NO. 33598-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BRYAN BEWICK,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The police cannot seize a young, white male simply because he is in the suspected vicinity of a fugitive white male they are looking for. Three United States Marshals in protective gear approached Bryan Bewick in broad daylight on this basis. He fled. The officers seized him, and held him beyond the time it took to confirm he was not the white male they were looking for. Any evidence obtained during the prolonged detention should have been suppressed because it was the poisonous fruit of an unconstitutional seizure.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding law enforcement had sufficient basis to seize Mr. Bewick. (Conclusions of Law 1, 2, 4)

2. The trial court erred in concluding law enforcement properly searched Mr. Bewick's pocket for contraband when the limited basis for the initial detention had been achieved. (Conclusions of Law 3, 4)

3. The trial court erred in denying Mr. Bewick's motion to suppress. (Conclusion of Law 5)

4. The court improperly imposed legal financial obligations where Mr. Bewick lacks the ability to pay.

5. The boilerplate "finding" that Mr. Bewick has the ability to pay legal financial obligations is without support in the record.[1]

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. One of the carefully drawn and jealously guarded exceptions to the warrant requirement is that law enforcement may temporarily seize an individual for investigation if they have reasonable, articulable suspicion that criminal activity is afoot. But the suspicion must be particularized. Mere proximity to criminal activity is insufficient. Likewise, generic characteristics qualify too much of the population to satisfy particularized suspicion. Flight also does not necessarily indicate criminal activity. Did law enforcement lack a basis to conduct a warrantless seizure of Mr. Bewick where he matched a general description of a wanted fugitive's description, but lacked similarity on all particular characteristics, and where he fled from three U.S. Marshals in a large vehicle, wearing protective gear?

2. If a basis exists for a brief, investigative detention, the seizure must endure no longer than necessary to achieve the purpose of the investigation, must be related to the purpose of the investigation,

[1] Trial counsel is working to have findings and conclusions entered pursuant to Criminal Rule 6.1(d). In the event that additional issues are raised by the entry or lack of entry of that order, appellate counsel will file supplemental assignments of error.

and must cease once the investigation is complete. Did law enforcement exceed the scope of the seizure when they held Mr. Bewick after they learned he was not the person they were seeking?

3. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants. "[A] trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). While the trial court recognized Mr. Bewick is indigent, the court imposed legal financial obligations (LFOs) without mention of his inability to pay. Should this Court remand with instructions to strike LFOs?

D. STATEMENT OF THE CASE

Three United States Marshals on the Violent Offender Task Force were looking for Brent Graham in Spokane Valley around one o'clock in the afternoon. CP 27, 57. Mr. Graham was wanted on a federal warrant. *Id*. He was known to be a white male with red hair, blue eyes and a large tattoo on his neck. CP 6, 16. The officers apparently believed Mr. Graham was average for height and weight. *Compare* CP 12, 27 *with* CP 6, 14. The officers believed Mr. Graham was staying in an upstairs apartment, number 17, at an apartment

building at 12114 E. Cataldo Ave. CP 27, 58 (finding 2). In their brown GMC Tahoe sport utility vehicle and wearing protective tactical vests, they positioned themselves so they could watch the stairwell leading to apartment 17 and other apartments in the building. CP 27.

The U.S. Marshals saw a man and woman come down the apartment complex stairway. CP 58 (finding 3). The male had a "hoodie" over his head and sunglasses on his face. CP 27, 58 (finding 3). The officers could tell only that he was a white male of medium build. CP 14, 27. As the man approached his vehicle, the officers pulled in behind him to check his identity and "see if he was in fact Graham." CP 12, 20, 27-28. The male "attempted to abscond on foot." CP 20. An officer yelled "stop, police" and the man was "subdued" after a short pursuit. CP 20, 28, 58 (finding 6). He was identified as Bryan D. Bewick and his date of birth was obtained. CP 58 (finding 6). Mr. Bewick has brown hair and brown eyes,

CODE	NAME: LAST, FIRST MIDDLE	RACE	ETH	SEX	DOB	AGE	HGT	WGT	HAIR	EYES
A	Bewick, Bryan David	W	N	M	05/07/1986		509	140	bro	bro

CP 14, in direct contrast with Brent Graham's red hair and blue eyes:

CP 16. The officers then knew Mr. Bewick was not Brent Graham, the fugitive subject of the warrant. *Id*.

Nevertheless, the officers continued to hold Mr. Bewick and saw him "attempting to access or accessing" his front left pocket. CP 58 (finding 7). They questioned Mr. Bewick about this, because the officers believed it was associated with an attempt to conceal or discard contraband. CP 58 (findings 7, 8). Mr. Bewick admitted to having drugs, the contraband was seized and he was charged with two counts possession of a controlled substance. CP 3, 58 (finding 8).

Before trial, Mr. Bewick moved to suppress the evidence as the poisonous fruit of an unlawful seizure. CP 6-23. The parties agreed as to the essential facts, but Mr. Bewick argued law enforcement did not have a lawful basis to seize him and that the scope of the seizure had

been exceeded by the time the officers suspected the contraband, CP 6-23, 29-31; 5/14/15 RP 3-6, 8-9. The court found the facts supported a "seizure and detention of [Mr. Bewick] in order to determine his identity" and the subsequent furtive behavior justified further investigation. CP 59. The court denied the motion to suppress. CP 59.

Mr. Bewick was sentenced after a stipulated facts bench trial. 6/1/15 RP 2-17; CP 36. In addition to time in custody, the court imposed 800 dollars in costs with 12 percent interest accruing immediately, but found Mr. Bewick indigent for purposes of appeal. CP 43-45, __ (Sub. No. 2).

E. ARGUMENT

1. Law enforcement did not have reasonable, articulable suspicion to detain Mr. Bewick because he was seen in the same suspected area as an alleged fugitive who was also a Caucasian of medium build.

While Mr. Bewick does not challenge the trial court's factual findings, its conclusions of law are not privy to any discretion. This Court's review is de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

a. Presence in an area suspected of criminal activity is not enough to support a warrantless seizure.

As a general rule, under the Fourth Amendment and article 1, section 7, warrantless searches and seizures are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).[2] The State therefore bears the heavy burden of proving that a particular warrantless search or seizure falls within an exception to the warrant requirement. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). A limited and jealously-guarded exception permits an officer to briefly detain, for limited questioning, a person whom he reasonably suspects of criminal activity and to frisk the person for weapons if he has reasonable grounds to believe the person to be armed and presently dangerous. *State v. Broadnax*, 98 Wn.2d 289, 293-94, 654 P.2d 96 (1982) (relying on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct.

[2] Because the federal agents here were operating under a task force designed to assist state and local law enforcement, their actions are subject to our State Constitution. *State v. Johnson*, 75 Wn. App. 692, 699-700, 879 P.2d 984 (1994) (citing *In re Teddington*, 116 Wn.2d 761, 774, 808 P.2d 156 (1991)) (federal agents subject to state constitution when cooperating with or assisting state officers); U.S. Marshals, Fact Sheet – Overview, http://www.usmarshals.gov/duties/factsheets/overview.pdf (last viewed Dec. 9, 2015) (Marshals "provide assistance to state and local agencies" and "combine the efforts of federal, state and local law enforcement agencies").

1868, 20 L. Ed. 2d 889 (1968)), *abrogated on other grounds by Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

For even a brief seizure to be permissible, an officer must have a reasonable and articulable suspicion that the person stopped is engaged in criminal conduct. *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010). To justify a *Terry* stop, the police officer must identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion. *Terry*, 392 U.S. at 21; *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

Suspicion of criminality must relate to the person seized or searched, not to the location where he is found. *See State v. Smith*, 102 Wn.2d 449, 452-53, 688 P.2d 146 (1984). For example, an individual's presence in a high-crime area is insufficient to establish probable cause. *See State v. Crane*, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003); *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). Further, mere association with a person whom police have grounds to arrest does not constitute probable cause for

arrest. *United States v. Di Re*, 332 U.S. 581, 587, 68 S. Ct. 222, 92 L. Ed. 210 (1948) (search of a car passenger unjustified when the driver was arrested). Likewise, the mere proximity to others suspected of criminal activity does not establish probable cause for a search of the associate. *Crane*, 105 Wn. App. at 312; *State v. Dorsey*, 40 Wn. App. 459, 466, 698 P.2d 1109 (1985) (probable cause based on association with others engaged in criminal activity requires an additional circumstance that reasonably implies knowledge of or participation in that activity).

b. Flight from law enforcement does not create reasonable, articulable suspicion justifying a warrantless seizure.

In the absence of other circumstances implicating a crime, simply acting suspiciously does not give the law enforcement the authority to stop an individual. *State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41 (1992) (finding that an officer investigating a report of suspicious behavior in a neighborhood inappropriately stopped a man who appeared startled when he saw the officer and turned onto another street to avoid him); *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for a *Terry* stop).

Flight alone does not justify a seizure. "Startled reactions to seeing the police do not amount to reasonable suspicion." *Gatewood*,

163 Wn.2d at 540. The act of absconding from approaching law enforcement can only justify a warrantless stop when combined with other individualized suspicion. *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) (suspect's leaving at the time a police cruiser arrives does not necessarily lead to the conclusion that it is reasonable to suspect the person of committing a crime); *State v. Graham*, 130 Wn.2d 711, 725-26, 927 P.2d 227 (1996) (finding probable cause when, in addition to ignoring officer's request to stop, the defendant quickly concealed an object in his pants pockets, looked nervous, and sweated profusely on a cold night); *State v. Hobart*, 24 Wn. App. 240, 243, 600 P.2d 660 (1979), *rev'd on other grounds*, 94 Wn.2d 437, 617 P.2d 429 (1980) (after officer asked if defendant had cocaine in his pocket, defendant grabbed his pocket and turned away).

c. Mr. Bewick's generic look, appearance in the suspected area of a fugitive and flight from law enforcement did not justify a seizure.

The officers here had a warrant for fugitive Brent Graham, who they believed to be in apartment 17. Around one o'clock in the afternoon, Mr. Bewick exited from a stairwell associated with a number of apartments, including number 17. Apparently like Mr. Graham, Mr. Bewick is white and of a medium build. *See* CP 14 (Bewick is 5'09'

and weighs 140 pounds); CP 27 (Bewick's physical stature matched Graham's). This was all the officers could tell. CP 27. "This description [Caucasian of medium build] is so general that it fits a very large group of ordinary young men." *State v. Lee*, 97 Wis.2d 679, 685, 194 N.W.2d 547 (1980) (no reasonable, articulable suspicion to search "young, white male" in apartment where subject of warrant lived).

The officers could not have simply stopped anyone just because they happened to be near the apartment complex. *Smith*, 102 Wn.2d at 452-53 (general practice of frisking individuals in particularly dangerous area of the city is not justified by probable cause). Our constitution does not "authorize general, exploratory searches." *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 315, 178 P.3d 995 (2008). Yet, the officers here pulled in behind Mr. Bewick on scant more. For a seizure to be permissible, an officer must have a reasonable suspicion that the person stopped is the one engaged in criminal conduct. *Doughty*, 170 Wn.2d at 62-63. The officers lacked that basis here.

Mr. Bewick did nothing to act suspiciously. He simply walked down a stairwell in an apartment complex suspected of containing a fugitive. Even if Mr. Bewick had been found <u>inside</u> the suspected

apartment of the fugitive, the officers would have needed more to formulate articulable suspicion to conduct a *Terry* stop, or frisk him for weapons. *Broadnax*, 98 Wn.2d at 98-99, 101 (requiring suppression of evidence seized from individual found inside an apartment when officers executed a search warrant for the premises); *Lee*, 97 Wis.2d 679 (seizure unlawful of person located in apartment where suspect was expected where both were young, white males). Nonetheless, based simply on his presence at Graham's apartment complex, white race, and average build, three U.S. Marshals in tactical vests and a dark, full-size sport utility vehicle suddenly pulled in behind him.
Mr. Bewick began to run away from the Marshals when Agent Eric Carlson effectuated a seizure by yelling "stop, police." CP 28; *Gatewood*, 163 Wn.2d at 540; *State v. Sweet*, 44 Wn. App. 226, 230, 721 P.2d 560 (1986).

Mr. Bewick was a white male of medium build at an apartment complex in the middle of the day. The fact that he ran when approached by a dark GMC Tahoe with three U.S. Marshals wearing tactical vests, is hardly surprising, let alone indicative of criminal activity. *See State v. Bruton*, 66 Wn.2d 111, 401 P.2d 340 (1965) (to admit at trial, State must substantiate that "departure from the scene . . .

was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution"). It is a reasonable assumption that Mr. Bewick turned and ran in panic or because he was scared. In light of the scant additional suspicion of criminal activity particularized to Mr. Bewick, his flight does not create a lawful basis for a seizure.

It is prohibited to "pyramid[] vague inference upon vague inference" to circumvent the warrant requirement. *Bruton*, 66 Wn.2d at 113. The police lacked individualized, reasonable suspicion that Mr. Bewick was engaged in criminal activity simply because he was a white male of medium build at a given apartment complex and turned and ran from U.S. Marshals in protective gear who sprang upon him. While the officers arguably could have continued to follow Mr. Bewick or engage in a consensual encounter to determine his identity, they did not have a reasonable, articulable basis to detain Mr. Bewick. *See Gatewood*, 163 Wn.2d at 541.

d. <u>The evidence resulting from the unlawful seizure must be suppressed.</u>

Evidence obtained as a result of an unlawful, warrantless search or seizure must be excluded from criminal proceedings. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963);

State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). The trial court erred in failing to suppress the contraband obtained from Mr. Bewick's pocket because they had no basis to stop him in the first place.

2. Because law enforcement had learned Mr. Bewick was not the fugitive Graham, the detention should have ended before law enforcement searched his pocket.

Even if the officers properly apprehended Mr. Bewick, the subsequently seized evidence must be suppressed because the search exceeded the scope of the initial detention.[3] The scope of a *Terry* stop is decidedly narrow. *E.g.*, *Broadnax*, 98 Wn.2d at 99-101. "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983). "If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

The court held the officers were authorized to conduct a limited "seizure and detention of [Mr. Bewick] in order to determine his

[3] Like the preceding issue, the validity of the court's conclusion on this suppression issue is determined by this Court de novo. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

identity." CP 59 (conclusion 2). According to the agreed facts, Mr. Bewick "was stopped by the officers after a short foot pursuit and identified as Brian D. Bewick with a date of birth of 05/07/86." CP 58 (finding 6). At this point the purpose of the stop had been effectuated. *See Royer*, 460 U.S. at 500. The officers had ascertained Mr. Bewick was not Brent Graham, the fugitive subject of the warrant. The lawfulness of the investigative detention ceased at this time. Mr. Bewick should have been released. *Acrey*, 148 Wn.2d at 747.

Law enforcement cannot prolong a detention while they gather additional evidence. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). Yet here, the officers continued to seize Mr. Bewick after they had identified he was not a suspect in any criminal activity. After he was identified, Mr. Bewick "began accessing or attempting to access his left front pocket." CP 58 (finding 7). In response, the officers inquired of Mr. Bewick and searched his pockets. CP 58 (finding 8); *accord* CP 28 (contraband detected <u>after</u> identity was known). This was unrelated to the investigation they were conducting to find their fugitive suspect. *See Williams*, 102 Wn.2d at 740 (purpose of stop and basis for continuing detention must be related). Moreover, this further investigation and search occurred after the basis for the stop had been

achieved and after the reasonable suspicion for a brief investigative detention ended.

The subsequent search of Mr. Bewick's left front pocket was without authority. On this independent ground, the evidence seized should have been suppressed. *See Garvin*, 166 Wn.2d at 254.

3. The Court should strike the legal financial obligations because Mr. Bewick lacks the ability to pay.

a. The trial court found Mr. Bewick unable to pay legal costs, yet imposed legal financial obligations without analyzing his ability to pay those obligations.

Because he was indigent, the court appointed counsel for Bryan Bewick during the proceedings below. CP __ (Sub. No. 2). At sentencing, the court imposed "fees and fines of $200 court costs; $500 to victim assessment; $100 DNA fee" and "a 12% interest rate that does start running today when that judgment is filed" despite costs not being due until August 1, 2016. 6/1/15 RP 16. Contemporaneously, the court made Mr. Bewick aware he could appeal at public expense. 6/1/15 RP 18. Days later the court signed an order of indigency for appeal, based on Mr. Bewick's declaration that he was unemployed and entirely lacking in assets. CP ___ (Subs. Nos. 39, 40).

The State requested these "standard costs" totaling 800 dollars, but provided no argument or evidence that Mr. Bewick was able to pay those LFOs. 6/1/15 RP 13-14.

Despite the lack of evidence, the findings reflects a boilerplate statement that "The court has considered the total amount owing, the defendant's 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." CP 40. This finding was not discussed at sentencing. The judgment imposed the 800 dollars sought by the State with interest accruing immediately. CP 43-45.

b. <u>The relevant statutes and rules prohibit imposing LFOs on impoverished defendants, reading these provisions otherwise violates due process and the right to equal protection.</u>

Our legislature mandates that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized this means "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010. Further, it proves a detriment to society by increasing hardship and recidivism. *Blazina*, 182 Wn.2d at 837.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW

36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a $200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d

1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[4]

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). *Curry*, however, addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830

[4] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited one of the same LFOs Mr. Bewick challenges here, the criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition costs). *See id.* If the Court were limiting its holding to only certain of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee and "criminal filing fee" are exempt from the ability-to-pay inquiry. Although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina*, 182 Wn.2d at 830-39.

It would be particularly problematic to require Mr. Bewick to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants. *Cf. Blazina*, 182 Wn.2d at 857 (noting significant disparities in administration of LFOs across counties).[5] This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 355 P.3d at 1096 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); *and see* RCW 9.94A.010(3) (stating that a sentence should "[b]e

[5] This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. Bewick can supplement the record with representative judgments from King County.

commensurate with the punishment imposed on others committing similar offenses").

General Rule 34, which was adopted at the end of 2010, also supports Mr. Bewick's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

Our Supreme Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants.

Id. at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.* at 529. Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal cases. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the

Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. *See Jafar*, 177 Wn.2d at 528-29; *Blazina*, 182 Wn.2d at 857.

The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that "principles of due process or equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those

who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to

pay was willful" and not due to indigence. *Id.* at 241. This assumption was not borne out. As significant studies post-dating *Blank* recognize, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay); *see Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).[6] The risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State*

[6] Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Bewick concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like him is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

c. <u>This Court should reverse and remand with instructions to strike legal financial obligations.</u>

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. In *Blazina*, the Supreme Court exercised discretionary review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand" it. 182 Wn.2d at 835. This case raises the same concern. *See also Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a), "rules will be liberally interpreted to promote justice and

facilitate the decision of cases on the merits," counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. Because the record demonstrates Mr. Bewick's indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. Bewick has the ability to pay.

4. The Court should not impose costs against Mr. Bewick on appeal.

In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and constitution. Even if the Court disagrees, the Court should exercise its discretion not to impose appellate costs against Mr. Bewick. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id*. at 841 (Fairhurst, J. concurring).

F. CONCLUSION

The warrant for fugitive Graham did not give officers authority to invade the constitutional rights of other white males who happened to be at his apartment complex. Law enforcement lacked reasonable,

articulable suspicion to seize Mr. Bewick. A separate violation occurred when officers continued the detention after ascertaining his identity and searched his pocket. On either ground, the evidence seized must be suppressed.

In the alternative, this Court should remand with instructions to strike the imposition of legal financial obligations and the unsupported ability to pay finding.

DATED this 9th day of December, 2015.

Respectfully submitted,

s/ Marla L. Zink

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 33598-4-III
	)	
BRYAN BEWICK,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF DECEMBER, 2015.

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