

No. 46069-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Katrina Bowen,

Appellant.

Lewis County Superior Court Cause No. 13-1-00896-8

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Bowen's guilty plea was entered in violation of her Fourteenth Amendment right to due process.
2. The trial court erred by accepting Ms. Bowen's guilty plea.
3. The court lacked an adequate factual basis for Ms. Bowen's guilty plea.

ISSUE 1: A guilty plea is invalid if the record of the plea hearing fails to set forth a sufficient factual basis for the charge. Neither Ms. Bowen's written plea statement nor her oral colloquy with the judge indicates that she stole more than \$5,000. Must her conviction be vacated and the charge of first-degree theft dismissed with prejudice?

4. The 48-month sentence is clearly excessive under the circumstances of this case.
5. The sentencing court considered improper factors in determining the length of Ms. Bowen's exceptional sentence.
6. The sentencing court erred by basing the length of Ms. Bowen's sentence on a desire to send a message.
7. The sentencing court erred by adopting Conclusion of Law No. 2.5.

ISSUE 2: An exceptional sentence is clearly excessive if it is based on untenable grounds. The sentencing court in this case imposed an exceptional sentence of 48 months in order to send a message. Must the 48-month exceptional sentence be reversed because it is clearly excessive?

8. The trial court erred by imposing attorney fees in the amount of \$600.
9. The trial court erred by imposing attorney fees without finding that Ms. Bowen has the present or likely future ability to pay.
10. The imposition of attorney fees without any evidence that Ms. Bowen has the present or future ability to pay violates her Sixth and Fourteenth Amendment right to counsel.

ISSUE 7: A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability to pay. Here, the court imposed \$600 in attorney fees without inquiring into whether Ms. Bowen had the ability to pay them. Did the trial court violate Ms. Bowen's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2012 and 2013, Katrina Bowen worked at the “Flying K” store and gas station in Toledo, Washington. RP (1/29/14) 7. Her duties included selling lottery tickets. RP (1/29/14) 7. She began taking and scratching the tickets herself, hoping to find winning tickets. RP (1/29/14) 7. She reimbursed Flying K for only some of the tickets she took. RP (1/29/14) 6-7.

The state charged Ms. Bowen with first-degree theft. CP 1. The Amended Information alleged that she “did wrongfully obtain or exert unauthorized control over more than five thousand dollars (\$5,000) in lawful money of the United States of America belonging to another, to-wit: Flying K, with intent to deprive...” CP 1. The Amended Information also included a special allegation that “the current offense was a major economic offense...” CP 1-2.

Ms. Bowen entered a guilty plea and acknowledged that the offense qualified as a major economic offense. Statement of Defendant on Plea of Guilty, Supp CP; RP (1/29/14) 8, 10. In her plea form, she indicated that “Between 1/1/12 and 9/30/13 in Lewis County I knowingly took property of another (lottery tickets) unlawfully—without paying for

the tickets, with the intent to deprive the owner.” Statement of Defendant on Plea of Guilty, p. 8, Supp CP.

At the plea hearing, the court asked what she’d done that made her guilty of the offense. She told the court:

I scratched tickets while I worked. I thought I was keeping track of them, pay for all of them, and I guess I wasn’t, and I scratched about 500 per shift.
RP (1/29/14) 7.

She also acknowledged her written account of the offense, and agreed with the judge’s summary. RP (1/29/14) 7. She did not admit that she’d stolen \$5,000, either in her written plea statement or in her colloquy with the judge. Statement of Defendant on Plea of Guilty, p. 8, Supp CP; RP (1/29/14) 3-10.

Ms. Bowen had no prior convictions. RP (3/26/14) 3; CP 10. Her standard range was 0-90 days. CP 10. At sentencing, the prosecutor recommended an exceptional sentence of two years. RP (3/26/14) 6. The prosecutor asked the judge to take note of the “press coverage on this case” and impose a sentence that would deter “someone in the future who is tempted to take money from the till...” RP (3/26/14) 6.

Defense counsel noted that Ms. Bowen had immediately acknowledged her crime when confronted by her employer. RP (3/26/14) 9. She cooperated when the police came to interview her. RP (3/26/14) 8-

9. She obtained an evaluation for a gambling addiction, entered treatment, and began attending Gambler's Anonymous. RP (3/26/14) 9. Counsel asked the court to impose a first-time offender sentence of 90 days. RP (3/26/14) 13.

The court imposed an exceptional sentence of 48 months in prison. CP 12. In pronouncing sentence, the judge said

I agree with [the prosecutor]: I think a message needs to be sent. The message that needs to be sent is this kind of behavior is reprehensible... I don't believe that to treat Ms. Bowen as a first time offender is equitable, I don't think it is appropriate, and I don't think that it would send the proper message. RP (3/26/14) 20-21.

Although the judgment and sentence recited that the court had "considered the defendant's present and future ability to pay legal financial obligations," the court did not enter a finding on that issue. CP 11. The court found Ms. Bowen indigent at the inception of the case and appointed counsel to represent her. Order Appointing Attorney, Supp CP. The court also entered an Order of Indigency at the conclusion of the case. CP 19.

At sentencing, defense counsel noted that Ms. Bowen had lost her job with Flying K upon being discovered. She'd lost a second job after pleading guilty. RP (3/26/14) 8. Counsel also pointed out that she was a single mother of two young children. RP (3/26/14) 8.

Although the court did not impose a fine, it did order Ms. Bowen to pay \$600 in attorney fees. CP 13.

Ms. Bowen appealed. CP 18.

ARGUMENT

I. MS. BOWEN’S GUILTY PLEA VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 316 P.3d 469 (2013). The voluntariness of a guilty plea may be raised for the first time on appeal. *State v. Mendoza*, 157 Wn.2d 582, 589, 141 P.3d 49 (2006); *State v. Walsh*, 143 Wn.2d 1, 4, 17 P.3d 591 (2001). The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

B. The conviction for first-degree theft must be vacated and the charge dismissed with prejudice because the record does not affirmatively establish a factual basis for Ms. Bowen’s guilty plea.

Due process requires an affirmative showing that an accused person’s guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004). The

factual basis for a guilty plea must be developed on the record at the time the plea is taken. *State v. S.M.*, 100 Wn. App. 401, 415, 996 P.2d 1111 (2000).

The factual basis for a plea is insufficient if it fails to satisfy all the elements of the offense. *State v. R.L.D.*, 132 Wn. App. 699, 706, 133 P.3d 505 (2006). Failure to sufficiently develop facts on the record at the time of a guilty plea requires vacation of the conviction and dismissal of the charge with prejudice. *Id.*

The state charged Ms. Bowen with first-degree theft under RCW 9A.56.030(1)(a). CP 1. Conviction required the state to prove that she wrongfully obtained property of another, valued at more than \$5,000, with intent to deprive the owner. RCW 9A.56.020(1)(a); RCW 9A.56.030(1)(a).

At Ms. Bowen's plea hearing, the state did not develop an adequate factual basis for a plea to first-degree theft as charged. In her Statement on Plea of Guilty, Ms. Bowen admitted that she "knowingly took property of another (lottery tickets) unlawfully – without payment for the tickets, with the intent to deprive the owner." Plea of Guilty, Supp CP. The court's colloquy with Ms. Bowen added that she "scratched about 500 [lottery tickets] per shift." RP 6-8. Neither the written plea form nor the

verbal colloquy on the record established that the value exceeded \$5,000.

Plea of Guilty, Supp CP; RP 6-8.

The factual basis for Ms. Bowen's guilty plea is insufficient because the record is silent as to an element of first-degree theft. *R.L.D.*, 132 Wn. App. at 706. Because the state did not develop an adequate factual basis for Ms. Bowen's guilty plea, the plea was not voluntary. *Id.* Ms. Bowen's plea must be vacated and the charge dismissed with prejudice. *Id.* at 707.

II. THE SENTENCING COURT LACKED A TENABLE BASIS FOR THE LENGTH OF MS. BOWEN'S EXCEPTIONAL SENTENCE.

A sentencing court has discretion to determine the length of an exceptional sentence. *State v. Bluehorse*, 159 Wn. App. 410, 433-34, 248 P.3d 537 (2011). A trial court abuses its discretion if the sentence imposed is "clearly excessive." *Id.*; RCW 9.94A.585(4)(b). A sentence is clearly excessive if it is based on untenable grounds. *Bluehorse*, 159 Wn.App. at 434.

The legislature intended the Sentencing Reform Act to structure a sentencing court's discretion and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;

- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. When imposing an exceptional sentence, the court must consider the purposes of the SRA. RCW 9.94A.535(2)(a), RCW 9.94A.537(6).

Here, the sentencing court imposed 48 months, doubling the prison term requested by the prosecutor. CP 12; RP (3/26/14) 6, 22. The court selected this term of confinement in part to send a message and thereby deter others from committing similar offenses. RP (3/26/14) 20, 21-22.

But deterrence of others is not a proper basis to punish a particular offender. Instead, the length of an exceptional sentence must be based on the defendant's criminal history and the circumstances of the offense, not on a desire to send a message to other potential offenders.

Because the sentence length rests on deterrence of others and the court's desire to send a message, it does not promote the purposes of the SRA. The sentence does not ensure proportionality, or promote respect for the law by providing punishment which is just. RCW 9.94A.010(1), (2). Singling out and making an example of one offender cannot result in punishment commensurate with the sentences imposed on others

committing similar offenses. RCW 9.94A.010(3). The sentence here does not further the SRA's goal of protecting the public, because there is no evidence regarding Ms. Bowen's risk of recidivism. RCW 9.94A.010(4). The lengthy prison term does not offer Ms. Bowen an opportunity to improve herself. RCW 9.94A.010(5). It does not make frugal use of public resources. RCW 9.94A.010(6). Finally, although the sentence incapacitates Ms. Bowen while she's confined, it does nothing to reduce the risk that she'll reoffend once she returns to the community. RCW 9.94A.010(7).

The sentence here is clearly excessive because it was imposed on untenable grounds. The sentence must be vacated and the case remanded for a new sentencing hearing. *Bluehorse*, 159 Wn. App. 433-34.

III. THE COURT VIOLATED MS. BOWEN'S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPOSING ATTORNEY'S FEES IN A MANNER THAT IMPERMISSIBLY CHILLS THE EXERCISE OF THAT RIGHT.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014).

- B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).¹ A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Although most issues may not be raised absent objection in the trial court, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). An offender may challenge imposition of a criminal penalty for the first time on appeal if the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).²

¹ *See also* *State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

² *See also*, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App.

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenged to LFOs. *Id.* Those cases do not govern Ms. Bowen’s claim that the court lacked constitutional and statutory authority.

- C. The court violated Ms. Bowen’s right to counsel by ordering her to pay the cost of her court-appointed attorney without inquiring into her present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused’s exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person’s current or future ability to pay prior to imposing costs. *Id.*

873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

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) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.³ *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay

³ In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

them.” *Id.* The court noted that, under the Oregon scheme, “no requirement to repay may be imposed if it appears *at the time of sentencing* that ‘there is no likelihood that a defendant's indigency will end.’” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a

defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, neither party provided the court with information about Ms. Bowen's present or likely future ability to pay attorney's fees. RP (1/10/14). Although the Judgment and Sentence includes a boilerplate finding that "the Defendant has the ability or likely future ability to pay," this finding is not supported by anything in the record. CP 99. Indeed, the court found Ms. Bowen indigent at beginning and at the end of the proceedings. CP 110-12. Ms. Bowen's felony convictions and lengthy incarceration will also negatively impact her prospects for employment.

The lower court ordered Ms. Bowen to pay \$600 in attorney fees without conducting any inquiry into her present or future ability to pay. This violated her right to counsel. Under *Fuller*, the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Ms. Bowen to pay \$600 in attorney fees must be vacated. *Id*

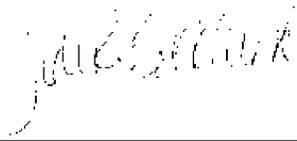
CONCLUSION

Ms. Bowen's conviction for first-degree theft must be vacated, and the charge dismissed with prejudice. In the alternative, her sentence must be vacated and the case remanded for a new sentencing hearing. If the

sentence is not vacated, the order requiring her to pay attorney fees must be vacated.

Respectfully submitted on August 14, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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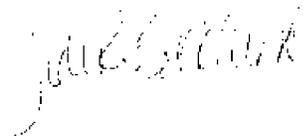
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on August 14, 2014.



Jodi R. Backlund, WSBA No. 22917
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