NO. 46707-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT BURTON FALCONER, JR.,

Appellant.

RESPONDENT'S BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
SEAN BRITTAIN/WSBA 36804
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

I. ISSUES

1. Did the trial court err in denying the Appellant's pre-trial motion to dismiss the school bus stop enhancements?

2. Did the trial court err when imposing legal financial obligations upon the Appellant?

II. SHORT ANSWERS

1. No. Under CrR 8.3(c)(3), the trial court had no authority to dismiss the school bus stop enhancements.

2. No. The Appellant did not object to the imposition of legal financial obligations at the time of sentencing; therefore, this court is not obligated to review this claim.

III. STATEMENT OF FACTS

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to the record to address specific facts in contention regarding the issues before the Court.

IV. ARGUMENTS

A. UNDER CrR 8.3(c)(3), THE TRIAL COURT HAD NO AUTHORITY TO GRANT THE APPELLANT'S PRE-TRIAL MOTION TO DISMISS THE SCHOOL BUS STOP ENHANCEMENTS.

"The court *shall not* dismiss a sentence enhancement or aggravating circumstance unless the underlying charge is subject to dismissal under this section." CrR 8.3(c)(3) (emphasis added); *see also State v. Meacham*, 154 Wn. App. 467, 225 P.3d 472 (2010). "CrR 8.3(c)(3) permits a defendant to

move to dismiss an "aggravating circumstance" allegation but only when the underlying charge is also subject to dismissal. The court may not separate the aggravating circumstances from the underlying charge..." *Meacham*, 154 Wn. App. at 474. Here, the Appellant did not move to dismiss the underlying delivery of a controlled substances charges. Therefore, under CrR 8.3(c)(3) and *Meacham*, the trial court's denial of the Appellant's motion to dismiss was proper.

Even assuming, for argument's sake, that the Appellant was able to move for dismissal of the school bus stop enhancements, his motion was still properly denied. The Appellant's motion was based upon RCW 69.50.435(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 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.

RCW 69.50.435(4).

The Appellant claims that his pre-trial motion was, in effect, a motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). To prevail on a *Knapstad* motion, the defendant must establish

that "there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt." *Knapstad*, 107 Wn.2d at 356, 729 P.2d 48. A *Knapstad* motion can be defeated if the State files an affidavit which specifically denies the material facts alleged in the defendant's affidavit. *State v. Groom*, 133 Wn.2d 679, 684, 947 P.2d 240 (1997). "If material factual allegations in the motion are denied or disputed by the State, denial of the motion to dismiss is mandatory." *Id.* (*quoting Knapstad*, 107 Wn.2d at 356, 729 P.2d 48).

The Appellant's motion to dismiss focused squarely upon two main assertions: (1) that the prohibited conduct took place within his private residence; and (2) that no one under the age of eighteen was present during the commission of the offense. However, the Appellant seemingly purposely ignores the third requirement of the affirmative defense: "*and that the prohibited conduct did not involve the manufacturing, selling, or possessing with intent to manufacture, sell, or deliver any controlled substance...for profit.*" RCW 69.50.435(4) (emphasis added).

At trial, the State presented evidence that the Appellant sold methamphetamine to the confidential informant in exchange for money. On April 15, 2014, the Appellant was paid $60 for the methamphetamine. RP at 85-86, 123-24. On April 16, 2014, the Appellant was paid $70 for the

methamphetamine. RP at 97, 163. On May 1, 2014, the Appellant was paid $70. RP at 102, 191. These facts were not disputed.

To establish the affirmative defense, the Appellant was required to present proof by a preponderance of the evidence that these transactions of $60, $70, and $70 were not for profit. He failed to do so. He never alleged that the transactions were not for profit. His motion only addressed the first two factors of the affirmative defense. He did not request a jury instruction for the affirmative defense. Therefore, even if the court were to have considered the merits of his motion, the results would have been the same.

B. THE COURT IS NOT OBLIGATED TO REVIEW THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

For the first time on appeal, the Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay. Recently, the Washington Supreme Court decided *State v. Blazina*, 344 P.3d 680 (2015). It held that it is not error for a Court of Appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *Id.* at 682. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Id.* at 684. The decision to review is discretionary on the reviewing court under RAP 2.5. *Id.* at 681. In other words, this Court may continue to apply its initial decision in *State v.*

Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) ("Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.").

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The Appellant did not object to the legal financial obligations at the time of sentencing. The State respectfully requests this court not review the Appellant's claim.

V. CONCLUSION

For the above stated reasons, the Appellant's appeal should be denied.

Respectfully submitted this 4 day of May, 2015.

Ryan P. Jurvakainen
Prosecuting Attorney
Cowlitz County, Washington

SEAN M. BRITTAIN
WSBA #36804
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division I portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahayslaw@comcast.net
donnabaker@qwestoffice.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 4th day of May, 2015.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 04, 2015 - 3:12 PM

Transmittal Letter

Document Uploaded: 6-467071-Respondent's Brief.pdf

Case Name: State of Washington v. Robert B. Falconer, Jr.

Court of Appeals Case Number: 46707-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

jahayslaw@comcast.net
donnabaker@qwestoffice.net