

NO. 48999-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DEREK J. KINNEY,

Appellant.

RESPONDENT'S BRIEF

Mark McClain
Prosecuting Attorney
Pacific County, Washington

Office Address:

300 Memorial Avenue
PO Box 45
South Bend, WA 98586

Telephone: (360) 875-9361

Fax: (360)875-9362

Email:

TABLE OF CONTENTS

I. STATE’S RESPONSE TO THE APPELLANT’S ASSIGNMENTS OF ERROR.....1

A. There was sufficient evidence introduced at trial for the jury to find beyond a reasonable doubt the Petitioner, Derek Kinney, possessed with intent to deliver a controlled substance within 1000 feet of a school bus route stop.

B. The trial court did not err when it ordered the Petitioner, Derek Kinney, to pay legal financial obligations in his Judgment and Sentence.

II. STATE’S RESPONSE TO THE APPELLANT’S ISSUES PRESENTED FOR REVIEW.....1

A Does a school bus route stop no longer qualify for the statutory 24 month drug sentencing enhancement under RCW69.50.435(1)(c) just because the particular bus that services the stop transports only pre-school students to school? (Assignment of Error 1).

B Did the Petitioner fail to properly preserve the issue of whether the trial court conducted a sufficient inquiry into his current and future ability to pay legal financial obligations at sentencing, where he did not object and affirmatively indicated he had the ability to pay? (Assignment of Error 2).

C Did the court fail to conduct a sufficient inquiry into the Petitioner’s ability to pay legal financial obligations at sentencing, even though he affirmatively indicated he had the ability to pay? (Assignment of Error 2).

III. STATEMENT OF THE CASE.....2

A. Procedural History.....2

B. Statement of Facts.....3

IV. ARGUMENT.....7

A. There was sufficient evidence introduced at trial for the jury to find beyond a reasonable doubt the Petitioner, Derek Kinney, possessed with intent to deliver, a controlled substance within 1000 feet of a school bus route stop.....7

1. A school bus route stop qualifies for the statutory 24 month drug sentencing enhancement under RCW69.50.435(1)(c) despite the fact the particular bus that services the stop transports only pre-school students to school.....7

B. The trial court did not err when it ordered the Petitioner, Derek Kinney, to pay legal financial obligations in his Judgment and Sentence.....11

1. The Petitioner failed to properly preserve the issue of whether the trial court conducted a sufficient inquiry into his current and future ability to pay legal financial obligations at sentencing where he did not object and he affirmatively indicated he had the ability to pay.....11

2. The court conducted a sufficient inquiry into the Petitioner’s ability to pay legal financial obligations at sentencing, especially considering he affirmatively indicated he had the ability to pay.....13

V. CONCLUSION.....14

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

City of Seattle State v. Patu, 147 Wn.2d 717, 58 P.3d 273 (2002).....12

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....11,13

State v. Coria, 120 W.2d 156, 839 P.2d 890 (1992).....9

State v. Davis, 93 Wn. App. 648, 970 P.2d 336 (1999).....10

State v. J.P., 149 Wn. 2d 444, 69 P.3d 318 (2003).....7

State v. Pam, 101 Wn.2d 507, 680 P.2d 762 (1984).....12

State v. Von Thiele, 47 Wn. App. 558, 736 P.2d 297 (1987).....7

State v. Wilbur, 110 Wn.2d 16, 749 P.2d 1295 (1988).....7

WASHINGTON STATUTES

RCW 69.50.4358,9,10

RCW 10.01.160.....13

OTHER REGULATIONS

RAP 2.5.....11

WAC 392-121-003.....9

WAC 392-121-106.....9

WAC 392-143-010(1).....9

I.

STATE'S RESPONSE TO THE APPELLANT'S ASSIGNMENTS OF ERROR

1. There was sufficient evidence introduced at trial for the jury to find beyond a reasonable doubt the Petitioner, Derek Kinney, possessed with intent to deliver a controlled substance within 1000 feet of a school bus route stop.
2. The trial court did not err when it ordered the Petitioner, Derek Kinney, to pay legal financial obligations in his Judgment and Sentence.

II.

STATE'S RESPONSE TO THE APPELLANT'S ISSUES PRESENTED FOR REVIEW

- A. Does a school bus route stop no longer qualify for the statutory 24 month drug sentencing enhancement under RCW69.50.435(1)(c) just because the particular bus that services the stop transports only pre-school students to school? (Assignment of Error 1).
- B. Did the Petitioner fail to properly preserve the issue of whether the trial court conducted a sufficient inquiry into his current and future ability to pay legal financial obligations at sentencing, where he did not object and affirmatively indicated he had the ability to pay? (Assignment of Error 2).
- C. Did the court fail to conduct a sufficient inquiry into the Petitioner's ability to pay legal financial obligations at sentencing, even though he affirmatively indicated he had the ability to pay? (Assignment of Error 2).

III.
STATEMENT OF THE CASE

A. Procedural History.

On May 19, 2016, Derek Kinney, was found guilty of possession with intent to deliver a controlled substance following a two day jury trial in the Superior Court for the State of Washington, Pacific County. (CP 23). The jury also found that he committed this crime within 1000 feet of a school bus route stop. (CP 18). The trial was presided over by Judge Pro-Tem Douglas Goelz. (RP 20). The Petitioner, Derek Kinney was represented by Harold Karlsvik. (Id.) The Respondent, the State of Washington, was represented by Deputy Prosecuting Attorney Don Richter. (Id.)

The Petitioner has appealed to this Court seeking to reverse the jury's special verdict finding of the sentencing enhancement. Additionally, the Petitioner is asking the Court to reverse the trial judge's assessment of legal financial obligations.

B. Statement of Facts.

On March 11 2013, Officer, Ryan Miskell, of the South Bend Police Department observed a vehicle parked in front of 603 Broadway Avenue in the city of South Bend Washington (RP 59). Officer Miskell ran the vehicle's plate and discovered that it had been sold more than forty five days earlier, but that the title had not been transferred by the new owner, which is a criminal traffic offense. (RP 60-61). Officer Miskell then observed the defendant, later identified as Derek Kinney enter the car and start to drive away. (Id.). Officer Miskell initiated a traffic stop for the offense. (Id.). The driver was identified as Mr. Kinney who was taken into custody for an unrelated warrant. (See CP 17-36).

A later search of the vehicle and defendant later produced 23.5 grams of methamphetamine (RP 86), a scale (RP 69), multiple cell phones (RP 72), \$452 in cash (RP 75), a small box full of tiny empty Ziploc bags, and tourniquets (RP 85), and multiple torch lighters (RP 82).

At trial the State called, Wyatt Kunken, to testify as to the existence of a School Bus Route Stop that was located across the street from 603 Broadway. (RP 128). Mr. Kuiken is the

manager of the South Bend School District transportation department. (Id.) As part of his duties he testified he is familiar with the active bus route stops of the school district. (RP 29). He testified that the location where Officer Miskell initially observed Mr. Kinney was 70 feet from a South Bend School District bus route stop located at 602 Broadway Avenue. (RP 131). Mr. Kuiken testified that the South Bend School District is a public school. (RP 166). That it received public funding. (Id.) That grades present at the school are pre-school “all the way through 12th grade.” (Id.) He also testified that the children picked up by the particular bus that stopped at the bus stop across from 603 Broadway was owned and operated by the South Bend School District and was used for “early education routes... preschool students.” (RP 167).

The jury was instructed that the term school “means a school or institution of learning having a curriculum below the college or university level as established by law and maintained at public expense. (RP 209).

Mr. Kinney was found guilty by unanimous jury verdict of possessing with intent to deliver a controlled substance as charged. (RP 241). The jury also found by unanimous special

verdict that the crime was committed within 1,000 feet of a school bus route stop. (RP 242).

Sentencing occurred the following day on May 20, 2016. (RP 246). Mr. Kinney was sentenced to a mid-range sentence of 16 months with a 24 month school bus route stop enhancement totaling 40 months. (RP 250).

In addition to his prison time Mr. Kinney was ordered to pay a \$500 victim assessment fee, \$200 in court costs, \$250 public defender fee, \$100 crime lab fee, \$100 DNA collection fee, and a \$1000 drug fine, totaling \$2150.00 in legal financial obligations. (RP 250.)

At the time the court was imposing these legal financial obligations the State specifically requested it inquire as to the defendant's ability to pay. (RP 251). The court did so with the following exchange

The Court: You going to be able to pay payment on that when you get out?

The Defendant: 35 bucks a month. Should be able to if I can get a job in a timely fashion.

The Court: What's your profession?

The Defendant: When I got arrested I was working sanitation at a cannery.

The Court: Really?

The Defendant: Yeah.

The Court: You have a sanitation license?

The Defendant: I do not.

The Court: Oh, Okay.

The Defendant: That's just the position I held.

The Court: Yeah. Cause you have a license in sanitation, that's worth a lot of money.

The Defendant: I'm planning on taking the sanitation course in prison when I get there. It's a two-week course.

The Court: Really?

The Defendant: Yeah.

(RP 251-252). After this discussion the court ordered the \$2150 in LFOs, but waived the \$250 jury fee. (RP 252). The imposition of these LFOs was not objected to. (Id.).

IV.

ARGUMENT

A. There was sufficient evidence introduced at trial for the jury to find beyond a reasonable doubt the Petitioner, Derek Kinney, possessed with intent to deliver, a controlled substance within 1000 feet of a school bus route stop.

1. A school bus route stop qualifies for the statutory 24 month drug sentencing enhancement under RCW69.50.435(1)(c) despite the fact the particular bus that services the stop transports only pre-school students to school.

The standard of review for matters of statutory interpretation is de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The court's primary objective in construing a statute is to determine and carry out the intent of the Legislature. State v. Wilbur, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988). To determine legislative intent the court first looks to the language of the statute, if it is plain and unambiguous, it need go no further. State v. Von Thiele, 47 Wn. App. 558, 562, 736 P.2d 297 (1987), review denied, 108 Wn.2d 1029 (1987).

The Washington State Legislature enacted a sentence enhancement for, "Any person who ...possess[es] with intent...to deliver a controlled substance... within one thousand feet of a school bus route stop

designated by the school district....” RCW 69.50.435(1)(c). This enhancement also applies separately to such possessions in a school (1)(a) or on a school bus (1)(b).

A “school bus route stop” is defined as, “a school bus stop as designated by a school district.” RCW 69.50.435(6)(c). The State submits this statute is plain on its face and we need go no further to determine the legislature’s intent. The statute clearly indicates the only requirement to meeting the definition of a “school bus route stop” is that it be designated as such by a school district. Id.

The South Bend School District transportation manager, Mr. Kuiken, testified the “bus route stop” in question was designated by the South Bend School. He testified it was located at 602 Broadway, in the city of South Bend Washington, and was seventy feet away from where Officer Miskell observed the Petitioner. The jury found this evidence persuasive, and found the Petitioner guilty of possessing, with intent to deliver, a controlled substance within 1000 feet of a school bus route stop.

The Petitioner claims in his opening brief that the term “school bus stop” is not defined by statute, and therefore we must turn to a “plain meaning” definition. (Pet. Br. at 5). He proposes this definition to be “a location where a school bus regularly stops.” (Id.) A “school bus” he points out is defined in part as a bus “regularly used to transport *students*

to and from school or in connection with school activities...” WAC 392-143-010(1) *emphasis added*. The Petitioner then goes on to define a “student” as only applying to individuals enrolled in kindergarten through 12th grade. (Pet. Br. at 5). It is worth noting that he does so by utilizing the definition of “enrolled student” in WAC 392-121-106, which self restricts the definition to that particular chapter in the WAC, the stated purpose of which is to “set forth policies and procedures related to the general apportionment of state moneys....” WAC 392-121-003.

The Petitioner then argues that pre-school children are not “students” under this definition and therefore a bus that is reserved for transporting them to school is not a school bus and thus a stop on this bus’s route cannot be a “school bus route stop.” (Pet. Br. at 5).

This definition is strained and works directly against the identified purpose of RCW 69.50.435 which is to discourage the “development of the violent and destructive drug culture in areas where there are *children*.” State v. Coria, 120 Wn.2d 156, 172-173, 839 P. 2d 890 (1992) *emphasis added*. The intent to protect not just students, but children becomes more apparent by looking at the other protected zones encompassed in RCW 69.50.435(1): “(e) in a public park..., (f) in a public housing project..., (g) a civic center...” all areas that are frequented by children.

Tying the definition of “school bus route stop” to the definition for “school bus” has also been explicitly rejected by this very court in State v. Davis, 93 Wn. App. 648, 970 P.2d 336 (1999). In Davis, the Bremerton School District contracted with Kitsap transit to supply school transportation on its regular public buses. Id. at 652. These public buses did not meet the definition of a “school bus” as buses operated by common carriers such as a municipal transportation systems are explicitly excluded from the definition of “school bus.” See RCW 69.50.435(6)(b). Despite this fact this Court still found the “bus route stop” serviced by these buses qualified as a “school bus route stop” for the statutory enhancement. See Davis, 93 Wn. App. 648. The Court noted, referencing the definition of a school bus stop, that it was the fact it was “designated by a school district” as a bus route stop that was the determining factor. See generally id.

The Petitioner’s argument is rejected by law and is contrary to the legislative intent of the statute. As such, this Court should deny his request to overturn the jury’s special verdict finding that he possessed, with intent to deliver, a controlled substance within 1000 feet of a school bus route stop.

B. The trial court did not err when it ordered the Petitioner, Derek Kinney, to pay legal financial obligations in his Judgment and Sentence.

1. The Petitioner failed to properly preserve the issue of whether the trial court conducted a sufficient inquiry into his current and future ability to pay legal financial obligations at sentencing where he did not object and he affirmatively indicated he had the ability to pay.

A defendant who makes no objection to the imposition of discretionary Legal Financial Obligations (LFOs) at sentencing is not automatically entitled to review. State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015). It is well settled that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” Id. quoting RAP 2.5(a). The reason behind this practice is to do otherwise would allow for a party to deny the trial court a chance to correct a potential error below, as well as deny the opposing counsel an opportunity to respond to the claimed error. Id. at 833. Unpreserved LFO errors do not command review as a matter of right. Blazina, 182 Wn.2d at 833. Although appellate courts normally decline to review issues raised for the first time on appeal, RAP 2.5(a) allows a reviewing court discretion to reach the merits of a case. Id. at 835.

In the current case, the Petitioner failed to object to the imposition of LFOs at the trial court level, and he represented to the court that he did

have the ability to pay. So not only did the Petitioner deny the trial court and opposing party opportunity to respond to any claimed error and possibly fix it below, he misled the court from perhaps developing a more robust record on the issue. In this way the Petitioner's actions go beyond failing to preserve the issue but qualify as "invited error."

The goal of the invited error doctrine was to "prohibit a party from setting up an error at trial and then complaining of it on appeal." City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) *quoting* State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). Here, we have just that scenario. When the court inquired into the Petitioner's ability to pay LFOs, he affirmatively represented that he did indeed have the ability to pay. He effectively prevented a more thorough inquiry into other factors regarding his financial position by representing it wasn't necessary.

This case does not warrant this Court reviewing the issue which was not properly preserved in the trial court. To do so would undercut both the purpose of reviewing only properly preserved issues and the invited error doctrine, by removing the trial court's and opposing counsel's ability to address the issue below, which was created by the actions of the Petitioner in the first place.

2. The court conducted a sufficient inquiry into the Petitioner's ability to pay legal financial obligations at sentencing, especially considering he affirmatively indicated he had the ability to pay.

Before a court imposes Legal Financial Obligations (LFOs) as part of sentencing, it must first determine if "the defendant is or will be able to pay them." RCW 10.01.160(3). This inquiry by the court must be reflected on the record. Blazina, 182 Wn.2d at 838. The inquiry must include important factors, such as incarceration, and defendant's other debts, including restitution. Id.

If a convicted individual is determined to be indigent courts should seriously question that person's ability to pay LFOs. Id. at 839. However, the ways in which a court may establish indigent status, or the lack thereof, remains "nonexhaustive." Id.

The trial court in this case had just sentenced the Petitioner to 40 months in prison and clearly referenced this incarceration when asking, "You going to be able to pay payment on that *when you get out?*" *emphasis added.* It inquired into the type of employment that the Petitioner had at the time of his arrest, to which he responded that he was gainfully employed in sanitation at a cannery. In regards to the petitioner's future ability to pay, he indicated that he was going to be

enrolling in the sanitation course in prison which he knew to be a two week course. The trial court acknowledged that this field paid well.

As to the Petitioner's other financial obligations such as restitution, the court was aware that there was no restitution with the current conviction. As for the other debts or indigence status of the Petitioner, the court should be allowed to take him at his word when he represents to the court that he should be able to make payments. In other words, relying on the individual to represent his own situation to the court should be included in under a "nonexhaustive" method for determining if the convicted is indigent. Therefore the court's inquiry into the Petitioner's ability to pay should be found to be sufficient.

V.

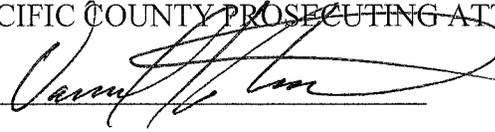
CONCLUSION

For the foregoing reasons discussed above, the Court of Appeals should affirm the Jury Verdict finding Mr. Kinney guilty of possession with intent to deliver a controlled substance with the special finding that the crime occurred within 1000 feet of a school bus route stop. The Court should also affirm the trial courts imposition of \$2150.00 in legal financial obligations.

Respectfully submitted this 19th day of December, 2016.

MARK MCCLAIN
PACIFIC COUNTY PROSECUTING ATTORNEY

By:

A handwritten signature in black ink, appearing to read "Donald J. Richter", written over a horizontal line.

Donald J. Richter, WSBA # 39439
Pacific County Prosecuting Attorney
P.O. Box 45
South Bend, WA 98586

PACIFIC COUNTY PROSECUTOR

December 19, 2016 - 9:02 AM

Transmittal Letter

Document Uploaded: 5-489996-Respondents' Brief.pdf

Case Name: State of Washington v. Derek J. Kinney

Court of Appeals Case Number: 48999-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Bonnie Walker - Email: bwalker@co.pacific.wa.us

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

taylor@crtaylorlaw.com

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 DEREK KENNEY,)
)
 Appellant.)

No. 48999-6-II
CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss.
 County of Pacific)

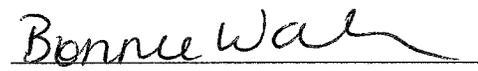
The undersigned being first duly sworn on oath deposes and states: That on the 19th day of December, 2016, affiant delivered by electronic mail a true and correct copy of Respondent's Brief to:

David Ponzoha
Court of Appeals
Division II
950 Broadway, Ste 300
Tacoma, WA 98402-4454

Christopher Taylor
Attorney for Appellant
203 4th Ave E STE 407
Olympia WA 98501
taylor@crtaylorlw.com

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Dated this 19th day of December, 2016, in South Bend, Washington.


Bonnie Walker
Paralegal

PACIFIC COUNTY PROSECUTOR

December 19, 2016 - 9:36 AM

Transmittal Letter

Document Uploaded: 5-489996-20161219_101136.pdf

Case Name: State of Washington v. Derek J. Kinney

Court of Appeals Case Number: 48999-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Certificate of Service

Comments:

No Comments were entered.

Sender Name: Bonnie Walker - Email: bwalker@co.pacific.wa.us

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

taylor@crtaylorlaw.com