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Court of Appeals
Division III

State of Washington

No. 34327-8-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CARL MOORE, JR.,

Appellant.

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

The Honorable Judge Scott Galina

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Carl Moore, Jr., was convicted of two counts of possession of a controlled substance (methamphetamine) and now appeals to this Court. His convictions stem from evidence seized from him during questioning by officers on June 4, 2015 (count I), and during a search incident to Mr. Moore's rearrest on October 7, 2015 (count II) for the same exact offense for which he was initially arrested in June.

Mr. Moore's conviction for count II should be reversed and dismissed with prejudice. Mr. Moore was not lawfully arrested on October 7th, since he had already been arrested on June 4th based on the exact same evidence, and the State neglected to obtain an arrest warrant or have a probable cause hearing before a neutral and detached magistrate in the intervening months between Mr. Moore's initial arrest on June 4th and his rearrest on October 7th.

Mr. Moore further argues he is entitled to a new trial, because the trial court impermissibly commented on the evidence when it referred to a baggie of purported methamphetamine and told the parties, "Keep track of that [referring to a baggie of alleged methamphetamine]. I don't want my courtroom becoming a superfund cleanup site." RP 124. Mr. Moore should also receive a new trial, because there was an abundance of impermissible evidence admitted during this trial. Mr. Moore was denied

his constitutional right to effective assistance of counsel when his defense attorney failed to object to this inadmissible evidence. At a minimum, the effect of the cumulative trial errors in this case was to deny Mr. Moore his right to a fair trial, such that a new trial is the only fair remedy.

Finally, in the event this Court disagrees with Mr. Moore's substantive arguments, Mr. Moore maintains this matter should be remanded for resentencing for the trial court to strike the over \$4,000 discretionary legal financial obligations (LFOs) that were imposed. Mr. Moore also preemptively objects to the imposition of costs on appeal in the event the State substantially prevails in this appeal.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to suppress evidence obtained following Mr. Moore's unlawful stop and seizure on October 7, 2015.
2. The trial court erred by making an impermissible comment on the evidence.
3. The trial court erred by permitting irrelevant, unduly prejudicial and impermissible prior bad act evidence to permeate Mr. Moore's trial. Defense counsel was ineffective for failing to object to this evidence.
4. The effect of the cumulative trial errors in this case was to deny Mr. Moore a fair trial.
5. The trial court erred by imposing over \$4,000 in discretionary legal financial obligations (LFOs), contrary to the record on Mr. Moore's ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Moore's rearrest in October 2015 for the same offense for which he was arrested in June 2015, without any intervening probable cause hearing or arrest warrant, should result in the suppression of evidence obtained at the rearrest in October.

Issue 2: Whether Mr. Moore's constitutional right to a fair trial by an impartial fact-finder was violated by the trial court's comment on the evidence during trial testimony "Keep track of that [referring to a baggie of alleged methamphetamine]. I don't want my courtroom becoming a superfund cleanup site." RP 124.

Issue 3: Whether defense counsel was ineffective for failing to object to an abundance of irrelevant, unduly prejudicial and/or inadmissible prior bad act evidence.

Issue 4: Whether the court's finding that Mr. Moore had the ability to pay legal financial obligations, and its imposition of over \$4,000 in discretionary costs, should be set aside.

Issue 5: Whether, in the event Mr. Moore does not prevail in this appeal, this Court should nonetheless deny the imposition of costs on appeal against this indigent appellant.

D. STATEMENT OF THE CASE

On June 4, 2015, Carl Moore, Jr., was stopped while driving a vehicle in Clarkston, Washington. RP 83, 86. Prior to the stop, law enforcement saw Mr. Moore and Shannon Grove, a woman known to officers for her narcotics activities, enter and leave a known drug residence (Kemper's house), which was under surveillance by multiple officers that day. RP 11, 38-39. Officers pulled Mr. Moore's vehicle over in order to arrest Ms. Grove for her previously admitted drug offenses and to ask about current drug activity at Kemper's house. RP 8-11, 35-37, 83.

Upon being stopped, Mr. Moore was read his *Miranda* rights and questioned by Detective Jonathan Coe. RP 87-88. Detective Coe asked Mr. Moore if he had any narcotics on his person; initially, Mr. Moore answered “no,” but then he emptied his pockets and placed three baggies of methamphetamine and a glass smoking pipe on the hood of the car. RP 19. Detective Coe asked where the defendant got the methamphetamine, and Mr. Moore said, “Her,” referring to Ms. Grove. RP 19-20. Mr. Moore was placed under arrest and put in another officer’s patrol car. RP 94, 133. Before the patrol car left, Detective Coe obtained Mr. Moore’s phone number and discussed an agreement with Mr. Moore for him to cooperate with law enforcement in exchange for “consideration” on drug possession charges; that is, the pursuit of a felony charge would be “aborted in favor of...giving [Mr. Moore] an opportunity to cooperate.” RP 22-23, 26-27.

Shortly after the patrol car left the scene with Mr. Moore, there was an officer-involved shooting with another person who had been at the Kemper house. RP 25, 40. This shooting then consumed Detective Coe and other officers for the evening so that Detective Coe was unable to complete a probable cause affidavit in Mr. Moore’s case. RP 25-26, 40-41. Instead, Detective Coe called the jail and directed Mr. Moore be released without being charged, since he and Mr. Moore had previously

made a deal for Mr. Moore to “work for consideration for his charges.” RP 26, 40-41. Detective Coe typed up his initial police report within a couple days of June 4th, but he did not file it with the prosecutor’s office. RP 41. Over the next four months, there was no contact between Detective Coe and Mr. Moore. RP 26-27. Charges were not brought against Mr. Moore during this time. RP 32.

On October 7, 2015, Detective Coe saw Mr. Moore at a different house in Clarkston that was under surveillance for drug activity. RP 28, 43. Detective Coe had a marked unit stop Mr. Moore’s vehicle, and Detective Coe then made contact with Mr. Moore in order to rearrest him for the June 4th narcotics offense and to “begin the formal charging process,” as Mr. Moore had never held up his end of the “bargain” to “ameliorate” charges by contacting Detective Coe. RP 31-32, 41, 44-46. Mr. Moore was searched incident to this arrest, at which time Detective Coe located methamphetamine in Mr. Moore’s pocket. RP 31.

Mr. Moore was charged with two counts of possession of methamphetamine stemming from the June 4th and October 7th stops. CP 8-9. Following a pretrial hearing, the trial court refused to suppress evidence from either stop. CP 74.

As to the October 7th stop, which is challenged in this appeal, defense counsel argued in pertinent part, “There is no basis in law for the

theory that once an officer releases someone on a potential charge the officer then has carte blanche to arrest the individual four months later on the charge he was previously released upon.” CP 34. The State acknowledged officers should not be able to harass citizens, “[b]ut when circumstances change [such as in this case where Mr. Moore had “not followed through the promises he made” sic], officers can rearrest folks for the same charge.” RP 50. The trial court held the stop was lawful because officers maintained probable cause to arrest Mr. Moore on October 7th for the June 4th drug possession offense. CP 74.¹

The case proceeded to trial where Detective Coe testified about Mr. Moore admitted having methamphetamine on his person on June 4th, and also finding methamphetamine on Mr. Moore on October 7th. RP 89-91, 100, Exhibits P1-P6. The State admitted Exhibit P5, an audio recording of the defendant’s statements on June 4th in the back of the patrol car, where Mr. Moore said he did not have anything other than the drugs he had gotten from Ms. Grove. RP 138, 145. The State also admitted Exhibit P6, a video showing the removal of methamphetamine from Mr. Moore during his arrest on October 7th. RP 147, 149. Along

¹ Although there was argument by the parties about whether surveillance of drug activities at the known drug house on October 7th would have given officers a lawful basis to stop Mr. Moore (see CP 33; RP 49), the trial court did not find the stop was justified for investigative purposes (see CP 73-74). Rather, the trial court found officers had a lawful basis to stop Mr. Moore in order to effectuate the arrest for the June 4th narcotics. CP 74. Regardless, Mr. Moore was immediately arrested on October 7th prior to any investigation of possible drug activities that might have occurred on October 7th. RP 31, 44-46.

with the related lab reports (Exhibits P2 and P4), the State admitted the baggies of substance that tested positive for methamphetamine (Exhibits P1 and P3). RP 90, 91, 100-01. During this introduction of physical evidence, the trial court stated without objection, “Keep track of that. I don’t want my courtroom becoming a superfund cleanup site.” RP 124.

Also without objection, Detective Coe testified about the narcotics activities that had been under surveillance on the days Mr. Moore was arrested, his separate experiences with Mr. Moore, and his concern that Mr. Moore intended to sell methamphetamine. Specifically, Detective Coe testified that, before making contact with Mr. Moore, he had been watching a known drug house (the Kemper residence) where Ms. Grove was seen getting into Mr. Moore’s vehicle. RP 85. Detective Coe said there had previously been lots of drug activity at that residence, including people throwing needles into nearby yards where kids played, confrontations between people, and thefts in the area. RP 84. He said this drug residence happened to be directly next to a daycare. RP 126.

Detective Coe testified Mr. Moore was known to officers from “other events,” and that he had “known [Mr. Moore] from the past ...[as] he had been a participant in...[a] prior case.” RP 89-90, 108. Detective Coe said he also knew Mr. Moore from a scenario that occurred at a motel in Clarkston with Mr. Moore’s son. RP 95. Detective Coe explained how

he offered to work with the defendant in lieu of charges in this case, because “I know Mr. Moore’s involvement in -- in our area.” RP 92. Detective Coe continued, “[W]e use people like Mr. Moore to go into those places that they’ve been buying narcotics from and buying under our control.” RP 93. Detective Coe told the jury the defendant failed to make contact with the officer after promising to try to ameliorate charges. RP 94-95, 99. Detective Coe said he did not have Mr. Moore’s address to make contact, as Mr. Moore was transient. RP 95, 120-21. Finally, Detective Coe told the jury he “believe[d Mr. Moore] had a warrant or something, too.” RP 94.

As to the three baggies of methamphetamine found on Mr. Moore on June 4th, Detective Coe explained that having smaller baggies is typical with certain drug activities:

The only time that people do that is when they’re going to be selling those bags. They’ll pre-measure up, they’ll set them -- you know, -- smaller baggies, so that if you want -- 20 or 40 or 60 they’ll have them pre-measured out so they don’t have to do it -- like in a parking lot or something.

RP 92.

The jury convicted Mr. Moore as charged with two counts of possession of a controlled substance (methamphetamine). CP 112; RP 189-90. Mr. Moore received a standard range sentence, and the court imposed \$4,770.00 in legal financial obligations (LFOs) after the

prosecutor stated the defendant was physically capable of working. CP 139, 141; RP 203. There was no further inquiry by the court regarding the defendant's ability to pay LFOs. RP 203-04. Mr. Moore, who was found indigent since he received food stamps and Medicaid, submitted a Report as to Continued Indigency on appeal contemporaneously with this opening brief. CP 11-12, 162, 164; Report Attached as Appendix A. That report shows Mr. Moore does not have any real property, he owns a vehicle valued at \$750, he has no income from any sources, he owes an estimated \$17,000 in LFOs and other debts, and he is 54-years-old. *Id.* Mr. Moore timely appealed his judgment and sentence to this Court. CP 150.

E. ARGUMENT

Issue 1: Whether Mr. Moore's rearrest in October 2015 for the same offense for which he was arrested in June 2015, without any intervening probable cause hearing or arrest warrant, should result in the suppression of evidence obtained at the rearrest in October.

As a threshold matter, the issue in this case is not whether the October 7th stop was a lawful *Terry*² stop made for investigatory purposes. Although some argument was made by the parties on this issue, the trial court did not find a *Terry* stop was ever made on October 7th. *See* CP 74. Indeed, the trial court could not have admitted the evidence seized on October 7th pursuant to *Terry*, because law enforcement chose to arrest

² *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (an officer may stop and detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot.)

Mr. Moore on October 7th for his activities on June 4th without first questioning him about any narcotics activities at the known drug house on October 7th. *See* RP 31, 44-46. Simply put, the October 7th stop was not made pursuant to *Terry*, but, rather, to effectuate Mr. Moore's arrest. Thus, the only issue before this Court is whether Mr. Moore's arrest on October 7th could lawfully be made and evidence lawfully obtained as a search incident thereto, based on probable cause from his stop and arrest on June 4th, particularly where no probable cause hearing was ever held and no warrant to arrest was ever issued between the initial arrest on June 4th and Mr. Moore's rearrest on October 7th.

Generally, warrantless searches and seizures are per se unconstitutional. Wash. Const. Art. I, §7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); U.S. Const. Amend. IV (forbidding "unreasonable searches and seizures."); U.S. Const. Amend. XIV (applying Fourth Amendment to the states). When a person establishes he was seized, the State must establish the seizure was justified by a warrant or one of the "jealously and carefully drawn exceptions" to the warrant requirement. *State v. Gantt*, 163 Wn. App. 133, 257 P.3d 682, 686 (2011) (citing *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998)); *State v. Jackson*, 82 Wn. App. 594, 601–02, 918 P.2d 945 (1996)). "[A] search incident to a lawful arrest is a

recognized exception to the warrant requirement.” *State v. A.A.*, 187 Wn. App. 475, 481, 349 P.3d 909, 912 (2015) (internal cites omitted) (emphasis added).

“When a stop is conducted to effectuate an arrest, [courts] require a valid arrest warrant or probable cause.” *State v. Flores*, __ Wn.2d __, 379 P.3d 104, 112 (Sep. 15, 2016) (internal citations omitted). *See also* RCW 10.31.100 (“A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant.”) Mr. Moore was arrested on June 4, 2015, when officers had probable cause to believe he possessed methamphetamine. RP 22-26. He was handcuffed, placed in a patrol car and transported to jail. *Id.* Mr. Moore does not herein challenge the lawfulness of his arrest on June 4th. Rather, he challenges the lawfulness of his re-arrest for the same offense four months later.

“A person who is arrested shall have a judicial determination of probable cause no later than 48 hours following the person’s arrest, unless probable cause has been determined prior to such arrest.” CrR 3.2.1(a). The probable cause determination is made in the same manner as provided for in CrR 2.2(a) for issuing an arrest warrant. CrR 3.2.1(b). “A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged.” CrR

2.2(a)(2). If no preliminary hearing is held for a probable cause determination, the defendant must be released from jail within 72 hours of arrest if no charges have been filed. CrR 3.2.1(a), (b), (f)(2)(ii).

A person who is released from jail without a probable cause hearing and without being formally charged is not “forever exonerate[d] from his prior criminal conduct...” *Saunders v. King Cty.*, 546 F. App’x 650, 650-51 (9th Cir. 2013).³ Rather, due process and CrR 3.2.1 “simply require[] the County to release [the defendant] and obtain a valid warrant for his arrest.” *Id.* This process of obtaining an arrest warrant after the defendant’s release would permit rearrest of the defendant without running afoul of the Fourth Amendment. *See id.*

The primary purpose of having a preliminary appearance is a judicial determination of probable cause. *Westerman v. Cary*, 125 Wn.2d 277, 291, 892 P.2d 1067 (1994). As Courts “have often explained, the placement of this checkpoint between the Government and the citizen implicitly acknowledges that an ‘officer engaged in the often competitive enterprise of ferreting out crime,’ ...may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual’s interests in protecting his own liberty and

³ F.R.C.P. 32.1(a) (permitting citation to decisions marked “not for publication” where issued on or after January 1, 2007); Wash. GR 14.1(b) (permitting citation to opinion of another jurisdiction designated as “not for publication” if citation to that opinion is permitted under the law of the jurisdiction of the issuing court).

the privacy of his home.” *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981) (internal quotation omitted). The warrant requirement is “‘designed to prevent unjustified intrusions on liberty by [government,]’ and to safeguard this purpose a warrant requires that the judgment of an issuing judge be based on probable cause.” *State v. Fisher*, 145 Wn.2d 209, 222, 35 P.3d 366 (2001) (internal quotation omitted). “Another purpose of the rule is to prevent unlawful detention and to eliminate the opportunity and incentive for application of improper police pressure.” *State v. Bradford*, 95 Wn. App. 935, 948, 978 P.2d 534 (1999) (internal citations omitted).

In *State v. Bradford*, the Court of Appeals decided whether the violation of a court rule in one of the defendant’s cases tainted a confession to a separate offense. 95 Wn. App. 935. There, the defendant had been arrested on suspicion of lewd conduct. *Id.* at 939. He was scheduled for a preliminary appearance the following day, but, rather than being able to attend that preliminary appearance hearing, the defendant was instead detained and confessed to a separate rape that had occurred six months prior. *Id.* at 937, 940. The Court of Appeals found a violation of CrRLJ 3.2.1(d)(1) had occurred in the lewd conduct case, which required a preliminary hearing to occur before the close of business on the next court day. 95 Wn. App. at 948. But, the Court did not suppress the defendant’s

confession to the separate rape, because it found this evidence was nonetheless voluntary for purposes of the Fourth Amendment. *Id.* at 949.

The *Bradford* Court held that the failure to comply with court rules requiring a preliminary appearance in the lewd conduct matter was a factor “taken into consideration in determining whether [evidence obtained in the later rape interrogation] was involuntary.” *Bradford*, 95 Wn. App. at 949. The Court explained as follows:

In the present case, there was an unnecessary and unwarranted delay in Mr. Bradford's preliminary appearance before the court on the lewd conduct charges. While we do not condone this violation of the court rule and regard it as serious, it is but one of the factors to be taken into consideration in determining whether Mr. Bradford's confession was voluntary for purposes of the Fifth Amendment.

Bradford, 95 Wn. App. at 949. In holding the rape confession to be voluntary (despite not being able to attend the preliminary hearing on the lewd conduct case), the Court found it significant that the defendant voluntarily confessed after being informed of and waiving his *Miranda* rights, the defendant voluntarily elected to continue talking to detectives after being asked if he wanted interrogation to end, the defendant was allowed to speak with his wife, and there was no indication he confessed due to inducement by threat or promise. *Id.* at 949. In other words, the “violation of CrRLJ 3.2.1(d)(1) did not render the confession involuntary and therefore inadmissible.” *Id.* at 950.

Whereas here, the violation of the 48-hour probable cause hearing requirement (CrR 3.2.1(a)), and the failure to obtain an arrest warrant pursuant to CrR 2.2(a)(2), did result in evidence being obtained involuntarily from Mr. Moore when he was rearrested on October 7, 2015. Unlike in *Bradford, supra*, where the defendant voluntarily offered a confession to the second offense (the rape), the methamphetamine obtained for Mr. Moore's second drug possession charge was obtained involuntarily through Mr. Moore's search incident to arrest.

Mr. Moore is not arguing that probable cause to make an arrest disappears after a few months, or that officers needed to obtain an arrest warrant simply because they had time to do so. *See United States v. Watson*, 423 U.S. 411, 423, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (warrantless public arrest on probable cause was lawful, and it was immaterial that officers had time to first obtain arrest warrant). But, where a defendant is actually arrested based on that probable cause, CrR 3.2.1 then requires a probable cause hearing to be held within 48 hours.

Mr. Moore's case is unique in that he was actually arrested and then rearrested for the exact same crime, based on the same probable cause that existed on June 4th, without any additional investigation that might have changed the initial probable cause determination by a neutral and detached magistrate. After the defendant's first arrest, the State was

required to seek a probable cause determination by a neutral and detached magistrate, rather than releasing the defendant and leaving his rearrest up to the prerogative of the officer based on Mr. Moore's failure to contact the officer about working as a confidential informant. *See State v. Edwards*, 94 Wn.2d 208, 616 P.2d 620 (1980) (in discussing a former court rule that required the time for trial to start at the time of arrest, the Court noted, "the prosecutor is often bound by police decisions with regard to arrest, search, and seizure. The State's case against the defendant must always proceed in light of a police officer's initial decision to arrest an individual because he has probable cause to believe the defendant has committed a crime.")

If the defendant is arrested and then released without charges before a preliminary hearing is held, seeking an arrest warrant pursuant to CrR 2.2 would satisfy the requirement in CrR 3.2.1 to have a neutral and detached magistrate determine probable cause. CrR 2.2(c) ("The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant.") *See also State v. Hatchie*, 133 Wn. App. 100, 108, 135 P.3d 519 (2006), *aff'd*, 161 Wn.2d 390 (2007) ("an arrest warrant...will suffice to interpose the

magistrate's determination of probable cause between the zealous officer and the citizen.") *Accord State v. Simmons*, 35 Wn. App. 421, 423-24, 667 P.2d 133 (1983) ("An arrest warrant protects the individual from unreasonable seizures by allowing a neutral judicial officer to assess whether the police have probable cause to arrest... Once a warrant has been properly issued, the primary purpose has been served.")

In the absence of a probable cause hearing after arrest, or obtaining an arrest warrant, citizens could be subjected to unreasonable seizures by zealous officers over and over again for the exact same offense, based on the exact same evidence, without ever experiencing the protection of a neutral and detached magistrate. Like occurred in this case, persons could be arrested based on an officer's determination of probable cause, released without any formal hearing, rearrested for the same crime, and even subjected to this same cycle of arrest-release-rearrest an infinite number of times. An officer could use the initial existence of probable cause as a license to repeatedly stop and search a citizen, without ever being subjected to the checks and balances provided by our courts. A probable cause determination pursuant to CrR 3.2.1 is our State's way of safeguarding citizens' constitutional rights against such unreasonable seizures and ongoing detentions by officers, and for interjecting the review of a neutral judge into the probable cause determination after an arrest has

been made. See *City of Riverside v. McLaughlin*, 500 U.S. 44, 53, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (“the Fourth Amendment requires every State to provide prompt determinations of probable cause”).

Although no Washington authority appears to directly address Mr. Moore’s exact same type of arrest-release-rearrest situation, this similar cycle has been warned against in other jurisdictions. In *State v. Watkins*, a defendant was arrested and then released when his preliminary hearing did not occur within the required 72 hours. *State v. Watkins*, 399 So.2d 153, 154 (La. 1981). The defendant was then immediately rearrested on the same probable cause for the offense that had led to his initial arrest. *Id.* The court found it significant that, like here, the rearrest was made without a warrant and without a court’s determination of probable cause. *Id.* at 156. The court ordered Watkins released from custody and explained, “[Mr. Watkins’ arrest was not] made under exigent circumstances where it was impossible to obtain a prior warrant. Indeed, there is no showing of any reason why the police could not have obtained a warrant prior to rearresting Watkins... the rearrest of Watkins was simply a ‘revolving door’ procedure not contemplated by [the law].” *Id.* at 156.

Similarly, in *United States v. Holmes*, the defendant was arrested, released on bail, and then rearrested based on the same probable cause that existed for the first arrest without any new arrest warrant issuing. *United*

States v. Holmes, 452 F.2d 249, 260 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016, 407 U.S. 909 (1972). During the rearrest, officers seized \$6,029 in cash from the defendant's person pursuant to a search incident to that rearrest. *Id.* The 7th Circuit held that this evidence obtained during the rearrest should have been suppressed. *Id.* at 261-62. The court explained as follows:

Not only must there be reason to believe that a prospective arrestee is guilty of a crime; in addition, there must be some purpose to be served by making an arrest. During the entire period between March and October 18, 1967, probable cause to believe that Oliver had committed an offense continued to exist because he was under indictment. But since he had been admitted to bail, no purpose could have been served by continually rearresting him... the continuing knowledge of his possible guilt of the offense charged in the indictment is not itself sufficient [to rearrest]; otherwise, harassment by continual rearrests could be justified by the continuing existence of 'probable cause.' The Fourth Amendment requires both a reasonable foundation for a charge of crime and also the avoidance of 'rash and unreasonable interferences with privacy.'

... Since there was no valid justification for Oliver's [re]arrest, we conclude that the search of his person on October 18, 1967, was prohibited by the Fourth Amendment, and the seized cash was inadmissible.

Holmes, 452 F.2d at 260-61 (internal cites omitted) (emphasis added).

Mr. Moore's rearrest in October 2015 violated the U.S.

Constitution Fourth Amendment's protections against unreasonable seizures, Washington's constitutional prohibition on warrantless seizures without authority of law, Washington's CrR 3.2.1 (requiring a probable

cause hearing within 48 hours) and/or Washington's CrR 2.2 (probable cause required for issuance of an arrest warrant). The remedy in this case is to suppress the evidence obtained at Mr. Moore's unlawful rearrest, i.e., the methamphetamine found during the search and any related statements or exhibits obtained at that rearrest. *United States v. Perez-Castro*, 606 F.2d 251, 253 (9th Cir. 1979) ("Evidence obtained as a result of an illegal arrest, which is not sufficiently attenuated from the arrest to purge it of the taint of the illegal act, must be suppressed.") Because no evidence remains to support count II in this case once the tainted evidence is suppressed, count II must be reversed and dismissed with prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 131, 137, 101 P.3d 80 (2004) (reversing and noting, like in Mr. Moore's case, the illegally seized methamphetamine was "the most important evidence the State offered...")

Finally, Mr. Moore contends the foregoing argument was preserved by his attorney's challenge that the stop on October 7th had "no basis in law for the theory that once an officer releases someone on potential charge the officer then has carte blanche to arrest the individual four months later on the charge he was previously released upon." CP 34; RP 50-51, 53-54. But, in the event this Court disagrees, Mr. Moore argues his unlawful arrest on October 7th is an issue of constitutional magnitude that can be raised for the first time on appeal pursuant to RAP 2.5(a)(3), or

his attorney was ineffective for failing to more specifically argue that a 48-hour probable cause determination was required, or an arrest warrant had to be issued, prior to Mr. Moore's rearrest.

Pursuant to RAP 2.5(a)(3), an Appellant may raise manifest errors affecting a constitutional right for the first time on appeal. "A constitutional error is manifest where there is prejudice, meaning a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial." *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)).

A criminal defendant has the constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is ineffective where (1) the representation was deficient, i.e., fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) counsel's deficient representation prejudiced the defendant, i.e., there is reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Counsel has a duty to know relevant law. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “Counsel’s performance is deficient if he or she fails to bring a viable motion to suppress when there is ‘no reasonable basis or strategic reason’ for failing to do so.” *State v. Barron*, 139 Wn. App. 266, 276, 160 P.3d 1077 (2007) (internal quotations omitted). Counsel’s performance is deficient where he fails to present an argument that would have resulted in evidence being suppressed, and a defendant is prejudiced where the particular motion would have resulted in the suppression of the primary evidence offered against the defendant, such as the methamphetamine itself. *Reichenbach*, 153 Wn.2d at 130-31.

Here, Mr. Moore’s rearrest on October 7th violated the United States Constitution Fourth Amendment prohibition against unreasonable seizures. There was also no law providing officers authority to rearrest Mr. Moore without a probable cause determination or arrest warrant issued by a neutral and detached magistrate. Wash. Const. Art. I, §7 (unlawful to seize person “without authority of law.”). Had counsel cited the constitutional authorities, as well as the probable cause hearing and warrant requirements of CrR 3.2.1 and 2.2 to the trial court, there is at least a reasonable probability that the court would have suppressed all of the evidence obtained following the unlawful arrest on October 7th. Mr.

Moore was prejudiced by counsel's failure to bring a viable motion to suppress in this case, which should result in his conviction on count II being reversed and dismissed with prejudice.

Issue 2: Whether Mr. Moore's constitutional right to a fair trial by an impartial fact-finder was violated by the trial court's comment on the evidence during trial testimony "Keep track of that [referring to a baggie of alleged methamphetamine]. I don't want my courtroom becoming a superfund cleanup site." RP 124.

The court impermissibly commented on the evidence during trial testimony when it referred to a baggie of alleged methamphetamine and said, "Keep track of that. I don't want my courtroom becoming a superfund cleanup site." RP 124.

A judge is forbidden from commenting on the evidence presented at trial. Wash. Const. art. IV, §16; *State v. Tili*, 139 Wn.2d 107, 127, 985 P.2d 365 (1999). "The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case." *Id.* (citing Wash. Const. art. 4, §16, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.") "Since a comment on the evidence violates a constitutional prohibition, [a] failure to object or move for a mistrial does not foreclose [him or] her from raising the issue on appeal." *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968). The purpose of the constitutional prohibition from commenting on the evidence is to prevent the jury from

being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). As has often been explained:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

“A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement.” *Lane*, 125 Wn.2d at 838. “A judge need not expressly convey his or her personal feelings on an element of the offense; it is sufficient if they are merely implied.” *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). A court comments on the evidence “if it resolves a disputed issue of fact that should have been left to the jury.” *State v. Becker*, 132 Wn.2d 54, 64–65, 935 P.2d 1321 (1997). The expressed assumption by the court that any material fact is true or untrue is a prohibited comment on the evidence. *State v. McDonald*, 70 Wn.2d 328, 330, 422 P.2d 838 (1967).

There is a “rigorous standard when reviewing alleged violations of Const. art. 4, §16.” *Lane*, 125 Wn.2d at 838. “Once it has been

demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial." *Id.* (internal citations omitted); *State v. Levy*, 156 Wn.2d 709, 723-24, 132 P.3d 1076 (2006) ("The presumption of prejudice test has consistently been applied to oral comments made by a judge during the course of trial.") The burden then rests on the State to show affirmatively from the untainted record that no prejudice could have resulted from the comment. *Id.* at 838-39.

Here, Detective Coe was in the process of testifying about a baggie that he said contained methamphetamine found on the defendant. RP 114, 149. Defense counsel cross examined the detective about the contents of the baggie and its delayed transfer between offices, eventual storage into evidence after first being put in a locker at a separate location, and the multiple persons who came into contact with the baggie before it was eventually processed at the crime laboratory. RP 115-19. Defense counsel's questions were designed to give the jury reason to doubt the contents of the baggie tested by the crime lab. *See id.* The prosecutor, in response to defense counsel's cross examination, questioned the detective about the standards used to make sure the baggie of alleged methamphetamine was not tampered with. *See* RP 122-24. In other words, the contents of the baggie were in factual dispute.

During this testimony regarding the baggie of supposed methamphetamine, the court interjected the following comment, in reference to the baggie: “Keep track of that. I don’t want my courtroom becoming a superfund cleanup site.” RP 124.

Mr. Moore was charged with two counts of possession of a controlled substance (methamphetamine). CP 8-9; RCW 69.50.4013(1). To prove unlawful possession of a controlled substance, the State was required to prove “the nature of the substance and the fact of possession.” *State v. Hathaway*, 161 Wn. App. 634, 645, 251 P.3d 253, 260 (2011). The court’s comment about keeping track of the baggie so his courtroom would not become a superfund cleanup site went directly to a critical fact in issue: whether the substance in the baggie was actually methamphetamine. The court’s statement implied, if not directly stated, that the substance in the baggie was indeed methamphetamine, a dangerous substance needing to be carefully contained, where the nature of the substance was precisely what the State needed to prove.

Mr. Moore’s constitutional right to have a jury determine the facts in his case was violated by the court’s impermissible comment on the evidence. Wash. Const. art. 4, §16. The court’s comment had the significant ability to unduly influence the jury on the sufficiency of the evidence as to the nature of the substance in the baggie. *Jacobsen*, 78

Wn.2d at 495. The court expressed to the jury its assumption that the nature of the substance in the baggie was in fact methamphetamine, a critical issue before the jury. *McDonald*, 70 Wn.2d at 330.

The court's unconstitutional comment on the evidence during testimony was presumptively prejudicial so as to require a new trial in this case. *Lane*, 125 Wn.2d at 838. The untainted record does not affirmatively establish the nature of the substance in the baggie without question. *See id.* at 838-39. Defense counsel spent significant time during cross examination questioning the officer about the possible mishandling or tampering with the baggie, suggesting the jury had reason to doubt the contents of the baggie. RP 115-19. This cross examination prompted the State to interject a line of questioning to the contrary, which only demonstrates that the issue as to the baggie's contents remained in dispute in this case. RP 122-24. While defense counsel remarked in closing that the baggies contained methamphetamine when apparently tested by the crime lab (RP 174, 182), defense counsel's remarks, statements and arguments were not actually evidence,⁴ so they are irrelevant to the determination of whether the untainted evidence in this case necessarily would have established the nature of the substance as methamphetamine. Regardless, defense counsel then maintained in closing argument that that

⁴ 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.02 (3rd Ed. 2008); *State v. Prado*, 144 Wn. App. 227, 252, 181 P.3d 901 (2008).

the baggie could have been tampered with (RP 175), continuing the challenge to the State's proof that the baggie did in fact contain the unlawful substance charged in this case.

Ultimately, this matter should be remanded for a new trial when considering the seriousness of the court's improper comment, the presumptively prejudicial nature of the comment, and the rigorous standard applied by this Court when reviewing violations of Wash. Const. art. 4 §16. Mr. Moore never challenged whether a baggie was taken from his person during each of his arrests. Rather, his only defense was to the nature of the substance, arguing there was reason to doubt that he had possessed methamphetamine. Mr. Moore had the constitutional right to a trial by a jury that was not improperly influenced by the trial court's comment on the only disputed factual issue. By stating that the baggie contained a substance that could turn the courtroom into a "superfund cleanup site," the trial court impermissibly interfered with the constitutional fact-finding process. A new trial is warranted.

Issue 3: Whether defense counsel was ineffective for failing to object to an abundance of irrelevant, unduly prejudicial and/or inadmissible prior bad act evidence.

Mr. Moore was denied his right to effective assistance of counsel when his attorney failed to object to irrelevant, unduly prejudicial and inadmissible prior bad act evidence to prove his two drug possession

charges, including testimony Mr. Moore was seen earlier at a narcotics house that had wreaked havoc on the community, he was known to officers for apparently illicit conduct, he was transient, he was suspected of being a drug distributor, he failed to keep a promise to contact and cooperate with an officer to avoid these charges, and he “had a warrant or something too” at the time of his arrest.

Again, to establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

McFarland, 127 Wn.2d at 334-35.

Prejudice can be established by showing “‘counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

To prove the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that

the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[.]” and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). “[S]trategy must be based on reasoned decision-making[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

“Relevant evidence” is that “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401; *State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011 (2012). Irrelevant evidence is inadmissible. ER 402. In addition, relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Mee*, 168 Wn. App. at 157; ER 403. “The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.” *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013).

As to evidence of a criminal defendant's prior bad acts, such evidence is not necessarily objectionable because it has no probative value, but because it presents a danger that the defendant will be found guilty based on the jury's overreliance on past acts as evidence of the defendant's character. *State v. Slocum*, 183 Wn. App. 438, 442, 333 P.3d 541 (2014). Thus, pursuant to ER 404, character evidence should generally be excluded unless it is relevant for a permissible purpose. ER 404 states:

(a)... Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;...

(b)... Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404.

“Before a trial court admits evidence under ER 404(b), it must ‘(1) find by a preponderance of the evidence this misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence.’”

State v. Fuller, 169 Wn. App. 797, 828-29, 282 P.3d126 (2012), *review denied*, 176 Wn.2d 1006 (2013) (quoting *State. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009)). A defendant's past bad acts are presumptively inadmissible and any doubts on whether to admit the evidence are resolved in the defendant's favor. *Fuller*, 169 Wn. App. at 828-29 (internal citation omitted).

Here, defense counsel's failure to object to the admission of irrelevant, unduly prejudicial, prior bad act evidence fell below professional norms. Mr. Moore was on trial only for possession of methamphetamine, which required the State to prove "the nature of the substance and the fact of possession." *Hathaway*, 161 Wn. App. at 645; RCW 69.50.4013(1). And yet, the State admitted a plethora of evidence that went beyond proving the elements of the crime, merely painting Mr. Moore in the most negative light possible before the jury, which undermines confidence in the jury's outcome.

For instance, Detective Coe testified that law enforcement was in the process of watching a known narcotics house (the Kemper residence), which had a lot of drug activity, when he saw the defendant's vehicle at this location. RP 85. While this fact may have helped explain Mr. Moore's ultimate possession of narcotics when later stopped, the detective's ongoing explanation of drug activity at this particular known

narcotics house was irrelevant to prove any fact in issue. Specifically, the detective testified that persons coming and going from the known narcotics house (not necessarily Mr. Moore, though impliedly so) had created problems for the community, including that people were throwing needles in nearby yards where children played, there had been confrontations by persons coming and going to the Kemper residence, and there had been thefts in the area related to the known narcotic house. RP 84. The detective later emphasized the danger to the community, stating that this narcotics house was directly next to a daycare. RP 126.

Mr. Moore was not on trial for intent to deliver any controlled substance, let alone for involvement in a drug trafficking operation at the Kemper residence. The extensive testimony provided by Detective Coe regarding problems the community had experienced from the Kemper residence was irrelevant and would have only served to stir passions and prejudices against the defendant. No tactical advantage was to be gained from admission of this evidence; no known tactical decision can explain defense counsel's failure to object to the admission of this evidence.

Additionally, counsel's performance fell below professional norms when he failed to object to and move to strike prior bad act evidence, which, again, was designed to prejudice the jury against the defendant based on irrelevant, character attacks. Detective Coe testified Mr. Moore

was known to officers, particularly since Mr. Moore was involved in a “scenario” that had occurred at a motel in Clarkston with his son. RP 95. Detective Coe said he “believe[d] [Mr. Moore] had a warrant or something, too [prior to being stopped by officers on June 4th.]” RP 94. When defense counsel later asked Detective Coe on cross examination whether there was anything about Mr. Moore’s behavior on June 4, 2015, that gave officers reason to be suspicious of Mr. Moore, the detective offered the following non-responsive answer: “No...Other than – I’ve known him from the past, and I know what he’s been involved in... he had been a participant in-- [a] prior case.” RP 108. Defense counsel did not move to strike this response. *See id.*

The evidence of Mr. Moore’s prior bad acts known to officers was not relevant to prove any particular character trait related to possession of a controlled substance on either June 4th or October 7th. The evidence of Mr. Moore’s prior contacts with officers, an unrelated arrest warrant, involvement in a prior case or illicit conduct at a hotel in Clarkston all constituted inadmissible attacks on the defendant’s character. Had defense counsel objected to this evidence, it would have been presumptively inadmissible and excluded pursuant to ER 404.

In addition, counsel should have objected to officer testimony that suggested Mr. Moore was actually a drug dealer. Mr. Moore was on trial

for possession of methamphetamine, which required minimal testimony in this case. Yet, Detective Coe's testimony suggested other bad acts of Mr. Moore of actually intending to sell methamphetamine. Detective Coe testified Mr. Moore was found with several smaller baggies, which suggested he was a drug dealer rather than mere possessor:

[T]he only time that people do that [--have smaller premeasured baggies--] is when they're going to be selling those bags. They'll pre-measure up, they'll set them -- you know, -- smaller baggies, so that if you want -- 20 or 40 or 60 they'll have them premeasured out so they don't have to do it -- like in a parking lot of [sic] something. They just pull out the bag that you want, it's already ready to go, just like at a grocery store.

RP 92.

This testimony went far beyond attempting to prove possession of methamphetamine. It instead suggested Mr. Moore's involvement in a greater offense so that the jury's view of the defendant was tainted. Mr. Moore was not charged with possession of methamphetamine with intent to deliver. The detective's testimony about whether Mr. Moore might have intended to deliver the methamphetamine was, therefore, entirely irrelevant and unduly prejudicial.

Next, Detective Coe testified about Mr. Moore failing to make contact with officers in order to keep a promise and complete an agreement to work as a confidential informant and avoid charges, which only served to further flog Mr. Moore's character. Specifically, Detective

Coe testified the defendant was offered to work with officers in lieu of charges being pursued against him, but Mr. Moore failed to make contact with officers after supposedly promising to do so. RP 92, 95, 99.

Whether or not Mr. Moore kept a promise with Detective Coe has absolutely no bearing on whether Mr. Moore possessed methamphetamine on either June 4th or October 7th. Relatedly, there was no relevant purpose for informing the jury that Mr. Moore was transient when explaining why contact was not made between June 4th and October 7th. RP 95, 120-21.

Detective Coe's testimony about his supposed deal with Mr. Moore and the defendant's failure to keep promises painted the defendant in an unfairly prejudicial "criminal light" for the jury, suggesting Mr. Moore was just the type of person who should be convicted of a drug crime. After all, Detective Coe explained as a part of this irrelevant diatribe that officers use "people like Mr. Moore to go into those places that they're buying narcotics from and buying under our control." RP 93 (emphasis added). The jury was all but guaranteed to convict a "person like Mr. Moore" after the detective's inadmissible testimony. There can be no strategic reason for defense counsel failing to object to these character attacks.

Mr. Moore was prejudiced by the admission of the abundance of irrelevant, unduly prejudicial, character-attacking evidence detailed above.

Due to the extent of inadmissible evidence that was presented against the defendant, it cannot be said that the defendant received a “fair trial” whose “result is reliable.” *Hicks*, 163 Wn.2d at 488. Had the jury not been so unfairly squared against the defendant throughout these proceedings, it would likely have questioned the evidence chain that was called into doubt by defense counsel during closing argument. *See* RP 175. Ultimately, Mr. Moore’s right to a fair trial was prejudiced by defense counsel’s failure to object to inadmissible evidence throughout the underlying trial.

In the event this Court agrees it was error for the court to admit certain evidence and for defense counsel to fail to object thereto, but finds each evidentiary admission did not create sufficient prejudice on its own to warrant a new trial, Mr. Moore asks this Court to consider the cumulative effect of the evidentiary errors discussed above and order a new trial. Under the cumulative error doctrine, this Court may order a new trial when errors, even if individually not reversible, cumulatively produced a trial that was fundamentally unfair. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 290 (2000); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). At a minimum, that is what occurred in this case; the cumulative effect of the multiple errors deprived Mr. Moore of a fair trial.

Mr. Moore was described as a drug-dealing person who was known to officers for his prior illicit conduct from the past, and suggested

to be of unsound character given he would break a promise to contact Detective Coe. Detective Coe suggested Mr. Moore was involved with actually selling narcotics, and it was implied Mr. Moore was connected to greater drug activities at known narcotics houses (or was at least part of the same drug culture) that had led to needles being thrown in children's yards and conflicts and thefts occurring in the area. When this inadmissible evidence is taken into consideration, along with the court's comment on the evidence that essentially directed the jury to find the pertinent baggies contained methamphetamine (see Issue 2 above), Mr. Moore has established he was denied his constitutional right to a fair trial due to the cumulative errors at the trial below. Mr. Moore asks this Court to reverse his convictions and order a new trial.

Issue 4: Whether the court's finding that Mr. Moore had the ability to pay legal financial obligations, and its imposition of over \$4,000 in discretionary costs, should be set aside.

The trial court's boilerplate finding that Mr. Moore has the ability to pay LFOs is not supported by substantial evidence in the record, was not supported by the required inquiry by the court before costs could have been imposed, and is inconsistent with Mr. Moore's indigent status. The court's erroneous finding, along with the \$4,020.00 in discretionary court costs, should be set aside. CP 139.

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). “Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original).

The applicable statute states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant’s current or future ability to pay based on the particular facts of the defendant’s case. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The record must reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837–39. This inquiry requires the court to consider important factors, such as incarceration and a defendant’s other debts, including any restitution. *Id.* at 838-39.

“[T]he court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)) (emphasis added). “[T]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants’ inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants’ lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). Where a finding of fact is entered, however, it "is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Id.* (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, the prosecutor informed the trial court that the defendant was physically capable of working because he was seen driving a vehicle to move Ms. Grove's belongings when he was arrested on June 4th. RP 203. But, there was no inquiry by the court into Mr. Moore's ability to pay LFOs. The court did not inquire into the defendant's other debts, which are substantial, his employment history or prospects upon release, or any current assets. RP 203-04. Even if Mr. Moore was physically capable, this superficial information was no substitute for the required inquiry the court should have made before finding Mr. Moore had the ability to pay

LFOs. Indeed, the trial court was required to consider other important factors besides Mr. Moore's physical capability, such as the incarceration Mr. Moore faced, his debts, his financial resources, and the nature of the burden that LFOs would impose on Mr. Moore when he attempts to successfully reenter society. *Blazina*, 182 Wn.2d at 838-39; RCW 10.01.160(3). Given the defendant's indigent status, the trial court should have "seriously question[ed]" Mr. Moore's ability to pay LFOs. *Id.* The lack of inquiry at sentencing in this case did not satisfy the examination by the court that was supposed to precede a finding on Mr. Moore's ability to pay LFOs.

The court's finding of Mr. Moore's ability to pay LFOs (CP 139) is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343. Because Mr. Moore is indigent, the court should have "seriously question[ed Mr. Moore's] ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. The court entered a finding on Mr. Moore's ability to pay that was not supported by a sufficient, individualized review of the defendant's circumstances and was not supported by substantial evidence in the record. The finding on Mr. Moore's ability to pay LFOs should be set aside, and the discretionary court costs should be stricken from Mr. Moore's judgment and sentence.

Issue 5: Whether, in the event Mr. Moore does not prevail in this appeal, this Court should nonetheless deny the imposition of costs on appeal against this indigent appellant.

Mr. Moore preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Mr. Moore was found indigent by the trial court and was represented by appointed counsel for purposes of the trial court and appellate proceedings. CP 11-12, 164. Mr. Moore automatically qualified for his case below to proceed at public expense given his receipt of food stamps and Medicaid. CP 11-12.

According to his Report as to Continued Indigency, filed contemporaneously on the same day this opening brief was filed, Mr. Moore does not have any real property, he owns a vehicle valued at \$750, he has no income from any sources, he owes an estimated \$17,000 in LFOs and other debts, and he is 54-years-old. Appendix A.

Mr. Moore remains indigent and unable to pay costs that may be imposed on appeal. The imposition of costs under these circumstances would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*, 182 Wn.2d at 835-37.

In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on

appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence. This is particularly true where, as here, Mr. Moore's continued indigency demonstrates a continued inability to pay costs and presents a significant barrier to successfully reentering society. CP 46-47.

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed, because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for *Blazina*'s recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for

appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The *Blazina* Court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds

the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the "supreme court . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, acknowledged appellate courts have discretion to deny the State's requests for costs. *Blank*, 131 Wn.2d at 252-53.

The record demonstrates Mr. Moore does not have the ability to pay costs on appeal. He was found indigent by the trial court and remains indigent. Mr. Moore respectfully requests this Court exercise its discretion by denying an award of appellate costs in this case, in the event the State substantially prevails on appeal.

F. **CONCLUSION**

Based on the foregoing, Mr. Moore asks this Court to reverse and dismiss his conviction on count II due to his unlawful arrest on October 7th. At a minimum, both counts should be reversed and remanded for a

new trial, due to the trial court's impermissible comment on the evidence and the plethora of evidentiary errors that should have been challenged by defense counsel.

If this Court does not reverse the defendant's convictions, Mr. Moore nonetheless asks this Court to remand for resentencing so the discretionary LFOs may be stricken from the defendant's judgment and sentence, since they are unsupported by a sufficient record on Mr. Moore's ability to pay. Finally, in the event Mr. Moore does not prevail in this appeal, he asks this Court to deny any award of appellate costs to the State, given his ongoing indigent status and the great hardship that appellate costs would have on Mr. Moore's successful reentry to society.

Respectfully submitted this 14th day of November, 2016.

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918
Attorney for Appellant

Appendix A
REPORT AS TO CONTINUED INDIGENCY

Appendix B

Saunders v. King Cty., 546 F. App'x 650, 650-51 (9th Cir. 2013)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34327-8-III
vs.) Asotin County No. 15-1-00170-3
)
CARL R. MOORE, JR.) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 14, 2016, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Carl R. Moore, Jr.
1302 13th Street Apt. #8
Clarkston, WA 99403

Having obtained prior permission, I also served the Respondent by email at
bnichols@co.asotin.wa.us and lwebber@co.asotin.wa.us.

Dated this 14th day of November, 2016.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, Carl R Moore Jr certify as follows:

1. That I own:

- a. No real property
- b. Real property valued at \$_____.
- c. Real property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

2. That I own:

- a. No personal property other than my personal effects
- b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at \$ 750.00.
- c. Personal property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

3. That I have the following income:

- a. No income from any source.
- b. Income from employment: \$_____ per month.
- b. Income of \$_____ per month from the following public benefits:

- Basic Food (SNAP) SSI Medicaid Pregnant Women Assistance Benefits
- Poverty-Related Veterans' Benefits Temporary Assistance for Needy Families
- Refugee Settlement Benefits Aged, Blind or Disabled Assistance Program
- Other: _____

4. That I have:

a. The following debts outstanding:

Approximate amount owed:

Credit cards, personal loans, or other installment debt:	\$ <u>2,000.00</u>
Legal financial obligations (LFOs):	\$ <u>15,000.00</u>
Medical care debt:	\$ _____
Child support arrears:	\$ _____
Other debt:	\$ _____

Just a Guess

Approximate total monthly debt payments:

\$ 200⁰⁰

() b. No debts.

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State:

\$?

7. That I am 54 years of age at the time of this declaration.

8. That the highest level of education I have completed is: 12th grade.

9. That I have held the following jobs over the past 3 years:

Employer/job title	Hours per week	Pay per week	Months at job

10. That I have received the following job training over the past three years: _____

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: _____

12. That I am financially responsible for the following dependents (children, spouse, parent, etc.): _____

I, Carl R Moore JR certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

July 8, 2016

Date and Place

ACT Jail

Carl R Moore JR

Signature of (Defendant) (Respondent) (Petitioner)

Thank you

546 Fed.Appx. 650

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3) United States Court of Appeals, Ninth Circuit.

Daniel Macio SAUNDERS, Plaintiff–Appellant,

v.

KING COUNTY, Defendant–Appellee.

No. 12–35834.

Argued and Submitted Nov. 5, 2013.

Filed Nov. 21, 2013.

Synopsis

Background: Arrestee filed action against county alleging various torts and civil rights violations. The United States District Court for the Western District of Washington, Ricardo S. Martinez, J., 2011 WL 1045686, entered summary judgment in county's favor, and arrestee appealed.

Holdings: The Court of Appeals held that:

[1] arrestee lacked due process right to be present when criminal information was filed and arrest warrant issued, and

[2] county's failure to file charges within 72 hours of arrest did not exonerate arrestee from his prior criminal conduct.

Affirmed.

Attorneys and Law Firms

*650 Andrew Luke Magee, Esquire, Andrew L. Magee, LLC, Seattle, WA, for Plaintiff–Appellant.

Kimberly Y. Frederick, Deputy Prosecuting, Seattle, WA, for Defendant–Appellee.

Appeal from the United States District Court for the Western District of Washington, Ricardo S. Martinez, District Judge, Presiding. D.C. No. 2:10–cv–01456–RSM.

Before: KOZINSKI, Chief Judge, PAEZ and BERZON, Circuit Judges.

MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

[1] 1. Saunders didn't have a free-standing federal due process right to be present when a criminal information was filed and an arrest warrant issued. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 119–22, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Despite this well-settled law, Saunders appears to argue that the Washington Superior Court Criminal Rules (“CrRs”) give him a federally enforceable right to be present for these events. Even if the Rules create enforceable liberty interests beyond what is required by federal due process, *see, e.g., Ky. Dep't. of Corr. v. Thompson*, 490 U.S. 454, 460–63, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989), Saunders's claim fails because Washington's procedures for filing a criminal information and issuing an arrest warrant were followed in his case. These events were governed by Rules 2.1 and 2.2, which make no provision for a defendant's presence at this stage of a criminal proceeding. Nothing in the plain language of these rules suggests that they don't apply to individuals like Saunders who are in custody when charges are filed against them.

Nor did Rule 3.2.1 give Saunders the right to be present when his information was filed and arrest warrant issued. Under that rule, Saunders had the right to a preliminary hearing for a probable cause determination, and to be released if no charges were filed within 72 hours. CrR 3.2.1(a)-(b), (f). That's exactly what he got.

[2] 2. Furthermore, Rule 3.2.1 didn't bar the County from filing charges against Saunders more than 72 hours after his arrest. Rule 3.2.1 provides that if no charges are filed within that time frame, “the accused shall be

immediately released from jail or deemed exonerated from all conditions of release.” CrR 3.2.1(f)(2)(ii). Contrary to Saunders's claim, this language did not forever exonerate him from his prior criminal conduct; it simply required the County to release him and obtain a valid warrant for his arrest. Since this is what the County did, Saunders's due process claim fails.

AFFIRMED.

All Citations

546 Fed.Appx. 650

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