No. 33702-2-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MIGUEL ANGEL MAGALLAN,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Michael G. McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Magallan's conviction for possession with intent to deliver violated his federal and state constitutional right to due process.

2. The evidence was insufficient to prove the elements of possession with intent to deliver beyond a reasonable doubt.

3. The prosecution failed to prove Mr. Magallan intended to deliver a controlled substance.

4. The prosecution failed to present evidence of intent to deliver beyond the quantity of drugs and the officer's opinion.

5. The trial court failed to properly determine Mr. Magallan's criminal history and offender score.

6. The sentencing judge erred by sentencing Mr. Magallan with an offender score of nine.

7. The trial court erred by entering Finding of Fact No. 2.3 because the evidence was insufficient to establish Mr. Magallan has the criminal history listed therein. (Judgment and Sentence, CP 115)

8. The trial court erred by entering Finding of Fact No. 2.7 because the record does not support the boilerplate finding Mr. Magallan "is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein." (Judgment and Sentence, CP 115)

9. The imposition of legal financial obligations is improper because Mr. Magallan lacks the ability to pay.

10. The court erred by imposing costs of incarceration and medical care.

Issues Pertaining to Assignments of Error

1. Was Mr. Magallan's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, violated where the State failed to prove he possessed methamphetamine with the intent to deliver?[1]

2. At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor failed to present any evidence regarding Mr. Magallan's criminal history. Did the trial court violate Mr. Magallan's Fourteenth Amendment right to due process by finding he had seven prior felony convictions and sentencing him with an offender score of "9?"[2]

3. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the trial court recognized Mr. Magallan was impoverished and erroneously found he was not disabled, but nevertheless imposed LFOs including the means to pay

[1] Assignment of Error Nos. 1, 2, 3, 4.
[2] Assignment of Error Nos. 5, 6, 7.

costs of incarceration and medical care without mention of Mr. Magallan's inability to pay. Should this Court remand with instructions to strike LFOs?[3]

B. STATEMENT OF THE CASE

On April 8, 2015, 52-year-old[4] Miguel Angel Magallan was arrested on a warrant by his supervising probation officer while walking alongside his bicycle in the parking lot of Work Source, an employment assistance agency located at south Third Avenue and Division Street in Yakima. Mr. Magallan had a bag slung over his shoulder. RP 100–02. He asked the officer to take the bicycle and backpack to his son's house. RP 103. The officer found a baggie containing a small hard substance in Mr. Magallan's pants pocket. RP 103–04. The backpack contained three items containing a crystalline substance and two empty little baggies. RP 73, 105–06.

The officer observed Mr. Magallan staggering, having a difficult time standing, and talking in a slurred and somewhat incoherent manner. RP 110. The warrant had been issued because Mr. Magallan's urinalysis results from tests taken on April 3 were positive for methamphetamines and heroin. RP 111–12. A day after the arrest, Mr. Magallan signed a

[3] Assignment of Error Nos. 8, 9, 10.

statement at the jail admitting to his use of these drugs on the day of arrest. RP 116–18.

By amended information, the Yakima County Prosecutor charged Mr. Magallan with possession of methamphetamine with intent to deliver allegedly was committed in a drug protection zone, and possession of heroin. CP 15–16.

At jury trial, witnesses testified to additional facts. The hard rock substance was heroin, in an amount described as a "user amount." RP 78–79, 141. The 32.9 grams of methamphetamine was packaged in three containers: a Ziploc bag containing 27.6 grams, a clear square plastic vial containing 5.3 grams, and a round plastic vial the contents of which were not tested. RP 72–74, 83, 137, 139, 141–42.

Detective Erik Horbatko, a detective in the narcotics division of the Yakima Police Department, testified. RP 65–97. Based on information gleaned from his ten years' experience with confidential informants and controlled buys, this amount could be bought for $550 to $600 and resold for $800 to $1,120, and represented 165 to 327 doses depending on the

[4] Mr. Magallan's date of birth is February 17, 1963. CP 114. The date of the arrest herein was April 8, 2015. RP 100–02.

user's tolerance level and drug purity. RP67–69, 74–75. This methamphetamine hadn't been tested for cutting agents. RP 83–84. The detective and/or his confidential informants have bought but never sold meth while acting undercover. RP 90. "No way" would the detective consider an ounce a user amount and in his experience he'd never seen just a user with that much methamphetamine. RP 75, 77. Sellers could dispose of an ounce of methamphetamine to even just two or three established customers in half a day or a few hours depending on how much they sell or how they break it down. RP 77. He declared "Those [two clean, unused] baggies [found here] are intended to use to put something from a bigger amount to make it into a smaller amount for sale." RP 78. The detective agreed an addict over time uses an increasing amount of a drug to obtain a high and in the case of methamphetamine would just continue to take hits to avoid the alternative of possibly sleeping for seven days when his or her drugs wear off. RP 86–87.

The probation officer had known Mr. Magallan for nine years and began directly supervising him ten months prior to this encounter. RP 118–19. The officer knew during that time Mr. Magallan had been staying with his son and daughter-in-law and used their phone number as his contact number. RP 108–109. When the officer attempted to locate Mr.

Magallan regarding the test results, the relatives hadn't seen or had contact with him since three days prior to this arrest. RP 111. During supervision the officer never knew Mr. Magallan to have a job. Although he had not seen any paperwork, the officer believed Mr. Magallan may be on a disability and that Mr. Magallan may have told him so. RP 107, 109.

The jury returned a verdict of guilty on both counts and found the possession of methamphetamine with intent to deliver occurred in a protected drug zone. CP 106, 108, 109. It did not reach consideration of the lesser crime of possession of methamphetamine. RP 104, 107.

At sentencing, the prosecutor did not mention specific offender scores and alleged standard sentencing ranges of 60 to 120 months and 12-plus to 24 months, respectively, regarding the convictions on counts 1 and 2. RP 253. Trial defense counsel did not object to inclusion of the alleged prior convictions summarized in Finding of Fact 2.3 of the proposed Judgment and Sentence, stating the following:

> I would point out that – we have to go back 25 years to count the criminal offenses for Mr. Magallan. 1988, for which there's not even any paper work. 1989, 1993. He knows that those count under the current Sentencing Reform Act guidelines. They didn't used to. That was a change that was made several years ago to – make sure that any misdemeanor conviction prevented a washout instead of just felonies.

> But we have somebody here who has an offender score – that he does. And technically there [are] seven prior felonies in the last 25 years. And then because he was on DOC, that adds a point. And then because there are concurrent conviction that [*sic*] and that's how you get to nine.

RP 258–59. Mr. Magallan did not acknowledge any prior convictions. RP 261. Despite this, the court found Mr. Magallan had seven prior felony convictions, and sentenced him with an offender score of "9." CP 115.

The court struck the proposed court-appointed attorney fee, drug fine and drug enforcement fund contribution, and capped costs of incarceration "given [Mr. Magallan's] lack of financial resources. RP 263;CP 117. Even though recognizing Mr. Magallan was impoverished, the court imposed $800 in legal financial obligations and costs of incarceration[5] and medical care, with no discussion of Mr. Magallan's ability to pay. RP 261–64; CP 117–18. The Judgment and Sentence contained a boilerplate finding that Mr. Magallan "is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 115, ¶ 2.7. Mr. Magallan did not object to the imposition of the LFOs. No restitution was ordered. The court ordered Mr. Magallan to pay the LFOs in full within 180 or 270 days after his release. CP 118, ¶ 4.D.7.

[5] The court capped the costs of incarceration at $100. CP 117.

Mr. Magallan timely appealed. CP 125.

C. ARGUMENT

1 Mr. Magallan's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, was violated where the State failed to prove he had the intent to deliver the drugs he possessed.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

As a general proposition, substantial evidence of a specific criminal intent exists when the evidence supports a logical probability that the defendant acted with the requisite intent. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P .2d 41 (1991). However, evidence of the specific intent to deliver a controlled substance must be compelling. *State v. Davis*, 79 Wn. App. 591, 594, 904 P .2d 306 (1995). Mere possession of a controlled substance even in large amounts is insufficient alone to establish an inference of intent to deliver. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Rather, there must be compelling other evidence that supports the inference of the intent to deliver in order that most

possessions of controlled substances are not improperly turned into possessions with intent to deliver without substantial evidence as to the possessor's intent, above and beyond the possession itself. *State v. Hutchins*, 73 Wn. App. 211, 217, 868 P.2d 196 (1994). Finally, as the court stated in *State v. Brown*, 68 Wn. App. 480, 485, 843 P .2d 1098 (1993), "[c]onvictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession."

Here, the state argued the amount of methamphetamine in conjunction with two empty Ziploc baggies—one small and the other two to three times its size—and the testimony of the officer constituted substantial evidence of an intent to deliver. However, in those decisions in which an intent to deliver has been inferred from possession of a large quantity of a controlled substance, some significant additional factor has been present. *State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989) (presence of 1 1/2 pounds of cocaine combined with informant's tip and controlled buy supported intent to deliver inference); *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992) (possession of cocaine coupled with officer's observations of drug deals supported inference of intent); *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989) (1 ounce of

cocaine, together with large amounts of cash and scales, supported an intent to deliver); *State v. Simpson*, 22 Wn. App. 572, 590 P.2d 1276 (1979) (possession of uncut heroin, lactose for cutting and balloons for packaging supported an intent to deliver). Unlike in *Mejia*, *Llamas-Villa*, *Lane* or *Simpson*, in this case there was no informant's tip and controlled buy, or an officer's observations of drug deals, or large amounts of cash and scales, or proof of an uncut controlled substance and cutting agents.

In *Davis*, the court determined there was not substantial evidence as to the possessor's intent, above and beyond the possession itself. There, police discovered six baggies of packaged marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of sandwich baggies. No quantity of money was found nor were any weighing devices. While "the seeds might well suggest an intent to grow marijuana," the court concluded "there was no evidence Mr. Davis had bought or sold marijuana or was in the business of buying or selling. The marijuana totaled 19 grams, an amount which could certainly be consumed in the course of normal personal use. The packaging likewise is not inconsistent with personal use. There is not enough evidence before us to infer the specific criminal intent to deliver

required by the statute. Intent to deliver does not follow as a matter of logical probability." *Davis*, 79 Wn. App. at 595–96 (citations omitted).

As in *Davis*, there was no evidence Mr. Magallan had bought or sold methamphetamine or was in the business of buying or selling. There were no controlled buys or observations of sales. In *Davis* there was the presence of a number of bags of marijuana. By contrast, in this case there was essentially one volume of methamphetamine, packaged in containers of decreasing size and thus not inconsistent with personal use. If the box of sandwich baggies found in *Davis* was insufficient to tip the scale in favor of finding intent to deliver, certainly the two unused and mis-matched-in-size baggies found in Mr. Magallan's backpack are even less significant in the realm of logical probability. While the officer found a methamphetamine pipe with residue in it, this is indicative of personal use, not possession with intent. What is compelling in this case on the issue of intent to deliver is what the police did not find. They did not find pre-wrapped methamphetamine weighed out in commercially saleable amounts. They did not find any money, ledgers, pagers or cell phones, cutting agents or other items indicative of drug sales or transactions. RP 80–84.

The state's case rests exclusively on the detective's opinion of the quantity of a controlled substance normal for personal use. That the amount of methamphetamine discovered in the backpack might represent 165 to 327 individual doses of the controlled substance could sound incriminating to the non-using lay person. But the state presented no evidence what this dosage means – in a general situation of how many doses are typically ingested hourly or daily or weekly by an addict or in the specific context of a homeless and jobless and drug-addicted Mr. Magallan who received monthly disability payments and was arrested shortly after the first of the month with his backpack containing his replenished drug of choice in both a larger purchased volume and a smaller packaging for easier access when he needed another "hit." The jury was given no information with which to translate the detective's testimony from number of doses into a typical normal personal use. The officer's bare opinion that this quantity of a controlled substance was not normal for personal use is insufficient to establish, beyond a reasonable doubt, that a defendant possessed the controlled substance with an intent to deliver. *Hutchins*, 73 Wn. App. at 217.

In sum, there is no compelling and substantially corroborating evidence as to Mr. Magallan's intent above and beyond his possession

itself. The evidence in this case, even seen in the light most favorable to the state, indicates that while the defendant may have possessed the methamphetamine, he had no intent to deliver it. Consequently, substantial evidence does not support the conviction. This court should vacate his conviction for possession of methamphetamine with intent to deliver and remand the case to the trial court with instructions to enter judgment for possession.

2. The sentencing court failed to properly determine Mr. Magallan's criminal history and offender score.

Sentencing errors resulting in unlawful sentences may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Offender score calculations are reviewed de novo. *State v. Moeurn*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010). The sentencing court acts without statutory authority when imposing a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson,* 131 Wn.2d 558, 568, 933 P.2d 1019(1997).

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9. 94A.500(1). Under RCW 9. 94A.525, the sentencing court is required to determine an offender

score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9. 94A.525(1).

The use of prior convictions as a basis for sentencing is constitutionally permissible provided either the State proves their existence to a judge by a preponderance of the evidence, or a defendant affirmatively acknowledges their existence. *State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014); *State v. Mendoza*, 165 Wn.2d 913, 927–28, 205 P.3d 113 (2009).

While a certified copy of the judgment provides the best evidence to prove a prior conviction's existence, a sentencing court may rely on other comparable documents or transcripts as long as they provide minimum indicia of reliability. *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 568–69, 243 P.3d 540 (2010). But an unsupported criminal history summary, standing alone, is insufficient to establish the existence of a defendant's prior convictions by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 917, 287 P.3d 584 (2012).

To make an affirmative acknowledgment of a conviction's existence, the defendant must make an affirmative acknowledgement of "*facts and information* introduced for the purposes of sentencing."

Mendoza, 165 Wn.2d at 928. Neither the defendant's failure to object to the State's statement of criminal history, nor the defendant's agreement with the ultimate sentencing recommendation, constitutes an affirmative acknowledgement of the State's asserted criminal history. *Hunley*, 175 Wn.2d at 917; *Mendoza*, 165 Wn.2d at 928.

Here, the State provided only its unsupported summary of Mr. Magallan's alleged prior convictions. This, standing alone, is insufficient to establish the existence of his alleged prior convictions by a preponderance of the evidence. *Hunley*, 175 Wn.2d at 917.

Mr. Magallan made no statements. His counsel made general statements about conviction date(s) for which there wasn't any paperwork and a misdemeanor conviction and seven prior felonies. These statements do not qualify as affirmative acknowledgments of Mr. Magallan's alleged prior convictions because these statements were too general to clearly state which, how many, or what type of convictions Mr. Magallan acknowledged. Under these circumstances, Mr. Magallan should have been sentenced with an offender score of zero. Instead, the Judgment and Sentence reflects seven prior convictions, and the court sentenced Mr. Magallan with an offender score of "9." CP 115.

In the absence of any proof that he had prior convictions, the

sentence violated Mr. Magallan's Fourteenth Amendment right to due process. *Hunley*, 175 Wn.2d at 910–17. The State failed to meet its burden of proving the existence of Mr. Magallan's convictions by a preponderance of the evidence. Accordingly, the sentence must be vacated and the case remanded for another sentencing hearing. *Id*. Because Mr. Magallan did not object to the inclusion of any priors, the prosecution will have the opportunity to prove his criminal history by a preponderance of the evidence. *In re Cadwallader*, 155 Wn.2d 867, 878, 123 P. 3d 456 (2005).

3. The legal financial obligations should be stricken because Mr. Magallan lacks the ability to pay.

The sentencing court recognized that Mr. Magallan's crime was the result of drug addiction. RP 261. The testimony established he was homeless, jobless, on disability and living with relatives. RP 107–109, 111. The court nevertheless imposed $800 in legal financial obligations, including a $500 crime penalty assessment, $200 criminal filing fee, and $100 DNA collection fee. The court also imposed costs of incarceration[6] and medical care, with no discussion of Mr. Magallan's ability to pay. RP 261–64; CP 117–18. The Judgment and Sentence contained a boilerplate

[6] The court capped the costs of incarceration at $100. CP 117.

finding that Mr. Magallan "is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 115, ¶ 2.7. The parties and the court did not discuss this finding at all.

a. The findings that Mr. Magallan has the current of future means to pay costs of incarceration and medical care are not supported in the record and must be stricken.

Costs of incarceration and medical care are discretionary legal financial obligations. *State v. Leonard*, 184 Wn.2d 505, 507, 358 P.3d 1167, 1168 (2015). The statutes allowing imposition of these categories of costs require individualized inquiries regarding the ability to pay. *Id.*, citing RCW 9.94A.760(2), RCW 70.48.130, RCW 70.48.130(5). Here, the record reflects no such inquiry at the sentencing hearing, and the judgment and sentence form contains only boilerplate findings of ability to pay, which the Washington State Supreme Court in *State v. Blazina*[7] held to be inadequate. *Leonard*, 184 Wn.2d at 508. The matter must be remanded to the superior court to reconsider these legal financial obligations consistent with the requirements of *Blazina*. *Id.*

[7] 182 Wn.2d 127, 838, 344 P.3d 680 (2015).

b. The imposition of LFO's on an impoverished defendant is improper under the relevant statutes and court rules, and violates principles of due process and equal protection.

The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 127, 830, 344 P.3d 680 (2015).

There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Blazina,* 182 Wn.2d at 837. Thus, a failure to consider a defendant's

ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Mr. Magallan's poverty, because the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a $200 fee); RCW 43.43.7541 (every felony sentence "must include" a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage

absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 712–13, 355 P.3d 1093 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[8]

It is true the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917–18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because

[8] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). It is noteworthy that when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Mr. Magallan challenges here: the Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition costs). *See id.* If the Court were limiting its holding to a minority of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

It does not appear that the Supreme Court has ever held that the DNA fee and "criminal filing fee" are exempt from the ability-to-pay inquiry. And although the court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102–03 *with Blazina*, 182 Wn.2d at 830–39.

It would be particularly problematic to require Mr. Magallan to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants.[9] This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 183 Wn.2d 706, 711–12 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant

[9] This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. Magallan would be happy to provide the Court with representative judgments from King County.

disparities" in the administration of LFOs among different counties); *and see* RCW 9.94A.010(3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

GR 34, which was adopted at the end of 2010, also supports Mr. Magallan's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527–30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.* at 529. Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Our Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory

costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528–29 (noting that "principles of due process or equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a

year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45–46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller,* the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id.* at 241. Unfortunately, this assumption was not

borne out. As indicated in significant studies post-dating *Blank*, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. *See e.g.*, Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).[10] In other words, the risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Magallan concedes that the government has a legitimate interest in

[10] Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Mr. Magallan is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

c. This Court should reverse and remand with instructions to strike legal financial obligations.

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. Prior to *Blazina*, the trial court may have been bound by the decision in *Lundy*, so any objection would have been futile and contrary to the goal of judicial efficiency. *See State v. Robinson*, 171 Wn. 2d 292, 305, 253 P.3d 84 (2011) (granting relief even though issue not raised below, where trial court would have been bound by precedent that was abrogated post-trial). However, *Blazina* mandated consideration of ability to pay before imposing LFOs and held the ability to pay legal financial LFOs may be raised for the first time on appeal by

discretionary review. In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources

would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Magallan's case regardless of his failure to object. *See, Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.") (Citations omitted)).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Mr. Magallan's August 14, 2015, sentencing occurred five months after the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts to make the appropriate ability to pay inquiry on the record. The court below did not inquire. Mr. Magallan respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

In sum, because *Blazina* clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record demonstrates Mr. Magallan's extreme indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. Magallan has the ability to pay.

4. Appeal costs should not be imposed.

Mr. Magallan was sentenced to 114 months (nine and one-half years) of confinement inclusive of the mandatory 24-months protected zone enhancement. CP 116. The evidence showed he was homeless,

jobless and probably disabled. The trial court found Mr. Magallan to be indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at public expense. CP 122–24. If Mr. Magallan does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. *See State v. Sinclair*, __ P.3d __, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the "court of appeals … may require an adult … to pay appellate costs." (Emphasis added) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. *Blazina*, 182 Wn.2d 8 at 834. Only by conducting such a "case-by-case" analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.* Accordingly, Mr. Magallan's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the court waived most non-mandatory fees. Without a basis to determine Mr. Magallan has a present or future ability

to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the reasons stated, Mr. Magallan asks this Court to reverse the possession with intent to deliver conviction and remand for resentencing requiring proof of his criminal history and striking of all legal financial obligations.

If Mr. Magallan is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the State ask for them.

Respectfully submitted on May 2, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 2, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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