

FILED
Court of Appeals
Division II
State of Washington
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NO. 52519-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MEAGAN GREENHAW,

Appellant.

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

BRIEF OF THE APPELLANT

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.
..... 3

D. STATEMENT OF THE CASE 5

E. ARGUMENT 8

 1. **Possession of a controlled substance requires proof the defendant *knowingly* possessed the illegal substance. The court’s failure to properly instruct the jury on this requirement requires reversal. 8**

 a. The jury must be clearly instructed on all the elements of an offense..... 8

 b. The court erred by failing to instruct the jury the prosecution must prove Ms. Greenhaw knew she possessed the substance..... 9

 c. The prosecution cannot meet its burden to prove the error harmless beyond a reasonable doubt..... 14

 2. **If the drug possession statute does not require proof of knowledge, it is unconstitutional. The conviction must be reversed and the prosecution dismissed.16**

 3. **The sentencing court’s finding of fact that increased the penalty beyond the standard range violated Ms. Greenhaw’s Sixth and Fourteenth Amendment rights to a jury finding beyond a reasonable doubt.....17**

 a. A fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 18

b. Because imposing community supervision increased the maximum punishment Ms. Greenhaw received, it was unconstitutional for the court to make a finding Ms. Greenhaw had a chemical dependency that contributed to her offense.	21
F. CONCLUSION	23

TABLE OF AUTHORITIES

United States Supreme Court

Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 188 L. Ed. 2d 314 (2013)..... 19

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 8, 19

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 20, 21

Coffin v. United States, 156 U.S. 432, 15 S. Ct. 394 (1895) 12

Gomez v. United States, 490 U.S. 858, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)..... 11

Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952)..... 9

Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 15

Nelson v. Colorado, __ U.S. __, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017) 12

Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) 11

Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) 12, 13

United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978)..... 10

Washington Supreme Court

City of Seattle v. Grundy, 86 Wn.2d 49, 541 P.2d 994 (1975) ...
..... 17

State v. Allen, 192 Wn.2d 526, 431 P.3d 117 (2018) 19

State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000)
..... 10, 13

State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004)
..... 9, 10, 13

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 15

State v. Clark-El, 196 Wn. App. 614, 384 P.3d 627 (2016)
..... 9

State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981)
..... 9, 10

State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) 19

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 9

State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012) 20

Utter v. Bldg. Indus. Ass’n of Washington, 182 Wn.2d 398,
341 P.3d 953 (2015) 11

Washington Court of Appeals

State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004)
..... 16

Decisions of Other Courts

Dawkins v. State, 313 Md. 638, 547 A.2d 1041 (1988)
..... 13

May v. Ryan, 245 F. Supp. 3d 1164 (D. Ariz. 2017) 14, 17

<i>State v. Adkins</i> , 96 So. 3d 412, (Fla. 2012).....	13
<i>State v. Bell</i> , 649 N.W.2d 243 (2002).....	13
Statutes	
RCW 69.50.4013	13
RCW 9.94A.537.....	20
RCW 9.94A.607.....	22
RCW 9.94A.650.....	22
RCW 9A.20.021.....	13
Unif. Controlled Substances Act 1970 § 401	13
Rules	
RAP 2.5.....	8
Constitutional Provisions	
Const. art. I, § 22	8
Const. art. I, §§ 3	8, 16
U.S. Const. amend. VI.....	8
U.S. Const. amend. XIV	8, 16
Other Authorities	
Scalia, Antonin & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012)	11, 12

A. INTRODUCTION

Meagan Greenhaw was experiencing homelessness when she went to the Chehalis Walmart to steal basic hygiene products, including toothpaste and face cream. When store security confronted her, she immediately cooperated, telling her story and admitting to the theft. When law enforcement searched Ms. Greenhaw, they discovered a coin pocket containing a baggy with methamphetamines inside it.

Although Ms. Greenhaw did not know the substance her boyfriend gave her was actually a controlled substance, the trial court did not instruct the jury knowledge is an essential element of the crime of unlawful possession of a controlled substance. The failure to properly instruct the jury requires reversal of Ms. Greenhaw's conviction.

At sentencing, the court found chemical dependency contributed to Ms. Greenhaw's crime. As a result, the court imposed a sentence above the standard range that authorized a sentence of 6 months, instead imposing 15 days of confinement and 12 months of community supervision.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth and Fourteenth Amendments to the United States Constitution, and article I, sections 3 and 22 of the Washington Constitution, the court erred by failing to instruct the jury the prosecution must prove Ms. Greenhaw knew she possessed methamphetamine. CP 85 (instruction number 6).

2. If unlawful possession is a strict liability crime without a knowledge element, the law violates due process under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution. The court erred by entering the judgment and sentence.

3. The trial court violated the Fourteenth Amendment's Due Process Clause and the Sixth Amendment, by making a finding of fact in the absence of proof beyond a reasonable doubt and without a jury verdict that increased the penalty beyond the standard range.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The possession of a controlled substance statute does not expressly require the government to prove the possession was knowing. Statutes must be construed to avoid constitutional deficiencies. If construed to be a strict liability crime without a knowledge element, the statute is likely unconstitutional. Consistent with the constitutional-doubt canon, must the possession statute be read to require proof of knowledge?¹

2. The jury must be instructed on all elements of an offense. Properly construed, knowledge is an element of the crime of possession of a controlled substance. Did the court err by failing to instruct the jury knowledge is an element of possession of a controlled substance?

3. The presumption of innocence is a principle fundamental to America's history and tradition. Freakish

¹ The Washington Supreme Court is reviewing whether the possession statute must be interpreted to have a knowledge element and whether the statute is unconstitutional if it does not have a knowledge element. *State v. A.M.*, 76758-5-I, 2018 WL 3628994 (Wash. Ct. App. July 30, 2018), *review granted*, Supreme Court No. 96354-1.

criminal laws that eliminate inherent elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. All states except Washington require the prosecution to prove possession of a controlled substance is knowing. In Washington, an innocent person in possession of drugs must prove their possession was “unwitting.” Is it unconstitutional to make possession of a controlled substance a strict liability crime and to presume guilt unless the defendant can prove unwitting possession?

4. Any fact increasing the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The statutory maximum is the maximum sentence a judge may impose based only on the facts in the jury verdict or admitted by the defendant. The judge made a finding Ms. Greenhaw had a chemical dependency, which increased her community custody to twelve months. This issue was not submitted to the jury, proved beyond a reasonable doubt, or admitted to by Ms. Greenhaw. Should the sentence be reversed and remanded

because the court's finding deprived Ms. Greenhaw of her due process rights?

D. STATEMENT OF THE CASE

Meagan Greenhaw was without a home and having a hard time in her life. RP 116. She went into the Chehalis Walmart to steal items for her basic needs, including cold medicine and some trial-sized containers of hygiene products, including toothpaste and face cream. RP 99, 103, 117.

Store security observed Ms. Greenhaw acting nervous, then saw a man approach her, who appeared to be stealing a watch. RP 102. When confronted by security, Ms. Greenhaw cooperated immediately, handing her the items she concealed in her purse. RP 103.

Ms. Greenhaw was taken to the loss prevention office. RP 117. Law enforcement arrived shortly after. RP 114. She admitted to the theft, making no excuses for her crime. RP 121.

When the officer searched Ms. Greenhaw, he discovered a small coin pocket containing a clear plastic bag with what

the officer, based on his training and experience, believed to be methamphetamines. RP 124.

The officer asked Ms. Greenhaw about the coin pocket and its contents. RP 124. She said she was holding on to it for her boyfriend because security was less likely to search women if they were apprehended. RP 124-25.

The substance later tested positive for methamphetamines. RP 151. The lab technician who tested the substance also testified a lab test was required to prove the substance was in fact methamphetamines. RP 154. Based on observation, it could be a number of other things, including table salt, sugar, or bath salts. RP 154-55.

Ms. Greenhaw testified on her own behalf. She admitted to the theft, but stated she did not know the substance inside the coin purse her boyfriend gave her contained a controlled substance, although it was possible. RP 161.

The jury was instructed on the required elements to convict Ms. Greenhaw. They were told:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 25th, 2018, the defendant possessed a controlled substance, to wit, methamphetamine;

And (2) that this act occurred in the state of Washington.

CP 20 (instruction 6).

The jury was also instructed on the defense of unwitting possession. CP 23 (instruction 9). The jury was not instructed the prosecution was required to prove beyond a reasonable doubt Ms. Greenhaw knew she was in possession of a controlled substance.

The jury found Ms. Greenhaw guilty of theft in the third degree and possession of a controlled substance. The standard range for her felony conviction was 0 to 6 months. The court imposed 364 days, suspending all but 15 for the misdemeanor. RP 213. The court also imposed 15 days for the felony conviction.

The court additionally made a finding a chemical dependency contributed to Ms. Greenhaw's crime and imposed 12 months of community supervision. RP 213. This special allegation was not submitted to a jury.

E. ARGUMENT

- 1. Possession of a controlled substance requires proof the defendant *knowingly* possessed the illegal substance. The court's failure to properly instruct the jury on this requirement requires reversal.**

a. The jury must be clearly instructed on all the elements of an offense.

Due process and the right to a jury trial require the prosecution prove every element of an offense to the jury. *Apprendi v. New Jersey*, 530 U.S. 466, 499, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Const. art. I, §§ 3, 22; U.S. Const. amend. VI, XIV. An error in failing to properly instruct the jury on every element of the offense is a manifest constitutional error that may be raised for the time on appeal. RAP 2.5(a)(3); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); *State v. Clark-El*, 196 Wn. App. 614, 619, 384 P.3d 627 (2016).

b. The court erred by failing to instruct the jury the prosecution must prove Ms. Greenhaw knew she possessed the substance.

It is fundamental that “wrongdoing must be conscious to be criminal.” *Morrisette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). In this case, the trial court did not instruct the jury the government bore the burden of proving Ms. Greenhaw *knew* she possessed the controlled substance. CP 20 (instruction 6). Rather, to convict Ms. Greenhaw, the court instructed the jury it simply needed to find she possessed methamphetamine, a controlled substance. CP 20. This was error.

Washington’s Supreme Court has previously interpreted drug possession to be a strict liability crime with no mental element. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 375, 635 P.2d 435 (1981). Those who innocently possess drugs can avoid a conviction only if they prove “unwitting possession.” *Bradshaw*, 152 Wn.2d at 537-38. In short, there is a presumption of guilt rather than a presumption of innocence.

This interpretation is wrong. In reaching this conclusion, the Court relied on the fact the legislature appeared to have omitted a mental element from the statute. *Bradshaw*, 152 Wn.2d at 534-35; *Cleppe*, 96 Wn.2d at 379-80. The “failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.” *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); accord *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978). Unless it can be absolutely shown a legislature intended to exclude a traditional mental element, the courts will infer one. *See, e.g., Anderson*, 141 Wn.2d at 366-67. This makes sense because otherwise innocent conduct may be criminalized.

In concluding drug possession is a strict liability crime, *Cleppe* and *Bradshaw* overlooked the canon of construction that statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Utter v. Bldg. Indus. Ass’n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); accord *Gomez v. United States*, 490 U.S. 858, 864,

109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (“settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) (“A statute should be interpreted in a way that avoids placing its constitutionality in doubt.”). Unless interpreted to have a knowledge element, the constitutionality of the statute is dubious in light of fundamental due process principles.

A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” *Nelson v. Colorado*, __ U.S. __, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017); accord *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394

(1895). For this reason, in allocating the burden of proof, “there are obviously constitutional limits beyond which the States may not go.” *Patterson*, 432 U.S. at 210.

History and tradition indicate the constitutional line is crossed when “an inherent element” is shifted or when the elements of the crime are “freakish”:

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); *see Schad*, 501 U.S. 650 (Scalia, J. concurring) (“It is precisely the historical practices that *define* what is ‘due.’”).

If interpreted to have no mental element, there are grave doubts about the validity of the possession statute. It creates a felony offense punishable by up to five years in

prison and a fine of up to ten thousand dollars. RCW 69.50.4013(2); RCW 9A.20.021(1)(c). It is out of line with the Uniform Controlled Substances Act and every other state, all of which require the prosecution to prove knowledge. *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); *Bradshaw*, 152 Wn.2d at 534; *State v. Bell*, 649 N.W.2d 243, 252 (2002); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988); Unif. Controlled Substances Act 1970 § 401(c). And it is out of line with *Anderson's* reading of unlawful possession of a firearm to include knowledge. 141 Wn.2d at 366-67. Thus, Washington's drug possession law is "freakish" in that it eliminates the "inherent" mental element of knowledge. *Schad*, 501 U.S. 640 (plurality).

For innocent persons who possess drugs without knowledge, they bear the burden of proving lack of knowledge. This burden-shifting scheme is constitutionally dubious. *See e.g., May v. Ryan*, 245 F. Supp. 3d 1164 (D. Ariz. 2017). Here, unwitting possession requires defendants to disprove knowledge. The defense recognizes there is no

wrongful quality about possessing drugs unless there is knowledge. This shows the state seeks to punish knowing possession of drugs, not every possession of drugs. *See id.* at 1163 (“Shifting what used to be an element to the defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish”). Unless the burden is placed on the prosecution, the statute is unconstitutional.

For these reasons, possession of a controlled substance requires proof of knowledge. This Court should hold the trial court erred by failing to properly instruct the jury the prosecution bore the burden of proving beyond a reasonable doubt Ms. Greenhaw knowingly possessed a controlled substance.

c. The prosecution cannot meet its burden to prove the error harmless beyond a reasonable doubt.

An instructional error that relieves the prosecution of its burden of proof, such as through the omission or misstatement of an element, is subject to the constitutional harmless error test. *Neder v. United States*, 527 U.S. 1, 15,

119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The court must be able to conclude beyond a reasonable doubt the error did not contribute to the verdict. *Neder*, 527 U.S. at 15; *Brown*, 147 Wn.2d at 341. In other words, the court must be able to conclude beyond a reasonable doubt the verdict would have been the same without the error. *Neder*, 527 U.S. at 19; *Brown*, 147 Wn.2d at 341. If the missing element is supported by uncontroverted evidence, this standard may be satisfied. *Neder*, 527 U.S. at 18; *Brown*, 147 Wn.2d at 341.

The prosecution cannot meet its burden to prove the error harmless. There is not uncontroverted evidence Ms. Greenhaw knew she possessed an uncontrolled substance. Ms. Greenhaw testified she did not know what the substance was her boyfriend gave her. RP 160. She suspected it was methamphetamines, but did not actually know what the substance was. RP 161. In addition, Ms. Greenhaw was not in possession of drug paraphernalia, like pipes or needles. RP 136. The prosecutor also expressly told the jury “in order to

convict someone for possession of a controlled substance, they just have to possess it on the date in Washington. RP 188-89.

Because the jury could have found Ms. Greenhaw's testimony credible, the prosecution cannot prove the error harmless beyond a reasonable doubt. *See State v. Holmes*, 122 Wn. App. 438, 444-45, 93 P.3d 212 (2004) (appellate court not in a position to say jury would have necessarily reached the same result when the issue comes down to credibility). The conviction must be reversed and a new trial granted.

2. If the drug possession statute does not require proof of knowledge, it is unconstitutional. The conviction must be reversed and the prosecution dismissed.

If the drug possession statute does not require proof of knowledge, it violates due process principles and is unconstitutional. U.S. Const. amend. XIV; Const. art. I, § 3. As explained, Washington's drug possession statute crosses the constitutional line and criminalizes innocent behavior. For the innocent to avoid a felony conviction (and the grave consequences that flow from it), they must disprove the presumption that they were aware of the substance they

possessed. This burden-shifting scheme for possession of a controlled substance is unlike any in the union. The possession statute turns the presumption of innocence, fundamental to our nation's history and traditions, on its head. It creates a presumption of guilt. This Court should hold the statute is unconstitutional. *Cf. May*, 245 F. Supp. 3d at 1162-65. Ms. Greenhaw's conviction should be reversed and the prosecution dismissed because the statute is unconstitutional, and unconstitutional statutes are void. *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

3. The sentencing court's finding of fact that increased the penalty beyond the standard range violated Ms. Greenhaw's Sixth and Fourteenth Amendment rights to a jury finding beyond a reasonable doubt.

During sentencing, the court determined Ms. Greenhaw had a chemical dependency. The prosecution did not include this allegation in the information. It was not presented to the jury to prove beyond a reasonable doubt. The jury never made such a finding.

And instead of sentencing Ms. Greenhaw within the statutory guidelines to six months of supervision, the court

increased her community custody to twelve months. RP 213. The judge relied on findings outside of the basis of the facts in the verdict or admitted by Ms. Greenhaw. *Id.* There was no showing during trial Ms. Greenhaw used methamphetamine, let alone had a chemical dependency. At trial, Ms. Greenhaw emphasized she did not know what was in the baggie, which had been given to her by her boyfriend. RP 160. Therefore, it was unconstitutional for the judge, and not a jury, to make a finding of chemical dependency not proven beyond a reasonable doubt.

a. A fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490; *State v. Allen*, 192 Wn.2d 526, 539, 431 P.3d 117 (2018). It is unconstitutional under the Fourteenth Amendment’s Due Process Clause, and the Sixth Amendment “to remove from

the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Id.*; see also *Alleyne v. United States*, 570 U.S. 99, 114-15, 133 S. Ct. 2151, 188 L. Ed. 2d 314 (2013) (“When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.”).

These facts are the equivalent of elements, which is why they must be proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; see e.g., *State v. Goodman*, 150 Wn.2d 774, 786-87, 83 P.3d 410 (2004) (finding the government must allege and prove the specific identity of a controlled substance beyond a reasonable doubt because the statutory maximum increased depending on the controlled substance). The statutory maximum means “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531,

159 L. Ed. 2d 403 (2004). It is the maximum a judge “may impose without any additional findings.” *Id.* at 304.

Additionally, in order for Ms. Greenhaw to provide an adequate defense against aggravating circumstances, “the defendant must receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury.” *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). The Sentencing Reform Act of 1981 codifies these constitutional requirements. RCW 9.94A.537. It requires the prosecution to give notice it is seeking an exceptional sentence, with the notice stating the aggravating circumstances. *Id.* Before imposing a sentence above the standard range, Ms. Greenhaw was entitled to the essential protections of notice, a jury trial, and a heightened standard of proof with respect to facts that increase the statutory maximum.

b. Because imposing community supervision increased the maximum punishment Ms. Greenhaw received, it was unconstitutional for the court to make a finding Ms. Greenhaw had a chemical dependency that contributed to her offense.

The sentencing court violated the Sixth and Fourteenth Amendments when it did not give Ms. Greenhaw notice of the sentence enhancement or make findings of fact that increased her sentence. Additionally, the court imposed the increased sentence on Ms. Greenhaw without a jury finding and without proof beyond a reasonable doubt. Instead, the judge found Ms. Greenhaw had a chemical dependency and ordered her to serve twelve months of community custody, rather than the six months the court could impose without a jury finding. RP 122. The judge’s reasoning for imposing the treatment and therefore the twelve months community custody was that “chemical dependency contributed” to her offense. RP 213. This finding of fact falls outside of the “basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 542 U.S. at 303.

While RCW 9.94A.607(1) provides treatment may be ordered where “the court finds that the offender has any chemical dependency that has contributed to his or her offense,” this judicial finding was made without all of the requirements of due process. It was made without notice, without proof beyond a reasonable doubt, and without a jury. And without complying with these requirements, the maximum permissible term of community custody the court could impose based on the facts in the verdict or admitted by Ms. Greenhaw was six months. RCW 9.94A.650. Only on finding Ms. Greenhaw had a chemical dependency could the court impose twelve months of community custody. It was unconstitutional for the judge, and not a jury, to make this finding of fact in the absence of proof beyond a reasonable doubt.

This Court should reverse the exceptional sentence and remand for resentencing within the standard range of six months.

F. CONCLUSION

If the statute is not held to be unconstitutional, Ms. Greenhaw's conviction should be reversed due to the instructional error.

In the alternative, remand is required to correct the sentencing error because the judge made a finding without a jury and not proved beyond a reasonable doubt Ms. Greenhaw had a chemical dependency.

DATED this 29th day of March 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52519-4-II
)	
MEAGAN GREENHAW,)	
)	
Appellant.)	

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[appeals@lewiscountywa.gov]
[sara.beigh@lewiscountywa.gov]
LEWIS COUNTY PROSECUTING ATTORNEY
345 W MAIN ST FL 2
CHEHALIS, WA 98532 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> MEAGAN GREENHAW
515 SILVER ST
CENTRALIA, WA 98531 | (X)
()
() | U.S. MAIL
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Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

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