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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36458-5-III

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STATE OF WASHINGTON, Respondent,

v.

DEVIN ADAM WOOD, Appellant.

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**APPELLANT'S BRIEF**

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Andrea Burkhardt, WSBA #38519  
Two Arrows, PLLC  
8220 W. Gage Blvd #789  
Kennewick, WA 99336  
Phone: (509) 572-2409  
Andrea@2arrows.net  
Attorney for Appellant

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## **I. INTRODUCTION**

The State successfully prosecuted Devin Wood for maintaining a drug property under RCW 69.50.402(1)(f). Insufficient evidence supports the conviction as to at least one of the alternative means of committing it. Additionally, discretionary legal financial obligations were improperly imposed. The conviction should be reversed and the case remanded.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** Insufficient evidence supports the conviction for maintaining a drug property contrary to RCW 69.50.402(1)(f).

**ASSIGNMENT OF ERROR NO. 2:** The trial court erred in imposing discretionary legal financial obligations without finding Wood had the ability to pay them.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** Whether the State's evidence was sufficient to establish both alternative means of the crime of maintaining a drug house.

**ISSUE NO. 2:** Whether the trial court conducted an adequate inquiry into Wood's ability to pay discretionary legal financial obligations.

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

A confidential informant allegedly conducted three controlled buys of controlled substances from Devin Wood with the support of several law enforcement officers assigned to the Columbia River Drug Task Force. I RP<sup>1</sup> 70, 73-74, 79, 132, 135, 143, 144, 148, 153, 156, 157, 170, 171, 173, 176. Wood lived with his girlfriend in an outbuilding on his parents' property where the buys allegedly occurred. I RP 74, 118, 172, 174, 176. On the first alleged buy, the informant testified that Wood, his girlfriend, and an unknown third party were present. I RP 185. During the second alleged buy, the informant described having to wait outside because there were other people inside the outbuilding. I RP 86, 174, 189. On the third alleged buy, the informant said there were a few people outside that he knew and a couple of people inside. I RP 176, 193. The informant never used drugs inside Wood's building and never described seeing anybody else do so. I RP 189.

After conducting the operations with the informant, the law enforcement officers obtained a search warrant for Wood's outbuilding

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<sup>1</sup> The Verbatim Reports of Proceeding consist of two volumes, consecutively paginated, containing pretrial and trial proceedings reported by Barbara J. Scoville, CCR, and one volume of sentencing proceedings, non-consecutively paginated to the trial proceedings, reported by Karen Komoto, CCR. For clarity, this brief will reference the trial proceedings by volume and page number as "[Vol.] RP [page]" and will separately designate the sentencing proceedings as "RP (Sentencing) [page]."

and executed it a week after the last alleged buy. I RP 83, 91. They found some cash bundles that they believed were proceeds of drug sales, a 10-dollar bill that was allegedly used as buy money during the third controlled buy, and a tooter,<sup>2</sup> a scale, and a baggie that each had drug residue on them. I RP 96, 117, 126. Otherwise, they did not find quantities of drugs for sale, baggies, or ledgers. I RP 107, 117, 119.

Police claimed that after being read his *Miranda* warnings, Wood confessed to dealing drugs and named some of his suppliers and customers, although he did not name the informant as a customer. I RP 93-95, 119, II RP 245. The conversation was not recorded and Wood denied it happened, claiming he admitted that he was a drug addict but denied that he sold drugs. II RP 273, 275. He also testified that the cash police recovered was cash he earned doing janitorial work for his parents' business. II RP 262, 268. 274.

The State charged Wood with four counts<sup>3</sup> of delivering a controlled substance, one count of possessing a controlled substance for the residue on the items found during the search warrant execution, and

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<sup>2</sup> According to [www.urbandictionary.com](http://www.urbandictionary.com), a "tooter" is "[a] thinly shaped cylinder used to put any manner of powder into your nose from a flat surface."

<sup>3</sup> One of the purported controlled buys involved two different controlled substances, and so was charged as two separate counts. I RP 82; CP 5-6.

one count of maintaining a drug property contrary to RCW 69.50.402(1)(f). CP 4-7. The “to convict” instruction for maintaining a drug property provided that the jury could convict if it found Wood knowingly maintained the property “for the purpose of using controlled substances, or . . . for keeping or selling controlled substances.” CP 43. The jury was unable to reach a verdict on the four delivery counts<sup>4</sup> but convicted Wood of possessing heroin and maintaining a drug house. II RP 368, 372, CP 60-61.

At sentencing, the court confirmed Wood’s trial testimony that he earned \$1,500 per month from his parents and conducted no further inquiry into his ability to pay legal financial obligations. RP (Sentencing) 10. Notably, Wood had testified at trial that he received food stamps in addition to his wage. II RP 276. The trial court imposed \$1,150 in legal financial obligations including a \$200 criminal filing fee and \$450 for Wood’s court-appointed attorney. RP (Sentencing) 10, CP 67-68. It imposed a maximum term sentence of 24 months confinement followed by 12 months of community custody. CP 65-66. Wood now appeals and has been found indigent for that purpose. CP 76, 78.

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<sup>4</sup> Review of the case docket in the Judicial Information System indicates that no action has been taken to retry Wood on these counts, and the court dismissed them at sentencing. CP 65.

## V. ARGUMENT

A. Insufficient evidence supports one of the alternative means of violating RCW 69.50.402(1)(f) submitted to the jury.

The State charged Wood with violating RCW 69.50.402(1)(f), which reads:

It is unlawful for any person . . . Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

The statute establishes two alternative means by which the crime can be committed – by allowing others to use drugs on the property, or by using the property to store or sell drugs. *See State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997). When the State charges an alternative means crime and the jury is instructed on both means, it must present substantial evidence of both alternative means to sustain the conviction. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). Evidence is substantial if it is sufficient for a rational jury to find the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the State. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

To convict a defendant under the “use” prong of RCW 69.50.402(1)(f), the State must prove that someone other than the defendant used drugs in the house. *Fernandez*, 89 Wn. App. at 300. The alleged drug activity must be of a continuing and recurring nature, and the evidence must show that the drug activity is a substantial purpose of maintaining the property. *State v. Menard*, 197 Wn. App. 901, 905, 392 P.3d 1105, *review denied*, 189 Wn.2d 1005 (2017); *State v. Ceglowski*, 103 Wn. App. 346, 352-53, 12 P.3d 160 (2000).

Here, the jury was unable to find beyond a reasonable doubt that Wood had delivered any controlled substances as the State alleged. II RP 368, 372. However, assuming the evidence would have been sufficient to convict under the “keeping and selling” alternative even absent convictions for delivery, the evidence fails to establish that any person other than Wood used drugs on the premises. Although the confidential informant testified to seeing several other people inside and outside the outbuilding, he did not testify at any time to seeing other people use drugs there on any occasion, let alone on multiple occasions. Wood’s own drug use in his room is insufficient to satisfy the “use” alternative. *Fernandez*, 89 Wn. App. at 300.

In *Fernandez*, the State did not present evidence that any person other than the named defendants used drugs on the property. 89 Wn. App. at 300. Because the State did not elect which of the alternative means it intended to rely upon to convict, and the verdict form did not establish which prong the jury relied upon, the conviction was reversed and remanded for trial only on the “keeping and selling” prong. *Id.* at 300.

*Fernandez* controls the outcome in this case. The conviction for maintaining a drug property must be reversed and if the State intends to retry Wood, it must proceed under the “keeping and selling” prong only.

B. Discretionary legal financial obligations should be stricken in light of Wood’s testimony that he received food stamps.

Trial courts may not impose discretionary legal financial obligations unless a defendant has the likely present or future ability to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). To make this determination, the trial court must make an individualized inquiry into a defendant’s ability to pay discretionary LFOs before imposing them, and the inquiry must, at a minimum, consider the effects of incarceration and other debts, as well as whether the defendant meets the GR 34 standard for indigency. *Blazina*, 182 Wn.2d at 838-39; *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018).

Under recently-enacted House Bill 1783, trial courts may not impose the \$200 criminal filing fee on defendants who are indigent under RCW 10.101.010(3)(a)-(c). *Ramirez*, 191 Wn.2d at 747; RCW 36.18.020(2)(h). House Bill 1783 applies to Wood's case because it became effective while his appeal was pending. *Ramirez*, 191 Wn.2d at 747. Wood testified at trial that he received food stamps, which renders him indigent under RCW 10.101.010(3)(a). II RP 276. Accordingly, the criminal filing fee should be stricken.

Similarly, because RCW 10.01.160(3) now prohibits the sentencing court from imposing costs if the defendant is indigent at sentencing, the attorney fee assessment should not have been imposed. Imposing discretionary LFOs without an individualized inquiry is an abuse of the court's discretion. *Ramirez*, 192 Wn.2d at 741. The trial court here did not inquire into Wood's past work experience, income, assets and other financial resources, monthly expenses, or other debts. *See id.* at 744 (describing adequate inquiry). Moreover, Wood was indigent under RCW 10.101.010(3)(a). Accordingly, the inquiry was insufficient to support the attorney fee assessment and it should be stricken.

**VI. CONCLUSION**

For the foregoing reasons, Wood respectfully requests that the court REVERSE his conviction for maintaining a drug house and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 18 day of April, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Devin Wood, DOC #869885  
Ahtanum View Work Release  
2009 S. 64<sup>th</sup> Ave.  
Yakima, WA 98903

Douglas J. Shae  
Attorney at Law  
PO Box 2596  
Wenatchee, WA 98807

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

Signed this 19 day of April, 2019 in Kennewick, Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

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Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net  
Address:  
8220 W. GAGE BLVD #789  
KENNEWICK, WA, 99336  
Phone: 509-572-2409

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