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No. 52603-4-II

Cowlitz County No. 18-1-00326-08

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC NEWMAN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
COWLITZ COUNTY

The Honorable Anne M. Cruser, Judge

APPELLANT'S OPENING BRIEF

KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct when the state failed to prove an essential element of the crime of possession of a stolen firearm and instead relied on an impermissible factual presumption in violation of the state and federal guarantees of due process under the Fourteenth Amendment and Article 1, § 3.

Appointed counsel was prejudicially ineffective in failing to object, in violation of the Sixth Amendment and Article 1, § 22 rights to effective assistance of appointed counsel.

2. The superior court violated the presumption of innocence, the presumption of pretrial release without conditions, and state and federal due process by failing to follow the requirements of CrR 3.2.
3. Article 1, §§ 14 and 20, the Eighth Amendment, state and federal due process and equal protection are violated when a person cloaked with the presumption of innocence is kept in physical custody because he is too impoverished to be able to meet wealth-based conditions of release.
4. The Court should address the bail issues regardless whether they are technically moot.

B. QUESTIONS PRESENTED

1. To prove that Newman possessed a stolen firearm, the state had to show that he knew the firearm was stolen. Did the prosecutor commit misconduct, misstate her burden of proof and improperly urge the jury to presume that the state had met its burden of proof when she repeatedly argued that jurors should assume that the accused knew the gun was stolen based on the theory that anyone who was unable to legally buy and possess a firearm must know any firearm they have access to is likely stolen?

Was counsel prejudicially ineffective in failing to object and seek a curative instruction on his client's behalf?

2. Did the trial court err and violate CrR 3.2 by failing to apply the presumption of release on personal

recognizance?

3. Did the trial court err and violate CrR 3.2 by ordering an indigent accused to pay a \$35,000 financial condition of release without first considering all other means of mitigating any perceived risk of “danger,” as required by the rule and due process?
4. Does requiring an indigent accused to pay \$35,000 in order to secure release pretrial in violation of CrR 3.2 violate the due process rights of the accused to the pretrial presumption of innocence? Does it further violate equal protection and the prohibitions against excessive bail to keep an accused in custody based upon inability to pay an improperly imposed financial condition where a person accused of the same crimes would be able to buy their freedom?
5. Where the length of pretrial detention is growing and the improper use of financial conditions is endemic and in violation of the mandates of the relevant court rule, are the ongoing failure of trial courts to follow the rule and the resulting constitutional violations issues of substantial public importance likely to evade review but upon which guidance is needed?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Eric J. Newman was charged in Cowlitz County superior court by Amended Information with possession with intent to deliver methamphetamine with a firearm enhancement, possession of heroin, first-degree unlawful possession of a firearm and possessing a stolen firearm. CP 27-29 ; RCW 9.41.010, RCW 9.41.040, RCW 9.94A.533(3), RCW 9.94A.825, RCW 9A.56.310(1), RCW 9A.56.140(1), RCW 69.50.401(1), RCW 69.50.401(2)(b), RCW 69.50.4013(1).

Pretrial proceedings were held before the Honorable Judge G. Bashor on March 9, 2018, the Honorable Judge S. Warning on March

20 and April 17, 2018, the Honorable Judge Anne M. Crusier on May 10, 2018, the Honorable Judge Michael Evans on July 16, 2018, Judge Crusier on August 20, 2018, and Judge Warning on August 23, 2018, with the suppression hearing and trial before Judge Crusier on August 28-31, 2018, after which the jurors found Newman guilty of all of the counts but did not find that he was armed with a firearm for count 1. CP 62-65; RP 391.¹

After denying a motion for dismissal for insufficiency of the evidence (RP 407), Judge Crusier imposed standard-range sentences which amounted to 159 months in custody. RP 422. Mr. Newman appealed and this pleading follows. See CP 90-104.

2. Overview of relevant facts

On January 21, Ryan Lorenzo learned that his truck had been rummaged through while parked at the home of his father-in-law. RP 187-88. Several items were taken, including a custom-engraved firearm from Lorenzo's military service. RP 188, 190-91.

On February 9, several detectives with the Longview Police Department went to serve a search warrant at an apartment in Longview where they thought Eric Newman lived. RP 191-97. The lead detective, Longview Police Department (LPD) Detective Benjamin Mortensen, said officers did a "knock-and-announce" at the front door to the apartment, then yelled, "[s]tep away from the door" before breaking it down. RP 191-99.

¹The verbatim report of proceedings consists of three volumes, all chronologically paginated.

Once inside the apartment, they saw Newman standing in the “living room/kitchen or the space between the two.” RP 200. There were other people in the apartment as well, later identified as Cassandra Luthy, Ricardo Perkins, Alexandra Delano, and Cody Kessler. RP 209. Officers had observed the apartment prior to going to serve the warrant and also saw other people coming and going, too. RP 208.

The apartment was in Delano’s name. RP 209-210. The detectives found Kessler hiding in the closet of one of the two bedrooms, under a bunch of clothes. RP 200-209, 241. All the other people inside (including Newman) came out and were detained for “safety.” RP 201-10.

In one bedroom, a detective saw medical supplies such as bandaging materials. RP 201. The detective knew that Newman had recently suffered a very severe leg injury and thus thought the bedroom was Newman’s. RP 204-205. A detective would later testify that he had located Mr. Newman’s medical discharge papers in that room, but those papers were not entered into evidence. RP 275.

On the left hand side of the bed in that bedroom was a safe. RP 205. Detective Mortensen gave the safe to Detective Jordan Sanders. RP 205, 210-12. Detective Sanders’ initial role was to handcuff everyone and “detain them outside the apartment until it was cleared.” RP 217. When Mortensen handed him the safe, everyone was “cleared,” so Sanders took the safe outside. RP 218.

The safe was locked and Newman denied having a key. RP

218, 269. Detective Sanders then took the safe over to the sidewalk and dropped it again and again. RP 218. When the safe finally broke open, the detective picked up the door and the rest of the safe's remains and carried them back into the apartment. RP 218-19. The detective then found inside the remains of the safe a .45 Ruger firearm and what the detective described as "Suboxone strips, Oxycodone pills, Hydrocodone pills, a scale with residue, plastic that contained a white powder inside of it, a coffee grinder with brown residue mixed up inside the coffee grinder," and several other pills "that weren't narcotics[.]" RP 219-20.

A forensic scientist for the state testified that the "crystalline substance" weighed 5.9 grams. RP 255. She also tested a small amount of the substance and found that it included some methamphetamine of indeterminate strength. RP 255.

Detective Sanders testified that a key which fit the safe was found a couple of feet inside the door, in the common area of the apartment. RP 225, 270. He said it was "a couple feet inside the door basically in the middle of the living room between the living room and the kitchen on the floor." RP 225, 270. Detective Mortensen thought the key later found on the floor somehow must have been overlooked by officers going in, taking everyone out, going through the apartment and "clearing" it and then in searching. RP 270. The detective said the key was near where Newman had been standing when the front door to the apartment was broken in. RP 270.

Kristen Celeski testified that the safe in the apartment was

actually hers. RP 341-42. She had it in the bedroom at the apartment of her friend because she was in a “domestic violence” situation at home and was concerned that police might find the safe there. RP 344. She admitted the safe had a firearm, a coffee grinder with some heroin residue, a bunch of “Oxy” pills and some “meth” inside. RP 344. She described the weapon as a pistol with “like a wooden-ish handle” and engraving of “Commander” on one side and “Task Force” on the other. RP 344.

Ms. Celeski said she had come forward because it was the “right thing to do” and that Newman should not have to pay for what she did. RP 345. She testified that, when she left the safe in the apartment, she left the key to the safe on top of the refrigerator in the apartment. RP 347-48.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL AND ILL-INTENTIONED MISCONDUCT AND MR. NEWMAN’S STATE AND FEDERAL DUE PROCESS RIGHTS WERE VIOLATED WHEN THE PROSECUTOR URGED JURORS TO PRESUME AN ESSENTIAL ELEMENT. IN THE ALTERNATIVE, COUNSEL WAS PREJUDICIALLY INEFFECTIVE.

Unlike other attorneys, prosecutors enjoy a special role and duties because they are considered “quasi-judicial” officers not just “officers of the court.” See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d

1186 (1984), review denied, 103 Wn.2d 1014 (1985). As such, prosecutors have a duty to the public to seek justice rather than just trying to “win” a conviction at all costs. See In re Glassman, 175 Wn.2d 696, 712-13, 286 P.3d 673 (2012). Further, the accused is a part of the public to whom this duty is owed. Id.

In this case, the prosecutor failed in these duties by committing flagrant, prejudicial misconduct. In closing argument, she repeatedly told jurors to relieve the state of the full weight of its burden of proof by improperly presuming the required “knowledge” element of the crime of possession of a stolen firearm. Further, even if this misconduct was not so flagrant and ill-intentioned that it could have been cured, appointed counsel was prejudicially ineffective in failing to object and seek that remedy in order to mitigate the serious prejudice to his client.

The crime of possession of a stolen firearm is defined in RCW 9A.56.310, and occurs when someone “possesses, delivers, sells, or is in control of a stolen firearm.” RCW 9A.56.310(1). But possession of a stolen firearm is not a strict liability crime. See State v. Khlee, 106 Wn. App. 21, 23-34, 22 P.3d 1264 (2001). Instead, the state must meet the burden of proving the possession was “knowing.” Id.

This means that the state had to either prove that Newman actually knew the gun found in the locked safe was stolen or present sufficient evidence to prove that Newman should have been put on notice that the firearm was stolen. See State v. Rockett, 6 Wn. App. 399, 402, 493 P.3d 321 (1972).

Here, there was no evidence Newman had such knowledge. The only evidence was that the gun found in the safe appeared to be the gun that Lorenzo was missing. Other than the bare constructive possession of the safe and the gun's presence inside, however, there was no evidence regarding that gun. No evidence linked Newman to the gun's theft. No evidence linked him to anyone believed to have been involved. There was no evidence regarding how the gun got into the safe or how it came to be in the apartment at all, let alone evidence to show that Newman knew it had been stolen.

Instead of providing such evidence, the state urged jurors to find the essential element of the crime by presumption. RP 366. In closing argument, the prosecutor told jurors that they should find the state had met its burden of proving that element because of Newman's status as a felon. RP 366.

The prosecutor told jurors that anyone who is not lawfully allowed to own or possess a firearm because of their "felon" status would not be able to just go buy a gun at a local gun store. RP 366. She then stated that any felon would thus have to go buy a gun from back channels, which she declared, "frequently include stolen firearms." RP 366. As a result, she urged the jury to assume that Newman knew the firearm was stolen, because "a reasonable person would conclude" that any firearm they could get as a felon was stolen, and this particular gun appeared distinctive so one would assume that meant someone owned it. RP 366.

These arguments were flagrant, prejudicial and ill-intentioned

misconduct which compels reversal of the conviction for possession of a stolen firearm. A prosecutor commits misconduct in misstating the law. See State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955). This is particularly true when the misstatements minimize the state's burden of proof. See State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 168 (2015). Both the state and federal due process clauses guarantee the accused the right to have the state shoulder the burden of proving every essential element of the crime charged, beyond a reasonable doubt. See State v. W.R., Jr., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Sixth Amend., 14th Amend., Art. 1, § 3.

In general, the state may use evidentiary devices, such as inferences or presumptions, to assist it in meeting this constitutional burden, so long as those devices do not relieve the state of its burden. See State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135, cert. denied, 513 U.S. 919 (1994). This issue usually arises in cases where there is a jury instruction given telling jurors to apply such a device. See, e.g., State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996); Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed.2d 39 (1979). In such cases, our courts allow instructions which *permit* jurors to find a presumed fact from a proven fact, but prohibit instructions which *require* jurors to make such a link. See Hanna, 123 Wn.2d at 710. Further, even permissive presumptions cannot be used unless the presumed fact is established "more likely than not" from the proven fact. Id.

In another context, it was a violation of due process when the juvenile court presumed that the state had proven the essential element of the accused being a “minor” for the purposes of a charge of “minor in possession,” just because the case was in juvenile court. See State v. K.N., 124 Wn.App. 875, 103 P.3d 844 (2004).

Here, the prosecutor argued that jurors should presume that the state had proven the essential element that the accused was in “knowing” possession of a stolen firearm based on Newman’s status as a felon. RP 366. The reasoning the state used was that anyone like Newman who cannot go buy a gun lawfully should be assumed to know that any gun they can get their hands on is likely stolen, especially if it is distinctive. RP 366.

But the state presented no evidence that felons can only get guns which are stolen, or that the majority of guns on the secondary markets are stolen, or anything similar. There is no presumption that a felon should know any gun he could possess was stolen. See, United States v. Howard, 214 F.3d 361, 364 (2nd Cir. 2000). In Howard, as here, the government relied on the argument that jurors could conclude that the gun the accused had possessed was stolen because he was not lawfully allowed to acquire a weapon as a convicted felon. The Court rejected the state’ claim:

[T]he fact that appellant may have known that as a convicted felon he could not lawfully obtain a firearm does not tend to prove that he had reason to know it was stolen. We have no basis on this record or on the arguments made to us to opine that such a significant portion of the guns sold on the ‘black market’ are stolen that a purchaser would likely share such knowledge and believe that any particular gun sold on that

market was even highly likely to have been stolen. Nor was there evidence that appellant stole the gun himself or was somehow in league with the thief. The record is silent as to the circumstances under which he came into possession of the gun, apart from the fact of possession itself.

214 F.3d at 364.

Similarly, here, the state presented no evidence to support the presumption it told jurors they could rely on in finding that the state had met its burden of proof. The prosecutor committed misconduct in arguing that jurors should apply a presumption that a convicted felon should know any gun he was able to possess was likely stolen, especially if the gun is somewhat unique. Further, the misconduct was flagrant, ill-intentioned and prejudicial, because it improperly relieved the state of its burden of proving all the essential elements of the charged crime.

Even if it did not meet that standard, however, and could possibly have been cured with instruction, reversal would still be required, because counsel was prejudicially ineffective in failing to object and to seek curative instruction on his client's behalf. Counsel is ineffective if, applying a strong presumption of competence, his performance falls below an objective standard of reasonableness and prejudices his client. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P2d 28 (1995). In general, a "tactical" decision is not ineffective unless that decision is not one any reasonable attorney would make. See, e.g., State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Here, there could be no reasonable tactical explanation for

failing to object to the prosecutor's repeated misstatements of the relevant law in a way which reduced the state's burden of proof. Further, counsel's failure to object and seek instruction to cure the state's misstatement prejudice Mr. Newman. Counsel's deficient performance is prejudicial and reversal is required where within reasonable probabilities the outcome would have been different, absent counsel's errors. See id.

Notably, this does not require proof the defendant would likely have been acquitted had counsel objected, although that is the level of prejudice here. A "reasonable probability" is one sufficient enough to "undermine confidence in the outcome," by the low burden of "a preponderance of the evidence." See State v. Crawford, 159 Wn.2d 86, 104-105, 147 P.3d 1288 (2006); see also, State v. Riofta, 166 Wn.2d 358, 376, 209 P.3d 467 (2009)(Chambers, J., concurring in dissent.) Here, had the jury been properly instructed that it could not simply presume the required "knowing" and instead had to hold the state to the burden of proof, there is more than a reasonable probability the outcome would have been different and that Mr. Newman would not have been convicted of the crime of possession of a stolen firearm. This Court should so hold.

2. THE TRIAL COURT ERRED AND APPELLANT'S PRETRIAL RIGHTS WERE VIOLATED WHEN THE COURT FAILED TO FOLLOW THE MANDATES OF CRIMINAL RULE 3.2

The criminal justice system is based upon the foundation of the presumption of innocence. See, State ex rel Wallen v. Judges

Noe, Towne, Johnson, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed 481 (1895).

The presumption ensures that the state may not simply keep someone in custody pretrial based solely on an unproven accusation. Hudson v. Parker, 156 U.S. 277, 285, 15 S. Ct. 450, 39 L. Ed. 424 (1895). Instead, a person accused of a crime is entitled to have the state prove their guilt beyond a reasonable doubt before punishment such as jail time may be imposed. See State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014).

As a result, pretrial release and liberty is - supposedly - “the norm.” United States v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095, 96 L. Ed. 2d 697 (1987); see Barton, 181 Wn.2d at 150. The U.S. Supreme Court has declared that “detention prior to trial or without trial” should be “the carefully limited exception.” Salerno, 481 U.S. at 742; see Barton, 181 Wn.2d at 152.

The federal Eighth Amendment, Washington’s Article 1, §§ 14, 20 and CrR 3.2 apply when the government tries to keep custody of someone accused but not yet convicted of a crime. Barton, 181 Wn.2d at 152-54. The Eighth Amendment prohibits “excessive bail.” Salerno, 481 U.S. at 742. Article 1, § 20, goes further, ensuring a right to bail “by sufficient sureties” in all cases except a very few, while Article 1, § 14 guarantees the right to be free from “excessive bail.” CrR 3.2 goes yet further, providing for a presumption of release on personal recognizance for all but a very limited number of specific charges involving the death penalty or life without parole.

All of these provisions were violated in this case. Further, the trial court violated the constitutional guarantees of equal protection and due process by setting a financial condition for pretrial release which was excessive and forced appellant to be deprived of his pretrial liberty for being too poor to pay bail. These issues affect not just Mr. Newman in this case but all accused. In addition, they are of substantial and compelling public importance. This Court should address them and, on review, should reject and condemn what occurred in this case, remind the superior courts of their duties to follow the mandates of the criminal rules, and reiterate this state's commitment to the constitutional protections against excessive and unconstitutional pretrial proceedings which violate fundamental state and federal rights.

a. Relevant facts

At the preliminary hearing on March 9, the judge read the statement for determination of probable cause regarding the charges, then asked Mr. Newman if he wanted an attorney appointed. RP 3. When Newman answered, “[y]es,” the judge then said, “OPD, Group B,” apparently appointing counsel. RP 3. The judge then turned to the prosecutor, who said Newman had “six prior warrants, seven prior misdemeanor convictions, 14 prior felony convictions,” and what the prosecutor said was “some aggravated criminal history:”

His felony convictions include an assault in the second degree with a deadly weapon, three assault in the third degree convictions, two felony no-contact order violations, a residential burglary, and tampering with a witness. So this is a particularly aggravated criminal history. The gun that was

found along with a fairly large quantity of controlled substances. . . was stolen or reported as stolen, so this is quite a concerning criminal history. For those reasons, Judge, we're asking the court to consider \$50,000 bail.

RP 3-4. Someone, apparently newly appointed counsel, told the court Newman had lived at the same address in Vancouver for seven years and, while he had some criminal history, he has been dealing with recovering from two gunshot wounds to his leg and had to be at a vascular surgeon's appointment the following Monday. RP 4-5. That person said that Mr. Newman was saying to them "he's been on bail before and made court appearances. RP 5. That person went on; "[w]e'd ask the court to consider PR'ing him based primarily on his medical condition." RP 5. It would later be discussed that Mr. Newman had been shot in the leg multiple times and had three surgeries just a few months before. RP 7.

The judge declared, "I'm going to set bail at \$35,000." RP 5.

- b. The imposition of \$35,000 pretrial bail upon an indigent person accused of bailable crimes without following the mandates of CrR 3.2 violated not only rule but also constitution and, while "moot," is an issue of substantial and continuing public interest

The trial court's decision violated CrR 3.2 and both the state and federal constitutions. First, the court erred in failing to apply the mandatory presumption of release on personal recognizance the rule requires. See Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007).

The rule provides:

- (a) **Presumption of Release in Noncapital Cases.** Any person, other than a person charged with a capital offense, shall at the preliminary appearance or

reappearance . . . be ordered released on the accused's personal recognizance pending trial unless

- (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
- (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

CrR 3.2(a) (emphasis in original). Release on "personal recognizance" means release "the court takes the defendant's word he or she will appear for a scheduled matter" or the arrested person promises, "without supplying a surety or posting bond, to appear." BLACKS LAW DICTIONARY (10th ed. 2014).

Thus, under CrR 3.2(a), the presumption is that a person who is charged with a crime in this state will be released based upon the promise to return, without any conditions placed on that person's release - unless and until the presumption is rebutted under CrR 3.2(a)(1) or (2). See State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008).

In this case, the apparent basis for the state's request that the trial court impose \$50,000 as a financial condition on the indigent accused was "danger to the community," because of his criminal history and the nature of the charges filed. Assuming this is the subsection (2) exception for when it is shown there is a "likely danger" that the accused will either "commit a violent crime," "seek

to intimidate witnesses,” or will “otherwise unlawfully interfere with the administration of justice.” But the trial court did not comply with the requirement of CrR 3.2(b) and (e), which set forth the relevant facts the court must consider in determining whether this standard is met:

- (1) The accused’s criminal record;
- (2) The willingness of responsible members of the community to vouch for the accused’s reliability and assist the accused in complying with conditions of release;
- (3) The nature of the charge;
- (4) The accused’s reputation, character and mental condition;
- (5) The accused’s past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
- (6) Whether or not there is evidence of present threats or intimidation directed to witnesses;
- (7) The accused’s past record of committing offenses while on pretrial release, probation or parole; and
- (8) The accused’s past record of use of or threatened use of deadly weapons or firearms, especially to victim’s [sic] or witnesses.

Further, the rule requires more than proof of just general fear of “danger;” the state must show the danger is “substantial.” Rose, 146 Wn. App. at 452. Thus, to rebut the presumption of release without conditions, there had to be “available” information before the superior court to prove a “substantial” danger that the accused would engage in a violent crime or otherwise interfere with the administration of justice. See Butler, 137 Wn. App. at 524 (trial court

made finding of “substantial danger”).

This requires, for example, more than just proof the defendant has been charged with unlawfully possessing a firearm and has a prior serious felony and has skipped bail in the past. See Rose, 146 Wn. App. at 443-44. And while the trial court’s determination of “substantial danger to the community” which justifies imposing conditions of pretrial release is reviewed for abuse of discretion, a decision which is unsupported by the record or applies an incorrect legal standard is an “abuse of discretion.” See State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Here, there was no discussion of any specific, substantial danger that Mr. Newman would commit a violent crime if released or would go try to intimidate a witness. The concern was simply a general concern for safety based on Newman’s prior convictions and the charges against him. That is insufficient to show a substantial danger which is sufficient to rebut the strong presumption of release on personal recognizance for all but the most extremely severe crimes.

In addition, it is improper to rely on the nature of a charge as the primary or sole basis for determining issues of pretrial release. See Stack v. Boyle, 342 U.S. 1, 5-6, 72 S. Ct. 1, 96 L. Ed. 3 (1951). It violates the presumption of innocence. As the Supreme Court has held, “[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act” itself - one which would inject into “our own system of government the very principles

of totalitarianism[.]” 342 U.S. at 6.

The trial court violated CrR 3.2 by failing to apply the presumption of pretrial unconditional release based on a general declaration of “danger” by the state.

The lower court’s decision violated the requirements of CrR 3.2 in yet another way. Under CrR 3.2(d), even if there is sufficient proof of a showing of “substantial danger” rebutting the presumption of release without conditions and the court is thus authorized to impose *some* conditions, there are limits. CrR 3.2(d)(6) provides that the court may require a financial condition, but only if certain requirements are met:

[The court may] [r]equire the accused to pose a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. **This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community.** If the court determines under this section that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused’s financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice.

CrR 3.2(d)(6) (emphasis added).

Below, the superior court did not make any findings that a financial condition was required because “no less restrictive condition or combination of conditions would reasonably assure the safety of the community.” If the presumption of release on personal recognizance had actually been rebutted, the court would have been authorized under CrR 3.2(d) to impose conditions “other than

detention to assure noninterference with the administration of justice and reduce danger to others or the community.” CrR 3.2(d)(10). The trial court erred and violated CrR 3.2 a second time by imposing a financial condition as a matter of course, not as a last resort and then only if other conditions would not reasonably assure the safety of the community.

These errors did not just violate the Rule. They violated fundamental constitutional rights, including due process, equal protection and the state and federal rights to be free of excessive bail. The federal and state constitutions protect against the state depriving any person of “life, liberty or property, without due process of law.” Hardee v. Dep’t. of Soc. & Health Svcs., 172 Wn.2d 1, 256 P.3d 339 (2011); Salerno, *supra*. These protections apply pretrial. Salerno, 481 U.S. at 744. And it is an essential part of pretrial due process - even “implicit in the concept of ordered liberty” - that every person is presumed innocent unless and until proven guilty by the state, beyond a reasonable doubt. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 368 (1970).

As a result, being a pretrial detainee is far different and due process provides far greater protection for such detainees as compared with those being detained *after* conviction, either in custody or on parole. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1997); State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981). Here, however, Mr. Newman was kept in custody pretrial, because he was denied the clear protections of a

state court rule.

The state violates due process when it discriminates on the basis of wealth. Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974). In Reanier, the state's highest Court recognized that, under the system as it existed then, wealthy defendants were treated differently and secured release (except where no bail was allowed), while indigent defendants did not. 83 Wn.2d at 349. Put bluntly, the Court declared, based on the existing "present (especially state) bail procedures," the wealthy "are able to remain out of prison until conviction and sentencing; the poor stay behind bars." 83 Wn.2d at 349. And the Court held that finding that "[p]re-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty." Rainier, 83 Wn.2d at 349, quoting, Culp v. Bounds, 325 F. Supp. 416 (D. N.C. 1971).

Further, pretrial detention has a significant negative impact on people who are kept in custody - "warehoused" despite not having been convicted of the crime:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Barker v. Wingo, 407 U.S. 514, 532-33, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). There is also strong evidence that pretrial detention correlates to increased likelihood of conviction and higher sentence. See Andrew D. Leipold, *How the Pretrial Process Contributes to*

Wrongful Convictions, 42 AM. CRIM. L. REV. 1123, 1165 (2005); Christopher T. Lowenkamp et. al, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013).²

There can be no question that a person still cloaked with the presumption of innocence suffers significant negative impact on their lives - and their case - when deprived of the presumption of release on personal recognizance set forth in CrR 3.2.

The lower court's decision here also violated the prohibitions against "excessive bail" contained in the state and federal constitutions. That prohibition is violated when bail is set "at a figure higher than an amount reasonably calculated" to ensure the presence of the accused in court. Stack, 342 U.S. at 5. In our state, Article 1, § 20,³ of the Washington Constitution provides a right to bail in all but the most extreme case, while Article 1, § 14 prohibits "excessive bail." State v. Heslin, 63 Wn.2d 957, 959-60, 389 P.3d 892 (1964); Barton, 181 Wn.2d at 152-53.

The function of bail is "limited" so that fixing of it for "any individual defendant must be based upon standards relevant to the

²Available at <https://csgjusticecenter.org/courts/publications/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes/>

³Before 2010, that meant a trial court had no authority to deny bail in any case unless the defendant was accused of a capital (i.e. death penalty) crime. See Barton, 181 Wn.2d at 152-53. After 2010 amendments, Article 1, § 20, now provides, in relevant part, "[a]ll persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evidence or the presumption great," and that bail may be denied for offenses punishable with possible life without parole, "upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any person." See Barton, 181 Wn.2d at 153; see ESHJ Res. 4220, 61st Leg., Reg. Sess. (Wash. 2010) (amending Article 1, § 20).

purpose of assuring the presence of that defendant.” Id. Further, bail “is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial[.]” Stack, 342 U.S. at 7-8 (Jackson, J, and Frankfurter, J, concurring). In this respect, the right to be free from “excessive” bail reflects a principle of proportionality, requiring that the court setting bail must consider the specific situation of the individual involved and set bail only at the amount required for the relevant purpose, in light of the situation of the accused. Stack, supra; see also, Salerno, supra, 481 U.S. at 744-47.

Here, the amount set was not done for the purposes of protecting against danger. Instead, the entire basis for the request for \$50,000 by the state was Mr. Newman’s criminal history and the nature of the charges against him.

Finally, incarcerating people because they are unable to pay to be freed, whether based on “fines” or a particular type of bond, violates equal protection. See, e.g., Tate v. Short, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct. 2016, 76 L. Ed. 2d 221 (1983). Equal protection requires that similarly situated individuals receive similar treatment under the law. State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). Even applying the most deferential standard of review, “rational basis,” to the superior court’s practices below, the violation here is still clear. There is no legitimate or rational difference between a person in Mr. Newman’s situation who is indigent and

the same person with money - they present exactly the same risk. Yet Newman had to remain in custody pretrial, despite the presumption of innocence, despite the principles of CrR 3.2, simply because he was too poor to pay for his release.

This failure to adjust bail to fit the individual case created not only a violation of excessive bail but a problem of equal protection, as impoverished suspects like Mr. Newman are kept in jail pending trial while those with money are not. The existence of a separate “second class” system of accused in jail despite the presumption of innocence, based on inability to post monetary bail has been discussed with concern for years. See, e.g., John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Co., 1979) (Cambridge, Ma.); see also, Ram Subramanian et al, *Incarceration’s Front Door: The Misuse of Jails in America*, Vera Institute of Justice) (Feb. 2015).⁴

Exacerbating this issue, the private “bail bonds” industry, outlawed in all but one other country in the world, has enjoyed staggering growth. See Subramanian et al, supra. The average length of pretrial stay also increased during this time, from 14 to 23 days, but in Washington state it is usually far, far longer. See, e.g., Caseloads of the Courts, Superior Courts, Criminal Case Management (2016).⁵

⁴Available at <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>.

⁵Available at <http://www.courts.wa.gov/caseload/>

Over this same time, there has been a stark increase in the use of “financial” conditions upon people presumed innocent, awaiting trial. From 1990 to 1998, “non-financial” release in state courts dropped from 40% of all those released to 28%. See Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, Special Report, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007).⁶ In 2009, the percentage of pretrial release involving financial conditions had grown to an estimated average in large urban counts of 61 percent of all cases involving felonies. See Brian A. Reaves, Bureau of Justice Statistics, State Court Processing Statistics, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* (Dec. 2013).⁷

Today, it is estimated that, like Mr. Newman, pretrial, three out of five people sitting in jail in our country are legally presumed innocent, awaiting trial or plea resolution, too poor to afford bail. See Timothy R. Schnacke, *Fundamentals of Bail: a Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. Dept. Of Justice, Nat’l Inst. of Corrections (2014).⁸ There is some evidence that this even impacts whether a person is convicted and how long their later sentence will be. See Lowenkamp et. al,

?fa=caseload.showReport&level=s&freq=a&tab=trend&fileID=Crimcm.

⁶Available at <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

⁷Available at <https://www.bjs.gov/content/pub/pdf/fdluco9.pdf>.

⁸Available at <http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf>.

supra.

It is worth noting that, in fact, the portions of CrR 3.2 limiting use of financial conditions of pretrial release to only those limited situations and amounts truly needed were added in 2002, for the very purpose of reducing the unconstitutional, unfair disparities between the treatment of those with resources and those without. See *In the Matter of the Adoption of the Amendments to CrR 3.2, CrR 3.2.1, CrRLJ 3.2 and CrRLJ 3.2.1*, Order No. 25700-A-721 (WSR 02-01-025) (Dec. 6, 2001).⁹ The Commission proposed amendments to CrR 3.2 after receiving a study which “concluded the criteria established by court rule for pretrial release may discriminate against persons who are economically disadvantaged. Id; see, George Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington*, Washington State Minority and Justice Commission (Oct. 1997).¹⁰ These proposed amendments included a requirement for both the “secure future appearance” and “substantial danger” means of disproving the presumption of pretrial release without conditions, relating to financial conditions, so that CrR 3.2(b) included a requirement that, if the court determines that a bond is required, the court “shall consider, on the available information, the accused’s financial resources for the purposes of setting bond that will reasonably assure the accused’s appearance,”

⁹Available at <http://apps.leg.wa.gov/documents/laws/wsr/2002/02/02-01-025.htm>.

¹⁰Available at http://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf.

and amended CrR 3.2(d)(6) to create the same requirement of a court considering “on the available information, the accused’s financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice.” See id.

In response, the prosecution may urge the Court to decline to discuss the issue as “moot,” because Mr. Newman was convicted and is of course no longer suffering from the improperly set bail. This Court should reject any such claim. A case is moot if the court can no longer provide the appellant “effective relief.” In re Det. of M.W., 185 Wn.2d 633, 374 P.3d 1123 (2016). While in general the Court does not consider a case which is moot, this Court also retains discretion to consider such a case, where the question is of “continuing and substantial public interest.” See State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

The superior court’s refusal to apply the presumption of personal recognizance and the other provisions and limits of CrR 3.2, and the constitutional implications of those failures, are issues of continuing and substantial interest, likely to arise again but evade review. See, e.g., Federated Publ’ns, Inc. v. Swedberg, 96 Wn.2d 13, 16, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982). To determine if a case meets this standard, the Court considers 1) the public or private nature of the question presented, 2) the desirability of an authoritative determination on the issue for “the future

guidance of public officers,” and “the likelihood of future recurrence of the question.” Hunley, 175 Wn.2d at 907.

Matters involving interpretation and proper application of a rule or statute tends to be more public in nature, more likely to arise again and the more likely it is that a ruling would be desirable in order to provide future guidance. See Hart v. Dep’t of Soc. & Health Serv., 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). In addition the Court considers “the likelihood that the issue will escape review because the facts of the controversy are short-lived.” In re the Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004) (quotations omitted).

This case meets all of those requirements. Decisions on pretrial release occur all the time and the failure to properly apply the relevant court rule is an issue of serious public importance. It is desirable for this Court to provide guidance as there are a limited number of cases on the issue but appears to be a lack of understanding and application of the rule.

This Court should address the issue, should roundly decry the lower court’s violations of CrR 3.2 and should hold that the procedures here used violated due process, the right to the presumption of innocence, the state and federal prohibitions against excessive bail, and equal protection.

E. CONCLUSION

For the reasons stated herein, the Court should grant appellant relief.

DATED this 27th day of November, 2019.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Appointed counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that I served the attached document as follows: by this Court's portal upload to the Cowlitz County Prosecutor's Office and by depositing a true and correct copy in the U.S.P.S. first-class postage prepaid, addressed to appellant Eric Newman, DOC 308797, WCC, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 27th day of November, 2019.



KATHRYN A. RUSSELL SELK, WSBA 23879
Attorney for appellant
RUSSELL SELK LAW OFFICE
1037 NE 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

RUSSELL SELK LAW OFFICE

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