

FILED

DEC 21, 2016
Court of Appeals
Division III
State of Washington

No. 34327-8-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

CARL R. MOORE Jr., Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUES

1. SHOULD THE DECISION OF THE TRIAL COURT BE AFFIRMED WHERE THE ISSUE RAISED HEREIN WAS NOT RAISED BELOW AND DOESN'T OTHERWISE SUPPORT SUPPRESSION?
2. DOES THE TRIAL COURT'S ALLEGED IMPROPER COMMENT ON THE EVIDENCE REQUIRE A NEW TRIAL WHERE NO PREJUDICE OCCURRED?
3. WAS TRIAL COUNSEL INEFFECTIVE WHERE THE DECISION NOT TO OBJECT WAS REASONABLE TRIAL STRATEGY AND THE APPELLANT FAILED TO DEMONSTRATE SUFFICIENT PREJUDICE?
4. WAS THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS PROPER AND IS REVIEW PROPER WHERE ANY ERROR WAS NOT PRESERVED?
5. SHOULD THE POSSIBILITY OF IMPOSITION OF APPELLATE COSTS BE PREEMPTORILY FORECLOSED?
6. DO THE ISSUES RAISED IN THE APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS MERIT RELIEF?

II. SUMMARY OF ARGUMENT

1. THE ORDER OF THE TRIAL COURT DENYING THE APPELLANT'S SUPPRESSION MOTION SHOULD BE AFFIRMED.
2. THE TRIAL COURT'S ALLEGED IMPROPER COMMENT ON THE EVIDENCE DOES NOT REQUIRE A NEW TRIAL.
3. TRIAL COUNSEL WAS NOT INEFFECTIVE AS FAILING TO OBJECT WAS REASONABLE TRIAL STRATEGY AND THE APPELLANT FAILS TO DEMONSTRATE SUFFICIENT PREJUDICE.
4. THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS PROPER AND ANY ERROR WAS NOT PRESERVED.
5. THE POSSIBILITY OF IMPOSITION OF APPELLATE COSTS SHOULD NOT BE FORECLOSED.
6. ISSUES RAISED IN THE APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS DO NOT MERIT RELIEF.

III. STATEMENT OF THE CASE

On June 4, 2015, detectives with the Quad Cities Drug Task Force¹ were attempting to locate Shannon Grove. Report of Proceedings (RP) 7-8. Ms Grove had previously admitted to various crimes in contacts with law enforcement. RP 8. Officers had probable cause based upon collateral investigations to arrest her for various drug crimes. RP 8. Ms Grove had previously told police about drug activities occurring at a residence in the Clarkston Heights. RP 10. This was the residence of Gary Kemper, an individual known to law enforcement to be involved in the trafficking and sales of controlled substances and in particular methamphetamine. RP10-11. This information had been corroborated by independent police investigation. RP 10. She stated that Mr. Kemper was being supplied with methamphetamine by a pair of Hispanic males that would bring the controlled substances to the residence. RP 11, 38. She had told police after the Hispanic males dropped off methamphetamine, she would pick up drugs at that residence RP 10-11.

Based upon previous statements made by Ms Grove, officers decided to watch this residence to see if Ms Grove might be able to be located at that location. RP 10-11. Officers observed Ms Grove at that

¹The Quad Cities Drug Task Force is a cooperative effort between the Asotin and Whitman County sheriffs' offices, several municipal police departments including Clarkston, Washington, and a few Idaho law enforcement agencies in Latah and Nez Perce counties in Idaho.

residence and two males initially believed to be Hispanic. RP 11. Based upon the previous statements of Ms Grove, officers believed that they were observing methamphetamine being delivered to the residence. RP 12. Ms Grove was subsequently observed leaving the residence in a red pickup truck. RP 12-13. Detectives had a marked patrol unit initiate a traffic stop a few blocks away. RP 12-13. Detectives Jon Coe, of the Clarkston Police Department and Bryson Aase, of the Whitman County Sheriff's Office, approached the vehicle. RP 13-15. Detective Coe contacted the driver, who was identified as the Appellant, Carl R. Moore Jr, while Detective Aase contacted Ms Grove.

Detective Coe recognized the Appellant and was familiar with him as being involved in methamphetamine. RP 15. Detective Coe advised the Appellant of his Miranda² rights, which he waived and spoke with the detective. RP 17. Detective Coe asked him if he had any weapons and the Appellant immediately responded that he did not. RP 18. The Appellant was then asked about narcotics, and the Appellant dropped his head, hesitated, and then said that he did not. RP 18. Observing the change in posture and his hesitation, Detective Coe asked him to empty his pockets, and the Appellant did so, placing the contents on the hood of the patrol car. RP 19. Detective Coe

²Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

observed baggies containing methamphetamine and a glass pipe among the items placed on the hood. RP 19. Detective Coe asked the Appellant where he got the methamphetamine from and the Appellant stated he received it from Ms Grove. RP 19. The Appellant clarified that he had just received it from Ms Grove while they were at the Kemper residence. RP 20. The Appellant also told the detective that he and Grove had been robbed at gunpoint while at the residence. RP 20. The Appellant was offered an opportunity to cooperate with law enforcement as a confidential informant and he agreed to do so. RP 22-23. The Appellant was placed under arrest for Possession of a Controlled Substance and he gave Detective Coe his phone number to contact him. RP 22. The Appellant was then taken to the Asotin County Jail. RP 23.

Officers then shifted focus onto the allegations concerning the armed robbery. RP 23. Shortly after the Appellant was transported, officers received information that the robbery suspect was leaving the Kemper residence. RP 23-24. Officers, including Det. Coe, attempted to stop the vehicle and the vehicle eluded with occupants therein firing shots at police who returned fire. RP 24. The vehicle was ultimately rammed off the roadway. RP 25. As a result of this incident, all involved officers were sequestered at the fire station while the incident was investigated. RP 25.

As a result, Detective Coe was unable to complete the necessary probable cause affidavit. RP 25-26. After speaking to the deputy prosecutor, and in light of the Appellant's offer to cooperate, it was determined to simply release the Appellant without charges and allow him to cooperate. RP 26-27. After release, the Appellant failed to contact Detective Coe and Coe was unable to contact the Appellant at the phone number he had provided. RP 27. Detective Coe was unable to contact the Appellant until October 7, 2015. RP 27-28.

On October 7, 2015, detectives were watching another residence in Clarkston, Washington, known to be involved in narcotics. RP 27-29. Officers observed individuals known to be involved in drugs coming and going. RP 28. At one point, the Appellant was observed to arrive at the residence, stay a short time, and then leave. RP 29. Detective Coe recognized this to be consistent with narcotics activities. RP 29-30. The Appellant was accompanied by another person known to be involved in drugs. RP 30. After departing the drug house, Detective Coe had a marked unit conduct a stop of the Appellant's vehicle for the purposes of contacting and arresting the Appellant based upon the events of June 4, 2015, and reinitiating the charging process in light of his failure to cooperate as promised. RP 31. Detective Coe contacted the Appellant, placed him under arrest for the June felony possession charge and searched his person incident

thereto. RP 31. During this search, Detective Coe found a baggie containing methamphetamine in his pants pocket RP 31, 100-103.

The Appellant was charged with two counts of Possession of a Controlled Substance (Methamphetamine), one count relating to the June incident and one count for the October incident. Clerk's Papers (CP) 8-9. The Appellant filed a motion to suppress. CP 26. In support of his motion, the Appellant argued that the stop of his vehicle on June 4, 2015, was unlawful and therefore the methamphetamine discovered on that date should be suppressed. CP 27-34. With regard to the June 4 stop, his sole argument was that there was no cause to stop the Appellant's vehicle. CP 30. He then argued, by extension, that his arrest on October 7, 2015, since it was based upon the methamphetamine discovered on June 4, 2015, was therefore unlawful, resulting in suppression of the methamphetamine discovered during the search incident to his arrest on October 7. CP 27-34. Specifically as to the October 7 arrest and search, the Appellant argued:

Since Detective Coe cites the [June 4, 2015] stop as the sole basis for Mr. Moore's detention, the stop of Mr. Moore on October 7, constitutes fruit of the poisonous tree, as it is the un-attenuated by product of the initial stop on June 4.

CP 33. He framed the officer's cause to arrest as "he promised me he'd do something but then didn't" CP 33. The Appellant made only a passing reference to the ability of an officer to arrest someone on a

charge after releasing the person earlier and did so without citation to any legal authority. CP 34. At hearing, the Appellant did not advance any arguments concerning whether an officer may re-arrest for the same crime. RP 50-54. He simply reiterated his characterization that the Appellant was arrested for the felony committed on June 4, 2015, but rather, for failing to keep his word to contact the detective and cooperate. RP 54. Therein the Appellant's counsel argued:

He pulled Carl Moore over because Carl Moore did not contact him and cooperate as -- essentially as an informant for the officers.

RP 54. Counsel further clarified:

That was the basis for the stop, and that is not probable cause. There is no exception to the Fourth Amendment presumption warrant rule that says that you can have reasonable suspicion or probable cause to pull somebody over because they pinkie swore that they would call you and work with you and then never actually called you and worked with you.

RP 54.

A hearing on the Appellant's motion to suppress was held on December 15, 2015, and, after hearing testimony from Detective Coe, the court determined that the stop of the Appellant's vehicle on June 4, 2015 was justified by the existence of probable cause to arrest Ms Grove who was an occupant thereof. CP 69-74. In addition, the trial court specifically found that, based upon the observations of the officers that day of the activities at the residence, and in light of Ms Grove's previous statements to detectives, there was reasonable

suspicion to believe that both occupants of the vehicle were involved in narcotics activities, and therefore legal grounds to stop the vehicle.

CP 73. As to the October 7 stop, the court ruled that, since law enforcement had probable cause to believe that the Appellant had committed a felony offense on June 4, 2015, there was lawful grounds to stop and arrest him on October 7, 2015. CP 73.

The matter proceeded to jury trial on March 21, 2015. RP 79 - 196. The jury heard testimony from Detective Coe concerning the investigation and the stop of the Appellant's vehicle on June 4, 2015. RP 151. Detective Coe explained the reasons that police were in the Clarkston Heights on June 4, and explained the reasons for the stop of the Appellant's vehicle, including the search for Ms Grove and that they found her at a known drug house in the Clarkston Heights. RP 83-86. Detective Coe testified that the Appellant and Ms Grove were observed leaving in the Appellant's pickup and were stopped a few blocks from the house. RP 85-86. No objection was made to any of the questions or answers given. RP 83-86.

Detective Coe described his contact with the Appellant and how, when asked about drugs, the Appellant empties his pockets. RP 87-89. Detective Coe testified that the Appellant pulled out a baggie that contained three smaller baggies of what appeared to be methamphetamine. RP 89. Detective Coe testified that the Appellant told him that he had gotten the methamphetamine from Ms Grove. RP

89. Detective Coe identified the methamphetamine recovered from the Appellant on June 4, 2015, and it was admitted into evidence, without objection. RP 91.

Detective Coe testified that the Appellant was offered an opportunity to cooperate in exchange for consideration and the Appellant indicated that he would like to do so. RP 94. Detective Coe began to testify concerning his belief that the Appellant had information and the ability to assist law enforcement and trial counsel objected on the basis of lack of foundation. RP 92-93. Detective Coe then explained how users and smaller dealers can provide information or assistance that leads to the arrest of persons who are larger scale drug traffickers. RP 93. During this testimony, Detective Coe testified that law enforcement utilizes persons "like Mr. Moore" to engage in controlled buys from larger scale drug dealers, implying that Mr. Moore was a "small fish." RP 93. Detective Coe further testified that the baggies and their contents were sent to the Washington State Crime Laboratory and tested and determined to be methamphetamine. RP 97. The lab report (P-2) was admitted without objection. RP 97.

Detective Coe testified that the Appellant failed to contact him and so, on October 7, 2015, when he was observed leaving another residence, Detective Coe had a patrol officer stop the Appellant and he was arrested based upon the methamphetamine found on June 4, 2015. RP 98-99. Detective Coe testified that the Appellant was

searched incident to arrest and a baggie of methamphetamine was found in his pocket. RP 100. This baggie was also admitted into evidence (P-3) without objection. RP 100-101. Detective Coe testified that this baggie was also sent to the crime lab, tested, and the contents determined to be methamphetamine. RP 102-103. The lab report (P-4) was admitted without objection. RP 103.

On cross examination, defense counsel, inquired regarding geography, pointing out a mistake in the Detective's testimony concerning his incorrect identification of one of the streets in the area. RP 106. Detective Coe acknowledge his lack of familiarity with the streets in the Clarkston Heights as these are outside his normal jurisdiction when he worked patrol. RP 107. Counsel pointed out perceived inconsistencies. RP 106-120. Counsel highlighted for the jury Detective Coe's inability to recall whether he transported the methamphetamine recovered on October 7 to the evidence locker in Whitman County,³ or whether it was a different detective. RP 116-119. He further clarified confusion by the officer whether the Appellant had a warrant at the time he was contacted on June 4. RP 119-120.

On redirect, state's counsel had Detective Coe explain how his initials and the evidence sealing tapes utilized, gave him confidence that the items admitted into evidence (P-1 and P-3), were the baggies

³The Quad Cities Drug Task Force maintains evidence from their investigations with the Whitman County Sheriff's Office. RP 115.

of methamphetamine recovered from the Appellant on the respective dates. RP 122-124. While one of the exhibits⁴ containing methamphetamine was being reviewed with the witness, the trial court mused, “Keep track of that. I don’t want my courtroom becoming a superfund cleanup site.” RP 124. It is unclear whether any members of the jury heard the comment, but no objection was lodged or request to strike made at that time. RP 124.

During his closing argument, defense counsel’s theme was that the State hadn’t proven its case because there was reason to believe that Detective Coe made a mistake. RP 175. Counsel conceded that the substances in evidence (P-1 and P-3) contained methamphetamine. RP 174. With regard to the methamphetamine seized on October 7, counsel conceded:

Is there a reasonable doubt that this substance contains -- that this bag contains methamphetamine. No. You’ve got the lab reports. This is P-3. And you’ll be able to take this back in the jury room with you. And there’s a lab report that goes with it that says this substance is methamphetamine.

RP 174. Likewise, counsel conceded that the P-1 also contained methamphetamine, stating, “Is there a reasonable doubt there? No.”

RP 174. Instead counsel argued, “The hang-up is in the possession.”

He clarified:

⁴It isn’t clear from the record which baggie of methamphetamine was being inspected.

Because for all of the testimony that we heard, about what this sticker means, and that sticker means, and this blue tape or this red tape, and you can't take this off without damaging it, "Here's my initials," we don't know when this got put in the bag. Det. Coe wasn't able to tell you. He doesn't know. He doesn't know who took it up to the evidence vault. He can't tell you.

RP 175. He continued:

Same with this one. He doesn't know when this went in the evidence bag, when he wrote his initials on it. He doesn't know when it got to the evidence vault and -- I'm sorry; I said Pullman, I should have said Colfax -- in Whitman County. He doesn't know whether he took it there. He doesn't know where one of the other detectives took it there.

RP 175. Counsel continued to argue that Detective Coe made a mistake. RP 176. He argued that his testimony concerning the cooperation agreement didn't make sense and pointed to an absence of evidence that the Appellant could provide information with regard to anyone except Ms Grove. RP 177. Counsel again highlighted Detective Coe's geography gaff concerning the name of area streets. RP 177. Counsel argued that nothing but the testimony of Detective Coe tied the Appellant to the baggies, and that this was reasonable doubt in light of his testimonial errors. RP 178.

After deliberations, the jury returned a verdict of guilt as to both charges of Possession of a Controlled Substance (Methamphetamine). RP 189-190, CP 112. At sentencing, the court imposed a standard range sentence, including incarceration which is not challenged herein, and legal financial obligations (LFOs) including costs. CP 138-147.

Total LFOs imposed came to four thousand seven hundred seventy dollars (\$4,770.00). CP 139. Specifically, the court imposed five hundred dollars (\$500.00) under Crime Victim Compensation, a two hundred dollar (\$200.00) filing fee, one hundred twenty dollars (\$120.00) in sheriff service fees, a seven hundred fifty dollar (\$750.00) court appointed attorney fee, a one thousand dollar (\$1,000.00) fine, the one hundred dollar (\$100.00) DNA fee, a two thousand dollar (\$2,000.00) VUCSA fine, and a one hundred dollar (\$100.00) lab fee. The Appellant filed timely Notice of Appeal to this Court. CP 150-160.

IV. DISCUSSION

The Appellant raises several issues in his brief, each of which will be addressed in turn. Because these issues were not raised below, and because there is no showing of error, the jury's verdicts and subsequent sentence of the court should be affirmed. Further, this court should decline to summarily and peremptorily foreclose the State's opportunity to seek costs, should it prevail.

1. THE ORDER OF THE TRIAL COURT DENYING THE APPELLANT'S SUPPRESSION MOTION SHOULD BE AFFIRMED.

First, the Appellant claims that the trial court should have suppressed the methamphetamine recovered from the Appellant's pants on October 7, 2014. This claim is based upon an assertion that, once an officer has arrested a suspect, the officer may not release the suspect, and subsequently re-arrest when additional facts become

known. Since this issue was not raised below, this Court should refuse to consider this new and novel argument. Further, because the arrest was supported by probable cause to believe the Appellant had committed a felony offense, and does not otherwise constitute an unreasonable seizure under the facts of this case.

a) The Appellant Did Not Raise the Issue below and RAP 2.5 Should Preclude Review.

The Appellant argues that his arrest on October 7, 2015 was unlawful pursuant to CrR 3.2.1. He argues that CrR 3.2.1 requires that, when he was arrested on June 4, 2014, he needed to have a probable cause determination by a judge. This issue was not raised below.

“As a general rule, appellate courts will not consider issues raised for the first time on appeal.” State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). RAP 2.5(a) affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006); State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The requirement

that an issue be preserved by timely objection also addresses several other concerns. The rule advances judicial economy by enabling trial courts to address potential mistakes and make corrections, thereby obviating the wasteful expense of appellate review and further trials. State v. Strine, 176 Wn.2d at 749-50 (2013). The rule further “facilitates appellate review by ensuring that a complete record of the issues will be available,” and prevents “adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.” State v. Strine, 176 Wn.2d at 749-50 (2013); State v. Scott, 110 Wn.2d 682, 685-88, 757 P.2d 492 (1998).

The Appellant argues that the issue was preserved. Brief of Appellant, p. 20. He contends that trial counsel preserved the issue by stating in the briefing:

There is 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. The Appellant, however, offered no legal authority for this proposition. Read in context, counsel was arguing that there was some sort of requirement that the reasonable suspicion (in this case, rising to the level of probable cause, must be based upon contemporaneous facts. CP 34. The very next sentence of his

memorandum argues, “The law states that officers must have reasonable suspicion, *at the time of the stop*, . . .”. CP 34. He goes on to argue that the Detective had neither reasonable suspicion, nor probable cause to believe a crime had been committed, and instead argues that the only cause Detective Coe had for arresting the Appellant on October 7, 2015, was that the Appellant had failed to keep his promise. CP 34. Further and more importantly, the Appellant’s primary argument had little or nothing to do with the facts surrounding his arrest on October 7 and instead focused on the traffic stop on June 4, 2015. To clarify, the Appellant’s core argument was that, because the stop of his vehicle on June 4 was unlawful, his arrest on October 7 for methamphetamine discovered during that first stop was unlawful. CP 33. The Appellant claimed that his arrest on October 7, 2015 was the fruits of the poisonous tree of the illegal stop on June 4, 2015.⁵ This is wholly insufficient to apprise the trial court and the State that the Appellant was challenging that he had not been given a probable cause hearing within forty-eight hours of his arrest as required by CrR 3.2.1, and that, therefore, Detective Coe needed a warrant to arrest.

⁵It should be noted that, while the stop on June 4, 2015 and the circumstances surrounding it was the focus of the Appellant suppression motion, the Appellant Counsel doesn’t even challenge whether there was lawful ground to stop the Appellant’s vehicle on that date.

The Appellant virtually acknowledges this and claims instead that this issue falls within the narrow exception regarding errors which may be raised for the first time on appeal under RAP 2.5(a). Brief of Appellant, p. 21. Under RAP 2.5(a)(3), an issue first raised on appeal may be reviewed by an appellate court where it is a manifest error affecting a constitutional right. The burden is on the defendant to make the required showing. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). However, an appellant waives a suppression issue if he or she failed to move for suppression on the same basis below. State v. Garbaccio, 151 Wn.App. 716, 731, 214 P.3d 168 (Div. I, 2009) (*“Because [the defendant’s] present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, we will not consider it for the first time on appeal.”*). The Appellant did not argue this theory in his motion, memorandum, or at hearing. His argument that counsel’s failure to so aver constituted ineffective assistance of counsel is likewise misplaced and not well taken. That Appellant counsel could not find any direct authority to support the proposition posited herein belies this claim. Since there is no case law to support suppression as a remedy for violation of CrR 3.2.1, trial counsel was not ineffective for failing to move for suppression on that basis. See State v. Barron, 139 Wn.App. 266, 277, 160 P.3d 1077 (Div. I, 2007). This Court should

decline to consider this claim where the Appellant failed to raise it below.

- b) The Arrest of the Appellant on October 7, 2015 Was Lawful as it Was Supported by Probable Cause to Believe That the Appellant Had Committed a Felony Offense.

Were the Court willing to overlook the obvious and fatal procedural bar to this claim, the Appellant's claim fails on its merits as well. It should be noted that the Appellant was not held in jail for longer than forty-eight hours without a probable cause determination by a judge and is not so claiming. He was released shortly after his arrest and well before the expiration of the forty-eight hour clock. The Appellant claims that his release and subsequent re-arrest violated CrR 3.2.1, as that rule requires a probable cause determination anytime someone is arrested. This argument is based upon the language of the rule and is initially alluring, but fails to recognize the purpose of the rule. Looking at the fundamentals of the Fourth Amendment and the law on warrantless arrests, the Appellant's arrest on October 7, 2015 was lawful and reasonable under the circumstances.

CrR 3.2.1(a) requires that when a person is arrested, a judge must make a probable cause determination within forty-eight hours.

The obvious purpose⁶ of this rule is to assure arrested persons are not held for a long durations without judicial oversight and review of the arrest. Its obvious application is to persons detained in a jail facility. The rule further requires that a detained person must appear as soon as practicable, and not later than the close of the next business day for consideration of conditions of release. CrR 3.2.1(d)(1) and (e). Again, the structure of the rule is designed to assure that offenders are not held in custody *in pertetua*, without opportunity for judicial review and release on conditions.

The Appellant's argument ignores the clear purpose of the rule.

The clear implication of this rule is that it would apply only to arrestees who are being detained, and not persons who are arrested but released. To demonstrate the false presumption made by the Appellant, consider application of the rule espoused by the Appellant upon a hypothetical set of facts, which occurs routinely. Under the Appellant's theory, where an officer arrests someone for a misdemeanor and, rather than take them to jail, the officer releases them after serving a misdemeanor citation and obtaining the offender's signature, the officer has violated CrR 3.2.1.⁷ This is obviously not the

⁶The purpose is so obvious that not a single case could be located stating this obvious and basic proposition.

⁷Assuming the officer filed the citation with the misdemeanor court, it would actually be a violation of CrRLJ 3.2.1, but both rules contain the same language.

intent of the rule. In fact, the rules provides for its own remedy for violation. CrR 3.2 states:

If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.

CrR 3.2.1(a) merely provides the time line in which this determination must occur. Because the Appellant was not held, and no conditions placed upon him (i.e. no liberty infringement), CrR 3.2.1(a) does not apply. Instead the Court should apply the fundamental jurisprudential principles governing warrantless arrests.

"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." RCW 10.31.100. See also Noel v. King County, 48 Wn.App. 227, 233, 738 P.2d 692 (Div. I, 1987)(citing State v. Mustain, 21 Wn.App. 39, 42, 584 P.2d 405 (Div. II, 1978), and State v. Cottrell, 86 Wn.2d 130, 132, 542 P.2d 771 (1975)). Here, Detective Coe had probable cause to believe that the Appellant had committed a felony offense. He developed this probable cause to arrest based upon his investigation which culminated on June 4, 2015. The Appellant does not challenge the existence of probable cause to believe that he committed the crime of Possession of a Controlled Substance on June 4, 2015. The Appellant was initially arrested and taken to jail, but, based upon his offer of cooperation, he

was released prior to being charged or brought before the Court for fixing conditions of bond pursuant to CrR 3.2.. When the Appellant subsequently failed to contact him, Detective Coe, determined to rearrest on his outstanding probable cause and request that the charge be pursued.

The Appellant expresses fears concerning serial arrests for the same crime. These concerns are not present in the current case. The Appellant was not re-arrested on multiple occasions. The Appellant argues that there was no additional investigation that changed the initial probable cause. Brief of Appellant, p. 15. While no additional information concerning the Appellant's guilt on the charge was developed, there certainly was a change in circumstances leading to the Appellant's subsequent arrest: his failure to follow through with his promise to cooperate, which was the inducement that secured his release. In the main case cited by the Appellant, there was no intervening event which justified re-arrest. United States v. Holmes, 452 F.2d 249, 261 (7th Cir. 1971). In that case, the defendant was arrested and admitted to bail. Id. at 260-1. The grand jury subsequently issued an indictment and the defendant was rearrested. Id. Here, the charging process was aborted to allow the Appellant to cooperate in exchange for consideration on the underlying charge. The Holmes court was concerned that the re-arrest of the defendant

therein had no purpose that was not served by the original arrest. *Id.* at 261. Here, the second arrest had a significant purpose: to re-initiate the charging process after the Appellant failed to follow through with the inducement to release him previously. Additionally, it should be noted that the Appellant was, once again, frequenting a known drug house, indicating that he was currently engaging in the same criminal behavior.

There is no cause to believe under the facts of this case that the Appellant would be subject to a cycle of arrest and release complained of in his brief. Further, there is no indication that the detective passed up on opportunities to arrest him prior to October 7, 2015, or suggesting that the Detective sought to play his cards opportunistically. The Appellant was arrested by Detective Coe at his first opportunity. Likewise, this is not a situation where he was arrested and held for more than the forty-eight hour period, without a probable cause review, released and then re-arrested. These situations might likely give rise to an unreasonable arrest or serious violation of CrR 3.2.1 that might give rise to a suppression argument.

As a final note, even assuming there was any violation of CrR. 3.2.1, the remedy sought by the Appellant, suppression, would not be appropriate under the facts of this case. The Appellant's argument assumes, without appropriate discussion, that the remedy for violation

of his Fourth Amendment and Article I, Section 7 rights, is applicable under these circumstances. There is no claim that his constitutional rights were violated. His complaint is that a rule was violated. While attempting to color it as a constitutional violation, the error, if any occurred, was a violation of CrR 3.2.1(a). Again, the Appellant does not dispute that, on October 7, 2015, there existed probable cause to arrest him, or that RCW 10.31.100 provides legal authority to arrest without a warrant for a felony offense. Instead he argues that there was no judicial determination of probable cause before his re-arrest. Any violation is therefore, not a constitutional concern, but a technical violation of a court rule.

In State v. Trevino, 127 Wn.2d 735, 745, 903 P.2d 447, 453 (1995), the Washington Supreme Court ruled that violations of court rules do not necessarily result in suppression of evidence. Instead, the Court found that, "suppression of evidence was only appropriate for rule violations where 'the evidence to be suppressed has been tainted by the violation.'" *Id.* (quoting State v. Schulze, 116 Wn.2d 154, 162, 804 P.2d 566 (1991)). More recently, the Court stated:

Having concluded that the error in this case resulted from violation of a court rule, rather than a constitutional infirmity, the stringent harmless error beyond a reasonable doubt standard does not apply. Instead, we apply the rule an error is prejudicial if, within reasonable probabilities, . . . the error had not occurred, the outcome of the trial would have been materially affected.

State v. Templeton, 148 Wn.2d 193, 220, 59 P.3d 632 (2002)(*internal quotes omitted*). The Court continued:

Suppression is a harsh remedy to be used sparingly only where justice so requires and not where error is harmless.

Templeton, at 221. Here, there can be no dispute that, had a court been asked to review an affidavit, it would have found probable cause. In fact, after the Appellant's arrest on October 7, 2015, the court did find probable cause in setting bond. CP 2-6. Considering the facts of this case, even assuming that CrR 3.2.1(a) requires a probable cause determination for all persons arrested, regardless of whether or not they are held in jail, suppression of the evidence is wholly inappropriate. The Appellant would be given a windfall and rewarded for his broken promise which helped to secure his release without charges.

The Appellant failed to raise this issue below and his belated objection should be deemed waived. Further, his application of an obviously inapplicable rule should be rejected as sophistry. The arrest of the Appellant on October 7, 2015 was reasonable and lawful. Suppression of evidence seized pursuant to his otherwise lawful arrest is not merited and his conviction should therefor, on this basis, be affirmed.

2. THE TRIAL COURT'S ALLEGED IMPROPER COMMENT ON THE EVIDENCE DOES NOT REQUIRE A NEW TRIAL.

The Appellant next complains that the trial court judge deprived him of a fair trial in making a comment during testimony concerning the potential danger of the contents of the two evidence items which contained methamphetamine. This is again, an issue not raised or preserved at the trial level and should not be reached by this Court. Further, because under the facts and circumstances of this case, the statement was nothing more than an attempt at humor and in any event, the Appellant suffered no prejudice.

Presumably, the Appellant would again rely on the exception under RAP 2.5(a)(3), allowing an issue first raised on appeal may be reviewed by an appellate court where it is a manifest error affecting a constitutional right. The burden is on the defendant to make the required showing. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

In State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (Div. I, 1992), the Court stated the proper approach in analyzing alleged constitutional error raised for the first time on appeal and established a four step analysis:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then

the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Lynn, at 345. The Court further explained:

[I]t is not sufficient when raising a constitutional issue for the first time on appeal to merely identify a constitutional error and then require the State to prove it harmless beyond a reasonable doubt. The appellant must first make a showing how, in the context of the trial, the alleged error actually affected the defendant's rights. Some reasonable showing of a likelihood of actual prejudice is what makes a manifest error affecting a constitutional right.

Id. at 346. As will be demonstrated below, there is no showing of prejudice.

Judges in Washington are forbidden from commenting on evidence presented at trial. Wash. Const. art. IV, § 16; see State v. Woods, 143 Wn.2d 561, 590-91, 23 P.3d 1046, *cert. denied*, 151 L. Ed. 2d 285, 122 S. Ct. 374 (2001). "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case[.]" State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991). While all such comment is prohibited, a new trial is warranted only if the complaining party was prejudiced by it. See State v. Richard, 4 Wn.App. 415, 424, 482 P.2d 343 (Div. I, 1971) ("But even an unlawful comment is not necessarily reversible error unless the

comment is prejudicial.”)(citing State v. Williams, 68 Wn.2d 946, 416 P.2d 350 (1966)).

The Appellant did not lodge an objection or bring the issue to the attention of the trial court at that time or during an opportune moment outside the presence of the jury, nor did he move the Court for a new trial.

It is the duty of counsel to call to the court's attention, either during the trial or in a motion for new trial, any error upon which appellate review may be predicated, in order to afford the court an opportunity to correct it.

Seattle v. Harclaon, 56 Wn.2d 596, 597, 354 P.2d 928, 929 (1960).

Had the issue been brought to the court's attention in a timely fashion, the court could have ameliorated any impact on the jury with an explanation that the statement was intended in jest and given a specific admonishment to disregard. The trial court would be in the best position to consider the impact of such a statement on the jury. No such opportunity was given the trial judge. Pursuant to RAP 2.5, this Court should decline to consider the issue as one not being properly preserved, and one which could have been remedied if raised in a timely fashion.

Reaching the merits of the claim, it is clear from this record that no prejudice occurred. Under the circumstances, the comment is clearly understood as being made in jest. Further, there is nothing in the record to suggest that any members of the jury heard the comment

directed at the witness. Considering the nature of his defense, the comment is clearly harmless beyond a reasonable doubt.

The Appellant mischaracterizes the trial defense. Appellant counsel claims that the nature of the defense was that there were questions regarding the chemical composition of the baggies admitted into evidence. Brief of Appellant, p. 28. This was not at all the case and ignores the trial record. The evidence of the Appellant's guilt was strong and uncontroverted. The Appellant had admitted that the item seized from him on June 4, 2015 was methamphetamine and told police, in a recorded interview, where he obtained it. No challenge was made to introduction of the lab reports nor to the veracity of the conclusion therein concerning the identity of the substances contained in the baggies admitted into evidence. In summation, counsel himself conceded, on the strength of the lab reports, that the substances in the baggies (P-1 and P-3) did contain methamphetamine. RP 174. Instead, counsel focused on whether the baggies admitted into evidence were proven beyond a reasonable doubt to be the same items recovered from the Appellant. RP 175. Succinctly summarized, counsel's argument was that Detective Coe had made mistakes in his investigation and that the State didn't prove beyond a reasonable doubt that the detective didn't make a mistake in his testimony that the baggies in evidence were the same items possessed by the Appellant. RP 175-177.

Considering the facts and defenses propounded by the Appellant, the court's off-handed attempt at humor was clearly harmless beyond any doubt, where there was no dispute that the item referenced by the trial judge was, in fact, a dangerous controlled substance. Trial counsel's failure to object or request a mistrial belies the Appellant's claim of prejudice as trial counsel clearly did not see any harm in the comment, or feel that the comment rendered the trial fundamentally unfair. Whether considering the Appellant's burden to demonstrate prejudice sufficient to warrant review of an unpreserved claim under RAP 2.5, or determining whether the State meets its burden to show that the error was harmless beyond a reasonable doubt, it is clear on this record that no prejudice was sustained by the Appellant sufficient to merit reversal of his convictions.

3. TRIAL COUNSEL WAS NOT INEFFECTIVE AS FAILING TO OBJECT WAS REASONABLE TRIAL STRATEGY AND THE APPELLANT FAILS TO DEMONSTRATE SUFFICIENT PREJUDICE.

The Appellant next complains that trial counsel was ineffective for failing to object to certain testimony. Specifically, the Appellant contends that certain responses from Detective Coe during his testimony constituted "prior bad acts" evidence and should have been objected to by trial counsel pursuant to ER 404(b). Because trial counsel's decision not to object was strategic, the Appellant cannot

show deficient performance. Further, in light of the overwhelming evidence of guilt, the Appellant cannot demonstrate prejudice.

A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish that the right to effective assistance of counsel has been violated, a defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To establish deficient performance, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *Id.* Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Counsel's decisions regarding whether to object fall squarely within strategic or tactical decisions. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (Div. I, 1989). The appellant court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. Davis, 152 Wn.2d at 714 "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Madison, at 763. The reasonableness of

trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Finally, prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73.

As stated in Davis:

To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted

Id. at 714.

The Appellant asserts that trial counsel failed to object at various points in the trial. As a starting point, he complains concerning testimony by Detective Coe regarding surveillance of the Kemper residence, and claims that this evidence somehow constituted evidence of the Appellant's "prior bad acts." However, this evidence did not directly implicate the Appellant and related to Mr. Kemper, not the Appellant.

"Evidence is relevant if a logical nexus exists between the evidence and the fact to be established." State v. Burkins, 94 Wn.App. 677, 692, 973 P.2d 15 (Div. I, 1999); see also ER 401. Relevant evidence is presumed to be admissible unless the party seeking to

exclude the evidence shows that its probative value is substantially outweighed by the danger of misleading the jury. Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). ER 402 states that "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, these rules, or by other rules or regulations applicable in the courts of this state." ER 401 defines relevant evidence as "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 that it would be without the evidence." Here, the evidence was relevant, in that the Appellant had just come from a location known for being involved in trafficking methamphetamine was certainly relevant to whether or not he was in possession of methamphetamine, which was found on his person immediately following.

He complains that further testimony concerning the problems created by the activities occurring at this residence were irrelevant to the charges. Perhaps so, but counsel's decision not to object to this passing comment was strategic considering an objection might highlight the issue for the jury. Further, it fit into his theory concerning the detective's fallibility, since he was focused on this residence and Ms Grove and was not targeting the Appellant. His further complaint regarding testimony of a nearby daycare mischaracterizes the discussion. This statement was made on redirect and in response to

questioning by defense counsel about misidentification of streets in the area. Detective Coe was describing the location of the house for the purposes of clarifying his geographical mistake. Again, no objection was made to avoid emphasizing the fact and further, in light of the purpose of the discussion, an objection would not have been sustained.

Counsel next complains that testimony concerning a “scenario” at a hotel concerning the Appellant and his son should have drawn an objection. He claims that this testimony likewise fell within the prohibitions of ER 404(b). However, the facts surrounding the “scenario” were not revealed. The Appellant assumes this was some sort of nefarious event. Perhaps this demonstrates a guilty conscience on his part, describing the incident as “illicit,” but there is nothing in the record that colors this incident as bad acts on the part of the Appellant. Again, this testimony was offered concerning his last contact with the Appellant prior to October 7, 2015. Detective Coe testified that there was a situation with the Appellant and his son at a hotel but the Coe did not have contact with him at that time. It further appears that Detective Coe was confused about the question and was instead answering as to whether he had previous contact with the Appellant prior to the charged incidents. Again, no objection was made, most likely to avoid creating the appearance that the hotel incident involved anything untoward.

The Appellant complains concerning evidence and testimony suggesting that he was involved in dealing rather than just use. However, while not charged, that he might be selling drugs rather than simply using drugs is certainly relevant to whether or not he possessed the methamphetamine, i.e. exercised dominion and control over the items. Further, testimony concerning “people like Mr. Moore” being used by law enforcement to investigate larger dealers was likewise not unfairly prejudicial. It was the State’s theory that Mr. Moore wasn’t prosecuted on June 4, 2015 because of his promise to cooperate. But the testimony also tended to show that Mr. Moore was a very small fish, whose activities are of little concern to drug detectives like Detective Coe. It allowed defense counsel to paint his client as a “victim of the war on drugs” and argue that the Appellant was merely, and carelessly, a casualty of the investigation of the Kemper residence. Since Detective Coe’s investigation wasn’t focused on the Appellant, he therefore might be more careless in the handling of evidence concerning his case. Counsel further attempted to mar Detective Coe’s credibility by pointing out his mistaken testimony concerning the existence of a warrant on June 4, 2015. This fit the Appellant’s trial theme that Detective Coe makes mistakes. In any event, failure to object to testimony which downplays the Appellant’s role is hardly deficient performance.

His final argument concerns testimony regarding the Appellant's broken promise of cooperation. Again, this evidence was relevant and admissible to give the jury a proper narrative of the entirety of the case. Without such evidence, the jury might be concerned that the Appellant was being unfairly targeted by police. The evidence was certainly necessary to explain why he was being arrested four months later for a crime for which he had already been arrested.

Further, counsel's decision not to object related directly to his trial strategy. In closing argument, defense counsel argued that the jury should not give credence to Detective Coe's testimony because of his testimony concerning the agreement to cooperate. RP 177. Counsel argued that his testimony on this point didn't make sense in light of the other evidence and testimony. RP 177. The Appellant has failed to demonstrate that trial counsel's failure to object at any of the points discussed fell below objective standards and was anything other than reasonable trial strategy.

Finally, considering the overwhelming quantum of largely unrefuted evidence and testimony, there is no likelihood that the outcome of the trial would have been any different. The Detective's testimony, coupled with the Appellant's audio recorded confession that the methamphetamine seized on June 4 came from Ms Grove, and the lab reports demonstrated the Appellant's guilt conclusively. There is nothing about the complained of testimony or failure of counsel to

object that suggests that it would have had any meaningful impact on the outcome of the trial. As such, this Court should reject these claims and affirm the Appellant's convictions on this ground.

4. THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS PROPER AND ANY ERROR WAS NOT PRESERVED.

The Appellant next complains that the sentencing court improperly imposed legal financial obligations. The Appellant relies upon RCW 10.01.160 and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and claims that the sentencing court failed to adequately consider his ability to pay before imposing non-mandatory legal financial obligations. Because the Appellant failed to object to the imposition of any of the fines, fees, costs or other assessments imposed, he has, yet again, failed to properly preserve the issue. Further, because most of the assessments are either mandatory, or may be imposed without regard to ability to pay, this Court should exercise its discretion and decline to reach the issue.

As discussed above, RAP 2.5 requires that the Appellant have raised an issue in the trial court, in order to preserve appellate review. Here, the Appellant did not object when the State characterized him as able bodied. RP 204. The State relied upon the Appellant's own representations that he was hired to help Ms Grove move her belongings to a storage unit. RP 200, 204. At no point did the Appellant object or claim he would not be able to pay.

While recognizing that RAP 2.5 vests in this Court the discretion to consider this issue raised for the first time on appeal, under the current facts, the Court should decline to do so. As a starting point, the Appellant was tried and sentenced well after the Supreme Court's decision in Blazina. See State v. Lyle, 188 Wn.App. 848, 850, 355 P.3d 327 (Div. II, 2015), *remanded*, 184 Wn.2d 1040, 365 P.3d 1263 (2016).⁸ It would be difficult to imagine that trial counsel would not have been aware of the Supreme Court's decision, which had been issued over a year before. Further, the nature of the individual assessments imposed herein should weigh against review. The Appellant attempts to lump all but the absolute mandatory assessments under the umbrella of the Blazina requirement. However, contrary to his mischaracterization, only a small fraction fall within the purview of Blazina.

The Appellant was assessed the five-hundred dollar (\$500.00) Crime Victim Assessment which is required by RCW 7.68.035(1)(a). He was further ordered to pay the one hundred dollar (\$100.00) DNA collection fee is required by RCW 43.43.7541, and a two hundred dollar (\$200.00) criminal filing fee is required by RCW 36.18.020(2)(h). These assessment are mandatory irrespective of the defendant's

⁸The State further recognizes that the fact that sentencing occurred after the decision in Blazina was issued is not dispositive, it is certainly fair game for consideration as to whether or not the Appellant should have preserved the issue by objecting and allowing the sentencing court an opportunity to further inquire.

ability to pay. See State v. Curry, 62 Wn.App. 676, 680-81, 814 P.2d 1252 (Div. I, 1991), *aff'd*, 118 Wn.2d 911. The Appellant was further assessed a fine of one thousand dollars (\$1,000.00) pursuant to RCW 9A.20.021. This fine, while discretionary, may be imposed without regard to the offender's ability to pay. See State v. Clark, 191 Wn.App. 369, 375-76, 362 P.3d 309 (Div. III, 2015). The Appellant as further fined two thousand dollars (\$2,000.00) as a mandatory fine pursuant to RCW 69.50.430(2).⁹ See also State v. Mayer, 120 Wn.App. 720, 726, 86 P.3d 217, 220 (Div. III, 2004). (*RCW 69.50.430 sets forth mandatory minimum fines for the enumerated offenses*). The court further imposed a one hundred dollar (\$100.00) crime lab assessment¹⁰ pursuant to RCW 43.43.690. This assessment is also mandatory and may only be suspended upon verified petition by the offender that they lack the ability to pay. RCW 43.43.690. The Blazina ruling is only applicable to assessments imposed pursuant to RCW 10.01.160 which, by its terms, requires the court to consider the offender's future ability to pay when imposing *costs*. See Clark,

⁹RCW 69.50.430(1) establishes a mandatory one thousand dollar (\$1,000.00) fine for all felony violations of 69.50, but the fine is doubled pursuant to section (2) if, as here, the offender has one or more prior convictions under the act.

¹⁰It appears that any error was to the benefit of the Appellant where the statute requires a separate one hundred dollar assessment for each offense. See RCW 43.43.690(1).

supra. It is therefore inapplicable to the above legal financial assessments.

The only costs imposed upon the Appellant were the seven hundred fifty dollar (\$750.00) for court appointed counsel recoupment, and one hundred twenty dollars (\$120.00) costs for sheriff service fees. His arguments now raised for the first time on appeal are, at best, only applicable to eight hundred seventy dollars (\$870.00). The remaining three thousand nine hundred dollars (\$3,900.00) would remain unaffected. The Appellant, rather than object to the imposition of any fines, fees, and assessments, instead took the opportunity to interrupt state's counsel and reargue the facts of his conviction and the suppression issues previously decided. RP 204. Considering the availability and notoriety of the Blazina decision, his apparent and undisputed ability to perform labor, and the relatively small fraction of the total legal financial assessments at issue, this Court should exercise its discretion and decline to review this unpreserved issue for the first time on appeal.

5. THE POSSIBILITY OF IMPOSITION OF APPELLATE COSTS SHOULD NOT BE FORECLOSED.

Finally, the Appellant asks this Court to rule that, should the State prevail on appeal, he should not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected. It is a Appellant's future ability to pay costs, rather than

his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that he has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

At sentencing, the trial court found, based upon his age, physical condition, and work history, that the Appellant would have the ability to pay costs. CP 150-160 The Appellant obtained an ex parte Order of Indigency after presenting a declaration regarding his current financial circumstances. CP 164-165. The declaration contained no information about his employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding the Appellant's likely future ability to pay financial obligations.

It is a Appellant's future ability to pay, rather than simply their current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (*indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments*).

In State v. Sinclair, 192 Wn.App. 380, 393, 367 P.3d 612 (Div. I, 2016) *review denied* 185 Wn.2d 1034 (2016), the court held that

costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was "no realistic possibility" that he could pay appellate costs in the future. The court also recognized, however, that "[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy." Sinclair, 192 Wn.App. at 391.

The record is devoid in this case of any information that would support a finding that there is "no realistic possibility" that the Appellant will be able in the future to pay appellate costs. In such circumstances, appellate costs should be available for award. State v. Caver, 195 Wn.App. 774, 785-7, 381 P.3d 191 (Div. I, Sept. 6, 2016).

The Appellant here is 55 years old and, while little is known about his employment history, has no apparent physical limitations that would preclude employment. In fact, he has already served his sentence hereunder, so incarceration is no longer a bar to his employment. CP 150-160. Assuming retirement at sixty-five, he still has thirty of his working years ahead of him. Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of

appellate costs in this case would be unreasonable, premature, and arbitrary.

6. ISSUES RAISED IN THE APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS DO NOT MERIT RELIEF.

In his Statement of Additional Grounds (SAG), the Appellant's arguments are mostly comprised of attacks upon the credibility of Detective Coe. Questions of credibility are beyond the scope of appellate review. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The grounds stated fail to identify issues appropriate for appellate review and should be summarily denied. RAP10.10(c); State v. Bluehorse, 159 Wn.App. 410, 436, 248 P.3d 537 (Div II, 2011). Should this Court determine further briefing is required, the State will oblige pursuant to RAP 10.10(f).

V. CONCLUSION

The Appellant was lawfully arrested on October 7, 2015. This arrest was supported by probable cause to believe that he had committed a felony, and was reasonable under the circumstances. Any alleged violation of the court rule was not properly raised below and, in any event, would not support suppression. The comment by the trial court did not prejudice the Appellant. Trial counsel's strategic decisions not to object did not constitute deficient performance, and the Appellant has failed to show that the outcome would have been different had counsel objected at the points now claimed on appeal.

The Court should decline to reach the issue of costs imposed below where the Appellant attempts to raise this issue for the first time on appeal. Finally, the Court should not peremptorily deny the State a fair opportunity to seek costs on appeal. The State respectfully requests this court deny this appeal and affirm the convictions and sentence imposed by the trial court.

Dated this 21st day of December, 2016.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

CARL R. MOORE,

Appellant.

Court of Appeals No: 34327-8-III

DECLARATION OF SERVICE

DECLARATION

On December 21, 2016 I electronically mailed, with prior approval from Ms. Nichols, a copy of the BRIEF OF RESPONDENT in this matter to:

KRISTINA M. NICHOLS
wa.appeals@gmail.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on December 21, 2016.



LISA M. WEBBER
Office Manager