

No. 45702-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

KIRK W. RHODEN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable John R. Hickman, Judge

OPENING BRIEF OF APPELLANT

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress statements made during a second interrogation when the first interrogation occurred in violation of Miranda v. Arizona, 384 U.S. 436, 460-61, 86 S. Ct. 1602, 16 L. Wd. 2d 694 (1966), and the second, while made after Miranda warnings, was not free of the taint of the first interrogation and was instead simply a repeat and extension of the initial questioning.
2. Appellant Kirk W. Rhoden assigns error to “CONCLUSIONS AS TO ADMISSIBILITY” in the Findings of Fact and Conclusions of Law [on] Admissibility of Statement, CrR 3.5, d, h and i, which provide:
 - d. Deputy Olesen did not use any undue pressure in order to get the defendant to answer his questions. No threats or promises were made to the defendant in exchange for his statements.
...
 - h. Defendant made a freely, knowing and intelligent waiver of his constitutional rights prior to answering Deputy Olesen’s questions.
 - i. All of defendant’s statements made in the kitchen ARE admissible at trial.
- CP 99.
3. The trial court’s error in failing to suppress the evidence was not harmless.
4. The sentencing court erred as a matter of law in failing to comply with RCW 10.01.160(3) when imposing legal financial obligations.
5. Appellant assigns error to the boilerplate “finding” pre-printed on the judgment and sentence which provides

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood the defendant’s status will change. The court finds that the defendant has the ability or

likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 108.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An officer repeatedly questioned Rhoden in the living room, eliciting incriminating statements about what contraband officers would find in the house. Rhoden and others were in handcuffs after a SWAT team served an unrelated warrant on the house where Rhoden was living, at 5:30 in the morning.

The officer did not read Rhoden his rights prior to eliciting the incriminating statements.

Once he had learned about guns, drugs and other items from this questioning, the officer then took Rhoden into the kitchen and read him his rights, apparently from memory. The officer did not have Rhoden sign anything indicating he was waiving his rights but said Rhoden orally did so. The officer then asked essentially the same questions and elicited the same incriminating responses as in the initial interrogation.

Where, as here, police use improper tactics in violation of Miranda and elicit a statement from a suspect, does the trial court err in failing to suppress a later statement where the taint of the initial, improper interrogation remains and the second interrogation is effectively a continuation and repeat of the first?

2. Under RCW 10.01.160(3), did the trial court err as a matter of law in failing to determine the defendant's actual ability to pay and the potential effect of the imposition of several thousand dollars of costs on the indigent defendant before imposing legal financial obligations of \$1800, with interest of 12% starting to run from the date of the sentence, not the date of release?
3. Does a pre-printed "finding" entered in every case satisfy the requirement of amounting to an actual finding relative to the specific situation of the individual defendant?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Kirk Rhoden was charged by information with unlawful possession of methamphetamine. CP 4; RCW 69.50.4013(1). Pretrial proceedings were held before the Honorable Judge Bryan Chuschcoff on August 29, 2013, after which trial was held before the Honorable Judge John R. Hickman on October 31, November 4, 18, 19 and 20, 2013.¹ The jury convicted Rhoden as charged. CP 94.

On December 13, 2013, Judge Hickman ordered Rhoden to serve a standard-range sentence. 3RP 13-15; CP 107-117.

Mr. Rhoden appealed and this pleading follows. CP 118.

2. Overview of facts relating to charge

It was about 5:30 in the morning on February 26, 2013, when the Pierce County Sheriff's Department (PCSD) Special Weapons and Tactics ("SWAT") Team and other officers served a warrant on a home on 160th Street East. RP 155-56, 202. After surrounding the home with cars, officers and an armored vehicle, they used a public announcement system to declare their presence and order everyone in the house to come out. RP 157-63. One of the five or so people who left the house that early morning was later identified as Kirk Rhoden. RP 159.

The officers searched the home and spoke to the people who had

¹The verbatim report of proceedings will be referred to as follows:
the volume containing the proceedings of August 29, 2013, as "1RP;"
the chronologically paginated volumes containing the proceedings of October 31, November 4, 18, 19 and 20, 2013, as "RP;"
the sentencing on December 13, 2013, as "SRP."

been inside. RP 171-74.

In a dresser in one of the two bedrooms, officers found a plastic baggie with some white powdery substance, which later tested positive for methamphetamine. RP 208, 259. An electronic “gram” scale and three “glass smoking devices” were also in the dresser, but two of those devices were broken. RP 208-209, 228. They also found a white powder on a plate on a nightstand next to the bed in the same room. RP 210-11. Also in the dresser were some papers with Kirk Rhoden’s name on them and the address of the home. RP 210.

An officer, Deputy Thomas Olesen, confronted the people inside the house, who were handcuffed and being held in the living room. RP 170. The officer also specifically spoke to Rhoden. RP 170-72.² The officer then took Rhoden into the nearby kitchen, read Rhoden his rights, and asked him questions again. RP 170-71. The questions were all about “specific items that may be located in the residence,” and whether officers would find narcotics and other contraband. RP 171-72.

According to the officer, when asked whether officers would find anything illegal in the house, Rhoden said they would find methamphetamine in “his” bedroom, along with other things. RP 172. Rhoden was asked how long he had been using meth and admitted it had been several months. RP 172-74. Rhoden was also asked how he consumed it, where it would be found in the room and how much would be found. RP 172-73. He said he smoked the meth in order to ingest it

²The content of that first statement and the circumstances of its making and that of the second interrogation are discussed in more detail in the argument section, *infra*.

and identified the dresser in the room as where about a gram of the drug would be found. RP 175-87. The officer also said that Rhoden had indicated other things which would be found in the bedroom which were so found but did not detail what those items were. RP 171-72, 193-95.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS RHODEN'S POST-MIRANDA INCRIMINATING STATEMENT AS AN IMPROPER TWO-STEP PROCESS WAS USED AND THE FIRST STATEMENT WAS ELICITED DURING CUSTODIAL INTERROGATION CONDUCTED BEFORE RHODEN WAS READ HIS RIGHTS

Under both the state and federal constitutions, a suspect has the right to be free from self-incrimination. See Miranda, supra; State v. Hickman, 157 Wn. App. 767, 238 P.3d 1240 (2010); Fifth Amend.; Art. 1, § 9. In Miranda, the Supreme Court recognized that custodial interrogation is inherently coercive, so that it can only be constitutionally valid to use statements resulting from such interrogation if the police have adequately and effectively apprised the defendant of his rights and he had knowingly, voluntarily and intelligently agreed to waive them. Miranda, 364 U.S. at 467; Hickman, 157 Wn. App. at 772. Miranda warnings “protect a defendant from making incriminating statements to police while in the coercive environment of police custody.” Hickman, 157 Wn. App. at 772. As a result, if the police fail to follow the requirements of Miranda and properly read a suspect his so-called “Miranda” warnings, any statements he makes are presumed to be involuntary and thus inadmissible in our courts. See State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988).

Further, courts are leery of police tactics clearly designed to simply circumvent Miranda requirements. As a result, in Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), a plurality of the U.S. Supreme Court found that a second statement which is made even following Miranda warnings is not admissible when the first statement was made without such warnings and the two statements were effectively part of the same interrogation with the officer deliberately using a “two-step” interrogation process to get around the requirements of Miranda. See Hickman, 157 Wn. App. at 772.³ In Seibert, the Court condemned “an interrogation technique where a law enforcement officer questions a witness first, then gives Miranda warnings, and attempts to elicit the same answers given before the warnings.” State v. Grogan, 147 Wn. App. 511, 519, 195 P.3d 1017 (2008), review granted and remanded to intermediate appellate court on other grounds, 168 Wn.2d 1039, 234 P.3d 169 (2010); Seibert, 542 U.S. at 604-607.

In this case, this Court should reverse, because the trial court erred in failing to suppress the statements Rhoden made in the kitchen, which were effectively part of a two-step process of ongoing interrogation.

a. Relevant facts

At the 3.5 hearing on the motion to suppress all of Rhoden’s statements to Deputy Olesen at the house that day, Olesen testified about being there with many other officers in order to serve a search warrant on

³Discerning the true holding of Seibert has confounded many courts, because the Court was so fragmented and the decisions do not show a single rationale for the plurality result. In Hickman, however, this is the interpretation this Court found should be used. 154 Wn. App. at 772.

the house as part of an auto-theft ring investigation. RP 88, 91. Olesen, who said he had been asked to “kind of run” the police activity that day, did not go into the residence at the time the warrant was served, instead arriving maybe 10-15 minutes after the entry. RP 91, 108.

When he arrived, Olesen made contact with all of the people in the house, who were in handcuffs in the living room. RP 92. No one was being allowed to move around and they had all been ordered to “[r]emain where they were at.” RP 93, 104-105. Olesen was clear the people in the living room were “not free to leave, let alone move around[.]” RP 105.

The officer sort of spoke to the “group,” in order to “serve the warrant.” RP 107. Ultimately, Olesen specifically spoke with Rhoden in particular. RP 93. Without reading Rhoden his Miranda rights, the officer asked Rhoden if officers would find any drugs or guns in the residence, and Rhoden said there would be some drugs in his bedroom and at least one gun, if not more. RP 93, 108. The officer admitted that some of the people being held in the living room refused to answer the officer’s questions, but said he made no threats or promises to Rhoden to get him to speak. RP 93-94.

After that, Olesen said, he spoke to Rhoden in the kitchen, this time reciting for Rhoden the Miranda warnings first. RP 94. At the time, the officer admitted that the police had not yet started really beginning their search. RP 94-95. Rhoden was specifically escorted to the kitchen by officers. RP 105-106.

In the kitchen, the officer was still wearing a firearm on his hip, and, although he could not recall for sure if Rhoden was still in handcuffs,

he thought it was likely the trial court would later find it was “more likely than not” that Rhoden was so restrained. RP 95-96, 105; CP 97.

Olesen said Rhoden said he understood each part of his rights, did not ask for clarification or express any confusion and did not appear to be “under the influence.” RP 98-99. The officer did not have Rhoden sign anything so indicating, although he admitted he could have brought along a form for that purpose. RP 115-16.

During the 5-10 minutes he interrogated Rhoden in the kitchen, Olesen said, Rhoden again answered the questions about whether any guns or drugs would be found and where they would be found. RP 100.

When asked if he asked the “same questions or questions . . . in the second contact . . . [as] you asked previously in the first contact,” the officer admitted, “[p]retty much, yes.” RP 115-16.

The officer admitted that the warrant he was there to serve was not for anything relating to narcotics or guns. RP 124. Based on what Rhoden and another person told him in that initial statement, the officers then secured an amended warrant to allow them to search for drugs and guns. RP 124-25.

In arguing the motion, the prosecutor first conceded that the initial questioning in the living room had occurred when Rhoden was “in custody for purposes of Miranda right[s],” without him being read his rights as required. RP 129. As a result, the prosecutor admitted, those statements were not admissible, at least in the state’s “case in chief.” RP 129. Counsel questioned whether the second statement was freely and voluntarily given, given the timing, the fact that the officer had asked the

same questions and that the officer admitted he had conducted the interrogation in the kitchen the same way as the prior, improper interrogation. RP 131-32. Counsel noted that the officer had asked the same questions the same way and that was a “subtle coercion” from the first interrogation, tainting the second. RP 131-32. He said the pressure was on for Rhoden to “answer consistently because the officer had already asked him” the same questions, “repeating what he had already been asked in violation of his rights.” RP 133.

In ruling on the issue, the court first found that “there was not an advisement of rights in the living room, that the defendant was not free to move about or to leave the residence, that he was handcuffed,” and that he was interrogated. RP 138. The court said it was clearly “part of an investigation,” not innocent questions, and was intended to be part of the “investigatory process,” so it would be in violation of Miranda to admit those statements. RP 138.

Regarding the subsequent reading of rights and questioning in the kitchen, the court found that, when the officer took Rhoden into the kitchen, he was clearly still not “free to leave and that was a custodial atmosphere in which those . . . questions were asked.” RP 139. The court then found that, because it appeared that the full Miranda warnings were read, a “proper foundation was laid by the State as to there being a free and voluntary waiver.” RP 140. The judge said there was no “undue pressure” committed by the officer, then went on:

[Rhoden] had indicated a spirit of cooperation in the living room, and he continued to exercise that cooperation in the living room. And I can’t speculate as to what his motives were or not. All I

know is that based on the un rebutted testimony of the officer, [Rhoden] did not indicate his desire to have an attorney. . .[or] indicate any confusion. No promises were made to him.

RP 140. As a result, the judge found the statement “meets the legal requirement of a freely and voluntary statement made without any undue pressure.” RP 140. The court also found that the officer took Rhoden into the kitchen “to avoid the disruption and noise of the living room and have an opportunity to question him in a more private setting[.]” RP 141.

b. The trial court should have suppressed the second statement

The trial court erred in failing to suppress the statement in the kitchen, because it was part of the ongoing interrogation which started in the living room and was essentially an improper “two-step” interrogation condemned in Seibert. In Hickman, this Court noted that it is not necessary for a court to determine that the interrogator subjectively *intended* to avoid the application of Miranda. 157 Wn. App. at 774-75. Instead, the court is required to

consider whether objective evidence and any available subjective evidence, such as an officer’s testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning. Such objective evidence would include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.

Hickman, 157 Wn App. at 775, quoting, United States v. Williams, 435 F. 3d 1148, 1157-58 (9th Cir. 2006).

Applying those standards here, an improper “two-step” procedure was, in fact, used. Indeed, all of the objective and subjective evidence proves this point. The officer’s own testimony shows that the second

interrogation was essentially a repeat and continuation of the first. The two statements occurred within moments of each other. They were made to the same officer. And the first statement was clearly thorough, including not only that drugs and guns would be found but where they would be found, establishing how the defendant consumed the drugs and how often, and even how much officers could expect to find. Those are the very same questions the officer asked in the kitchen.

Indeed, the evidence shows that the break between the two statements was only for the purposes of physically moving Rhoden away from others, reading his rights and then getting him to repeat his incriminating statements in the kitchen. A “deliberate two-step interrogation” occurs when an officer purposefully questions a suspect without Miranda warnings, obtains a confession, then gives ineffective “mid-stream” warnings and has the suspect repeat his confession. See Williams, 435 F.3d at 1150. In Seibert, the police arrested the defendant and then engaged in questioning without reading Miranda warnings for about 30-40 minutes, during which the defendant confessed. Seibert, 542 U.S. at 604-605. The officers then gave her a 20 minute break for coffee and cigarettes. Seibert, 542 U.S. at 605. When they returned, the officers then read her rights, got her to waive them and got her to repeat her confession. Id.

Here, it does not appear that even 20 minutes passed between the first and second interrogations. Indeed, they were effectively part of the same continuous interrogation. Olesen’s initial interrogation of Rhoden was specific and complete. It covered all of the potentially incriminating

statements Rhoden could have made. It was a deliberate questioning, done before Miranda warnings were read. And it was done by an experienced officer who was assigned to lead the search that day, who *knew* that the warrant did not cover guns or drugs. Once he had elicited the incriminating statements and gotten all of the details, the officer already had what he wanted and needed. His movement of Rhoden to the kitchen, a few moments later, to *then* read Rhoden his rights and simply reask the exact same questions in order to elicit the incriminating statements again cannot be deemed anything other than a deliberate use of an improper “two-step” interrogation strategy designed to get around Miranda. This Court should so hold.

c. The error was not harmless

The improper admission of custodial statements is reviewed under the constitutional “harmless error” standard. See Arizona v. Fulminante, 499 U.S. 279, 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Under that standard, this Court presumes that the error is prejudicial and further that reversal is required. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986). The only way to meet that burden is for the prosecutor to show that *any and every* reasonable jury would necessarily still have convicted even absent the error. Id. This standard is far different than the deferential standard used in cases where the issue is sufficiency of the evidence. See State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). In those cases, this Court will affirm unless *no* reasonable jury could have convicted, taking the evidence in the light most favorable to the state. See State v.

Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In stark contrast, with the constitutional harmless error test, the “overwhelming evidence” test, the Court is *required* to “reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Put another way, under the “overwhelming evidence” test, the Court is *required* to “reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

The prosecution cannot meet its heavy burden of proving the error harmless here. A “confession is like no other evidence,” and is “the most probative and damaging evidence that can be admitted.” Fulminante, 499 U.S. at 296, quoting, Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting). Further, the statement in the kitchen was raised over and over at trial and was a large part of the prosecution’s focus in initial and rebuttal closing argument. RP 166-88, 194-95, 303, 304, 305, 306, 307, 323, 325. In fact, the prosecutor relied on the “admissions” as proving its case even in light of the questions about the evidence. RP 325-26. The prosecution cannot prove the error “harmless” and this Court should so hold and reverse.

2. THE SENTENCING COURT ERRED IN FAILING TO COMPLY WITH STATUTORY REQUIREMENTS IN IMPOSING LEGAL FINANCIAL OBLIGATIONS

The authority to order the defendant to pay legal financial obligations is wholly statutory. See State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992); RCW 9.94A.760. In this case, even if reversal and remand for a new trial was not required, Mr. Rhoden would still be entitled to relief, because the sentencing court failed to follow statutory requirements in ordering the legal financial obligations in this case.

a. Relevant facts

At sentencing, the prosecutor asked the court to order Rhoden to pay certain fees, including “\$1,500 DAC recoupment.” SRP 4-5. When the court asked for the amount again, the prosecutor repeated it, then said that counsel “was appointed and this case did go to the trial,” so that “\$1,500 is appropriate under the circumstances.” SRP 5. For his part, counsel noted he was court-appointed. SRP 7-8. He then asked the court to “exercise discretion on nonlegal mandatory amounts[.]” SRP 8.

In imposing the sentence, Judge Hickman said, “[o]bviously, the attorney fees issue is not even close to market rate,” and that defense counsel had “put on a very spirited defense[.]” SRP 13-14. The judge said he would reduce the payment to “\$1,000 but would not “go any less than that.” SRP 13-14.

On the judgment and sentence, the court ordered the following costs: \$500 for “Crime Victim assessment,” \$100 DNA fee, \$1,000 court appointed attorney fees and \$200 Criminal Filing Fee. CP 109-10.

In a pre-printed portion of the judgment and sentence, the

document provided:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 108. Boilerplate language also imposed interest "from the date of the judgment until payment in full." CP 111-12. Similar, pre-printed language gave notice that the defendant counsel be subjected to "payroll deduction" if he is merely 30 days past due on an amount "equal to or greater than the amount payable for one month." CP 111-12. The defendant is also required to "pay the costs of services to collect unpaid legal financial obligations." CP 109.

b. The sentencing court acted outside its statutory authority in ordering the costs

This Court should vacate the imposition of costs and interest in this case, because the sentencing court acted outside its statutory authority in ordering Mr. Rhoden to pay these costs.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

In this case, the lower court did not make any specific findings that Mr. Rhoden, who was indigent, “is or will be able” to pay the \$1800 (plus interest) before ordering him to do so. Instead, the only such alleged “finding” was the pre-printed “boilerplate” finding, apparently included on every judgment and sentence in the county.

That finding, however, does not withstand review. A finding of fact must be supported by “substantial evidence in the record.” See State v. Echevarria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997). “Substantial evidence” is evidence sufficient to convince a rational, fair-minded trier of fact of the truth of the declared premise. Id. There is no evidence whatsoever that the court “considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood the defendant’s status will change” before entering the costs. Nor was there anything in the record showing an ability or likely future ability to pay.

Notably, a “boilerplate” finding is not evidence that the trial court actually gave independent thought and consideration to the facts of the particular case. See, e.g., Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). Indeed, there is not even a “box” next to the preprinted language for the judge to “check off” if she makes the relevant finding in the particular case - the “boilerplate” finding is presumptively entered in *every* case, regardless of the evidence or circumstances involved.

Thus, the “boilerplate” language did not amount to a proper finding

by the court sufficient to show compliance with the mandates of RCW 10.01.160(3). See, e.g., State v. Bertrand, 165 Wn. App. 393, 404 n. 13, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012). And while the Supreme Court has held that there is no constitutional requirement that a court enter formal, specific findings regarding ability to pay, where, as here, an unnecessary finding is made in “boilerplate” language, that “finding” is subject to this Court’s scrutiny. See Curry, 118 Wn.2d at 918; Bertrand, 165 Wn. App. at 404 n. 13. The trial court’s “boilerplate” “finding,” included by virtue of being in the judgment and sentence in every case, was unsupported by the record and wholly improper.

There was thus no true finding or consideration under RCW 10.01.160(3) before imposition of the costs in this case. Further, because interest is already running and accruing against Rhoden he is already suffering from the improper order.

It is important to remember that recoupment of costs against an indigent defendant are only constitutional when the trial court is required to consider ability to pay and if the procedures for modification of the obligation exist for those who cannot pay. See State v. Blank, 131 Wn.2d 230, 237, 930 P.2d 1213 (1997) (RCW 10.73 provision for appellate costs). In Blank, the failure to include a pre-imposition consideration of ability to pay was upheld because the defendant might later acquire the means to pay but could raise an objection to enforcement later based on inability to pay and/or ask for “remission” of those costs later. 131 Wn.2d at 242-43. And the Supreme Court specifically required that “ability to pay (and other financial considerations) must be inquired into before

enforced payment or imposition of sanctions for nonpayment” and relied on the remission procedures in concluding that RCW 10.73.160 was not unconstitutional. 131 Wn.2d at 246-47.

Now, however, we know that, in fact, the remission process is broken, as are many of the protections detailed in Blank. The imposition of costs and their substantial impact on the lives of indigents has recently been detailed at length by the ACLU, which discovered that lower courts in this state are requiring people to give up public assistance and other public monies given to cover their basic needs and even imprisoning poor people for failure to pay on such debt. *See* ACLU/Columbia Legal Services Report: Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People for Being Poor (February 2014).⁴

Similarly, a study from the Washington State Minority and Justice Commission examined the impact of such costs, finding that the imposition of them reduces income, worsens credit ratings, makes it more difficult to secure stable house, hinders “efforts to obtain employment, education, and occupational training” and has other serious effects “which in turn prevents people from restoring their civil rights” and becoming full members of society. *See* Washington State Minority and Justice Commission, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008).⁵

Further, once such an order is entered, the defendant may be

⁴Available at aclu-wa-org/news/report-exposes-modern-day-debtors-prisons-washington.

⁵Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

subject to arrest for failure to pay and is immediately liable not only for the amount ordered but also to pay the astronomical interest rate of 12%. See RCW 10.82.090.

In response, the prosecution may attempt to prevent this Court from addressing this issue by claiming it was “waived” as it was not raised below. Any such effort should fail, for two reasons. First, counsel actually brought the issue of Mr. Rhoden’s indigency to the attention of the court at sentencing, asking the court to consider it in imposing the costs. SRP 11-14.

Second, it is well-settled that, where a court acts without statutory authority in ordering a sentence, that issue may be raised for the first time on appeal. See State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A similar issue is currently before the Supreme Court in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013). In Blazina, as here, the defendant did not object to the trial court’s failure to comply with the requirements of RCW 10.01.160. In addition, while it is not on review, this Court has recently held, in State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013), that a lower court order imposing legal financial obligations is not “ripe for review” until the prosecution tries to enforce them, as Division One held in State v. Calvin, 176 Wn. App. 1, 302 P.3d 509 (2013) (as amended 10/22/13), review granted, ___ Wn.2d ___ (2014) (currently stayed pending Blazina).

Regarding the latter issue, however, our courts have repeatedly held that a defendant may challenge sentencing rulings for the first time on

appeal when the ruling in question is in violation of statutory requirements. See, e.g., State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993) (“when a sentencing court acts without statutory authority in imposing a sentence, the error can be addressed for the first time on appeal”). And the Supreme Court has rejected the idea that challenges to sentencing conditions are not “ripe” where, as here, the issues are primarily legal, do not require further factual development and involve a final decision of the court. Bahl, 164 Wn.2d at 751. Here, the order of costs is immediately enforceable as of the day of its entry and starts gathering interest upon that date and the issue is legal - did the trial court act outside its statutory authority in ordering costs? No further factual development or proceedings are required for that question to be answered by this Court.

Notably, in its decision in Calvin, Division One focused solely on whether there was a *factual* issue with the trial court’s decision below, finding that the failure to identify such a dispute below had waived the issue on appeal. The issue here, however, is legal - did the trial court act outside its statutory authority in failing to comply with RCW 10.01.060 in imposing the discretionary legal financial obligations. The question of whether a court acts outside its statutory authority is reviewed de novo, as it is a matter of law. See, State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010).

RCW 10.01.160(3) mandates that a court “shall not order a defendant to pay costs” unless and until the court finds the defendant “is or will be able to pay them,” and further that the court “shall” take the

defendant's financial resources and the nature of the financial burden into account before imposing it. Here, the state provided no evidence establishing Rhoden's ability to pay, nor did it ask to have the trial court make any determination under RCW 10.01.160 in asking for imposition of the costs, although Rhoden was represented by appointed counsel. This Court should hold that the trial court failed to comply with statutory requirements in imposing the discretionary costs for attorney's fees and other costs in this case, and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand based upon the trial court's error in failing to suppress the evidence of the second statement. The Court should also strike the order of costs against Mr. Rhoden, as those costs were imposed without statutory authority.

DATED this 4th day of August, 2014.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at pcpatcecf@co.pierce.wa.us, and to Kirk Rhoden, at 6030 160th St. E, Puyallup, WA. 98375.

DATED this 4th day of August, 2014.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

RUSSELL SELK LAW OFFICES

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