

**NO. 45702-4-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

KIRK WILLIAM RHODEN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John R. Hickman

No. 13-1-00860-4

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted statements made by the defendant at the time of his arrest?
2. If admission of the defendant's statement was error, was it harmless error?
3. Whether Defendant waived the issue of the imposition of legal financial obligations by not raising this issue below?
4. If the defendant did not waive the issue of legal financial obligations, is that issue is not ripe for review?
5. If the issue was not waived and is ripe, did the trial court properly imposed legal financial obligations?

B. STATEMENT OF THE CASE.

1. Procedure

On February 28, 2013, Kirk William Rhoden, hereinafter referred to as defendant, was charged by information in Pierce County Superior Court cause number 13-1-00860-4 with unlawful possession of a controlled substance - methamphetamine in count I. CP 4. The case was called for trial on October 31, 2013. 1 RP 4. The trial court held a CrR 3.5 hearing on November 18, 2013. 3 RP 78 - 147. The trial court ruled that

defendant's first statement made prior to *Miranda* was inadmissible, but his second post-*Miranda* statement was admissible. 3 RP 141. The defendant was convicted as charged. CP 94. On December 13, 2014, the defendant was sentenced to two days in custody and twelve months of community custody. CP 11-112. The trial court entered Findings of Fact and Conclusions of Law with regard to the CrR 3.5 Hearing. CP 95 - 99.

## 2. Facts

Pierce County Sheriff's deputies served a search warrant at 6023 160th Street East in Pierce County, Washington, on February 26, 2013 at 5:30 a.m. 4 RP 157. Prior to entry, deputies ordered five individuals, which included the defendant, to exit the home. 4 RP 158-159. All of the individuals were detained, placed in flex cuffs, patted down for weapons, and identified. 4 RP 160. Deputy Olesen interviewed the defendant.<sup>1</sup> 4 RP 170-171. The defendant admitted there was methamphetamine in his bedroom. 4 RP 172.

Deputy Brockway searched the southeast bedroom of the residence and located a scale, drug pipes, and baggies of methamphetamine. 4 RP 204. In this bedroom, Deputy Brockway also located a number of

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<sup>1</sup> A more complete factual description surrounding his interview will be provided below.

documents with the defendant's name and the address of the residence being searched on them. 4 RP 210.

Jane Boysen, the supervising forensic scientist in the materials analysis unit for the Washington State Patrol Crime Laboratory, confirmed the substance found in the defendant's bedroom was methamphetamine. 4 RP 258-259.

C. ARGUMENT.

1. THE DEFENDANT'S STATEMENT WAS FREELY AND VOLUNTARILY GIVEN AFTER BEING READ HIS *MIRANDA* WARNINGS.

The question on review is whether there is substantial evidence in the record from which the trial court could have found that the confession was voluntary by a preponderance of the evidence. *State v. Broadaway*, 133 Wn.2d 118, 129, 942 P.2d 363, 370 (1997). The Court must conduct an independent review of the record in order to determine the voluntariness of the confession. *Id.* In confession cases, findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record. *Id.* at 131.

*Miranda* warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State. *State v. Sargent*,

111 Wn.2d 641, 647, 762 P.2d 1127 (1988) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). Without *Miranda* warnings, a suspect's statements during custodial interrogation are presumed involuntary. *Id.*

However, although *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn solely on whether it is knowingly and voluntarily made. *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). A careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. *Id.* at 310-311. "A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 318.

After the decision in *Oregon v. Elstad*, law enforcement devised interrogation techniques that relied on a deliberate two step process calculated to avoid *Miranda*. *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). The police officer in the Seibert case "made a 'conscious decision' to withhold Miranda warning and used an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that [the suspect] already provided once.'" *Id.* at 605-6. This interrogation

technique was adapted to undermine the *Miranda* warnings. *Id.* at 616. A plurality of the Court held that this two step process rendered the second confession inadmissible.

The holding in a plurality opinion is the position of the Members who concurred in the judgment on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). Washington adopted the holding of *United States v. Williams*, 435 F.3d 1148, 1157-58 (9th Cir. 2006) as which applied the *Marks* rule to *Siebert* as follows:

A trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warnings - in light of the objective facts and circumstances - did not effectively apprise the suspect of his rights. Although the *Siebert* plurality would consider all two-stage interrogations eligible for a *Siebert* inquiry, Justice Kennedy's opinion narrowed the *Siebert* exception to those cases involving deliberate use of the two-step procedure to weaken *Miranda's* protections.... This narrower test - that excludes confessions made after a deliberate, objectively ineffective mid-stream warning - represents *Siebert's* holding. In situations where the two-step strategy was not deliberately employed, *Oregon v. Elstad* continues to govern the admissibility of postwarning statements.

*State v. Hickman*, 157 Wn. App. 767, 774-775, 238 P.3d 1240 (2010)  
(emphasis added).

Trial courts should look at objective and subjective evidence to support an inference that the two-step interrogation procedure was used to

undermine the Miranda Warnings. *Id.* at 775. Objective evidence would include the timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements. *Id.*

In this case, Deputy Olesen was part of a search warrant team serving a warrant at the defendant's residence. 3 RP 90. The SWAT team made the initial entry into the home and detained the people in the house 4 RP 160. After SWAT secured the home, Deputy Olesen contacted a group of four to five individuals gathered in the living room. 3 RP 92-93. The defendant was one of the detained individuals. 3 RP 91-92. Deputy Olesen informed the group why he was at the residence. 3 RP 93. He was speaking with them as a group. 3 RP 93-94. He asked the individuals in the group if he would find any drugs or guns in the residence. 3 RP 93. The defendant said there would be a small amount of drugs in his bedroom and at least one gun, if not more. 3 RP 93. Some of the individuals chose not to answer the question. 3 RP 94. Deputy Olesen did not advise the individuals in the group of their *Miranda* rights. 3 RP 107. Deputy Olesen was not aware whether or no any other officers had advised the defendant of his *Miranda* rights. 3 RP 125. Consequently, the trial court ruled that this initial statement inadmissible. 3 RP 136.

After the initial group interrogation, the defendant was then separated from the group and was moved to the kitchen. 3 RP 94. In the kitchen, Deputy Olesen read the defendant his *Miranda* rights using a card from the Criminal Justice Training Commission. 3 RP 95-96. The defendant indicated he understood his rights. 3 RP 98. He did not request an attorney. 3 RP 99. No one made any threats or promises to him in order to get him to answer the questions. 3 RP 99-100. There was no indication that the defendant was under the influence of any mind altering substances. 3 RP 98. The defendant then answered questions about specific items that would be found in his bedroom. 3 RP 100. The trial court correctly ruled that this Mirandized statement was admissible as the defendant made a free and voluntary waiver. 3 RP 140.

Deputy Olesen was not conducting a deliberate two-step interrogation to avoid *Miranda*. The trial court remarked:

And it was consistent with [the defendant's] behavior of cooperation in the living room, and I believe that the officer took him 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, thus avoiding the fact that he might not hear or understand if there were loud noises in the living room.

3 RP 141. The record indicates that there were multiple individuals in the living room, and after the defendant expressed a willingness to speak to police, he was then taken into the kitchen to be fully interviewed. The

defendant was then read his *Miranda* rights and he gave a statement to police. The subjective and objective evidence support the trial court's ruling that the defendant's second statement was freely and voluntarily given.

Therefore, this was not a deliberate two-step *Miranda* warning and the trial court properly admitted the defendant's admission.

2. ASSUMING IT WAS ERROR TO ADMIT THE STATEMENT, IT WAS HARMLESS BECAUSE OF THE OTHER OVERWHELMING EVIDENCE THAT THE DRUGS BELONGED TO DEFENDANT.

Assuming *arguendo* that the trial court should have suppressed the defendant's statement, it should be considered harmless error. Admission of an involuntary confession obtained in violation of *Miranda* is subject to treatment as harmless error. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991). A constitutional error is harmless if the Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). If the untainted evidence is so overwhelming that it necessarily leads to a finding of guilty, then reversal is not required. *Id.* at 426.

In this case, deputies were serving a search warrant at a residence<sup>2</sup>. The deputies were authorized to search the entire residence for evidence associated with stolen vehicles — titles, documents, vehicle identification tags, license plates, etc. 1 RP 40, CP Attachment, Search Warrant, Case No. 13-1-50285-4. Even if the defendant had not told the deputies that he had drugs and guns in his bedroom, deputies would have searched defendant's room. In the course of that search, they would have located the drugs and guns. After finding drugs or guns, the deputies would have secured an amended search warrant regardless of defendant's statement after they located any guns or drugs in the house. 3 RP 126-127.

The deputies located a baggie of white power, scales and drug pipes in the dresser of a bedroom. 4 RP 209-210. In the same dresser as the drugs, deputies found documents with the defendant's name and address on them. 4 RP 210. The documents also had the address of the house the deputies were searching on them. 4 RP 211. These documents are evidence of the defendant's custody and control over this bedroom and its contents and were covered under the original search warrant.

Additional drugs were found in this bedroom as well. 4 RP 211-212.

Deputies found no other evidence that anyone besides defendant resided in

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<sup>2</sup> The defendant assigns no error to the search warrant that lead to the discovery of the drugs in the defendant's bedroom.

this bedroom. 4 RP 231. The untainted evidence of where the drugs were found, coupled with the documents in the defendant's name, is so overwhelming that it necessarily leads to a finding of guilty.

Therefore, even if it was error to admit the statement, the error was harmless and the defendant's conviction should be affirmed.

3. THE DEFENDANT WAIVED THE ISSUE OF THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BY FAILING TO RAISE THIS ISSUE IN THE COURT BELOW.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

However, RAP 2.5(a) provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In determining whether a defendant may raise an issue for the first time on appeal under RAP 2.5(a), the Court must first determine whether the alleged error even suggests a constitutional issue. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

If it does, the defendant must show that the error is manifest; that is, that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* at 345. *See also State v. Gordon*, 172 Wn.2d 671,

676, 260 P.3d 884 (2011) (holding that an appellant must show that he or she incurred actual prejudice in order to demonstrate that a constitutional error is manifest). When the record does not contain the facts necessary to adjudicate a claimed error, “no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Only if the defendant can demonstrate that the error is both constitutional and manifest, does the burden shift to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011).

In the present case, Defendant did not object to the imposition of legal financial obligations (LFOs) at sentencing and makes no showing that the issue may be raised for the first time here. Because there is no record to support defendant’s claimed inability to pay LFOs, the defendant has not shown prejudice and the claimed error cannot be manifest. *See McFarland*, 127 Wn.2d at 333.

Therefore, Defendant may not raise this issue here, and the trial court's imposition of LFOs should be affirmed.

- a. Assuming defendant did not waive the issue of the imposition of legal financial obligations, that issue is not ripe for review.

The time to challenge the imposition of LFOs is when the State seeks to collect the obligation. *State v. Smits*, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009). *See also State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (holding that "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation.").

"The party presenting an issue for review has the burden of providing an adequate record to establish such error[.]" *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *See also* RAP 9.2(b). "If the appellant fails to meet this burden, the trial court[']s decision stands." *State v. Tracy*, 128 Wn. App. 388, 394–395, 1215 P.3d 381 (2005).

Here, there is no evidence that the State has sought collection of defendant's LFOs. The issue is thus not ripe for review.

- b. Assuming the issue of the imposition of legal financial obligations was not waived and is ripe, the trial court properly imposed legal financial obligations upon defendant after he was convicted.

Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial pursuant to RCW 10.01.160. However,

- (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them...
- (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs...

RCW 10.01.160 (emphasis added). In light of such safeguards, the judiciary is not required to provide the added protection of formal findings to support the assessment of court costs. *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991). See also *State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55 (1991); *State v. Suttle*, 61 Wn. App. 703, 812 P.2d 119 (1991) (in both cases, financial obligations were upheld in the absence of formal findings of fact).

A defendant's poverty does not immunize him from punishment or the requirement to pay legal financial obligations. *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (quoting *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992)). While a court may not incarcerate

an offender who truly cannot pay LFOs, every offender must make a good faith effort to satisfy these obligations by seeking employment, borrowing money, or otherwise legally acquiring resources to pay their court ordered financial obligations. *State v. Woodward*, 116 Wn. App. 697, 703-704, P.3d 530 (2003). Furthermore, defendants who claim indigency must do more than plead poverty in general terms when seeking remission or modification of LFOs. *Id.* at 704.

The Court review a trial court's determination of a defendant's resources and ability to pay under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 1120 (1991) (reasoning that the erroneous standard applies because defendant's ability to pay and financial status are essentially factual findings); *State v. Calvin*, 316 P.3d 496, 500 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). "The inquiry is whether the court's determination is supported by the record." *Baldwin*, 63 Wn. App. at 312, fn 27.

In the present case, the defendant's trial counsel asked the court to exercise discretion on nonlegal mandatory amounts. 12/13/13 RP 8. It is clear that the trial court listened to the defendant and defense counsel as the court imposed a reduced amount of \$1,000. 12/13/13/ RP 13. This implies that the trial court found the defendant had an ability to pay a lesser amount. Moreover, the record contains sufficient evidence from

which the trial court could determine that defendant had the present or future ability to pay LFOs. The defendant told the trial court that he had a job working for an apartment management firm. 12/13/13 RP 10-11.

Therefore, the court's order imposing LFOs was not clearly erroneous and should be affirmed.

D. CONCLUSION.

The defendant has not shown that the trial court erred in admitting the defendant's second, *Mirandized* statement to the police at trial because he cannot show that the police utilized a deliberate, two step *Miranda* warning. The defendant's conviction should be affirmed.

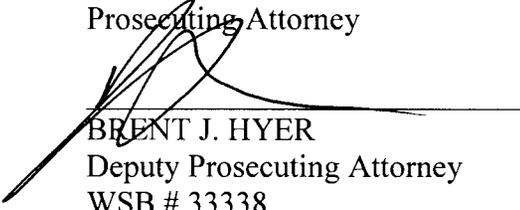
Even if there was error, it was harmless error as the drugs were located in the defendant's room along with other items that clearly belonged to him. This overwhelming, untainted evidence would still lead a reasonable jury to convict the defendant of the charge.

The defendant failed to raise any issue with regard to legal financial obligations at trial. In addition, this issue is not ripe for review as the State is not attempted to collect on his legal financial obligations.

Lastly, the trial court properly set his legal financial obligations because the defendant was gainfully employed at the time of his sentencing.

DATED: November 20, 2014.

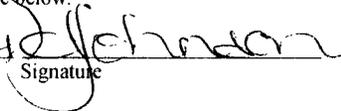
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/20/14   
Date Signature

**PIERCE COUNTY PROSECUTOR**

**November 20, 2014 - 9:56 AM**

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