

FILED
Court of Appeals
Division III
State of Washington
5/23/2018 8:00 AM
No. 35696-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE MURILLO, JR.,

Appellant.

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

The Honorable Judges Samuel Swanberg and Cameron Mitchell

APPELLANT'S OPENING BRIEF

Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

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A. SUMMARY OF ARGUMENT

Kennewick Police found a stolen vehicle with no license plates and all usable parts removed. Their investigation led to two informants, who identified a person named “Cousins,” later determined to be Enrique Murillo, as being involved with this stolen vehicle. Based on this information, an officer arrested Mr. Murillo. During a search of Mr. Murillo’s person incident to arrest, an officer found methamphetamine. The State charged Mr. Murillo with one count of possession of a controlled substance (methamphetamine). Mr. Murillo moved to suppress the methamphetamine, arguing the police did not have probable cause to arrest him, based upon the informants’ tips. The trial court denied the motion, and the case proceeded to a jury trial. The to-convict instruction given to the jury did not specify the type of controlled substance Mr. Murillo possessed. The jury found Mr. Murillo guilty as charged, and the trial court sentenced him on one count of unlawful possession of a controlled substance, as a Class C felony.

Mr. Murillo now appeals, arguing the trial court erred in denying his motion to suppress, and in the alternative, that the jury’s verdict does not support the sentence for possession of methamphetamine, requiring remand for resentencing to impose a misdemeanor sentence. Mr. Murillo also argues the judgment and sentences contains two errors that should be corrected, and preemptively objects to the imposition of appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Murillo's motion to suppress.

2. The trial court erred in entering Conclusion of Law 6:

Nevertheless, [Mr.] Whitney's and [Ms.] Ross's statements to police were against penal interest and weigh in favor of finding that the veracity prong is satisfied. Specifically, [Mr.] Whitney's statement that he worked on the stolen vehicle with the defendant, was against his penal interest.

(CP 108-109).

3. The trial court erred in entering Conclusion of Law 7:

The fact that [Ms.] Ross and [Mr.] Whitney independently gave a similar account of who had worked on or brought the white Mitsubishi to the house lends credibility both [Ms.] Ross's and [Mr.] Whitney's accounts and weighs in favor of finding that the veracity prong is satisfied.

(CP 109).

4. The trial court erred in entering Conclusion of Law 8:

The fact that [Mr.] Whitney knew the first letter of Cousin's real name, the car he drove and where he lives lends credibility to [Mr.] Whitney's account.

(CP 109).

5. The trial court erred in entering Conclusion of Law 9:

The identification of [Mr.] Murillo as Cousins during the photo lineup lends credibility to [Mr.] Whitney's account.

(CP 109).

6. The trial court erred in entering Conclusion of Law 10:

Even though neither [Ms.] Ross nor [Mr.] Whitney had an established track record, under the circumstances, their statements satisfy the veracity prong of the *Aguilar-Spinelli* test.

(CP 109).

7. The trial court erred in entering Conclusion of Law 11:

At the time [Mr.] Murillo was arrested, officers had probable cause to arrest for the felony crime of possession of a stolen motor vehicle.

(CP 109).

8. The trial court erred in entering Conclusion of Law 12:

The resulting search incident to arrest was lawful, and the alleged controlled substance discovered during such search is admissible in trial.

(CP 109).

9. The to-convict instruction failed to set forth the identity of the controlled substance, which is an essential element of the crime of possession of a controlled substance.
10. The jury's verdict does not support the sentence for possession of methamphetamine, where the to-convict instruction did not specify which controlled substance was possessed.
11. The judgment and sentence contains an error that should be corrected: it indicates that a violation of the Judgment and Sentence is punishable by up to 60 days of confinement per violation under RCW 9.94A.634.
12. The judgment and sentence contain an error that should be corrected: it indicates that Mr. Murillo is required to register as a felony firearm offender.

13. An award of costs on appeal against Mr. Murillo would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in denying Mr. Murillo's motion to suppress, where the information provided by the informants did not provide probable cause for Mr. Murillo's arrest.

Issue 2: Whether the jury's verdict does not support the sentence for possession of methamphetamine, where the to-convict instruction did not specify which controlled substance was possessed, requiring remand for resentencing to impose a misdemeanor sentence.

Issue 3: Whether the judgment and sentence contains two errors that should be corrected, where it indicates that a violation of the Judgment and Sentence is punishable by up to 60 days of confinement per violation under RCW 9.94A.634, and that Mr. Murillo is required to register as a felony firearm offender.

Issue 4: Whether this Court should deny costs against Mr. Murillo on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

On August 24, 2017, a Kennewick Police Officer observed a white Mitsubishi Eclipse parked in the area of 4412 W. 7th, in Kennewick. (CP 105). The vehicle has no license plates and all usable parts had been taken out of the vehicle. (CP 105). The officer contacted SECOMM and learned that the vehicle had been reported stolen. (CP 105-106).

Officers observed an oil trail leading from the vehicle to the driveway of the residence located at 723 S. Volland Street. (CP 106). Officers discovered a Toyota pickup parked in front of this residence. (CP 106). Officers determined

that the truck had been stolen. (CP 106). Officers also determine that the plates on the truck were stolen. (CP 106). Officers also observed a vehicle license plate in plain view in a dumpster near the house. (CP 106).

Officers contacted the occupants of the residence on S. Volland Street, to include Jenna Ross, James Whitney, and Jessica Miller. (CP 106). Ms. Miller advised she knew nothing of the Mitsubishi. (CP 106). Officers discovered suspected methamphetamine in Ms. Ross' purse. (CP 106).

Kennewick Police Detective Marco Montebalco interviewed Ms. Ross. (CP 106; 2 RP¹ 68). She denied knowledge that the vehicles were stolen. (CP 106). She stated that an individual she knew as "Cousins" had brought the white Mitsubishi to the residence, but had no idea who brought the Toyota. (CP 106).

Detective Montebalco interviewed Mr. Whitney. (CP 106). While Mr. Whitney initially gave a false name, this was not discovered until after his initial questioning. (CP 106). Mr. Whitney denied stealing the vehicles, but admitted to working on the Mitsubishi with a person he knew as "Cousins," whom he described as a Hispanic male. (CP 106).

¹ The Report of Proceedings (RP) consists of five separately paginated volumes. Three of these five volumes are cited herein. For ease of reference, they are referred to as follows: the RP from October 25, 2017, containing the suppression hearing, reported by Nicole A. Buldis, is referred to as "1 RP"; the RP from October 30 and 31, 2017, containing the jury trial, reported by Michelle R. Giangualano, is referred to as "2 RP"; and the RP from November 15, 2017, containing the sentencing hearing, reported by Cheryl A. Pelletier, is referred to as "3 RP."

Kennewick Police Detective Daniel Todd took over questioning of Mr. Whitney. (CP 106; 2 RP 66). Mr. Whitney stated that he had stayed at the residence for a few days, and that the residents were Jenna Ross and Tyler Hoyt. (CP 106). Mr. Whitney also stated that “Cousins” had been working on the Mitsubishi and possibly removing parts from it. (CP 106).

Detective Todd obtained a description of Cousins from Mr. Whitney: a Hispanic Male with a spider web tattoo on his elbow. (CP 107). Mr. Whitney believed his first name started with the letter “E.” (CP 107). Mr. Whitney explained that Cousins lived in an apartment complex on Hood Avenue, just east of Tweedt Street. (CP 107). He also described the color of the apartment complex, and that he believed the complex contained the word “Sage.” (CP 107). Mr. Whitney further advised that Cousins had driven to the residence in a green Kia. (CP 107).

Officers went to the location described on Hood Avenue, and located the Sage Creek Apartments, and confirmed they matched the description given by Mr. Whitney. (CP 107). Detective Todd observed a dark blue Kia Optima in the parking lot. (CP 107). He texted a picture of the Kia to another Officer and asked to have Mr. Whitney confirm whether this was Cousins car. (CP 107). The Officer responded that Mr. Whitney had stated it was his car. (CP 107).

Detective Todd determined that the vehicle was registered to Enrique Murillo. (CP 107). Detective Todd then requested another Detective, Detective

Runge, complete a photo montage with Mr. Whitney, to confirm the identity. (CP 107). Mr. Whitney positively identified the picture of Mr. Murillo, as the person he knew as Cousins. (CP 107).

Detective Runge advised Detective Todd of the positive identification, and Detective Todd knew that the defendant had been identified as Cousins, prior to stopping the defendant's vehicle and arresting the defendant. (CP 107).

At 11:45 a.m., Mr. Murillo's vehicle was stopped. (CP 107). Mr. Murillo, who had been driving, was arrested. (CP 107). During a search incident to arrest, a baggie of suspected methamphetamine was discovered on Mr. Murillo's person. (CP 107-108).

At 1:17 p.m., Mr. Whitney was interrogated further. (CP 108). Mr. Whitney eventually admitted that he had given a false name and that he had stolen the Toyota truck and white Mitsubishi. (CP 108).²

The baggie of suspected methamphetamine found on Mr. Murillo's person was later tested and was found to contain methamphetamine. (2 RP 48-52).

The State charged Mr. Murillo with one count of possession of a controlled substance, as follows:

That the said Enrique Murillo, Jr. in the County of Benton, State of Washington, on or about the 24th day of August, 2017, in violation of RCW 69.50.4013(1), did unlawfully possess a controlled substance, to wit: methamphetamine, contrary to the form of the

² The foregoing facts are from the trial court's findings of fact denying Mr. Murillo's Motion to Suppress. (CP 105-108). Mr. Murillo does not assign err to any of these findings of fact.

Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

(CP 1-2).

Mr. Murillo moved to suppress the methamphetamine found on his person, arguing that officers did not have probable cause to arrest him. (CP 17-26, 34-40). He argued that the informants' tips, from Ms. Ross and Mr. Whitney, were insufficient to establish probable cause to arrest him, under the *Aguilar-Spinelli* test. (CP 22-25).

After a hearing, the trial court denied Mr. Murillo's motion to suppress. (CP 108-109; 1 RP 4-36). In its oral ruling, the trial court stated "this is a close call. It really is. I've struggled with it. I've looked at both sides and gone back and forth on it a little bit." (1 RP 32).

The trial court issued written findings of fact and conclusions of law. (CP 105-110). The trial court concluded that the informants' tips were sufficient to establish probable cause to arrest Mr. Murillo, under the *Aguilar-Spinelli* test. (CP 108-109; 1 RP 32-35). The trial court concluded the statements from Ms. Ross and Mr. Whitney satisfied the veracity prong of the *Aguilar-Spinelli* test. (CP 108-109; 1 RP 32-35). The trial court issued the following conclusions of law, among others:

4. Neither [Mr.] Whitney, nor [Ms.] Ross had an established track record of providing reliable information to police.
5. Although the officers could adequately establish that [Mr.] Murillo was the individual that [Ms.] Ross and [Mr.] Whitney referred to when describing Cousins, officers were unable to

corroborate the allegations that it was he that had brought the white Mitsubishi to the residence and possibly worked on it or removed parts from it.

(CP 108).

The case proceeded to a jury trial. (2 RP 11-109). An officer testified he arrested Mr. Murillo, searched his person, and found a baggy with a crystalline substance in it. (2 RP 13-28). A forensic scientist testified she tested this substance, and that it contained methamphetamine. (2 RP 45, 48-52).

Mr. Murillo testified in his own defense. (2 RP 71-75). He testified the shorts he was wearing when he was arrested did not belong to him, and that he did not know there was methamphetamine in the pocket of the shorts. (2 RP 72-75). The trial court instructed the jury on the defense of unwitting possession. (CP 93; 2 RP 87-88).

The trial court gave the jury the following to-convict instruction:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 24th, 2017, the defendant possessed a controlled substance; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 89; 2 RP 86).

The jury was also instructed “[m]ethamphetamine is a controlled substance.” (CP 92; 2 RP 87).

The jury found Mr. Murillo guilty “of the crime of Unlawful Possession of a Controlled Substance as charged in Count I.” (CP 97; 2 RP 106-109).

Mr. Murillo was sentenced on one count of unlawful possession of a controlled substance, as a Class C felony. (CP 112-124; 3 RP 4-10). The judgment and sentence contains the following provisions, among others:

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days confinement per violation. RCW 9.94A.634

.....

5.6b **FELONY FIREARM OFFENDER REGISTRATION.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the “Felony Firearm Offender Registration” attachment.

(CP 119).

The trial court did not address felony firearm offender registration at the sentencing hearing. (3 RP 4-10).

The felony judgment and sentence also contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations[,]” and “[t]he Court of Appeals . . . may required the defendant to pay the costs of unsuccessful appeal” (CP 116, 120). The trial court imposed only mandatory costs. (CP 115, 124; 3 RP 8-9). In doing so, the trial court stated:

I have been provided a motion for order of indigency. I'm looking at that in regard to the issue right now of legal financial obligations. And it does appear that Mr. Murillo has limited ability to pay his legal financial obligations in this matter, so the court will impose only the mandatory legal financial obligations.

(3 RP 8).

Mr. Murillo appealed. (CP 127-128). The trial court entered an Order of Indigency, granting Mr. Murillo a right to review at public expense. (CP 129-131; 3 RP 10).

E. ARGUMENT

Issue 1: Whether the trial court erred in denying Mr. Murillo's motion to suppress, where the information provided by the informants did not provide probable cause for Mr. Murillo's arrest.

The information provided by the informants, Ms. Ross and Mr. Whitney, did not provide probable cause for Mr. Murillo's arrest. Therefore, the trial court should have suppressed the methamphetamine found on Mr. Murillo's person following his arrest, and Mr. Murillo's conviction should be reversed and dismissed with prejudice.

A motion to suppress is reviewed "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Cole*, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Conclusions of law in

an order pertaining to the suppression of evidence are reviewed de novo. *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

As a general rule, warrantless searches and seizures are per se unreasonable under the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). One exception to the strict search warrant requirement rule is a search incident to arrest. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). “Under article I, section 7 of the Washington State Constitution, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest.” *Id.*

“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. “Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.” *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

“Const. art. 1, § 7 requires adherence to the 2-prong test of *Aguilar-Spinelli* in evaluating informants for probable cause determinations.” *State v. Smith*, 102 Wn.2d 449, 455, 688 P.2d 146 (1984) (citing *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984)); *see also Aguilar v. Texas*, 378 U.S. 108, 84 S.

Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). “This is true whether the issue is probable cause for an arrest or search without a warrant, or a magistrate's determination for issuing a warrant.” *State v. Salinas*, 119 Wn.2d 192, 200, 829 P.2d 1068 (1992). The *Aguilar–Spinelli* test requires: (1) showing that the informant had a sufficient basis of knowledge (the basis of knowledge prong), and (2) showing the informant's veracity (the veracity prong). *See id.*; *see also Smith*, 102 Wn.2d at 455.

If either or both prongs of the *Aguilar–Spinelli* test are not met, “probable cause may yet be satisfied by independent police investigation corroborating the informant's tip to the extent it cures the deficiency.” *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002) (citing *Jackson*, 102 Wn.2d at 438).

The second part of the *Aguilar–Spinelli* test requires an examination of the credibility of the informant or the reliability of the informant's information. *Gaddy*, 152 Wn.2d at 72. This prong “seeks to evaluate the truthfulness of the informant.” *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007). “It may be satisfied if the credibility of the informant is established. Or, even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth.” *Id.* at 41-42.

“The most common way to satisfy the ‘veracity’ prong is to evaluate the informant’s ‘track record’, *i.e.*, has he provided accurate information to the police a number of times in the past?” *Jackson*, 102 Wn.2d at 437. “If the informant’s track record is inadequate, it may be possible to satisfy the veracity prong by showing that the accusation was a declaration against the informant’s penal interest.” *Id.* “Statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true.” *State v. Chenoweth*, 160 Wn.2d 454, 483, 158 P.3d 595 (2007).

“If the identity of an informant is known—as opposed to being anonymous or professional—the necessary showing of reliability is relaxed.” *Gaddy*, 152 Wn.2d at 72-73. “This is so because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants.” *Id.* at 73. “Also, an identified informant’s report is less likely to be marred by self-interest.” *Id.*

Here, Mr. Murillo was arrested based upon information provided to the police by two informants, Ms. Ross and Mr. Whitney. (CP 106-108). However, the information provided by the informants did not provide probable cause for Mr. Murillo’s arrest. The trial court erred in denying Mr. Murillo’s motion to suppress, because the information provided by Ms. Ross and Mr. Whitney was insufficient to establish the veracity prong of the *Aguilar-Spinelli* test.

Neither informant had a track record of providing reliable information to the police. (CP 108).

Neither Ms. Ross nor Mr. Whitney made a statement against their penal interest. To the contrary, both Ms. Ross and Mr. Whitney made statements to the police to protect their own interests. (CP 106-108). Ms. Ross gave only one statement, that an individual she knew as “Cousins” had brought the white Mitsubishi to the residence, but she had no idea who brought the Toyota. (CP 106). This statement does not subject her to any potential criminal liability related to the Mitsubishi, but rather, places the blame on “Cousins” and admits no involvement with the vehicle on her part.

Mr. Whitney denied stealing the vehicles, but he admitted to working on the Mitsubishi with a person he knew as “Cousins.” (CP 106). Mr. Whitney also stated that “Cousins” had been working on the Mitsubishi and possibly removing parts from it. (CP 106). Mr. Whitney did not make these statements against his penal interest, because Mr. Whitney did not reveal his name to the police when making these statements. (CP 106, 108). It was not until after Mr. Murillo was arrested that Mr. Whitney admitted he had given a false name and that it was him who stole the Toyota truck and the white Mitsubishi. (CP 108). This shows that at the time Mr. Whitney admitted to working on the Mitsubishi with “Cousins,” he did not do so in hopes of obtaining leniency from the police, but rather, in an effort to shield himself from blame and place the blame on Mr. Murillo.

Mr. Whitney's statements should not be subject to the relaxed standard of reliability for named informants, because at the time he made his statements to law enforcement that were used as a basis of probable cause to arrest Mr. Murillo, Mr. Whitney was using a false name. *See Gaddy*, 152 Wn.2d at 72-73 (discussing the required showing of reliability for a named informant).

The circumstances surrounding Mr. Whitney's statements do not assure trustworthiness or reliability. *See Chamberlin*, 161 Wn.2d at 41-42. Mr. Whitney, using a false name when talking to the police, was not willing to publicly stand by his information. *Cf. Chamberlin*, 161 Wn.2d at 42 (finding the veracity prong of *Aguilar-Spinelli* was met where a named informant made a statement against his penal interest and was willing to stand publicly by his information, revealing his identity in the search warrant affidavit and later in court and by providing a tape recorded statement); *State v. Martinez*, No. 34929-2-III, 2018 WL 1773179, at *3 (Wash. Ct. App. Apr. 12, 2018) (finding the veracity prong of *Aguilar-Spinelli* was met where a named informant made admissions against his penal interest); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). The fact that Mr. Whitney was not willing to come forward and correctly identify himself shows that the statements he made to the police about working on the Mitsubishi with Mr. Murillo are not reliable. *See Chamberlin*, 161 Wn.2d at 42 n.7; *see also Chenoweth*, 160 Wn.2d at 483.

Furthermore, in finding Mr. Whitney's statements credible, the trial court placed weight on the fact that Mr. Whitney's information regarding Cousin's real name, the car he drove, and where he lived was accurate, and that he identified Mr. Murillo as "Cousins" in a photo line-up. (CP 109). However, this information merely corroborates that Mr. Whitney knew who Mr. Murillo was; it does not corroborate that Mr. Murillo's involvement with the white Mitsubishi. Mr. Whitney and Ms. Ross could have just selected Mr. Murillo to take the fall for the crimes involving the white Mitsubishi; it means nothing in terms of credibility of the information they provided the police regarding Mr. Murillo's involvement with the vehicle that Mr. Whitney knew where Mr. Murillo lived, what he drove, and what he looked like.

The second prong of the *Aguilar-Spinelli* test, requiring informant veracity, is not established here. Therefore, there was no probable cause to arrest Mr. Murillo. Without a lawful custodial arrest, officers did not have authority to search Mr. Murillo. *See Gaddy*, 152 Wn.2d at 70. The trial court erred in denying Mr. Murillo's motion to suppress the methamphetamine found on his person. *See State v. Ladson*, 138 Wn. 2d 343, 359, 979 P.2d 833 (1999) (stating "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed."). Mr. Murillo's conviction should be reversed and dismissed with prejudice.

Issue 2: Whether the jury’s verdict does not support the sentence for possession of methamphetamine, where the to-convict instruction did not specify which controlled substance was possessed, requiring remand for resentencing to impose a misdemeanor sentence.

Mr. Murillo requests this Court consider this argument, made in the alternative, if it rejects his motion to suppress argument presented in Issue 1 above.

The jury’s verdict for possession of a controlled substance does not support the sentence for possession of methamphetamine, because the to-convict instruction did not specify which controlled substance was possessed. Remand for resentencing is required, to impose a misdemeanor sentence.

“A to-convict instruction must include all essential elements of the crime charged.” *State v. Clark-El*, 196 Wn. App. 614, 618, 384 P.3d 627 (2016) (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). “[A] ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *Smith*, 131 Wn.2d at 263. The omission of an element of a charged crime from the to-convict instruction may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415, 417 (2005). Alleged error in jury instructions is subject to de novo review. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

“When the identity of a controlled substance increases the statutory maximum sentence which the defendant may face upon conviction, that identity is

an essential element.” *Clark-El*, 196 Wn. App. at 618 (citing *State v. Goodman*, 150 Wn.2d 774, 778, 83 P.3d 410 (2004); *Sibert*, 168 Wn.2d at 311-12 (plurality opinion)). The identity of the controlled substance is an essential element of the offense of unlawful possession of a controlled substance (methamphetamine) under RCW 69.50.4013(1). *State v. Gonzalez*, 2 Wn. App. 2d 96, 105-10, 408 P.3d 743 (2018).³

In *Gonzalez*, the defendant was charged with unlawful possession of a controlled substance (methamphetamine), under RCW 69.50.4013. *Id.* at 101. The to-convict instruction stated “the defendant possessed a controlled substance[.]” *Id.* at 104. It did not specify the nature of the controlled substance, but it did refer to the offense “as charged in Count II.” *Id.* On appeal, Division II agreed with the defendant “that because RCW 69.50.4013 imposes different statutory maximum sentences for possession of certain quantities of marijuana and otherwise authorizes possession of recreational and medical marijuana, the identity of the controlled substance that the defendant possessed is an essential element of the crime of unlawful possession of a controlled substance.” *Id.* at 105-06. The court reasoned that “RCW 69.50.4013(2), (3), and (5) have the effect of imposing different maximum sentences based on the type and amount of the controlled substance possessed.” *Id.* at 110. The court further reasoned

³ The defendant/appellant in *State v. Gonzalez* filed a Petition for Review on February 20, 2018. At the time this Opening Brief was filed, the Petition for Review had not yet been considered by the Washington Supreme Court.

“[w]ithout specifying the identity of the controlled substance, the to-convict instruction could allow the jury to convict a defendant and impose a class C sentence based on the possession of *any* controlled substance, including any amount of *marijuana*.” *Id.*

Thus, the *Gonzalez* court found “the omission of the essential element of the identity of the controlled substance from the to-convict instruction is error.” *Id.* at 111. The court held “the error in omitting the essential element of the identity of the controlled substance is subject to a harmless error analysis as to the conviction but . . . an unauthorized sentence is not subject to a harmless error analysis.” *Id.* at 112.

With respect to the sentence, the court found “[w]ithout a finding regarding the nature of the controlled substance, the jury’s verdict did not provide a basis upon which the trial court could impose a sentence based on possession of methamphetamine.” *Id.* at 114 (citing *Clark-El*, 196 Wn. App. at 624). The court reasoned “[t]he jury’s finding that [Gonzalez possessed] an unidentified ‘controlled substance’ authorized the court to impose only the lowest possible sentence for [unlawful possession of a controlled substance.]” *Id.* (quoting *Clark-El*, 196 Wn. App. at 624) (second and third alterations in original). The court remanded the case for “resentencing on the unlawful possession of a controlled substance conviction to impose a misdemeanor sentence. . . .” *Id.* at 114, 116.

Here, as in *Gonzalez*, Mr. Murillo was charged with unlawful possession of a controlled substance (methamphetamine), under RCW 69.50.4013. (CP 1-2). Also as in *Gonzalez*, the to-convict instruction given to the jury did not require proof that the controlled substance possessed by Mr. Murillo was methamphetamine. (CP 89; 2 RP 86). Instead, it merely required proof that Mr. Murillo “possessed a controlled substance.” (CP 89; 2 RP 86). Further, unlike *Gonzalez*, the to-convict instruction given here makes no reference to the offense “as charged.” (CP 89; 2 RP 86); *see Gonzalez*, 2 Wn. App. 2d at 104 (the to-convict instruction referred to the offense “as charged in Count II.”); *see Clark-El*, 196 Wn. App. at 619-20 (in finding the to-convict instruction omitted an essential element, noting that it did not include the “as charged” language). Therefore, the jury’s finding that Mr. Murillo possessed an unidentified controlled substance authorized the trial court to impose only the lowest possible sentence for unlawful possession of a controlled substance, which is a misdemeanor sentence. *See Gonzalez*, 2 Wn. App. 2d at 114 (quoting *Clark-El*, 196 Wn. App. at 624); *see also* RCW 69.50.4013(2) (“Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.”); RCW 69.50.4014 (“Except as provided in RCW 69.50.401(2)(c) or as otherwise authorized by this chapter, any person found guilty of possession of forty grams or less of marijuana is guilty of a misdemeanor.”).

Including the “as charged in Count I” language in the verdict form does not remedy the error in the to-convict instruction. (CP 97); *see, e.g., State v. Ibrahim*, No. 75770-9-I, 2018 WL 418894, at *2-3 (Wash. Ct. App. Jan. 16, 2018) (finding that including the “as charged” language in the jury verdict does not remedy the error in the to-convict instruction); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). “[A] reviewing court may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). “[T]he jury has a right to regard the ‘to convict’ instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction.” *Mills*, 154 Wn.2d at 8 (quoting *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002)).

“The constitutional right to jury trial requires that a sentence must be authorized by a jury’s verdict.” *Gonzalez*, 2 Wn. App. 2d at 113 (quoting *Clark-El*, 196 Wn. App. at 624) (internal quotation marks omitted). The sentence for possession of methamphetamine imposed here was not authorized by the jury verdict. Remand for resentencing is required, to impose a misdemeanor sentence.

Issue 3: Whether the judgment and sentence contains two errors that should be corrected, where it indicates that a violation of the Judgment and Sentence is punishable by up to 60 days of confinement per violation under RCW 9.94A.634, and that Mr. Murillo is required to register as a felony firearm offender.

The judgment and sentence contains two errors that should be corrected. First, it indicates “[a]ny violation of this Judgment and Sentence is punishable by up to 60 days confinement per violation. RCW 9.94A.634[.]” (CP 119). RCW 9.94A.634 was recodified as RCW 9.94B.040, effective August 1, 2009. *See* Laws of 2008, ch. 231, § 56. “RCW 9.94B.040 applies only to crimes committed prior to July 1, 2000.” *State v. Bigsby*, 189 Wn.2d 210, 214, 399 P.3d 540 (2017). The crime on appeal here was committed on August 24, 2017, well after July 1, 2000. (CP 1-2, 97). Therefore, this provision authorizing sanctions under the former RCW 9.94A.634 should be stricken.

Second, the judgment and sentence indicates “[t]he defendant is required to register as a felony firearm offender.” (CP 119). However, the trial court did not impose this requirement at sentencing. (3 RP 4-10). Furthermore, felony firearm offender registration applies only to convictions for felony firearm offenses; it does not apply to a conviction for possession of a controlled substance. *See* RCW 9.41.330(1) (governing felony firearm offender registration). Therefore, the felony firearm offender registration requirement should be stricken.

The remedy for errors in the judgment and sentence is remand to the trial court for correction of the errors. *See, e.g., State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the terms of confinement imposed); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence). This court should remand this case to the trial court for correction of the judgment and sentence to strike the following provisions:

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days confinement per violation. RCW 9.94A.634

.....

5.6b FELONY FIREARM OFFENDER REGISTRATION. The defendant is required to register as a felony firearm offender. The specific registration requirements are in the “Felony Firearm Offender Registration” attachment.

(CP 119).

Issue 4: Whether this Court should deny costs against Mr. Murillo on appeal in the event the State is the substantially prevailing party.

Mr. Murillo preemptively objects to any appellate costs being imposed against him, 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 (2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court imposed only mandatory costs. (CP 115, 124; 3 RP 8-9). An order finding Mr. Murillo indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 129-131; 3 RP 10). To the contrary, Mr. Murillo's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Murillo remains indigent. His report as to continued indigency shows that he has no income from any source.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). 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, the 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 serious 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 successfully rehabilitate 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 *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, the trial court imposed only mandatory costs and entered an Order of Indigency, and Mr. Murillo's Report as to Continued Indigency demonstrates a continued inability to pay costs. (CP 129-131; 3 RP 10).

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 said, "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. Mr. Murillo met this standard for indigency. (CP 129-131; 3 RP 10).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 129-131. “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) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Murillo to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Murillo’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Murillo remains indigent.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains

in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Murillo's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Murillo remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

Mr. Murillo's conviction should be reversed and dismissed with prejudice, because the trial court erred in denying his motion to suppress, where the information provided by the informants did not provide probable cause for Mr. Murillo's arrest.

In the alternative, because the jury's verdict for possession of a controlled substance does not support the sentence for possession of methamphetamine, remand for resentencing is required, to impose a misdemeanor sentence.

At a minimum, this matter should be remanded to the trial court for correction of the judgment and sentence to strike the provisions indicating that a violation of the Judgment and Sentence is punishable by up to 60 days of

confinement per violation under RCW 9.94A.634, and that Mr. Murillo is required to register as a felony firearm offender.

Mr. Murillo also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 23rd day of May, 2018.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

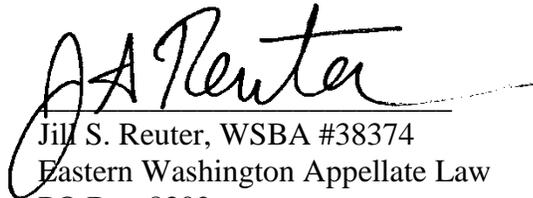
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35696-5-III
vs.) Benton Co. No. 17-1-00987-7
)
ENRIQUE MURILLO, JR.) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 23, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Enrique J. Murillo, Register Number 30995-051
FCI Sheridan
Federal Correctional Institution
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Sheridan, OR 97378

Having obtained prior permission, I also served a copy on the Benton County Prosecutor's Office at prosecuting@co.benton.wa.us using the Washington State Appellate Courts' Portal.

Dated this 23rd day of May, 2018.


Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 731-3279
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

May 22, 2018 - 11:05 PM

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Appellate Court Case Number: 35696-5
Appellate Court Case Title: State of Washington v. Enrique Murillo, Jr.
Superior Court Case Number: 17-1-00987-7

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