

FILED  
Court of Appeals  
Division II  
State of Washington  
7/29/2019 4:37 PM  
NO. 53091-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS THIBODEAUX

Appellant.

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

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to sustain conviction for delivery of methamphetamine as alleged in Count I.

2. The sentencing court erred by imposing the legal financial obligations [LFOs] of Department of Corrections community supervision in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez* and after enactment of House Bill 1783.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against him for a crime unsupported by substantial evidence? Assignment of Error 1.

2. Following the Supreme Court's decision in *Ramirez*, and after enactment of House Bill 1783, should the community supervision fee be stricken? Assignment of Error 2.

**C. STATEMENT OF THE CASE**

1. **Procedural facts:**

Louis Thibodeaux was charged in Cowlitz County Superior Court by amended information with three counts of delivery of methamphetamine. Clerk's Papers (CP) 1-3, 72-74. RCW 69.50.401(1), (2)(b). The State alleged in each count that Mr. Thibodeaux delivered methamphetamine to police confidential informant Autumn Stanfield, and

alleged that Count I took place May 3, 2016, that Count II took place May 5, 2016, and Count III occurred on July 5, 2016. CP 72-74. The State alleged that Count I took place within 1,000 feet of a school bus route stop and that Count III occurred within 1,000 feet of the perimeter of a community college and a high school. CP 72-74. RCW 69.50.435(a).<sup>1</sup>

The matter came on for trial on November 7 and 8, 2018, the Honorable Michael Evans presiding. <sup>2</sup>Report of Proceedings<sup>2</sup> (RP) at 101-339; 3RP at 345-520.

**a. CrR 3.5 hearing**

The court found following a CrR 3.5 hearing that the State met its burden for admission of Mr. Thibodeaux's custodial statements to police that he does not deal drugs, but that he "hustles," made following advisement of his *Miranda* rights. 2RP at 255.

**b. Verdict and sentencing**

Ms. Thibodeaux was found guilty by a jury of delivery of methamphetamine as alleged in Counts I, II and III. 3RP at 513. Pursuant

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<sup>1</sup>Mr. Thibodeaux entered a stipulation to the accuracy of the facts supporting the enhancements in Counts I and III. CP 117-118.

<sup>2</sup>The record of proceedings consists of the following transcribed hearings: 1RP – August 9, 2017, August 21, 2017, September 25, 2017, October 9, 2017, October 23, 2017, October 30, 2017, November 13, 2017, May 18, 2018, May 21, 2018, June 4, 2018, June 25, 2018, July 2, 2018, July 19, 2018, July 26, 2018, August 1, 2018, August 2, 2018, September 11, 2018, October 25, 2018, November 1, 2018, November 20, 2018, November 29, 2018, and December 18, 2018 (sentencing); 2RP – November 7, 2018 (CrR 3.5, jury trial, v day 1), February 14, 2018 (jury trial, day 2), February 15; and 3RP – February 15, 2018, February 16,

to the stipulation by defense, the jury found by special verdict that Count I was committed within 1000 feet of a school bus route stop and Count III occurred within 1000 feet of high school and a college. 3RP at 513-14; CP 136, 137, 138, 139, 140.

Mr. Thibodeaux was subsequently convicted of one count of possession of methamphetamine on October 31, 2018 in Cowlitz County cause no. 17-1-01383-08,<sup>3</sup> and both cases came on for sentencing on December 18, 2018. 1RP at 89-95.

Based on an offender score of 9 points and the enhancements, standard range for Counts I and III was 84 to 144 months and 60 to 120 months for Count II. 1RP at 89; CP 153. The State argued for a base sentence of 60 months for each count, and 24-month enhancements for Counts I and III, for a total of 84 months, and 12 months of community custody. 1RP at 90. Defense counsel requested an exceptional sentence downward of 24 months based on Mr. Thibodeaux's heart condition. 1RP at 91. The defense argued that a letter from Mr. Thibodeaux's cardiologist indicating that Mr. Thibodeaux suffers from congestive heart failure. 1RP at 90-91.

The court declined to impose an exceptional sentence downward, and instead imposed 60 months for each count to be served concurrently

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2018 (jury trial, day 3 and 4, and March 7, 2018 (sentencing).

<sup>3</sup>Cause no. 53095-3-II.

and 24 months for the enhancements in Counts I and III, to be served consecutively, for a total of 84 months. 1RP at 93-94; CP 154.

The court sentenced Mr. Thibodeaux to a year and a day in cause no. 17-1-01383-08 and 12 months of community custody, to be served concurrently with cause no. 17-1-00825-08. 1RP at 94; CP 154.

The court imposed a \$500.00 victim assessment legal financial obligation. CP 156. The judgment and sentence also provides in Section 4.2 that the defendant shall “pay supervision fees as determined by” the Department of Corrections. CP 155

Timely notice of appeal was filed January 2, 2019. CP 163. This appeal follows.

**2. Trial testimony:**

Autumn Stanfield agreed to act as a confidential informant and make a series of nine “controlled buys” for the Longview Police Department Street Crimes Unit. 2RP at 275. The “target” selected for three of drug buys was Louis Thibodeaux. 2RP at 275-76, 3RP at 354, 377. Ms. Stanfield testified that she was going to “work a deal” the Street Crimes Unit and make a total of nine buys in order to have drug charges against her dropped, but that she “didn’t follow through” and that she was eventually convicted of several drug offenses. 2RP at 273, 274. Ms. Stanfield testified that she faced six heroin charges and three methamphetamine charges and that she faced “twenty, twenty-eight years,

with all the school enhancements, deliveries, drugs.” 2RP at 296.

The first buy was set to take place at a house located at 361½ Oregon Way in Longview. 2RP at 276, 307. Several members of the Longview Police Department Street Crimes Unit, including Detective Benjamin Mortensen, Officer Seth Libbey, and Detective Calvin Ripp surveilled the house at 361½ Oregon Way in Longview where the controlled buy between Ms. Stanfield and Mr. Thibodeaux was arranged to take place. 3RP at 413, 423, 424. Ms. Stanfield initially texted with Mr. Thibodeaux to arrange to meet him and to buy \$40.00 worth of “w”. 2RP at 276, 278, 3RP at 426.

Detective Mortenson, who was lead detective in the case, stated that “w” was street slang for “white,” or methamphetamine. 3RP at 423, 426.

The police followed the same procedure for each of the three arranged buys. Ms. Stanfield was searched prior to the buy, and Detective Mortensen provided her with \$40.00 in prerecorded “buy” money. 3RP at 404-06; 424, 426. Ms. Stanfield stated that Detective Mortenson performed the search prior to and after each buy and testified that no female officers were involved in the searches of her person. 2RP at 297. Ms. Stanfield stated that the detective had her lift and shake her arms and shirt and made her take off her shoes and socks. 2RP at 298. After Ms. Stanfield was searched on May 3, Detective Mortensen drove her to the vicinity of the house. 3RP at 355-56. After being dropped off, Ms. Stanfield walked to the

house where two men were standing outside, and she then went inside the house. 2RP at 310.

After leaving the house Ms. Stanfield talked with a man who was outside the house and then walked back to where Detective Mortensen was positioned in a vehicle. 2RP at 311, 3RP at 358 After she returned, Ms. Stanfield was searched a second time and gave Detective Mortensen a plastic bag containing a white crystal substance that be believed to be methamphetamine. 3RP at 407, 408, 430, 432.

Longview police officer Seth Libbey video recorded Ms. Stanfield walking up to and entering the house. 3RP at 355. Officer Libbey was parked diagonally from the house and could see the front door of residence. 3RP at 356. Officer Libbey was able to observe Ms. Stanfield walking on Oregon Way to house and as she entered the house. 3RP at 357. After entering the house she was out of the view of the Street Crimes Unit officers providing surveillance. 2RP at 310-11.

Video of Ms. Stanfield walking to the house and then returning was entered as Exhibit 4 and played for the jury. 3RP at 360-63. In the video, two men are seen standing outside the house. 2RP at 361.

Longview Police Officer Jordan Sanders provided surveillance of the meeting and saw her walk past his vehicle where he was stationed. 3RP at 377-78.

The State alleged that a second drug transaction took place during a

meeting between Ms. Stanfield and Mr. Thibodeaux on May 5, 2016 at the Traveler's Inn in Longview. 3RP at 363, 438. Detective Mortenson performed the same procedure of searching Ms. Stanfield prior to the controlled buy and she was then transported to the vicinity of the Traveler's Inn. 3RP at 408-10.

Again, Officer Libbey video recorded the alleged controlled buy. 3RP at 364. Officer Libbey testified that he saw Ms. Stanfield approach the Traveler's Inn and meet Mr. Thibodeaux, who had come from the top floor of the hotel. 3RP at 365. He stated that they had "a hand to hand interaction between them before she returned back to detectives." 3RP at 364-67. Officer Libbey described the meeting as "a drug transaction." 3RP at 366. He explained the transaction:

looking over your shoulder. There was that kind of, like, that type of attitude, awareness that there's something going on; and, then, there was a short—relatively short, brief meeting, and then it led up to the quick transaction and then them separating.

3RP at 366.

Officer Jordan Sanders also video recorded the meeting, which was played to the jury. 3RP at 384, 385. Exhibit 5.

Prior to the meeting Detective Mortenson searched Ms. Stanfield and again provided her with "buy" money. 3RP at 439. Ms. Stanfield was also provided with a body wire and recorded the transaction. 3RP at 439. The body wire recording was played to the jury. 3RP at 446. Exhibit 6.

After she returned she gave Detective Mortensen a small bag of suspected methamphetamine. 3RP at 442.

The State alleged that a third meeting took place on July 5, 2016 in a WinCo parking lot in the Triangle Mall in Longview. 2RP at 329, 3RP at 369. Prior to the alleged buy on July 5, Detective Mortensen again searched Ms. Stanfield and provided buy money to her, and she again wore a body wire. 3RP at 387, 447.

Officer Libbey testified that when he arrived in the parking lot Mr. Thibodeaux was near the front entrance to the store. 3RP at 370. He saw Ms. Stanfield walking toward him, and Mr. Thibodeaux initially went into the store, but then came outside again and they met near the large pillars in front the of the building. 3RP at 371. He stated that he did not “see a specific hand to hand” exchange, “but from the body movements and motions, once you see a whole bunch of ‘em, you get pretty good at just—that’s what it looked like it was.” 3RP at 372.

Officer Libbey said that after the interaction with Mr. Thibodeaux, Ms. Stanfield returned to Det. Mortensen. 3RP at 372. Detective Mortensen stated that after she returned, Ms. Stanfield gave him a “piece of plastic” containing a white crystal substance. 3RP at 450. He then deactivated her body wire and searched her. 3RP at 411, 442, 450.

Again, the wire recoding was played to the jury. 3RP at 451.  
Exhibit 8.

Detective Durbin testified that when he questioned Mr. Thibodeaux about the three alleged drug transactions, he stated that Mr. Thibodeaux denied that he deals drugs, but said that he “hustles,” which means that he acts as a middle man and that he “would take the drugs and deliver them to the customer” and that prior to delivering the drugs “he would pinch a little bit of drugs for himself and then collect the money for it.” 2RP at 337.

Mr. Thibodeaux acknowledged meeting Ms. Stanfield briefly outside the Traveller’s Inn and outside the WinCo, but denied that he sold methamphetamine to Ms. Stanfield and denied that he made the statement to Detective Durbin that he “hustled” drugs. 3RP at 467-69, 471. He stated he did not have his cell phone on May 3, 2016 and that his brother Beau had it. 3RP at 471:

The defense stipulated that the substance that Detective Mortenson obtained from Ms. Stanfield on May 3, May 5 and July 5 and entered as Exhibits 1-A, 2-A, and 3-A were tested and found to contain methamphetamine. 3RP at 394. Defense counsel also stipulated that the house at 361 ½ Oregon Way is within 1000 feet of a school bus route stop, and WinCo Foods is within 1000 feet of a college and a high school. 3RP at 394-95.

#### **D. ARGUMENT**

1. **THE EVIDENCE WAS INSUFFICIENT TO PROVE DELIVERY OF METHAMPHETAMINE AS ALLEGED IN COUNT I**

- a. *The State bears the burden to prove every element of the offense beyond a reasonable doubt.*

The due process clauses of the federal and state constitutions require the prosecution prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 21, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Further, when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. *State v. Hickman*, 135 Wn.2d 97, 954 P. 2d 900 (1998); *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972).

***b. The State failed to prove that Mr. Thibodeaux delivered methamphetamine to the informant on May 3, 2016 as alleged in Count I***

In the case at bar, the State charged Mr. Thibodeaux with delivery of methamphetamine under RCW 69.50.401. This statute provides in relevant part:

[I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Any person who violates this section with respect to ... methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony.

RCW 69.50.101(f) defines “delivery” as an actual transfer of a controlled substance from one person to another.

The gravamen of this offense, as charged and instructed against Mr. Thibodeaux, is to deliver methamphetamine to another person. The evidence presented at trial, even when seen in the light most favorable to the state, does not constitute substantial evidence that Mr. Thibodeaux delivered anything to the police informant on May 3, 2016. No witness other than Ms. Stanfield asserted that he saw the defendant possess or

deliver methamphetamine, or saw Mr. Thibodeaux enter or leave the house. No video or audio recording was made of the alleged drug deal. Under these critical facts, there were many sources for the methamphetamine the informant gave to Detective Mortensen, potentially as a scheme or plan to falsify evidence against the defendant and at the same time garner the approbation of the police. For example, the methamphetamine could have been given to Ms. Stanfield by someone in the house other than Mr. Thibodeaux—assuming arguendo that Mr. Thibodeaux was even in the house on May 3. The tiny package of methamphetamine could have been secreted in the house by Ms. Stanfield or a confederate prior to the alleged drug deal since the buy location had been previously arranged. The small package could have been secreted in a body cavity because the search of Ms. Stanfield conducted by Detective Mortensen was limited to a search of her clothing, and consisted of her “shaking” her clothing and not sure of her intimate areas.

The absence of police monitoring of the CI while inside the house creates a scenario in which the police could only suspect that the defendant was the source of the methamphetamine and force the police to take the informant’s word for the source of the methamphetamine. Evidence that only gives rise to suspicion or speculation does not constitute substantial evidence sufficient to meet the requirements of due process

under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's conviction in Count I and remand with instructions to dismiss.

**2. THE COURT ERRED IN IMPOSING THE COMMUNITY SUPERVISION FEE**

*a. Recent statutory amendments prohibit discretionary costs for indigent defendants*

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute House Bill 1783*, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. *Laws of 2018*, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

*House Bill 1783* amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW

10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing *Laws of 2018*, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

***b. The court did not inquire into Mr. Thibodeaux’s financial situation***

The sentencing court must conduct on the record an individualized inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when determining his ability to pay. *Id.* Here, the court did not engage in a *Blazina*

inquiry. RCW 10.01.160 is mandatory: “it creates a duty rather than confers discretion.” *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking ... the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.” *Id.* “Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant's other debts ... when determining a defendant's ability to pay.” *Id.*

*c. Mr. Thibodeaux was indigent*

Mr. Thibodeaux was represented by court-appointed counsel, and shortly after sentencing the court found Mr. Thibodeaux indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 179-81. The defense also presented evidence that Mr. Thibodeaux suffers from congestive heart failure, presumably impacting his ability to work. 1RP at 91. Thus, the record indicates that Mr. Thibodeaux was indigent under RCW 10.101.010(3) at the time of sentencing.

*d. The trial court erred by imposing discretionary community supervision*

In the judgment and sentence, the court directed Mr. Thibodeaux to pay a community supervision fee to the Department of Corrections. CP

156.

The community custody supervision fee is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). The trial court found Mr. Thibodeaux indigent at sentencing for purposes of appeal. Therefore, under RCW 10.01.160(3), this Court should remand to strike the community custody supervision fee.

**E. CONCLUSION**

For the foregoing reasons, Mr. Thibodeaux respectfully requests this Court reverse his conviction in Count I and order the charge be dismissed with prejudice.

Mr. Thibodeaux also respectfully requests this Court to remand for resentencing with instructions to strike the community supervision fee.

DATED: July 29, 2019.

Respectfully submitted,  
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## CERTIFICATE OF SERVICE

The undersigned certifies that on July 29, 2019, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Sean M. Brittain, Cowlitz County Prosecuting Attorney's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

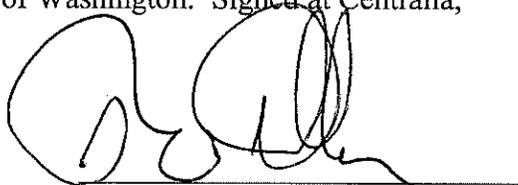
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 29, 2019.



PETER B. TILLER

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**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53091-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Louis James Thibodeaux, Appellant  
**Superior Court Case Number:** 17-1-00825-4

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