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August 24, 2016
Court of Appeals
Division I
State of Washington

NO. 74766-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

TAMARA LARSON,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in denying the motion to suppress where the evidence was obtained in violation of appellant's right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and article 1, § 7 of the Washington Constitution.

Issue Pertaining to Assignment of Error

Where appellant was sitting in her car talking to another woman whom police knew to be a heroin addict who sometimes dated drug dealers, but police did not know appellant or observe anything resembling a drug deal, did police lack a reasonable, articulable suspicion of criminal activity to justify asking appellant to exit her car, walk away from the car and answer questions about drug use?

B. STATEMENT OF THE CASE

On September 3, 2015, the Whatcom county prosecutor charged appellant Tamara Larson with one count of possessing methamphetamine with intent to deliver and one count of possessing heroin with intent to deliver. CP 1-2. Police discovered drugs in Larson's car after contacting her in a 7-Eleven parking lot on July 23, 2015. CP 3-4.

Larson moved to suppress the drugs and dismiss the charges on grounds the state's only evidence was obtained pursuant an illegal seizure. CP 5-18. A CrR 3.6 hearing was held on November 10, 2015. RP.¹

At the hearing, Bellingham detective Joshua Danke testified he works in the special investigations unit and is familiar with areas known for drug trafficking in the city. RP 14. In his work, he is often in contact with "the same people over and over" and speaks with them "about what's going on." RP 14.

Around midnight on July 23, 2015, Danke was working with sergeant Jay Hart near the 7-Eleven on Yew Street and Alabama Street. RP 16. They were in an unmarked SUV and in plain clothes, but wearing black vests with the word "police" marked on the front and back. RP 15-17, 46. According to Danke, the 7-Eleven is located in a high drug crime area. RP 17.

When Danke drove through the lot, he noticed Danielle Coakley, whom Danke reportedly knew to be a heroin addict who also has dated a number of mid-level heroin dealers during the time Danke knew her. RP 18.

¹ "RP" refers to the verbatim report of proceedings for November 9, and November 10, 2015, which are in one bound volume, consecutively paginated.

According to Danke, Coakley was halfway down the strip mall, away from where the 7-Eleven was located. RP 19. She was standing with a girlfriend near the stairs that lead to a Mexican restaurant. RP 19.

Danke and Hart determined Coakley had no warrants as they circled the block and returned to the 7-Eleven parking lot. RP 20. Upon their return, Danke saw Coakley walk to a small passenger car and get in the passenger seat. RP 20. Danke had not seen the car previously. RP 20. Danke thought it unusual the car was parked a little bit away from the 7-Eleven when there were closer parking spaces. RP 20-21.

Danke and Hart got out of their SUV and went to contact Coakley and the driver of the passenger car, who turned out to be Larson. RP 21. Danke and Hart had run the plate and determined Larson was the registered owner and that she "had been a reference in a drug report from recent years."² RP 21. Danke suspected a drug deal was about to occur. RP 22.

Danke went to the passenger side to speak to Coakley while Hart went to speak to Larson. RP 22. To Danke, it appeared Coakley was hurriedly rummaging in the purse on her lap. RP 22.

² Danke couldn't remember the specifics. RP 39.

Danke claimed:

I shined my light into her purse, and I can see a little plastic container that appeared to have little baggies in it which is consistent with drug packaging, and then she opened her door and got out and started speaking with me.

RP 23.

Once Coakley was outside the car, Danke asked her about the container; Coakley said she didn't have any "dope." RP 24. When Danke asked if he could search her purse, Coakley placed it on the hood of the car. RP 24. Danke noted she had drug paraphernalia and asked her "about dealing, who is drug dealing[.]" RP 25. According to Danke, Coakley "lifted her eyes and nodded over her shoulder at Ms. Larson, and we went back and forth about how much and what level Ms. Larson was dealing." RP 25. Reportedly, Danke asked how much drugs were in the car and Coakley responded, "enough[.]" RP 25. Danke testified he had received information from Coakely in the past and it turned out to be reliable. RP 26.

Danke testified his conversation with Coakley lasted five minutes and he received the inculpatory information about Larson midway through. RP 28, 77.

Danke told Coakley she was free to go. RP 28. Danke didn't say anything to Hart about the conversation as he did not want to betray Coakley's trust. RP 29. Danke went to the driver's side of the car to see what was happening there. RP 29.

Sergeant Jay Hart testified he approached Larson at the same time Danke approached Coakley. After confirming it was Larson in the driver's seat, Hart immediately asked her to step away from the vehicle, for two reasons:

Umm, one, I, I was going to ask her questions about what she was doing in that area. It was, it was a high crime area, high drug trafficking area, and I also didn't want Danielle to hear what she was saying. So they could sort of form a story on why they were there.

...
The other reason is within this drug culture in the contacts that we make, it's very common for people to come clean, so-to-speak. They understand that we have a lot of latitude with taking – a lot of discretion with whether or not we take somebody to jail or not.

RP 50-51. Hart testified Larson got out of the car as requested.

RP 51.

Hart had Larson walk with him a short distance away, where he began to question her about what she was doing in the area, where she was going, etc. RP 52-53, 62. Larson explained she stopped to buy a particular kind of candy and was on her way to her

brother's house in Custer, where her son was staying. RP 52-53. Larson explained she was just talking to her friend that she saw when she pulled into the 7-Eleven. RP 53.

Hart told Larson "her stories didn't make much sense." RP 54. Hart questioned Larson about drug use but Larson said she was no longer using. RP 54.

Hart asked if there were drugs in the car and whether Larson would consent to a search of her vehicle for drugs.³ RP 55, 63. Larson responded that she knew her rights and had the right not to consent. RP 55. Hart asked what would happen if he called for a drug dog to sniff around the car. RP 55. Larson reportedly said she had no idea what other people may have brought into her car. RP 55.

According to Hart, they next discussed the possibility of Hart getting a search warrant and the idea of Larson becoming an informant. RP 55. Hart testified he and Danke told Larson she would not be going to jail that night, regardless. RP 56. Hart

³ This was about the time Danke joined them at the driver's side. He testified Hart told Larson he believed there was heroin in the car and wanted permission to search for it. RP 29-30. Larson responded that she knew her rights, did not want the police in her car and wanted to go home to her son. RP 29.

testified Larson appeared to be struggling with whether to trust the officers. RP 56. She was worried about seeing her son. RP 56.

Hart testified that towards the end of his conversation with Larson, Danke relayed what Coakley told him. RP 57. However, the officers did not relay that information to Larson. RP 57.

According to the officers, Larson ultimately told them there was heroin in a silver lock box in the back seat and consented to a search of her car. RP 30-31, 57-58.

Danke found the drugs where Larson said they would be. RP 35. The officers allowed Larson to leave thereafter. RP 36.

In arguing the drugs should be suppressed, defense counsel argued Hart's seizure of Larson occurred well before Danke heard Coakley's allegations. RP 70, 79. And at the time of the seizure, police had no reasonable, articulable suspicion of criminal activity:

So there is no basis, and there's no probable cause to have to, to seize Ms. Larson at this point. She's in her car. She's in a parking lot. She's having contact with Ms. Coakley. All of those are perfectly acceptable.

There's no information. They don't see a drug transaction. They don't have any information that a drug transaction happened between the two. All that information is just benign. It's just a hunch at that point.

What the officers do is they approach the vehicle. There are two people in a closed car having personal conversation. They come upon it. They

have a flashlight illuminating inside the car. I think that is an intrusion.

They come to the vehicle, have people step out and separate people. Another intrusion.

RP 67-68. As defense counsel further argued: “everything as a result of that seizure, the consent to search the vehicle is tainted and must be suppressed.” RP 70-71.

The state countered that Hart’s interaction with Larson – including asking her to step out of the car – was a social contact that ripened into a Terry⁴ stop once Danke received the inculpatory information from Coakley. RP 74-75. At that point, the prosecutor argued, the police were justified in investigating further. Id.

In its oral ruling, the court appeared to agree Hart’s initial contact with Larson was merely a social contact:

The initial social contact is just that, it’s a social contact under the context of the case, not social contact as Mr. Larson mentioned. It’s not like how are you doing? How was the ball game last night? It’s more in the nature of police officers talking to people and citizens to make sure that everything is on the up and up, and in this case, that’s what we have I think when they walk over to the car and say hi, identify themselves. That’s social contact, the discussion with Ms. Coakley is social contact. The initial discussion with Mr. Larson is social contact.

RP 82.

⁴ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The court also appeared to agree with the prosecutor that at some point, however, the encounter ripened into a Terry stop. But unlike the circumstances of the cases cited by defense counsel,⁵ the court found the officers obtained additional information to justify the additional intrusion:

The officer cannot begin a social contact, and then just escalate that as it says in these cases, just take it from there to what are you doing here? How is everything? Anything that is going on that we need to know about? No, everything is fine. If that's all they got, they can't go further and start have you got drugs with you? What area you doing? Do you have cocaine on you? Do you have some heroin? I know you're a heroin addict, you can't do that.

But when in this case Ms. Coakley says, yeah, I was, I'm here, I was just here to buy some, and you know, she's got some in the car, and kind of nods and looks back that way and says there's enough in here, at that point, four minutes into this contact, Detective Danke has reasonable and articulable suspicion that

⁵ State v. Guevara, 172 Wn. App. 184, 288 P.3d 1167 (2012) (contact between officer and defendant not a social contact but a seizure implicating defendant's constitutional rights where officer stopped his marked patrol car behind defendant and two other high school age boys, approached them, asked what they were doing, told them that he believed that they had been skipping school to smoke marijuana, and then asked them to turn their pockets inside out so he could see what they were carrying); State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009) (officer's initial social contact on sidewalk escalated into an illegal seizure when a second officer arrived minutes later and stood mute seven or eight feet away, officer asked questions about defendant's activities that evening and found answers suspicious, officer asked defendant to remove his hands from his pockets and officer asked to frisk defendant without any articulable facts to believe that defendant was armed and presently dangerous); State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992) (defendant was seized when officer asked him if he had cocaine on his person and if officer could search him; defendant had done nothing indicative of a criminal act before being confronted by officer but was merely walking on the street, albeit in an area known for cocaine trafficking), abrogated on other grounds, State v. Thorn, 129 Wash.2d 347, 351, 917 P.2d 108 (1996).

there's drugs being sold out of this car. That's pretty clear. He knows that right then and there.

Whether he communicates that right away to Sergeant Hart I think is immaterial, because at that point, Detective Danke who is on scene and is just as much involved in this process as Sergeant Hart, and has allowed Ms. Coakley to leave, has articulable suspicion, and he, himself, can raise this to the level – Sergeant Hart can raise this to the level of essentially a Terry stop. He has some reasonable, articulable suspicion based upon what a reliable informant that we know to be drug involved in the past has said there is drugs, and they were meeting up to do a transaction. Drugs were going to be sold inside that car.

RP 85-86.

The court held that at that point, the officers were justified in conducting further investigation and that during that investigation, Larson ultimately gave consent because “she chose to.” RP 86-87. The court therefore denied the motion to suppress. RP 88.

In its oral ruling, the court did not address the uncontested fact Hart asked Larson to step out of the car and walk a short distance away from the car to answer questions, before Coakley conveyed her allegations to Danke. No written findings and conclusions have been entered, either.

Following the unsuccessful motion to suppress, Larson waived her right to a jury trial and agreed to a bench trial based on the police reports and laboratory results. CP 19-21; RP 89. The

court found Larson guilty of possessing heroin with intent to deliver, but dismissed the methamphetamine count, as there was no evidence to support that count. Id.; RP 94.

At sentencing on November 10, 2015, the court waived imposition of a sentence within the standard range and imposed residential chemical dependency treatment under the drug offender sentencing alternative (DOSA). This appeal follows. CP 35-44.

C. ARGUMENT

1. LARSON'S CONVICTION SHOULD BE REVERSED AND DISMISSED BECAUSE HER CONSENT TO SEARCH WAS OBTAINED THROUGH EXPLOITATION OF HER PRIOR ILLEGAL SEIZURE.

Larson does not disagree that once Coakley conveyed to Danke that Larson had drugs in the car, police had a reasonable, articulable suspicion to justify a Terry stop. The problem is Hart seized Larson – by asking her to step out of the car – well before that information was conveyed. A seizure must be justified at its inception. Here, it was not, as police had observed nothing indicative of criminal activity. Larson was merely sitting in her car talking to another woman.

Had Hart not illegally seized Larson, she could have driven away. Instead, police exploited the illegal seizure to obtain

Larson's consent to search, resulting in the officers' discovery of drugs in Larson's car. Evidence obtained by exploiting the primary illegality must be suppressed. The court erred in denying the motion to suppress. This Court should reverse and dismiss Larson's conviction because once the illegally obtained evidence is suppressed, the state cannot establish a prima facie case.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, a warrantless seizure is per se unreasonable unless it falls within one of the narrow, carefully delineated, and jealously guarded exceptions to the warrant requirement. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). "These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement." State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

The United States Supreme Court announced one such exception in Terry v. Ohio, 92 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). To initiate a Terry stop, officers must have "a well-founded suspicion that the defendant is engaged in criminal

conduct.” State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Id. (quoting Terry, 392 U.S. at 21). Thus, there must be “a substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

On review, “a court must evaluate the totality of circumstances presented to the investigating officer.” Doughty, 170 Wn.2d at 62. These circumstances are judged against an objective standard. Terry, 392 U.S. at 21-22. The officer’s actions also “must be justified at their inception,” meaning that circumstances arising after the seizure begins cannot inform the analysis. State v. Gatewood, 162 Wn.2d 534, 539, 182 P.3d 426 (2008); accord Terry, 392 U.S. at 21-22 (requiring analysis of “facts available to the officer at the moment of the seizure”).

The State carries the “heavy burden” of proving the justification for a warrantless search or seizure, State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d

343, 350, 979 P.2d 833 (1999), and must carry this burden by clear, cogent, and convincing evidence. Doughty, 170 Wn.2d at 62.

(i) Larson was Seized when Sergeant Hart Asked Her to Step Out of the Vehicle.

Whether police conduct amounts to a seizure is a mixed question of law and fact. State v. Harrington, 167 Wash.2d 656, 662, 222 P.3d 92 (2009). The trial court is entitled to deference in resolving the facts, but “the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.” State v. Thorn, 129 Wash.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wash.2d 564, 62 P.3d 489 (2003).

Article I, section 7 of our state constitution provides that “[n]o person shall be disturbed in his private affairs ... without authority of law.” It “casts a wider net than the Fourth Amendment’s protection against unreasonable search and seizure.” Harrington, 167 Wash.2d at 663.

A person is seized 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.”

State v. Rankin, 151 Wash.2d 689, 695, 92 P.3d 202 (2004). Police actions likely to amount to a seizure include, “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” State v. Young, 135 Wash.2d 498, 512, 957 P.2d 681 (1998) (quoting United States v. Mendenhall, 446 U.S. 544, 554–55, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

Here, Hart was wearing a black vest with the word “police” on the front and back. After approaching Larson’s parked car and confirming Larson’s identity, Hart immediately asked her to step out of the vehicle. He also had her walk with him a short distance away and began questioning her about drugs.

The case law is clear that this was a seizure per the analysis elucidated in State v. O’Neill, 148 Wn.2d 564, 574-82, 62 P.3d 9 (2003). There, an officer pulled behind a car parked in front of a closed store that had recently been burglarized and contacted the driver, O’Neill. Id. at 571-72. The officer shone a flashlight on O’Neill, asked O’Neill to roll down the window, asked O’Neill to try to start the car, and asked O’Neill for his driver’s license and

registration. Id. at 572. When the identification appeared revoked and the registration's name did not match, the officer asked O'Neill to exit the car. Id.

The Supreme Court carefully analyzed whether O'Neill was seized by considering when his freedom of movement was restrained such that a reasonable person in his position would not have felt free to leave or otherwise decline the officer's request and terminate the encounter. Id. at 574-82. The court held that up to the officer's request that O'Neill exit the car, O'Neill was free to refuse the officer's requests. Id. But at the point the officer asked O'Neill to exit the car, "a reasonable person in O'Neill's position would not believe himself free to leave." Id. at 582.

Like O'Neill, Larson was seated in a parked vehicle and would not have felt free to decline Hart's request to exit her car. The state argued below, and the court seemed to agree, that everything that happened up until Coakley informed Danke that Larson had drugs in the car amounted to a mere social contact. Perhaps if Larson had been standing on the street when Hart began to question her, the state's and court's analysis would be correct. However, neither the state nor the court addressed the fact

that prior to questioning, Hart had Larson exit her car and walk away from it.

As defense counsel argued – and the O’Neill court held – a reasonable person would not feel free to refuse the request. It was at this moment Larson was seized. The state therefore was required to provide a justification for the intrusion prior to – and apart from – Coakley’s information. The state failed to do so.

(ii) The Seizure Was Unreasonable

If a police-citizen encounter constitutes a seizure, that seizure is reasonable only if the officer had an objectively reasonable suspicion that the person was involved in criminal activity. State v. Gantt, 163 Wn. App. 133, 257 P.3d 682 (2011). Hart’s seizure of Larson was unreasonable because he had no objectively reasonable suspicion she was involved in criminal activity.

The Supreme Court’s opinion in Doughty is instructive. Doughty approached a suspected drug house late at night, stayed for two minutes, and then drove away. 170 Wn.2d at 60. Although officers did not see Doughty’s actions in the house, they stopped Doughty for suspicion of drug activity. Id. The court held the Terry stop was unlawful: “A person’s presence in a high-crime area at a

'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." Id. at 62. More importantly, "a person's 'mere proximity to others independently suspected of criminal activity does not justify the stop.'" Id. (quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). Doughty requires Terry stops to be based on individualized suspicion.

Doughty comports with United States Supreme Court precedent. In Ybarra v. Illinois, 444 U.S. 85, 87 & n.1, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), the Court construed an Illinois statute permitting police to detain and search any person found on the premises when executing a search warrant. Officers obtained a warrant because they suspected a bartender of dealing heroin from a bar. Id. at 88. When executing the warrant, officers detained and searched Ybarra, who was a patron of the bar, and found heroin. Id. at 88-89. The Court held the detention unlawful: "Although the search warrant . . . gave officers authority to search the premises and to search [the bartender], it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." Id. at 91-92. In analyzing the detention under Terry, the Court confirmed that the "'narrow scope' of the Terry exception does not permit a frisk for weapons on less than

reasonable belief or suspicion *directed at the person to be frisked.*" Id. (emphasis added) (quoting Dunaway v. New York, 442 U.S. 200, 210, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)).

Similarly, in Brown v. Texas, 443 U.S. 47, 48-49, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), the Court considered the propriety of officers' stop of Brown, who was merely walking in an alley with a "high incidence of drug traffic." Brown refused to identify himself and was arrested. Id. at 49. The Court held that the initial detention was unlawful, noting "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id. at 51. "[S]eizure[s] must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual" Id.

The only reasons police had to suspect Larson of criminal activity was her presence in a high drug crime area and proximity to a known drug user. There was nothing individualized to Larson, herself, except some vague mention of her as a "reference" in a drug report some time ago, the details of which neither officer remembered. Under Brown, Ybarra, and Doughty, the stop was unreasonable and illegal.

(iii) Larson's Consent to Search Was Obtained through the Exploitation of her Illegal Seizure.

A consent to search obtained through exploitation of a prior illegality may be invalid even if voluntarily given. Wong Sun v. United States, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). There, the court stated:

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police, Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun, 371 U.S. at 487-88 (emphasis added).

Several factors need to be considered in determining whether a consent to search is tainted by the prior illegality:

(1) temporal proximity of the illegality and the subsequent consent; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of Miranda warnings.

Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982); Soto-Garcia, 68 Wn. App. at 25. One factor, alone, is generally not dispositive. Soto-Garcia, at 25.

Under Wong Sun and Taylor v. Alabama, Larson's consent to search was tainted by the prior illegal seizure. First, the entire encounter lasted 15-20 minutes, including the search itself. RP 34-35. Thus, the search was within 15 minutes of the illegal detention. Moreover, almost as soon as Hart asked Larson to step from the vehicle, he began his attempt to obtain Larson's consent. RP 29, 54-55. Thus, there were no significant intervening circumstances. Indeed, Hart's purpose from the get-go seemed to be to obtain Larson's consent, as he not only asked for consent but threatened to summon a drug dog and/or apply for a search warrant. RP 55. Considering that Hart had no individualized suspicion of Larson, his seizure of her was flagrant misconduct. Finally, neither officer advised Larson of her Miranda rights. RP 65.

Given the circumstances, Larson's consent to search and the officer's concomitant discovery of the drugs did not come by means sufficiently distinguishable to be purged of the primary taint. The illegally obtained evidence must be suppressed. Because the evidence forms the sole basis for Larson's conviction, this Court should reverse the conviction and dismiss the charge. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Larson was represented below by appointed counsel. CP 7-18. The trial court found her indigent for purposes of this appeal. CP 48-49. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At the time of sentencing, Larson was staying with her mother. RP 98. Larson has a 12 year-old son. RP 100. She indicated she had not worked recently and had no source of income. RP 101. The court imposed only the mandatory fees. RP 102.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our

Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94. Based on Larson’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

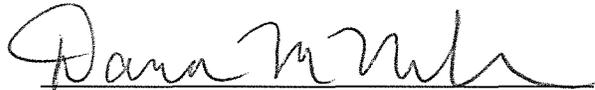
D. CONCLUSION

This Court should reverse and dismiss Larson's conviction. Alternatively, this Court should exercise its discretion and deny any request for costs.

Dated this 24th day of August, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson".

DANA M. NELSON, WSBA 28239

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