

No. 46618-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Todd Burman,

Appellant.

Clark County Superior Court Cause No. 14-1-01284-5

The Honorable Judge Scott Collier

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court's unwitting possession instruction violated Mr. Buurman's Fourteenth Amendment right to due process.
2. The court erred by giving instruction number 16.
3. The state's failure to disprove unwitting possession violated the defendant's right to due process.

ISSUE 1: Due process prohibits a court from placing the burden on an accused person to prove a defense if that defense negates an element of the charged crime. Here, the court instructed the jury that Mr. Buurman had the burden of proving unwitting possession even though that defense cannot coexist with the element requiring dominion and control to establish constructive possession. Did the court's instructions violate Mr. Buurman's Fourteenth Amendment right to due process?

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

ISSUE 2: 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 simple possession of drugs 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 simple possession in the absence of any culpable mental state?

5. RCW 69.50.4013 violates due process as applied because it permits felony conviction for possession absent a culpable mental state.

ISSUE 3: Due process prohibits imposition of criminal liability for acts which the defendant does not cause. Washington allows conviction for simple drug possession 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 4: 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?

6. Mr. Buurman's theft conviction violated his Sixth and Fourteenth Amendment right to an adequate charging document.
7. Mr. Buurman's theft conviction violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
8. The charging document failed to allege critical facts identifying the theft charge and allowing Mr. Buurman to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

ISSUE 5: A charging document must set forth any critical facts necessary to identify the particular crime charged. Here, the Information charging Mr. Buurman with theft did not provide any details describing the items he allegedly stole. Did the omission of critical facts infringe Mr. Buurman's right to an adequate charging document under the Fifth, Sixth, and Fourteenth Amendments and Wash. Const. art. I, §§ 3 and 22?

9. The court exceeded its statutory authority by ordering Mr. Buurman to pay the victim penalty assessment twice.

ISSUE 6: The legislature has authorized a superior court to order a \$500 victim penalty assessment in any case or cause number involving one or more felony or misdemeanor convictions. Here, the court ordered Mr. Buurman to pay the assessment twice for a single case. Did the court exceed its statutory authority?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Todd Buurman lost his job following an injury. RP 113. He lost his home and resorted to couch surfing with various friends. RP 113-14. He was broke. RP 113.

One morning, Mr. Buurman woke up at a friend's house and put on some cargo shorts he found on a pile of laundry. RP 116. The shorts were long and had numerous pockets. RP 115. That evening, Mr. Buurman went to Safeway and walked out of the store with some items without paying. RP 116. A store employee saw him do it and called the police. RP 56-60.

The police contacted Mr. Buurman and he admitted the theft. RP 67. He said that he did not have any money and needed the items for personal use. RP 67-68.

The officer searched Mr. Buurman incident to arrest and found a small baggie in one of his lower pockets. RP 68-69. The baggie contained methamphetamine and weighed approximately 0.19 grams. RP 88, 90.

The state charged Mr. Buurman with possession of a controlled substance and third degree theft. CP 1. The charging language for the theft offense alleged that Mr. Buurman:

... did wrongfully obtain or exert unauthorized control over the property or services of another, of a value less than \$750, with intent to deprive that person of such property or services, to wit: various items belonging to Safeway...
CP 1.

The police officer testified that Mr. Buurman admitted that the shorts he was wearing were his. RP 73. But Mr. Buurman also said that he had never seen the baggie before and did not know where it came from.
RP 72.

The court instructed the jury on the defense of unwitting possession. CP 54. The court's instruction required Mr. Buurman to prove that he was unaware of the drugs in the shorts' pocket by a preponderance of the evidence. CP 54.

The jury found Mr. Buurman guilty of both charges. RP 165. The court ordered him to pay the \$500 victim penalty assessment twice, once on his felony Judgment and Sentence and once on his misdemeanor Judgment and Sentence. CP 65, 76.

This timely appeal follows. CP 86.

ARGUMENT

I. DUE PROCESS REQUIRES THE STATE TO DISPROVE UNWITTING POSSESSION BECAUSE IT NEGATES THE ELEMENT OF POSSESSION.

A. Standard of Review.

Constitutional issues are reviewed de novo. *Dellen Wood*

Products, Inc. v. Washington State Dep't of Labor & Indus., 179 Wn. App.

601, 626, 319 P.3d 847 *review denied*, 180 Wn.2d 1023, 328 P.3d 902

(2014). Manifest error affecting a constitutional right may be raised for

the first time on appeal. RAP 2.5(a)(3).

B. Due process prohibits instructions placing the burden on the accused to establish a defense that negates an element of an offense.

Due process requires the state to prove beyond a reasonable doubt

every fact necessary to constitute a charged crime. *State v. W.R., Jr.*, ---

Wn. 2d ---, 336 P.3d 1134, 1136 (October 30, 2014); U.S. Const. Amend.

XIV; art. I, § 3. As a corollary, the state cannot require the accused to

disprove any element of the offense. *Id.*

The legislature may require the accused to prove an affirmative defense. *Id.* at 1137. A true affirmative defense is one which admits a criminal act but “pleads an excuse for doing so.” *Id.* The legislature may not place the burden on the defense to establish facts negating an element of the crime. *Id.* at 1137-38. In such a situation, the accused need only

present evidence sufficient to raise a reasonable doubt as to the element. *Id.* at 1139. The analysis focuses on “whether the completed crime and the defense can coexist.” *Id.* at 1138.

C. Unwitting possession negates the element of possession because an unwitting possessor cannot exercise dominion and control.

Here, the court violated Mr. Buurman’s right to due process by requiring him to prove that his possession of the drugs was unwitting. *W.R.*, --- Wn. 2d ---, 336 P.3d at 1137-38.

Possession can be either actual or constructive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Actual possession requires proof that the accused had the contraband in his/her “actual physical custody.” *Id.* Constructive possession requires proof of “dominion and control” over a substance. *Id.*

Here, the state did not demonstrate that Mr. Buurman had the baggie in his actual physical custody. *See RP generally.* Accordingly, the state was required to prove that he exercised dominion and control over the drugs in the pocket of the shorts he was wearing. *Id.*

Unwitting possession negates constructive possession because a lack of knowledge cannot coexist with dominion and control over a controlled substance. *W.R.*, --- Wn. 2d ---, 336 P.3d at 1138. A person

cannot exercise dominion or control over an item that s/he does not know exists.

Once Mr. Buurman presented some evidence of unwitting possession, due process required the state to disprove it beyond a reasonable doubt in order to establish dominion and control. *Id.* The court's instruction placing the burden on Mr. Buurman violated his constitutional rights. *Id.*

This error requires reversal unless the state can demonstrate that no reasonable factfinder would have been swayed by an instruction properly placing the burden of proof on the state. *Id.* at 1140-41. Here, the state did not present any evidence that Mr. Buurman was aware of the drugs in the shorts' pocket. *See RP generally.* There was no testimony refuting Mr. Buurman's claim that he had never seen the baggie before. If instructed that the state had the burden of disproving unwitting possession, a reasonable factfinder could have found that that burden had not been met. *Id.* Accordingly, this constitutional error requires reversal of Mr. Buurman's possession conviction. *Id.*

The court's instructions violated Mr. Buurman's right to due process by requiring him to disprove constructive possession by a preponderance of the evidence. *W.R.*, --- Wn. 2d ---, 336 P.3d at 1138. Mr. Buurman's possession conviction must be reversed. *Id.*

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 for simple possession 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, 2021, 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 simple drug possession, when that crime is committed without any culpable mental state.

2. There is a strong national consensus that simple possession of drugs 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 \$10,000.¹ RCW 9A.20.021.

Furthermore, a convicted felon loses certain civil rights, such as the right to

¹ This compares to a fine of \$5,000 and confinement of up to 364 days for most gross misdemeanors. RCW 9A.20.021.

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 simple drug possession should not be punished as a felony absent a *mens rea* element. *See, e.g., Louisiana v. Joseph*, 32 So.3d 244 (2010) (statute requires proof that defendant “knowingly or intentionally” possessed a controlled substance); *Finn v. Kentucky*, 313 S.W.3d 89 (2010) (possession statute requires knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (same); *State v. Moore*, 352 S.W.3d 392, 400 (Mo. Ct. App. 2011) (state must prove knowing possession); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (felony possession requires knowledge); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of established by defendant’s statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (possession requires knowledge); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (evidence sufficient for possession conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (statute requires proof that defendant “knowingly or purposely” obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (noting that prosecution must prove knowledge); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993)

(statute requires knowledge to prove possession); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (state must prove knowledge in possession case); *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988) (statute requires knowing possession); 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); (statute requires willful possession).

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 drugs 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 drugs.

Four commonly recognized penological interests are retribution, deterrence, incapacitation, and rehabilitation. *Graham*, at 72. None of these

four goals are served here. A person who unwittingly possesses drugs 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 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 drugs. 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 drugs 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 drugs 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).²

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).

² 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*, 611 F.3d 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)).

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.³ *See, e.g., State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 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*, 173 Wn. App. 805, 809, 294 P.3d 862 (2013). Current law allows

³ 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 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).

conviction for unwitting possession unless the accused proves lack of knowledge by a preponderance of the evidence. RCW 69.50.4013.

Washington's possession law violates due process. *Macias*, 740 F.3d 96. RCW 69.50.4013 imposes liability even when the accused does not know she or he is in possession of a controlled substance.

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. *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 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. Buurman'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. Buurman's possession conviction and dismiss the charge with prejudice. *Id.*

III. THE INFORMATION CHARGING MR. BUURMAN WITH THEFT WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE CRITICAL FACTS.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

- B. The document charging Mr. Buurman with theft fails to allege sufficient facts to allow him to argue an acquittal or conviction as a bar against a second prosecution for the same crime.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.⁴ A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).⁵ The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

⁴ Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

⁵ The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amend. V, XIV.

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

In theft cases, Information must not name the owner but must “clearly” charge the accused person with a crime relating to “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information passes only the first of these three requirements: it charges in the language of the statute, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

Here, the Information does not provide any allegations regarding the nature or character of the items Mr. Buurman was supposed to have stolen. CP 1. The document’s provisions that the goods were valued at less than \$750 and belonged to Safeway were insufficient to detail

“specifically described property.” *Greathouse*, 113 Wn. App. at 903.

Because of this, the allegations are “too vague and indefinite upon which to deprive [Mr. Buurman] of his liberty.” *Id.* It provides neither notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64;

Valentine, 395 F.3d at 631. The critical facts in Mr. Buurman’s theft charge cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

The Information is constitutionally deficient. Mr. Buurman’s theft conviction must be reversed and the charge dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

IV. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY ORDERING MR. BUURMAN TO PAY THE VICTIM PENALTY ASSESSMENT TWICE.

A. Standard of Review.

Issues of statutory interpretation are reviewed *de novo*. *Keithly v. Sanders*, 170 Wn. App. 683, 687, 285 P.3d 225 (2012).

B. The legislature has only permitted a court to order a single \$500 victim penalty assessment for each superior court case.

A court derives the authority to order payment of legal financial obligations (LFOs) 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).

The legislature has authorized a superior court to impose a single \$500 victim penalty assessment per case:

When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor...

RCW 7.68.035.

Here, Mr. Buurman was convicted of one felony and one gross misdemeanor pursuant to a single case or cause of action. CP 61, 74. Still, the court ordered him to pay the penalty assessment twice, once on his Felony Judgment and Sentence and once on his misdemeanor Judgment and Sentence. CP 65, 76.

The court exceeded its statutory authority by ordering Mr. Buurman to pay double the statutorily-authorized amount for his victim penalty assessment. RCW 7.68.035. The order for Mr. Buurman to pay the assessment twice must be vacated.

- C. 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.

Hathaway, 161 Wn. App. at 651-653.⁶ 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.

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) *superseded on other grounds as recognized in State v. Cobos*, No. 89900-2, 2014 WL 6687191, at *1, --- Wn.2d ---, --- P.3d --- (Nov. 26, 2014); *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). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).⁷

⁶ *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).

⁷ *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 challenges to LFOs. *Id.* The cases do not govern Mr. Buurmans’s claim that the court lacked statutory authority to order him to pay the statutorily-authorized victim penalty assessment twice.

Additionally, a court may consider challenges to LFOs for the first time on appeal when doing so is necessary “in order to preserve the ends of justice.” RAP 1.2(c); *Hathaway*, 161 Wn. App. at 651.

Because the sentencing court ordered Mr. Buurman to begin payment of his LFOs immediately, consideration of this issue is necessary to serve the ends of justice. *Id.*; CP 65. The court also ordered DOC to issue a notice of payroll deduction. CP 65. Mr. Buurman is unlikely to be able to take advantage of the statutory mechanisms for challenging this erroneous LFO during his incarceration but is subject to having any DOC

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”).

wages withheld nonetheless. This court should consider the merits of Mr. Buurman's claim that the trial court exceed its authority by requiring to pay double the statutorily-authorized victim penalty assessment.

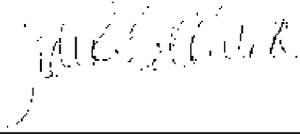
CONCLUSION

The court violated Mr. Buurman's right to due process by requiring him to prove the defense of unwitting possession by a preponderance of the evidence. The statute making it a felony to possess drugs even absent a culpable mental state violates the Eighth Amendment and Due Process. This court should either strike down the statute or infer a knowledge element. The Information charging Mr. Buurman with theft was constitutionally deficient because it failed to allege critical facts. Mr. Buurman's convictions must be reversed.

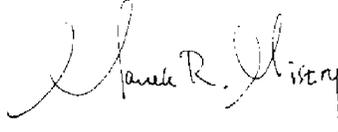
In the alternative, the court exceeded its authority by requiring Mr. Buurman to pay a victim penalty assessment twice for a single case. The court's order must be reversed.

Respectfully submitted on January 8, 2015,

BACKLUND AND MISTRY



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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:

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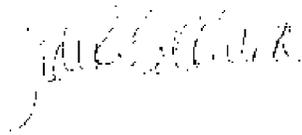
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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 8, 2015.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

January 08, 2015 - 12:52 PM

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