

NO. 46030-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

GEORGE E. TAYLOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAMANIA COUNTY

The Honorable Brian Altman, Judge

CORRECTED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to present sufficient evidence of a nexus between any firearm and the manufacturing of methamphetamine.

2. The State failed to prove Taylor possessed pseudoephedrine intending to manufacture methamphetamine.

3. The court erred in imposing a firearm enhancement on counts five and six.

4. The court abused its discretion in refusing to sever the reckless endangerment and making a false statement charges from the four unrelated drug charges.

5. The community custody for counts five and six, both class B felonies, combined with the standard range sentence and the firearm enhancement exceeds the statutory maximum sentence of 120 months.

6. The court imposed discretionary legal financial obligations without considering Taylor's present or future ability to pay them.

7. The pre-printed finding in the judgment and sentence that Taylor has the current or future ability to pay legal financial obligations is erroneous.

8. The trial court failed to enter required written findings of fact and conclusions of law as required by CrR 3.5(c).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the evidence establish a sufficient nexus between a firearm made specifically available for offensive or defensive purposes and Taylor's manufacturing methamphetamine when the manufacturing occurred at least six to twelve months prior to Taylor's arrest and there was no evidence as to Taylor's access to or use of guns six to twelve months prior?

2. Did the State provide sufficient proof that Taylor possessed pseudoephedrine intending to manufacture methamphetamine when the evidence in the light most favorable to the State only established Taylor possessed five Sudafed tablets and the remains of an old methamphetamine lab?

3. Did the evidence establish a sufficient nexus between a firearm made specifically available for offensive or defensive purposes and any intent on Taylor's part to manufacture methamphetamine with just five Sudafed tablets?

4. Did the trial court abuse its discretion when it refused to sever the reckless endangerment and making a false statement charges from the four unrelated drug charges?

5. Did Taylor's sentences for counts five and six, manufacturing methamphetamine and possession of pseudoephedrine with intent to

manufacture methamphetamine, exceed the statutory maximum of 120 months when the standard range sentence plus the gun enhancement plus the community custody totaled 144 months?

6. Did the trial court abuse its discretion when it imposed discretionary legal financial obligations on Taylor without considering Taylor's individualized present or future ability to pay them?

7. Did the trial court fail to enter required written findings of fact and conclusions of law after hearing a CrR 3.5(c) when, to date, no such written findings and conclusions are entered in the court file?

C. STATEMENT OF THE CASE

The State charged George Taylor with these crimes: count 1 - reckless endangerment; count 2 - making a false statement or misleading statement to a public servant; count 3 - possession of methamphetamine; count 4 - use of drug paraphernalia; count 5 - possession of ephedrine, pseudoephedrine, or pressurized ammonia gas with intent to manufacture methamphetamine; and count 6 - manufacture of a controlled substance – amphetamine or methamphetamine. CP 1-5 (fourth amended information).¹ Counts 5 and 6 further alleged Taylor was armed with a firearm in committing the offenses. CP 3-4.

¹ The court tried Taylor on the fourth amended information.

Prior to trial, the court held a CrR 3.5 hearing to determine the admissibility of statements Taylor made to the police. RP May 3, 2012 at 14-58. The court found Taylor's statements admissible. RP May 3, 2012 at 57-58. No CrR 3.5(c) findings of fact and conclusions of law are filed.

The court also heard a motion to sever the reckless endangerment and certain offenses from the drug charges. RP January 30, 2014. The court denied the motion. RP January 30, 2014 at 5. Taylor renewed the motion at a later hearing. RP February 7, 2014 at 18. He argued he would not receive a fair trial if the reckless endangerment remained joined with the drug charges. RP February 7, 2014 at 18-22. This was true because of the firearm enhancements the State added to the methamphetamine manufacturing and the possession with intent to manufacture charges. RP February 7, 2014 at 18-19. The court again refused to sever counts. RP February 7, 2014 at 29.

Taylor moved to suppress all evidence recovered in a search of his house authorized by a search warrant and an addendum to the search warrant. RP May 3, 2012 at 4-13. Supplemental Designation of Clerk's Papers, 3.6 Motion to Suppress Evidence (sub. nom. 33). The court refused to suppress the evidence. RP May 3, 2012 at 11-13.

Calah Spencer lived in a rural Skamania County neighborhood. RP Trial Day² 1 at 43-45. One morning, she found a bullet on her bedroom floor. RP Trial Day 1 at 52. Her grandmother called the police. RP Trial Day 1 at 37. The Skamania County Sheriff's Office investigated. RP Trial Day 1 at 84-87. Officers determined the bullet pierced the manufactured home's exterior and entered the bedroom. RP Trial Day 1 at 89-93. A mark on the bedroom wall suggested the bullet hit the interior wall just above Calah's head as she slept. RP Trial Day at 1 56, 89-93. The officers concluded that the bullet inside the house was likely the result of a ricochet. RP Trial Day 1 at 184.

The police canvassed the neighborhood hoping to find the person who fired the gun. RP Trial Day 1 at 101. Taylor lived next door to Spencer. RP Trial Day 1 at 101. When the police contacted Taylor, he denied firing a gun that morning. RP Trial Day 1 at 187. Further investigation in the neighborhood made the police suspect that Taylor was the person who fired the gun. A judge authorized a warrant to search Taylor's home. RP Trial Day 1 at 1113.

The police talked to Taylor when they served the warrant. Taylor told them he had shot his gun that morning and that he shoots in a

² The record consists of two volumes of verbatim specific to the trial. In keeping with the cover page for the verbatim, the report of proceedings ("RP") for each day is cited as either "RP Trial Day 1" or "RP Trial Day 2."

shooting pit behind the house. RP Trial Day 1 at 120-22. Taylor had guns in his bedroom to include a gun that could have fired the bullet that ricocheted into Spencer's home. RP Trial Day 1 at 1122-23. The police saw glass pipes on Taylor's bedroom floor. RP Trial Day 1 at 123. They suspected the pipes were the type commonly used to smoke methamphetamine. RP Trial Day 1 at 126-28.

The police wrote an addendum to the search warrant and a judge approved it. The addendum allowed the police to search for evidence of drug crimes. RP Trial Day 1 at 129-30.

The police continued their search of the home and particularly Taylor's bedroom. They recovered glass pipes and a small amount of methamphetamine. RP Trial Day 1 at 139. A police officer trained in methamphetamine lab recognition looked over the items in Taylor's bedroom and the kitchen and concluded he was seeing the remnants of a methamphetamine lab. RP Day 2 Trial at 40. It was an inactive lab; it had been at least six to twelve months since the equipment was used to cook anything. RP Trial Day 2 at 92. Glassware, funnels, Mason jars, acetone, iodine, heating elements, scales and other items were among the items identified as part of the inactive lab. RP Trial Day 2 at 17, 34-37. As it was an inactive lab, none of the investigators wore any protective

breathing device or protective clothes during the search. RP Trial Day 2 at 58.

The police also found five Sudafed tablets in Taylor's bedroom. Each tablet was in its blister pack. RP Trial Day 2 at 95, 115. Sudafed contains pseudoephedrine. Pseudoephedrine is a primary ingredient in methamphetamine. Some methamphetamine labs extract pseudoephedrine from Sudafed tablets. RP Trial Day 2 at 100. To make even a gram of methamphetamine would require 33 Sudafed tablets. RP Trial Day 2 at 169-70.

Taylor lived in the home since 2002. RP Trial Day 1 at 63. The home owner, Terry Schoell, commonly spent just weekends at the home. RP Trial Day 1 at 72.

The jury found Taylor guilty as charged and returned affirmative verdicts on both firearm enhancements. CP 14-21. At sentencing, the court imposed 132 months total confinement, plus 12 months of community custody on the manufacturing and possession with intent to manufacture counts, and legal financial obligations. CP 28, 130.

D. ARGUMENT

1. THE EVIDENCE AT TRIAL DID NOT ESTABLISH A NEXUS BETWEEN TAYLOR'S POSSESSION OF A FIREARM AND THE MANUFACTURING METHAMPHETAMINE OR POSSESSION OF PSEUDOEPHEDRINE WITH INTENT TO MANUFACTURE.

The due process clause of the Fourteen Amendment requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same holds true for sentencing enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). Constitutional questions are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

A firearm enhancement may only be imposed if the state proves the offender was "armed with a firearm" within the meaning of RCW 9.94A.533. The Supreme Court has expanded the definition of "armed" beyond the colloquial understanding of a person carrying a weapon; however, the "mere presence of a [firearm] at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed." *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). A person is armed with a firearm only if it is "easily accessible and readily available for use for

either offensive or defensive purposes.” *Id.* These purposes include using the weapon “to facilitate the commission of the crime, escape from the scene of the crime, protect contraband or the like, or prevent investigation, discovery, or apprehension by the police.” *State v. Gurske*, 155 Wn.2d 134, 139, 118 P.3d 333 (2005). To determine whether these connections exist, the factfinder must look to “the nature of the crime, the type of weapon, and the circumstances under which the weapon was found.” *Gurske*, 155 Wn.2d at 142 (quoting *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)). In addition, “there must be a nexus between the defendant, the crime, and the weapon.” *Brown*, 162 Wn.2d at 431. This nexus requirement is critical because “[t]he right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired....” Wash. Const. Art. I, § 24. The State may not punish a citizen merely for exercising this right. *State v. Rupe*, 101 Wn.2d 664, 704, 683 P.2d 571 (1984).

The court instructed the jury on the firearm enhancement:

For purpose of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in count five.

For purpose of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in count six.

A person is armed with a firearm, if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, and the type of weapon.

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

Supplemental Designation of Clerk’s Papers, Court’s Instructions to the Jury (sub. nom. 113), Instruction 32.

Washington courts have consistently held that a defendant is not “armed” within the meaning of the statute “even though he, presumably, could have obtained a weapon by taking a few steps.” *State v. Ague-Masters*, 138 Wn. App. 86, 104, 156 P.3d 265 (2007); *Gurske*, 155 Wn.2d at 143. A defendant arrested at his home (after offering to sell drugs to an undercover agent) is not “armed” with a firearm, even if a rifle is found under his bed. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

As to count 5, possession of pseudoephedrine with intent to manufacture, there is no evidence Taylor was armed with a weapon in the context necessary to prove a firearm enhancement. Although he had guns

in his home, nothing about that suggested he had them for offensive or defensive purposes to, say, protect the five Sudafed tablets.

On count 6, manufacturing methamphetamine, there is no evidence Taylor was armed with a weapon in any sense. By the fourth amended information under which Taylor was tried, the State alleged the crime occurred anywhere between July 29, 2009, and March 14, 2012. The lab was defunct well before its discovery on March 14. It was so defunct, none of the responding officers took any precautionary measures to protect themselves from harmful chemicals commonly associated with methamphetamine labs. The State's lab expert's best guess is the lab equipment had not been used in at least six to twelve months. RP Trial Day 1 at 92.

Because of the insufficient nexus, both firearm enhancements must be vacated and the case remanded for resentencing.

2. THE EVIDENCE DID NOT PROVE TAYLOR POSSESSED FIVE SUDAFED TABLETS WITH THE INTENT TO USE THEM IN MAKING METHAMPHETAMINE.

As noted in Issue 1, the Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *Winship*, 397 U.S. at 364; *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

Evidence cannot support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992);, *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A challenge to the sufficiency of the evidence can be raised for the first time on appeal as manifest constitutional error. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

In *Moles*, police discovered several empty blister packs, a box of Suphedrine, a full package of pseudoephedrine, two sealed packages of Contac Cold Medicine, and almost 440 assorted loose pills in a stolen vehicle. *State v. Moles*, 130 Wn. App. 461, 123 P.3d 132, (2005), *review denied*, 157 Wn.2d 1019 (2006). Police also recovered coffee filters, one with methamphetamine residue, from one of the defendant's pockets. *Id.* at 463. Moles was charged with possession with intent to manufacture methamphetamine. *Id.* at 464.

In analyzing the facts, the *Moles* court initially declared that “[b]are possession of a controlled substance is not enough to support an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present.” *Id.* at 466 (emphasis added) (*citing State v. McPherson*, 111 Wn. App. 747, 759, 46 P.3d 284 (2002)). It noted that a

person acts with intent when “he acts with the objective or purpose to accomplish a result that constitutes a crime.” *Id.* (citing RCW 9A.08.010(1)(a)).

Although Taylor had what police described as an inactive methamphetamine lab in his home, the existence of five Sudafed tablets in his home does not satisfy the *Moles* test of possession of a controlled substance plus one additional factor suggestive of intent equating to adequate proof of possession with intent to manufacture. Five Sudafed tablets are much less than the 33 Sudafed tablets necessary to produce even one gram of methamphetamine.

Because the evidence was insufficient, Taylor’s conviction for possession with intent to manufacture must be reversed and dismissed. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

3. THE TRIAL COURT’S REFUSAL TO SEVER RECKLESS ENDANGERMENT AND MAKING A FALSE STATEMENT FROM THE DRUG CHARGES DEPRIVED TAYLOR A FAIR TRIAL.

The trial court committed reversible error in refusing to sever the reckless endangerment and making a false statement from the four drug

charges. The error deprived Taylor a fair trial. Any convictions not otherwise reversed by this appeal should be reversed and remanded for retrial.

CrR 4.3(a) permits two or more offenses, whether felonies or misdemeanors or both, to be joined in one information when the offenses are (1) of the same or similar character, even if not part of a single scheme or plan, or (2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Improper joinder of offenses shall not preclude subsequent prosecution on the same charge for the charge improperly joined. CrR 4.3(e).

Offenses properly joined under CrR 4.3(a) should be severed if “the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.” CrR 4.4(b). This is true even though Washington law disfavors separate trials. *State v. Medina*, 112 Wn. App. 40, 52, 48 P.3d 1005, *review denied*, 147 Wn.2d 1025 (2002). The failure of the trial court to sever counts is reversible upon a showing that the court's decision was a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A defendant seeking severance must demonstrate that a trial involving multiple counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *Id.* at 718.

Four factors mitigate the prejudice of joinder to the defendant, none of which is dispositive: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses on each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Sutherby*, 165 Wn.2d 870, 884–85, 204 P.3d 916 (2009). Regarding the fourth factor, the trial court need not sever counts just because evidence is not cross-admissible. *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

Here, the trial court's refusal to sever the reckless endangerment and the making a false statement from the four unrelated drug charges denied Taylor a fair trial on all the charges and the two firearm enhancements. None of the above four factors mitigate the harm done by joining the two sets of unrelated counts.

First, the evidence of the reckless endangerment was weak as was the firearm enhancements and possession of pseudoephedrine with intent to manufacture. (See Issues 1 and 2 above.) The bullet that went into the bedroom resulted from a ricochet. There is nothing inherently reckless about shooting in a firing pit in a rural neighborhood. A ricochet is just an inadvertent event.

Because of failing to sever counts, in finding Taylor guilty of reckless endangerment, the jury knew Taylor had various guns and a defunct methamphetamine lab in his home. Without that prejudicial evidence, the jury may well have acquitted Taylor of doing an act that resulted in an unfortunate ricochet.

Second, although Taylor defended all the charges with a general denial, the compounding effect of all the charges and all the denials, denied Taylor a fair trial.

Third, the court's instructions to the jury did nothing to illuminate limitations on the jury's consideration of the evidence. While the court instructed the jury it must decide each count separately, and their verdict on one count should not control their verdict on another count,³ the court never instructed the jury what they meant in terms of applying the evidence and not being influenced by joined, but unrelated, allegations of criminal behavior.

Fourth, none of the drug evidence is cross-admissible with the reckless endangerment or making false statements. It occurred at a separate time and place. To decide the reckless endangerment count and making a false statement, the jury did not need to know about the drug evidence in Taylor's home. And the reverse is true. To understand the

³ Supp. DCP, Court's Instructions to the Jury (Instruction 31)

drug charges against Taylor, they did not need to know about the reckless endangerment or the making a false statement allegations. The false notion of cross-admissibility really equated to cross-prejudice and nothing else.

Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245, *review denied*, 169 Wn.2d 1027 (2010). The admission of the drug evidence against the other charges was used by the jury to improperly infer Taylor's guilt on the reckless endangerment and false statements and vice versa. The jury could not be expected to do otherwise.

Joinder must not be utilized in such a way as to prejudice a defendant. *State v. Harris*, 36 Wn. App. 746, 749-50, 677 P.2d 202 (1984). Given the differing nature of the two sets of charges, joinder only prejudiced Taylor. Taylor's convictions must be reversed and remanded for separate trials.

4. THE COURT EXCEEDED ITS SENTENCING AUTHORITY ON COUNTS 5 AND 6 IN IMPOSING A TERM OF COMMUNITY CUSTODY THAT, TOGETHER WITH THE STANDARD RANGE SENTENCES AND THE CONSECUTIVE FIREARM ENHANCEMENTS, EXCEED THE STATUTORY MAXIMUM 120 MONTH SENTENCE.

Taylor's case must be remanded for resentencing on counts 5 and 6 because the sentences on both counts exceed the maximum sentence allowed by law.

The Sentencing Reform Act (SRA) prescribes the trial court's authority to sentence in felony cases. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *State v. Skillman*, 60 Wn. App. 837, 839, 80 P.2d 756 (1991). Whenever a sentencing court exceeds its statutory authority, its action is void. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002).

A sentence imposed contrary to the law may be raised for the first time on appeal. *State v. Anderson*, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). On appeal, a defendant may challenge a sentence imposed in excess of statutory authority because "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Here, the convictions for counts 5 and 6, convictions for possession of pseudoephedrine with intent to manufacture methamphetamine and manufacturing methamphetamine, were both class B felonies with maximum penalties of ten years confinement and a fine of \$20,000. RCW 9A.20.021(1)(b). A court may not impose a term of community custody that, combined with the term of confinement, exceeds the maximum term of confinement allowed by RCW 9A.20.021. RCW 9.94A.505(5)..

RCW 9.94A.701(9) provides that “[t]he term of community custody ... shall be reduced by the court whenever an offender’s community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.” Here, the court imposed a 60 month standard range sentence on both counts 5 and 6, plus an additional 36 months firearm enhancement for a total sentence of 96 months on each count. CP 27, 36. Under RCW 9.94A.533(3), a “firearm enhancement ... must be added to the total period of confinement for all offenses.” The court added an additional 36 months to each count to clarify the consecutive quality of the two firearm enhancements, e.g., 60 months + 36 month = 96 months (base sentence for each count) + 36 consecutive

months for the second enhancement = 132 months of total confinement.⁴ CP 36. The court then added 12 concurrent months of community custody taking each sentence well beyond the 120 month statutory maximum on each count.

Where the sentence imposed exceeds the statutory maximum, the trial court must reduce the term of community custody. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The proper remedy is to “remand to the trial court to either amend the community custody term or resentence.” *Id.* at 473.

The trial court’s imposition of sentences for counts 5 and 6 exceeded the statutory maximum of 120 months. The remedy is for this Court to remand to the trial court for resentencing.

5. THE COURT VIOLATED STATUTORY MANDATE IN FAILING TO CONSIDER TAYLOR’S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The court ordered Taylor to pay these discretionary legal financial obligations (LFOs): (1) \$250 jury demand fee; (2) \$150 pre-trial supervision fee; (3) \$4,300 fee for court appointed attorney; (4) \$3,250

⁴ There is no cap on the statutory maximum when a defendant is sentenced to more than one crime with a firearm enhancement. *State v. Thomas*, 150 Wn.2d 666, 671-72, 80 P.3d 168 (2003).

fine; (5) \$300 crime lab fee; (6) \$100 DNA collection fee.⁵ CP 29-31. The court erred in imposing these LFOs because it failed to make an individualized inquiry into Taylor’s current and future ability to pay them.

The court may order a defendant to pay costs under RCW 10.01.160. However, the statute also provides “[t]he 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).

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 legal financial obligations. *State v. Blazina*, 344 P.3d 680, 683 (2015). The record reflects no consideration here.⁶ RP March 13, 2014 at 2-17.

In the judgment and sentence, the following pre-printed, generic language appears:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the

⁵ The court also ordered a \$500 victim assessment and a \$200 criminal filing fee. CP 50. Those fees are not at issue on appeal because they are mandatory. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

⁶ This is the verbatim record for sentencing.

defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 27.

Taylor challenges this finding on the ground that the court did not consider his individual financial resources and the burden of imposing such obligations on him. The boilerplate finding regarding ability to pay lacks support in the record. RP March 13, 2014, 2-17.

Further, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina*, 344 P.3d at 683. The court failed to follow statutory mandate in imposing the legal financial obligations. The remedy is a new sentence hearing. *Id.*

The issue is ripe for review. *Blazina*, 344 P.3d at 683. And although defense counsel did not object below, an appellate court may reach this error consistent with RAP 2.5. *Id.* at 682. Taylor requests this Court reach the merits. The LFO system is broken.⁷ *Id.* at 683. It will not be fixed until appellate courts reach the merits of these claims and send cases back for resentencing thereby sending a clear signal to trial judges

⁷ Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Blazina*, 344 P.3d 680, 684.

about the importance of individualized inquiry into ability to pay legal financial obligations.

6. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PER CrR 3.5.

The trial court held a CrR 3.5 hearing to determine whether Taylor's statements were the product of police coercion. RP May 3, 2012 at 13-58. However, the court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c). Even if this court concludes Taylor's statements were admissible, this Court must remand the matter for the entry of written findings of fact and conclusions of law as the law requires.

CrR 3.5(c) provides, "Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefore." This rule plainly requires written findings of fact and conclusions of law. The trial court provided an oral ruling that Taylor's statement to investigating detectives was admissible, but no written findings or conclusions have been entered. The trial court's failure to enter written findings and conclusions violate the clear requirements of CrR 3.5(c).

“It must be remembered that a trial judge’s oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). An oral ruling “has no final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment.” *Id.* at 567 (emphasis added).

When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). This is so because the court rules promulgated by our supreme court provide the basis for a “consistent, uniform approach.” *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). “[A]n appellate court should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Id.* at 624. However, where a defendant cannot show actual prejudice from the absence of written findings and conclusions, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.* at 624.

Here, the trial court did not enter written findings or conclusions following the CrR 3.5 hearing and provided only an oral ruling. This

court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

E. CONCLUSION

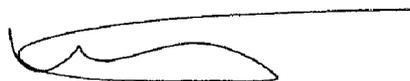
Count 5, possession of pseudoephedrine with intent to manufacture methamphetamine, should be dismissed for insufficient evidence.

The firearm enhancements on counts 5 and 6 should be dismissed for insufficient evidence of the required nexus.

On the remaining counts, they should be remanded to the trial court with an order for retrial and severance of counts 1 and 2, reckless endangerment and making a false or misleading statement to a public servant, from the drug charges.

Absent the above dismissal and retrial, the court should remand for a hearing to determine Taylor's individualized ability to pay LFOs, to be resentenced on counts 5 and 6 so as not to exceed the statutory maximum sentences, and for entry of CrR 3.5(c) findings of fact and conclusions of law.

Respectfully submitted this 17th day of May 2015.



LISA E. TABBUT/WSBA #21344
Attorney George E. Taylor

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Corrected Brief of Appellant with (1) Adam Kick, Skamania County Prosecutor's Office, at kick@co.skamania.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to George E. Taylor/DOC# 702698, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

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

Signed May 17, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for George E. Taylor

COWLITZ COUNTY ASSIGNED COUNSEL

May 17, 2015 - 7:10 PM

Transmittal Letter

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Corrected Appellant's Brief

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A copy of this document has been emailed to the following addresses:

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