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NO. 70203-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH R. BURNETT,

Appellant.

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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## **I. ASSIGNMENT OF ERROR**

The trial court erred in imposing a fine of only \$1,000.

## **II. ISSUES**

### **A. ISSUE RELATED TO DEFENDANT'S APPEAL.**

When a sentencing court imposes a drug fine under RCW 69.50.430, is the court required to make an affirmative finding of ability to pay?

### **B. ISSUE RELATED TO STATE'S CROSS APPEAL.**

Under RCW 69.50.430, can the sentencing court reduce a drug fine, when the record does not affirmatively show that the defendant was indigent at the time of sentencing?

## **III. STATEMENT OF THE CASE**

The appellant, Kenneth Burnett, was charged with one count of possession of a controlled substance to wit: heroin, on July 25, 2012. CP 41-44. The defendant entered a plea of guilty to the original charge on February 25, 2013. CP 25-40, 14. At the plea hearing, the defendant requested the opportunity to be screened for work release. RP 2/25/13, 5. The defendant was sentenced on March 26, 2013. CP 14-24.

At the sentencing hearing, Mr. Burnett's attorney advised the court that Mr. Burnett was indigent, stating that although he had

some work history in the past, he had not been employed for some time. RP 3/26/13, 3. The defendant declined to make any statements to the court. RP 3/26/13, 3-4.

The parties agreed to a recommendation of 7 months confinement, but disagreed as to the legal financial obligations. RP 3/26/13, 2. The state requested the court impose a \$2,000 fine, court costs, attorney's fees, \$100 biological sample fee and the \$500 victim assessment. RP 3/26/13, 2. The \$2,000 fine was based on Mr. Burnett having a prior VUCSA – possession (cocaine) conviction. CP 15 and 39.

Paragraph 4.3 of the judgment and sentence addresses the legal financial obligations imposed by the court. CP 19. The court waived court costs and court appointed attorney's fees. CP 19. The court imposed a \$1,000 fine under RCW 9A.20.021 and RCW 69.50.430. CP 19. The court also imposed the mandatory \$500 victim assessment and the \$100 Biological Sample Fee. CP 19.

#### **IV. ARGUMENT**

##### **A. ARGUMENT ON DEFENDANT'S APPEAL.**

##### **1. Imposition Of A Fine Under RCW 69.50.430 Does Not Require An Affirmative Showing Of Ability To Pay.**

The defendant challenges the imposition of the \$1,000 fine under RCW 9A.20.021 and RCW 69.50.430 due to insufficient facts

in the record to support the conclusions in paragraph 2.5 of the judgment and sentence. Appellant's brief, pg 1.

However, the \$1,000 fine in question was imposed under RCW 9A.20.021 and RCW 69.50.430. There is no statutory requirement for the court to assess a defendant's future ability to pay when imposing fines under RCW 9A.20.021. In Calvin, although the court found RCW 10.01.160 applied to the court costs, it found the trial court had no such obligation with regard to the fine. "Calvin also challenges the imposition of a \$250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the trial court enter findings or even take into account a defendant's financial resources before imposing a fine. Calvin has not articulated any basis for striking the fine." State v. Calvin, \_\_\_ Wn. App. \_\_\_, 302 P.3d 509, 522 (2013). As with Calvin, Mr. Burnett has not articulated any basis for striking the \$1,000 fine imposed by Judge Bowden.

## **B. ARGUMENT ON STATE'S CROSS APPEAL.**

### **2. Since The Defendant Did Not Affirmatively Establish His Indigence, RCW 69.50.430 Did Not Allow The Sentencing Judge To Reduce The Drug Fine.**

The \$1,000 fine imposed by the sentencing court was imposed under RCW 69.50.430 which states in relevant part, "On a second or subsequent conviction for violation of any of the laws listed in subsection (1) of this section, the person shall be fined two thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the person to be indigent, this additional fine shall not be suspended or deferred by the court." RCW 69.50.430(2). Mr. Burnett has been previously convicted of a VUCSA offense. Although Mr. Burnett's defense counsel asserted he was indigent, there is nothing in the record to support a finding of indigence at the time of sentencing as required to waive all or part of the mandatory \$2,000 fine. The court did not inquire about the defendant's economic situation such as when the last time he held a job, what his expenses were, what his assets were, bank accounts, spousal income, if any, etc. The defendant did not offer any information to support a claim of indigency. The court noted there had been evidence of dealing when imposing half of the mandatory fine. It is likely the court was referring to the ill-gotten

gains of drug dealing that were likely available to the defendant at the time of sentencing. This does not support a finding of indigency for purposes of waiving half of the fine.

In other words, the trial court assesses the defendant's financial wherewithal as he or she stands before the court, not as it was in the past, or as it will be as a result of his or her incarceration. Here, no meaningful discussion occurred as to Mr. Mayer's current assets, his credit history, or other potential economic resources....The trial court's finding was devoid of supporting evidence indicating Mr. Mayer was indigent at the time of sentencing.

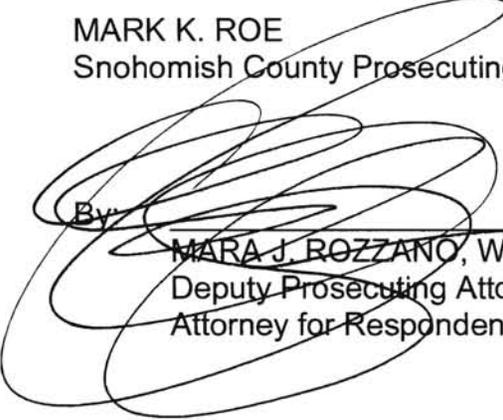
State v. Mayer, 120 Wn. App. 720, 728, 86 P.3d 217, 221 (2004) citing, State v. Rutherford, 63 Wn.2d 949, 954, 389 P.2d 895 (1964). See also, State v. Cowin, 116 Wn. App. 752, 760, 67 P.3d 1108, 1113 (2003). ("Since there is no evidence that the trial court made a finding of indigency, it erred in failing to fine Kelli Cowin \$1000.")

**V. CONCLUSION**

For these reasons, the matter should be remanded for resentencing for the imposition of the entire \$2,000 drug fine.

Respectfully submitted on December 3, 2013.

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By: 

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Handwritten mark: a large 'H' with a diagonal slash through it, and a date stamp 'DEC 11 2013'.

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THE STATE OF WASHINGTON,  
  
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No. 70203-3-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 4<sup>th</sup> day of December, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 4<sup>th</sup> day of December, 2013.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit