NO. 46707-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT BURTON FALCONER, JR.,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court erred when it refused to grant the defendant's pretrial motion to dismiss the school zone enhancements because the defendant claimed that all three drug deliveries occurred in a private residence with no minor present and the state did not allege the existence of any evidence to the contrary.

2. The trial court erred when it imposed legal financial obligations upon an indigent defendant without any discussion about the defendant's ability to pay.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a pretrial motion to dismiss school zone enhancements when the defendant alleges that all three charged drug deliveries occurred in a private residence without the presence of a minor and the state fails to allege the existence of any evidence to the contrary?

2. Does a trial court err if it imposes legal financial obligations upon an indigent defendant without any consideration of that defendant's ability to pay?

STATEMENT OF THE CASE

Factual History

On April 15, 2014, Longview Police Officers Michael Berndt and B.J. Mortensen met with an informant by the name of Steven Meadows in order set up a "controlled buy" of methamphetamine from defendant Robert Falconer. RP 86-88, 116-119, 223-227. Mr. Meadows was acting as an informant in order to avoid prosecution and jail following his own drug arrest. RP 80-81. During the meeting on the 15th, the officers searched Mr. Meadows person and vehicle, found no drugs or money, and then gave him $60.00 cash and an audio recording device. RP 86-88, 120-126, 223-227. Upon receiving the money and recording device Mr. Meadows drove to the defendant's small travel trailer, which was parked in space 18 of a trailer court at 636 California Way in Longview. RP 88-92. Officers Berndt and Mortensen followed Mr. Meadows to the defendant's trailer while other officers working surveillance saw Mr. Meadows pull into the driveway, get out and then enter. RP 124-128, 226-227, 256. The defendant's trailer sits within 1,000 feet of a school bus stop. RP 298-302.

About 10 minutes after Mr. Meadows entered the defendant's trailer he exited, got in his vehicle, and drove to a prearranged location with officers following. RP 88, 92-93, 126-129, 230-231. Once at that location Officer Berndt and Mortensen searched the defendant's person and vehicle, this time

finding a small baggie of methamphetamine and no money. *Id.* Mr. Meadows told them that he had gone into the defendant's trailer and given the defendant the money. RP 88-90. The defendant then used some scales to weigh out the appropriate amount of methamphetamine, put it in a baggie and gave it to him. *Id.* The officers also retrieved the audio recording device from Mr. Meadows. RP 130. It contained an audio file with both Mr. Meadows and the defendant on it discussing the sale of the drugs that Mr. Meadows brought back to the police. RP 137-159.

On April 16th and May 1st Mr. Meadows again met with Officers Berndt and Mortensen in order to purchase methamphetamine from the defendant. RP 97-100, 101-105, 160-168, 188-195, 235-237. Each occasion followed the exact pattern of the first controlled buy with two minor exceptions. *Id.* During the April 16th purchase of methamphetamine, Mr. Meadows asked the defendant to come outside to look at the tail lights of Mr. Meadow's vehicle. RP 98-99. Mr. Meadows did this at the instructions of the officers, who wanted to see the defendant themselves. *Id.* In fact the defendant did come out after the sale of the drugs to look at Mr. Meadows vehicle. RP 267-269. When he did, the officers were able to identify him. *Id.* During the May 1st sale the police gave Mr. Meadows $70.00 in return for which the defendant gave Mr. Meadows a larger quantity of methamphetamine. RP 97-98, 191.

With the exception of the two noted differences in the second and third controlled buys, all of the other details of the second and third controlled purchases were identical to the first. RP 97-100, 101-105, 160-168, 188-195, 235-237. These details were: (1) on all three occasions the officers searched Mr. Meadows and his vehicle, found no money or drugs, and then gave him cash and an audio recording device, (2) on all three occasions the officers followed Mr. Meadows to the defendant's trailer while surveillance officers watched him go in and come out, (3) on all three occasions neither the controlling officers or the surveillance officers saw any other person go into or out of the defendant's trailer while Mr. Meadows was in it, (4) on all three occasions the officers watched Mr. Meadows come out of the defendant's trailer and followed him to their agreed meeting location, and (5) on all three occasions the officers then searched Mr. Meadows, found drugs on his person but no money, and retrieved the audio recording device which, on each occasion, had recorded the drug transaction between the Mr. Meadows and the defendant. RP 97-100, 101-105, 160-168, 188-195, 235-237. When later asked about the transactions Mr. Meadows stated that on the first occasion he believed the defendant's girlfriend might have been present but he was not sure. RP 91.

On May 7, 2014, the Longview Officers involved in the prior controlled buys served a search warrant at the defendant's trailer at 636

California Way, Space 18, in Longview. RP 204-211, 240-243. During the execution of the warrant the officers arrested the defendant, searched his person and later claimed that they found a small amount of heroin and methamphetamine during that search. RP 216. The defendant disputed this account, claiming that while he did have heroin on his person when arrested, the methamphetamine was in his trailer. RP 216-217.

Procedural History

By information filed May 12, 2014, and later amended on the day of trial, the Cowlitz County Prosecutor charged the defendant Robert Falconer with three counts of delivery of methamphetamine within a school bus stop, possession of methamphetamine and possession of heroin. CP 1-3, 25-28. Initially, the court appointed an attorney from Cowlitz County Public Defenders to represent him. CP 82. The defendant thereafter became displeased with that attorney actions and unsuccessfully asked for the appointment of a new attorney's. CP 83. When the court denied that request, the defendant asked to be appointed a "co-counsel." CP 84-85. When the court denied that request the defendant insisted that he be allowed to represent himself. CP 85. The court granted this request. *Id.* However, the court ordered his public defender to proceed as standby counsel. CP 86

Acting as his own attorney the defendant filed four handwritten motions with the court. CP 8-11, 12-15, 16-18, 19-21. The first motion was

to dismiss the school bus stop enhancements. CP 8-11. Specifically, the defendant argued that the alleged enhancement should be dismissed "because all transactions allegedly occurred inside a private residence with no minor children inside [that] private residence." CP 9.

The defendant's second *pro se* motion was "that all evidence obtained at the time of search be suppressed as part of evidence due to lack of information to be filled out by searching officers left blank." CP 13. Apparently the defendant was referring to the fact that his copies of that the first page of the officer's affidavit given in support of the warrant, and the second page of the warrant itself, had his addressed blacked out as was shown with the copies of these documents attached to his motion. CP 15-16.

The defendant's third motion was to suppress "any and all transactions between C.I. and defendant. Especially controlled buys." CP 17. The defendant made the following argument in support of that motion:

> On all denominations of United States currency you will find the phrase "This note is legal tender for all debts public and private." With that in mind, how can S.C.U. [Longview Police Street Crimes Unit] and C.I. do a controlled buy when in fact it was a private transaction between C.I. and defendant thereby putting it into the same category as a private conversation. Thereby protecting it under the privacy act of the State of Washington. Therefore all evidence obtained during those private transactions is in violation of the act and is inadmissible for any purpose at trial.

CP 17.

The defendant's fourth *pro se* motion was to suppress "any and all

taped conversations between C.I. and defendant including telephone conversations. CP 20. The defendant made the following argument in support of this motion:

> The privacy act prohibits recording of any private conversation by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all persons engaged in the conversation. Wash. Rev. Code 9.73.030(1)(b) evidence obtained in violation of the act is inadmissible for any purpose at trial Rev. Code 9.73.050.

CP 20.

Two days prior to trial the court denied the defendant's second and third motion to suppress evidence. CP 86. However, the court reserved ruling on the defendant's argument that the tape recordings had been made in violation of the Washington Privacy Act. *Id.*

On July 17, 2015, the court called this case for trial before a jury. CP 1. Following *voir dire* the court heard the defendant's remaining motions to suppress the audio recordings and the defendant's motion to dismiss the school zone enhancements. RP 9-10. During argument on the first motion the prosecutor produced the prior authorizations the police obtained for the audio recordings. RP 57-60. Based upon this argument the trial court denied the motion to suppress. RP 63-64. The trial court then asked the state to respond to the defendant's motion to dismiss the enhancements. RP 64. The prosecutor responded that since the defendant was claiming an affirmative

defense it was not subject to a pretrial ruling. RP 64-66. The trial court agreed and refused to grant the defendant's motion. *Id.* The colloquy between the prosecutor and the court went as follows on this issue:

> JUDGE EVANS: Okay. Alright. Thank you. Alright. As far as the dismissal for the school zone enhancement, Mr. Brittain?
>
> MR. BRITTAIN: Yeah. If the Court were to – I'm sorry, I don't have the statute right in front of me, but the school zone enhancement statute, which is 69.50.435(1)(c) is the – the school bus stop location, contained, I believe farther down in that statute, it discusses how, I believe what Mr. Falconer's motion is actually not ev – cannot be a motion to dismiss, it is an affirmative defense that requires Mr. Falconer to put on evidence that complies with the statute. It's not something subject to dismissal, it's simply – he has it confused in that it's actually an affirmative defense that he has to present evidence for, in which he can also do so, the Court can also not instruct the jury as to that affirmative defense.
>
> JUDGE EVANS: I'm looking in Subsection 4. It says it's an affirmative defense to a prosecution for violation of this section that the prohibitive contact took place entirely within a private residence?
>
> MR. BRITTAIN: That's – that's the subsection I was referring to.
>
> JUDGE EVANS: Yeah. That – that no person under 18 was present and at the residence at the time of the commission and that the prohibitive conduct did not involve deliver, manufacture, sell, or possessing with intent to manufacture, sell, or deliver controlled substance for profit. An affirmative defense is established in this section. The burden's on the defendant and the standard is a preponderance. Okay. So, I think given that that particular statute, there's an opportunity for an affirmative defense, and if you're successful in that defense, Mr. Falconer, then the jury is instructed basically not to consider the school zone enhancement. As far as the dismissal of that, we kind of have to wait to figure out and see what the – the testimony is to whether that affirmative defense is – is – is established. So I'm going to reserve ruling on the motion to dismiss

> the school zone enhancement under that – under 69 – pardon me, 69.50.435(4). So I'll – that's – that's reserved.

RP 64-66.

Once the court had ruled on the defendant's remaining two motions the state presented its case-in-chief calling seven witnesses, including Mr. Meadows, Officers Berndt and Mortensen, as well as surveillance officers and the forensic scientist who tested the drugs the police had seized. RP 78-324. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. Following the close of the state's case the defendant took the stand on his own behalf. RP 341-350. He testified that he had delivered methamphetamine to Mr. Meadows as alleged, but argued that he was not guilty of the crimes charged because he didn't "knowingly" commit the crimes because of his lifetime of drug use and his "devastation" over the death of this father. RP 341-345.

After the defendant finished his testimony the court instructed the jury with neither party making any objections. RP 335-338. Neither the state nor the defendant proposed an instruction on the defense available under RCW 69.50.435. RP 283-287, 335-338, 353-368. Following argument by the state and the defendant the jury retired for brief deliberation before returning guilty verdicts on all counts. RP 369-377, 381-386; CP 55, 57, 59, 61, 62. The jury also returned special verdicts that the defendant had committed the three

deliveries within 1,000 feet of a school bus stop. CP 56, 58, 60.

The court later held a sentencing hearing and imposed 162 months each on the first three delivery counts and 24 months each on the fourth and fifth possession counts. CP 71. The court ordered that all of the sentences run concurrently. *Id.* The court arrived at the 162 month sentences on the first three counts by imposing 90 months on a standard range of 60 to 120 months, and then adding the three consecutive 24 months school zone enhancements. *Id.* The court also imposed legal financial obligations of $3,225.00 without any discussion concerning the defendant's ability to pay. CP 69; RP 406-409. The defendant thereafter filed timely notice of appeal. CP 78.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE DEFENDANT'S PRETRIAL MOTION TO DISMISS THE SCHOOL ZONE ENHANCEMENTS BECAUSE THE DEFENDANT CLAIMED THAT ALL THREE DRUG DELIVERIES OCCURRED IN A PRIVATE RESIDENCE WITH NO MINOR PRESENT AND THE STATE DID NOT ALLEGE THE EXISTENCE OF ANY EVIDENCE TO THE CONTRARY.

In RCW 69.50.435(1) the legislature has created sentencing enhancements for certain drug crimes committed within 1,000 feet of a number of listed protected areas, including schools and school bus stops. *See* RCW 69.50.435(1). In subsection (4) of this same statute the legislature created a defense to the imposition of the enhancements if the underlying crime was committed inside a private residence with no minors present. This subsections states:

> (4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

RCW 69.50.435(4).

In the case at bar the state by amended information alleged

enhancements under RCW 60.50.435(1) in that the state claimed that the defendant committed the first three offenses of delivery of methamphetamine within 1,000 feet of school bus stop. The defendant thereafter filed a written motion to dismiss the enhancements, alleging that under RCW 69.50.435(4) the offenses were committed in his private residence with no minors present. Although explicitly named, the defendant's written request functioned as a partial motion for summary judgment under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). As the following explains, in the case at bar the trial court erred when it refused to grant this motion and when it refused to dismiss the enhancements.

In criminal cases, just as in civil cases, the defendant is entitled to judgment in his or her favor as a matter of law if the evidence, seen in the light most favorable to the state, is insufficient to prove each and every element of the crime charged. *State v. Knapstad, supra.* In *State v. Groom*, 133 Wn.2d 679, 947 P.2d 240 (1997), the Washington State Supreme Court reviewed the procedures for such a motion to dismiss as follows:

> Under *Knapstad*, 107 Wash.2d at 356, 729 P.2d 48, such a motion should be initiated by a sworn affidavit "alleging there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt." Then "[t]he State can defeat the motion by filing an affidavit which specifically denies the material facts alleged in the defendant's affidavit. If material factual allegations in the motion are denied or disputed by the State, denial of the motion to dismiss is mandatory." *Id.* On the other hand, "[i]f the State does not deny the undisputed facts or allege other material facts," the court

> must decide "whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt." *Id.* at 356-57, 729 P.2d 48. "Since the court is not to rule on factual questions, no findings of fact should be entered." *Id.* at 357, 729 P.2d 48.

State v Groom, 133 Wn.2d at 634.

Knapstad motions are the criminal equivalent to civil motions for summary judgment under CR 56(c) with the distinction being that charges dismissed under a *Knapstad* motion are subject to being refiled while an order granting a motion for summary judgment under CR 56(c) is final. *State v. Freigang*, 115 Wn.App. 496, 502, f. 5, 61 P.3d 343 (2002). Summary judgment, as with a *Knapstad* motion, is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In both motions the moving party has the burden of proving that there is no genuine issue of material fact. *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004). If the moving party meets that burden, then the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). In determining whether a genuine issue exists, the courts construe the facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Black*, 153 Wn.2d at 160–61.

In the case at bar the defendant did file both a written motion as well

as a written factual claim to support the facts necessary to bring his motion. The defendant specifically alleged the following facts in support of his motion:

> I am asking that School zone enhancements be dismissed because all transactions allegedly occurred inside a private residence with no minor children inside private residence.

RP 9.

Although inelegant, the defendant's statement constitutes a factual claim made by a person (the defendant) whom the state alleged was present during the transactions and who therefore had personal knowledge about the factual claim. The defendant's written statement also made the two factual assertions that are necessary to raise a claim for affirmative relief under RCW 69.50.435(4): (1) that the transactions took place in a private residence, and (2) that no minors were present. Thus, in this case the defendant met his burden setting out facts sufficient for relief. As a result, the burden shifted to the state to "set forth specific facts showing that there is a genuine issue for trial." *LaPlante v. State*, 85 Wn.2d at 158.

In this case the state did not dispute the defendant's factual claims. This is not difficult to understand given the evidence the state presented at trial, which was that each transaction was completed in the defendant's residence and that there was no evidence that a minor was present. Thus, in this case the trial court erred when it denied the defendant's motion to

dismiss the enhancements.

As was mentioned in the preceding Factual History, when the court considered argument on the defendant's motion to dismiss the enhancements, the state argued, and the trial court agreed, that the defendant could not bring a motion to dismiss based upon an affirmative defense. The state's argument, and the court's ruling, went as follows:

> JUDGE EVANS: Okay. Alright. Thank you. Alright. As far as the dismissal for the school zone enhancement, Mr. Brittain?
>
> MR. BRITTAIN: Yeah. If the Court were to – I'm sorry, I don't have the statute right in front of me, but the school zone enhancement statute, which is 69.50.435(1)(c) is the – the school bus stop location, contained, I believe farther down in that statute, it discusses how, I believe what Mr. Falconer's motion is actually not ev – cannot be a motion to dismiss, it is an affirmative defense that requires Mr. Falconer to put on evidence that complies with the statute. It's not something subject to dismissal, it's simply – he has it confused in that it's actually an affirmative defense that he has to present evidence for, in which he can also do so, the Court can also not instruct the jury as to that affirmative defense.
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> there's an opportunity for an affirmative defense, and if you're successful in that defense, Mr. Falconer, then the jury is instructed basically not to consider the school zone enhancement. As far as the dismissal of that, we kind of have to wait to figure out and see what the – the testimony is to whether that affirmative defense is – is – is established. So I'm going to reserve ruling on the motion to dismiss the school zone enhancement under that – under 69 – pardon me, 69.50.435(4). So I'll – that's – that's reserved.

RP 64-66.

The prosecutor's argument and the court's decision that it couldn't rule upon the defendant's motion to dismiss because he was raising an affirmative defense was incorrect. In fact, there is nothing within the procedures or substance for either *Knapstad* motions or summary judgment motions that precludes the court from granting either based upon facts that establish an affirmative defense provided the non-moving party does not allege the existence of evidence that controverts the facts that set out the affirmative defense. *See Oltman v. Holland Am. Line USA, Inc.*, 163 Wn. 2d 236, 245, f. 6, 178 P.3d 981 (2008); *Rivera v. Anaya*, 726 F.2d 564 (9th Cir.1984) (absent prejudice to the plaintiff, a defendant may raise an affirmative defense in a motion for summary judgment). Since the state in this case did not allege facts controverting the affirmative defense, and did not present such facts at trial, the trial court erred when it denied the motion to dismiss the school zone enhancements. As a result, this court should vacate the defendant's sentence and remand to the trial court with instructions

to dismiss the school zone enhancements.

II. THE TRIAL COURT ERRED WHEN ITIMPOSED LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WITHOUT ANY DISCUSSION ABOUT THE DEFENDANT'S ABILITY TO PAY.

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

> (3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;

2. Repayment may be imposed only on convicted defendants;

3. Repayments may only be ordered if the defendant is or will be able to pay;

4. The financial resources of the defendant must be taken into account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and

7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court summarily imposed legal financial obligations without any consideration of the defendant's ability to pay those obligations. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's ability to pay.

In this case the state may argue that this court should not address this issue because the defendant did not preserve the statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, No. 89028-5 (filed 8/12/15), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

> At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10. 01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims oferror, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.
>
> 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. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

State v. Blazina, at 11-12.

In this case the record reveals that the trial court imposed a 162 month

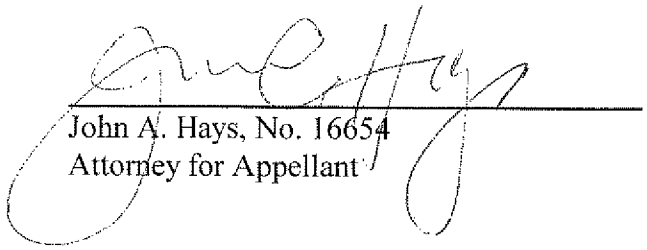
sentence on a 58-year-old indigent defendant who will be well in his late sixties or early seventies prior to release without any consideration of his ability to pay. Appellant argues that this case would also be appropriate for this court to exercise its discretion to review the issue of legal-financial obligations.

CONCLUSION

The trial court erred when it denied the defendant's motion to dismiss the school zone enhancements and when it imposed legal financial obligations without consideration of the defendant's ability to pay. As a result this court should vacate the defendant's sentence and remand with instructions to strike the enhancements and reconsider the imposition of legal financial obligations.

DATED this 13th day of March, 2015.

Respectfully submitted,



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APPENDIX

RCW 69.50.435
Violations Committed in or on Certain Public Places or Facilities – Additional penalty – Defenses – Construction – Definitions

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

(a) In a school;

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

(e) In a public park;

(f) In a public housing project designated by a local governing authority as a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and

imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for

a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, streetcar, train, trolley vehicle, or any other device, vessel, or vehicle which is owned or operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

RCW 10.01.160
Costs – What constitutes – Payment by defendant – Procedure – — Remission – Medical or Mental Health Treatment or Services

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. 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 take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial

resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

(5) Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant's competency to stand trial as provided in RCW 10.77.060, this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units. This section shall not prevent the secretary of the department of social and health services or other governmental units from imposing liability and seeking reimbursement from a defendant committed to an appropriate facility as provided in RCW 10.77.084 while criminal proceedings are stayed. This section shall also not prevent governmental units from imposing liability on defendants for costs related to providing medical or mental health treatment while the defendant is in the governmental unit's custody. Medical or mental health treatment and services a defendant receives at a state hospital or other facility are not a cost of prosecution and shall be recoverable under RCW 10.77.250 and 70.48.130, chapter 43.20B RCW, and any other applicable statute.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **ROBERT B. FALCONER, JR.,** **Appellant.**	**NO. 46707-1-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Ryan Jurvekinen
   Cowlitz County Prosecuting Attorney
   312 SW First Avenue
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2. Robert Burton Falconer, Jr., No.917237
   Coyote Ridge Corrections Center
   P.O. Box 769
   Connell, WA 99326

Dated this 13th day of March, 2015, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

March 13, 2015 - 4:49 PM

Transmittal Letter

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Court of Appeals Case Number: 46707-1

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