No. 90188-1

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Court of Appeals
Division III
State of Washington

No. 29916-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CHAD EDWARD DUNCAN,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Blaine G. Gibson, Suppression Hearings
Honorable James C. Lust, Trial/Sentencing Hearings

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR……..……...…….....1

B. STATEMENT OF THE CASE…….……..2

CrR 3.6 suppression motion……...…3

Trial testimony…….….6

C. ARGUMENT…….10

1. The stop of Mr. Duncan's car was not justified at its inception as a Terry stop because there was no reasonable and articulable suspicion of criminal conduct and the intrusion was not supported by probable cause……...10

Standard of review…….…….10

Applicable law……..…..10

Argument……15

2. The warrantless search of Mr. Duncan's car violated Const. article I, section 7 because Mr. Duncan had been arrested and was not able to access a weapon or destroy evidence…….…..20

3. A sentencing court lacks statutory authority to impose a sentence of community custody for unlawful possession of a firearm where the state did not plead and the jury did not find by special verdict that the defendant was a criminal street gang member or associate during the commission of the crime…….24

4. The findings that Mr. Duncan has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence……..…26

D. CONCLUSION…….…….……...….29

TABLE OF AUTHORITIES

Cases **Page**

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710,
173 L.Ed.2d 485 (2009)…….…21

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022,
29 L.Ed.2d 564 (1971)……...11

Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824,
99 S.Ct. 2248 (1979)……..14

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868,
20 L.Ed.2d 889 (1968)…….11, 13

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407
9 L.Ed.2d 441 (1963)……....19

United States v. White, 648 F.2d 29 (D.C.Cir. 1981)……17

Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801,
16 P.3d 583 (2001)…….25

In re Personal Restraint of Carle, 93 Wn.2d 31,
604 P.2d 1293 (1980)…….26

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719,
18 P.2d 796 (1986)……...…..24

State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116,
837 P.2d 646 (1991)……...27

State v. Bertrand, ___ Wn. App. ___,
2011 WL 6097718 (Dec. 18, 2011)……..…26, 27, 28

State v. Belieu, 112 Wn.2d 587, 773 P.2d 46 (1989)……12

State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997)…….10

State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980)……...24

State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009)…….21

State v. Clark, 143 Wn.2d 731, 755, 24 P.3d 1006 (2001)……..…..23

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010)……..…16

State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)……..11

State v. Greenway, 15 Wn. App. 216, 218, 547 P.2d 1231
rev. denied, 87 Wn.2d 1009 (1976)……..23

State v. Jeannotte, 133 Wn.2d 847, 947 P.2d 1192 (1997)……...10

State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)……..11, 12, 19

State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980)……....19

State v. Monday, 85 Wn.2d 906, 540 P.2d 416 (1975)……..…24

State v. Montague, 73 Wn.2d 381, 438 P.2d 571 (1968)……...23

State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937)……..24

State v. O'Cain, 108 Wn. App. 542, 549, 31 P.3d 733 (2001)……12, 13

State v. Richardson, 64 Wn. App. 693, 825 P.2d 754 (1992)……...…16

State v. Ringer, 100 Wn.2d 686, 701, 674 P.2d 1240 (1983)……....22

State v. Ross, 145 Wn.2d 1016, 41 P.3d 483 (2002)…….10

State v. Smith, 88 Wn.2d 127, 135, 559 P.2d 970 (1977)…….22

State v. Snapp, ___ Wn.2d ___,
___ P.3d ___, 2012 WL 1134130……..20, 21

State v. Tijerina, 61 Wn. App 626, 629, 811 P.2d 241 (1991)……..13

State v. White, 97 Wn.2d 92, 101, 640 P.2d 1061 (1982)……...…11, 19

State v. Williams, 102 Wn.2d 733
689 P.2d 1065 (1984)……..10, 11, 13, 14, 15, 17, 18, 19

People v.Ramirez, 34 Cal.3d 541, 668 P.2d 761,
194 Cal. Rptr. 454 (1983)…….…….13

Statutes

U.S. Const. Fourth Amendment…….……10, 14, 21

Const. article I, section 7…….…….10, 20, 21, 24

RCW 9.94A.030(16)……..25

RCW 9.94A.030(34)……....8

RCW 9.94A.701……25

RCW 9.94A.701(3)(b)……...25

RCW 9.94A.760……....27

RCW 9.94A.589(1)(b)……8

RCW 9.94A.829……25

RCW 70.48.130…….…28

Other Resources

3 WAYNE R. LAFAVE, SEARCH AND SEIZURE §9.2 (1978)……11

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the CrR 3.6 motion to suppress evidence.

2. To the extent they contain findings of fact, the court erred in entering Conclusions of Law Nos. 3, 4, 5, 6, 7 and 8 regarding the CrR 3.6 suppression hearing. CP 206–07.

3. The trial court erred in making a factual finding that the defendant is a criminal street gang member or associate as defined by RCW 9.94A.030(16).

4. The trial court erred in imposing community custody of 12 months for the conviction for unlawful possession of a firearm.

5. The record does not support the findings that Mr. Duncan has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care.

Issues Pertaining to Assignments of Error

1. Whether the stop of Mr. Duncan's vehicle was unjustified at its inception as an improper Terry stop, where there was no reasonable and articulable suspicion of criminal conduct and the intrusion was not supported by probable cause?[1]

[1] Assignment of Error 1 and 2.

2. Whether a police officer's warrantless search of a car violates article I, section 7 of the Washington Constitution when performed "incident to the arrest" of a person who is secured and unable to access a weapon or destroy evidence.[2]

3. Whether a sentencing court lacks statutory authority to impose a sentence of community custody for unlawful possession of a firearm where the state did not plead and the jury did not find by special verdict that the defendant was a criminal street gang member or associate during the commission of the crime?[3]

4. Whether the findings that Mr. Duncan has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care must be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?[4]

B. STATEMENT OF THE CASE

Police Officer Jeff Ely responded to a report of "shots fired" in the City of Yakima, Washington. 3 RP[5] 357–58. The officer followed and

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[2] Assignment of Error 1 and 2.
[3] Assignment of Error 3 and 4.
[4] Assignment of Error 5.
[5] The main proceedings are contained in seven volumes and will be referred to by volume number and page, e.g. "3 RP ___". Any reference to the presentation hearing regarding findings of fact and conclusions of law regarding the CrR 3.5 and CrR 3.6 motions to suppress will be referred to by its date, e.g. "2/8/12 RP ___".

eventually stopped a white car driving eastbound matching the report description of a "white Subaru or Impala car" last seen heading northbound, which was being driven by the defendant, Chad Edward Duncan. 3 RP 362–68, 391.

CrR 3.6 suppression motion. Prior to trial, defense counsel filed a CrR 3.6 motion to suppress, contending that the stop and investigative search were unlawful. CP 6–16, 27–29. In part, police testified at the suppression hearing as follows.

Officer Ely was dispatched shortly before 1:00 a.m. to a report of "shots fired" with confirmation of a victim with a gunshot wound to the head, and given a vehicle description of a white Subara or Impala car headed northbound on 5th Avenue. 1 RP 65–66. The address was in west central Yakima, an area known to police as associated with the Sureño gang whose members claim the color blue. 1 RP 66–67, 3 RP 359. One of two ways to drive east from the address, in order to cross the railroad tracks that intersect the city of Yakima, would be to drive north and then turn eastbound on "I" Street. 1 RP 67; CP 202–03 at ¶2. Officer Ely, speculating the rival Norteño gang was probably responsible and would be fleeing to the east side of town, headed toward "I" Street. 1 RP 67. There was very little traffic at that time of the morning. Within 30 seconds to a

couple of minutes after the initial call, the officer saw a white car headed eastbound on "I" Street, just at the railroad tracks. 1 RP 68, 70.

While following the car over the railroad tracks, Officer Ely saw two passengers in the car and the driver was wearing a red hat, which he knew to be a color claimed by members of the Norteño group. 1 RP 69. The officer called for backup units and activated his red and blue overhead lights. 1 RP 68–69. He then received information that there were possibly two females in the suspect car. 1 RP 71. The white car pulled over to the side of the road immediately and stopped. 1 RP 69–70. At least three other officers had arrived. 1 RP 70. There were two females in the stopped car, and Officer Ely was "pretty sure at that point we had the right vehicle stopped." 1 RP 71.

The officers initiated a "high risk stop", calling the occupants out—at gunpoint— one at a time, having them walking backwards toward police and pull up their shirts and turn full circle so ensure there were no weapons in their waistbands, and lie in a prone position on the ground. All three of the occupants were frisked, handcuffed and placed in separate patrol cars. 1 RP 71–72, 91–92.

The officers then "cleared the vehicle" or "did a protective sweep" to make sure there were no other occupants hiding in the vehicle. They

made a verbal announcement, approached the car, visually cleared the interior of the car at gunpoint, and popped open the trunk looking for someone hiding in it. 1 RP 71, 81–82, 93. Officer Scherzinger testified that while he had never found people hiding in a trunk, it was a possibility. 1 RP 95. While clearing the car, Officer Ely saw (either from outside the car or when opening the passenger door) aluminum shell casings all over the floorboard and the seat from what appeared to be a small caliber handgun. 1 RP 71; CP 203 at ¶11. Officer Scherzinger similarly saw spent shell casings inside the car. 1 RP 93; CP 203 at ¶11.

The record is a little unclear as to why the interior of the car was "cleared". Officer Scherzinger testified it was to locate anything that could be "used against us" in the event the vehicle had to be released back to its occupants. 1 RP 94. Officer Ely testified the three occupants were transported to be interviewed at the station because "we had the shell casings, … the two females in the car that fit the description, … [and] the driver where the shell casings were located at his feet with the red hat", and they did a frisk of the car's interior and trunk to ensure they would not be sending the car off for towing with a handgun inside that could possibly discharge. 1 RP 72; CP 203 at ¶12. The gun was found by the front passenger seat, between the door and the seat. 1 RP 72, 97.

The trial court denied the defense motion to suppress physical and testimonial evidence, and entered written findings of fact and conclusions of law. 1 RP 115–124; CP 202–08.

Trial testimony. At trial, Officer Jeff Ely testified pretty much as he had during the suppression motion. 3 RP 357–87.

Yakima Police Officer Tarin Miller testified the area the victims' house is located in is known for gang activity, but there were no gang-related problems with the house prior to this incident. 4 RP 406, 452. Officer Miller had no knowledge of any gang-related involvement regarding Mr. Duncan prior to this time. 4 RP 406.

No latent prints were found on the handgun. 4 RP 460–73. Profile evidence on the firearm showed Mr. Duncan matched as one major contributor, with the probability of finding an unrelated individual to match the profile in the U.S. population as one in 5.3 trillion people. 5 RP 605–06. Six of the spent shell casings that were found came from this gun. 5 RP 614–21.

Jaime Butler and Alexis Brock were the two passengers in Mr. Duncan's car. 5 RP 624–56; 6 RP 733–42, 751–57.

Kyle Mullins was in the living room when he noticed he was bleeding from his head. A visitor from Ritzville, he didn't know who had

shot him and didn't know Jaime Butler, Alexis Brock or Mr. Duncan. He had never been a gang member. 4 RP 557, 559, 561–62.

Derrick Rivera said a dark curtain covered the front living room window at the time of the shooting, but the front door may have been open. 4 RP 480–81. He heard several shots and the curtains moved when bullets came through, with one bullet going through the baseball hat he was wearing. 4 RP 482–83. Rivera didn't recognize anybody in the courtroom as involved in the shooting, and stated none of the people in the house were gang members. 4 RP 485–86, 490. Although he knew their names but did not meet them until after the shooting, Rivera was aware that Jaimee Butler and Alexis Brock had fought his brother David Riviera's girlfriend, Anna, at a nearby park a few days before this incident. 4 RP 491, 493–94. He'd seen Butler and Brock hang out with North side gang members, and at dance clubs with people who wore the red colors. 4 RP 492–93.

Margie Collins lived at the house with her children, Manuel Villa, Amanda Villa and Derrick Riviera, and her son David Riviera did not live there. 4 RP 496. She and her mother Sherrie Ratliff were awakened from sleeping by the shots, and ran into the front room. 4 RP 498, 553–54. Four or five bullets had ruined the front windows, which were covered by

a big bedspread. 4 RP 501–02. Collins stated nobody in the house at the time of the incident were gang members. 4 RP 504–05.

Geraldo Villalobos was also in the home when a bullet came within 12 to 18 inches of him as he was getting up from a chair. 4 RP 509–12. He knew Butler and Brock because ”my family’s both sides, so I was friends with most everybody from both gangs.” 4 RP 515. He said none of the people at the house were gang members, and he did not know Mr. Duncan. 4 RP 516–17.

Manual Villa, who was also in the house, heard shots and saw his friend Kyle bleeding from his head wound. 4 RP 525, 531–32. He also said no one in the house was involved with gang activity. 4 RP 533.

The jury found Mr. Duncan guilty as charged of six counts of first degree assault, with special verdicts on each count that he was armed with a firearm during the commission of the crimes. He was also found guilty of unlawful possession of a firearm. 7 RP 971–73. The court imposed consecutive[6] high standard range sentences on counts 1 through 7, for a total base sentence of 799 months. Together with the mandatory consecutive 60-months enhancement on counts 1 through 6, the total term of confinement is 1,159 months. CP 178–79. The court imposed terms of

[6] *See* RCW 9.94A.030(34) and 9.94A.589(1)(b).

community custody of 36 months on the assault convictions. Based on a finding by the court that "The defendant is a criminal street gang member or associate as defined by RCW 9.94A.030(16), the court also imposed a term of community custody of 12 months on the unlawful possession of a firearm conviction. CP 178, 180.

As a condition of sentence, the court made the following findings**:**

> ¶2.7 Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

CP 179.

> ¶4.D.4. Costs of Incarceration: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of $50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed $100.00 per day of incarceration (the rate in 2011 is $79.75 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).
>
> ¶ 4.D.5 Costs of Medical Care: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP 181. This appeal followed. CP 186.

C. ARGUMENT

1. The stop of Mr. Duncan's car was not justified at its inception as a Terry stop because there was no reasonable and articulable suspicion of criminal conduct and the intrusion was not supported by probable cause.

Standard of review. A trial court's denial of a suppression motion is reviewed by examining whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. State v. Ross, 145 Wn.2d 1016, 41 P.3d 483 (2002). Substantial evidence is that sufficient to persuade a fair-minded person of the truth of the declared premises. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). This Court reviews the trial court's conclusions of law *de novo.* State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

Applicable law. The core of the constitutional protections provided by the Fourth Amendment and Const. article I, section 7 is the right of the individual to be protected against unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). "As a general rule, warrantless searches and seizures are per se

unreasonable." Williams, 102 Wn.2d at 736 (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). One exception to the warrant requirement is an investigative stop pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under the *Terry* exception, police may conduct a brief warrantless investigatory stop of an individual where the officer has a well-founded suspicion of criminal activity based on specific and articulable facts. State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). The Washington State Supreme court has defined "articulable suspicion" as "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) (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE §9.2, at 65 (1978)). A brief *Terry* stop can be justified 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; White, 97 Wn.2d at 105. Although less intrusive than an arrest, a *Terry* stop must nevertheless be reasonable. Kennedy, 107 Wn.2d at 4. To justify a seizure on less than probable cause, the officers' suspicion must be based on specific, objective facts indicating that a *particular* person has or is about to commit a crime. Terry, 392 U.S. at 21; State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513

(2002); Kennedy, 107 Wn.2d at 6. Even for a brief detention the officer must have more than innocuous facts or a mere hunch. State v. O'Cain, 108 Wn. App. 542, 549, 31 P.3d 733 (2001).

Whether police conduct falls within the scope of a *Terry* stop or whether the contact rises to the level of an arrest depends on the facts of each case. The use of felony stop procedures with drawn guns can turn an investigative stop into an arrest. State v. Belieu, 112 Wn.2d 587, 598–600, 773 P.2d 46 (1989). The admissibility of the evidence turns on whether the State can prove that the police dispatch was based on a sufficient factual foundation to support the kind of seizure at issue—probable cause in the event of an arrest, or well-founded suspicion based on articulable facts in the event of an investigative stop. O'Cain, 108 Wn. App. at 545. Officers who act on the basis of the dispatch are not required to have personal knowledge of the factual foundation, and are not expected to cross-examine the dispatcher about the foundation for the transmitted information before acting upon it. Rather, the collective knowledge of law enforcement agencies giving rise to the police dispatch will be imputed to the officers who act on it. Id. " ']I]f we impute to the arresting officer the collective knowledge of law enforcement agencies for the purpose of

establishing probable cause, we must also charge him with knowledge of information exonerating a suspect … .'" Id. at 543 (quoting People v.Ramirez, 34 Cal.3d 541, 668 P.2d 761, 764–65, 194 Cal. Rptr. 454 (1983)). The good faith of the officers executing the seizure does not relieve the State of its burden to prove that there was a factual basis for the stop–probable cause in the event or an arrest, and reasonable suspicion in the event of a *Terry* stop. O'Cain, 108 Wn. App. at 553.

In evaluating investigative stops, the court must make several inquiries: (1) Was the initial interference with the suspect's freedom of movement justified at its inception? (2) Was it reasonably related in scope to the circumstances which justified the interference in the first place? State v. Tijerina, 61 Wn. App 626, 629, 811 P.2d 241 (1991) (citing Terry v. Ohio, *supra*); Williams, 102 Wn.2d at 739.

As to this second inquiry—the scope and intensity of the intrusion—the Williams Court enunciated three relevant factors to be considered in determining whether an intrusion on a suspect's liberty is permissible under *Terry* or instead must be supported by probable cause: (1) the purpose of the stop, (2) the amount of physical intrusion upon the suspect's liberty, and (3) the length of time the suspect is detained. Further, the degree of intrusion must also be appropriate to the type of

crime under investigation and to the probable dangerousness of the suspect. Williams, 102 Wn.2d at 740. The Williams Court recognized that under *Terry*, the United States Supreme Court has generally approved pat-down searches for weapons and brief on-the-spot questioning, but disapproved of more intensive seizures without consent. "For instance, in Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979), the Court held that the police had illegally seized a murder suspect when, after getting a 'lead' from a police informant, they brought him to the station for questioning. In finding that the subsequent interrogation of the defendant was illegal, the Court rejected a balancing analysis and concluded that 'detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.'" Williams, 102 Wn.2d at 737 (citing Dunway, 442 U.S. at 216, 99 S.Ct. at 2258)).

In Williams, the court reversed the conviction of a man who had been detained and handcuffed while leaving the immediate area of a silent alarm. The Court was offended by the officers' detention, without questioning, of an individual while they collected possible evidence against him. Unlike the normal purpose for an investigatory *Terry* stop,

the officers in Williams did not question the individual when he was first detained and handcuffed, or permit him to explain his presence in the area. The Court ruled that the scope of the stop thus exceeded that permitted for a brief *Terry* stop encounter and thus it would have to be justified by probable cause to support an arrest. Because the officers did not have probable cause to support this arrest, the evidence recovered was suppressed. Williams, 102 Wn.2d at 742.

Argument. In this case, the police simply observed a white car and conducted a stop and effective arrest of the defendant and each of the vehicle occupants at gunpoint. The "facts" preceding the stop did not support a reasonable suspicion of criminal activity by Mr. Duncan.

The trial court concluded the officer had a reasonable articulable suspicion that Mr. Duncan was involved in a very serious crime: he was in the right area at the right time, he was driving a white car that matched the suspect car description of being a white car, he was wearing a red hat in a neighborhood occupied by a gang that claimed the color blue, and the two females in his car matched [later-obtained] information that there were two females in the suspect car. CP 206 at ¶3.

Officer Ely was responding to a report of "shots fired" and given a minimal description of a "white car" headed northbound away from the

scene. Officer Ely had a hunch this could be a gang-related retaliatory drive-by shooting. Simply being in a high crime area or one known for drug activity is insufficient to support a *Terry* detention. *See, e.g.,* State v. Richardson, 64 Wn. App. 693, 825 P.2d 754 (1992) (consorting with a suspected drug dealer late at night in a high-crime area did not justify a *Terry* stop); State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010) (two-minute length of time spent by defendant at a suspected drug house, at night, did not justify the police's intrusion into his private affairs).

Based on his hunch, Officer Ely speculated that the alleged shooter would surely head back over the railroad tracks to reach his home neighborhood. As he drove to that area, the officer saw a white car heading eastbound. Since the car was "white" and the direction the car was headed matched up with his hunch, the officer initiated a full-blown felony stop. The totality of circumstances known to Officer Ely at the inception of the stop was that Mr. Duncan was driving a white car and headed in a different direction than that conveyed by dispatch, and was wearing a red hat. These facts are insufficient to support a reasonable suspicion of criminal activity, and did not justify a temporary investigative stop. The stop was therefore unlawful.

As to the substantial scope of this intrusion, each of the Williams factors shows this case to be similar in intensity and duration to an arrest which needs probable cause. First, the purpose of the stop shows this to be the equivalent of an arrest. As in Williams, the purpose of the stop was not related to the occupants' detention. The police did not question Mr. Duncan and his passengers but detained them until they collected evidence from the car. The record does not disclose that police asked the occupants why they were in the vicinity or any other investigative questions. Police simply ordered them out of the car, frisked them, handcuffed them, placed them in patrol cars, transported them to the police station, searched Mr. Duncan's car and trunk, and called for a tow truck. *See* Williams, 102 Wn.2d at 740.

Second, the amount of physical intrusion upon the suspects' liberty was extreme. The fact that police were responding to a "shots fired" call—without further and extreme circumstances— does not support a reasonable inference that any occupants of the innocuous white car seen by Officer Ely were armed or dangerous. Williams, 102 Wn.2d at 740 fn.2 ("Drawn guns and handcuffs, generally, are permissible only when the police have a legitimate fear of danger. *See, e.g.,* United States v. White, 648 F.2d 29 (D.C.Cir. 1981) (drawn guns permissible when approaching

an identified car with three people in it who police had been told were armed)." Here, Mr. Duncan and his passengers were force-marched at gunpoint and then handcuffed and locked into the back of police cars. The officers began searching Mr. Duncan's car even though all three occupants were already handcuffed and placed into custody. None of the occupants were under arrest at that time for any possible criminal activity. The officers' actions clearly escalated what could have been a *Terry* type stop into an arrest situation. As such, the officers needed probable cause to legitimize their conduct. The bare-bones report of a white Impala or Subaru type car cannot justify the officer's detention and subsequent felony stop of just any white car. There was no probable cause to stop Mr. Duncan's vehicle based on the color of the car and unsupported hunches alone.

Third, while the length of time of the stop—estimated by the trial court to be five minutes or so[7]—does not seem excessive, the stop itself was clearly not supported by probable cause from its inception.

In Williams, the Court of Appeals had also recognized that at some point the police actions constituted an arrest, but concluded that this took place after the police acquired sufficient evidence for probable cause to

[7] 1 RP 119.

make an arrest. On review, the Supreme Court disagreed with the premise of this conclusion. "As evident from the facts recited above, from the outset of this police/citizen encounter, the police actions exceeded those permitted under *Terry*. Since, as respondent admits, no probable cause existed when petitioner was first detained, the detention was illegal. As the evidence admitted in petitioner's trial was a fruit of this illegal detention, it must be suppressed. *See* State v. White, 97 Wn.2d 92, 101, 640 P.2d 1061 (1982)." Williams, 101 Wn.2d at 742.

In this case, the trial court concluded that probable cause did exist when Mr. Duncan was first detained: white car, the shooting took place in an area known for gang activity, and he was wearing a red hat. CP 207 at ¶7. As discussed above, these facts did not rise to the level of probable cause to arrest Mr. Duncan and the detention was illegal. The trial court further concluded that probable cause to arrest was also established at the later point in time when Officer Ely observed spent shell casings on the driver's side floor. CP 207 at ¶5. Under Williams, *supra*, the unjustified police actions at the outset prohibit any "cure" of the initial illegal detention.

If the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. Kennedy, 107

Wn.2d at 4, 726 P.2d 445, (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980)). The firearm, bullets, shell casings and any other physical evidence obtained during the search of the vehicle, as well as any statements or testimony obtained from Mr. Duncan and/or the passengers in his car as a result of the search of the car must be suppressed and the matter remanded for retrial.

2. The warrantless search of Mr. Duncan's car violated Const. article I, section 7 because Mr. Duncan had been arrested and was not able to access a weapon or destroy evidence.

Warrantless searches are per se unreasonable under our state constitution, subject to a limited set of carefully drawn exceptions. The State bears the burden of establishing that an exception to the warrant requirement applies. State v. Snapp, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 1134130 *4 at ¶23 (2012) (citations omitted).

"[A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception." Snapp, ___ Wn.2d ___, ___ P.3d ___, 2012

WL 1134130 *5 at ¶28 (citing State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009)). Similarly, article I, section 7 does not permit a warrantless vehicle search incident to the arrest of a recent occupant of a vehicle when it is reasonable to believe—or there is even probable cause to believe— that evidence relevant to the crime of arrest might be found in the vehicle. Snapp, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 1134130 *6 at ¶¶30–31, *8 at ¶¶41–42, *9 at ¶46.[8]

Here, Mr. Duncan and his passengers were handcuffed and locked into the back seats of patrol cars when police searched his vehicle. Under Snapp, the warrantless vehicle search incident to their effective arrests was unjustified.

Nor can the search of Mr. Duncan's car be justified under the "exigent circumstances" exception to the general prohibition against warrantless searches and seizures. Where police have probable cause to

[8] In Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the United States Supreme Court held that a warrantless automobile search incident to arrest of a recent occupant of the vehicle is proper under the Fourth Amendment to the United States Constitution only (1) when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. The Snapp Court concluded that an equivalent to Gant's exception (2) is not permissible under our State Constitution. Snapp, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 1134130 *1 at ¶2. The court further rejected the State's proposal to "narrow" the application of exception (2) to instances where probable cause was present: "Contrary to the urgency attending the search incident to arrest to preserve officer safety and prevent destruction or concealment of evidence, there is no similar necessity associated with a warrantless search based upon either a reasonable belief or probable cause to believe that evidence of the crime of arrest is in the vehicle." Id., *8 at ¶¶ 41–42.

conduct a search, they may do so without a warrant when "*they are confronted by emergencies and exigencies* which do not permit reasonable time and delay for a judicial officer to evaluate and act upon probable cause applications for warrants by police officers." State v. Ringer, 100 Wn.2d 686, 701, 674 P.2d 1240 (1983) (citing State v. Smith, 88 Wn.2d 127, 135, 559 P.2d 970 (1977)). Here, the initial stop was illegal and police had no probable cause to search the car. But assuming that they did, there is no showing that the exigencies of Mr. Duncan's effective arrest made it impractical for the officers to obtain a warrant prior to the search of his car.[9] The vehicle was lawfully parked at the side of a road, immobile and unoccupied. There were at least four officers at the scene of the detention and there apparently was very light traffic in the area. Presumably any one officer could have radioed or telephoned for a search warrant, while yet another could have watched over the car for safety reasons. The State has failed to show that exigent circumstances obviated the need to seek a warrant prior to the search, and the search of the car and

[9] The time of night was certainly no hindrance for obtaining a telephonic search warrant. The stop of the car occurred on July 9, 2009, around 1:00 a.m. 1 RP 65–66, 70. Officer Ely was working swing shift at the time, 5:00 p.m. to 3:40 a.m. 1 RP 66. He was able to obtain a telephonic search warrant for the impounded car the following night, July 10, from a Yakima Municipal Court judge at 12:06 a.m. 3 RP 373–74.

trunk were therefore illegal.[10]

However, the State did argue, and the trial court agreed, that the presence of a suspected handgun presented a safety risk to officers and citizens if accidentally discharged while the car was being towed to the police impound yard, and that the police were therefore justified in frisking the interior of Mr. Duncan's car on this basis. 1 RP 107–11; CP 207 at ¶6. However, this is not a recognized exception to the requirement of a search warrant. The State instead created its own exigent circumstance by requesting a tow truck and choosing not to conduct an inventory search pursuant to impoundment. For the same reasons set forth in the preceding paragraph, the State has failed to show why a search warrant could not have been obtained before searching the car for a suspected handgun. The State was simply conducting an exploratory search looking for evidence of the crime of arrest, and the search of the car

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[10] A further narrow exception to the exclusionary rule allows law enforcement to conduct a warrantless inventory search following lawful impoundment of a vehicle. State v. Greenway, 15 Wn. App. 216, 218, 547 P.2d 1231, *rev. denied*, 87 Wn.2d 1009 (1976). Evidence discovered during an inventory search is admissible when "there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime." State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). As discussed above, in the present case police did not have probable cause to believe that the vehicle had been used in the commission of a felony and was, therefore, evidence. State v. Clark, 143 Wn.2d 731, 755, 24 P.3d 1006 (2001) (officer may impound vehicle if he has probable cause to believe it was used in the commission of a felony). In fact, the State correctly did *not* argue that the handgun was found during an inventory search performed in connection with lawful impoundment.

and trunk were therefore illegal under Const. article I, section 7.

Since the State has failed to establish any exception to the search warrant requirement, all fruits of the illegal search of the car and trunk must be suppressed and the matter remanded for retrial.

3. A sentencing court lacks statutory authority to impose a sentence of community custody for unlawful possession of a firearm where the state did not plead and the jury did not find by special verdict that the defendant was a criminal street gang member or associate during the commission of the crime.

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). Statutory

construction is a question of law and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

> 3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:
>
> …
>
> (b) An offense involving the unlawful possession of a firearm under RCW 9. 41.040, where the offender is a criminal street gang member or associate;
>
> …

RCW 9.94A.701(3)(b). A "criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang. RCW 9.94A.030(16). The special allegation that a defendant is a criminal street gang member must be pleaded in the Information and found by a jury by special verdict. RCW 9.94A.829.[11]

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[11] **RCW 9.94A.829. Special allegation--Offense committed by criminal street gang member or associate—Procedures**

In a criminal case in which the defendant has been convicted of unlawful possession of a firearm under RCW 9.41.040, and there has been a special allegation pleaded and proven by a preponderance of the evidence that the accused is a criminal street gang member or associate as defined in RCW 9.94A.030, the court shall make a finding of fact of the special allegation, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the accused was a criminal street gang member or associate during the commission of the crime.

Here, the State did not plead the allegation in the Information. CP 31–32. More importantly, the allegation was not submitted to the jury by special verdict. Without the finding, the community custody statute does not authorize imposition of any term of community custody for a conviction of unlawful possession of a firearm. "A trial court only possesses the power to impose sentences provided by law." In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Here, the trial court imposed a term of community custody beyond its authority. The judgment and sentence must be corrected.

4. The findings that Mr. Duncan has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.

The record does not support the trial court's judgment and sentence "findings" that Mr. Duncan has (1) the current or future ability to pay LFOs and (2) the means to pay costs of incarceration and (3) the means to pays costs of medical care. CP 179 at ¶ 2.4, 181 at ¶¶ 4.D.4 and 4.D.5. The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, ___ Wn. App. ___, 2011 WL

6097718, *4 (Dec. 18, 2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard (bracketed material added) (internal citation omitted)." Bertrand, 2011 WL 6097718, *4, citing Baldwin, 63 Wn. App. at 312.

The record here does not show that the trial court took into account Mr. Duncan's financial resources and the nature of the burden of imposing LFOs and costs of incarceration and medical care on him. In fact, the record contains no evidence to support the trial court's findings in ¶ 2.7 that Mr. Duncan has the present or future ability to pay LFOs, in ¶ 4.D.4 that he has the means to pay costs of incarceration[12], and in ¶ 4.D.5

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[12] The sentencing court imposed a total term of confinement of 1,159 months. CP 179. The costs of incarceration at $50/day would roughly total $1,762,645.00. In pertinent part, RCW 9.94A.760, Legal Financial Obligations, provides as follows:

> (2) If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration, if incarcerated in a prison, or the court may require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision

that he has the means to pay costs of medical care[13]. *See* 7 RP 991–93. The findings are therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 2011 WL 6097718, *5.

> shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department

[13] In part, RCW 70.48.130, Emergency or necessary medical and health care for confined persons--Reimbursement procedures--Conditions—Limitations, provides as follows:

> As part of the screening process upon booking or preparation of an inmate into jail, general information concerning the inmate's ability to pay for medical care shall be identified, including insurance or other medical benefits or resources to which an inmate is entitled. This information shall be made available to the department, the governing unit, and any provider of health care services.
>
> The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence, the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.
>
> To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for the department's medical care programs under chapter 74.09 RCW, or for coverage from private sources, and in the absence of an interlocal agreement or other contracts to the contrary, the governing unit may obtain reimbursement for the cost of such medical services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

D. CONCLUSION

For the reasons stated, this Court should remand the matter for retrial and/or resentencing.

Respectfully submitted on April 23, 2012.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 23, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Chad E. Duncan (#349049)
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla WA 99362

E-mail: trefrylaw@wegowireless.com
David Brian Trefry
Special Deputy Prosecuting Attorney
P. O. Box 4846
Spokane WA 99220-0846

_____
s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com