NO. 46899-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

AMY LYNN BROOKS,

Appellant.

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

The Honorable Michael Evans, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS **Page**

A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against her for a crime unsupported by substantial evidence.

2. The State failed to meet its constitutional burden of proving all the elements of the crime of delivery of a controlled substance beyond a reasonable doubt.

3. The trial court erred by not assessing the appellant's individual financial circumstances and making an individualized inquiry into her current and future ability to pay legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the law of the case doctrine, the State was required to prove that the appellant knew she was delivering a controlled substance. Taken in a light most favorable to the State, the prosecution proved that the appellant parked her vehicle next to the confidential informant's vehicle in a parking lot, got out of her car, walked to the driver's window and leaned into the car and spoke with the confidential informant, who subsequently provided methamphetamine to law enforcement officers who observed the meeting. Was

the evidence insufficient to prove the elements of the offense beyond a reasonable doubt? Assignment of Error 1.

2. Did the State fail to prove beyond a reasonable doubt that the appellant delivered a controlled substance where the appellant was not "targeted" by the confidential informant, but instead appeared unexpectedly during a "controlled buy" arranged by the informant with another person, and where police officers watching the confidential informant did not see the appellant hand drugs to the informant? Assignment of Error 2.

3. Did the sentencing court err by imposing the legal financial obligations requested by the State without assessing the individual financial circumstances of the appellant and making an individualized inquiry into her current and future ability to pay? Assignment of Error 3.

C. STATEMENT OF THE CASE

Dale Nease worked as a confidential informant for the Cowlitz-Wahkiakum Narcotics Task Force in 2013 in order to have his pending charges for delivery of drugs reduced. 2Report of Proceedings (RP) at 40-42.[1] On July 25, 2013, Mr. Nease arranged to buy methamphetamine from

[1]The record of proceedings consists of two volumes:
1RP—January 30, February 11, February 24, March 3, April 14, May 5, May 12, July 10, October 9, October 21, November 4, and November 6, 2014 (sentencing hearing); and
2RP—October 16 and October 17, 2014 (jury trial).

Danielle Graves in a controlled drug buy for the Task Force. 2RP at 44, 45, 67. The informant called Ms. Graves using his cell phone and she agreed to meet him in the parking lot of Big Lots in Longview, Washington. 2RP at 46. Before the meeting, Detective James Hansberry conducted a search of the informant's clothing and another detective searched the cab of a pickup truck that Mr. Nease borrowed. 2RP at 47, 48, 69. The detectives gave the informant $140.00 and then followed him to the Big Lots parking lot. 2RP at 49, 73.

Danielle Graves did not show up at Big Lots. 2RP at 51. Unexpectedly, a woman driving a Saturn arrived and parked next to the informant's truck. 2RP at 76, 77. She got out of her car, walked to the truck and leaned into the open window on the driver's side. 2RP at 77. Mr. Nease testified that he handed the money to her and that he received a bag containing methamphetamine from her. 2RP at 53. The informant returned with the methamphetamine and gave it to Detective Hanberry. 2RP at 79. Detective Hanberry took several pictures of the woman and the truck while in the parking lot. Exhibits 2-5.

The detectives identified the woman in the Saturn as Amy Brooks. 2RP at 77, 121. At trial, Mr. Nease stated that he did not talk to Amy

Brooks when he arranged to buy drugs from Ms. Graves. 2RP at 57. Mr. Nease identified Ms. Brooks as the person who handed him the methamphetamine in the parking lot. 2RP at 51.

Ms. Brooks was charged with one count of delivery of a controlled substance. Clerk's Papers (CP) 4-5. The State alleged that the delivery took place within one thousand feet of a Longview School District bus stop. CP 4. RCW 69.50.435(1)(c).

At trial, Ms. Brooks stipulated that the substance obtained by police from the informant tested positive for the presence of methamphetamine and that the parking lot of Big Lots located at 700 Ocean Beach Highway in Longview is within one thousand feet of two school bus stops. 2RP at 8, 127.

Neither exceptions nor objections to the proposed jury instructions were noted by either counsel. 2RP at 134.

As proposed by the State, the court instructed the jury in pertinent part as follows:

> INSTRUCTION NO. 10
>
> To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 25, 2013 the defendant delivered a controlled substance;
> (2) *That the defendant knew that the substance delivered*

> *was a controlled substance*; and
> (3) That this act occurred in the State of Washington.
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 25, 47 (emphasis added).

The jury found Ms. Brooks guilty of the offense as charged and returned a special verdict that the delivery took place within 1,000 feet of a school bus stop. 2RP at 173; CP 50, 51.

Ms. Brooks was sentenced to 36 months of confinement, including the school bus stop enhancement, plus 12 months of community custody. 1RP at 52-53; CP 58. The court also ordered a total amount of Legal Financial Obligations ("LFOs") of $2,625.00. CP 56. The court made no express finding that Ms. Brooks had the present or future ability to pay the LFOs. 1RP at 53; *see* CP 55 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the Court:

> **¶ 2.5 Ability to Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 55. The court made no inquiry into Ms. Brooks' financial resources and the nature of the burden that payment of LFOs would impose. 1RP at 53. The court ordered Ms. Brooks to begin making monthly payments on the LFOs commencing immediately and that she pay up to $25.00 per month. CP 57 at ¶ 4.1a.

Timely notice of appeal was filed November 6, 2014. CP 65. This appeal follows.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT MS. BROOKS KNEW SHE WAS DELIVERING A CONTROLLED SUBSTANCE, AS REQUIRED UNDER THE LAW OF THE CASE.

The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This includes elements added under the "law of the case" doctrine. *See State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). An instruction to which no objection is made becomes the "law of the case." *Hickman, supra.*

In order to be guilty of delivery of a controlled substance, the accused

need only know that the substance was a controlled substance. *State v. Nunez–Martinez,* 90 Wn.App. 250, 255–56, 951 P.2d 823 (1998). He or she need not know the specific nature of the proscribed substance. On appeal, a defendant may challenge the sufficiency of evidence of an element in the "to convict" instruction, even if that element is not part of the underlying statute. *Hickman,* 135 Wn.2d at 102, 954 P.2d 900; *State v. Ong,* 88 Wn.App. 572, 577–78, 945 P.2d 749 (1997).

Here, the State charged Ms. Brooks with unlawful delivery of a controlled substance- methamphetamine, in violation of RCW 69.50.401(2)(b), alleging that she "did deliver a controlled substance, to wit: methamphetamine, knowing such substance to be a controlled substance . . . ." CP 4.

The trial court's "to convict" instruction set forth the following element: "That the defendant knew that the substance delivered was a controlled substance." CP 47. Because the State proposed and did not except to the "to convict" instruction, the instruction became the law of the case. CP 47; 2RP 134; *Hickman,* 135 Wn.2d at 101-02 (jury instructions to which the State failed to object are the law of the case, and assignment of error may include a challenge to the sufficiency of evidence of an element added in the instruction); see also *State v. Ong*, 88 Wn. App. 572, 577-78, 945 P.2d 749 (1997).

To sustain charges of delivery of a controlled substance, the State need not present direct evidence. "The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other." *State v. Rangel–Reyes,* 119 Wn.App. 494, 499, 81 P.3d 157 (2003); *State v. Green*, 94 Wn.2d 216, 220, 616 P,2d 628 (1980).

Under Instruction No. 10, the State was required to prove that Ms. Brooks knew the baggie she was alleged to have delivered to the informant contained a controlled substance rather than an innocuous, legal substance or other benign item. *Ong,* 88 Wn. App. at 577. In *Ong,* the State accused Steven Ong of giving a morphine tablet to a child. The State presented evidence of the following: (1) Ong's five felony convictions; (2) Ong's drug paraphernalia of syringes, a straw, smoking device, and cotton; (3) the small numbers marked on the tablets; (4) his testimony that he knew the pills were "pain medication"; (5) his testimony that he stole the pills; and (6) his flight to Bremerton, showing consciousness of guilt. However, nothing in the record evidence pointed to knowledge that the substance was morphine rather than any other controlled substance. Therefore, viewing the evidence in a light most favorable to the State, it was insufficient to support Ong's

conviction for delivery of a controlled substance. *Ong,* 88 Wn.App. at 577–78, 945 P.2d 749.

In this case, the State presented even less evidence than in *Ong.* No circumstantial evidence in this case showed that Ms. Brooks knew she delivered a controlled substance, let alone methamphetamine. The only evidence that even remotely ties Ms. Brooks to knowledge of the methamphetamine is the testimony that the informant arranged to meet Ms. Graves to buy methamphetamine, and Ms. Brooks appeared at the designated time and place of the arranged transaction. However, in contrast to the facts in *Ong*, no evidence was presented that Ms. Brooks acted furtively while in the parking lot, that she attempted to flee, that she had prior convictions, that she knew Ms. Graves, that she had involvement with drugs or was known to the police as a drug dealer, or that she and the CI agreed to buy and sell the specific illicit item.

The record contains no evidence that Ms. Brooks knew what was in the baggie, or that it was a controlled substance. The State's circumstantial evidence is comprised of the following—the CI made a call and arranged to meet with Ms. Graves, and Ms. Brooks showed up at the Big Lots parking lot at the approximate time that Ms. Graves was expected. Ms. Brooks parked next to

the truck occupied by the informant, got out of her car and leaned into the truck's open window. A package was obtained by police from the informant which contained methamphetamine. These facts do not support that Ms. Brooks delivered drugs, as argued in section 2, *infra*, and does not support an inference that Ms. Brooks knew what was in the package.

Even assuming *arguendo* that Ms. Brooks handed the baggie to the informant, the evidence is insufficient to prove that Ms. Brooks had knowledge that the package contained an illegal substance, which was a required element under Instruction 10. Therefore, her conviction must be reversed and the case dismissed with prejudice. *Ong, supra.*

2. THE POLICE INFORMANT'S CLAIM THAT MS. BROOKS SOLD HIM METHAMPHETAMINE IS INSUFFICIENT TO SUPPORT A CONVICTION

In evaluating the sufficiency of the evidence, the court reviews the evidence in the light most favorable to the State. *State v. Ehrhardt,* 167 Wn.App. 934, 943, 276 P.3d 332 (2012) (citing *State v. Drum,* 168 Wash.2d 23, 34, 225 P.3d 237 (2010)). The Court inquires "'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum,* 168 Wn.2d at 34–35, 225 P.3d 237 (quoting *State v. Wentz,* 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant who claims that insufficient evidence supports his conviction "admits the truth of

the State's evidence and all reasonable inferences therefrom." *Ehrhardt,* 167 Wn.App. at 943, 276 P.3d 332 (citing *Drum,* 168 Wn.2d at 35, 225 P.3d 237). Inferences drawn from circumstantial evidence "must be reasonable and cannot be based on speculation." *State v. Vasquez,* 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In applying these rules, a reviewing court must "defer to the fact finder on issues of witness credibility." *Drum,* 168 Wn.2d at 35, 225 P.3d 237.

In the case at bar, the State charged Ms. Brooks with delivery of methamphetamine under RCW 69.50.401. This statute provides as follows:

> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.40.401(1).

The elements of the offense are simple: the State is required to show that Ms. Brooks delivered methamphetamine to another person. However, the evidence presented at trial, even when seen in the light most favorable to the State, does not constitute substantial evidence that she delivered anything to the police informant on July 25, 2013, much less that Ms. Brooks delivered methamphetamine to the informant.

In *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the State presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, Mr. Mace appealed, arguing that the State had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. Mr. Mace then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

> Second degree burglary is defined as follows:
>
> > A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.
>
> RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved

> only that petitioner may have possessed the recently stolen bank cards in Kennewick. **There was no direct evidence, only inferences**, that he had committed second degree burglary by entering the premises in Richland.

Mace, 97 Wn.2d at 842-43.

Here, the detectives collectively testified that after searching Mr. Nease's clothing and the cab of his borrowed pickup truck and after giving him $140, they saw him park the truck in the Big Lots parking lot and then saw a woman later identified as Brooks park next to the truck, get out, and lean inside the truck window. Several photographs were taken of the alleged exchange, but no audio or video recording was made. When he returned to the police, the informant had methamphetamine in his possession. No money was recovered from Ms. Brooks at the time of her arrest.

No evidence suggests that Ms. Brooks was involved in the discussion that the informant had with Ms. Graves about buying drugs. Moreover, although detectives saw Ms. Brooks appear in the parking lot, no witness saw her actually possess or deliver methamphetamine or even exchange anything with the CI.

Under these critical facts, there were many potential methods for the CI to have obtained the methamphetamine that he gave to the detective. For example, the methamphetamine could have been placed in the truck by the

owner from whom the informant borrowed it and simply not discovered by police when they searched the truck cab. Similarly, Ms. Brooks' approach to the truck may have been purely happenstance. Ms. Brooks may have known Mr. Nease, seen him while in the parking lot at Big Lots and approached him in order to talk. This is corroborated by the detectives, who stated that they saw her lean into the truck's window and talk with the informant for approximately two minutes. 2RP at 105.

A trier of fact may therefore conclude that the methamphetamine did not come from the informant's person, given the detective's testimony concerning his search of the CI. However, the fact that the truck was borrowed, that Ms. Brooks was not the intended target, the unknown relationship between Ms. Brooks and the CI, the choice of law enforcement not to make a visual recording of the meeting other than a few still photographs, and the absence of police testimony that Ms. Brooks physically handed the baggie to the CI creates a situation in which the police could only suspect that Ms. Brooks was the source of the methamphetamine.

The State's case rests entirely on the testimony of a single informant, with no further forensic or recorded corroboration. The CI's claim is corroborated by the observation of detectives, but only to the extent that they

saw Ms. Brooks approach the truck and lean into the open window and put her arms on the truck door for a short duration. 2RP at 77, 105, 123. Her hands were not visible to the detectives at that time. 2RP at 77, 105, 123.

As the decision in *Mace* explains, evidence that only gives rise to suspicion or speculation does not constitute substantial evidence sufficient to meet the requirements of due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this Court should reverse the conviction and remand with instructions to dismiss.

3. THE TRIAL COURT FAILED TO TAKE INTO ACCOUNT MS. BROOKS' FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

At sentencing, the court ordered Ms. Brooks to pay legal costs in The trial court ordered Ms. Brooks to pay legal costs in the amount of $2,625.00, which included discretionary costs of $825.00 for appointed counsel and defense costs. CP 56. The record contains no finding, either oral or written, stating that the trial court considered Ms. Brooks' financial circumstances and found that she has the ability or likely future ability to pay the LFOs ordered in the Judgment.

Ms. Brooks did not object to the trial court's failure to make any findings of ability to pay, or to the trial court's imposition of discretionary

LFOs. However, our Supreme Court recently chose to review an objection to the imposition of LFO's raised for the first time on appeal, In *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court held that RAP 2.5(a) provides appellate courts with discretion whether to review a defendant's LFO challenge raised for the first time on appeal. *Blazina,* 344 P.3d at 683. There, the *Blazina* court exercised its discretion in favor of allowing the LFO challenge. *Id.*

In this case, the sentencing court failed to make any individualized inquiry into her present or future ability to pay. Factors to be considered in determining whether a person has a present or future ability to pay include the length of incarceration and whether the court has previously made an indigency determination.

The State did not provide evidence establishing Ms. Brooks' ability to pay, nor did it ask the court to make a determination under RCW 10.01.160, when it asked that LFOs be imposed. Moreover, the trial court made no further inquiry into Ms. Brooks' financial resources, debts, or employability. There was no specific evidence before the trial court regarding her past employment or her future educational opportunities or employment prospects. "The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina,* 344 P.3d at 685.

The record in this case fails to establish that the trial court made an "individualized inquiry" into her ability to pay, or actually took into account her financial circumstances before imposing LFOs. The trial court therefore did not comply with the LFO statute.

In *Blazina*, the Supreme Court held that because the sentencing judge failed to make a proper inquiry into the defendant's ability to pay, the case should be remanded to the trial court for a new sentencing hearing. *Blazina*, 344 P.3d at 685. Similarly, this Court should vacate the LFO portion of Ms. Brooks' Judgment and remand for resentencing on this issue.

E. CONCLUSION

The State's evidence was not sufficient to support Ms. Brooks' conviction. This court should reverse and dismiss the charge against her. Alternatively, because the record fails to establish that the trial court did in fact consider her ability to pay before imposing discretionary LFOs, this case should be remanded for resentencing.

DATED: June 10, 2015.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Amy Brooks

CERTIFICATE OF SERVICE

The undersigned certifies that on June 10, 2015, that this Appellant's Opening Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a true and correct copy was mailed by U.S. mail, postage prepaid to the following:

Mr. Sean M. Brittain
Deputy Prosecuting Attorney
Cowlitz County Prosecutor's Office
312 SW 1st Ave.
Kelso, WA 98626

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Ms. Amy Lynn Brooks
DOC #378540
W.C.C.W.
9601 Bujacich Rd. NW
Gig Harbor, WA 98332
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 10, 2015.

PETER B. TILLER

TILLER LAW OFFICE

June 10, 2015 - 4:51 PM

Transmittal Letter

Document Uploaded: 5-468999-Appellant's Brief.pdf

Case Name: State v. Amy Brooks

Court of Appeals Case Number: 46899-9

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: Appellant'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: Shirleen K Long - Email: slong@tillerlaw.com