No. 47756-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TAMARA CHURCHILL,

Appellant.

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

The Honorable Jennifer A. Forbes

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

1. The police lacked lawful authority to search Ms. Churchill's purse. 6

   a. *Warrantless searches are per se unreasonable.* 6

   b. *The police cannot search the property of a person not named in a search warrant absent lawful authority.* 7

   c. *It was readily apparent to the police that the purse belonged to Ms. Churchill.* 9

   d. *The items seized from inside Ms. Churchill's purse must be suppressed as violative of the Fourth Amendment and article I, section 7.* 12

2. The trial court erred in imposing court costs and attorney's fees without making a finding regarding Ms. Churchill's ability to pay. 13

   a. *The court may impose court costs and fees only after a finding of an ability to pay.* 13

   b. *The trial court failed to make an individualized inquiry into Ms. Churchill's ability to pay the LFOs.* 15

   c. *The remedy for the court's failure to inquire into Ms. Churchill's financial circumstances and make a finding*

of her ability to pay the LFOs is remand for a new sentencing hearing..18

F. CONCLUSION 19

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV .... passim

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 7 .... passim

FEDERAL CASES

Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) 7

Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) 8

WASHINGTON CASES

State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) 12

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)...... 14, 15, 16, 18

State v. Broadnax, 98 Wn.2d 289, 654 P.2d 96 (1982) 7, 8

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) 17

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)............................ 8, 9

State v. Johnson, 128 Wn.2d 431, 909 P.2d 293 (1996) 7

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002)............................. 9

State v. Lohr, 164 Wn.App. 414, 263 P.3d 1287 (2011).......... 10, 11, 12

State v. Mayer, 120 Wn.App. 720, 86 P.3d 217 (2004) 17

State v. Nolan, 98 Wn.App. 75, 988 P.2d 473 (1999) 13

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999)............................. 8

State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983)......................... 7

State v. Smith, 88 Wn.2d 127, 559 P.2d 970 (1977)............................... 7

State v. Thompson, 153 Wn.App. 325, 223 P.3d 1165 (2009) 17

State v. Vrieling 144 Wn.2d 489, 28 P.3d 762 (2001)............................ 9

State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) 7

State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984)...................... 6

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009) 12

State v. Worth, 37 Wn.App. 889, 683 P.2D 622 (1984)................passim

STATUTES

RCW 10.01.160 .... 13, 14, 15

RCW 69.50.430 17

RULES

CrR 3.6.. 1, 2

GR 34... 16, 17

A. INTRODUCTION

Tamara Churchill was present in an apartment when a search warrant was executed. She was not named in the warrant. Nevertheless, Ms. Churchill was detained and her purse that was at her feet when she was detained by the police was searched. The trial court refused to suppress the methamphetamine discovered inside the purse, finding the police did not know the purse belonged to Ms. Churchill. In addition, at sentencing, the court imposed legal financial obligations without conducting an individualized assessment of Ms. Churchill's ability to pay. Ms. Churchill asks this Court to reverse her conviction and/or sentence.

B. ASSIGNMENTS OF ERROR

1. The admission of the items seized pursuant to the illegal search of Ms. Churchill's purse violated the Fourth Amendment and article I, section 7.

2. The trial court erred in admitting the items illegally seized from inside Ms. Churchill's purse.

3. In the absence of substantial evidence, the trial court erred in entering Finding of Fact for Hearing on CrR 3.6 III to the extent it finds "Detective Rauback was unsure who owned the purse on the couch."

4. To the extent it is deemed a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law III for Hearing on CrR 3.6 where the court ruled that "the purse was not closely associated with the defendant or immediately recognizable as the defendant's."

5. To the extent it is deemed a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law III for Hearing on CrR 3.6 where the court ruled that "there was no way for Detective Rauback to know which female the purse belonged to."

6. The trial court erred in imposing Legal Financial Obligations (LFOs) in the absence of an individualized inquiry into Ms. Churchill's ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under article I, section 7 and the Fourth Amendment, the police may not search the possessions of a person not named in a search warrant absent an exception to the warrant requirement. The police may not search items either the police know are the person's or closely associated with that person. Here, the police searched Ms. Churchill's purse where she was not named in the search warrant and her purse was

discovered alone on a sofa on which she was seated. Did the search violate the United States and Washington Constitutions requiring suppression of the methamphetamine found inside?

2. A court may impose discretionary LFOs only after making an individualized assessment on the record of the defendant's financial situation and determining his ability to pay. The court here imposed over $3500 in discretionary LFOs without making any finding regarding Ms. Churchill's financial circumstances or her ability to pay. Is Ms. Churchill entitled to reversal of his sentence and remand for a new sentencing hearing?

D. STATEMENT OF THE CASE

On December 5, 2014, the Bremerton Police Department executed a search warrant at an apartment, the focus of which was one Anthony Anderson. CP 84; 3/30/2015RP 27. No one else was listed on the search warrant. *Id.* Inside the apartment, the police found five young women, one of which was Tamara Churchill. CP 84.

Four of the women were immediately escorted out of the apartment and detained. CP 85; 3/30/2015RP 18, 32. Ms. Churchill was found lying on a sofa. CP 85; 3/30/2015RP 32. On the sofa was a purse. CP 85; 3/30/2015RP 35. The purse was close to Ms. Churchill's

legs and was the only purse on the sofa. 3/30/2015RP 42. Ms. Churchill was escorted out of the apartment and detained. CP 85; 3/30/2015RP 34.

Inside the apartment, Officer Rauback looked inside the purse and saw a cigarette pouch. CP 85; 3/30/2015RP 37. He took the purse outside and asked the women if the purse belonged to one of them. CP 85; 3/30/2015RP 37. Officer Rauback then looked inside the cigarette case and found suspected methamphetamine and paraphernalia for smoking it. CP 85; 3/30/2015RP 38. Further examination of the purse revealed a wallet with Ms. Churchill's identification inside. CP 85; 3/30/2015RP 38.

Ms. Churchill was subsequently arrested and charged with possession of methamphetamine. CP 1-2. Prior to trial, Ms. Churchill moved to suppress the methamphetamine discovered in the purse. CP 5-71. Following a hearing, the trial court denied the motion, finding that the purse was "not closely associated with the defendant or immediately recognizable as the defendant's." CP 86. The court did find that "[t]he only factor within the defendant's favor was her physical proximity to the purse." *Id.*

Following a jury trial, Ms. Churchill was found guilty as charged. CP 130. At sentencing, after imposing the sentence, the trial court turned to the imposition of LFOs. Prior to the imposition of the LFOs, the trial court inquired:

> Ms. Churchill, once you're released, is there any reason you can't work?
>
> THE DEFENDANT: Not that I know of.
>
> THE COURT: Okay. Do you believe you'll be able to make payments towards your legal financial obligations?
>
> THE DEFENDANT: I will have lost my job by then.
>
> THE COURT: Okay. So if I gave you six months after you're out of custody to begin making payments on your legal financial obligations, would that be enough time, do you think, for you to find a job?
>
> THE DEFENDANT: I hope so.
>
> THE COURT: Do you think you could pay $25 a month?
>
> THE DEFENDANT: I hope so.
>
> THE COURT: So at this time, based on what I have in front of me, the defendant has the ability to pay presently. If there's a situation -- certainly she can bring it back to court if her situation changes. I'll set the payment at $25 a month beginning six months, or 180 days, after she's released from custody.

6/5/2015RP 11-12. The trial court then imposed LFOs in the amount of $3,535. CP 141. The Judgment and Sentence section

4.1 included the boilerplate finding: "The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations." CP 141.

E. ARGUMENT

1. The police lacked lawful authority to search Ms. Churchill's purse.

a. *Warrantless searches are per se unreasonable.*

The Fourth Amendment to the United States Constitution protects against unlawful searches and seizures. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. Warrantless seizures are per se unreasonable under both the Washington and United States Constitutions, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Williams,* 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). These exceptions to the warrant requirement are "'jealously and carefully drawn.'" *Id., quoting Arkansas v. Sanders,* 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

The language of article I, section 7 prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable

searches and thus constitutional, which creates "an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions . . . ." *State v. Ringer,* 100 Wn.2d 686, 690, 674 P.2d 1240 (1983). The privacy protections of article I, section 7 are thus more extensive than those provided under the Fourth Amendment. *State v. White,* 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982).

Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement. *Ringer,* 100 Wn.2d at 701, *citing State v. Smith,* 88 Wn.2d 127, 135, 559 P.2d 970 (1977). Exceptions to the warrant requirement are limited and narrowly drawn. *White,* 135 Wn.2d at 769. The State, therefore, bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for. *State v. Johnson,* 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

b. *The police cannot search the property of a person not named in a search warrant absent lawful authority.*

Under article I, section 7, it has been specifically recognized that "[r]egardless of the setting ... 'constitutional protections [are] possessed individually.'" *State v. Broadnax,* 98 Wn.2d 289, 296, 654 P.2d 96 (1982), *quoting Ybarra v. Illinois,* 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (second alteration in original).

Accordingly, a person's "mere presence" in a place validly searched pursuant to s search warrant does not justify a search of that person or their possessions. *Broadnax,* 98 Wn.2d at 295, 301. Further, merely associating with a person suspected of criminal activity "does not strip away" individual constitutional protections. *Broadnax,* 98 Wn.2d at 296. Thus, where officers do not have articulable suspicion that an individual is armed or dangerous and have nothing to *independently* connect such person to illegal activity, a search of the person is invalid under article I, section 7. *Broadnax,* 98 Wn.2d at 296.

Personal items may be "so intimately connected with" an individual that a search of the items constitutes a search of the person. *State v. Parker,* 139 Wn.2d 486, 498-99, 987 P.2d 73 (1999); *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Personal effects need not be worn or held to fall within the scope of protection. *State v. Worth,* 37 Wn.App. 889, 893-94, 683 P.2D 622 (1984) (narrow focus on whether person is holding or wearing a personal item undercuts purpose of constitutional protection and leaves vulnerable to search readily recognizable personal effects which a person has under his or her control and seeks to preserve as private).

Thus, under article I, section 7 the police cannot search the personal effects of a non-arrested individual, such as a purse, jacket, or container, known to the officers to belong to the person, if not in the "immediate control" of the person arrested. *State v. Jones,* 146 Wn.2d 328, 336, 45 P.3d 1062 (2002), *quoting State v. Vrieling,* 144 Wn.2d 489, 494 n. 2, 28 P.3d 762 (2001).

The same rule holds true for the Fourth Amendment: "Fourth Amendment protections extend to 'readily recognizable personal effects ... which an individual has under his control and seeks to preserve as private.'" *Hill,* 123 Wn.2d at 647 (alteration in original), *quoting Worth,* 37 Wn.App. at 893.

c. *It was readily apparent to the police that the purse belonged to Ms. Churchill.*

The police here claimed they did not know the purse belonged to Ms. Churchill. 3/30/2015RP 38. The trial court continued this fallacy when it found that the purse was on the sofa but at the opposite end of the sofa from Ms. Churchill's head. CP 85-86.

The decision in *Worth* answers the question here. In *Worth,* the court addressed whether the police had the right to search Ms. Worth's purse, which they found resting against a chair during the search of another's home. 37 Wn.App. at 891. Similar to Ms. Churchill, Ms.

Worth was a visitor to the house, which was being searched under a premises search warrant. The police searched Ms. Worth's purse twice, finding a bindle of cocaine during the second search. 37 Wn.App. at 891. In suppressing the cocaine, the Court of Appeals stated: "[I]t was apparent to officers conducting the search that Worth's purse was not just another household item which police could search by virtue of their warrant to search the premises of Folkerts'[s] house. Because Worth's purse rested against the chair on which she was seated, it was clear that she owned the purse." *Worth*, 37 Wn.App. at 893.

Similarly, in a more recent decision by this Court, *State v. Lohr*, 164 Wn.App. 414, 263 P.3d 1287 (2011), the same conclusion was reached. The police executed a premises search warrant at a residence. The officers entered the residence and they found Ms. Lohr, who did not live at the residence, among the several individuals present; she was sitting on a couch approximately seven feet from an officer. When the police told Ms. Lohr she was free to leave, she asked the target of the warrant for her boots and pants, which were seven to eight feet away behind the officer. While retrieving those items, the officer noticed a "medium size" purse sitting with Ms. Lohr's boots and pants. Prior to handing the purse to Ms. Lohr, the officer searched the purse and found

Ms. Lohr's identification card and several syringes, one of which contained methamphetamine. *Lohr*, 164 Wn.App. at 416-17. The trial court refused to suppress the methamphetamine, finding the purse was not immediately recognizable as belonging to Ms. Lohr. *Id.* at, 418-19. This Court reversed, ruling:

> Here, as in *Worth*, it was clear before Clary searched the purse that it was Lohr's purse with her jeans and boots. Despite the fact that Lohr's purse was not located next to her but was seven to eight feet away, it was next to her clothing and was clearly associated with her.

Lohr, 164 Wn.App. at 421.

In both of these decisions, the items searched were near the defendant almost identically to Ms. Churchill. The trial court's conclusion that it was readily apparent the purse belonged to Ms. Churchill because it was at the other end of the sofa flies in the face of *Worth* and *Lohr* and the facts. First, *Worth* involved a similar situation where the purse was at her feet while she was seated in a chair. *Lohr* involved a purse approximately eight feet away from Ms. Lohr. Ms. Churchill's situation where the purse was on the same sofa on which she was seated and close to her feet, fits directly into these decisions.

Second, the police assumed the purse belonged to one of the women, but this was the only purse on the sofa and the only one close

to Ms. Churchill. The police claimed they could not have assumed the purse belonged to Ms. Churchill because the living room contained approximately 10 purses and several other bags. 3/30/2015RP 36-37. But again, this was the only purse on the sofa and the only one closest to Ms. Churchill. *Lohr* dealt with a purse several feet away from Ms. Lohr and *Worth* involved a purse lying against a hair in which Ms. Worth had been seated. Ms. Churchill's factual scenario fits within the same analysis, thus the search of Ms. Churchill's purse violated article I, section 7 and the Fourth Amendment.[1]

d. *The items seized from inside Ms. Churchill's purse must be suppressed as violative of the Fourth Amendment and article I, section 7.*

If a police officer has disturbed a person's "private affairs" under the Washington Constitution, any evidence seized will be suppressed. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). *See also State v. Winterstein,* 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (Washington's exclusionary rule is "nearly categorical").

The police lacked any authority of law to search the purse, which it was readily apparent belonged to Ms. Churchill. As a

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[1] The fact that Ms. Churchill denied ownership of the purse does not mean she abandoned the purse, thus authorizing the police to search it. *See State v. Evans*, 159 402, 412-13, 150 105 (2007) ("disclaiming ownership is not sufficient, by itself, to constitute abandonment").

consequence, the search of her purse was illegal and this Court must reverse the trial court's refusal to suppress the drugs and paraphernalia and order these items suppressed.

2. **The trial court erred in imposing court costs and attorney's fees without making a finding regarding Ms. Churchill's ability to pay.**

At sentencing, the court imposed LFOs in the amount of $3,535 of which $600 was mandatory fees and the $1000 was a mandatory fine. CP 141. The Judgment and Sentence contains a boilerplate finding stating: "The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations." CP 141. Despite Ms. Churchill's plea that she would most likely lose her job because of her incarceration, the court imposed the legal financial obligations without making an individualized inquiry into her ability to pay. 6/5/2015RP 12.

a. *The court may impose court costs and fees only after a finding of an ability to pay.*

The allowance and recovery of costs is entirely statutory. *State v. Nolan,* 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by

the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." *See also State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015) (citing RCW 10.01.160 and requiring court to make individualized inquiry into defendant's ability to pay). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs.

Blazina held:

> "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." [citation omitted] To determine the amount and method for paying 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." [citation omitted]

Id., *citing* RCW 10.01.160(3) (emphasis in original).

The court here made no such inquiry and under *Blazina*, Ms. Churchill is entitled to a new sentencing hearing.

b. *The trial court failed to make an individualized inquiry into Ms. Churchill's ability to pay the LFOs.*

In *Blazina*, the Supreme Court held that prior to imposing discretionary LFOs, the trial court *must* make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay. *Blazina*, 182 Wn.2d at 837-38. In addition, the record must reflect this individualized inquiry:

> *Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.* The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id. (emphasis added).

Here, the trial court failed to make the individualized inquiry required under 10.01.160. CP 141; 6/5/2015 11-12. At sentencing, the court merely asked Ms. Churchill if she could get a job after she was released, and when Ms. Churchill answered tentatively that she might, the court imposed the costs. 6/5/2015RP 11-12.

The *Blazina* Court suggested courts use the guidelines listed in GR 34 in assessing an individual's ability to pay LFOs:

> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.,* if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Blazina, 182 Wn.2d at 838-39.[2]

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[2] GR 34 states in relevant part:

> (3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that:
> (A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:
> (i) Federal Temporary Assistance for Needy Families (TANF);
> (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
> (iii) Federal Supplemental Security Income (SSI);
> (iv) Federal poverty-related veteran's benefits; or
> (v) Food Stamp Program (FSP); or
> (B) his or her household income is at or below 125 percent of the federal poverty guideline; or
> (C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses

Sadly, we'll never know if Ms. Churchill was indigent as defined in GR 34 because the court never asked. The only question the court inquired of Ms. Churchill was whether she could get a job after she was released. 6/5/2015RP 11-12. There was no inquiry into Ms. Churchill's overall financial status; any outstanding debts, current income prior to Ms. Churchill losing her job, rent obligations, and similar subjects.

In addition, only the $100 victim assessment, the $500 DNA collection fee, and the drug crime fine were mandatory fees that arguably could not be waived. *See State v. Mayer,* 120 Wn.App. 720, 726, 86 P.3d 217 (2004) (RCW 69.50.430 (drug fine is mandatory); *State v. Curry,* 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson,* 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). All of the other fees imposed by the court were discretionary and could have been waived. Yet, the court failed to

---

> (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or
> (D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

GR 34(a)(3).

consider waiving these discretionary costs or even consider the impact that imposition of these fees would have on Ms. Churchill as required by *Blazina*.

Further, the court's finding that Ms. Churchill had the ability to pay the LFOs was disingenuous where the court immediately found Ms. Churchill to be indigent for the purposes of her appeal, thus waiving filing fees and appointing counsel. 6/5/2015RP 13.

c. *The remedy for the court's failure to inquire into Ms. Churchill's financial circumstances and make a finding of her ability to pay the LFOs is remand for a new sentencing hearing.*

Where the trial court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand the matter to the trial court for a "new sentence hearing[]." *Blazina*, 182 Wn.2d at 839. This Court should remand Ms. Churchill's matter to the trial court for a new sentencing hearing.

F. CONCLUSION

For the reasons stated, Ms. Churchill asks this Court to reverse the trial court's order denying her motion to suppress and order the methamphetamine suppressed. Alternatively, Ms. Churchill asks this Court to remand the matter for a new sentencing hearing at which the court would engage in an individualized inquiry into Ms. Churchill's ability to pay the LFOs prior to the imposition of any LFOs. Finally, in the event this Court affirms Ms. Churchill's conviction and sentence, she asks this Court to order that no costs be imposed because she was found indigent at trial and for the purpose of this appeal.

DATED this 18th day of December 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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	)	NO. 47756-4-II
v.	)	
	)	
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	)	
Appellant.	)	

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