NO. 46168-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES THOMAS SORENSEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-01268-3

BRIEF OF RESPONDENT

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SERVICE		
	Jodi R. Backlund Po Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 9, 2015, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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2. Whether the trial court properly refused to suppress where the trooper was justified in stopping Sorensen by both the community caretaking function and by Sorensen's apparent commission of a traffic infraction in the trooper's presence, and where established precedent, including that of the Washington Supreme Court, holds that the legality of the initial detention is irrelevant in an eluding case?

3. Whether Sorensen's claims with regard to his ability to pay and the imposition of costs for appointed counsel are premature and without merit?

4. The State concedes that the imposition of costs for the expert witness fund should be stricken.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Charles Thomas Sorensen was charged by information filed in Kitsap County Superior Court with felony DUI, attempting to elude a pursuing police vehicle, second-degree driving with license suspended or revoked, operating a motor vehicle without an ignition interlock, and obstructing a law enforcement officer. CP 174-78.

Sorensen moved to suppress, arguing that the trooper lacked sufficient reasonable suspicion to detain Sorensen after a citizen reported to 911 that Sorensen had blown through a stop sign and driven his truck into a ditch. CP 2-6. He further argued that as a result, all evidence thereafter obtained should be suppressed. CP 7. After a hearing, the trial court agreed that there were insufficient facts from which the officer could conclude that Sorenson's vehicle had been involved in an accident. CP 252. It nevertheless concluded that probable cause existed to arrest Sorenson for violating the eluding statute. CP 253. Citing controlling case law, the court concluded that the issue under the eluding statute was the defendant's behavior after the attempted stop by the police, not whether the police had authority to make the stop. CP 254. Reviewing the evidence, the court concluded that all three elements of eluding were met. CP 255-56. The court therefore denied Sorensen's suppression motion. CP 256

The case then proceeded to a trial on stipulated facts. CP 257. The trial court found Sorenson guilty as charged on all counts. CP 264. The trial court imposed an exceptional total sentence of 72 months based on Sorensen's offender score of 13 and his rapid recidivism. CP 302-03.

B. FACTS

1. CrR 3.6 hearing.

At 9:50 p.m., Washington State Patrol Trooper Joren Barraclough received at dispatch to a one-vehicle collision, injury unknown at Sedgwick and Banner Roads. RP 8.[1] He had no further information about the incident. RP 16.

It took him 10 minutes to get to the scene. RP 9. Although there were some lights, the area was generally pretty dark. RP 9, 43. As Barraclough came up the hill on Sedgwick toward Banner, he saw a pickup facing north in the westbound lane. RP 9. The front tires were off the road in the ditch. RP 9. The bed of the truck was blocking the lane. RP 9. The truck was not moving. RP 14, 30.

Barraclough then saw the truck back up and head westbound, toward him. RP 9. There were branches and leaves stuck to the truck's front bumper. RP 9.

As soon as the truck passed him, Barraclough made a U-turn and

[1] All references are to the report of the CrR 3.6 hearing held on March 5, 2014.

turned on his lights in an attempt to stop the truck. RP 10. Barraclough decided to stop the truck because "The vehicle had been traveling with its wheels off the roadway and also been blocking the roadway. It was also in the area that the collision had been dispatched, and I wanted to check and make sure that the driver was okay, that there was no other property damage that the driver of the truck had struck." RP 10. He believed it had been in a collision based on its initial position and the branches stuck to the bumper. RP 10.

The truck did not stop. RP 10. Barraclough turned on his siren, but the truck continued to fail to yield. RP 11. The vehicle continually crossed the center line and also the fog line on the right shoulder multiple times, weaving within its lane. RP 11. Barraclough became concerned the driver was impaired. RP 11.

The driver eventually stopped after turning right onto Clover Valley Road. RP 11. The pursuit began at Sedgwick and Banner, led west on Sedgwick onto Long Lake Road and then onto Clover Valley. RP 11. After the stop, the driver was identified as Sorensen. RP 12.

Jack Kimbrel reported to the 911 operator that he was stopped on Banner to make a right turn onto Sedgwick. RP 57. A truck came around him and wrecked into the driveway across Sedgwick. RP 57-58. He stated that the truck had crashed into a hill or ditch. RP 59. The driveway

went up to the right. RP 59. Sorensen went to the left. RP 59.

2. Stipulated Trial Facts[2]

On October 30, 2013, at approximately 9:50 p.m., Sorensen drove his truck through a stop sign located at the intersection of Sedgwick and Banner Road in Port Orchard. CP 257-58. Jack Kimbrel was stopped at the stop sign at the when Sorensen drove around his vehicle, straight across Sedgwick, and off the roadway. CP 258. Kimbrel called 911 and reported the accident. CP 258.

Trooper Barraclough was dispatched to a "vehicle in ditch/collision" and arrived 10 minutes later. CP 258. When Barraclough arrived, he saw Sorensen attempting to back out of a ditch. CP 258. When Sorensen backed out onto Sedgwick, Barraclough saw grass and branches hanging from underneath the bumper of the truck. CP 258.

Sorensen drove westbound on Sedgwick Road. CP 258. Barraclough activated his lights and attempted to pull Sorensen over. CP 258. The trooper believed Sorensen had been involved in a collision and wanted to check if Sorensen was okay to drive.[3] CP 258.

Sorensen failed to yield to the trooper and continued driving down Sedgwick at 50 miles per hour while weaving within the lane and touching

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[2] Only the facts relevant to the issues on appeal are included.

[3] Barraclough also believed Sorensen had committed the traffic infractions of blocking the roadway and driving with wheels off the roadway. CP 258.

both the fog and centerlines. CP 258. The speed limit on Sedgwick was 45. CP 258. Barraclough turned on his siren as they approached Long Lake Road. CP 258.

At Long Lake Road, without signaling, Sorensen made a wide turn and almost drove over an embankment. CP 258. While driving down Long Lake Road, he continued to weave within the lane and crossed both the fog and centerlines. CP 258 Sorensen continued to drive down Long Lake Road and turned onto Clover Valley Road, where he came to a stop. CP 258.

The pursuit lasted for approximately 3 minutes and spanned approximately 2.7 miles. CP 258. A subsequent blood test revealed that Sorensen's blood alcohol level was 0.27. CP 260, 290.

III. ARGUMENT

A. EVIDENCE THAT SORENSEN, WHOSE BLOOD ALCOHOL LEVEL WAS MORE THAN THREE TIMES THE LEGAL LIMIT, LED THE POLICE ON A CHASE FOR THREE MILES DOWN DARK ROADS IN EXCESS OF THE SPEED LIMIT WHILE CONTINUOUSLY WEAVING BOTH WITHIN HIS LANE AND ACROSS THE FOG AND CENTER LINES, AND MADE A WIDE TURN AT SPEED, NEARLY GOING OVER AN EMBANKMENT IN THE PROCESS, WAS CLEARLY SUFFICIENT FOR THE TRIAL COURT TO FIND THAT SORENSON DROVE IN A RASH OR HEEDLESS MANNER, INDIFFERENT TO THE CONSEQUENCES.

Sorensen argues that the stipulated fact evidence was insufficient to support his eluding conviction. Sorensen essentially argues that because no specific person was endangered, the evidence fails to show that he drove in a reckless manner. There is no such requirement in the law.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court

examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

The "reckless manner" standard of RCW 46.61.024 at issue here takes the same meaning as the "reckless manner" standard of RCW 46.61.520 (vehicular homicide) and RCW 46.61.522 (vehicular assault). *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007); *accord State v. Ratliff*, 140 Wn. App. 12, 15, 164 P.3d 516 (2007). In *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005), the Supreme Court reaffirmed that "reckless manner" meant "'driving in a rash or heedless manner, indifferent to the consequences." *Roggenkamp*, 153 Wn.2d at 622 (*quoting State v. Bowman*, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960)). The "reckless manner" standard of RCW 46.61.024 at issue here takes the same meaning as the "reckless manner" standard of RCW 46.61.520 (vehicular homicide) and RCW 46.61.522 (vehicular assault).

State v. Ridgley, 141 Wn. App. 771, 781, 174 P.3d 105 (2007). Cases involving those offenses are thus also instructive.

Here, Sorensen, whose blood alcohol level was more than three times the legal limit led the police on a chase for three miles down dark roads in excess of the speed limit. He continuously weaved both within his lane and across the fog and center lines. He made a wide turn at speed and nearly went over an embankment in the process. This evidence was clearly sufficient for the trial court to find that Sorenson drove in a rash or heedless manner, indifferent to the consequences.

For example, in *State v. Randhawa*, 133 Wn.2d 67, 74-75, 941 P.2d 661 (1997), the Supreme Court found that speeding, a failure to negotiate a gentle curve, and alcohol consumption were sufficient to prove that the defendant was driving his vehicle in a reckless manner. In *State v. Hursh*, 77 Wn. App. 242, 248-49, 890 P.2d 1066 (1995), the Court held that evidence that the defendant admitted to drinking six to eight beers before getting into his car, that he was dozing on and off and that his car drifted off met the standard for driving in a reckless manner.[4] *See also State v. Hill*, 48 Wn. App. 344, 348, 739 P.2d 707 (1987) (driving the

[4] Note that the Supreme Court has specifically disapproved *Hursh* for applying the incorrect standard of recklessness – willful or wanton disregard. *Roggenkamp*, 153 Wn.2d at 622. That standard, however, is *higher* than what the State was required to prove here. *See Ridgley*, 141 Wn. App. at 782 ("*Roggenkamp* makes it clear that 'willful or wanton' is a 'higher mental state' than 'reckless.'") (*citing Roggenkamp*, 153 Wn.2d at 626).

wrong way on the freeway and was intoxicated)

That Sorensen's driving could have been worse has no bearing on whether sufficient evidence supports the verdict. *See State v. Whitcomb*, 51 Wn. App. 322, 327, 753 P.2d 565 (1988) (even under the previous "willful and wanton" standard, the State was not required to prove that anyone else was endangered by the defendant's conduct or that a high probability of harm existed). Indeed, it was just a matter of luck that no one was injured during the chase.

Sorensen's reliance on *State v. Naillieux*, 158 Wn. App. 630, 241 P.3d 1280 (2010), Brief of Appellant at 9, is misplaced. That case addressed the sufficiency of the charging document, not the evidence. *Naillieux*, 158 Wn. App. at 643-45. The evidence here was sufficient and Sorensen's conviction should be affirmed.

B. THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS WHERE THE TROOPER WAS JUSTIFIED IN STOPPING SORENSEN BY BOTH THE COMMUNITY CARETAKING FUNCTION AND BY SORENSEN'S APPARENT COMMISSION OF A TRAFFIC INFRACTION IN THE TROOPER'S PRESENCE, AND FURTHER, ESTABLISHED PRECEDENT, INCLUDING THAT OF THE WASHINGTON SUPREME COURT, HOLDS THAT THE LEGALITY OF THE INITIAL DETENTION IS IRRELEVANT IN AN ELUDING CASE.

Sorensen next claims that the trial court erred in not suppressing

the evidence. This claim is without merit for several reasons. First, contrary to the trial court's conclusion, the trooper's initial attempt to detain Sorensen was not unlawful. The trooper was justified in stopping Sorensen by both the community caretaking function and by Sorensen's apparent commission of a traffic infraction in the trooper's presence. Further, established precedent, including that of the Washington Supreme Court, holds that the legality of the initial detention is irrelevant in an eluding case. Even were this Court empowered to overturn Supreme Court precedent, Sorensen offers no compelling reason to do so.

1. No unlawful seizure occurred.

The trial court concluded that Barraclough did not have authority to stop Sorensen. CP 252. Nevertheless, an appellate court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Guttierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court's reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993); *see also State v. Cerrillo*, 122 Wn. App. 341, 347-48, 93 P.3d 960 (2004) (Court would consider issue of whether a seizure occurred even where the parties assumed one occurred at trial).

Under Article I, section 7, a person is "seized" within the meaning

of the state and federal constitutions "when, by means of physical force or a show of authority, his freedom of movement is restrained." *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) (internal quote marks omitted). This is an objective test based on the officer's actions. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998) Generally, a defendant is deemed to be seized when an officer activates his emergency lights. *State v. Gantt*, 163 Wn. App. 133, 141, 257 P.3d 682 (2011), *review denied*, 173 Wn.2d 1011 (2012).

Sorensen argued that Trooper Barraclough did not have a reasonable suspicion based upon articulable facts to warrant a *Terry* stop.[5] However, contrary to the trial court's legal conclusion below, Barraclough's attempt to stop Sorensen was reasonable under the circumstances. Indeed, the trooper's articulated reasons for stopping Sorensen were proper under the community caretaking exception as well as under *Terry* based on a potential traffic infraction personally observed by the trooper.

a. The trooper was properly exercising his community caretaking duties.

Police have multiple responsibilities, only one of which is the enforcement of criminal law. *State v. Acrey*, 148 Wn.2d 738, 748, 64 P.3d 594 (2003). Citizens look to the police to assist them in a variety of

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

circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid. *Id.* "When police officers are engaged in noncriminal, noninvestigative 'community caretaking functions,' whether a particular stop is reasonable depends not on the presence of 'probable cause' or 'reasonable suspicion,' but rather on a balancing of the competing interests involved in light of all the surrounding facts and circumstances." *Id.* (internal quotes omitted). In Washington, the community caretaking function exception to the warrant requirement encompasses not only the search and seizure of automobiles, but also situations involving either emergency aid or routine checks on health and safety. *Acrey*, 148 Wn.2d at 749.

In determining whether an officer's encounter with a person is reasonable as part of a routine check on safety, the Court balances the "individual's interest in freedom from police interference against the public's interest in having the police officers perform a community caretaking function." *Acrey*, 148 Wn.2d at 750. The Court in *Acrey* found that on balance the facts of that case justified the police intrusion:

> [Petitioner] was a 12–year–old boy, out after midnight on a weeknight without adult supervision, in an isolated area with no residences or open businesses. Most notably, the officers had stopped [Petitioner] to conduct a criminal investigation in response to a citizen 911 call.

Acrey, 148 Wn.2d at 751 (editing the Court's).

Washington cases have applied the community caretaking exception to search and seizure of automobiles, emergency aid situations, and routine checks on health and safety. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). The emergency aid exception recognizes the community caretaking function of the police to "assist citizens and protect property." *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001). This exception applies when "(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched." *Kinzy*, 141 Wn.2d at 386-87. Further, two competing policies come into play when the emergency aid exception is invoked: "(1) allowing police to help people who are injured or in danger, and (2) protecting citizens against unreasonable searches." *Johnson*, 104 Wn. App. at 418. The Court balances these policies in light of the facts and circumstances of each case. *Johnson*, 104 Wn. App. at 418, 16 P.3d 680. Further, the claimed emergency may not be a pretext for conducting an evidentiary search. *Johnson*, 104 Wn. App. at 414.

The community caretaking function exception recognizes that a person may encounter police officers in situations involving not only

emergency aid, but also involving a routine check on health and safety. Thus, in *Kalmas v. Wagner*, 133 Wn.2d 210, 216–17, 943 P.2d 1369 (1997), the Supreme Court concluded the exception applied when someone of "called 911 asking for police assistance." Under a routine check on safety, "[w]hether an encounter made for noncriminal, noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" *Id.*

Here, and Barraclough testified that he "wanted to check and make sure that the driver was okay, that there was no other property damage that the driver of the truck had struck." RP 10.[6] He was specifically responding to a 911 call that reported that there had been a one-car crash at the location Barraclough encountered Sorensen's truck in the ditch. As the truck drove away there were leaves and branches stuck in its bumper. There was no evidence whatsoever that the trooper had intent to conduct a criminal investigation at the time he initially sought to stop Sorensen. Under these circumstances, it was reasonable for Barraclough to conduct a check to make sure no one in the truck was injured, that there was no property damage, and that the truck was safe to drive on the roadway.

[6] Sorensen also stipulated to this fact at trial. CP 258.

Under these circumstances, the trial court should have found that the initial attempt to stop Sorensen was proper. This Court may properly affirm the ruling below on these grounds. The State urges it to do so.

b. The trooper had a reasonable suspicion that Sorensen had committed a traffic infraction.

Alternatively, the trial court have also properly concluded that the trooper was attempting to make a valid *Terry* stop. 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. *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). A reasonable, articulable suspicion means that there is a substantial possibility that criminal conduct has occurred or is about to occur. *Snapp*, 174 Wn.2d 197-98. *Terry*'s rationale applies to traffic infractions. *Snapp*, 174 Wn.2d 198. In reviewing the propriety of a Terry stop, a court evaluates the totality of the circumstances. *Id.* Further, the question of a valid stop does not depend upon the motorist actually having violated the statute. *Id.* Rather, if the officer "had a reasonable suspicion that he was violating the statute, the stop was justified." *Id.*

Here, in addition to his concerns about Sorensen's safety, Barraclough also testified that he believed Sorensen was unlawfully

blocking the roadway. RP 10.[7] RCW 46.61.560(1) provides:

> Outside of incorporated cities and towns no person may stop, park, or leave standing any vehicle, whether attended or unattended, upon the roadway.

Here Barraclough was dispatched 10 minutes before he arrived on the scene. When he arrived, Sorensen's truck was still there, was stationary, and was halfway into the roadway. Barraclough certainly had a reasonable basis to suspect that this statute was being violated. He therefore properly sought to briefly detain Sorensen to investigate the potential infraction.

2. Sorensen did not have the right to resist the stop.

Even if the seizure were unlawful, Washington law clearly holds that the constitutional right to be free from unreasonable searches does not create a constitutional right to react unreasonably to an illegal detention. Even if he believed the stop was unjustified, Sorensen was required to pull over and stop.

In *State v. Duffy*, 86 Wn. App. 334, 337-39, 936 P.2d 444 (1997), an officer was responding to an accident report around 2:22 am when he came upon two vehicles. As he approached, the officer rolled down his window and heard "angry voices" coming from the car. Duffy stood in between the officer and the driver of the other vehicle, who Duffy

[7] Again, Sorensen stipulated to this fact at trial. CP 258.

identified as his wife, and would not allow the officer to see her to make sure she was okay. Concerned for the safety of Duffy's wife, the officer moved his squad car. As he was doing so, Duffy got in his vehicle and left the scene. Duffy accelerated away at a high rate of speed and pursued by the officer, eventually collided with another vehicle. Duffy was subsequently charged with attempting to elude a police vehicle, DUI, and hit and run. The trial court dismissed the eluding charge, holding there were insufficient facts to establish a reasonable suspicion for the initial stop.

This Court reversed, holding that dismissal was inappropriate even if there was no reasonable suspicion for the initial stop. *Duffy*, 86 Wn. App. at 341. The Court reasoned that the issue in prosecution for eluding is the defendant's behavior after the officer initiates the stop, not whether the officer had authority to make stop. *Duffy*, 86 Wn. App. at 340 (*citing State v. Malone*, 106 Wn.2d 607, 611, 724 P.2d 364 (1986)). Similarly, in *State v. Brown*, 40 Wn. App. 91, 92, 697 P.2d 583, *review denied*, 103 Wn.2d 1041 (1985), the Court held that RCW 46.61.024 is a "resisting arrest" statute that "punishes unreasonable conduct in resisting law enforcement activities." Thus, the legality or illegality of the stop is not at issue. *Brown*, 40 Wn. App. at 96.

Sorensen argues that these cases should not be followed.

However, this Court is bound by the Supreme Court's decisions. *In re Le*, 122 Wn. App. 816, 820, 95 P.3d 1254, 1256 (2004) (*citing State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984)), *aff'd sub nom. In re Domingo*, 155 Wn.2d 356 (2005). Because the Supreme Court has ruled "that the issue under RCW 46.61.024 is the nature of the defendant's behavior after the police initiate a stop, not whether the officer has authority to make the stop," *Malone*, 106 Wash.2d at 611, this Court would not have the authority to abrogate that rule even were Sorensen's argument persuasive.

Moreover, Sorensen's argument is not persuasive. He argues that under *State v. Barnes*, 96 Wn. App. 217, 978 P.2d 1131 (1999), the arrest for eluding cannot be justified. *Barnes*, a Division III case, is at best an anomaly. Notably it does not appear to have been followed in any published opinion. In any event, even Division III itself subsequently described its holding as comporting with the *Duffy/Malone* rule:

> A citizen must not willfully hinder, delay, or obstruct a law enforcement officer discharging his "official powers or duties." RCW 9A.76.020; SMC 10.07.032. Officers are performing official duties even during an arrest that later turns out to be without probable cause, provided they were not acting in bad faith or engaged in a "frolic" of their own. *State v. Hudson*, 56 Wn. App. 490, 496–97, 784 P.2d 533 (1990). Even if the officer is acting unlawfully, the citizen must still comply, and rely on legal recourse. *State v. Barnes*, 96 Wn. App. 217, 224–25, 978 P.2d 1131 (1999) (*citing State v. Valentine*, 132 Wn.2d 1, 19, 935 P.2d 1294 (1997)).

> Even if Mr. Hays' interpretation of the code is correct, the only effect would be that Ms. Stewart, the driver, would prevail if she were to challenge the ticket. She would not be relieved from her duty to stop and cooperate. Similarly, just because the passenger is not seized when the car he is riding in is lawfully stopped for a traffic infraction does not mean that he is not required to comply with the instructions of the officers controlling the scene. Mr. Hays was required to cooperate, whether the traffic citation issued to the driver was valid or not.
>
> The alleged traffic infraction here may be debatable. But this does not excuse Mr. Hays' failure to cooperate with officers at the scene.

Spokane v. Hays, 99 Wn. App. 653, 661, 995 P.2d 88 (2000).

Moreover, the decision in *Barnes* appears to have been based on the fact that the defendant was not ultimately charged with with obstruction, but with various drug offenses. *Barnes*, 96 Wn. App. at 225 ("Mr. Barnes was arrested for obstruction but was never charged with obstruction. Our evaluation of the police conduct, therefore, ends with whether Mr. Barnes was lawfully detained. He was not."). As the dissent pointed out, however, "That the initial charge underlying the arrest was obstructing, assault or any other possible connected offense is not important. Neither is the failure to prosecute the arresting charge important." *Barnes*, 96 Wn. App. at 226 (Brown, J., dissenting). In any event, even if *Barnes* were a valid interpretation of the law, it would be inapposite here, where Sorensen *was* prosecuted and convicted of eluding.

Similarly, *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426

(2008), has no bearing on the issues presented in this case. There, the police lacked any reasonable suspicion to detain the defendant when the approached him while he was on foot. Further, the defendant did not even flee from the officers. He merely walked away, which was his right. The police then arrested him. No statute similar to the eluding statute was involved. *Gatewood*, 163 Wn.2d at 540-41.

Nor does *State v. Cardenas-Muratalla*, 179 Wn. App. 307, 310, 319 P.3d 811 (2014), have any apparent application to the issue before the Court. There, the State apparently argued in passing that the defendant's arrest was justified because he committed an assault. This Court, however, observed that the record did not support such a claim, and the defendant was not charged with assault. *Cardenas-Muratalla*, 179 Wn. App. at 318 n.22.

Sorensen also argues that the *Duffy/Malone* rule is no longer valid after the 2003 amendment of the eluding statute, which as discussed previously, lowered the State's burden of proof. The Supreme Court in *Malone* noted that the eluding statute was aimed at avoiding the dangers inherent in police chases:

> Both the language and the legislative history of RCW 46.61.024 indicate that the Legislature enacted the statute to address the dangers of high-speed chases. *See*, *e.g.*, House Comm. on the Judiciary, Report on House Bill 2468, 46th Legislature (1979).

Malone, 106 Wn.2d at 611. Sorensen fails to explain how making convictions easier under the statute can be read as a legislative intent to abrogate the rule in *Malone.*

Moreover, such an approach is inconsistent with the Court's holding in *State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997), where the Supreme Court abrogated the common law right to resist an unlawful arrest. As in *Malone*, the Court noted that self-help is disfavored in our modern society:

> More importantly, if the rule were ... that a person being unlawfully arrested may always resist such an arrest with force, we would be inviting anarchy. While we do not ... condone the unlawful use of state force, we can take note of the fact that in the often heated confrontation between a police officer and an arrestee, the lawfulness of the arrest may be debatable. To endorse resistance by persons who are being arrested by an officer of the law, based simply on the arrested person's belief that the arrest is unlawful, is to encourage violence that could, and most likely would, result in harm to the arresting officer, the defendant, or both. In our opinion, the better place to address the question of the lawfulness of an arrest that does not pose harm to the arrested person is in court and not on the street.

Valentine, 132 Wn.2d at 21-22. This principle is equally applicable in the present context. *See Malone*, 106 Wn.2d at 611 ("The modern trend has been toward requiring submission to a known peace officer, even when the arrest is unlawful, in the interest of keeping the peace."). Sorensen offers no policy justification for a differing rule. His claim should be rejected.

C. SORENSEN'S CLAIMS WITH REGARD TO HIS ABILITY TO PAY AND THE IMPOSITION OF COSTS FOR APPOINTED COUNSEL ARE PREMATURE AND WITHOUT MERIT; THE STATE CONCEDES THAT THE IMPOSITION OF COSTS FOR THE EXPERT WITNESS FUND SHOULD BE STRICKEN.

Sorensen next claims that the trial court erred in imposing various costs. His claims with regard to his ability to pay and the imposition of costs for appointed counsel are premature and without merit. The State concedes that the imposition of costs for the expert witness fund should be stricken.

1. Cost of court-appointed counsel

This Court reviews a trial court's decision to impose LFOs on a defendant for an abuse of discretion. *See State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Neither the statute nor the constitution requires the trial court to enter formal, specific findings about a defendant's ability to pay LFOs. *Curry*, 118 Wn.2d at 916. Moreover, as the Court recently held in *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011):

> "[T]he meaningful time to examine the defendant's ability to pay is *when the government seeks to collect the obligation.*"

(Emphasis added) (*quoting State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991)) (*citing State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911); *see also State v.*

Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *review denied*, 165 Wn.2d 1044 (2009) ("Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs."). The Court further noted:

> "The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time."

Bertrand, 165 Wn. App. at 405 (alteration in original) (*quoting Baldwin*, 63 Wn. App. at 310-11). Because there is no evidence that the State has yet tried to collect Sorensen's legal financial obligations, this issue is not ripe for review. Moreover, the costs imposed were permissible. Contrary to Sorensen's claim, RCW 10.01.160 both authorizes the assessment of the cost of appointed counsel on convicted defendants and does not infringe upon the right to counsel. *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1977); *Baldwin*, 63 Wn. App. 303, 311.

2. Expert witness fund contribution.

Sorensen's final claims are that the trial court erred in imposing costs for the domestic violence assessment, expert witness fund, and the special assault unit. For the reasons set forth his brief, the State agrees. Sorensen's conviction and sentence should be affirmed and the cause

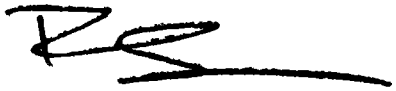
remanded to strike these provisions from the judgment.

IV. CONCLUSION

For the foregoing reasons, Sorensen's conviction and sentence should be affirmed and the cause remanded to strike the improper cost assessment.

DATED January 9, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney



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January 09, 2015 - 8:24 AM

Transmittal Letter

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