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No. 47135-3-II  
COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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Skamania County Superior Court nos.  
14-1-00060-8

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STATE OF WASHINGTON,  
Respondent

vs.

PATRICK FICK,  
Appellant

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BRIEF OF RESPONDENT

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Stevenson, Washington 98648  
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**I. FACTS**

The state incorporates the facts as recited by the appellant in appellant's brief as pertains to the issues raised in this appeal.

**II. APPELLANT'S ASSIGNMENT OF ERROR**

1. The initial search of the Appellant's backpack was an unlawful warrantless search and does not fall under the abandoned property exception.
2. Appellant's trial counsel's failure to challenge the Probable Cause for the warrant to search the backpack constituted ineffective Assistance of Counsel.
3. The Appellant's Legal Financial obligations were ordered without a required analysis of his ability to pay pursuant to Statute.

**III. RESPONSE TO APPELLANT'S CLAIMS**

1. The Appellant voluntarily abandoned the backpack searched and had no privacy rights in it's contents.
2. Any failure to challenge Probable Cause for the search warrant of the backpack was consistent with the court's ruling in regard to abandonment and had no impact on the evidence presented at trial.
3. The claim was not preserved for appeal by objection at trial, and the record reflects the court properly assessed discretionary costs

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**IV. ARGUMENT**

1. Was the initial safety search of the backpack in the field unlawful?

As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Washington allows a few jealously and carefully drawn exceptions to the warrant requirement, which include exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and Terry investigative stops. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

However, law enforcement officers may search property abandoned by a defendant before the defendant is seized, as such property is voluntarily abandoned. *State v. Reynolds*, 144 Wn.2d 282, 287-88, 27 P.3d 200 (2001). Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution. However, property cannot be deemed voluntarily abandoned (and thus subject to search) if a person abandons it because of unlawful police conduct. *State v. Whitaker*, 58 Wash.App. 851, 853, 795 P.2d 182 (1990) (citing *United States v. Tolbert*, 692 F.2d 1041, 1045 (6th Cir.1982), cert. denied, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306

1 (1983); Fletcher v. Wainwright, 399 F.2d 62 (5th Cir.1968)), review denied,  
2 812 P.2d 103 (1991), consistent with the principle that "[e]vidence produced  
3 as the result of an unlawful seizure is not admissible against an accused." State  
4 v. Nettles, 70 Wash.App. 706, 709, 855 P.2d 699 (1993) (citing Mapp v.  
5 Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)).  
6 Consequently, where a defendant abandoned property and that property was  
7 subsequently searched, the defendant may assert a constitutionally protected  
8 privacy interest only upon a showing that he or she involuntarily abandoned the  
9 property in response to illegal police conduct. To establish that the  
10 abandonment of the searched property was involuntary, a defendant must  
11 therefore show two elements: "(1) unlawful police conduct and (2) a causal  
12 nexus between the unlawful conduct and the abandonment." Whitaker, 58  
13 Wash.App. at 853, 795 P.2d 182 (citing United States v. Roman, 849 F.2d  
14 920, 923 (5th Cir.1988)); Nettles, 70 Wash.App. at 708, 855 P.2d 699 (citing  
15 Whitaker).

16 The Appellant argues that the attempt to secret the abandoned item  
17 undercuts the abandonment and suggests a want to exercise control over the  
18 abandoned backpack. Under this analysis a suspect who throws an item into  
19 an area with short grass has abandoned the item. However, if the defendant  
20 throws the item in an area of tall grass this attempt to secret the item now  
21 makes it no longer abandoned. The Appellant refers to cases involving  
22 defendants who are denying knowledge of the searched item as a basis for the  
23 abandonment. This is not the case here. Here, the defendant had left the  
24 backpack behind after fleeing from Deputy Scheyer as she attempted to arrest

1 him on outstanding felony warrants. The backpack was discovered at the last  
2 location the defendant was observed as he ran down Second Street in Carson,  
3 Washington. Deputy Scheyer's attempt to arrest the defendant was lawful and  
4 the defendant abandoned the backpack as he fled. Pursuant to case law  
5 Deputy Scheyer needed neither probable cause nor warrant to search the  
6 backpack. Her subsequent application for warrant was out of abundance of  
7 caution and ultimately unnecessary.

8 2. Does trial counsel's failure to challenge the probable cause basis for the  
9 search warrant of the backpack constitute ineffective assistance of counsel.?

10 Claims of ineffective assistance of counsel are reviewed de novo. State  
11 v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an  
12 ineffective assistance of counsel claim, the appellant must show both that 1)  
13 defense counsel's representation was deficient and 2) the deficient  
14 representation prejudiced the defendant. Strickland v. Washington, 466 U.S.  
15 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Grier, 171  
16 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if after  
17 considering all the circumstances, it falls below an objective standard of  
18 reasonableness. Grier, 171 Wn.2d at 33. Prejudice exists if there is a  
19 reasonable probability that except for counsel's errors, the result of the  
20 proceeding would have been different. Grier, 171 Wn.2d at 34. The remedy  
21 for a lawyer's ineffective assistance is to put the defendant in the position in  
22 which he or she would have been had counsel been effective. State v.  
23 Crawford, 159 Wn.2d 86, 107-08, 147 P.3d 1288 (2006).

24 Here, trial counsel raised a challenge to the search of the backpack

1 based upon an argument of no emergent need to open the backpack when first  
2 discovered and sought to have the information gleaned from that initial search  
3 suppressed and thereby invalidate the search warrant. CP 29 - 42. The trial  
4 court did not address the issue of the emergent need to search the backpack as  
5 the court was convinced that it had been abandoned. The trial counsel's theory  
6 on challenging the basis for probable cause was different from what appellate  
7 counsel claims would have been best practice. However, a challenge to  
8 probable cause was brought by trial counsel. Trial counsel's legal theory for  
9 the challenge was appropriate considering the position taken.

10 Further, if it is found that trial counsel's approach was deficient it still  
11 must be shown that a prejudice exists, based upon the deficiency, that creates a  
12 reasonable probability, that except for counsel's errors, the result of the  
13 proceeding would have been different. As addressed earlier the trial court  
14 ruled the backpack to have been voluntarily abandoned. Based upon that  
15 finding, the contents of the backpack were admitted into evidence. The issue of  
16 the probable cause challenge to the subsequent search warrant has no bearing  
17 on the evidence that would have been presented at trial.

18  
19 3. Did the court sufficiently analyze the appellant's ability to pay, pursuant to  
20 statute, before ordering legal financial obligations at sentencing.

21 **Claim not preserved for consideration under RAP 2.5(a)**

22 The Appellant made no objection at time of sentencing regarding the  
23 Costs imposed. RP 1/15/15 pg. 4-5. A defendant who makes no objection to  
24 the imposition of discretionary LFOs at sentencing is not automatically entitled

1 to review. It is well settled that an " appellate court may refuse to review any  
2 claim of error which was not raised in the trial court." RAP 2.5(a). State v.  
3 Blazina, 182 Wn.2d 827 at 832, 344 P.3d 680 (2015). This rule exists to give  
4 the trial court an opportunity to correct the error and to give the opposing party  
5 an opportunity to respond. State v. Davis, 175 Wn.2d 287, 344, 290 P.3d 43  
6 (2012), cert. denied, 134 S.Ct. 62 (2013). State v. Blazina, 182 Wn.2d 827 at  
7 833, 344 P.3d 680 (2015). The text of RAP 2.5(a) clearly delineates three  
8 exceptions that allow an appeal as a matter of right. 1) lack of trial court  
9 jurisdiction, 2) failure to establish facts upon which relief can be granted, and 3)  
10 manifest error affecting a constitutional right. See RAP 2.5(a). The appellant  
11 does not attempt to place this issue under any of these exceptions but instead  
12 seeks to apply the reasoning in Balzina to convince the court to grant  
13 discretionary review of this issue. However, while RAP 2.5(a) grants appellate  
14 courts discretion to accept review of claimed errors not appealed as a matter of  
15 right. State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). Each  
16 appellate court must make its own decision to accept discretionary review.  
17 State v. Blazina, 182 Wn.2d 827 at 835, 344 P.3d 680 (2015). Review  
18 should be denied for failure to preserve the issue at trial.

19 **Imposition of Costs**

20 The State Supreme Court applied Fuller v. Oregon to Washington  
21 Statute in State v. Barklind, 87 Wash.2d 814, 557 P.2d 314 (1976). There,  
22 the court delineated the features of a constitutionally permissible costs and fees  
23 structure. The following must be met:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment. *State v. Eisenman*, 62 Wash.App. 640, 644 n. 10, 810 P.2d 55, 817 P.2d 867 (1991) [829 P.2d 168] (citing *Barklind*). In *Barklind*, the court noted that these requirements were met, and that the Washington statute constitutional. 87 Wash.2d at 818, 557 P.2d 314.

Neither the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs. According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system. *State v. Curry*, 118 Wn.2d 911, 829 P.2d

166 (1992).

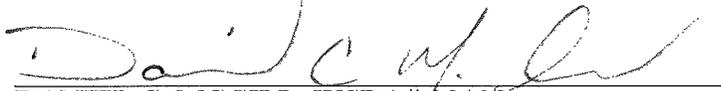
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2 If the court grants discretionary review of the appellant's claim it is  
3 important to note that the trial court was under no obligation to make a record  
4 that the court considered the appellant's's ability to pay. Further, this is a  
5 review of the court's discretionary powers and would be reviewed for an abuse  
6 of discretion with deference being given to the trial court. In the record of court  
7 proceedings there is evidence that the court acknowledges it did not expect the  
8 Appellant to make payments while in custody. RP 1/15/15 pg. 4. Further, the  
9 court, as mentioned by the appellant in his brief, was sentencing the Appellant  
10 on two different matters on the same docket. The court in the other matter  
11 waived attorney fees based upon it's consideration of Appellant's ability to pay.  
12 See CP 89-103 in State v. Fick, no. 47138-8-II. Sufficient evidence exists on  
13 the record to suggest that the court in carrying out it's discretionary function  
14 considered the Appellant's ability to pay when assessing costs per RCW  
15 10.01.160.

16  
17 **V. CONCLUSION**

18 The State respectfully submits that the appellant's backpack was  
19 voluntarily abandoned and open to search with probable cause or warrant  
20 when discovered by the tracking dog in the Bushes along the road. Further,  
21 this abandonment makes any challenge to the probable cause basis of the  
22 search warrant issued to search the backpack immaterial as was the challenge  
23 put forward by trial counsel. Finally, the defendant did not preserve the issue  
24 of discretionary costs imposed by the court by objecting at time of sentencing

1 and that even if an analysis was made of the proceedings it would suggest the  
2 court did consider the appellant's ability to pay when assessing those legal  
3 financial obligations.

4 RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of SEPTEMBER, 2015.

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7 DANIEL C. MCGILL, WSBA# 39129  
8 Skamania County Deputy Prosecuting Attorney  
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**SKAMANIA COUNTY PROSECUTOR**

**September 24, 2015 - 10:57 AM**

**Transmittal Letter**

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Court of Appeals Case Number: 47135-3

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Statement of Arrangements

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Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

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Personal Restraint Petition (PRP)

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