

No. 47144-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DALE CARTER,

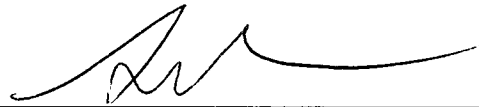
Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it found that the citizen informant provided sufficient information to provide officers with an articulable suspicion to justify an investigatory stop on Carter's vehicle?
- B. Did the trial court err when it imposed a jury demand fee in excess of 250 dollars?
- C. Did the trial court fail to consider Carter's present or future ability to pay prior to imposing non-mandatory legal financial obligations?

II. STATEMENT OF THE CASE

On April 3, 2014, Morton Police Officer Perry Royle received a call from Randy Dunaway, a concerned citizen, indicating Mr. Dunaway had just observed what he believed was a drug transaction at 145 High Avenue, Morton. RP (9/8/14) 3-4; CP 19. Mr. Dunaway told Officer Royle he had seen Carter shaking hands with Joanna Johnson and thereby receiving money and what Mr. Dunaway believed was drugs. RP (9/8/14) 4-5, 10. CP 19. Mr. Dunaway thought he saw what amounted to a palm to palm pass. CP 19.

Officer Royle had personally known Mr. Dunaway for over ten years and knew him to be a reliable individual. RP (9/8/14) 4; RP 20. Mr. Dunaway gave Officer Royle a basic description of the vehicle Carter was driving. RP (9/8/14) 5; CP 20.

Lewis County Sheriff's Deputy Lauer and Officer Royle saw the vehicle and pulled it over. RP (9/8/14) 5-6. CP 20. Officer Thompson joined them. RP (9/8/14) 7; CP 20. Carter was the driver of the vehicle. RP (9/8/14) 7; CP 20. Officer Royle asked Carter to step from the vehicle. RP (9/8/14) 7; CP 20. Carter stepped out of the car as requested. CP 20. Royle asked Carter if Ms. Johnson had handed him some drugs when he was at her house. RP (9/8/14)7; CP 20. Carter denied being handed anything. RP (9/8/14) 7; CP 20.

Officer Royle then asked Carter if he would mind showing Officer Royle what was in Carter's front pants pocket. RP (9/8/14) 7; CP 20. Carter asked Officer Royle if he had to show Officer Royle what was in his pants pocket. RP (9/8/14) 7; CP 20. Officer Royle told Carter, "No. It's strictly voluntary" RP (9/8/14) 7; CP 20. Carter pulled out of his front pants pocket some coins and a small baggie of what appeared to be a small amount of marijuana. RP (9/8/14) 8; CP 20.

Officer Royle asked Carter if he would mind if Officer Thompson searched Carter further. RP (9/8/14) 8; CP 20. Carter gave the officer permission for Officer Thompson to conduct a further search of his person. RP (9/8/14) 9; CP 20. Officer

Thompson searched Carter and located a small baggie with a white crystal substance that later tested positive for methamphetamine. RP (9/8/14) 9; CP 20. Carter was then placed under arrest. RP (9/8/14) 9; CP 20.

The State charged Carter with Possession of Methamphetamine. CP 1-3. Carter filed a motion to suppress, alleging the initial stop of his vehicle was not lawful. RP CP 6-10. The trial court found the stop lawful and denied the motion to suppress. CP 19-21. Carter was found guilty at a stipulated facts bench trial. CP 28-31. Carter timely appeals his conviction. 46.

The State will further supplement the facts in the argument section below.

III. ARGUMENT

A. THE INVESTIGATORY STOP OF CARTER WAS PERMISSIBLE BECAUSE THE OFFICERS POSSESSED THE REQUISITE REASONABLE SUSPICION THAT CARTER WAS INVOLVED IN CRIMINAL ACTIVITY.

Carter argues the officers lacked the required reasonable suspicion that he was involved or about to be involved in criminal activity to make the investigatory stop on his vehicle lawful. Brief of Appellant 6-13. Carter asserts because this initial contact was unlawful, the subsequent consent Carter gave the officers to search his person was unlawful and the trial court erred by failing to

suppress the evidence. The officers' initial contact with Carter was a lawful investigatory stop and the subsequent consent to search and drugs found on Carter were lawfully obtained. This Court should affirm the trial court's ruling and Carter's conviction.

1. Standard Of Review Regarding Finding Of Facts And Conclusions of Law.

Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." *Id.* Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo, with

deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

In the present case Carter does not assign error to any of the findings of fact, they are therefore verities on appeal. Carter also fails to assign error to the conclusions of law. Given Carter's arguments on appeal, the State will assume this was an oversight.

2. The Terry Stop Was Lawful Because The Officers Had Articulate Suspicion Provided From A Reliable Named Citizen Informant That Carter Was Engaged In Criminal Activity.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. art. I, § 7. People have a right to not have government unreasonably intrude on one's private affairs. U.S. Const. amend IV. Article One, section seven, of the Washington State Constitution protects the privacy rights of the citizens of Washington State. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). A

warrantless “seizure is considered per se unconstitutional unless it falls within one of the exceptions to the warrant requirement.” *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citation omitted).

The United States and Washington State constitutions permit an officer to seize someone for investigative purposes without a warrant if the officer has reasonable suspicion that the person has committed a crime. See *Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (federal constitution); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (same); *State v. Brown*, 154 Wn.2d 787, 796, 117 P.3d 336 (2005) (state constitution). An officer must have some suspicion that the person he or she is detaining is connected to a particular crime and not a generalized suspicion that the person detained is up to no good. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009) (citation omitted). An officer must be able to identify “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Mendez*, 137 Wn. 2d 208, 223, 970 P.2d 722 (1999), *abrogated by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (*citing Terry*, 392 U.S. at 21). When a court determines the

reasonableness of the officer's suspicion it looks at the totality of the circumstances. *Bliss*, 153 Wn. App. at 204.

When an officer bases their suspicion from an informant's tip the State is required to show, under the totality of the circumstances, that the tip bears some indicia of reliability. *State v. Z.U.E.*, __Wn.2d__, 352 P.3d 796, 800 (2015). There must be "(1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." *Z.U.E.*, 352 P.3d at 800. The corroborative observations do not have to be of blatant criminal activity but do have to be of more than just innocuous facts. *Id.*

A citizen informant who is known to the police is presumptively reliable. *State v. Howerton*, 187 Wn. App. 357, 366, 348 P.3d 781 (2015). This is in part because the known citizen informant is acting with the intent to aid police out of concern either for his or her own safety or concern for society and therefore is presumed to be more reliable than a compensated criminal informant. *Howerton*, 187 Wn. App. at 366-67.

Carter does not argue in his briefing that Mr. Dunaway is not a known citizen informant. Carter's argument is that Mr. Dunaway's information did not provide sufficient information for the officers to form an articulable suspicion that criminal activity had or was occurring. Brief of Appellant 5-13. Carter argues that the handshake witnessed by Dunaway had an innocent explanation and without corroborating evidence of criminal activity could not form the basis for an investigatory stop on Carter. *Id.*

Carter argues his case is similar to *State v. Sieler*, because the hand-to-hand gesture between Ms. Johnson and Carter did not contain a description of behavior that could objectively be interpreted as criminal. Brief of Appellant 8, citing to *State v. Sieler*, 95 Wn. App. 1, 830 P.2d 696 (1992). Carter asserts an officer could conclude that the hand-to-hand gesture was merely a handshake between a laborer and his client and without more Mr. Dunaway was merely concluding there was a drug deal. Brief of Appellant 8. First, Mr. Dunaway was a known person to the officers, unlike the citizen informant in *Sieler*. Further, the information Mr. Dunaway provided to the officers was much more detailed than the information the officers received in *Sieler* and provided sufficient information to provide an articulable suspicion that Carter was

involved in criminal activity.

In *Seiler*, James Tuntland was waiting to pick up his son from high school and witnessed what he believed to be a drug sale in another car in the parking lot of the high school. *Seiler*, 95 Wn. App. at 44. Mr. Tuntland called the school secretary and told her of his conclusion, described the car, reported the license plate and left his telephone number. *Id.* at 44-45. The secretary phoned the police, who were informed about a possible drug transaction involving a black-over-gold Dodge with a particular license plate. *Id.* at 45. There were no details given regarding the drug transaction. *Id.* The officer radioed and asked for the informant to be identified and was given the information that a man named Mr. Tuntland had concluded a drug transaction had occurred and that Mr. Tuntland was not available. *Id.* The officer was unable to get a description of the suspect and all the officer had to go on was a description of the vehicle. *Id.*

Prior to the officer's arrival the vice-principal had spoken to the occupants of the vehicle and identified two girls as students and the defendants who were not students. *Id.* The occupants were playing cards and the vice-principal observed nothing unusual or suspicious and saw no contraband. *Id.*

When the officer arrived he saw the car that fit the description given by the informant, except the license plate was different by one letter. *Id.* The officer questioned the occupants, smelled the faint odor of stale burnt marijuana, and had one occupant exit the car and when that occurred saw three pills of speed on the driver's seat. *Id.* After that occurred Sieler handed the officer a film container containing speed. *Id.* at 45-46.

The defendant's moved the trial court to suppress the pills, which was denied. *Id.* The Supreme Court held "the State generally should not be allowed to detain and question an individual based on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to detention." *Id.* at 48. There must be some underlying factual justification for the informant's conclusion and it must be revealed so that an officer may assess the probable accuracy of the informant's conclusion. *Id.* This is necessary to prevent a person who is making what can best be categorized as an innocent mistake, seeing innocent conduct and interpreting it incorrectly. *Id.*

In Carter's case the police had more than just a conclusion that a drug deal took place. The officers had a description of the conduct that occurred. Officer Royle testified that Mr. Dunaway

reported,

That Mr. Carter and another male was [sic] up there picking up a vehicle and they saw Joanne Johnson and Mr. Carter hand each other what they thought to be drugs.

RP (9/8/14) 4. Then Officer Royle stated, "Mr. Dunaway said that he saw Joanne and Mr. Carter do a handshake and they nodded at each other and walked away." RP (9/8/14) 5. Officer Royle also stated, "They said they saw cash and something exchange hands." RP (9/8/14) 10. Officer Royle further explained the actions were suspicious because Mr. Carter arrived, loaded up Ms. Johnson's vehicle, then unloaded the vehicle, then exchanged money, which made no sense, why would one get paid if they were no longer going to fix the vehicle. RP (9/8/14) 13. Officer Royle also explained, that the exchange was described as more of a high five than a handshake. RP (9/8/14) 11, 14.

The information Mr. Dunaway provided to the officers was more detailed than the information given to the officer in *Sielser*. Mr. Dunaway did more than make a conclusory statement that he had witnessed what he believe was a drug transaction. Mr. Dunaway saw two people exchange money and something else in a high five style exchange. This exchange further made no sense because the car Carter came to retrieve was loaded than unloaded from Ms.

Johnson's, so there was obviously no work to be done on the vehicle. There was also the nod to each other when the transaction was made. This description, as given to the officers, was sufficient to support an articulable suspicion that Carter was engaged in criminal activity and therefore the investigatory stop on his vehicle was lawful. The trial court correctly held the stop was lawful and this Court should affirm the ruling and Carter's conviction.

B. THE STATE CONCEDES THAT THE TRIAL COURT IMPOSED JURY COSTS IN EXCESS OF THE ALLOWED STATUTORY MAXIMUM FEE.

Carter argues the trial court imposed a jury fee in excess of the statutorily allowed fee for jury costs. Brief of Appellant 13-15. An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). RCW 36.18.016(3)(b) governs the collection of jury demand fees in criminal cases, and sets the maximum amount for a 12 person jury at 250 dollars. A jury fee in excess of that amount is impermissible. *State v. Hathaway*, 161 Wn. App. 634, 653, 251 P.3d 253 (2011). While the trial court could impose jury fees in accordance to RCW 10.46.190, a jury demand fee is limited to the 250 dollars set forth by RCW 36.18.016(3)(b).

The State requested and the trial court imposed a jury demand fee of \$1,417.78. CP 40. While the trial court's oral ruling states the imposition of the \$1,417.78 was for jury costs, the judgment and sentence, which the deputy prosecutor, Carter, Carter's attorney and the judge signed, states "jury demand fee." RP (1/14/15) 6; CP 34-45. Therefore, the State concedes the jury demand fee was above the statutory maximum allowed and this Court should remand the case back to the trial court to reverse the excessive fee.

C. THERE WAS SUFFICIENT INFORMATION PROVIDED AT THE SENTENCING HEARING TO PROVIDE A BASIS FOR THE TRIAL COURT'S IMPOSITION OF THE LEGAL FINANCIAL OBLIGATIONS.

Carter argues that the trial court imposed legal financial obligations without any meaningful consideration of his ability to pay. Brief of Appellant 15-17. Carter further argues he does not have the ability to pay the legal financial obligations and uses his affidavit in support of court appointment counsel for appeal to support this argument. Brief of Appellant 17-19. While the information from Carter's affidavit does paint a bleak picture, the information shared by his trial counsel at his sentencing hearing, coupled with the fact that he did not qualify for court appointed counsel at the trial court level was sufficient for the trial court to

conclude that Carter had the present ability to pay the imposed legal financial obligations at the rate of 25 dollars a month. See CP 41. Further, Carter did not object to the imposition of the legal financial obligations. RP (1/14/15) 4-8. This court should affirm the imposition of the legal financial obligations.

A defendant who at the time of sentencing fails to object to the imposition of non-mandatory legal financial obligations is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Unpreserved legal financial errors do not command review as a matter of right. *Blazina*, 182 Wn.2d at 833. The trial court is required to consider a defendant's current or future ability to pay the proposed legal financial obligations "based upon the particular facts of the defendant's case." *Id.* at 834.

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP (1/14/15) 4-8. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial

resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal).

Carter's attorney stated Carter supported his children by doing bodywork, therefore, the trial court could conclude Carter was employed. RP (1/14/15) 4. Carter's attorney requested Carter be allowed to serve his sentence on electronic home monitoring. RP (1/14/15) 4. In Lewis County the only means of electronic home monitoring is by a private home monitoring company, which was allowed and authorized on the judgment and sentence. CP 38. The trial court would have to know to take advantage of this request Carter would have to have the ability to pay the private monitoring company a daily monitoring fee. If Carter had the ability to afford nine months of private electronic home monitoring, he had the ability to pay the court imposed legal financial obligations. See CP 38.

The trial court's finding was supported by the record, this court should affirm the imposition of legal financial obligations. If

this Court holds the trial court's findings are not sufficient the State respectfully requests this Court remand for a hearing whereas the trial court has the ability to do a full inquiry as to Carter's ability to pay his legal financial obligations and enter findings based upon that inquiry.

IV. CONCLUSION

The officers had sufficient information from the citizen informant to form an articulable suspicion to support the investigatory stop of Carter's vehicle therefore, the subsequent search was lawful. The State concedes the jury demand fee was excessive and this Court should remand the case back to adjust the fee to the proper 250 dollar amount. Finally, there was sufficient information provided at the sentencing hearing for the trial court to conclude Carter had the present and future ability to pay the imposed legal financial obligations. For the reasons argued above this court should affirm Carter's conviction.

RESPECTFULLY submitted this 15th day of September, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

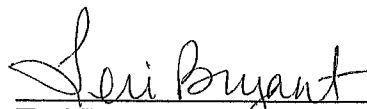
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. DALE CARTER, Appellant.	No. 47144-2-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On September 15, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Sara Taboada and Gregory C. Link, Washington Appellate Project, attorney for appellant, at the following email address: wapofficemail@washapp.org.

DATED this 15th day of September, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

September 15, 2015 - 2:59 PM

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