

No. 44646-4-II  
Cowlitz Co. Cause No. 12-1-01066-5

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Respondent,

v.

**SANDY FEHR,**

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. ANSWERS TO ASSIGNMENT OF ERROR**

1. The conviction does not violate Appellant's right to due process.
2. There was sufficient evidence for a rational trier of fact to find the elements of possession with the intent to distribute beyond a reasonable doubt.
3. There was sufficient evidence for a rational trier of fact to find the elements of possession with the intent to distribute beyond a reasonable doubt.
4. There was sufficient evidence for a rational trier of fact to find that the Appellant had the intent to deliver.
5. Appellant acknowledged the criminal convictions and offender score.
6. The trial court's calculation of offender score was proper.
7. The trial court's calculation of the offender score was proper.
8. Appellant acknowledged her prior convictions.
9. Appellant was not subject to a persistent offender sentence and the sentencing procedure did not violate her rights.
10. Appellant was not subject to a persistent offender sentence and the sentencing procedure did not violate her rights.

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

The Respondent generally accepts the Appellant's recitation of the facts with the following additions. Detectives testified that Methamphetamine is usually smoked. RP 47. Methamphetamine is often sold by "points," which roughly correlate to tenths of a gram. RP

48. The Longview Police Street Crimes unit ordinarily buys 0.2 to 0.6 grams of methamphetamine at a time. RP 72. Drug users tend to buy drugs as they need them, often just a day's worth at a time. RP 72. Drug dealers who are themselves drug addicts will often purchase a quantity of drugs, take some for themselves, then sell the remainder to fund their habit. RP 75-76.

At the time of the arrest, Appellant was contacted at a garage sale, where she was apparently involved in selling goods. RP 52. When the Appellant was searched, Detective Sgt. Hartley found a small purse in the front "kangaroo pocket" of her sweatshirt. RP 83. In that purse, Sgt. Hartley found a pipe with residue, some pills, and a small quantity of methamphetamine. RP 83. Sgt. Hartley testified that this purse was consistent with what he termed a "user's kit." RP 88. He testified kits usually contained the implements to ingest drugs, as well as the drugs themselves. RP 89. Sgt. Hartley then found, in her right front pants pocket, a baggy with 5.2 grams of methamphetamine in it. RP 83. This amounted to approximately \$500 worth of methamphetamine. RP 90.

Appellant personally acknowledged the bail jump convictions. RP 180. Counsel for Appellant acknowledged the offender score, the prior drug possession convictions, the prior convictions for bail jumping, and the prior conviction for possession with intent. RP 187.

He also acknowledged the three delivery convictions from the previous case in arguing for a reduced sentence. RP 187.

### **III. ARGUMENT**

#### **A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT**

There was sufficient evidence to support the jury's verdict of guilty. The test for sufficiency of the evidence is whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. George*, 146 Wn.App. 906, 919, 193 P.2d 693 (2008); *citing State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). As this court noted in *State v. Summers*, "in determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case." 107 Wn.App. 373, 28 P.3d 780 (2002). The question becomes, drawing all rational inferences in favor of the State and against the defendant, whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt and whether such a finding would be supported by substantial evidence. The answer is yes.

To support the inference that the appellant possessed with the intent to deliver where the inference is based on a large quantity, some additional factor must be present. *State v. Hutchins*, 72 Wn.App. 211, 216, 868 P.2d 196 (1994). The State presented evidence that the Appellant had methamphetamine on her person, in two different locations. In one location, a purse kept in the front pocket of her sweatshirt, Appellant had about a gram of a crystalline substance, a pipe with residue, 3 pills, and an empty baggy. In a separate location, Appellant had about 5.2 grams in a baggy in the pocket of her pants. Testimony established that the amount was significantly more than an average user would have, with the average user buying 0.2 grams at a time, and paying approximately \$10 per 0.1 grams. Testimony also established that the buying bulk was very rare in the user-community.

The State simply had to show some additional factor to support the inference of intent to deliver, over and above the mere amount of narcotics. The single most compelling piece of evidence is the division of the controlled substance. Some of the methamphetamine, a small amount, was kept in a separate location with the item that would allow its use, the pipe. A larger, separate, bag was kept in the pants pocket. The jury was allowed to consider and infer that the purpose of keeping the drugs in a separate location was to keep it separate for sale. This theory was consistent with the testimony of detectives that individuals that both sold and used would

typically purchase a large amount, then “pinch” off some for personal use, while they kept separate the drugs to be sold in order to fund their habit. The lack of baggies, scales, or cash on hand are factors the jury could have considered, in much the same way the jury was free to consider the fact that she was arrested at a garage sale, where she was apparently selling “a generator,” and where she was not actually outside, but inside the house. It is reasonable to infer that the lack of sales paraphernalia on her person, given those circumstances, is unremarkable since such paraphernalia could easily have been left inside the house.

The State presented sufficient evidence and the jury’s verdict in this case was based on more than simply the amount of drugs present. The “kit” that was found, separate and apart from the larger quantity in her pocket, reasonable implies that one was for personal use and the other for sale. That fact alone is sufficient, when considered with the testimony regarding the amount, to support the verdict. The Appellant’s conviction should be affirmed.

**B. APPELLANT ACKNOWLEDGED HER CONVICTIONS AND HER OFFENDER SCORE WAS APPROPRIATELY CALCULATED**

The Appellant explicitly acknowledged the convictions used to calculate her offender score and the offender score was then properly calculated. The State bears the burden of proving prior convictions by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472,

479-80, 973 P.2d 452 (1999). Where there is “affirmative acknowledgement” of the facts and information alleged at sentencing, the State is relieved of its evidentiary obligations. *Id.* at 482-483. Appellant acknowledged the prior convictions. The convictions were appropriately applied to her offender score, and her sentence was lawful.

Appellant acknowledged her prior convictions. Unlike in *State v. Hunley* and its forebears, Appellant did not simply stand silent, or argue for a sentence consistent with the standard range calculation. 175 Wn.2d 901, 287 P.3d 584 (2012). Appellant specifically acknowledged the bail jumps when arguing for an appeal bond. RP 180. Defense counsel specifically acknowledged the prior drug convictions and bail jumps when attempting to seek a low-end sentence. RP 187. This acknowledgement came in the context of illustrating the relatively low level Appellant held within the drug hierarchy. RP 187. This tactic appeared to attempt to paint her as a user who needed treatment. RP 187. Nonetheless, the acknowledgement of criminal history was explicit and went beyond simply seeking a standard range sentence, instead justifying the recommendation based upon the fact of the prior convictions and the facts inherent in those convictions. The offender score was appropriately calculated based on prior convictions which were proven sufficiently to support the sentence. The sentence should be

affirmed.

**C. APPELLANT WAS NOT SENTENCED AS A PERSISTENT OFFENDER AND THE SENTENCE SHOULD NOT BE VACATED**

Appellant was not sentenced as a persistent offender and the sentence should not be vacated. It appears that sections III and IV of the Appellant's brief may have been inappropriately pasted from another brief. Appellant was not subject to a persistent offender sentence. Appellant was given a standard range sentence. RP 188-89. Both sections III and IV are specific in their request to vacate a persistent offender sentence, base their analysis on the significant liberty interest at stake in a persistent offender sentence, and propose that proving prior convictions to a jury would be minimally burdensome to the State. These arguments do not make sense in this case, where Appellant was subject to a standard range sentence. The sentence should be affirmed.

**IV. CONCLUSION**

The jury's verdict in this case was supported by substantial evidence. The jury was presented with testimony that went beyond the simply proposition that a large amount of drugs implies an intent to distribute. The jury heard testimony about "user kits," the costs and common practices of user-dealers, and the two separate locations and circumstances surrounding the narcotics found on Appellant's person. There was sufficient evidence for a rational trier of fact to

find the Appellant intended to deliver methamphetamine beyond a reasonable doubt.

The trial court appropriately calculated the offender score. The Appellant acknowledged the prior convictions explicitly at sentencing, through defense counsel. This is sufficient under Ford. The sentence should be affirmed.

Finally, the trial court did not impose a persistent offender sentence, so this court should deny Appellant's request for relief on the basis that such a sentence would be unlawful. The sentence should be affirmed.

Respectfully submitted this 8<sup>th</sup> day of January, 2014.

SUSAN I. BAUR  
Prosecuting Attorney

By:



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DAVID L. PHELAN/WSBA # 36637  
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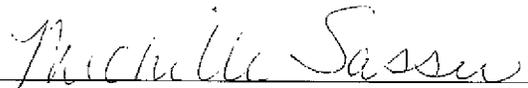
**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 8, 2014.

  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## January 08, 2014 - 1:33 PM

### Transmittal Letter

Document Uploaded: 446464-Respondent's Brief.pdf

Case Name: State of Washington v. Sandy Fehr

Court of Appeals Case Number: 44646-4

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Statement of Arrangements

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Answer/Reply to Motion: \_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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#### Comments:

No Comments were entered.

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