NO. 47239-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RAMSEY R. SHABEEB,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred when if affirmed the validity of a search warrant that did not establish a nexus of criminal activity between the place to be searched and the item to be seized.

2. The sentencing court erred, in the absence of substantial evidence in the record, by entering a finding "That the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future. RCW 9.94A.753." CP 78.

3. The sentencing court erred when it imposed $3,525 in discretionary legal financial obligations (LFOs) without conducting the statutorily mandated inquiry regarding Mr. Shabeeb's present or future ability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it affirmed the validity of a search warrant when 1) the affiant listed a backpack exchange between Mr. Shabeeb and another individual as indicative of probable cause that illicit material would be found in Mr. Shabeeb's car; 2) a dog sniff was found to contribute to probable cause to search Mr. Shabeeb's vehicle, but the dog was trained to alert to legal substances; 3) Mr. Shabeeb's vehicle was not identified on the date of the alleged drug buy; 4) the affiant neither directly observed the informant purchase heroin from Mr. Shabeeb

nor pointed to any successful past convictions based on the informant's information; and 5) the search warrant mentions many items that may be seized from Mr. Shabeeb's vehicle, but makes no mention of the backpack?

2. RCW 10.01.160(3) requires the record reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes Legal Financial Obligations (LFOs). Where no such inquiry was conducted, but the judgment includes a boilerplate finding that "the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future," must that finding be stricken?

3. Where the sentencing court fails to conduct an individualized inquiry into the defendant's current and future ability to pay LFOs, should the obligations be stricken, or the case remanded for further proceedings as necessary to comply with the statutory requirements?

C. STATEMENT OF THE CASE

On April 16, 2014, Detective Robert Latter arrested Ramsey Shabeeb for the delivery of a controlled substance in February of that year. CP 12. During a search incident to arrest, heroin was found in Mr. Shabeeb's pocket. *Id.* at 13. Detective Ramsey asked Mr. Shabeeb for permission to search the vehicle he had been driving, but Mr. Shabeeb

declined whereupon the vehicle was seized and towed to a police warehouse. *Id.*

Probable cause to arrest was purportedly based on a prior "controlled buy" attributed to Mr. Shabeeb two months earlier. *Id.* Officer Latter reported he had driven an informant to a residence in Battle Ground, to purchase heroin from a person previously identified as Mr. Shabeeb. *Id.* at 14. The informant returned to the detective with a small amount of heroin. *Id.* Nothing in the affidavit, however, indicates that Mr. Shabeeb resides in the home where the heroin was purchased. *Id.* at 9-17. Additionally, while surveillance units observed the informant walk to the residence, none of the units observed the informant purchase narcotics from Mr. Shabeeb. *Id.* at 14. Furthermore, no mention of Mr. Shabeeb's vehicle is made in the portion of the affidavit concerning the drug buy. *Id.* at 13-14.

Detective Latter deemed the informant reliable based on a previous "reliability buy" of heroin that occurred sometime between February 8, 2014 and February 21, 2014. *Id.* at 14. Nothing in the affidavit indicates, however, that the informant's purchases on behalf of the police department have led to any successful prosecutions. *Id.* at 14-15.

On the date of Mr. Shabeeb's arrest, Detective Latter and others assigned to his task force surveilled Mr. Shabeeb. *Id.* at 12. They observed

Mr. Shabeeb park his vehicle at a local auto parts business. Shortly afterwards, a blue Ford Focus parked next to Mr. Shabeeb's car. *Id*. Mr. Shabeeb and a person in the Ford talked through the open windows of their cars for a time. Mr. Shabeeb exited his vehicle and retrieved a backpack from the other car's trunk which he placed in his own trunk. *Id*. The Ford left, and Mr. Shabeeb entered the auto parts store. *Id*. Later, he returned to his car and worked on its engine. *Id*.

Mr. Shabeeb re-entered the auto parts store. *Id*. at 13. While he was inside, the Ford Focus again parked next to Mr. Shabeeb's vehicle. *Id*. Mr. Shabeeb left the store, entered his vehicle, and drove away from the parking lot. *Id*.

According to Detective Latter, Mr. Shabeeb drove slowly past his vehicle and seemed to stare inside. *Id*. at 13. Later, Mr. Shabeeb made a U-turn and drove to the parking lot where Detective Latter was parked. *Id*. Fearing that Mr. Shabeeb knew he was being watched, Detective Latter decided to arrest him for the earlier drug buy. *Id*.

At the warehouse where police towed Mr. Shabeeb's car, Trooper Charles Gardiner had his K-9 partner, Corbin, search outside of Mr. Shabeeb's vehicle. *Id*. Trooper Gardiner relayed that Corbin alerted to the presence of narcotics in the rear bumper seam on the driver's side. *Id*. Among the narcotics Corbin is trained to sniff are cocaine, crack,

methamphetamine, and marijuana. *Id.* at 11. However, at the time of Corbin's alert, possession of marijuana was legal in Washington.[1]

Detective Latter filed an affidavit for a warrant to search Mr. Shabeeb's vehicle on April 18, 2014. *Id.* at 17. Judge Kelly Ostler issued the search warrant. *Id.* at 19. Inside the vehicle, Detective Latter seized a cell phone and a backpack. *Id.* at 20. The backpack had a padlock, which Detective Latter cut off. *Id.* Inside the backpack, he found Oxycodone, Suboxone, and Buprenorphine, all classified as Schedule III drugs. *Id.* at 65. Mr. Carter was charged with one count of possession of a controlled substance with intent to deliver. *Id.*

Mr. Shabeeb moved to suppress all evidence seized based on the search warrant. CP 5-20, 51-58, 61-63. Judge Scott Collier denied the motion. CP 49-50. Following a stipulated facts trial, Judge Collier found Mr. Shabeeb guilty of possession with intent to deliver a schedule III narcotic. CP 64-70. Mr. Shabeeb was sentenced under the Residential Chemical Dependency Treatment-based Alternative to 3 to 6 months in a residential chemical dependency treatment facility and serve 24 months in community custody. CP 79. At sentencing, no inquiry was made regarding Mr. Shabeeb's ability to pay the legal financial obligations, but his Judgment and Sentence contains boilerplate language indicating such

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[1] *See* RCW 69.50.413.

an inquiry was made. CP 78. Although Mr. Shabeeb was deemed indigent prior to trial, he was ordered to pay $4,125 in fines, costs and fees. CP 80-81.

D. ARGUMENT

1. THE COURT SHOULD REVERSE THE TRIAL COURT'S RULING FINDING THE SEARCH WARRANT LAWFUL BECAUSE THE STATE POSSESSED INSUFFICENT PROBABLE CAUSE LINKING MR. SHABEEB'S ALLEGED DISTRIBUTION OF NARCOTICS TO THE SEARCHED VEHICLE.

a. A search warrant should only be issued upon a showing of probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found within the place to be searched.

The Fourth Amendment protects people from unreasonable searches and seizures. U.S. Const. amend. IV. Article 1, section 7 of the Washington Constitution further narrows the State's authority to search, ensuring that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. Because Washington's constitution provides greater protections of individual privacy, when presented with potential violations under the state and federal constitutions, Washington courts first examine the state law challenges. *State v. VanNess*, 186 Wn.App. 148, 155, 344 P.3d 713 (2015). The court determines if the challenged state act involved a

disturbance of private affairs and then asks whether the law justifies the intrusion. *Id.*

A search warrant should be issued only if the affiant shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999) (citing *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973). Furthermore, the magistrate may not issue a search warrant where the affidavit contains no facts to support the issuance of the warrant. *State v. Lyons*, 174 Wn.2d 354, 364, 273 P.3d 314 (2012).

"The court reviews de novo a trial court's assessment of a magistrate's probable cause determination when issuing a search warrant." *VanNess*, 186 Wn.App. at 154.

b. The search affidavit was insufficient because the behavior Detective Latter observed between Mr. Shabeeb and the driver of the Ford Focus did not provide reasonable suspicion that drugs would be found in Mr. Shabeeb's vehicle.

Probable cause requires a nexus between the items to be seized and the place to be searched. *State v. Goble*, 88 Wn.App. 503, 511, 945 P.2d 263 (1997). Because Mr. Shabeeb's conduct on the date of his arrest was

innocuous and did not establish a foundation of probable cause that drugs would be found within the vehicle, Detective Latter did not establish a nexus between the item to be seized and the place to be searched.

Compare *State v. Neth*, where a trooper stopped the defendant for speeding. The defendant was driving with his girlfriend and a dog. 165 Wn.2d at 179. The trooper relayed that the defendant appeared stressed, yelled at the dog, and expressed anger. *Id.* When the trooper asked the defendant for identification, registration, and proof of insurance, the defendant replied he was not carrying any of these items. *Id.* The trooper looked up the defendant's name and date of birth, which showed he had an outstanding warrant for driving with a suspended license and failing to appear in court. *Id.* at 180. The trooper handcuffed the defendant, searched him, and found several unused clear plastic baggies in his coat pocket. *Id.* The trooper told the defendant he was going to search the car and asked if there was anything he should know about inside the car. *Id.* The defendant replied there was between $2,500 and $3,500 in cash stowed in the car for the purpose of paying rent on his home. *Id.* Additionally, the defendant's girlfriend made some comments that the trooper interpreted as contradictory to the defendant's assertions. *Id.*

While the trooper was writing citations, a drug dog walked around the defendant's car and alerted three times to the presence of narcotics. *Id.*

When the defendant did not consent to further search of his vehicle, the trooper impounded the car and filed an affidavit for a search warrant. *Id.* The affidavit recounted all of previously stated facts, but also stated that the defendant is a convicted felon, having previously convicted of delivering heroin. *Id.* at 183.

The magistrate struck the dog sniff from the probable cause determination, but found that the other circumstances established probable cause to issue a warrant. *Id.* at 181. However, the Washington Supreme Court reversed the conviction, finding that although the facts taken together were odd, all of the circumstances were consistent with legal activity and did not establish a nexus between the criminal activity and the defendant's car. *Id.* at 184-86.

Similarly, in the instant case, Mr. Shabeeb's exchange with the individual in the Ford Focus was consistent with legal activity, therefore detracting from any potential suspicion that Mr. Shabeeb's vehicle contained narcotics. For example, like the plastic baggies in *Neth*, Judge Collier deemed Mr. Shabeeb's backpack (and its correlating exchange between Mr. Shabeeb and the driver of the Ford Focus) as evidence of criminal activity. CP 50. However, innocuous conduct that is equally consistent with lawful and unlawful activity does not constitute probable cause to search. 165 Wn.2d at 185. Backpack exchanges between

individuals are equally consistent with lawful conduct, such as returning a backpack to a friend who left their backpack at your home. Furthermore, the location of the backpack exchange (an auto parts shop) lends more support towards an innocent exchange among friends, such as exchanging tools or other materials used to repair cars.

Additionally, the circumstances in the instant case are far more innocuous than the circumstances in *Neth*. Backpacks do not carry the same criminal undertones that plastic baggies possess, having been described as "the hallmark of an illicit drug exchange." *Neth*, 165 Wn.2d at 185 (citing *People v. McRay*, 416 N.E.2d 1015 (N.Y. 1980)). Moreover, entering and exiting an auto shop and working on one's car engine is certainly consistent with legal activity.

Additionally, although Detective Latter cited Mr. Shabeeb's criminal history in his affidavit for a search warrant, Mr. Shabeeb's criminal history does not lend itself to probable cause to possession and/or distribution of narcotics. Mr. Shabeeb's criminal record is limited to driving with a suspended license and disorderly conduct, while the defendant in *Neth* possessed a criminal record for possession of heroin. "Some factual similarity between the past crime and the currently charged offense must be shown before the criminal history can significantly

contribute to probable cause." *Neth*, 165 Wn.2d at 186. Here, no such similarities exist.

c. The dog sniff of a K-9 that was trained to detect marijuana, a substance that was legal in Washington State at the time of the drug sniff, fails to establish probable cause.

Because Corbin, the drug sniffing K-9, was trained to alert to marijuana, a legal substance, the dog's drug sniff does not produce probable cause that Mr. Shabeeb's vehicle contained illicit narcotics.[2] One of the necessary elements to establish probable cause is whether a reasonable person, given the evidence presented, would believe that the item sought is *contraband*. *Goble*, 88 Wn.App. at 509 (emphasis added). Therefore, absent a sufficient basis in fact from which to conclude evidence of *illegal* activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Thein*, 138 Wn.2d at 147 (emphasis added).

Recognizing that K-9 searches involving dogs trained to sniff marijuana would detract from probable cause post-I-502, the Washington Association of Prosecuting Attorneys distributed a memorandum detailing how "I-502 will require officers to expand their investigations into

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[2] While Corbin is trained to sniff cocaine, crack, methamphetamine, and marijuana, none of these substances were found inside Mr. Shabeeb's vehicle or backpack.

suspected VUCSA violations."[3] The memorandum details two issues that present problems in establishing probable cause with K-9s trained to detect marijuana. Specifically, these concerns are

> [c]urrently, canines are trained to detect five substances: marijuana, methamphetamine, heroin, crack cocaine, and cocaine. *The canines cannot communicate to their handler which of the five substances they have detected.*
>
> The canines can detect *miniscule* amounts of the five substances. While they are trained using amounts ranging from trace to substantial, *the canines cannot communicate to their handler how much of the five substances are presence. Thus, a dog that alerts might be alerting to a legal quantity of marijuana.*[4]

After the passage of I-502, University of South Carolina law professor Seth Stoughton opined

> [i]f a drug dog can reveal non-criminal information about a person, it may fundamentally change the Fourth Amendment character of police canine sniffs…If a drug dog could be hitting on a legal substance, courts could very well find that the alert itself does not establish probable cause.[5]

To address these concerns, the Washington State Patrol and the Seattle Police Department are phasing out marijuana-trained dogs and are gradually replacing them with dogs that can only alert to illegal narcotics.[6]

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[3] Memorandum from Pam Loginsky, Staff Attorney, Wash. Ass'n of Prosecuting Atty's, to Washington Prosecuting Attorneys, (Dec. 4, 2012) (available at https://fortress.wa.gov/cjtc/www/images/I-502%20and%20Canine%20Alerts.pdf).

[4] *Id.* (emphasis added).

[5] Jacob Sullum, *Does Legalization Make Marijuana-Detecting Dogs Obsolete?*, REASON (Jan. 19, 2015, 12:01 AM), http://reason.com/archives/2015/01/19/does-legalization-make-marijuana-detecti. (quoting Seth Stoughton).

[6] *Id.*

Similar efforts are being undertaken in other states that legalized marijuana, like Oregon, Colorado, and Alaska.[7]

A dog that cannot distinguish between legal and illegal objects and cannot detect how much of a legal substance they smell does not form a lawful basis for probable cause. At the time of Mr. Shabeeb's arrest, Clark County police used Corbin, a K-9 trained to detect marijuana who could neither distinguish between drugs nor alert to specific quantities of marijuana. While some may argue that it is still illegal to possess marijuana beyond a certain amount and that this makes a marijuana-sniffing K-9 search lawful, dogs are not able to indicate how much of this legal substance they smell. Furthermore, deeming the use of a dog that can detect legal as well as illegal substances as adding to probable cause would lead to absurd results. What if, for example, the dog was able to smell and alert to alcohol *and* methamphetamine?[8] Would the dog's positive alert establish probable cause? What if the dog could smell and alert to heroin, crack, and plastic forks? Could that establish probable cause? Surely, the answer to these questions must be "no" to truly give meaning to the Fourth Amendment of the Constitution and article 1,

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[7] *Id.*; Jason Wilson, *Meet the Oregon Police Dogs who have a Big Drug Problem*, THE GUARDIAN (May 29, 2015, 9:51 AM), http://www.theguardian.com/society/2015/may/29/oregon-police-dogs-drug-problem-marijuana.

[8] Assuming, of course, the subject of the search was over 21 years old.

section 7 of the Washington Constitution, which affords more privacy rights than the United States Constitution.[9]

d. The search warrant was unlawful because the vehicle the search warrant authorized to search was not identified on the date of the informant's alleged drug buy from Mr. Shabeeb.

No one observed Mr. Shabeeb's vehicle on the earlier date of the alleged drug buy, further eroding any nexus between the narcotics the judge ordered for seizure and Mr. Shabeeb's car and any potential drugs the judge ordered to be seized. For example, in *Thein*, police officers executing a search warrant on an individual named Laurence McKone's home found several copies of money orders made out to the defendant. *Thein*, 138 Wn.2d at 136. At Mr. McKone's home, police also found over one half pound of marijuana and packaging materials associated with marijuana dealing. *Id.* Later, neighbors gave a rough description of Mr. Thein, and told police he provided marijuana to Mr. McKone. *Id.* at 137.

Based on the money orders found in Mr. McKone's home, information from Mr. McKone's neighbors relaying that Mr. Thein is a drug dealer, and the police officer's "experience and training" informing them that drugs would be found in the defendant's home, police officers

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[9] *See State v. VanNess*, 186 Wn.App. at 155 (stating that the Washington Constitution affords more privacy rights than the Federal Constitution).

sought a search warrant for Mr. Thein's home. *Id*. at 139. While a judge granted the search warrant, the Supreme Court reversed because the State did not adequately establish facts linking illegal activity to the defendant's home. *Id*. at 151.

Akin to the defendant in *Thein*, the police officers in the instant case did not establish a nexus between the item sought and the place to be searched. While Mr. Shabeeb was driving the vehicle at the time of arrest, and, like the defendant in *Thein*, some suspicion may have existed that Mr. Shabeeb sold drugs, Mr. Shabeeb's *vehicle* was nowhere to be seen at the time of the alleged drug deal. CP 13-14. While a nexus of criminal activity could exist between the drugs and the *home* where the alleged drug-buy occurred, no such connection can be drawn to the *vehicle* Mr. Shabeeb was driving at the time of his arrest.

Furthermore, similar to *Thein*, Detective Latter simply relied on his "experience and training" and his own incomplete observations to deduce that drugs would be found in Mr. Shabeeb's car. CP 15-16. Throughout the affidavit, Officer Latter details how his "experience and training" informed him that drugs will be found in various items likely to be found in Mr. Shabeeb's vehicle. *Id.* However,

> [a] conclusory assertion in an affidavit that drug traffickers commonly store a portion of their drug inventory and paraphernalia in their residences [is] insufficient to establish a nexus between evidence of illegal drug activity and the place to be

> searched, absent any statements actually tying the defendant's home to suspected criminal activity.

State v. Davis, 182 Wn.App. 625, 633, 331 P.3d 115 (2014) (paraphrasing the holding in *Thein*).

Similarly, a conclusory assertion that drug dealers commonly store narcotics in items likely to be found in a vehicle is not enough to establish a nexus between evidence of illegal activity and the vehicle. While some may argue that the backpack exchange was clear evidence of a drug deal, none of the "hallmarks" of a drug exchange were present (E.g., a money exchange). Furthermore, the Court in *Thein* expressly rejected the State's request to create a per se rule establishing that if a magistrate determines that probable cause exists that someone is a drug dealer, then a finding of probable cause to search someone's home follows. *Thein*, 138 Wn.2d at 141. The same logic extends to Mr. Shabeeb's vehicle.

e. The search warrant was improperly issued because the warrant did not sufficiently establish the informant's reliability.

Moreover, the informant's reliability was inadequately established. The test for probable cause necessary to issue a search warrant based on information obtained from an informant are

> 1) the affiant must set forth the underlying circumstances necessary to permit the magistrate issuing the warrant to independently determine that the informant had a factual basis for his or her allegations; and

> 2) the affiant *must present sufficient facts* so the magistrate may determine the credibility or the reliability of the informant.

State v. Woodall, 100 Wn.2d 74, 75-76, 666 P.2d 74 (1983) (emphasis added).

Furthermore, *State v. White* establishes that

> [t]he reliability of the information may be established by a *showing* that the informant based his assertions on direct personal observations, or upon the reasonableness of the underlying circumstances, sources, or facts upon which the informant reached his conclusion. In every case, *the informant's information must go beyond a mere unsupported conclusion…that illegal activities are occurring or will occur.*

State v. White, 10 Wn.App. 273, 277, 518 P.2d 245 (1973).

In the instant case, the facts were insufficient to establish the reliability of the informant and the informant's information. First, no *showing* was made that the informant based his or her assertions on direct personal observations. The affidavit simply indicates that Detective Latter met with the informant, drove him or her to a home in Battle Ground to purchase heroin, and believed the informant's claim that he or she purchased the heroin from Mr. Shabeeb. CP 14. However, the affidavit does not indicate that Mr. Shabeeb was seen during this drug buy. CP 13-15. Therefore, the informant's information amounts to an *unsupported* conclusion of criminal activity attributed to Mr. Shabeeb.

Second, Detective Latter did not establish the informant's reliability. "The mere statement that an informant is credible is

insufficient, but it is almost universally held to be sufficient if information has been given which has led to arrests and conviction." *State v. Woodall,* 100 Wn.2d 74, 76, 666 P.2d 364 (1983) (quoting *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743 (1982)). While Detective Latter does more than assert the informant's reliability, the affidavit contains no indication that the informant's past information has led to any arrests or convictions. CP 9-17. Thus, the affidavit's statement detailing how a past "reliability buy" of heroin "resulted in the informant becoming reliable" seems to be conclusory at best. CP 14.

f. Because no probable cause existed to search Mr. Shabeeb's vehicle, the court should suppress all evidence seized from the search.

Perhaps all of the foregoing explains why Officer Latter only arrested Mr. Shabeeb upon fearing that Mr. Shabeeb knew he was being watched—Officer Latter likely suspected he needed more to establish a connection between Mr. Shabeeb, his vehicle, and his home in order to receive a lawful warrant. Therefore, the court should reverse the judgment of the motion to suppress and Mr. Shabeeb's sentence.

2. ALTERNATIVELY, THE COURT SHOULD REVERSE THE TRIAL COURT'S DENIAL OF MR. CARTER'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT DID NOT INDICATE THAT MR. SHABEEB'S LOCKED BACKPACK COULD BE SEIZED OR SEARCHED.

a. Because the Fourth Amendment demands particularity for search warrants, the officer had no discretion in deciding what was to be seized.

The Fourth Amendment mandates that warrants describe with particularity the things to be seized. *State v. Rivera*, 76 Wn.App. 519, 522, 888 P.2d 740 (1995). "The particularity requirement prevents general searches; the seizure of objects on the mistaken assumption they fall within the issuing magistrate's authorization; and the issuance of warrants on loose vague, or doubtful bases of fact." *State v. Chambers*, 88 Wn.App. 640, 643, 945 P.2d 1172 (1997). "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Rivera*, 76 Wn.App. at 522 (quoting *Marron v. United States*, 275 U.S. 192, 195, 48 S.Ct. 74, 72 L.Ed. 231 (1927)).

b. Since the warrant listed several items that could be seized from Mr. Shabeeb's vehicle, but did not include any mention of the backpack, the warrant fails the particularity requirements of the Fourth Amendment and article 1, section 7 of the Washington Constitution.

The search warrant neglects to mention that the backpack can be searched, therefore, what was found inside the backpack should be suppressed. The affidavit for the search warrants indicates the items Detective Latter wished to seize: 1) heroin; 2) records relating to the ordering and possession of heroin; 3) photographs, films; 4) telephone records/Mr. Shabeeb's phone; 5) records showing the identity of co-conspirators; 6) drug paraphernalia; and 7) photographs of the crime scene. CP 9-10. Critically, no mention is made of the backpack, whose exchange was deemed suspicious by the trial judge. CP 50.

Furthermore, because a heightened expectation of privacy exists between locked versus unlocked items, a warrant to open the locked backpack was necessary. The court in *VanNess*, in explaining the reasoning in *Riley v. California*, 82 USLW 4558, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (holding a warrantless search and seizure of a cell phone incident to arrest unconstitutional), discussed the Supreme Court's implicit interpretation of *United States v. Robinson*, 44 U.S. 218, 94 S.Ct.

467, 38 L.Ed. 2d 427 (1973) (holding a warrantless search incident to arrest lawful). The *VanNess* court opined

> [w]hile *Riley* distinguishes cell phone data from physical objects associated with one's person, it also suggests that *Robinson* does not permit an unlimited search of items on an arrestee's person when an arrestee has a significant privacy interest in the item to be searched.

186 Wn.App. at 159.

Thus, the court in *VanNess* recognizes that a heightened standard for search and seizure exists where the possessor of the item has a privacy interest in the item police intend to search. *Id*. Certainly, when one locks an item, like a backpack, the possessor establishes that they do not wish to have this item searched and that they expect others to respect their privacy. Therefore, either a separate warrant should have been issued for the locked backpack, or the backpack should have been itemized in the original search warrant. The warrant failed to do either.

c. Because Mr. Shabeeb had a heightened expectation of privacy in his locked backpack, and because Detective Latter neglected to itemize the backpack in his search warrant, the contraband found in the backpack should have been suppressed.

Since Mr. Shabeeb's backpack was erroneously searched, the court should reverse the judgment of the lower court.

3. THE COURT SHOULD REVERSE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE THE COURT DID NOT PERFORM AN INDIVIDUALIZED INQUIRY REGARDING MR. SHABEEB'S ABILITY TO PAY.

a. Costs and fees may only be imposed after an individualized inquiry and finding of an ability to pay

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

RCW 10.01.160(3) then mandates, however, that a trial court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). In determining the amount and method of payment of costs, the sentencing court must specifically take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.[10] RCW 10.01.160(3).

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[10] The Supreme Court urged courts to look to the comment to GR 34, which states in relevant part:

> Any individual, on the basis of indent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent

> [U]nder 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. … 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 seriouslyu question that person's ability to pay LFOs.

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

The sentencing court here failed to make any individualized inquiry. Pursuant to *Blazina*, Mr. Shabeeb is entitled to a new sentencing hearing.

b. The sentencing court failed to make an individualized inquiry into Mr. Shabeeb's ability to pay the LFOs.

Blazina requires that prior to imposing discretionary LFOs, the sentencing court must make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay. 182 Wn.2d at 839. 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.

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to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

> 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.

Here, the trial court failed to make the individualized inquiry required under RCW 10.01.160, and instead simply checked a boilerplate finding in the Judgment and Sentence. CP 78.

Only the victim penalty assessment and DNA collection fee were mandatory so could not be waived. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992); *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). The remaining costs, fees, fines and assessments were discretionary, however, the court failed to consider Mr. Shabeeb's ability to pay or the impact the imposition would have as required by *Blazina*.

c. Mr. Shabeeb may raise the issue for the first time on appeal.

Despite the absence of a specific objection below, this Court should reach the issues herein for the first time on appeal. *Blazina*, 182 Wn.2d at 839. Neither of the appellants in *Blazina* objected at the time of sentencing. Nevertheless, the Supreme Court concluded that "[n]ational and local cries for reform of the LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Blazina, at 835. The demands are equally compelling in Mr. Shabeeb's case.

Although Mr. Shabeeb did not object at sentencing, the court did not undertake the required inquiry and its finding regarding his ability to pay is not supported by the record. In light of the compelling policy considerations identified in *Blazina*, this court should undertake review and provide the appropriate relief.

d. The remedy for the failure to inquire into Mr. Shabeeb's financial circumstances is to remand for a new sentencing hearing.

Where the sentencing court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand to the trial court for "new sentence[ing] hearings." *Blazina*, 182 Wn.2d at 839. The sentencing court failed to comply with the statutory requirement of RCW 10.01.160(3) when imposing legal financial obligations (LFOs), thus warranting remand Mr. Shabeeb's matter for a new sentencing hearing.

E. CONCLUSION

For the reasons stated herein, Mr. Shabeeb asks this court to reverse his conviction and sentence and remand for further proceedings.

Respectfully submitted this 26th day of August 2015.

s/ Sara Taboada
____
Sara Taboada (APR 9 #9499630)

s/ David Donnan
____
David L. Donnan (WSBA 19271)
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. RAMSEY SHABEEB, Appellant.	)))))))))	NO. 47239-2-II

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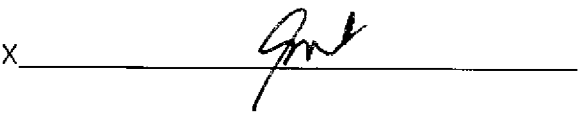
X

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