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Court of Appeals
Division III
State of Washington

30700-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KYLE K. TRAPP, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 1:

On the 15th day of May 2011, Richland police Sergeant Curtis Smith was dispatched to the location of the Richland 7-11 to a report of a man possibly dead or unconscious in a vehicle in the store's parking lot.

(CP 42)

2. The trial court erred in entering Finding of Fact 2:

While in route the Sergeant researched the license plate of the suspect vehicle finding it registered to the defendant who was tagged in the police database as violent with police.

(CP 42)

3. The trial court erred in entering Finding of Fact 7:

The defendant was disoriented and sluggish and was unable to give the day of the week or the time. The defendant gave several contradictory stories as to how he had come to be in the parking lot.

(CP 43)

4. The trial court erred in entering Finding of Fact 12:

When the defendant attempt [sic] to access the bag the defendant forcibly removed the defendant from the car by opening the car door and pulling the defendant out by his arm.

(CP 43)

5. The trial court erred in entering Finding of Fact 13:

When the defendant attempted to access the bag the officer saw two orange-capped hypodermic syringes and a burnt spoon within the bag.

(CP 43)

6. The trial court erred in entering Finding of Fact 14:

The officer immediately recognized what he believed from training and experience to be drug paraphernalia with possible drug residue.

(CP 43)

7. The trial court erred in entering Finding of Fact 16:

The Drug Recognition Expert found the defendant to be under the influence of a narcotic drug but not to the degree that his ability to drive was impaired.

(CP 44)

8. The trial court erred in entering Conclusion of Law 1:

The approach of the defendant by the police was proper under the community caretaking function.

(CP 44)

9. The trial court erred in entering Conclusion of Law 2:

The detention of the defendant was proper as both an investigation onto [sic] the defendant's medical condition.

(CP 44)

10. The trial court erred in entering Conclusion of Law 3:

The investigation into possible driving while intoxicated charges and drug possession charges.

(CP 44)

11. The trial court should have suppressed the fruits of the warrantless seizure of Mr. Trapp.
12. The trial court erred in sentencing Mr. Trapp based upon an offender score of four.

B. ISSUES

1. Sergeant Smith responded to a 911 call indicating a possible health issue with a person, later identified as Mr. Trapp, in a parked car in a store parking lot. After seeing Mr. Trapp sitting motionless in the driver's seat of a car parked in front of the store, Sergeant Smith saw Mr. Trapp stir, place his car in reverse, and back up. He did not observe Mr. Trapp having any difficulty driving. The 911 call did not indicate criminal behavior, and Sergeant Smith did not see any. Sergeant Smith waved at Mr. Trapp to stop, and Mr. Trapp complied. Did Sergeant Smith violate provisions prohibiting unreasonable searches and seizures,

Const. art. I, § 7 and the Fourth Amendment, by seizing Mr. Trapp without a warrant?

2. The trial court sentenced Mr. Trapp based upon an offender score of four. Included in his offender score were four prior convictions for class C felonies. At sentencing, the State failed to show that Mr. Trapp was confined pursuant to a felony conviction or committed a crime that resulted in conviction in the five consecutive years before the commission of the crime in this case. Did the trial court err in sentencing Mr. Trapp based on an offender score of four, where his four prior convictions for class C felonies had washed out?

C. STATEMENT OF THE CASE

On the afternoon of May 15, 2011, City of Richland Patrol Sergeant Curtis Smith responded to a 911 call indicating that there was a possible health issue at a 7-11 convenience store. (RP 5). The caller said that there might be something wrong with a person parked in a car in the store parking lot, and that medical assistance might be needed. (RP 5-7, 20). While driving to the store, Sergeant Smith ran the car's

license plate number, and found the car was registered to Kyle Trapp. (RP 5-6).

Sergeant Smith arrived at the store and saw Mr. Trapp, sitting motionless in the driver's seat of a car parked in front of the store. (CP 42; RP 6-7). Sergeant Smith called for a back-up officer, and a fire department vehicle had also been dispatched for the potential medical issue. (CP 42; RP 6-7, 44-45).

Mr. Trapp began to stir, placed his car in reverse, and backed up. (CP 43; RP 7-8). Sergeant Smith waved to Mr. Trapp to stop his car, and then walked up to Mr. Trapp's driver's side window. (CP 43; RP 8). Sergeant Smith spoke to Mr. Trapp. (RP 8-10). He described Mr. Trapp as slow and lethargic, and said that Mr. Trapp could not identify the day of the week or the time. (RP 8-10).

As he spoke to Mr. Trapp, Sergeant Smith saw that Mr. Trapp had a closed bank deposit bag next to the driver's seat, and a sum of paper money. (CP 43; RP 12-15, 41). He told Mr. Trapp to place his hands on the steering wheel and keep them there. (CP 43; RP 14, 54). As Sergeant Smith opened the car door to get Mr. Trapp out of the vehicle, Mr. Trapp took a sum of paper money and placed it into the bank bag. (CP 43; RP 14, 54). According to Sergeant Smith, as Mr. Trapp placed the money into the bank bag, he saw the top of a syringe cap and a spoon with burn

marks on it. (RP 15). Sergeant Smith forcibly removed Mr. Trapp from his car, placed him up against the car, and patted him down. (RP 14-15, 34, 36).

Sergeant Smith detained Mr. Trapp, and had a Drug Recognition Expert (DRE) from the Richland Police Department evaluate him for intoxication or impairment. (CP 43; RP 18, 48). The DRE said that it looked like Mr. Trapp had taken something, but did not conclude that his driving would be affected by it. (RP 29). Sergeant Smith released Mr. Trapp. (RP 18, 42).

Sergeant Smith seized Mr. Trapp's car, and applied for and obtained a search warrant for the car. (CP 43; RP 19). When executing the search warrant, Sergeant Smith found a controlled substance and drug paraphernalia. (CP 43; RP 19).

The State charged Mr. Trapp with one count of unlawful possession of a controlled substance, heroin, on May 15, 2011. (CP 1-2). Mr. Trapp moved to suppress the evidence obtained as a result of his illegal seizure by Sergeant Smith. (CP 12-17).

At the hearing held on the motion to suppress, Sergeant Smith acknowledged that the 911 call concerned whether Mr. Trapp needed medical assistance, and that the call did not indicate that Mr. Trapp was displaying criminal behavior or posing a danger to anyone. (RP 20). He

also acknowledged that he did not have the medics that had been dispatched to the scene evaluate Mr. Trapp. (RP 21, 27-28).

Sergeant Smith testified that he knew Mr. Trapp from prior law enforcement encounters involving controlled substances. (RP 19-20). He testified that in the week or month prior to his interaction with Mr. Trapp at the store, he had not received information regarding any activities involving Mr. Trapp. (RP 20).

Sergeant Smith said that when Mr. Trapp sat up in his car, prior to backing up, it would seem to indicate that Mr. Trapp was asleep and woke up. (RP 23). Sergeant Smith admitted he did not see Mr. Trapp delay putting his key in the ignition, or have any difficulty doing so, or that he put his car into the wrong gear. (RP 23). He also admitted he did not see Mr. Trapp's car jerk forward before he backed up, and that Mr. Trapp appeared to be backing up in a normal fashion. (RP 23).

Mr. Trapp told the court he fell asleep in his car after he had stopped at the store. (RP 51, 59-60). He said that after he woke up, he started to back his car up. (RP 52). He told the court he checked his mirrors, and then saw Sergeant Smith waving at him to stop, so he complied. (RP 52).

The trial court denied Mr. Trapp's motion to suppress. (CP 42-45; RP 72-74). The trial court entered findings of fact and conclusions of law on the motion. (CP 42-45).

Following a bench trial based upon stipulated facts, Mr. Trapp was convicted as charged. (CP 47-51; RP 77). He was sentenced to nine months' confinement, based upon an offender score of four. (CP 53-54, 56; RP 80). The trial court ordered his confinement to commence on March 14, 2012. (CP 56; RP 80). The Judgment and Sentence listed Mr. Trapp's criminal history as follows:

	CRIME	DATE OF SENTENCE	Sentencing Court <i>(County and State)</i>	DATE OF CRIME	A or J Adult, Juvenile	TYPE OF CRIME
1	Possession of stolen property second degree 93-1-00411-1	07.07.1995	Benton County	05-15-1993	A	NV
2	Theft second degree 00-1-010080-3	03.16.2001	Benton County	10.30.2000	A	NV
3	Assault in the third degree 01-1-00291-4	12.21.2001	Benton County	03.14.2001	A	NV
4	Theft in the second degree	08.02.2002	Benton County	06.11.2002	A	NV

(CP 53).

Mr. Trapp agreed that this criminal history was "true and accurate." (CP 61).

Mr. Trapp appealed. (CP 65-66).

D. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE FRUITS OF THE WARRANTLESS SEIZURE OF MR. TRAPP.

In reviewing the denial of a suppression motion, the court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Conclusions of law from an order on a suppression motion are reviewed *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

As a general rule, warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment and article I, § 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The general rule is subject to a few jealously and carefully drawn exceptions, including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). There is also a community caretaking exception to the warrant requirement. *See State v. Kinzy*, 141 Wn.2d 373, 386-88,

5 P.3d 668 (2000). The State bears the heavy burden of showing that the search or seizure falls under an exception to the warrant requirement. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). It must establish such an exception by clear and convincing evidence. *Garvin*, 166 Wn.2d at 250.

“The community caretaking function exception recognizes that a person may encounter police officers in situations . . . involving a routine check on health and safety.” *Kinzy*, 141 Wn.2d at 387. When the police conduct a routine check on safety, “[w]hether an encounter made for noncriminal, noninvestigatory purposes is reasonable depends on a balancing of the individual’s interest in freedom from police interference against the public’s interest in having the police perform a community caretaking function.” *Id.* (alteration in original) (internal quotation marks omitted) (*quoting Kalmas v. Wagner*, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997)). “When a person has been seized, balancing the interests does not necessarily favor an encounter by police.” *Id.* at 388. Once a seizure occurs, a person’s interest in being free from police intrusion is no longer minimal. *Id.* “When weighing the public’s interest, this Court must cautiously apply the community caretaking function exception because of ‘a real risk of abuse in allowing even

well-intentioned stops to assist.” *Id.* (quoting *State v. DeArman*, 54 Wn. App. 621, 626, 774 P.2d 1247 (1989)).

If the community caretaking exception to the warrant requirement applies, “police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function.” *Id.* However, “[t]he noncriminal investigation must end when reasons for initiating an encounter are fully dispelled.” *Id.*

A seizure occurs 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. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) (quoting *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)). “The relevant question is whether a reasonable person in the individual’s position would feel he or she was being detained.” *Id.* (citing *State v. O’Neill*, 148 Wn.2d 564, 581, 62 P.2d 489 (2003)). Commanding a person to stop is a seizure. *O’Neill*, 148 Wn.2d at 577.

Sergeant Smith responded to a 911 call indicating that medical assistance might be needed for Mr. Trapp. (RP 5-7, 20). Sergeant Smith arrived and saw Mr. Trapp sitting motionless in the driver’s seat of his car, parked in front of the convenience store. (CP 42; RP 6-7). Mr. Trapp

began to stir, placed his car in reverse gear, and backed up. (CP 43; RP 7-8). At this point, Sergeant Smith seized Mr. Trapp by waiving at him to stop his car. (CP 43; RP 8, 52); *see O'Neill*, 148 Wn.2d at 577 (commanding a person to stop is a seizure).

The community caretaking exception to the warrant requirement did not apply to Sergeant Smith's seizure of Mr. Trapp. *See Kinzy*, 141 Wn.2d at 388. Following the seizure, Mr. Trapp's interest in being free from police intrusion was no longer minimal. *Id.* The noncriminal investigation by Sergeant Smith had to be limited to the performance of the community caretaking function. *Id.* Sergeant Smith did not observe any issues with Mr. Trapp's driving as he backed up. (RP 23). He admitted he did not see Mr. Trapp delay putting his key in the ignition, or have any difficulty doing so, or that he put his car into the wrong gear. (RP 23). He admitted that Mr. Trapp appeared to be backing up in a normal fashion, and that he did not see Mr. Trapp's car jerk forward before he backed up. (RP 23). Sergeant Smith did not have the medics that had been dispatched to the scene evaluate Mr. Trapp. (RP 21, 27-28). The concern that medical assistance was needed was dispelled by Mr. Trapp's normal driving and Sergeant Smith's dismissal of the medics.

Once this reason for initiating the encounter with Mr. Trapp was dispelled, Sergeant Smith's noncriminal investigation should have ended. *See Kinzy*, 141 Wn.2d at 388.

Another exception to the warrant requirement is a *Terry* stop, which is a brief investigatory seizure. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). "A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct." *Id.* at 62 (citing *Terry*, 392 U.S. at 21).

The *Terry* stop exception to the warrant requirement did not apply to Sergeant Smith's seizure of Mr. Trapp. *See Doughty*, 170 Wn.2d at 61-62. Sergeant Smith did not have suspicion that Mr. Trapp was engaged in criminal conduct. He acknowledged that the 911 call concerned whether Mr. Trapp needed medical assistance, and that the call did not indicate that Mr. Trapp was displaying criminal behavior or posing a danger to anyone. (RP 20). Sergeant Smith had not received information regarding any activities involving Mr. Trapp in the week or month prior to this interaction. (RP 20). He did not observe any criminal behavior once he arrived at the store, prior to his seizure of Mr. Trapp. (RP 23).

Sergeant Smith's seizure of Mr. Trapp did not fall under the community caretaking exception to the warrant requirement, nor was it a valid *Terry* stop. Therefore, the trial court should have suppressed the fruits of Mr. Trapp's warrantless seizure, the controlled substance found in his car. See *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (stating that "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.").

2. THE TRIAL COURT ERRED IN SENTENCING MR. TRAPP BASED UPON AN OFFENDER SCORE OF FOUR.

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). The burden is on the State to prove the existence of prior convictions, by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." *Id.*

Under RCW 9.94A.525, the sentencing court is required to determine an offender score based upon the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Prior convictions that are class C felonies “wash out” of the offender score under the following circumstances:

[C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).

“[A] sentence based on a miscalculated upward offender score is in excess of statutory authority and generally may be challenged at any time.” *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2003) (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)). “The defendant cannot agree to a sentence in excess of that which is statutorily authorized.” *Id.* (citing *Goodwin*, 146 Wn.2d at 876). A sentencing court’s calculation of an offender score is reviewed *de novo*. *State v. Bush*, 102 Wn. App. 372, 377, 9 P.3d 219 (2000).

The Judgment and Sentence listed Mr. Trapp's criminal history. (CP 53). All four of the listed crimes were class C felonies. *See* RCW 9A.56.160(2) (possessing stolen property in the second degree); RCW 9A.56.040(2) (theft in the second degree); RCW 9A.36.031(2) (assault in the third degree). From the date of sentencing, August 2, 2002, of the final listed crime, theft in the second degree, until the commission of the crime in this case, May 15, 2011, more than eight years elapsed. (CP 47, 53). Even with an offender score of three, the maximum standard range sentence for this crime of theft in the second degree was six months' confinement. *See* RCW 9.94A.515 (ranking theft in the second degree as a seriousness level I offense); RCW 9.94A.510 (listing the standard range of two to six months confinement, for a crime with a seriousness level of I and an offender score of three). This would have put Mr. Trapp's release date sometime in early 2003, much more than five years before the commission of the crime in this case. Because the State failed to show that Mr. Trapp was confined pursuant to a felony conviction or committed a crime that resulted in conviction in the five consecutive years before the commission of the crime in this case, May 15, 2011, his prior four convictions for class C felonies washed out of his offender score. *See* RCW 9.94A.525(2)(c).

Because an offender cannot waive a challenge to a miscalculated offender score, Mr. Trapp's agreement that his criminal history was "true and accurate" does not change this result. See *Cadwallader*, 155 Wn.2d at 874 (citing *Goodwin*, 146 Wn.2d at 873-74). Mr. Trapp did not stipulate that these convictions had not washed out. Cf. *State v. Foster*, 140 Wn. App. 266, 276, 166 P.3d 726 (2007) (the State was relieved of its burden of proof, where the defendant stipulated that a prior conviction did not wash out).

Mr. Trapp was sentenced to nine months' confinement, to commence on March 14, 2012. (CP 56; RP 80). By the time his appeal is heard, it is possible that Mr. Trapp will already have served his term of confinement. "A case is moot if a court can no longer provide effective relief." *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (quoting *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995)). However, in order to provide guidance to lower courts, a court may still reach a determination on the merits "if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur[.]" *Id.* This exception to the mootness doctrine applies here. Inclusion of washed out felonies in an offender score, based upon a defendant's acknowledgment of his criminal history but absent a stipulation that the prior convictions

did not wash out, is an issue of continuing and substantial public interest, that is likely to reoccur. *See Ross*, 152 Wn.2d at 228; *see also State v. Harris*, 148 Wn. App. 22, 28-29, 197 P.3d 1206 (2008) (applying this exception to review the defendant's challenge to his offender score, subsequent to his release from confinement).

Mr. Trapp's four class C felonies washed out. *See RCW 9.94A.525(2)(c)*. The trial court should have sentenced Mr. Trapp with an offender score of zero. *See RCW 9.94A.525*. Mr. Trapp's sentence must be reversed, and the case remanded for resentencing using the correct offender score. *See State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (setting forth this remedy for a miscalculated offender score).

E. CONCLUSION

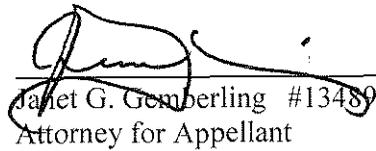
Sergeant Smith's seizure of Mr. Trapp did not fall under the community caretaking exception to the warrant requirement, nor was it a valid *Terry* stop. The trial court should have suppressed the fruits of the warrantless seizure of Mr. Trapp, the controlled substance found in his car. Mr. Trapp's conviction for unlawful possession of a controlled substance, heroin, should be dismissed.

In the alternative, the trial court erred in sentencing Mr. Trapp based upon an offender score of four. Mr. Trapp's sentence must be reversed, and the case remanded for resentencing using the correct offender score.

Dated this 1st day of October, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30700-0-III
)	
vs.)	CERTIFICATE
)	OF MAILING
KYLE K. TRAPP,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on October 1, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on October 1, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on October 1, 2012.


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