NO. 44256-6-II

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

STATE OF WASHINGTON, Respondent

v.

JESSICA MARIE SWEARINGEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-02095-1

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Jessica Swearingen (hereafter 'Swearingen') was charged by Amended Information with Possession of a Controlled Substance-Methamphetamine, Possession of a Controlled Substance-Cocaine, Possession of a Controlled Substance-Over 40 Grams of Marijuana, Possession of a Controlled Substance by Prisoners or Jail Inmate, Obstructing a law enforcement officer, and Bail Jumping on a Class B or C felony. CP 1-2. These charges arose out of a traffic stop on Swearingen's vehicle that occurred on December 26, 2010. 1 RP at 5-6.

Trooper Richard Bettger of the Washington State Patrol was on patrol and observed Swearingen's vehicle travelling in excess of the speed

limit. 1 RP at 4, 6. He also noted Swearingen's vehicle did not have headlights on even though it was dark outside. 1 RP at 7. After stopping the vehicle and approaching, Swearingen handed Trooper Bettger her driver's license. 1 RP at 11. On his first observation, Trooper Bettger observed Swearingen to appear in an "excited-ish kind of state." 1 RP at 10. While Swearingen was looking for her proof of insurance and registration, Trooper Bettger observed a nylon pouch with plastic bags sticking up out of it on the passenger side floor. 1 RP at 11-12. When asked about the nylon pouch, Swearingen picked it up and started rifling through it. 1 RP at 13. This movement caused Trooper Bettger concern for his safety. 1 RP at 13-14. As Swearingen continued rummaging through the bag, Trooper Bettger believed she was attempting to block his view. 1 RP at 14. Trooper Bettger unlatched his service weapon and commanded Swearingen to get her hands on the steering wheel. 1 RP at 14-15. Swearingen did not immediately comply; it took several commands for Swearingen to put her hands on the wheel. 1 RP at 15. However, Swearingen would not keep her hands on the wheel and she made a sudden movement twisting away from Trooper Bettger and blocking his view. 1 RP at 25. When she moved back, she tossed a plastic baggie towards him on the passenger side seat and said, "here, you can have the—you can have the marijuana then." 1 RP at 25. Trooper Bettger

observed the contents of the baggie to be consistent with marijuana, and could smell the odor coming through the vehicle window. 1 RP at 26. Trooper Bettger decided to arrest Swearingen for unlawful possession of marijuana, though he was waiting for backup to arrive.1 RP at 27.

Swearingen continued to make furtive movements inside the vehicle so Trooper Bettger decided for safety purposes he needed to remove her from the vehicle even though his backup had not yet arrived. 1 RP at 28-30. When he told Swearingen to exit, she rolled the window of the vehicle up and locked the door. 1 RP at 30. Trooper Bettger yelled that she was under arrest and to unlock the door and exit the vehicle. 1 RP at 30. Swearingen did not comply. 1 RP at 30. Trooper Better gave her five more commands to exit the vehicle and she continued to not comply. 1 RP at 30-31. Trooper Bettger told her he would use his baton to break the window to her vehicle because she continued to have a lot of movement within the vehicle. 1 RP at 31-32. After that threat, Swearingen stepped out of the vehicle. 1 RP at 33. Trooper Bettger placed her under arrest, handcuffed her. 1 RP at 33.

After Trooper Bettger had Swearingen arrested and handcuffed, Trooper Gardiner arrived. 1 RP at 39. Trooper Bettger performed a search of Swearingen's person incident to arrest. 1 RP at 40. He found a small baggie of suspected methamphetamine in her pants pocket. 1 RP at 41-42.

Trooper Gardiner found a small yellow pill on Swearingen that Swearingen indicated was oxycodone. 1 RP at 42-43. After the search incident to arrest, Swearingen was placed in the patrol vehicle and her vehicle was sealed with evidence tape and towed. 1 RP at 47. Swearingen was taken to the jail and searched again by a female officer and they found a suspected baggie of methamphetamine in her jacket pocket, and two more baggies of suspected methamphetamine in her bra. 1 RP at 46, 49-52.

Trooper Gardiner obtained a warrant to search Swearingen's vehicle. 1 RP at 110. Within her vehicle police found suspected marijuana in several plastic baggies and locations. CP 9. The troopers recognized the substance to be marijuana and it was admitted by Swearingen that the baggie she threw towards him contained marijuana. CP 9. The evidence log indicates that over 100 grams of marijuana was found. CP 24.

Swearingen moved to suppress the evidence found by the Troopers during the traffic stop and subsequent search warrant. Supp. CP 105. The trial court denied Swearingen's motion to suppress and entered written findings and conclusions. Supp. CP 136.

Swearingen missed a court date and the State filed an Amended Information adding a count of Bail Jumping. CP 1-2. Swearingen waived her right to a jury trial and proceeded on a stipulated facts trial. CP 3-10; 1

RP at 181, 215. The State and Defense agreed to stipulations included in a "Findings of Fact and Conclusions of Law for Stipulated Facts Trial." CP 6-10; 2 RP at 190-202. The trial court found Swearingen guilty of Counts 1, 3, 5 and 6. 2 RP at 214-15; CP 10. Counts 2 and 4 were dismissed on the State's motion. 2 RP at 199.

The parties attached 66 pages of law enforcement reports, lab reports and court records to the Findings of Fact and Conclusions of Law. CP 11-66. These attachments create the basis for the findings of fact and conclusions of law. CP 6.

Swearingen failed to appear for her initial sentencing hearing and after she returned to court, new counsel was appointed. 2 RP at 220-21. At the sentencing for this matter, the court took her plea to the new bail jump charge that was filed after Swearingen failed to appear for her initial sentencing hearing on this case. 2 RP at 229-32. The prosecutor recommended low end of the standard range. 2 RP at 236. The State requested the court proceed with sentencing on that date based on Swearingen's prior history of bail jumping and being late for court. 2 RP at 236. Defense requested the court consider setting the matter over for sentencing and also requested the court impose the low end of the standard range if the court was not inclined to set the matter over. 2 RP at 239.

After the prosecutor and her attorney spoke the court asked Swearingen if there was anything she wished to say. 2 RP at 240. Swearingen then addressed the court. 2 RP at 240. After Swearingen spoke, and in response to what defense counsel requested regarding setting the matter over again, the prosecutor again addressed the court and asked to proceed to sentencing at that time instead of setting the matter over. 2 RP at 240-41. At that time Swearingen whispered to her attorney "can I talk?" 2 RP at 241. Swearingen's attorney told her "no." 2 RP at 241.

The court followed the joint recommendation and sentenced Swearingen to the low end of the standard range-366 days. As part of her conditions of community custody the trial court imposed that she may not have any contact with "known felons." CP 78.

The trial court found Swearingen has the present or future ability to pay towards her legal financial obligations and imposed legal financial obligations. CP 76, 78-79. The court file includes a financial statement history of Swearingen's which shows she was employed for 7 years prior to her arrest on this case. Supp CP (sub. nom. 1).

C. ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICT FOR POSSESSION OF MORE THAN 40 GRAMS OF MARIJUANA

Swearingen argues there is insufficient evidence for the trial court to have convicted her of Possession of Marijuana over 40 grams. When the evidence admitted at trial is viewed in its totality, it is clear there is sufficient evidence to support this conviction.

Due process requires the State prove beyond a reasonable doubt all the necessary facts of the crime charged. *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1979) and *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984)). Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Bryant*, 89 Wn. App. 857, 869, 950 P.2d 1004 (1998), *rev. denied*, 137 Wn.2d 1017 (1999) (citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)).

When reviewing sufficiency of the evidence claims, this Court views the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency "admits the truth of the State's evidence and all inferences that can" be reasonably drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Swearingen specifically argues there is no evidence that the amount of marijuana was above 40 grams. First, there need not be specific lab reports which claim that a substance is a specific drug. *See State v. Colquitt*, 133 Wn. App. 789, 796-97, 137 P.3d 892 (2006) (citing to *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997)). Circumstantial evidence and lay testimony about the identity of a drug may be sufficient to establish the identity of a drug. *See Hernandez, supra.* In Swearingen's case, she admitted to stipulated facts that Trooper Bettger would testify that she told him, "here, you can have the Marijuana then," as she tossed the baggie of marijuana onto the front passenger seat. CP 7. Swearingen further admitted stipulated facts that Trooper Bettger recognized the substance to be consistent with Marijuana, based on his training and experience. CP 7. Regarding the weight of the marijuana, Swearingen agreed that the trial court could consider all the attached law enforcement reports, lab reports, and court records. CP 6, 10.[1] Within the

[1] In the "Findings of Fact and Conclusions of Law for Stipulated Facts Trial," the document refers to an additional pleading entitled "Stipulation." That document appears not to exist. It is clear from the transcript that the parties intended this document, the

documents attached to the Findings of Fact and Conclusions of Law, is a document which describes the marijuana seized and the weight of the marijuana that was found in Swearingen's possession. CP 15, 24.

The documents considered by the trial court in determining whether the State had proved beyond a reasonable doubt that Swearingen committed the crime of possessing marijuana over 40 grams detail that there was over 40 grams of marijuana. See CP 24. The Property/Evidence Report details that on December 26, 2010, police recovered "Brown sandwich baggie containing individual baggies of marijuana (12)" which weighed "109.5 gr," and "sandwich baggie containing brown substance-hash" which appears to have weighed "1.9gr." CP 24. Based on this evidence which the trial court considered, there is sufficient evidence that a rational trier of fact could have found that the element of weight of the substance of the crime of Possessing Marijuana over 40 grams was met beyond a reasonable doubt.

Swearingen's argument that there was insufficient evidence to support her conviction for Possession of Marijuana over 40 grams is without merit. Swearingen agreed to and admitted to facts contained in the Findings of Fact and Conclusions of law, and agreed to allow the court to

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"Findings of Fact and Conclusions of Law for Stipulated Facts Trial" to be the stipulated facts for the bench trial, and Swearingen does not assert otherwise in her appeal. Based on that, the 55 pages of attached law enforcement reports are those referred to in paragraph 1 of this document. CP 6-66.

consider all the law enforcement reports attached to that document. Based on those reports and the facts she agreed to, there was more than sufficient evidence to convict Swearingen of the crime of Possession of Marijuana over 40 grams. The trial court should be affirmed.

II. SWEARINGEN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL ADVISING HER NOT TO CONTINUE SPEAKING AT THE SENTENCING HEARING

Swearingen argues her attorney was ineffective for advising her not to speak further at sentencing. Swearingen characterizes this as denial of her right to allocution and ineffective assistance of counsel. However, it was wise and to Swearingen's benefit for her counsel to advise her not to speak as she had received a favorable recommendation from the State and further argument could expose a reason for the judge not to follow that recommendation and sentence her to lengthier prison term. Swearingen did not object at the time and cannot raise failure to fully allocute for the first time on appeal; her counsel was effective and had a tactical reason for advising her to stop speaking. Finally, Swearingen cannot prove any prejudice from her failure to speak as she was sentenced to the low end of the standard sentencing range. CP 77. Swearingen's allegation of ineffective assistance of counsel is without merit.

a. *Swearingen Had the Benefit of Effective Assistance of Counsel*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of

defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly

deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

From the transcript it is clear that Swearingen intended on rebutting the prosecutor's claims regarding her inability to appear in court when scheduled. 2 RP at 241. At this point in sentencing, Swearingen had already had her opportunity to tell the judge whatever she wanted regarding sentencing. 2 RP at 240. In her counsel's comments on sentencing, she requested the court set the matter over again and sentence Swearingen at a later date. 2 RP at 239. The State requested the court proceed with sentencing at that time because of Swearingen's poor attendance record. 2 RP at 240-41. Any comments Swearingen would have made at that time likely would not have been to her benefit. Her counsel made a sound strategic and tactical decision in advising Swearingen not to talk further. Her counsel made a good decision in that the trial court followed the recommendations and sentenced Swearingen to the low end of the standard range. Swearingen cannot show her counsel's performance fell below an objective standard for reasonableness, and Swearingen cannot show any prejudice. She cannot show that, but for her counsel's actions, there is a reasonable probability that her sentence would

have been different. *See In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Her claim of ineffective assistance of counsel fails.

b. *Swearingen Was Not Denied her Opportunity to Allocution and Cannot Raise this Issue for the First Time on Appeal.*

Allocution is the right of a criminal defendant to make a personal argument or statement to the court before pronouncement of sentence. *State v. Canfield*, 154 Wn. 2d 698, 701, 116 P.3d 391 (2005). RCW 9.94A.500(1) provides that the court shall conduct a sentencing hearing and at that hearing shall "allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." RCW 9.94A.500(1). A defendant's right to allocute has been codified in different forms throughout the years in the State of Washington. Under former RCW 10.64.040, the trial court was required to ask a defendant whether he have any legal cause to show why judgment should not be pronounced against him. Former RCW 10.64.040: *State v. Crider*, 78 Wn. App. 849, 855, 899 P.2d 24 (1995). This statute was superseded by former CrR 7.1(a)(1) which provided that the court "...shall ask the defendant if he wishes to make a statement in his own behalf and to

present any information in mitigation of punishment." *Crider*, 78 Wn. App. 855. CrR 7.1(a)(1) was rewritten in 1984 and recodified in CrR 7.2, with the allocution provision eliminated. *Id.* The right to allocution was once again found in former RCW 9.94A.110 which stated, "the court shall...allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." *Id.* (citing former RCW 9.94.110). Former RCW 9.94A.110 has been now transferred to RCW 9.94A.500(1), and contains the same language that the trial court shall allow arguments from the defendant prior to sentencing.

Swearingen cites to *Green v. United States*, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961) and *State v. Happy*, 94 Wn.2d 791, 620 P.2d 97 (1980) to support her argument that denial of her right to allocution is reversible error. In *Green*, the right to allocution was derived from Federal Rules of Criminal Procedure, rules which do not apply in Washington State. *State v. Snow*, 110 Wn. App. 667, 669, 41 P.3d 1233 (2002). In *Happy*, the right was derived from former CrR 7.1(a)(1), which was replaced in 1984. *Id.* The reasoning under *Green* and *Happy* does not apply to Swearingen's case as the statutory basis from which the right to allocution was derived is now different. RCW 9.94A.500(1) provides the

sole basis for the right to allocution in Washington. *See id*; RCW 9.94A.500(1).

The denial of the right to allocution is neither a constitutional nor a jurisdictional error and it is not a fundamental defect that inherently results in a complete miscarriage of justice. *Canfield,* 154 Wn.2d at 702. The failure to solicit a defendant's statement in allocution is a legal error. *State v. Ague-Masters*, 138 Wn. App. 86, 109, 156 P.3d 265 (2007) (citing *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005). *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). A defendant may not raise the right to allocution for the first time on appeal because the right to allocution is derived from state law and is not constitutional in nature. *Id; State v. Hatchie*, 161 Wn.2d 390, 405-06, 166 P.3d 698 (2007). RAP 2.5(a)(3) allows for review for the first time on appeal only those issues where constitute a "manifest error affecting a constitutional right." The Supreme Court in *Hatchie, supra*, recognizes the need for the defendant to object at the time of sentencing to preserve this issue for appeal, and denied review of this issue because Hatchie did not preserve it at the trial level. *Hatchie*, 161 Wn.2d 390.

Swearingen also cites to *State v. Roberson*, 118 Wn. App. 151, 74 P.3d 1208 (2003) for the proposition that a trial court's failure to ask a

defendant if he wishes to speak at sentencing is reversible error. However, on the issue of allowing a defendant to raise this issue for the first time on appeal, *Roberson* has been effectively overruled by *Hughes, supra.*

Mostly importantly, the trial court did ask Swearingen if there was anything she wished to say, and she spoke. 2 RP at 240. The trial court did not deny Swearingen her right to allocution: it was offered and Swearingen did have the opportunity to speak at sentencing, and did speak. 2 RP at 240. Further, neither Swearingen nor her attorney objected at any time during sentencing to any possible failure to allow her to fully speak. Swearingen cannot raise this issue for the first time on appeal, and further, even if she were able to address this on appeal, she was given her right to allocution and was not denied any rights. Her sentence should be affirmed.

III. THE COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH 'KNOWN FELONS' IS NOT UNCONSTITUTIONALLY VAGUE

Swearingen argues that the condition of her probation requiring that she refrain from contact with "known felons" is unconstitutionally vague. See Br. of Appellant, p. 17. However, the condition imposed provides adequate notice of what conduct is prohibited is not overly broad or vague. The trial court's imposition of the condition that Swearingen not have any contact with "known felons" should be affirmed.

The Sentencing Reform Act, chapter 9.94A RCW permits the trial court to impose certain prohibitions as part of a sentence. RCW 9.94A.703. It also allows a court to impose a community placement condition prohibiting contact with a "specified class of individuals." RCW 9.94A.703(3)(b). A defendant's freedom of association can be restricted while on probation if the condition is imposed "sensitively and the restriction is reasonably necessary to accomplish the essential needs of the state and public order." *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) and *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001) (quoting *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998))). A crime-related prohibition should be reversed only if it is manifestly unreasonable. *Riley*, 121 Wn.2d at 37 (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

Discouraging further criminal conduct is a goal of community placement. *Riley*, 121 Wn.2d at 38; *State v. Letourneau*, 100 Wn. App. 424, 438, 997 P.2d 436 (2000). Recurring criminal activity is a problem that can logically be discouraged by limiting contact with other known drug offenders. And along with other mandatory conditions of probation, the court may order any of the special conditions set forth in RCW

9.94A.703(3)(b) including that the defendant not have contact with "a specified class of individuals." RCW 9.94A.703(3)(b).

Swearingen's argument is similar to the argument of the defendant in *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992). In *Llamas-Villa*, the defendant argued that the condition that he not associate with persons using, possessing or dealing in controlled substances was vague or overbroad because it was not narrowly drawn. *Llamas-Villa*, 67 Wn. App. at 455. The defendant argued that it would achieve its purpose if the condition specified that he not have contact with those he knows to use, possess or deal with controlled substances. *Id.* In that case, the Court held that this provision was not overbroad or vague and that it did provide adequate notice of what conduct is prohibited. *Id.* at 456. The Court also noted that if the defendant were arrested for violating the condition he would have an opportunity to assert that he was not aware that the individuals were using, possessing or dealing in controlled substances. *Id.* (citing to former RCW 9.94A.205 (transferred to RCW 9.94A.737)).

As in *Llamas-Villa, supra*, the provision of prohibiting Swearingen from having contact with "known felons" is not overbroad or vague. It provides adequate notice of what conduct is prohibited. Swearingen's argument that this provision is unconstitutionally vague is meritless. This provision of the judgment and sentence should be affirmed.

IV. THE COURT DID NOT ERR IN FINDING SWEARINGEN HAS THE PRESENT AND FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS

Swearingen argues that the record below suggests only a finding that Swearingen does not have the ability to pay towards her legal financial obligations. However, the record does support that Swearingen is employable and therefore able to pay towards her legal financial obligations. Even if the record below did not support such a finding, the remedy would be for the trial court to enter such a finding at a later time, prior to any attempts to collect on the discretionary legal financial obligations. Swearingen's argument that the finding of the trial court of his ability to pay should be vacated is without merit.

Swearingen does not distinguish between mandatory and discretionary legal financial obligations in her argument. This distinction is important. For mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these legal financial obligations. The legislature has directed expressly that a defendant's ability to pay should not be taken into account for victim restitution, victim assessments, DNA fees and criminal filing fees. *See, e.g., State v. Kuster*, 175 Wn. App. 420, ___ P.3d ___ (2013). Swearingen's total financial obligations are outlined on pages 5 and 6 of her judgment and sentence. CP 78-79. The $500.00 victim

assessment is required by RCW 7.68.035(1)(a), the $100.00 DNA collection fee is required by RCW 43.43.7541, and the $200.00 filing fee is required by RCW 36.18.020(2)(h) irrespective of the defendant's ability to pay. *See State v. Curry*, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009).

For the discretionary legal financial obligations, such as court costs and fees, the trial court must consider the defendant's present or likely future ability to pay. *Curry*, 118 Wn.2d at 915-16. RCW 10.01.160, the statute codifying our State's court costs and fee structure does not "require[] a trial court to enter formal, specific findings regarding a defendant's ability to pay [discretionary] court costs." *Id.* at 916. This finding may be reviewed on appeal under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404, n. 13, 267 P.3d 511 (2011) (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991), *modified by* 837 P.2d 646 (1992)). A trial court's finding is "clearly erroneous" when "review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). There was evidence in the record in Swearingen's case

to support a finding that she has the likely future ability to pay towards her legal financial obligations. The trial court did not clearly err in making this finding and it should not be disturbed.

The trial court was aware that Swearingen had been employed for the seven years prior to her arrest in this case. See Supp. CP (sub. nom. 1). The State's burden in establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one. *See e.g., State v. Baldwin*, 63 Wn. App. at 312. In *Baldwin*, the court upheld the finding of ability to pay based on one statement contained in a presentence report that the defendant described himself as employable and should be held accountable for legal financial obligations. *Baldwin*, 63 Wn. App. at 311.

As in *Baldwin*, the fact of Swearingen's employability is sufficient to support the trial court's finding of her ability to pay. Based on the fact that immediately prior to being arrested on her current offense Swearingen was currently employed and had been for seven years shows that she is employable and should be held accountable for the legal financial obligations imposed by the court. The State met the burden of establishing Swearingen's ability to pay. Swearingen's allegation that the finding of ability to pay was entered without factual support is without merit.

Even if this court finds that the trial court's finding was clearly erroneous, the remedy is simply that the trial court must make a finding at a later time of Swearingen's ability to pay prior to collecting any of the discretionary legal financial obligations. In *State v. Bertrand, supra,* the Court of Appeals held the trial court's finding that the defendant had the ability to pay was clearly erroneous because the trial court did not 'take into account the financial resources of the defendant and the nature of the burden' imposed by LFOs...." *Bertrand*, 165 Wn. App. at 404 (citing *State v. Baldwin*, 63 Wn. App. at 312). However, even though it was erroneous for the trial court to make that finding, and the Court of Appeals reversed that finding, the Court of Appeals did not strike or reverse the imposition of legal financial obligations. *Bertrand,* 165 Wn. App. at 405. The Court held in *Bertrand, supra*, that the trial court must make a determination at a later time that the defendant is able to pay before any of the financial obligations may be collected. *Id.* at fn 16. The more appropriate and "meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." *Baldwin*, 63 Wn. App at 310 (citing *State v. Curry*, 62 Wn. App. at 680).

Swearingen's argument that the finding of the trial court of her ability to pay should be vacated is without merit. The finding was based on evidence within the record below and this evidence met the low

threshold of proof required to show Swearingen has a future ability to pay. The trial court's finding of her ability to pay should be affirmed.

D. CONCLUSION

When all the evidence is viewed in the light most favorable to the State, sufficient evidence supports the court's guilty verdict for Possession of Marijuana over 40 grams. The trial court did not err in imposing appropriate conditions of Swearingen's community custody and for finding that she has the present and future ability to pay towards her legal financial obligations. Further, Swearingen received the benefit of effective counsel when she was appropriately advised not to speak further given the situation with regards to sentencing. Swearingen's assignments of error are without merit and the trial court should be affirmed in all respects.

DATED this 1st day of September, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
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Clark County, Washington

By: _____
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CLARK COUNTY PROSECUTOR

September 13, 2013 - 11:04 AM

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