

31180-5-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**  
Feb 13, 2013  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

HEATHER L. MERCADO,

Appellant.

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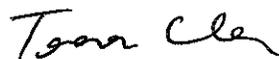
DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:



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### **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

### **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the sentencing of the Appellant.

### **III. ISSUE**

Does the trial court have authority to require the Defendant submit to HIV testing where her conviction is for a drug offense, the guilty plea form presented by the defense suggests a requirement for HIV testing, the particular drug (methamphetamine) is associated with the use of hypodermic needles, and a bloody T-shirt at the scene suggests the use of a needle?

### **IV. STATEMENT OF THE CASE**

On March 10, 2012, in the execution of an arrest warrant, Sergeant Moses observed Heather Mercado preparing to smoke methamphetamine with a pipe. CP 1-2. In the search of the bathroom of the residence,

police found Ms. Mercado's glass pipe and a golf ball-sized crystalline substance in a baggie with a Disney Princess design. CP 2, 4. The crystalline substance tested positive for methamphetamine. CP 2. In a black leather bag, police found a handgun, digital scales, and white T-shirts. CP 2. One of the T-shirts appeared to have blood on it. CP 2.

Ms. Mercado admitted that police had observed her with a baggie, which she said they offered to "forget" if she allowed them entry into the house. CP 3. She admitted knowing that there was a gun in the bag and that there was a Disney princess baggie containing "cut," i.e. an ingredient to mix with drugs. CP 3-4. She said the baggie was hers, but its contents belonged to someone else. CP 4. She said the leather bag belonged to a third person. CP 4.

In a related jail phone call, an inmate instructed his girlfriend to tell Ms. Mercado to take the blame for the methamphetamine. CP 5. In a second call, the girlfriend told the inmate that Ms. Mercado had agreed to take the blame. CP 5-6.

The Defendant Heather Mercado was convicted by guilty plea of possession of methamphetamine and sentenced to community service. CP 12, 29; RP 11.

The Defendant's attorney prepared the Statement of Defendant on

Plea of Guilty, as is apparent from the footer on the document. CP 12-21. In the statement, 17 “notification” paragraphs are crossed out as not applying to Ms. Mercado. CP 15-18. One of the three paragraphs which remains applicable is section (s), which states in relevant part: “If this crime involves  a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.” CP 16. Not only is the section not stricken, but there is a check mark indicating its applicability to her case. CP 16.

At the change of plea hearing, the Defendant told the court that she had read the statement through and had no questions about it. RP 2. Without qualification, the court advised the Defendant: “You will be required to be tested for the AIDS virus.” CP 6. She made no objection and said she understood. CP 6.

At sentencing, the court ordered HIV testing under RCW 70.24.340. CP 30.

On appeal, the Defendant challenges the requirement for HIV/AIDS testing.

## V. ARGUMENT

It is the State’s position that the requirement for testing is

appropriate in this case.

Under RCW 70.24.340(1), a person shall submit to HIV testing if:

- (a) Convicted of a sexual offense under chapter 9A.44 RCW;
- (b) Convicted of prostitution or offenses relating to prostitution under chapter 9A.88 RCW; or
- (c) Convicted of drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.

This statute has been reviewed in the context of sexual offenses. *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993). There the consolidated appellants argued that in some of their cases, the particular sexual behavior alleged could not have passed the virus. *In re Juveniles A, B, C, D, E*, 121 Wn.2d at 95. The court upheld the testing, noting that the “fact that the particular act for which an offender was prosecuted involved a minimal risk of exposure to HIV does not remove the State’s interest in testing.” *Id.* The court noted that sexual assaults are “rarely isolated events.” *Id.*, at 96. The “ambiguous nature” of the contacts means that it is “often difficult to learn whether bodily fluids passed.” *Id.*, at 95-96.

While this case regards subsection (1)(a), the discussion is pertinent to subsection (1)(c). Like sexual behaviors, drug use behaviors

can have an ambiguous nature and are rarely isolated events. Chapter 69.50 covers a wide range of controlled substances. Some are legally manufactured and prescribed, others are cultivated, and still others are illegally manufactured. Different substances are consumed in different ways. For example, codeine in cough syrup is consumed orally. Marijuana in the form of green vegetable matter is smoked or consumed orally. Prescription pills can be swallowed or ground up in order then to be smoked or injected. Truly the behavior of consumption of a controlled substance is as ambiguous, wide-ranging, and continuous as sexual behavior. And these behaviors can lead to public health concerns. Therefore, as with subsection (1)(a), it is appropriate the court not look to the particular behavior alleged, but only the type of drug offense and its associations, i.e. whether it is the kind of drug that is “associated with” hypodermic needles.

Ms. Mercado has been convicted of the possession of methamphetamine. Methamphetamine use is a drug offense associated with the use of hypodermic needles.

A review of related cases suggests that the reading of this statute does not need be excessively narrowly tailored. After conviction, the state may draw the blood of convicted felons in order to take their DNA. *State*

*v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007). This is done without a warrant, probable cause, or individualized suspicion and regardless of any advisement before a guilty plea. *State v. Olivas*, 122 Wn.2d 73, 83, 856 P.2d 1076 (1993). Blood may be drawn even before conviction, upon suspicion. *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558 (1991) (upholding the taking of blood samples of suspected intoxicated drivers). And even in civil matters, the state may enforce mandatory blood tests based on a mother's allegation against one or more putative fathers. *State v. Meacham*, 93 Wn.2d 735, 738, 612 P.2d 795 (1980) (upholding mandatory blood tests for putative fathers in paternity cases).

Here the statute calls for a drug offense "associated with the use of hypodermic needles." RCW 70.24.340(1)(c). That standard is met here.

The Defendant argues that the trial court made no determination that "hypodermic needles were involved in Ms. Mercado's offense" and that the Certificate of Probable Cause "does not contain any information that hypodermic needles were used." Appellant's Brief at 3. The State disagrees.

First, the statute does not require that needles be "involved" in the specific offense, but only that the drug offense be of the type that one "associate[s] with the use of hypodermic needles." The State has argued

that methamphetamine possession is the type of drug offense that one associates with the use of hypodermic needles.

Second, while it is the State's position that there is no requirement that actual needle use be proven in the specific offense, the Certificate of Probable Cause does indeed provide evidence suggestive of needle use. The certificate suggests that there were several people involved in methamphetamine consumption at this residence. Their use was a group activity. York and Whiteside were visitors to the residence at the time of the search. CP 2. They were present while the Defendant was using the drug, and York assisted her by hiding the pipe in the bathroom. CP 1-4. The Defendant said that she and her sister resided there together. CP 3. The sister and Jaimes were co-parents of more than one child. CP 3. Police had reason to believe that Jaimes (the subject of the warrant) would be at the home. CP 1. The Defendant claimed that Jaimes owned the "cut," although she appears to have been covering for York. CP 4-6. And York's girlfriend had some association with the group, sufficient for her to assist in negotiating responsibility. CP 5-6. There was a very large amount of methamphetamine – golf-ball sized – too big to be for one person's use, and apparently intended to be weighed (with the scales) and distributed. CP 2. The Defendant was aware of suspicious objects (drugs

and gun) although she initially denied possession, awareness which again suggests that methamphetamine consumption was a group activity with shared complicity. CP 3. Among the accoutrements was a bloody T-shirt. CP 2. While there are many reasons one might bleed, in the context of the activity and evidence observed, one quite obvious reason is the use of hypodermic needles. If one of the party used needles so as to cause blood to get on the shirt, and the individuals were using the substance as a group, then Ms. Mercado's possession was "associated with" needle use.

Third, the court made a determination that the offense was associated with the use of hypodermic needles *by dint of the fact that the court ordered the HIV testing.*

#### Invited Error

A party may not set up error at the trial level and then complain about it on appeal. *In re Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). The Defendant's counsel prepared the Defendant's Statement on Plea of Guilty.

In the Statement, the Defendant struck 17 notifications and checked three notifications, one of which was the advisement that she will be required to undergo HIV testing if the crime is a drug offense associated with hypodermic needles. In other words, the Defendant's

Statement on Plea of Guilty implicitly informed the trial court that the Defendant agreed that the court had authority to order HIV testing. When the court informed the Defendant that she would be required to undergo AIDS testing, the Defendant did not object. RP 6. Regardless of whether the requirement for testing is appropriate, it is offensive for the Defendant to complain about an alleged error, which she herself invited.

#### Reimbursement

The Defendant requests “that she be reimbursed for any funds she may have expended in connection HIV testing.” Appellant’s Brief at 3. She gives no authority for this request. Even if this Court were to find the trial court’s order improper, reimbursement is improper.

The State notes that in *The Matter of Juveniles A, B, C, D, E*, the order to test was stayed pending appeal. *In re Juveniles A, B, C, D, E*, 121 Wn.2d at 86. If there were error, a request for stay would have been the proper remedy, not reimbursement.

In this case, in drafting the plea statement, the Defendant’s attorney advised her client that the testing would apply to her case. The Defendant and her counsel made no objection. The testing is a benefit to her, as well as to the general public. *In re Juveniles A, B, C, D, E*, 121 Wn.2d 89, citing *Anonymous Fireman v. Willoughby*, 779 F.Supp. 402, 417

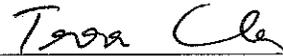
(N.D. Ohio 1991)). The Defendant has benefitted from the testing. And she has done so because she invited the court to enter the order in her plea in statement.

**VI. CONCLUSION**

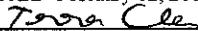
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's sentence.

DATED: February 12, 2013.

Respectfully submitted:



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<p>Dennis Morgan P.O. Box 1019 Republic, WA 99166 &lt;nodblspk@rcabletv.com&gt;</p> <p>Heather Mercado 630 Chase Street Walla Walla, WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 12, 2013, Pasco, WA</p>  <p>Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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