

NO. 48837-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

COLIN BECCARIA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello, Judge

No. 15-1-02207-7 & 15-1-03106-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's motion to suppress the heroin and illegally possessed firearm when they were seized pursuant to a warrant based on contraband observed in open view next to a bullet on the driver's seat of a car as defendant spontaneously exited amid a burglary investigation?

2. Should this Court deny defendant's untimely request for relief from appellate costs when the State has not yet submitted a cost bill and when defendant ought to pay for the cost of his appeal?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with unlawful possession of a controlled substance (UPCS), unlawful possession of a firearm in the first degree, and unlawful use of drug paraphernalia. CP 52-53. The trial court denied defendant's motion to suppress the heroin and firearm seized from the vehicle he was in pursuant to a warrant predicated on an open view observation. CP 61-71, 199-202. Defendant only challenged Findings of Fact No.2 and No.3. Brf. of App. 12-13. The challenged findings of fact relate to a third party female, not defendant. The remaining unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A jury convicted defendant of UPCS and acquitted defendant on the remaining counts. CP 181-183.

At sentencing, defendant's UPCS conviction was consolidated with a second UPCS conviction pursuant to a guilty plea not at issue in this appeal. CP 1-2, 4-13. The trial court imposed consecutive sentences as defendant's multiple current offenses and high offender score would have resulted in some current offenses going unpunished. 2/18/16RP 24-25¹, CP 203-205. Defendant timely appealed. CP 42, 206.

2. Facts

On August 7, 2015, at approximately 1:00 A.M., Officer Joseph O'Connell of the Puyallup Tribal Police was on his normal patrol shift in the Puyallup Reservation. 1/27/16RP 32, 1/25/16RP 18. O'Connell saw an early '90s white Honda Accord with no license plates and what appeared to be a fake trip permit on the back window parked in the driveway of a house. 1/25/16RP 20. O'Connell was aware the neighborhood he was in was a high crime area and had previous contacts with local residents. 1/21/16RP 39, 44. O'Connell saw that the Honda had an individual, later identified as defendant, sitting in the driver's seat and he also saw a female near the end of the driveway standing in front of what was later identified as a bedroom window. *Id.* Based upon O'Connell's observations and the time of night, he became suspicious and believed there may have been a burglary in progress.

¹ The verbatim reports of proceedings are contained in five volumes. Due to inconsistencies in the titles of the volumes, the reports of proceedings will be referred to by the date of the respective proceeding.

1/25/16RP 20-21. As O'Connell approached the scene he did not activate the emergency lights or siren on his police car. 1/25/16RP 64.

O'Connell exited his vehicle in an attempt to approach the female. 1/25/16RP 21. Upon seeing O'Connell, the female began to walk away from the window "in a fleeing manner". CP 199-202 (FoF 2²), 1/21/16RP 53. O'Connell contacted the female, subsequently identified as Briana March. 1/25/16RP 21, 1/26/16RP 28. For safety purposes March was ordered to stand behind the Honda with her hands on the car. 1/25/16RP 22.

After O'Connell instructed March to stand with her hands on the Honda, he went to contact defendant in the Honda. 1/21/16RP 35. Defendant spontaneously exited the Honda. 1/25/16RP 22. As defendant exited, O'Connell ordered him to stop getting out of the car. 1/21/16RP 35. Defendant however, completely exited the Honda at which point O'Connell noticed a bullet and what appeared to be heroin on the driver's seat of the vehicle. 1/25/16RP 21-22. For safety, O'Connell placed defendant in handcuffs and had him remain within the open driver's door of the Honda. 1/25/16RP 22, 56. O'Connell ran a records check for defendant and discovered he was a person prohibited from possessing firearms. 1/25/16RP 26. O'Connell took another look in the vehicle from the outside and noticed a firearm protruding from underneath the driver's seat, which was

² The Court entered Findings of Fact and Conclusions of Law on February 18, 2016. CP 199-202. Findings of Fact will be referred to as FoF followed by the specific finding number and Conclusions of Law will be referred to as CoL followed by the specific conclusion number.

determined after a search warrant was executed to be a fully loaded 9 mm. *Id.*, 1/25/16RP 27-29. While executing the warrant, O'Connell retrieved the previously observed heroin, firearm, and bullet, and also discovered a digital drug scale which had methamphetamine and heroin residue on it. *Id.*

The Washington State Patrol Crime Lab later tested the substance found by O'Connell and determined it was indeed heroin. 1/25/16RP 84. The Puyallup Tribal Police tested the 9 mm found under the driver's seat and determined it was a functioning firearm. 1/26/16RP 8.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS AS THE HEROIN WAS SEIZED PURSUANT TO A WARRANT BASED UPON THE OPEN VIEW OBSERVATION OF CONTRABAND AS DEFENDANT SPONTANEOUSLY EXITED THE VEHICLE.

The community expects police to be "more than mere spectators." *State v. Young*, 135 Wn.2d 498, 511-12, 957 P.2d 681 (1998). "[I]t is well established ... [e]ffective law enforcement techniques ... necessitate ... interaction with citizens on the streets." *Id.* It is in those necessary interactions officers expose themselves to the greatest risk for the common good. The United States Supreme Court explained the reasons for extending constitutional protection to officers conducting traffic stops:

It would seem ... the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact ... evidence of a more serious crime might be uncovered during the stop. And the

motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Maryland v. Wilson, 519 U.S. 408, 414, 117 S.Ct. 882 (1997). "Writing in 2009 for a unanimous Court, Justice Ginsburg reaffirmed the Court's unyielding view that traffic stops are 'especially fraught with danger to police officers.'" *Gonzalez v. City of Anaheim*, 747 F.3d 789, 804 (2014) (quoting *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)). Police are rightly presumed to legally fulfill their responsibilities absent evidence to the contrary. *State v. Hodge*, 11 Wn. App. 323, 330, 523 P.2d 953 (1974) (citing *Ledgering v. State*, 63 Wn.2d 94, 101, 385 P.2d 522 (1963)). They are empowered to respond to potential threats through means ranging from social contacts to seizures as circumstances demand. See *State v. Young*, 135 Wn.2d at 511; *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009); U.S. Const. amend. IV; Wash. Const. art. I § 7.

One exception to the warrant requirement is that an officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the reasonable suspicion standard under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). *State v. Bliss*, 153 Wn. App. 197, 203-04, 222 P.3d 107 (2009); *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). Specifically, an investigatory stop is lawful if the officer "...can point to

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. A seizure is reasonable and lawful when it is based upon an officer’s objectively reasonable suspicion that an individual has engaged in criminal activity. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

In reviewing the propriety of a *Terry* stop, a court should evaluate the totality of the circumstances known to the officer at the time of the stop’s inception. *Snapp*, 174 Wn.2d at 197. Courts should take an officer’s experience into consideration, for it can enable the officer to detect incriminating facts an ordinary citizen might misinterpret as innocent. *U.S. v. Brigoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574 (1974); *State v. Samsel*, 39 Wn. App. 564, 570, 694 P.2d 670 (1985); *see also United States v. Cortez*, 449 U.S. 411, 629 S. Ct. 690 (1981).

In order to secure the scene of arrest, officers may seize an arrestee’s companion so long as there is an objective rational predicated on safety concerns. *State v. Flores*, ___ Wn.2d ___ (Slip No. 91986-1; WL 4940036 at 1 (Sept. 15, 2016)). The inquiry into the presence or absence of an objective rational requires consideration of the circumstances present at the scene. *Id.* at 10 (quoting *State v. Mendez*, 137 Wn.2d 208, 221, 970 P.2d 722 (1992)). Officers may not engage in a full search of a nonarrest defendant, but instead must limit the search to ensure officer safety only and must be supported by objective suspicions that the person searched may be

armed or dangerous. *Id.* at 12 (quoting *State v. Parker*, 139 Wn.2d 486, 501-502, 987 P.2d 73 (1999) (Talmadge, J., concurring)).

The denial of a suppression motion is reviewed to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. *State v. Weller*, 185 Wn. App. 913, 922, 344 P.3d 695 (2015). Unchallenged findings of fact are verities on appeal. *Hill*, 123 Wn.2d at 644. Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Conclusions of law pertaining to suppression of evidence are reviewed *de novo*. *State v. Arreola* 176 Wn.2d, 284, 291, 290 P.3d 983 (2012).

- a. O'Connell saw the contraband in open view prior to detaining defendant.

A person is only seized when by means of physical force or a show of authority his or her freedom of movement is restrained and a reasonable person would not have believed they are (1) free to leave, and (2) free to otherwise decline an officer's request and terminate an encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (citing Washington State Constitution Article I, section 7). Determination of whether a seizure has occurred is made by looking objectively at the actions of the law enforcement officer. *State v. Mote*, 129 Wn. App. 276, 283, 120 P.3d 596 (2005). The relevant question is whether a reasonable person in defendant's

position would feel as though he or she is being detained. *O'Neill*, 148 Wn.2d at 581. The individual asserting a seizure occurred in violation of article I, section 7 bears the burden of proving that there was in fact a seizure. *Young*, 135 Wn.2d at 511. An officer may seize companions of the arrestee to control the scene of an arrest based upon objective rationale. *Flores*, Slip Op. at 8. Unlike with a *Terry* stop, the objective rationale test permits an officer to only control the movements of nonarrest companions for the sole purpose of controlling the scene of the arrest. *Id.* at 18.

An open view observation involves an observation made from a nonconstitutionally protected area. *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986). However, the right to seize an item seen in open view must be justified by a warrant or a valid exception if the items are in a constitutionally protected area. *State v. Swertz*, 160 Wn. App. 122, 134, 247 P.2d 802 (2011). If an officer, after making a lawful stop, looks into a car from the outside and sees contraband in the car, he has not searched the car. *Kennedy*, 107 Wn.2d at 10. As such, article 1, section 7 of the Washington State Constitution is not implicated. *Id.* The officer may use a flashlight to view the interior of a car. *State v. Gibson*, 152 Wn. App. 945, 955, 219 P.3d 964 (2009). This is because the flashlight is an exceedingly common device which can do no more than reveal what might be visible in natural light. *O'Neill*, 148 Wn.2d at 578.

Open view allows for police with legitimate business to enter the areas of a curtilage of a residence impliedly open to the public without violating article 1, section 7 or the Fourth Amendment. *State v. Gave*, 77 Wn. App. 333, 337, 890 P.2d 1088 (1995). A driveway is an area of curtilage impliedly open to the public. *Id.*

O'Connell observed the heroin prior to detaining defendant. O'Connell testified, and the trial court found that defendant spontaneously exited the Honda prior to being contacted by O'Connell. CP 199-202 (FoF 4-5, CoL 2), 1/21/16RP 37. As defendant was exiting the Honda, O'Connell ordered the defendant to stop getting out of the car. 1/21/16RP 35. Defendant, however, emerged from the driver's side door, revealing the heroin and bullet on the seat. CP 199-202 (FoF 5), 1/21/16RP 37. O'Connell saw the contraband in open view as he approached the Honda. *Id.*

The factual scenario here is very similar to *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998). In *Young*, the arresting officer, with his vehicle spotlight shining on Young, saw Young walk behind a tree, crouch down, and toss something behind a tree. *Young*, 135 Wn.2d at 503. Young then continued to move away from the officer. *Id.* Only after this did the officer ask Young to stop and the officer retrieved the contraband. *Id.* At the point where the officer asked Young to stop, that is when Young was seized for purposes of article I, section 7. *Id.* The Supreme Court held the spotlight

did not constitute a show of authority as that alone was not enough for a reasonable person to feel restrained. *Young, supra*, at 514-515.

Here, when the measures taken by O'Connell are looked at through the objective test, such measures were even less intrusive than *Young*. No flashlight or spotlight was ever shined on defendant or in his general direction. There was no evidence presented that O'Connell had his service weapon drawn or was yelling at defendant. When O'Connell approached defendant, one of the purposes was to control the scene. 1/25/16RP 22, 56. Such control of the scene and of companions is allowed when, as in this case, there is an objective rationale that officer safety might be at issue. *Flores*, Slip. Op. at 8, 18.

Similar to *Young*, defendant's actions were completely voluntary and were not coerced by any manifestation of force. Defendant's decision to get out of the Honda supports a reasonable inference that O'Connell did not engage in conduct which manifested a show of force as to defendant when O'Connell arrived on the scene. This is circumstantial evidence that a reasonable person in defendant's situation would not have perceived herself to have been seized by O'Connell before he observed the heroin. Defendant was only seized after O'Connell saw the heroin. CP 199-202 (FoF 5, CoL4), 1/21/16RP 38. And that observation was only made as a consequence of defendant's spontaneous act of exiting the car. *Id.*

Additionally, O'Connell followed the requirements for seizures based on contraband observed in open view. He saw the Honda parked in the driveway of a residence. 1/25/16RP 20. As established by *Gave*, a driveway is an area of curtilage to which the open view doctrine applies. *Gave*, 77 Wn. App. at 337. While O'Connell was standing on the driveway, he saw the heroin as defendant spontaneously exited the Honda. CP 199-202 (FoF 5), 1/25/16RP 21-22. Hence, O'Connell viewed the contraband from a nonconstitutionally protected area. The heroin and bullet were revealed only because of defendant's act of exiting the vehicle. *Id.*

Following defendant's arrest, O'Connell impounded the Honda and obtained a search warrant. 1/25/16RP 27. Credible testimony showed that only upon obtaining the search warrant did O'Connell search the Honda. 1/25/16RP 27-28. At that point he retrieved the heroin from the car. 1/25/16RP 28. These actions conform exactly to the requirements of *Swertz*. O'Connell did not seize the heroin until he had obtained the search warrant, even though he saw the items in open view. *Swertz*, 160 Wn. App. at 134. As such, the seizure of the heroin is valid.

- b. O'Connell did not seize defendant upon contacting him, but rather attempted to contact defendant to preserve the status quo of the scene for safety purposes.

The Supreme Court has recognized detention or control of both suspects and non-suspects may be necessary to ensure officer safety and to

maintain the officers' control over a crime scene. Thus, officers conducting a *Terry* stop are “authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.” *United States v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675 (1985). *See also McKinney v. City of Tukwila*, 103 Wn. App. 391, 405, 13 P.3d 631 (2000). The detention of non-suspects incidentally present on the scene, in the interest of officer safety, should not ordinarily exceed in scope or duration that of the suspects directly targeted by the *Terry* stop itself. *Walker v. City of Orem*, 451 F.3d 1139, 1149 (10th Cir. 2006).

While executing an arrest, police may seize nonarrest companions of the arrestee to control the scene of the arrest if police can articulate an objective rationale predicated specifically on safety concerns for the officers, the arrestee, his or her companions, or other citizens. *State v. Flores*, Slip Op. at 17.

Factors that warrant an officer seizing companions include (but are not limited to) the arrest, the number of officers, the number of people present at the scene, the location of the arrest, the presence or suspected presence of a weapon, officer knowledge of the arrestee or the companions, and potentially affect citizens... This is not an exhaustive list, and no one factor by itself justifies an officer’s seizure of nonarrest companions. When determining whether there is an objective rationale, the court should look at all the circumstances present at the scene.

Id.

In *Flores*, the responding officer went to the scene based on a report that a Giovanni Powell had pointed a gun at another's head. *Flores*, Slip Op. at 2. When the officer arrived at the scene, he saw Flores with Powell. *Flores*, Slip Op. at 3. The officer did not have an individualized, articulable suspicion that Flores himself was involved in criminal activity. *Id.* Yet, the Supreme Court upheld the seizure of Flores because, Flores and Powell were together, the officer was by himself, he was aware that Powell had a history with firearms, the stop occurred at 4:30 P.M. in November, and Flores halted when specifically only Powell was ordered to halt. *Flores*, Slip Op. at 21. All of these factors created an objective rationale for the officer to seize Flores and secure the scene of Powell's arrest. *Id.*

In this case similar factors are present. O'Connell was located by himself at 1:00 A.M. 1/27/16RP 32. While O'Connell did not know March by sight, he knew that he was in high crime area. 1/21/16RP 44. From the time of his arrival on the scene, O'Connell knew there were at least two individuals present. CP 199-202 (FoF 2-3), 1/25/16RP 20. The first individual, March, attempted to flee the scene as he approached. 1/21/16RP 53. O'Connell then went to the second individual, defendant, who was located in a vehicle, without knowing whether the defendant had a weapon. *Id.* Defendant spontaneously exited the vehicle just after O'Connell had detained March as if reacting to her detention. CP 199-202 (FoF 6),

1/25/16RP 21-22. O'Connell discovered through the course of his investigation that March and Beccaria had come to the house together. 1/21/16 36-37.

O'Connell reasonable suspected a felony property crime, residential burglary, was occurring. RCW 9A.52.025. Residential burglary is defined as a crime of violence for firearm offenses. RCW 9.41.010. Due to his perception of the burglary, it was reasonable to assume defendant, seated in a car close to where O'Connell believed a burglary occurred or was about to occur, would have material knowledge of the burglary. When the *Flores* factors are taken together with the community's concern for the safety of officers, it is clear the various exceptions applied to the detention of defendant.

- c. Defendant was seized from the point where O'Connell saw a crime being committed, not when O'Connell first arrived at the scene.

A person is seized within the meaning of the Fourth Amendment only when, by means of physical force or a show of authority, their freedom of movement is restrained. *Young*, 135 Wn.2d at 510 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980)). When determining if an individual is seized, the circumstances surrounding the incident must be taken into account to determine if a reasonable person would believe he or she was not free to leave. *State v. Mecham*, ___ Wn.2d

_____, 375 P.3d 604, 612 (2016) (quoting *State v. Stroud*, 30 Wn. App. 392, 394-395, 634 P.2d 316 (1981)). Flashing lights on a police car indicate an individual has been seized. *Stroud*, 30 Wn. App. at 396.

Based upon the factual situation in this case, there was not a seizure of defendant prior to when he was arrested for UPCS. At the time O'Connell approached defendant, he was the only officer on the scene and the patrol lights and siren on the police car were not activated. 1/25/16RP 64. Patrol lights not being activated on a police car is a circumstance that indicates defendant had not yet been seized at the time of his initial encounter with O'Connell. As there was no show of force and defendant spontaneously exited the Honda, a reasonable person in the same position would have felt he was not seized. Although O'Connell believed defendant was detained from the time O'Connell arrived at the scene, neither the testimony nor Findings of Fact and Conclusions of Law support this conclusion. CP 199-202 (FoF 5, CoL 4), 1RP 49. Defendant's response to O'Connell demonstrated that there was no show of force that made defendant feel as though he was not free to leave, which is circumstantial evidence that O'Connell was not exerting his authority over defendant. This in turn supports an inference that a reasonable person in defendant's situation would have felt free to leave. The challenged open view observation of the contraband was made prior to defendant being detained. Because the

observation preceded the detention, the detention cannot be a basis for suppressing the evidence.

- d. The heroin was viewed by defendant's spontaneous actions and as such, is not "fruit of the poisonous tree".

When an unconstitutional seizure occurs, all subsequently uncovered evidence becomes "fruit of the poisonous tree" and must be suppressed. *State v. Ladson*, 138 Wn. 2d 343, 359, 979 P.3d 833 (1999). This exclusionary rule applies to evidence derived directly and indirectly from illegal police conduct. *State v. Le*, 103 Wn. App. 354, 361, 12 P.3d 653 (2000). Derivative evidence will be excluded unless it was obtained through legal means or is "sufficiently distinguishable to be purged of the primary taint". *Id.* The State may prove evidence is purged from the taint by either (1) intervening circumstances that attenuate the link between the illegality and the evidence, *or*, (2) the evidence was discovered through a source independent from any illegality. *State v. Smith*, 165 Wn. App. 296, 266 P.3d 250 (2011) (emphasis in original).

In this case, even if it is assumed defendant was seized upon O'Connell's arrival, the circumstances of the discovery of the heroin make it so that the evidence obtained is not "fruit of the poisonous tree", but rather was a discovery through an independent means.

In *Flores*, the only reason that the officers discovered that Flores had a firearm was because he spontaneously informed one of the officers at the scene that he had a firearm. *Flores*, Slip Op. at 22. At no point did officers ask Flores if he was carrying a firearm. *Id.* At that point the officer now had a reasonable suspicion to further detain Flores. *Id.*

O'Connell testified that defendant spontaneously exited the vehicle as O'Connell went to approach him. CP 199-202 (FoF 4), 1/21/16RP 37. As O'Connell approached defendant, he instructed defendant to stay put. 1/21/RP 51. But, defendant preceded to exit the vehicle, notwithstanding O'Connell's instruction to remain in the vehicle. 1/21/16RP 37. At that point O'Connell saw the heroin and bullet on the front seat where defendant had been sitting before exiting. *Id.*

The factual situation here creates an intervening circumstance and a source independent from any illegal seizure, similar to *Flores*. Defendant spontaneously exited the vehicle and moved contrary to O'Connell's command. 1/21/16RP 37, 51. This was an intervening act revealing the heroin to O'Connell's open view observation. There was no evidence presented that O'Connell would have seen the heroin and bullet if defendant had been compliant with O'Connell's command to stay put and remained in the car.

This situation is different than one where incriminating evidence is discovered because an individual complied with an officer's orders. If the heroin had been seen because defendant obeyed an unlawful-police command, the observation would be connected to the unlawful conduct. That is not the situation presented. It was defendant's defiance of O'Connell's command which led to the heroin and bullet being seen and as such the heroin cannot be considered fruit of the poisonous tree even if one incorrectly assumes O'Connell's command was unlawful.

- e. The State was able to establish an articulable suspicion a crime had occurred or would occur as O'Connell saw an altered or fake trip permit on a vehicle and observed what he believed to be a burglary in progress.

The police are authorized to detain suspects for a brief time for questioning when there is an articulable suspicion, based on objective facts, that the suspect is involved in some type of criminal activity. *Brown v. Texas*, 443 U.S. 47, 99 S. Ct 2637 (1979). Washington law gives officers the legal right to stop a suspected person, request the person produce identification and an explanation of his or her activities as long as the officer's "well-founded suspicion" meets the *Terry* rational. *State v. Little*, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), quoting *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

While an officer must have articulable reasons for investigating, he need not be able to indicate the specific crime being investigated in order for a stop to be legitimate. *State v. Mercer*, 45 Wn. App. 769, 775, 727 P.2d 676 (1986). “The seriousness of the criminal activity” suspected “can affect the reasonableness calculus which determines whether an investigatory detention is permissible.” *State v. Sieler*, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980). “Crime prevention and crime detection are legitimate purposes for investigative stops or detention...[c]ourts have not required the crime suspected or under investigation to be a felony or serious offense.” *State v. Kennedy*, 107 Wn.2d, 1, 6, 726 P.2d 445 (1986).

The scope of the detention may be prolonged on the basis of information obtained during the detention. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 734 P.2d 966 (1987). The degree of probability required is only that the officer finds there is a substantial possibility that criminal conduct occurred or is about to occur. *Kennedy*, 107 Wn.2d at 6.

When the activity observed is consistent with criminal activity and also consistent with noncriminal activity, it may justify a brief detention. *Id.* Based upon an officer’s experience, location, and the conduct of individuals they observe, officers may stop individuals to investigate them. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Among the factors that may be considered in determining whether officers had a reasonable suspicion of criminal activity is flight from police officers. *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008). Courts have further

found that behavior consistent with criminal conduct in a high crime area can be enough to justify an investigation. *State v. Thierry*, 60 Wn. App. 445, 448-449, 803 P.2d 844 (1991).

O'Connell was able to point to specific and articulable facts that demonstrate how the conduct of defendant and March was more consistent with criminal conduct than innocent conduct. CP 199-202 (CoL 1). O'Connell identified what he believed was an altered or fake trip permit on the Honda in which defendant was sitting. CP 199-202 (FoF 1), 1/25/16RP 20. An altered trip permit is a violation of RCW 46.16A.320(3)(a)(iv), a gross misdemeanor. O'Connell saw what appeared to be a burglary in progress. 1/21/16RP 33. O'Connell determined that the behavior at the scene was suspicious due to the late hour and the neighborhood being a high crime area. 1/21/16RP 44. O'Connell was familiar with this neighborhood, and, in particular, the street where he saw defendant, due to his history of needing to contact people in the houses on either side of the house where he saw the Honda parked and March acting suspiciously. 1/21/16RP 39. Further, when he attempted to approach the scene, March left in a "fleeing manner." CP 199-202 (FoF 2) 1/21/16RP 53.

Based upon his experience, the location of the house, and the behavior of the individuals present, O'Connell was able to determine with a substantial probability that the behavior he observed was consistent with criminal conduct. CP 199-202 (CoL 1). The conduct would also likely appear suspicious to an ordinary citizen as March was peering into a

window at 1:00 A.M. When taken with O'Connell's special knowledge about the history of crime in the area, his ability to recognize fake trip permits, and capacity to recognize that there may have been a burglary in progress, such was enough to establish with substantial probability that there was criminal activity.

The trial court substantially agreed with O'Connell. In the Findings of Fact and Conclusions of Law, the trial court found that the Honda did not have a license plate and appeared to have an altered trip permit, O'Connell believed there was a potential burglary in progress, March fled when she saw O'Connell approach, and her behavior did not dispel O'Connell's suspicion of a burglary in progress. CP 199-202. Based upon the totality of the circumstances O'Connell had a reasonable belief that defendant was engaged in criminal activity. *Id.* O'Connell's observations led the court to conclude O'Connell was afforded the opportunity to lawfully expand the original *Terry* detention. CP 199-202 (CoL 3). As such, the court denied defendant's motion to suppress. *Id.* The only facts that defendant challenges are O'Connell's suspicions regarding March's action. As such, all remaining facts, including all facts related to the defendant, are verities on appeal. *Hill*, 123 Wn.2d at 644. When looking at the record as a whole, it is clear O'Connell had an articulable suspicion that a crime had occurred or was about to occur.

Cases defendant cites are inapposite to the facts before the court. In *State v. Doughty*, 170 Wn.2d, 57, 239 P.3d 573 (2010), the issue before the

court was whether a stop was justified because Doughty stopped at a suspected drug house for only two minutes at 3:20am. *Doughty*, 170 Wn.2d at 62. The Supreme Court found those facts fell short of the articulable suspicion standard required to justify an investigative seizure. *Doughty*, 170 Wn.2d at 62-63.

O'Connell did not merely stop defendant on the vague suspicion he might have been involved in a potential burglary due to the late hour only. Rather, O'Connell approached defendant, *inter alia*, because he saw what appeared to be an altered or fake trip permit on the vehicle in which defendant was sitting in the driver's seat. CP 199-202 (FoF 1), 1/25/16RP 20. While an altered trip permit alone is a gross misdemeanor under RCW 46.16A.320(3)(a)(iv), O'Connell explained that 90s Hondas are a very common vehicle that is stolen and fake trip permits are often put on a stolen vehicle. 1/21/16RP 33. Even without the suspicion of a burglary in progress, the fake trip permits on the back of a commonly stolen vehicle by itself would have created an articulable suspicion that justified O'Connell's investigation.

Further, defense cites to *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015). In *Fuentes*, the Supreme Court concluded that when the arresting officer had only a hunch that defendant was engaged in criminal activity and he felt the entire circumstance was suspicious, that alone was not enough to justify a *Terry* stop. 183 Wn.2d at 161. Here O'Connell had more than just a mere hunch. Again, O'Connell directly observed what he

believed to be a burglary in progress and altered or fake trip permits. CP 199-202 (FoF 1-2), 1/21/16RP 33, 1/25/16RP 20. The fact that O’Connell reasonably suspected two crimes were occurring, including one in which defendant was clearly engaged, demonstrates O’Connell conducted his investigation on more than a hunch. As such, he was able to provide an articulable suspicion which justified his actions.

2. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND THE STATE WERE TO SEEK ENFORCEMENT OF COSTS.

- a. Defendant’s ability to pay appellate costs should only be considered when the State submits a cost bill, if it elects to do so.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), defendant began review of the issue by filing an objection to the State’s cost bill. *State v. Nolan*, 141 Wn.2d at 622. As suggested by the Supreme Court, this is an appropriate manner in which to raise the issue. *State v. Blank*, 131 Wn.2d 230, 244, 930 P.2d 545 (1997). If the State prevails and if the State files a cost bill, defendant can argue regarding the Court’s exercise of discretion in an objection to the cost bill. *State v. Sinclair*, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016).

In this case, however, the State has yet to “substantially prevail.” It has also not submitted a cost bill. This Court should not address the cost

before it is ripe. Any ruling regarding costs at this time would have to rely on speculation regarding defendant's future ability to pay.

- b. In the alternative, this Court should rule that defendant must pay for his appeal.

RCW 10.73.160(1) empowers appellate courts to impose appellate costs on adult offenders. Imposition of legal financial obligations have been historically perceived to be an appropriate method of ensuring able-bodied offenders "repay society for a part of what it lost as a result of [their] commission of a crime." *State v. Barklind*, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). Recently, this community-centric concept of restorative justice has been subordinated to offender-centric concerns about the difficulty of repayment. *E.g. State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). "Ability to pay is certainly an important factor [], but it is not necessarily an indispensable factor." *State v. Sinclair*, 192 Wn. App. at 389.

Recently, in *State v. Caver*, ___ Wn. App. ___ (Slip No. 73761-9, WL 4626243) (Sept. 6, 2016), Division One of this Court directly addressed the situation where a defendant did not have the ability to pay appellate costs at the time of appeal, but was likely to have the ability to pay appellate costs in the future. *State v. Caver*, Slip Op. at 12-13 (2016). Division One found that, while Caver was indigent at the time of appeal, because he was only 53 years old and had a short sentence of incarceration, there is a "realistic possibility" Caver would be able to pay costs in the future. *Id.* (quoting *State v. Sinclair*, 192 Wn. App. at 393).

In this case, defendant is even younger at 26 years of age than the defendant was in *Caver*. Additionally, defendant will serve a total prison term of 48 months, inclusive of the time defendant already has served prior to conviction and while this appeal is pending. As such there is a “realistic possibility” defendant here will be able to pay costs in the future when he is released from incarceration at the relatively young age of 29.

Even if the court decides to award the State costs, this does not leave defendant without recourse if he cannot pay. RCW 10.73.160(4) provides that as long as a defendant is not in contumacious default of payments, he may petition the sentencing court for remission of any unpaid costs if such would impose a hardship on defendant or his immediate family. The sentencing court may then either remit the costs in all or part or modify such payments under RCW 10.01.170.

Defendant has the capabilities to work and has shown he has some measure of financial resources. Here, defendant was in the driver’s seat of a vehicle that contained heroin and a firearm, all of which require an expenditure of resources to purchase. In the past, defendant has shown the physical capacity to work through the various crimes he has committed. CP 186-198. If defendant directed the physical and mental energy he has so far devoted to crime, to payment of costs through prison or post-release labor,

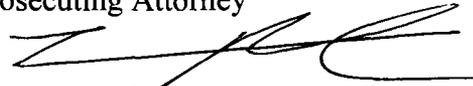
he might, in some small measure, repay the community for the substantial resources it has and continues to expand on his behalf.

D. CONCLUSION.

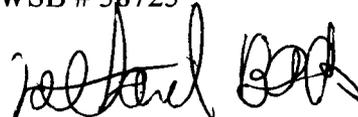
This Court should affirm the trial court's denial of defendant's motion to suppress. The illegal narcotics were seen in open view based upon defendant's spontaneous actions before he was seized. Additionally, at the time the heroin was seen, O'Connell had a reasonable and articulable suspicion that two distinct crimes were occurring. Finally, this Court should address the issue of appellate costs only if the State prevails on appeal and seeks enforcement. For the foregoing reasons this Court should affirm the trial court's denial of defendant's motion to suppress.

RESPECTFULLY SUBMITTED: October 19, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/20/16 Sheer Kar
Date Signature

PIERCE COUNTY PROSECUTOR

October 20, 2016 - 11:14 AM

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