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Washington State
Supreme Court

No. 94107-6

Court of Appeals No. 33702-2-III

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL ANGEL MAGALLAN,

Appellant.

PETITION FOR REVIEW

Miguel Angel Magallan, DOC # 939320
Appellant/Petitioner, pro se

Stafford Creek Corrections Center
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A. IDENTITY OF PETITIONER

Miguel Angel Magallan, acting pro se, is the Petitioner/ Appellant and asks this Court to accept review of the Court of Appeals Unpublished Opinion designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner asks this Court to accept review of the Court of Appeals decision in case no. 33702-2-III which held that, contrary to a long line of Washington case law, mere possession of a controlled substance, without any other additional factor, is sufficient to uphold Mr. Magallan's conviction for possession of a controlled substance with intent to deliver. A copy of this decision is in the Appendix at pages A-1 through A-16.

C. ISSUES PRESENTED FOR REVIEW

Mr. Magallan possessed 27.6 grams of methamphetamine. When arrested, police found no individually packaged drugs, no cell phone, no pager, no list of names, no money, and no scales or other drug paraphernalia. Yet he was found guilty of possession of a controlled substance with intent to deliver, a verdict upheld by the Court of Appeals on direct review.

1. Does the decision of the Court of Appeals conflict with other Court of Appeal decisions, and decisions of the Supreme Court?

2. Was it proper for the Court of Appeals to **infer** the additional factor that case law requires to sustain a conviction for possession of a controlled substance with intent

to deliver?

3. A long line of Washington case law requires the prosecution, in order to gain a conviction for possession of a controlled substance with intent to deliver, to prove in addition to mere possession of a large quantity of drugs, one additional factor exists to show the defendant's intent to sell it. Does this additional factor have to be material, physical evidence (such as a list of names, large amount of cash, or individually packaged drugs), or may a jury or reviewing court **infer** the additional factor based on the possession itself?

D. STATEMENT OF THE CASE

Petitioner/Appellant Miguel Angel Magallan was arrested on April 8, 2015, in Yakima while walking down the street with his bicycle, and a bag flung over his shoulder. RP 100-02. Magallan was on probation and was arrested by his probation officer, who found a baggie containing drugs in Magallan's pocket. RP 103-04. The officer also found two unused, clean baggies on Magallan. RP 78. No other contraband was found on Magallan; no pager, no cell phone, no weapon, no list of names, no money, no individually packaged drugs, no scales, and no other drug paraphernalia.

Yet Magallan was charged with, and convicted of possession of a controlled substance with intent to deliver. CP 106, 108, 109. At trial, the probation officer testified that he never knew Magallan to have a job. RP 107, 109. A police detective also testified that in his ten years of experience

with confidential informants and controlled buys, the amount of meth possessed by Magallan -- 27.6 grams -- although not individually packaged as such, could be sold in 165-327 doses, and that there was "No way" would he consider that much meth a user amount and that he'd never seen a user with that much methamphetamine. RP 67-69, 74-75, 77.

Drug testing conducted on Mr. Magallan following his arrest showed that he tested positive for methamphetamine. See Br. of Resp., Court of Appeals #33702-2-III, page 6.

In urging the Court of Appeals to reject Magallan's sufficiency of the evidence challenge and uphold his conviction, the state argued, for the first time, that the "additional factor" in this case justifying affirming the conviction was that because Magallan was jobless and supposedly homeless, he could not have possessed such a large amount of drugs unless he was also dealing them. See Br. of Resp., COA #33702-2-III, pgs. 4-8. Despite a long line of Washington cases, many of which were issued by this Court, requiring the state to show a defendant possessed something more than just a large amount of drugs to sustain a conviction for possession of a controlled substance with intent to deliver, the Court of Appeals affirmed Magallan's conviction, adopting the state's homeless and jobless argument.

Because the decision of the Court of Appeals conflicts with other decisions of the Court of Appeals and decisions of this Court, that require more than just an inference of the additional factor, Magallan's conviction must be reversed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Rule 13.4 of the Rules of Appellate Procedure govern the circumstances in which this Court will accept review of a Court of Appeals decision terminating review of a direct appeal in a criminal case. RAP 13.4(b) states as follows:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, the decision of the Court of Appeals conflicted with other decisions of the Court of Appeals and decisions of the Supreme Court, and Magallan asserts review should be granted in this case under RAP 13.4(b) (1) and (2) above.

Due process requires that the state must prove every element of a crime beyond a reasonable doubt. This is true whether analyzed under the state or federal constitutional standards. 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); Wash. Const. Art 1, § 3 and U.S. Const. Am. 14.

Mere possibilities, suspicion or conjecture is not evidence and does not meet the minimum requirements of due

process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972).

Unlike every other case where a conviction for intent to deliver a controlled substance was supported by some evidence other than possession of a large amount of drugs itself, such as a cell phone, a weapon, a list of names, a scale, or individually packaged drugs, here the Court of Appeals upheld Magallan's conviction based solely on the speculation and conjecture that because he was homeless and supposedly jobless, he could not have possessed such a large amount of methamphetamine unless he was also dealing it. See Unpublished Opinion, #37702-2-III, page 7 (Appendix at 7). This was improper speculation and flies in the face of dozens and dozens of cases decided by other Courts of Appeal and this Court, all of which required some additional piece of physical evidence -- not conjecture based on the possession of the drugs itself -- to affirm a conviction for possession of a controlled substance with intent to deliver.

In State v. Villareal, 174 Wn. App. 1031 (2013), the Court of Appeals held that courts may infer specific criminal intent of the accused only where his conduct indicates such intent as a matter of legal probability. See also State V. Goodman, 150 Wn.2d 781 (_____) (emphasis added). In cases charging possession of a controlled substance with intent to deliver, mere possession, without more, is insufficient to establish possession with intent to deliver. State v.

Hutchins, 73 Wn. App. 211, 868 P.2d 196 (1994); State v. Brown, 68 Wn. App. 480, 843 P.2d 1098 (1993). There must be at least one additional factor -- other than the drugs -- to sustain the conviction. Hutchins.

Washington courts affirm convictions for possession of a controlled substance with intent to deliver only where, in addition to the controlled substance, there was one or more of the following factors: large amount of cash, scales, cell phones, address lists, meth ingredients, mixing vessels, empty drug packaging materials, pagers, weapons, or crystalline cutting agents. State v. McPherson, 111 Wn. App. 759-61, 46 P.3d 284 (2002); State v. Zunker, 112 Wn. App. 130, 48 P.3d 344; State v. Campos, 100 Wn. App. 218 (____); State v. Miller, 91 Wn. App. 181, 955 P.2d 810 (1998); and State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992).

No Washington court has affirmed a controlled substance possession with intent to deliver conviction without the presence of one or more of the aforementioned factors. Until now.

In fact, Washington law forbids the inference of an intent to deliver based on "bare possession of a controlled substance, absent other facts and circumstances." Hutchins, Brown. These additional factors have always been some piece of physical evidence, not supposition and conjecture on how the defendant came into possession of the drugs in question.

In State v. Kovac, 50 Wn. App. 117, 747 P.2d 484 (1987), the Court of Appeals found possession of eight grams of marijuana and seven baggies insufficient to show an intent to deliver and reversed the conviction.

In State v. Cobelli, 56 Wn. App. 921, 788 P.2d 1081 (1989), the Court of Appeals found possession of 1.4 grams of marijuana and baggies insufficient to show an intent to deliver and reversed the conviction.

In State v. Liles, 11 Wn. App. 166, 521 P.2d 973 (1974), the Court of Appeals found possession of 6.8 grams of heroin and a baggie insufficient to show an intent to deliver and reversed the conviction.

In Brown, 680 Wn. App. 480, the defendant was found with 20 rocks of cocaine. His conviction was overturned by the Court of Appeals, who observed that Brown was not found with a weapon, large sum of money, scales, drug paraphernalia, the drugs were not separtely packaged, nor was there any observation of a deal or transaction.

In every intent to deliver case affirmed on appeal, there was at least one piece of physical evidence in addition to the drugs that the court relied on to sustain the conviction: State v. Mejia, 111 Wn.2d 892, 766 P.2d 454 (1989) (1½ lbs. cocaine, confidential informant's tip, controlled buy -- affirmed); State v. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239 (1992) (possession of cocaine, officer's observation of deal -- affirmed); State v. Lane,

56 Wn. App. 286. 786 P.2d 277 (1989) (1 oz. cocaine, large amount of cash, scales -- affirmed); Villareal, 174 Wn. App. 1031 (34.3 grams methamphetamine, scanner, $1,750 cash -- affirmed); Campos, 100 Wn. App. 218 (.05 grams less than an ounce cocaine, $1,750 cash -- affirmed); State v. Hagler, 74 Wn. App. 232, 872 P.2d 85 (1994) (24 rocks cocaine, large amount of cash for a juvenile -- affirmed); State v. Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995) (4.7 grams cocaine, $826.50 cash -- affirmed); Mcpherson, 111 Wn. App. 759 (2 grams meth, scale with residue -- affirmed); Zunker, 112 Wn. App. 130 (possession of meth ingredients, scales, notebooks -- affirmed); and Miller, 91 Wn. App. 181 (drugs packaged for individual use, 25 empty bindles, list of names, weapon -- affirmed).

The only one of these cases that even comes close to Magallan's is Hagler. There, the court did conclude that the amount of cash on the person of the defendant was inconsistent with his status as a juvenile. The state may argue that, likewise, the amount of drugs of Magallan's person was not consistent with the fact that he was homeless and believed to be unemployed. But Magallan had no cash on his person. If he did, then Hagler would seem to indicate that a court could undertake an analysis to determine the likelihood that the defendant had no other source of income other than selling drugs. But here, the Court of Appeals erred because it used the mere fact of the drug possession

itself -- not any additional factor such as cash, weapons, or scales -- to then make the supposition that Magallan must have been selling the drugs because he had no other source of income.

This was error, and in contravention of this Court's, and the Courts of Appeal, long line of cases that forbid the inference of intent to deliver based on mere possession of a large amount of drugs. Hutchins, Brown, etc.

To be sure, that is all Magallan had on him -- other than two clean, unused baggies -- was the drugs. In the absence of the additional factor required to show an intent to deliver, the Court of Appeals simply made one up. The problem is that the factor it made up was inferred from the "bare possession of a controlled substance," in violation of the long line of cases already stated.

Due process is offended where sufficient evidence to support a conviction is not presented. Moore, 7 Wn. App. 1. And "possibility," "suspicion," or "conjecture" does not constitutte substantial evidence. Id.

That is exactly what the Court of Appeals did here. It took the fact that Magallan had a large amount of drugs, coupled it with testimony that he was unemployed and homeless, and then concluded that there was no other way he could have acquired the drugs other than dealing them. This is the very definition of "possibility," "suspicion," and "conjecture."

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). Convictions for possession with intent to deliver require substantial corroborating evidence in addition to the mere fact of the possession. Brown, 69 Wn. App. at 485.

Nothing about the Court of Appeals' conjecture and suspicion as to the source of the drugs found on Magallan is compelling or substantial. It simply made a guess as to where Magallan got his drugs, discounting -- apparently -- the myriad of other possible ways Magallan could have come into possession of the meth. He could have been holding for another; he could have found the drugs; he may have taken the money made doing odd jobs and bought them; or maybe he was a drug dealer. They are all possibilities, but the Court of Appeals picked the one that suited its purposes in affirming Magallan's conviction. The Court of Appeals wrongly -- and against a slew of cases from this Court and other Courts of Appeal -- found that Magallan's mere possession of a large amount of drugs, without an additional factor that indicates intent to deliver as a matter of legal probability, was sufficient to support his conviction simply because he was homeless and believed to be unemployed. This conviction cannot stand. See Goodman, Hutchins, Brown, etc.

D. <u>CONCLUSION</u>

For the above-stated reasons, this Court should accept review of this case under RAP 13.4(b)(1) and (2), as the decision of the Court of Appeals conflicts with other Court of Appeals decisions and decisions of this Court. The additional factor required to sustain a conviction for possession of a controlled substance with intent to deliver simply doesn't exist in this case and the Court of Appeals erred in inferring one. Magallan's conviction should therefore be reversed and this case dismissed with prejudice.

Respectfully submitted this 5th day of April, 2017.

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A P P E N D I X

Court of Appeals Unpublished Opinion

Case No. 33702-2-III

FILED
JANUARY 10, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 33702-2-III
v.	)	UNPUBLISHED OPINION
MIGUEL ANGEL MAGALLAN, Appellant.	)	

LAWRENCE-BERREY, J. — Miguel Angel Magallan appeals his conviction and sentence following a jury verdict finding him guilty of one count of possession of a controlled substance, heroin, and one count of possession of a controlled substance, methamphetamine, with intent to deliver. The jury also found that the offenses occurred within a drug protection zone. The trial court sentenced Mr. Magallan to a term of imprisonment within the standard range in accordance with the jury's verdict and special finding, and based on an agreed offender score of 9. The trial court also assessed mandatory legal financial obligations (LFOs) and two discretionary LFOs.

Mr. Magallan contends: (1) the evidence was insufficient to convict him on the charge of possession of a controlled substance, methamphetamine, with intent to deliver,

(2) the State failed to meet its burden in proving his criminal history at sentencing, and (3) the trial court erred when it imposed various mandatory and two discretionary LFOs without inquiring into his ability to pay those obligations.

We reject Mr. Magallan's first and second contentions, but agree that the trial court erred when it imposed the two discretionary LFOs. We accept the State's concession to direct the trial court to strike those discretionary LFOs rather than remand for a new hearing. We also decline to award the State appellate costs, in accordance with our June 10, 2016 general order.

FACTS

Scott McLean, Mr. Magallan's probation officer, arrested Mr. Magallan on an outstanding warrant. The warrant was issued because Mr. Magallan had recently tested positive for methamphetamine and heroin. At the time of his arrest, Mr. Magallan was staggering alongside his bicycle and carrying a backpack. In the search incident to arrest, Officer McLean found a user's amount of heroin in Mr. Magallan's pocket. Officer McLean also searched Mr. Magallan's backpack. In the backpack, Officer McLean found two empty "baggies," a baggie with a white crystalline substance, and two vials with a white crystalline substance. The baggie contained 27.6 grams of methamphetamine. One

vial contained 5.3 grams of methamphetamine, and the other vial was not tested. Converted into ounces, the total weight of the methamphetamine was 1.16 oz.

By amended information, the State charged Mr. Magallan with one count of possession of heroin and one count of possession of methamphetamine with intent to deliver and alleged that the latter offense occurred in a drug protection zone.

At trial, Detective Erik Horbatko testified that there was approximately 1.25 oz. of methamphetamine found in the baggie and containers. He estimated the wholesale price of that amount of methamphetamine was between $550 and $600. But if sold in multiple sales of smaller quantities, the retail price for that amount would be from $800 to $1,120. He estimated the number of individual doses for 1.25 oz. of methamphetamine was between 165 and 327, depending on such factors as the user's tolerance and the drug's purity. He testified that 1.25 oz. was "[n]o way" a user's amount, and that he had never seen a user with that much methamphetamine. Report of Proceedings (RP) at 75. He also testified that the two clean baggies found on Mr. Magallan were "intended to use to put something from a bigger amount to make it into a smaller amount for sale." RP at 78. He further testified that he had "never seen an ounce be personal use—in my entire career—so far." RP at 90.

Officer McLean also testified. He testified he had known Mr. Magallan for nine years and began directly supervising him 10 months prior to the encounter. He also testified Mr. Magallan did not have a job while under his supervision, he may have been receiving disability payments, and he may have been living with his son, but did not have his own telephone.

After the parties presented their evidence, the court instructed the jury on the two charged offenses and also on a lesser offense of possession of methamphetamine. The jury returned guilty verdicts on the two charged offenses and found that the intent to deliver offense occurred in a protected drug zone. For this reason, the jury did not reach a verdict on the lesser offense of possession of methamphetamine.

At sentencing, the State set forth in the proposed judgment and sentence a summary of Mr. Magallan's criminal history, together with an offender score of 9. Defense counsel admitted that Mr. Magallan had the criminal history set forth in the summary and that the offender score of 9 was correct. While admitting this, she argued for a lenient sentence:

> 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's 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 convictions that and that's how you get to nine.

RP at 258-59.

The trial court struck a few proposed discretionary LFOs from the proposed judgment and sentence prior to signing it. The trial court did not inquire into Mr. Magallan's present or future ability to pay the LFOs. The trial court imposed mandatory LFOs in the form of a $500 crime penalty assessment, a $200 criminal filing fee, and a $100 deoxyribonucleic (DNA) collection fee. The trial court also imposed discretionary LFOs in the form of costs of incarceration, capped at $100, and did not strike a separate paragraph that made Mr. Magallan responsible for the costs of his medical care while incarcerated.

Mr. Magallan appealed.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Mr. Magallan contends the evidence is insufficient to show intent to deliver and only the lesser charge of possession of methamphetamine can be sustained.

Evidence is sufficient to convict if it permits a rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. *State v. Munoz-*

Rivera, 190 Wn. App. 870, 882, 361 P.3d 182 (2015). This court "must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant." *Id.* Direct and circumstantial evidence carry the same weight. *Id.* We will "defer to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence." *Id.* This court's role is not to reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

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). 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); *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995).

Mr. Magallan argues the State's evidence was insufficient to prove intent to deliver because the State was required to prove more than he possessed a large quantity of contraband. We agree with the legal principle argued by Mr. Magallan, but disagree that the State's evidence was so limited.

In *Lopez*, Lopez purchased $1,000 of cocaine from narcotics officers. *Lopez*, 79 Wn. App. at 758. In the search incident to arrest, an officer found 14 individual quarter-

gram bindles of cocaine and more than $800 of cash. *Id.* at 759. The State charged Lopez with two counts of possession of cocaine with intent to deliver, and one count of delivery of cocaine to a person under 18 years of age in a public park. *Id.* at 760. At trial, Lopez testified he was employed in construction prior to his arrest, and that all the money he used to purchase the cocaine and the money found on him was from his employment. *Id.* He explained he purchased a large amount of cocaine because he was an addict, and that he would sometimes buy a two or three month supply. *Id.* at 759-60. Despite his testimony, the jury convicted him of the possession with intent to deliver charges, but acquitted him of the delivery to a minor charge. *Id.* at 760. The *Lopez* court repeated the rule, "even possession of a large amount of controlled substances, without some additional factor, is insufficient to establish intent." *Id.* at 768. In concluding that sufficient evidence supported intent to deliver, the *Lopez* court determined that the purchase of a large quantity of contraband, together with a large sum of cash on Lopez's person, was sufficient. *Id.* at 769.

This case is similar to *Lopez*. In addition to the large amount of methamphetamine found on Mr. Magallan, the State presented evidence that Mr. Magallan could not have purchased that amount unless he also earned money selling it.

Mr. Magallan also relies upon *Davis*. The evidence in that case consisted of six individually wrapped baggies of marijuana, marijuana seeds, a small container of marijuana, a box of unused baggies, and another baggie with marijuana residue. *Davis*, 79 Wn. App. at 595. In reversing the intent to deliver charge, the *Davis* court determined "there was no evidence Mr. Davis had bought or sold marijuana or was in the business of buying or selling." *Id.* The *Davis* court reasoned that the packaging was "not inconsistent with personal use" and that the 19 grams of marijuana likewise could "certainly be consumed in the course of normal personal use." *Id.* at 595-96.

This case is distinguishable from *Davis* because the amount of contraband here is not consistent with personal use. Construing the evidence most favorably to the State, as we must for this type of review, possession of up to 317 individual doses together with empty baggies is indicative of intent to deliver rather than personal use.

Mr. Magallan also argues that an officer's opinion of what constitutes personal use is insufficient to infer intent. *State v. Hutchins*, 73 Wn. App. 211, 217, 868 P.2d 196 (1994). Again, we agree with the legal principle argued, but disagree that the State's evidence was so limited. Again, in addition to the large quantity of methamphetamine found on Mr. Magallan, the State submitted evidence that Mr. Magallan could not have possessed such a large amount of methamphetamine unless he also was selling it.

The State admits that this case is not the typical drug dealer case where a dealer might have a sophisticated operation and make good money selling contraband. Rather, the evidence suggested that Mr. Magallan traveled by bicycle instead of car, did not have his own telephone, and did not have his own home. The State argues,

> To require a level of sophistication as seen in many of the cases cited by Appellant to uphold a conviction for possession with intent to deliver will negate the State's ability to prosecute a vast array of individual[s] who are in fact selling drugs but doing [so] not to gain vast wealth but to support and sustain an all-consuming addiction.

Br. of Resp't at 6.

We agree. Whether intent to deliver has been proved beyond a reasonable doubt is a highly fact-specific inquiry. *Davis*, 79 Wn. App. at 594. Here, the State was permitted to argue that a methamphetamine user with little financial means could not come into such a large quantity of methamphetamine unless, in addition to using it, he was also selling it.

B. PROOF OF PRIOR CRIMINAL HISTORY

Mr. Magallan argues the State did not meet its burden in proving his prior criminal history that was used to calculate his 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 State has the burden of establishing a defendant's prior criminal history by a preponderance of the evidence to determine his or her offender score at sentencing. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). An unsupported statement of prior criminal history is insufficient to satisfy the State's burden of proof. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The State is relieved of this burden if the defendant affirmatively acknowledges his or her prior criminal history; the defendant's mere failure to object is insufficient. *Id.*

The State argues that defense counsel's admission of the correctness of the State's summary of prior criminal history and offender score calculation was a sufficient acknowledgment to relieve it of its burden. In *Ford*, the court noted that defense counsel's submissions in its proffered offender score calculation could be considered by the sentencing court without further proof. *Id.* at 483 n.5. We consider this note as sufficient authority to support the State's argument. We, therefore, conclude that defense counsel's admission was a sufficient acknowledgment to relieve the State of its burden of proving such facts.

C. LEGAL FINANCIAL OBLIGATIONS

Mr. Magallan also challenges the imposition of both discretionary and mandatory LFOs. He contends that the trial court did not conduct an individualized inquiry into his ability to pay before it imposed the LFOs. He challenges the imposition of LFOs on several grounds—grounds he did not preserve through arguments to the trial court. Mr. Magallan urges this court to exercise its discretion to review his unpreserved challenges. Because the factors for exercising such discretion differ depending on the nature of the LFOs, we address Mr. Magallan's requests and arguments in two parts.

1. *Discretionary LFOs*

Whenever a person is convicted, the trial court "may order the payment of a legal financial obligation" as part of the sentence. RCW 9.94A.760(1); *see* RCW 10.01.160(1). We refer to costs that are authorized but not mandated as "discretionary costs."

Here, Mr. Magallan asserts that the $100 capped cost of incarceration and the uncapped medical care costs are discretionary LFOs. He is correct. *See State v. Leonard*, 184 Wn.2d 505, 507, 358 P.3d 1167 (2015).

By statute, the trial court is not authorized to order a defendant to pay discretionary costs unless he or she is or will be able to pay them. RCW 10.01.160(3). In determining

the amount and method of payment of such costs, the trial court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose. *Id.* Accordingly, "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).

Importantly, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Id.* at 838. Therefore, "[t]he record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay."[1] *Id.* However, neither RCW 10.01.160 nor the constitution "'requires a trial court to enter formal, specific findings regarding a defendant's ability to pay [discretionary] court costs.'" *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (alteration in original) (quoting *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)).

"A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *Blazina*, 182 Wn.2d at 832. Subject

[1] Although courts have little guidance regarding what counts as an "individualized inquiry," *Blazina* makes clear, at a minimum, the sentencing court "must consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay," and "should also look to the comment in court rule GR 34 for guidance." *Blazina*, 182 Wn.2d at 838.

to three exceptions that do not apply here, RAP 2.5(a) provides that an "appellate court may refuse to review any claim of error which was not raised in the trial court." *Blazina* confirmed that an appellate court's discretion under RAP 2.5(a) extends to review of a trial court's imposition of discretionary LFOs. *Id.* at 834-35.

Under *Blazina*, each appellate court is entitled to "make its own decision to accept discretionary review" of unpreserved LFO errors. *Id.* at 835. Admittedly, the judges of this court are not in agreement as to what extent discretion should be exercised to review unpreserved LFOs. An approach favored by the author is to consider the administrative burden and expense of bringing a defendant to court for a new hearing, versus the likelihood that the discretionary LFO result will change. "An important consideration of this analysis is the dollar amount of discretionary LFOs imposed by the sentencing court." *State v. Arredondo*, 190 Wn. App. 512, 538, 360 P.3d 920 (2015), *review granted*, 185 Wn.2d 1024, 369 P.3d 502 (2016). In this case, the majority of these factors weigh in favor of reviewing Mr. Magallan's unpreserved discretionary LFO challenge.

First, the dollar amount of the discretionary LFOs the trial court imposed warrants granting review. The trial court imposed, perhaps unintentionally, medical costs incurred during incarceration. The sentence imposed was 114 months. Medical costs over the course of nearly 10 years might be substantial.

The second factor—the administrative burden and expense of bringing Mr. Magallan to court for a new sentencing hearing—weighs against granting review. Unless remand is otherwise required, the State would incur the extra expense of transporting Mr. Magallan to court.

The final factor weighs in favor of granting review—a new sentencing hearing would likely change the discretionary LFO result. As indicated earlier, Mr. Magallan probably depends on government assistance, and he has no car, no telephone, and no home of his own. A new sentencing hearing would very likely change the discretionary LFO result.

In weighing the relevant factors, we exercise our discretion and accept review of Mr. Magallan's discretionary LFO challenge. As acknowledged by the State, there is no evidence to support imposition of the discretionary LFOs. Rather than remand for a new sentencing hearing, the State requests that we remand with instructions to the trial court for it to strike the discretionary LFOs. We so instruct.

2. *Mandatory LFOs*

Mr. Magallan did not object to mandatory LFOs below. The State urges this court to decline to accept review of the unpreserved mandatory LFO challenge and to follow *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016). In *Stoddard*, we refused to

review unpreserved arguments challenging the constitutionality of various mandatory LFOs. *Id.* at 226. The reason for our refusal was the record was insufficient for us to determine Stoddard's indigency. *Id.* at 228-29.

That is not the case here. The degree of Mr. Magallan's indigency was an important factor in the State's ability to prove intent to deliver. Indeed, it was an important factor supporting our affirmance.

We therefore agree to review Mr. Magallan's unpreserved mandatory LFO challenge. But we do so only in the most summary fashion. We note that the issues he raises were recently raised and rejected in *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016). We similarly reject his challenges.

D. COSTS ON APPEAL

Mr. Magallan requests that we exercise our discretion and not award the State appellate costs in the event it substantially prevails. In making his request, Mr. Magallan has complied with our June 10, 2016 general order and submitted sufficient proof of his continued indigency. We, therefore, decline to award the State costs on appeal.

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Affirmed with instructions to correct the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	]	
	]	No. 94107-6
Respondent,	]	
	]	Court of Appeals No.
v.	]	37702-2-III
	]	
MIGUEL A. MAGALLAN,	]	DECLARATION OF SERVICE BY MAIL
	]	
Petitioner/	]	
Appellant.	]	
	]	

Miguel A. Magallan, being first duly sworn on oath, deposes and states that on the date below, I deposited, post prepaid, in the Mails of the United States, true and correct copies of PETITION FOR REVIEW and DECLARATION OF SERVICE BY MAIL in a properly addressed and sufficiently stamped envelope addressed as follows:

DAVID B. TEFRY
Senior Deputy Prosecuting Attorney
Yakima County Prosecutor's Office
128 N. 2nd St., Room 329
Yakima, WA 98901-2621

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

April 5th 2017
Date

MIGUEL A. MAGALLAN