No. 46218-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Richard Schmeling,

Appellant.

Clark County Superior Court Cause No. 13-1-00754-1

The Honorable Judge Scott Collier

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Schmeling's motion to suppress.

2. The search of Mr. Schmeling's car violated his rights under the Fourth and Fourteenth Amendments and Wash. Const. art. I, § 7.

3. The trial court erred by finding that Mr. Schmeling voluntarily consented to a search of his car, including all containers.

4. The trial court erred by shifting the burden to Mr. Schmeling to show his education, experience, and level of intelligence.

5. The police violated Mr. Schmeling's rights by conducting a warrantless search of his car in the absence of valid consent.

6. The trial court erred by concluding that Mr. Schmeling consented to a search of his car, duffel bag, and fanny pack.

> **ISSUE 1:** Absent an exception to the warrant requirement, evidence obtained pursuant to a warrantless search or seizure may not be admitted at a criminal trial. Here, the prosecution failed to establish an exception to the warrant requirement. Did the trial court err by admitting evidence seized in violation of Mr. Schmeling's rights under the Fourth and Fourteenth Amendments and art. I, § 7?
>
> **ISSUE 2:** A warrantless search cannot be justified as consensual unless, under the totality of the circumstances, consent is freely and voluntarily given. Here, Mr. Schmeling's purported consent was not voluntary. Should the trial court have granted Mr. Schmeling's motion to suppress the evidence seized without a search warrant?

7. Mr. Schmeling's felony conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment.

> **ISSUE 3:** The Eighth Amendment prohibits imposition of felony sanctions for a particular crime when there is a national consensus against doing so and the severity of the punishment is incommensurate with the culpability of the offender and does not serve legitimate penological goals. There is a national consensus that possession of drug residue should not be

punished as a felony absent proof of a culpable mental state; furthermore, the felony sanction is more severe than warranted by the blameworthiness of the offender or any legitimate penological goal. Does RCW 69.50.4013 violate the Eighth Amendment when applied to possession of drug residue in the absence of any culpable mental state?

8. RCW 69.50.4013 violates due process as applied because it permits conviction for possession of imperceptible amounts of a controlled substance.

ISSUE 4: Due process prohibits imposition of criminal liability for acts which the defendant does not cause. Washington allows conviction for possession of drug residue without proof of any culpable mental state, including negligence. Does RCW 69.50.4013 violate due process under the Fourteenth Amendment because it authorizes a felony conviction for acts the accused person did not cause?

ISSUE 5: Courts have the authority to recognize non-statutory elements where a criminal statute is unconstitutional. RCW 69.50.4013 is unconstitutional as applied to possession of drug residue. Should the Court of Appeals exercise its authority to recognize a non-statutory element requiring proof of a culpable mental state, in order to save RCW 69.50.4013?

9. The order imposing $800 in attorney fees violated due process and Mr. Schmeling's Sixth and Fourteenth Amendment right to counsel.

10. The trial court erred by imposing attorney fees in the absence of any evidence showing that Mr. Schmeling had the present or likely future ability to pay.

11. The court erred by adopting Finding of Fact No. 2.5 in the Judgment and Sentence.

ISSUE 6: A trial court may only order an offender to pay attorney fees upon finding that s/he has the present or likely future ability to pay. Here, the court imposed $800 in costs for court-appointed counsel without any evidence that Mr. Schmeling had the ability to pay them. Did the trial court violate due process and Mr. Schmeling's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Suleiman Musa worked at a convenience store in Camas. RP 414-416. He believed that Richard Schmeling had stolen some products near the register and made a police report. RP 416-436. A few days later, Sgt. Chaney received a call that another officer stopped Mr. Schmeling. RP 6, 454. He went to where Mr. Schmeling and his passenger, as well as the other officer, waited. RP 6, 482-484.

Chaney believed he had probable cause to arrest Mr. Schmeling on the shoplift incident, so he read him his rights. RP 6-7. He put Mr. Schmeling in custody and put him in the back of the police car. RP 7. According to Chaney, Mr. Schmeling admitted the theft.[1] RP 9. The other officer released the passenger, who left the area on foot. RP 15, 485.

Chaney wanted to search the car, so he sought Mr. Schmeling's consent. RP 10. He told Mr. Schmeling that he could stop or limit the search. According to Chaney, Mr. Schmeling assented.[2] RP 11-12. During the search of the car, Chaney kept Mr. Schmeling in the back of

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[1] Mr. Schmeling denied that he had admitted the theft. He said that he acknowledged to the officer that the product taken, a male enhancement pill, was one that he used, but denied that he had stolen the pills from the Camas store. RP 529.

[2] Mr. Schmeling later denied that he had given consent. He testified that he and the officer communicated through a closed police car window, and that when he said "No way", the officer may have thought he heard "okay". RP 532. This testimony was offered at trial; Mr. Schmeling did not testify at the suppression hearing. RP 20-22, 5532-540. The officer did acknowledge his report said the window was up during this conversation. RP 18.

the police car, parked behind Mr. Schmeling's car on the side of the road. RP 12. While another officer searched, neither Chaney nor Mr. Schmeling could see where or exactly how the search was proceeding. RP 16.

At some point, a blue duffle bag was brought out. Mr. Schmeling said the bag was his, but not all of the contents. RP 491. Inside the bag was a fanny pack that contained two plastic baggies with a very small amount of white powder. RP 459-460, 491. The powder contained methamphetamine. RP 504-508.

The state charged Mr. Schmeling with theft and possession of methamphetamine. CP 32. The defense moved to suppress the items found during the police search. CP 1-7, 8-23; RP 1-42. The court ruled the fruits of the search admissible.[3] RP 32-42. In giving his ruling, the trial judge acknowledged that there was no evidence offered regarding Mr. Schmeling's education or experience:

> ...there's nothing here that I've heard that would alert the officer that we may have an issue here about the intelligence level and the ability, intellectually, to consent.
> RP 34.

The first jury that tried Mr. Schmeling was unable to reach a verdict and the court declared a mistrial. RP 317-322. Mr. Schmeling was convicted of both counts by the second jury. CP 86-106.

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[3] The court did not enter a written order.

At sentencing, the court issued a fee for court-appointed attorney of $800. CP 91. The judge stated "I do believe he has the ability to pay legal fees, fines and costs." RP 647.

Mr. Schmeling timely appealed. CP 107.

ARGUMENT

I. THE EVIDENCE ADMITTED AGAINST MR. SCHMELING WAS SEIZED IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AMENDMENT AND ART. I, § 7.

A. Standard of Review.

The validity of a warrantless search is reviewed *de novo*. *State v. Westvang*, 174 Wn. App. 913, 918, 301 P.3d 64 (2013). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.* In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *Id.* at 916, n. 4.

B. Warrantless searches are *per se* unreasonable.

Both the Fourth Amendment to the federal constitution and art. I, § 7of Washington's constitution prohibit searches and seizures without a search warrant. *Westvang,* 301 P.3d at 68; U.S. Const Amends. IV; XIV; art. I, § 7. This "blanket prohibition against warrantless searches is subject to a few well guarded exceptions…" *Id.* When police have ample

opportunity to obtain a warrant, courts do not look kindly on their failure to do so. *State v. White*, 141 Wn. App. 128, 135, 168 P.3d 459 (2007) (internal citation omitted).

The state bears the heavy burden of showing that a search falls within one of the narrowly drawn exceptions to the warrant requirement. *Westvang,* 301 P.3d at 68. Before evidence seized without a warrant can be admitted at trial, the state must establish an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Unlike the Fourth Amendment, art. I, § 7 focuses on individual rights and the expectation of privacy, not the reasonableness of police conduct. *State v. Monaghan*, 165 Wn. App. 782, 787, 266 P.3d 222 (2012). In addition, art. I, § 7 specifically confers a privacy interest in vehicles and their contents. *State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). Absent a warrant, police may not intrude into a vehicle to seize evidence. *Id.*

C. Police had ample time to seek a warrant to search Mr. Schmeling's car, and should not have relied on his purported consent.

Consent to search is an exception to the warrant requirement. Consent cannot support a warrantless search unless the prosecution proves "that the consent was freely and voluntarily given." *State v. O'Neill*, 148

Wn.2d 564, 588-90, 62 P.3d 489 (2003). Consent, once voluntarily given, may be withdrawn. A person consenting to a search has the right to restrict or revoke that consent at any time. *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013).

Consent must be evaluated under the totality of the circumstances. *O'Neill*, 148 Wn.2d 564, 588-90. The totality-of-the-circumstances test requires the court to evaluate the person's age, experience, education, any restraint imposed, and any evidence of coercive tactics. *Id.; United States v. Brake*, 666 F.3d 800, 806 (1st Cir. 2011). Also relevant are the administration of *Miranda* warnings and notification of the right to refuse consent. *O'Neill*, 148 Wn.2d 564, 588-90.

Here, the state failed to prove that Mr. Schmeling freely and voluntarily consented to the search of his car. Furthermore, the court applied the wrong legal standard.

First, the state presented no testimony regarding Mr. Schmeling's age, intelligence, experience, or education.[4] RP 4-20. The court made no findings at all about his age and experience. RP 32-36. This absence of findings must be held against the state. *Westvang*, 174 Wn. App. at 916, n. 4. Furthermore, instead of finding that Mr. Schmeling was intelligent

[4] The state attached to its memorandum a plea form purporting to show that he'd completed 12th grade, but did not introduce the document into evidence. CP 8-23.

and/or educated, the court evaluated only what was known to the officer at the time of the search:

> [The officer] doesn't know if he's got a high-school education, two years at Clark College after that, or a master's degree somewhere. But basic commands, conversations -- there's nothing here that I've heard that would alert the officer that we may have an issue here about the intelligence level and the ability, intellectually, to consent.
> RP 34.

But the officer's good faith belief is irrelevant. *See, e.g., State v. Tamblyn*, 167 Wn. App. 332, 338, 273 P.3d 459 (2012). Instead, *the court* must examine the totality of the circumstances, regardless of what was apparent to the officer at the time of the alleged consent. *O'Neill*, 148 Wn.2d 564, 588-90.

Second, there is no indication that Mr. Schmeling consented to a search of all the containers in the car, including the fanny pack that was found inside the duffel bag. RP 4-20. The court found that he consented to a search of the trunk, but made no finding regarding containers. RP 32-36. The absence of a finding on this point must be held against the state. *Westvang*, 174 Wn. App. at 916, n. 4.

Third, the remaining circumstances weigh against a finding of valid consent. Mr. Schmeling was handcuffed, in custody, and sitting in a patrol car in the presence of two uniformed officers. RP 7-8, 10-11. Although he was administered *Miranda* warnings and told he could

change his mind or limit the scope of the search, he was not within hearing of the officer conducting the search, and thus could only voice any objections to the other officer. RP 12-14, 16-18. He could not see the interior of his car where the officer was searching. RP 16. Because of this, he could not evaluate whether to stop or limit the search, and likely did not realize the searching officer planned to empty out the duffel bag and fanny pack.

The totality of the circumstances establishes that Mr. Schmeling did not voluntarily consent to a search of his car. *O'Neill*, 148 Wn.2d at 588-90. The warrantless search and seizure cannot be justified under the consent exception to the warrant requirement. *Id.* Mr. Schmeling's convictions must be reversed and the evidence suppressed on remand. *Id.* at 593.

II. RCW 69.50.4013 IS UNCONSTITUTIONAL AS APPLIED.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014).

B. RCW 69.50.4013 violates the Eighth Amendment because it imposes felony sanctions on possession of drug residue without proof of a culpable mental state.

1. The Eighth Amendment prohibits punishment conflicting with the evolving standards of decency that mark the progress of a maturing society.

The Eighth Amendment categorically prohibits certain punishments. *Graham v. Florida*, 560 U.S. 48, 59-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *as modified* (July 6, 2010). Traditionally, this approach applied only in death penalty cases. *Id.,* at 60. The Supreme Court has expanded the categorical approach to cases that do not involve the death penalty. *Id.,* at 61.

To implement the Eighth Amendment, courts must look to "the evolving standards of decency that mark the progress of a maturing society." *Graham,* 560 U.S. at 58. The *Graham* court adopted a two-step framework for the categorical approach.

First, a reviewing court considers objective indicia of society's standards— in the form of legislation and sentencing data— "to determine whether there is a national consensus against the sentencing practice." *Id.,* at 61. Second, the court considers "'standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose' …[to] determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.,*

(quoting *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525, *opinion modified on denial of reh'g,* 129 S.Ct. 1 (2008)).

In *Graham,* the court analyzed sentencing data and found it significant that "only 11 jurisdictions nationwide" imposed the challenged sentence (in that case, life without parole for juvenile nonhomicide offenders). *Id.,* at 64. The court characterized the practice as "exceedingly rare." *Id.,* at 67.

The reasoning set forth in *Graham* requires invalidation of RCW 69.50.4013 as applied to possession of drug residue, when that crime is committed without any culpable mental state.

2. There is a strong national consensus that possession of drug residue should not be punished as a felony absent proof of some culpable mental state.

The consequences of a felony conviction are much greater than those imposed for a gross misdemeanor. A class C felony may be punished by up to five years in prison and a fine of up to $10,000.[5] RCW 9A.20.021. Furthermore, a convicted felon loses certain civil rights, such as the the right to vote, to sit on a jury, and to possess a gun, in addition to suffering "grave damage to his [or her] reputation." *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985).

There is a clear national consensus that mere possession of drug residue should not be punished as a felony absent a *mens rea* element. *See, e.g., Costes v. Arkansas,* 287 S.W.3d 639 (2008) (Possession of residue

insufficient for conviction); *Doe v. Bridgeport Police Dept.,* 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba,* 859 P.2d 708 (1993) ("Usable-quantity rule" requires proof that substance is in form and quantity that can be used); *Louisiana v. Joseph,* 32 So.3d 244 (2010) (Cocaine residue that is visible to the naked eye is sufficient for conviction if requisite mental state established; statute requires proof that defendant "knowingly or intentionally" possessed a controlled substance); *Finn v. Kentucky,* 313 S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant's knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of "awareness" and "conscious intent to possess"); *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant's knowledge is established); *North Carolina v. Davis,* 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma,* 146 P.3d 1141 (2006) (knowing possession of residue established by defendant's statement); *Ohio v. Eppinger,* 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a "miniscule" amount

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[5] This compares to a fine of $5,000 and confinement of up to 364 days for most gross misdemeanors. RCW 9A.20.021.

of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida,* 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells,* 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant "knowingly or purposely" obtain or possess a controlled substance); *Idaho v. Rhode,* 988 P.2d 685, 687 (1999) (rejecting "usable quantity" rule, but noting that prosecution must prove knowledge); *Lord v. State*, 616 So.2d 1065 (Fla. Dist. Ct. App. 1993) (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction);*Garner v. Texas*, 848 S.W.2d 799, 801 (1993) ("When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance"); *South Carolina v. Robinson,* 426 S.E.2d 317 (1992) (prosecution need not prove a "measurable amount" of controlled substance, so long as knowledge is established); *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988) (knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony); N.D. Cent. Code Ann. § 19-03.1-23; N.D. Cent. Code. § 12.1-02-02; *State v. Christian*, 2011 ND

56, 795 N.W.2d 702, 705 (2011) (willful possession—including reckless possession—of residue is a felony).

This national consensus is considerably stronger than in *Graham.* Thus, the analysis moves to the second phase. *Graham,* 560 U.S. at 61. The court examines three factors in applying the second part of the *Graham* test: (1) "the culpability of the offenders at issue in light of their crimes and characteristics," (2) "the severity of the punishment," and "(3) whether the challenged sentencing practice serves legitimate penological goals." *Graham,* 560 U.S. at 67 (citations omitted).

These three factors support the national consensus outlined above. First, persons who unknowingly possess drug residue are relatively blameless. Second, a felony conviction, the associated punishments, and the additional consequences to reputation and civil rights are unduly harsh. Third, there are no legitimate penological goals for imposing felony liability on those who unknowingly possess drug residue.

Four commonly recognized penological interests are retribution, deterrence, incapacitation, and rehabilitation. *Graham,* 560 U.S. at 72. None of these four goals are served here.[6] A person who unwittingly possesses drug residue cannot be deterred from doing so in the future. If the statute's goal is to make people more careful, even a low-level mental state such as criminal negligence would

[6]Furthermore, any penological goals are adequately served by RCW 69.50.412(1), which criminalizes (*inter alia*) the use of drug paraphernalia to store or ingest a controlled substance. Indeed, most residue cases—including this one—could be prosecuted under RCW 69.50.412(1). Violation of the statute is a misdemeanor.

serve that purpose; it is unnecessary to punish those whose mental state is wholly innocent.

Nor does it make sense to speak of retribution or incapacitation for a person who unwittingly possessed drug residue. Where possession is unwitting, the "offender" is neither deserving of punishment nor prevented (by imposition of felony sanctions) from causing future harm.

Finally, a person who unwittingly possessed drug residue cannot be rehabilitated. Rehabilitation presupposes a volitional act that can be treated in some manner. A person who did not even act negligently with respect to the fact of possession (or the nature of the substance) will not respond to any form of treatment, because there is no ill to be addressed.

Under *Graham,* "the sentencing practice under consideration is cruel and unusual." *Id.,* at 74. The Eighth Amendment categorically prohibits punishing as a felony the possession of drug residue, without some proof of a culpable mental state. *Id.*

C. RCW 69.50.4013 violates due process as applied to possession of drug residue absent proof of some culpable mental state.

The Fourteenth Amendment guarantees an accused person due process of law. U.S. Const. Amend. XIV. The legislature may create crimes with no *mens rea;* however, due process "admits only a narrow category of strict liability crimes, generally limited to regulatory measures where penalties are relatively small." *United States v. Macias*, 740 F.3d 96, 105 (2d Cir. 2014)

(Raggi, J., concurring). There are constitutional limits on the kind of penalties that can be imposed for strict liability crimes: "[s]evere fines and jail time… warrant a state of mind requirement" for conviction. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 688 n. 4 (10th Cir. 2010).[7]

A statute imposing strict liability "does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Wulff*, 758 F.2d at 1125. If it were otherwise, "a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his [or her] reputation," a result that "the Constitution does not allow." *Id.; see also Louisiana v. Brown*, 389 So.2d 48, 51 (La. 1980) (invalidating as unconstitutional "the portion of the statute making it illegal "unknowingly" to possess a Schedule IV substance).

The legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are "not inconsistent with the Constitution and statutes of this state…" RCW 9A.04.060. Washington courts have the power to recognize non-statutory elements of an offense.[8] *See, e.g., State v. Kjorsvik*, 117 Wn.2d 93, 98, 812

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[7] This is in keeping with the Supreme Court's prohibition on statutes that criminalize status crimes and acts which the defendant does not cause. *Apollo,* at 228 (citing *Lambert v. California,* 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) and *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)).

[8] In fact, the judiciary even has the power to define entire crimes. *See State v. Chavez,* 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge). Similarly, the judiciary has the power to recognize

P.2d 86 (1991) (intent to steal is an essential nonstatutory element of robbery); *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004) (identity of controlled substance is an essential element when it affects the penalty); *State v. Johnson*, 119 Wn.2d 143, 145, 829 P.2d 1078 (1992) (Conspiracy to deliver includes common-law element of "involvement of a third person outside the agreement.") Courts also have the power to add other facts required for conviction, when such facts are necessary to ensure the constitutionality of the statute. *See, e.g., State v. Allen*, 176 Wn.2d 611, 628, 294 P.3d 679 (2013), *as amended* (Feb. 8, 2013) (First Amendment requires state to prove a "true threat" for harassment conviction, but "true threat" is not an element of the offense.)

Possession of a controlled substance is a strict liability offense. *State v. Denny*, No. 42447-9-III, 294 P.3d 862 (Feb. 20, 2013). Current law allows conviction for unwitting possession of amounts so small as to be imperceptible to the naked eye. RCW 69.50.4013; *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008) ("[T]here is no minimum amount of drug which must be possessed in order to sustain a conviction."). Because of this, guilt is a function of the sensitivity of equipment used to detect controlled substances, rather than the culpability of the individual. Thus, a person who

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affirmative defenses to ameliorate the harshness of criminal statutes. *See, e.g., State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession).

visits Washington from Florida would likely be guilty of cocaine possession upon arrival.[9] *See, e.g., Lord v. Florida*, 616 So.2d 1065, 1066 (1993) ("It has been established by toxicological testing that cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.")

Washington's possession law violates due process. *Macias*, 740 F.3d 96. RCW 69.50.4013 imposes liability even when the accused cannot know she or he is in possession of a controlled substance without the aid of sensitive equipment.

The court should either invalidate the statute or employ its inherent and statutory authority to recognize a *mens rea* element for possession of a controlled substance.[10] *Goodman,* 150 Wn.2d 774*; Cleppe,* 96 Wn.2d 373*; Chavez,* 163 Wn.2d 262. A common law element requiring proof of a culpable mental state is not inconsistent with Washington's possession statute. RCW 69.50.4013.

The obligation to recognize a *mens rea* element does not conflict with *Cleppe* and its progeny. *Cleppe* concerned an issue of statutory interpretation; it did not address the requirements of the due process clause. *Cleppe,* 96

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[9]Such a person might assert the affirmative defense of unwitting possession. *Cleppe*, 96 Wn.2d at 381.

[10] The Supreme Court has rejected a "usable quantity" test, but has never upheld a conviction based on possession of mere residue. *See State v. Larkins*, 79 Wn.2d 392, 395, 486 P.2d 95 (1971) (affirming conviction based on "a measurable amount" of Demerol.)

Wn.2d at 377-381. Furthermore, *Cleppe* and subsequent cases have been concerned only with proof of intent or guilty knowledge. *Id.* There do not appear to be any cases addressing lesser mental states such as negligence or recklessness.

If the court recognizes a non-statutory element requiring proof of some culpable mental state, Mr. Schmeling's possession conviction would be based on insufficient evidence, in violation of his right to due process. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The court should either recognize such an element or invalidate RCW 69.50.4013 as applied. In either case, the court must reverse Mr. Schmeling's possession conviction and dismiss the charge with prejudice. *Id.*

III. THE COURT VIOLATED MR. SCHMELING'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.

Constitutional errors are reviewed *de novo. LK Operating,* 181 Wn.2d at 66.

B. The court violated Mr. Hansen's right to counsel by ordering him to pay attorney fees without inquiring into his 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 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.*

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 defendant'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.[11] *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 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

[11] 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.

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 Mr. Schmeling's present or likely future ability to pay attorney's fees. *See* CP *generally,* RP *generally.* The Judgment and Sentence does not even include a boilerplate finding regarding his ability to pay. CP 39-50.

However, the court did find Mr. Schmeling indigent at the beginning and end of the proceedings. CP 1, 52. This suggests he was unable to pay at the time he was sentenced. His felony convictions and incarceration will negatively impact his prospects for future employment.

The lower court ordered Mr. Schmeling to pay $1800 in attorney fees without conducting any inquiry into his present or future ability to pay. This violated his 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 Mr. Schmeling to pay $1800 in attorney fees must be vacated. *Id*

C. Erroneously-imposed legal financial obligations may be challenged for the first time on appeal.

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 thus challenge imposition of a criminal penalty for the first time on appeal. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[12] Furthermore, any argument may be raised for the first time on appeal if it involves a manifest error affecting a constitutional right. RAP 2.5(a).

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

[12] *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. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has

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 challenges to the court's finding that the accused had the present or future ability to pay LFOs. *Id.*

Those cases do not govern Mr. Schmeling's claim that the court lacked constitutional authority to order him to pay. They also conflict with *Ford, Bahl, Moen,* and the other cases cited above. The issue here may be reviewed even though Mr. Schmeling did not object in the trial court. *Bahl*, 164 Wn.2d at 744.

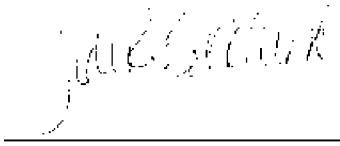
CONCLUSION

For the foregoing reasons, Mr. Schmerling's drug conviction must be reversed and the case dismissed with prejudice. In the alternative, the order imposing attorney fees must be vacated.

Respectfully submitted on January 7, 2015,

"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").

BACKLUND AND MISTRY



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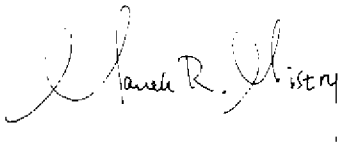

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Richard Schmeling
9811 NE 138th Ct
Vancouver, WA 98682

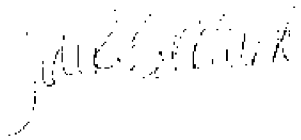
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

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 January 7, 2015.



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