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October 7, 2016  
Court of Appeals

Division I

State of Washington

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

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STATE OF WASHINGTON

Respondent

v.

LESLIE V. BOWLAN,

Appellant

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Did the court use the wrong standard range when it sentenced the defendant?
2. Should the doctrine of equitable estoppel apply to the calculation of the defendant's offender score?
3. Should the court refuse to consider a defendant's challenge to imposition of legal financial obligations for the first time on appeal where two of the obligations were mandatory and the defendant had agreed to pay the third discretionary obligation?

## **II. STATEMENT OF THE CASE**

On September 17, 2002 the defendant, Leslie Bowlan, was charged with Delivery of a Controlled Substance, cocaine. 1 CP 32-33. On October 31, 2002 the defendant signed an agreement to enter the CHART program. On November 7, 2002 she signed the CHART program contract and notification of her responsibilities. In each document the defendant agreed to pay \$600 in drug court fees to participate in the program. 1 CP 21-26.

The defendant failed to complete the program. On December 12, 2002 the defendant failed to appear for court and a warrant was issued for her arrest. The warrant limited extradition to statewide only. 2 CP 38-40, 42-44. The warrant remained

outstanding until 2015. At that time the extradition boundaries were expanded to include the Western United States. 2 CP 41. The defendant was then arrested on the warrant in Arizona. 8/7/15 RP 4.

When the defendant was brought before the court she was terminated from the CHART program. The court then found the defendant guilty of the charge beyond a reasonable doubt based on agreed documentary evidence. 8/7/15 RP 5-6. At sentencing the State reported the standard range was 67 to 89 months confinement. That range was based on the report from the Department of Correction in the DOSA/Risk Assessment. The court accepted that representation and sentenced the defendant to a prison based DOSA. It imposed 39 months confinement and 39 months community custody. 3 CP \_\_ (sub 43); 11/6/15 RP 2, 13.

### **III. ARGUMENT**

#### **A. THE SENTENCE WAS BASED ON AN INCORRECT STANDARD RANGE.**

A standard range sentence is determined by the offense seriousness level and the offender score. RCW 9.94A.530(1). The offense seriousness level is determined by the offense of conviction. RCW 9.94A.520. The offender score is determined by the number of current and prior convictions that have not washed.

RCW 9.94A.525. A sentence imposed under 9.94A RCW is determined in accordance with the law in effect when the current offense was committed. RCW 9.94A.345.

The defendant was convicted of delivery of a controlled substance, cocaine. 1 CP 6. In 2002 that was a level VII offense. See former RCW 9.94A.515<sup>1</sup>. The defendant's prior criminal history included 5 prior convictions for possession of a controlled substance and one prior conviction for possessing a fictitious check in California. 1 CP 7-8. With an offender score of 6 the sentencing range was 57-75 months confinement. RCW 9.94A.510. The court erred when it determined the standard range was higher than that. The court has a duty to correct an erroneous sentence upon its discovery. In re Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). The court should remand the matter to the trial court to re-sentence the defendant within the correct standard range.

**B. THE COURT WAS REQUIRED TO COUNT ALL OF THE DEFENDANT'S PRIOR CONVICTIONS IN HER OFFENDER SCORE.**

Before the defendant was charged with delivery of a controlled substance she had two prior felony convictions. After the

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<sup>1</sup> Delivery of a controlled substance, cocaine is currently listed as a level II drug offense RCW 9.94A.518. That statute became effective July 1, 2004. Laws of Washington 2002 Ch. 53, §57.

defendant failed to appear but before she was convicted of the Snohomish County charge the defendant was convicted of four separate counts of possession of a controlled substance. 1 CP 7-8. Each of these convictions were "prior convictions" that counted toward the defendant's offender score. RCW 9.94A.525. It was immaterial that four of the convictions entered after the date of offense in her current case. State v. Shilling, 77 Wn. App. 166, 175, 889 P.2d 948, review denied, 127 Wn.2d 1006 (1995).

The defendant argues that the doctrine of equitable estoppel should apply to exclude from her offender score the four convictions that entered after she failed to appear for drug court and a warrant had been issued for her arrest. The court should reject this argument for two reasons.

First the defendant has failed to preserve this issue for review. She accepted State's representation regarding her offender score at sentencing. She did not argue that the four prior convictions should not be included in her offender score on the basis that she now asserts on appeal. 11/6/15 RP 4-6. Generally the reviewing court will not consider an issue raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception applies for sentences imposed in excess of

the court's statutory authority. State v. Mercado, 181 Wn. App. 624, 632, 326 P.3d 154 (2014). Since the sentence conforms to the requirements of the Sentencing Reform Act this exception does not apply.<sup>2</sup>

The court may consider the issue if it involves manifest constitutional error. RAP 2.5(a)(3). To justify review under this provision the defendant must identify the constitutional error and show how, in the context of the case the alleged error actually affected her rights. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The facts necessary to adjudicate the claimed error must be in the record on appeal. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant has not addressed any of these requirements.

The issue here does not involve a constitutional question. Rather the defendant asks the court to apply equitable doctrines to excuse application of a statute to her case. Her "rights" were to be treated equally with others who committed the same offense and

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<sup>2</sup> The defendant did not contest the calculation of the offender score for purposes of this appeal except on the basis of equitable estoppel. BOA at 4, n. 2. Although the court did not have proof of the defendant's prior California convictions when it calculated her offender score the parties may provide that proof on remand for resentencing within the correct standard range. RCW 9.94A.530(2), State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014).

had the same criminal history. RCW 9.94A.010(1), (3). Those rights were respected when the court applied RCW 9.94A.525 correctly to calculate her offender score.

Moreover the facts necessary to adjudicate the issue are not in the record on appeal. To assert the doctrine of equitable estoppel applies a party must establish by clear, cogent, and convincing evidence (1) an admission, statement or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act. State v. Yates, 161 Wn.2d 714, 737-738, 168 P.3d 359 (2007), cert denied, 554 U.S. 922 (2008). The defendant claims that the State acted inconsistently when it did not expand its extradition parameters from statewide to Western States until 13 year after the warrant issued. She states that she relied on that restriction on extradition by living freely out of state during that time frame. Assuming for the sake of this argument that the extradition parameters are a statement there is nothing in the record showing the defendant knew that she had a warrant for her arrest when she failed to appear, or that she was aware of the extradition parameters. Nor is

there anything showing that she relied on the original parameters to believe that she could commit new crimes without facing increased punishment if she was convicted of new crimes when she was ultimately brought before the court on this charge.

Second, if this court does decide to consider the issue it should be rejected because the doctrine does not apply in this circumstance. The defendant has not cited a criminal case in which the doctrine of equitable estoppel applied. The doctrine was specifically held not to apply in the context of plea agreements. Yates, 161 Wn.2d at 738. It should not apply in this context because it “typically can be invoked only by persons who have demonstrated their own ‘clean hands,’ [which] seem unsuitable for general incorporation into the criminal law.” Id. quoting, United States v. Anderson, 637 F. Supp. 1106, 1109 (D. Conn. 1986). A defendant who defies a court order by failing to appear for a scheduled hearing and then obtains new convictions can hardly be said to have “clean hands.”

Courts have disfavored the application of the doctrine of equitable estoppel against the government. Kramarevcky v. Department of Social and Health Services, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). In addition to the three elements already

noted a party asserting the doctrine against the government must also show that “equitable estoppel is (1) ‘necessary to prevent a manifest injustice’ and (2) would not ‘impair[]’ ‘the exercise of governmental functions.’” Yates, 161 Wn.2d at 738 quoting Kramarevcky 122 Wn.2d at 744.

The defendant has not shown that either the first or second element of an equitable estoppel claim has been satisfied. Neither the “statement” in the warrant limiting the scope of extradition to statewide nor the later “statement” expanding that scope to Western States said anything about how the defendant’s offender score would be calculated should she be later convicted on the charge. Thus, it was not contrary to any statement the court made when it issued the warrant to include new convictions entered against the defendant while the warrant was outstanding. Because it made no statement in regard to the defendant’s offender score, she cannot be said to have relied on the warrant parameters to believe that she would be free to commit new crimes without a corresponding increase in her offender score should she be arrested and convicted of the charged crime.

Nor has the defendant established the third element of her claim because she was not harmed. She was treated equally with

other similarly situated defendants when all of her criminal history was considered in the offender score calculation. Doing so satisfied two purposes of the SRA to “ensure that punishment for a criminal offense is proportionate to the seriousness of the offense and the offenders criminal history,” and “to be commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010(1), (3).

She also fails to demonstrate the fourth element of equitable estoppel. Giving the defendant equal treatment to those who have been convicted of the same crime and who have the same criminal history is justice. She has not shown that eliminating the four post-warrant convictions from her offender score it is necessary to avoid a manifest injustice.

Finally, the defendant argues that the fifth element is met because employing the doctrine would force the State to choose between expanding the extradition parameters of a warrant at the time the warrant is issued or accurately determining the defendant's punishment by counting convictions entered in the defendant's criminal history after the warrant was authorized. The suggested choice however is really between incurring potentially unnecessary governmental expenditures of resources or undermining the

purposes of the State's sentencing scheme. In either case government functions would be impaired.

Washington has adopted the uniform criminal extradition act. White v. King County, 109 Wn.2d 777, 780, 748 P.2d 616 (1988), 10.88 RCW. That chapter provides a mechanism for bringing fugitives to justice. However nothing in the statute requires a court to seek extradition from outside the borders of the State. There are costs associated with extradition. Not only are there travel costs associated with bringing a fugitive back to the State but there are administrative costs as well. RCW 10.88.220. There may also be costs associated with responding to a challenge to a governor's warrant. White, supra, RCW 10.88.290. Depending on the defendant's financial status the government may never be able to seek recoupment of those costs from the defendant should she be convicted of the crime. State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). A trial court and local prosecutor's office with a limited budget may choose to prioritize those cases that it will seek extradition for outside the state.

Where there is no reason to think that a defendant had fled the State, authorizing extradition beyond the State's borders would be a useless act. Here there is nothing in the record at the time the

warrant had been issued to suggest that the defendant would flee to California or Arizona where she was eventually arrested. She had agreed to enter into a long term drug court treatment program just one month before she failed to appear. That commitment suggested that the defendant intended to stay in the area for the time being.

The other choice suggested by the defendant's position would be to prevent the court from counting all of the defendant's criminal history that had not "washed" in her offender score. Doing that would sacrifice the purposes of the Sentencing Reform Act. Punishment would not be commensurate with punishment imposed on others who committed similar crimes. Nor would it provide punishment which is proportionate to the seriousness of the offense or the defendant's criminal history. Perhaps the most serious impairment would be to promoting respect for the law which is also a stated purpose of the SRA. RCW 9.94A.010(2). A person should not be rewarded for willful disobedience to a court order to appear at a hearing and then compound the seriousness of her conduct by committing new crimes in another jurisdiction. The alternative suggested by the defendant's argument would do just that.

The defendant has not shown by clear, cogent, and convincing evidence that any of the five elements of equitable estoppel apply to her case. If the court does consider her argument that it should be applied to the calculation of her offender score it should be rejected.

**C. THE COURT SHOULD NOT EXERCISE ITS DISCRETION AND CONSIDER THE DEFENDANT'S CHALLENGE TO HER LEGAL FINANCIAL OBLIGATIONS FOR THE FIRST TIME ON REVIEW.**

The court imposed \$500 victim assessment, \$100 biological sample fee, and \$600 for drug court fees. 1 CP 11. The defendant had agreed to pay the drug court fee when she entered into the drug court program. 1 CP 22, 25. The court did not inquire into the defendant's ability to pay before he imposed those obligations. 11/6/15 RP 6-13.

For the first time on appeal the defendant argues that the trial court erred when it imposed the legal financial obligations without first considering her ability to pay. The remedy she seeks is an order on remand striking the obligations imposed. The court should refuse to do so. At most, at re-sentencing the trial court should be allowed to make an independent determination after inquiring into the defendant's ability to pay the discretionary costs.

Generally courts will not consider an issue that has not been raised in the trial court. RAP 2.5(a). Nevertheless the Supreme Court recently exercised its discretion to consider this issue in Blazina, 182 Wn.2d at 830 and State v. Duncan, 185 Wn.2d 430, 437-438, 374 P.3d 83 (2016). The defendant does not address this procedural bar. There are several reasons why this Court should not excise its discretion to consider the issue.

First, two of the three legal financial obligations did not require an ability to pay inquiry. The court is required to make an ability to pay inquiry if the obligation is a cost. RCW 10.01.160(3). Costs are "limited to expenses specially incurred by the state in prosecuting the defendant or administering a deferred prosecution program under 10.05 RCW or pretrial supervision." RCW 10.01.160(2). Neither the victim assessment nor the DNA fee are costs. Rather they are mandatory obligations the court must imposed. State v. Clark, 191 Wn. App. 369, 374, 362 P.3d 309 (2015), State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), State v. Mathers, 193 Wn. App. 913, 919-921, 376 P.3d 1163, review denied, \_\_\_ Wn.2d \_\_\_ (2016).

Second, as to the remaining financial obligation this case is in a different procedural posture than those cases which have

decided to consider the issue as it relates to discretionary costs. Here the drug court fee can be characterized as a court cost as defined by RCW 10.01.160(2). However the defendant agreed to pay this cost when she accepted the benefit of drug court. She agreed that she would not get a refund for any payments made if she were terminated from the program before completing it.1 CP 22. Had she completed drug court her charge would have been dismissed. 1 CP 23. In exchange the court and the State agreed to expend considerable resources over a one year period of time or longer to assist the defendant in maintaining her sobriety and achieving a law-abiding lifestyle. 1 CP 22, 24-25. (Noting that in addition to the defendant and her attorney, a prosecutor, the judge, a CHART coordinator, and CHART treatment provider would be involved in the defendant's case).

The court should have the authority to enforce that agreement without further inquiry into the defendant's ability to pay. Where the defendant has agreed to pay the drug court fee and has failed at the program she should not be treated any differently than those who have made the same agreement and succeeded.

Third, the State concedes that the matter must be remanded to the trial court for to re-sentence her within the accurate standard

range. If an ability to pay inquiry is appropriate for the drug court fee then at that time the defendant will have the opportunity to present information to the trial court bearing on her ability to pay that discretionary cost. Even courts which have considered the issue for the first time on review do not strike the legal financial obligations as the defendant has requested. Rather the remedy is to remand for consideration of the defendant's ability to pay. Blazina, 182 Wn.2d at 839, Duncan, 185 Wn.2d at 437-438.

#### **IV. CONCLUSION**

For the foregoing reasons the court should remand the case to the trial court to resentence the defendant within the correct standard range. The court should not apply the doctrine of equitable estoppel to prevent the trial court from including all of the defendant's criminal history in her offender score. The court should

refuse consideration of the defendant's challenge to her legal financial obligations.

Respectfully submitted on October 6, 2016.

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THE STATE OF WASHINGTON,  
  
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DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 7<sup>th</sup> day of October, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Marla Zink, Washington Appellate Project, [marla@washapp.org](mailto:marla@washapp.org); and [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

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

Dated this 7<sup>th</sup> day of October, 2016, at the Snohomish County Office.

  
\_\_\_\_\_  
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