Tacoma Police Department were on patrol in a marked police car. 1RP 6-8. Both officers were in uniform. 1RP 8. Dispatch relayed a 911 caller's report that that she had been robbed at gunpoint by an unknown black, light skinned or Indian male in the area of 56th and McKinley. 1RP 8-10. The female identified herself as Sheila Jones. 1RP 10. Jones reported the suspect was wearing a black puffy coat and gray pants.[4] 1RP 9, 21-22. The 911 call was disconnected. 1RP 8-9, 11.

At about 12:42 a.m., Officers Wolfe and Meeds arrived at 56th and McKinley but did not locate a possible suspect. 1RP 11-13. About five minutes later, they saw a man later identified as Youell walking at 52nd Street and McKinley Avenue. 1RP 11-12. The area was residential. 1RP 12-13. Officer Wolfe considered foot traffic in this area at that time of night to be "unusual." 1RP 13. The man was wearing a black coat and blue jeans. 1RP 12. He appeared to be of possibly Native American descent. 1RP 12.

[4] Officer Wolfe initially testified that the suspect was reported to be wearing blue jeans, but it was later clarified the suspect was reported to be wearing gray pants. 1RP 9, 21-22.

The two officers pulled up behind Youell in their marked patrol car and illuminated him with their spotlight. 1RP 12-13. The two officers got out of the car and asked him what he was doing. 1RP 14. Youell said he was "walking to the corner store at 56th and McKinley." 1RP 14. He also said the store was closed and so was walking over to 40th and McKinley where there was a 7/11 open 24 hours. 1RP 14.

The officer asked for identification. 1RP 15. Youell complied. 1RP 15. Youell took hold of his identification and started writing it down in his notebook. 1RP 15. Officer Wolfe retained Youell's identification as Officer Meeds asked Youell what he was doing in the area. 1RP 15-16, 19. Officer Meeds told Youell why the officers were in the area. 1RP 19. Officer Meeds asked if he was willing to consent to a frisk. 1RP 19. Youell said "sure." 1RP 19.

Officer Meeds asked if he had any weapons on him. 1RP 20. Youell said no. 1RP 20. Officer Wolfe then began to frisk Youell. 1RP 20. Youell started looking around and weeping, saying "oh my god, oh my god." 1RP 20. Officer Wolfe interpreted this reaction as Youell trying to hide "something." 1RP 20. At this point the officer detained Youell in handcuffs. 1RP 20-21. Prior to that time, Officer Wolfe had not given Youell any "orders." 1RP 23. Officer Meeds frisked Youell's beltline and found a firearm. 1RP 21.

Recordings of the 911 call and the dispatch were admitted into evidence, from which it was gleaned that Jones reported the assailant was a light-skinned African American or Indian or Asian but that she was not sure. 1RP 23-24, 39-40.

Youell also testified at the CrR 3.6 hearing. 1RP 25-33. Youell, who is Native American, maintained he was walking down the street ahead of his friends. 1RP 26. He wore a black jacket and dark blue jeans. 1RP 28. The police flashed their light at his friends. 1RP 26. Youell crossed the street. 1RP 26. The police sped up to catch up with him. 1RP 26.[5] The police flashed their light at him and he turned around. 1RP 26. The officers got out of the car and told him to stop. 1RP 27. He stopped. 1RP 27. He did not give permission to search his person but they placed him in handcuffs and searched him anyway. 1RP 27.

The court denied Youell's motion to suppress, concluding police lawfully engaged Youell and had a reasonable suspicion of criminal activity by the time he was seized. CP 39-40. Following a bench trial on stipulated facts, the court found Youell guilty of unlawful possession of a firearm and imposed a 42 month sentence. CP 42-44, 50; 1RP 49. This appeal follows. CP 73-86.

---

[5] With reference to this point in Youell's testimony, the court stated, "I don't think there is anything really different between what the officers testified to – Officer Wolfe and what Mr. Youell tells us." 1RP 40-41.

C. ARGUMENT

1. THE POLICE UNLAWFULLY SEIZED YOUELL IN VIOLATION OF ARTICLE I, SECTION 7 AND THE FOURTH AMENDMENT.

What started out as a social contact turned into a seizure without reasonable suspicion that Youell had committed a crime. The evidence obtained as a result of the unlawful seizure, including the firearm, must be suppressed.

a. Standard of Review

Challenged findings entered after a CrR 3.6 suppression hearing are reviewed for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists where there is sufficient quantity of evidence in record to persuade fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 644. Whether substantial evidence supports a finding is a question of law reviewed de novo. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Unchallenged findings are accepted as verities on appeal. Hill, 123 Wn.2d at 644.

The trial court's conclusions of law and whether the trial court's findings of fact support its conclusions of law on a suppression motion are legal questions reviewed de novo. State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001); State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). The ultimate determination of what constitutes a seizure is a

question of law reviewed de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). Whether a stop is supported by reasonable suspicion is likewise reviewed de novo. Ornelas v. United States, 517 U.S. 690, 696-97, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

b. The Seizure Occurred When The Officers Initially Questioned Youell Or, At The Latest, When They Asked To Frisk Him.

The Fourth Amendment to the United States Constitution and Article I section 7 of the Washington Constitution prohibit unlawful searches and seizures. Article I, section 7 provides greater protection than the Fourth Amendment because it focuses on the disturbance of private affairs rather than unreasonable searches and seizures. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009).

As a general rule, a warrantless seizure is per se unlawful under both the Fourth Amendment and article I, section 7 unless it falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). One exception to the warrant requirement occurs where a police officer makes an investigatory stop, commonly known as a Terry stop. Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010).

An investigative detention constitutes a seizure. Armenta, 134 Wn.2d at 10. A seizure occurs under article I, section 7 when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." Harrington, 167 Wn.2d at 663 (quoting State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)); see also Armenta, 134 Wn.2d at 10 (a person is "seized" under the Fourth Amendment if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.") (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980)). "The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained." Harrington, 167 Wn.2d at 663. An encounter between a citizen and the police is not consensual unless a reasonable person under the circumstances would feel free to walk away. Id.

The trial court concluded "the officers did not seize the defendant until they placed him in handcuffs. Prior to that, the officers had engaged the defendant in a voluntary and consensual contact." CP 39 (CL 1). This conclusion of law is wrong. Officers seized Youell before they placed him in handcuffs. The two officers seized Youell at the point when they

first asked him what he was doing. 1RP 14. In the alternative, officers seized Youell at the latest when they asked to frisk him. 1RP 19.

"[A] series of police actions may meet constitutional muster when each action is viewed individually, but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively." Harrington, 167 Wn.2d at 668. The following combination circumstances culminated in a seizure: (1) police pulled up behind Youell in a marked patrol car while he walked on foot; (2) police used a spotlight light to illuminate Youell; (3) two uniformed officers exited the car and walked up to Youell; and (4) the officers asked Youell what he was doing. 1RP 11-14. This combination of circumstances constituted a display of authority by the officers. A reasonable person in Youell's position would not believe he was free to leave. Youell was seized at that point.

It is true that a shined spotlight by itself does not constitute a seizure. State v. Young, 135 Wn.2d 498, 515, 957 P.2d 681 (1998) ("The spotlight alone, without additional indicia of authority, did not violate article I, section 7."). Progressive intrusions, however, may culminate in a seizure. Harrington, 167 Wn.2d at 669-70. In Youell's case, not one but two uniformed officers approached Youell after pulling up behind him in their marked patrol car and fixing a spotlight on him. The presence of

more than one officer contributed to the display of authority and eventual seizure. Id. at 666.

The seizure materialized when the two officers asked Youell what he was doing. In State v. Gantt, a seizure occurred when an officer pulled behind a person's van, activated his emergency lights, and asked the person what he was doing. State v. Gantt, 163 Wn. App. 133, 135, 257 P.3d 682 (2011), review denied, 173 Wn.2d 1011, 268 P.3d 943 (2012). The same kinds of factors are present in Youell's case. Police pulled up behind Youell in their patrol car, shined their spotlight on him, and two officers approached and asked Youell what he was doing. Under those circumstances, a reasonable person would not feel free to walk away.

A mere social contact between a police officer and a citizen "does not suggest an investigative component." Harrington, 167 Wn.2d at 664. As in Gantt, the police introduced an investigative component to the interaction by asking Youell what he was doing. Gantt, 163 Wn. App. at 142. The seizure occurred when the officers initially asked Youell what he was doing.

But even if the seizure did not start at that point, at the latest the seizure occurred when officers asked to frisk Youell. 1RP 19. "Requesting to frisk is inconsistent with a mere social contact." Harrington, 167 Wn.2d at 669. In addition, Officer Wolfe's retention of

Youell's identification while Officer Meeds continued to question Youell about what he was doing contributed to the circumstances supporting a seizure. 1RP 15-16; see State v. Crane, 105 Wn. App. 301, 310-11, 19 P.3d 1100 (2001) (retaining suspect's identification to run warrants check constitutes seizure), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). Youell has satisfied his burden of showing a seizure occurred.

c. Police Did Not Have Reasonable Suspicion That Youell Was Involved In Criminal Activity When They Seized Him.

If a warrantless seizure occurred, the State has the burden of justifying it. Gantt, 163 Wn. App. at 138. "The State must show by clear and convincing evidence that the Terry stop was justified." Doughty, 170 Wn.2d at 62.

A police officer may conduct an investigatory stop if the officer has a reasonable suspicion that there is a substantial possibility that criminal activity has occurred based on "specific and articulable facts" and the rational inferences from those facts. Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); Doughty, 170 Wn.2d at 63. To pass constitutional muster, the officer's suspicion must be well-founded (i.e., based on specific and articulable facts that the individual has committed a crime) and reasonable. Doughty, 170 Wn.2d at 63. A Terry

stop must be justified at its inception. Armenta, 134 Wn.2d at 15. "The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Jones, 117 Wn. App. 721, 728, 72 P.3d 1110 (2003), review denied, 151 Wn.2d 1006 (2004).

Because there was a warrantless seizure in this case, that seizure is justified only if police had reasonable suspicion of Youell's involvement in criminal activity. The court concluded "[r]easonable suspicion supporting a *Terry* stop existed no later than when the defendant admitted being at the scene where the robbery reportedly occurred." CP 40 (CL 3). Assuming substantial evidence shows Youell admitted to being at the scene of the robbery, this conclusion of law is flawed because Youell was seized without reasonable suspicion before the police learned of the admission. He was seized when police initially questioned him.

What the police learned after the unlawful seizure took place cannot be used to retroactively justify the seizure. State v. Mendez, 137 Wn.2d 208, 224, 970 P.2d 722 (1999), abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Evidence derived from an unlawful search or seizure, including inculpatory statements of the defendant, must be suppressed under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S.

471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Youell was unlawfully seized without reasonable suspicion at the moment police asked him what he was doing. What he said in response is fruit of the poisonous tree and cannot be used to support the illegal seizure that had already occurred before he answered.

Omitting Youell's admission of being at the location where the crime occurred, the remaining circumstances include Youell's walking late at night in a residential area four blocks from where the reported crime occurred five minutes before and his matching a vague description of the suspect to an extent. These circumstances are insufficient to support a reasonable suspicion that Youell was the person that assailed Jones.

The court found "foot traffic in this area at that time of night was minimal to nonexistent." CP 38 (FF 4). Officer Wolfe testified that it was "unusual," not minimal to non-existent. 1RP 13. Regardless, this was a residential area and, as such, people who live there could be expected to be out walking late on occasion for any number of innocuous reasons. The happenstance of being four blocks from a crime scene does not equate to a well-founded suspicion that Youell was the assailant. Facts justifying a Terry stop must be more consistent with criminal than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

Whether a person fits the description of a suspect is one factor that can support reasonable suspicion. State v. Randall, 73 Wn. App. 225, 230-31, 868 P.2d 207 (1994). But as a matter of common sense, the reasonableness of that factor will depend on how specific the description is to begin with and the degree to which a person matches the description.

The court here found "[t]he defendant appeared to substantially match the suspect description[.] CP 38 (FF 4). Youell did not "substantially" match the suspect description. First, the court found that Youell only "possibly" appeared to be of Native American descent while remarking the description of the suspect's race was "a little vague." CP 38 (FF 4); 1RP 40. Indeed, the suspect's race was variously described as black, light skinned, Asian or Indian male. 1RP 9-10, 23-24, 39-40.

Second, Youell wore blue jeans, not gray pants. 1RP 9, 21-22, 28. That discrepancy in clothing is significant given the vagueness of the suspect's description: black, light skinned, Asian or Indian male wearing a black puffy coat and gray pants. 1RP 8-10, 21-24, 39-40.

Even if Youell could fairly be said to "substantially match" the description, the description itself is so general that it does not single out Youell in any meaningful sense so as to give rise to reasonable suspicion that he was the assailant. See United States v. Brown, 448 F.3d 239, 247-248 (3rd Cir. 2006) (description of robbery suspects as "African-American

males between 15 and 20 years of age, wearing dark, hooded sweatshirts and running south on 22nd Street, where one male was 5'8" and the other was 6'" failed the Fourth Amendment's "demand for specificity" — "reasonable suspicion cannot be met by a description that paints with this broad of a brush.").

In the event this Court concludes Youell was not seized until police asked to frisk him, then it is necessary to address the court's finding that "[t]he defendant responded that he was just coming from a store at East 56th Street and McKinley Avenue (the location of the reported robbery)." CP 38 (FF 5). Officer Wolfe actually testified that Youell said he was "*walking to* the corner store at 56th and McKinley," not from that location. 1RP 14 (emphasis added). Youell also said the store was closed and so was walking over to 40th and McKinley where there was a 7/11 open 24 hours. 1RP 14. The testimony is confusing, but the transcript shows Youell said he was *walking to* the location where the robbery took place.

Even if Officer Wolfe's confusing testimony on this point can fairly be reconciled to show Youell admitted to coming from 56th and McKinley, the finding is still improper because the evidence does not show that Youell said he was "just" coming from that location. 1RP 14. No time frame was in fact given. 1RP 14. He could have been at that

location and left before the crime even occurred because the time of when he left was unknown.

Even if the evidence supports the finding, the fact remains that Youell was approached five minutes after the crime occurred, by which point Youell was four blocks away from the crime location. 1RP 11-12. Yet there is no evidence that Youell was sweating or breathing heavily when contacted by police, which a reasonable officer would expect to observe if Youell had just traveled a distance of four blocks in five minutes. Taking the totality of circumstances known to the officers into account, a well-founded suspicion that Youell was the one who assailed Jones four blocks away is lacking.

Conclusion of law 2 is flawed because, as argued above, officers did not have reasonable suspicion when they seized Youell — a seizure which took place before Youell was handcuffed and before he gave an excited reaction to being asked to consent to a frisk. CP 39 (CL 2). Conclusion of law 4 is flawed because it is predicated on the false premise that police had reasonable suspicion at the time they asked to frisk. CP 40 (CL 4). Youell was unlawfully seized without reasonable suspicion before the frisk took place. The initial stop must be justified in order for a subsequent frisk to be lawful. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

The trial court did not determine whether Youell's consent to the frisk was voluntary. Youell's consent to being frisked, even if voluntary, was tainted by the prior illegal detention because the consent immediately followed the illegal seizure without any intervening circumstances. Armenta, 134 Wn.2d at 17.

"'The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.'" State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009) (quoting Duncan, 146 Wn.2d at 176). "If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality." Harrington, 167 Wn.2d at 664. The firearm recovered as a result of the illegal seizure must therefore be suppressed. The conviction must be reversed and the charge dismissed with prejudice because there is insufficient evidence to prove guilt beyond a reasonable doubt once the unlawfully obtained evidence is excluded. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (same).

2. THE COURT ERRED WHEN IT FOUND YOUELL HAD THE PRESENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay legal financial obligations, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). The record does not reflect the requisite consideration here. The court's finding on Youell's ability to pay must therefore be stricken. CP 47.

The court ordered Youell to pay a total of $1,300 in legal financial obligations, broken down as follows: (1) $500 for court-appointed attorney and defense costs; (2) $200 criminal filing fee; (3) $500 crime victim assessment; and (4) $100 DNA database fee. CP 48; 2RP 11. The $500 fee for appointed counsel and defense costs is discretionary. RCW 10.01.160.

RCW 10.01.160(3) provides "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." This Court reviews the

trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04.

In the judgment and sentence, the following pre-printed, generic language appears:

> **2.5 Ability To Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 47.

Youell challenges this finding on the ground that the court did not actually consider his individual financial resources and the burden of imposing such obligations on him. 2RP 11. While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404.

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" that Youell had the present or future ability to pay his legal financial obligations. Cf. State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991) (statement in

presentence report that Baldwin was employable showed sentencing court properly considered burden of costs under RCW 10.01.160(3)).

The court did not conduct the analysis required by Bertrand. Accordingly, the court's determination that Youell had the present or future ability to pay the legal financial obligations was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405. "[T]he inquiry is simply whether there is evidence to support the finding actually entered." State v. Calvin, __Wn. App.__, 302 P.3d 509, 521 (2013). The remedy is remand for the trial court to strike the finding and the imposition of discretionary court costs. Calvin, 302 P.3d at 522. The $500 fee for appointed counsel and defense costs is discretionary and should therefore be stricken from Youell's judgment and sentence.

This argument may be raised for the first time on appeal because illegal or erroneous sentences may be challenged for the first time on appeal. Id. at 521 & n.2 (2013) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A panel of Division Two has reached a contrary conclusion. State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), review granted, __P.3d__ (Oct. 02, 2013). The Supreme Court has accepted review of the issue in Blazina.

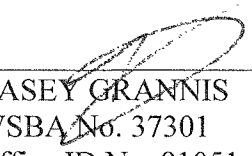
D. CONCLUSION

For the reasons set forth, Youell respectfully requests reversal of the conviction and dismissal of the charge with prejudice. In the event this Court declines to reverse the conviction, the Court should direct the trial court to strike the finding and the imposition of discretionary court costs.

DATED this 14th day of October 2013

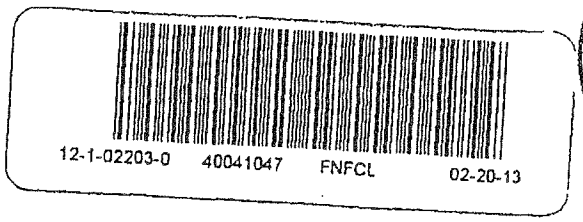
Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. FRANK EARL YOUELL, Defendant.	CAUSE NO. 12-1-02203-0 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR ~~BENCH TRIAL~~ CrR 3.6 Hearing

This matter came before the Honorable Bryan Chushcoff for a CrR 3.6 hearing on the 27th day of December, 2012. The State was represented by DPA Jesse Williams and the defendant was represented by Jon C. Iverson. The court, having taken evidence, orally pronounced findings and conclusion in support of its ruling denying the defendant's motion to suppress evidence. The court now sets forth the following written findings of fact and conclusions of law as to its rulings.

FINDINGS OF FACT

1. On June 14, 2012, at approximately 12:41 a.m., a female called 911 to report that she had just been robbed at gun point by an unknown male who she described as black or Native American. The female reported that the suspect was wearing a black jacket and grey pants. The female also reported that the robbery had just occurred in the area of East

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

56th Street and McKinley Avenue in the City of Tacoma. The female identified herself as Shelia Jones and identified the cell phone number that she was calling from.

2. The 911 phone call from Ms. Jones was inexplicably disconnected. She called back approximately 2 minutes later to report, "I'm sorry he just brought it back to me now." She affirmed that she did not know the suspect and the call then again inexplicably disconnected.

3. Officers with the Tacoma Police Department (TPD) responded to the location of the reported robbery but were unable to locate Ms. Jones or a possible suspect.

4. TPD Officers Zachery Wolfe and Tyler Meeds observed the defendant walking at East 52nd Street and McKinley Avenue. The area was residential, ~~the defendant was alone,~~ and foot traffic in this area at that time of night was minimal to nonexistent. The defendant appeared to substantially match the suspect description: He was wearing a puffy black jacket and blue jeans and appeared to be of possibly Native American descent.

5. The officers approached the defendant on foot and engaged him in casual conversation. They asked what he was doing in the area. The defendant responded that he was just coming from a store at East 56th Street and McKinley Avenue (the location of the reported robbery).

6. One officer asked if the defendant would voluntarily provide identification and he did.

7. An officer asked the defendant is he had any weapons on him and he said no. The officer asked if the defendant would voluntarily consent to a frisk of his person for weapons and the defendant then said, "sure." The defendant then began looking around, started to cry, and whispered, "oh my god, oh my god."

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

8. At this point, the officers suspected that the defendant had a weapon on him and detained him in handcuffs. Officer Meeds then frisked the defendant and found in his front waistband a .38 caliber handgun. A records check confirmed that the defendant was a convicted felon.

9. Officer Wolfe testified at the CrR 3.6 hearing before this court and the court finds his testimony credible.

CONCLUSIONS OF LAW

1. "A seizure occurs when an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *State* v. *Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Here, the officers did not seize the defendant until they placed him in handcuffs. Prior to that, the officers had engaged the defendant in a voluntary and consensual social contact.

2. When the officers handcuffed the defendant, they had a reasonable suspicion of criminal activity justifying the detention, i.e., his possible involvement in the reported armed robbery and his possession of a firearm. The reasonable suspicion of his involvement in the reported armed robbery stemmed from the totality of the circumstances including but not limited to his proximity both temporally and geographically to the reported robbery, his substantially matching the description of the suspect, and his potential possession of a firearm. The reasonable suspicion of his potential possession of a firearm stemmed from the totality of the circumstances including but not limited his excited reaction to being asked to consent to a frisk for weapons.

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-740

3. Reasonable suspicion supporting a *Terry*[1] stop existed no later than when the defendant admitted to being at the scene where the robbery reportedly occurred.

4. The officers lawfully frisked the defendant for a weapon after his detention. The officers had a reasonable concern for their safety given that they were responding to a reported armed robbery and given the defendant's telling responses when he initially denied possessing a weapon but then began to cry and repeatedly say "oh my god" after consenting to a frisk of his person for weapons.

//

//

//

//

//

//

//

//

//

//

//

//

//

//

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

5. The officers lawfully discovered the revolver on the defendant's person. His motion to suppress, filed on November 20. 2012, should be denied.

DONE IN OPEN COURT this 20th day of February, 2013.

Judge Bryan Chushcoff

Presented by:

Jesse Williams
Deputy Prosecuting Attorney
WSB# 35543

FEB 20 2013
Pierce County, Clerk
By DEPUTY

Approved as to Form:

Jon Iverson
Attorney for Defendant
WSB# 20153

Frank Earl Youell
Defendant

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44723-I-II
	)	
FRANK YOUELL,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FRANK YOUELL
DOC NO. 321976
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF OCTOBER 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

October 18, 2013 - 1:57 PM

Transmittal Letter

Document Uploaded: 447291-Appellant's Brief.pdf

Case Name: Frank Youell
Court of Appeals Case Number: 44729-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**

A copy of this document has been emailed to the following addresses:
pcpatcecf@co.pierce.wa.us