NO. 46297-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY RICHTER,

Appellant.

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

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to hold a CrR 3.5 hearing to consider the voluntariness of appellant's confession to police.

2. The trial court erred in denying appellant's motion for a mistrial after a police witness testified to appellant's confession without the benefit of a CrR 3.5 hearing.

3. The trial court erred in imposing consecutive school zone sentencing enhancements.

4. The trial court erred in imposing an exceptional sentence that is clearly excessive.

5. The trial court erred in finding appellant had the current or future ability to pay legal financial obligations (LFOs).

6. The trial court's conclusion that appellant had the ability to pay LFOs is unsupported by the record.

7. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

1. The trial court did not hold a pretrial CrR 3.5 hearing to consider the voluntariness of appellant's confession to police. At trial, a police witness revealed appellant's confession during cross-examination.

Did the trial court err in denying appellant's motion for a mistrial when his confession caused incurable prejudice?

2. RCW 9.94A.533(6) mandates that school zone sentencing enhancements run consecutively to "all other sentencing provisions." But it does not expressly state that school zone enhancements run consecutively to one another, unlike other enhancements in RCW 9.94A.533. Did the trial court exceed its statutory authority in running three school zone enhancements consecutively rather than concurrently with one another?

3. Is appellant's exceptional 240-month sentence for multiple offenses clearly excessive where police controlled the number of drug buys involving the same confidential informant and very small amounts of methamphetamine over a short period of time?

4. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary LFOs as part of appellant's sentence without first considering his present, past, and future ability to pay, thus making the LFO order erroneous?

5. Was appellant's trial counsel ineffective for failing to object to the imposition of discretionary LFOs?

B. STATEMENT OF THE CASE

On April 17, 2014, the Cowlitz County prosecutor charged Randy Richter with four violations of the Uniform Controlled Substances Act, chapter 69.50 RCW. CP 12-15. Specifically, the State alleged three counts of methamphetamine delivery within 1,000 feet of a school bus stop and one count of methamphetamine possession with intent to deliver. CP 13-14. The State also alleged the aggravating factor that Richter's multiple current offenses and high offender score would result in some of the current offenses going unpunished, pursuant to RCW 9.94A.535(2)(c).

The delivery charges arose from three controlled buys orchestrated by the Longview Police Department with the help of a confidential informant (CI), Natalie Curley. Curley agreed to work as a CI to avoid a felony possession of methamphetamine charge. 2RP 44-45.[1] The police asked Curley who she could potentially buy drugs from, and she identified several people, including Richter. 2RP 47. At the direction of police, Curley initiated three transactions with Richter, on June 21, July 5, and July 11, 2013. 2RP 48, 88-89, 106, 117. Curley admitted she used heroin two to four times a day while working as a CI. 2RP 72.

[1] This brief refers to the verbatim reports of proceedings as follows: 1RP – August 29, 2013 through April 24, 2014; 2RP – April 24, 2014; 3RP – April 25, 2015 and May 15, 2014.

Each controlled buy was the same. Detective Rocky Epperson conducted a pat-down search of Curley before each buy and gave her $40 to purchase methamphetamine. 2RP 82, 90-94, 107-08, 117-19. Curley then met Richter in a Big Lots parking lot in Longview, Washington. 2RP 90, 107-09, 120, 184. Richter arrived in a maroon Ford Explorer each time. 2RP 56, 64, 96, 184. Curley and Richter then traded $40 for methamphetamine in hand-to-hand exchanges. 2RP 98-100, 115, 122, 175-77, 185-86. On the third buy, Richter had an unidentified passenger with him. 2RP 68. Police observed Curley during each transaction. 2RP 95, 107-09, 120-21, 179, 185. The weight of methamphetamine from each buy was 0.9 grams, 0.6 grams, and 0.3 grams, respectively. 3RP 30-31, 35, 39.

The final charge for possession with intent to deliver arose from Richter's arrest on August 28, 2013. CP 14; 2RP 134-36. Detective Epperson pulled Richter over in the same maroon Ford Explorer and placed him under arrest. 2RP 134-36. The vehicle was transported to the Longview Police Department and searched the next day. 2RP 136. Police found a backpack on the front passenger seat that contained a digital scale with crystal residue on it, baggies, and a lockbox with one gram of methamphetamine inside. 2RP 137, 158; 3RP 42. However, there was nothing in the backpack, like addressed mail or other personal items, to

connect the backpack to Richter. 2RP 158. Nor did the State produce a vehicle registration identifying Richter as the owner. 3RP 118.

Curley testified at trial, as did Detective Epperson and several other Longview police officers who participated in the controlled buys. 2RP 43, 82, 162, 173; 3RP 4. Testimony also established two school bus stops were within 1,000 feet of the Big Lots parking lot. 3RP 49, 53.

The trial court did not hold a CrR 3.5 hearing to consider the voluntariness of any of Richter's statements to police, because the State did not intend to introduce any. 2RP 4-5. However, during Detective Epperson's testimony, defense counsel asked Epperson whether he found any items in the backpack indicating Richter was the owner. 2RP 158. Epperson responded, "No, it was sitting on the passenger seat right near some automotive type things," and then added, "[t]hat Mr. Richter told me were his." 2RP 158. Defense counsel objected. 2RP 158. The trial court sustained, struck the remark about Richter's confession, and ordered the jury to disregard it. 2RP 158. At the close of proceedings that day, defense counsel moved for a mistrial, arguing Richter's confession was unconstitutionally admitted without a CrR 3.5 hearing. 2RP 193-95. The trial court denied the motion. 2RP 197.

In closing, defense counsel emphasized Curley's lack of credibility due to her heavy heroin use during the controlled buys. 3RP 120-21.

Furthermore, the police patted down Curley but never strip searched her before the buys. 3RP 122-25. They never checked her shoes and socks, for instance, even though she could easily hide drugs there. 3RP 123-24, 131. Additionally, the amount of methamphetamine Curley returned with varied greatly each time. 3RP 130-31. Counsel also argued the State failed to establish actual or constructive possession of the backpack, emphasizing that the State did not produce a vehicle registration or other indicia of ownership. 3RP 118-20.

The jury found Richter guilty as charged on all four counts. CP 40-46. The jury also returned special verdicts on the first three counts, finding that Richter delivered a controlled substance within 1,000 feet of a school bus route stop. CP 40-46.

The sentencing court calculated Richter's offender score to be 28, based on several prior convictions and the four current convictions. CP 50-52. With an offender score of 9 or more and a seriousness level of II, the standard range sentence for each of Richter's four convictions was 60 to 120 months. CP 52; RCW 9.94A.517. The school bus stop enhancement added a mandatory 24 months for the three counts of delivering methamphetamine. CP 52, 56; RCW 9.94A.533(6). The maximum term for all four offenses is 240 months. CP 52; see RCW 69.50.408.

At sentencing, Richter's counsel requested a midrange sentence of 90 months based on State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993). Counsel pointed out that the police controlled the number of charges against Richter, by orchestrating three buys and then waiting to arrest him. 3RP 166-67. The court rejected this argument, reasoning that "I recognize what Sanchez is saying and I also recognize that no one is holding a gun to somebody's head and saying you need to sell drugs, you need to sell drugs. And there's that distinction between those two." 3RP 173.

The court ran the three 24-month school zone enhancements consecutively to one another for a total of 72 months. 3RP 173; CP 52-53, 56. The court imposed an exceptional sentence of 240 months, concluding there were substantial and compelling reasons to do so because Richter's high offender score resulted in some current offenses going unpunished under RCW 9.94A.535(2)(c). CP 56, 66; 3RP 173.

The sentencing court also imposed $5,045 in legal financial obligations (LFOs). CP 54. The court did not address Richter's ability to pay at the sentencing hearing. See 3RP 153-77. Nevertheless, the court entered the following boilerplate finding:

> **Ability to Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court

> finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 53. The non-mandatory LFOs imposed included a $250 jury demand fee, a $150 incarceration fee, $825 in court-appointed attorney fees, a $2,000 fine under RCW 9A.20.021, a $500 for the Cowlitz County Prosecutor drug enforcement fund, and a $400 crime lab fee.[2] CP 54.

Richter timely appealed. CP 65.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING RICHTER'S MOTION FOR A MISTRIAL WHEN HIS CONFESSION WAS ADMITTED WITHOUT A CONSTITUTIONALLY REQUIRED CrR 3.5 HEARING.

It violates due process if an individual's conviction is based, even in part, on an involuntary confession. Richter's confession to Detective Epperson was admitted without the trial court first determining it voluntariness in a CrR 3.5 hearing. Even though the trial court instructed the jury to disregard the statement, this trial irregularity caused incurable prejudice to Richter's defense to constructive possession of the backpack containing methamphetamine. This in turn prejudiced Richter's entire defense because his possession of methamphetamine made delivery of it

[2] Mandatory LFOs included $120 in restitution, a $500 victim assessment fee, a $200 criminal filing fee, and a $100 DNA collection fee. CP 54.

more plausible. This court should accordingly reverse and remand for a new trial on all counts.

A trial court's admission of an accused's confession to police without first determining voluntariness violates due process:

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . and even though there is ample evidence aside from the confession to support the conviction.

Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Thus, "[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." Id. at 380. This hearing should occur "at some stage in the proceedings," id. at 376-77, but it is "both practical and desirable that . . . a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence." Id. at 395.

In Washington, CrR 3.5 hearings serve this critical function.[3] State v. Taylor, 30 Wn. App. 89, 92-93, 632 P.2d 892 (1981). CrR 3.5 is mandatory; before introducing an accused's confession, the court must hold

[3] CrR 3.5 states, in pertinent part, "When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible."

a CrR 3.5 hearing to determine if the confession was freely given. State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983). But the right to a hearing may be waived absent a contemporaneous trial objection. State v. Myers, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976); State v. Rice, 24 Wn. App. 562, 566, 603 P.2d 835 (1979). Also, failure to hold a CrR 3.5 hearing does not render a confession inadmissible when the record shows there is no issue concerning its voluntariness. Kidd, 36 Wn. App. at 509.

Richter did not waive his right to a CrR 3.5 hearing. Before trial, defense counsel requested a CrR 3.5 hearing. CP 73. However, the prosecutor told the court no hearing was needed, because "I don't believe there's [sic] any statements that the State would offer in its case in chief." 2RP 5. But, during defense counsel's cross examination of Epperson, the following colloquy occurred:

> Q. Okay. What about that backpack, did you find any kind of mail or any kind of things that would indicate it was Randy's stuff?
>
> A. No, it was sitting on the passenger seat right near some automotive-type things.
>
> Q. Okay.
>
> A. That Mr. Richter later told me were his.

2RP 158. Defense counsel immediately objected and asked that the remark be stricken. 2RP 158. The trial court sustained and ordered the jury to

disregard it. 2RP 158. At the close of proceedings that day, counsel moved for a mistrial, arguing the evidence was unconstitutionally admitted "without the benefit of a 3.5 hearing." 2RP 193-95. On these facts, the State cannot claim the error was waived.

Furthermore, on this record, it would be impossible to determine whether Richter's confession was voluntary. Epperson did not elaborate on Richter's confession to him or the context in which he made it. As such, there is no way to determine voluntariness. This implicates Jackson, which forbids convictions based on involuntary confessions. 378 U.S. at 376. When the trial court has not held a CrR 3.5 hearing, "the conviction which relied upon the statements must be reversed." In re Detention of Strand, 167 Wn.2d 180, 203, 217 P.3d 1159 (2009) (citing Jackson, 378 U.S. at 391).

Therefore, given the essential purpose of the CrR 3.5 hearing, this court must determine whether the trial court erred in denying Richter's motion for a mistrial. A trial court's denial a mistrial should be reversed when the court abuses its discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). Reversal is required if the trial irregularity so prejudiced the jury that the accused was denied his right to a fair trial. Id. at 254. In determining whether a trial irregularity may have influenced the jury, courts consider (1) the seriousness of the claimed irregularity, (2)

whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard the irregularity. Id.

Applying these three factors demonstrates the trial court erroneously denied a mistrial. First, the seriousness of not holding a CrR 3.5 hearing is obvious. Epperson's testimony could have resulted in a conviction based on an involuntary confession, which violates due process.

Second, no other evidence referenced Richter's confession to police. Nor did Epperson or any other officer testify with certainty that the backpack was Richter's. Although the backpack was found on the passenger seat of the vehicle Richter drove (2RP 56, 64, 96, 134-36, 184), nothing else in the backpack, like addressed mail or other personal items, linked it to Richter. 2RP 158. Nor did the State produce a vehicle registration identifying Richter as the owner. 3RP 118. Epperson's remark about Richter's confession was not cumulative.

And third, the trial court's instruction to disregard Epperson's testimony could not cure the lasting prejudice. The defense theory was that the State failed to establish Richter's actual or constructive possession of the backpack. 3RP 119-20. This was plausible given the dearth of admissible evidence linking Richter to the backpack. However, Epperson's testimony established possession through Richter's own words, but without a CrR 3.5 hearing. This improperly negated Richter's defense to constructive

possession. Richter's possession of methamphetamine then made it more plausible that he delivered methamphetamine to Curley during the controlled buys. Epperson's testimony tainted Richter's entire defense.

Although the trial court made an effort to prevent the jury's consideration of Epperson's improper testimony, this is the quintessential situation where "[t]he bell once rung cannot be unrung." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1977). Put another way, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). The prejudice was incurable. Furthermore, the Jackson court emphasized that due process is violated "even though there is ample evidence aside from the confession to support the conviction." 378 U.S. at 376. The trial court accordingly erred in denying Richter's motion for a mistrial.

CrR 3.5 hearings protect due process rights by preventing convictions based on involuntary confessions. No CrR 3.5 hearing was held here. Because there is a chance that Richter's convictions resulted from his confession, his convictions should be reversed.

2. THE TRIAL COURT ERRED IN RUNNING THREE SCHOOL BUS STOP ENHANCEMENTS CONSECUTIVELY RATHER THAN CONCURRENTLY.

A trial court's sentencing authority is limited to that expressly provided by statute. State v. Skillman, 60 Wn. App. 837, 838, 809 P.2d 756

(1991). "If the statutory provisions are not followed, the action of the court is void." State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983).

Richter's three convictions for delivering methamphetamine included a 24-month enhancement for commission within 1,000 feet of a school bus stop route. CP 40-46, 52, 56. The trial court ran these enhancements consecutively for a total of 72 months. 3RP 173; CP 52-53, 56. In doing so, the court exceeded its statutory authority, because RCW 9.94A.533(6) does not expressly provide for consecutive school zone enhancements. Because these enhancements must run concurrently with one another, the court's action is void and the 72-month sentencing enhancement should be vacated.

Statutory interpretation is a question of law reviewed de novo. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). This court's primary duty in construing a statute is to determine the legislature's intent. State v. France, 176 Wn. App. 463, 469-70, 308 P.3d 812 (2013). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). If, after this examination, the provision is still subject to more than one reasonable interpretation, it is ambiguous. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). The rule of lenity requires an

ambiguous statute to be interpreted in the defendant's favor absent legislative intent to the contrary. Id. at 601.

RCW 9.94A.533(6) imposes a mandatory 24-month enhancement to the standard range sentence for drug offenses committed within 1,000 feet of a school bus stop route. See also RCW 69.50.435(1)(c). It provides:

> An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533(6) (emphasis added). This specifies only that school zone enhancements run consecutively to "other sentencing provisions," but not to other school zone enhancements. Id. (emphasis added).

By contrast, all firearm and deadly weapon enhancements under the same section "shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter." RCW 9.94A.533(3)(e), (4)(e) (emphasis added). Thus, firearm and deadly weapon enhancements run consecutively to other sentencing provisions and to each other. This demonstrates the legislature knows how to ensure that several of the same or similar enhancements run consecutively to one another. The school zone enhancement contains no such language.

This difference in language shows the legislature did not intend for multiple school zone enhancements to run consecutively to one another: "'where the legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.'" In re Det. of Swanson, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (quoting United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). Furthermore, courts must not add words to a statute where the legislature has chosen not to include them. Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

The State may argue in response that the legislature intended for the current school zone enhancement to overrule Jacobs. At issue in Jacobs was the previous version of RCW 9.94A.533(6),[4] which included only the first sentence of the current version: "An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605." 154 Wn.2d at 599-601. Two codefendants were convicted of manufacturing a controlled substance (1) within 1,000 feet of a school bus stop under RCW 69.50.435 and (2) while a person under 18 was present under RCW 9.94A.605. Id. The Washington Supreme Court held

[4] At the time the codefendants committed the offense, this was codified at former RCW 9.94A.310(6) (2001). Jacobs, 154 Wn.2d at 598 n.1.

the sentencing court erred in running these two enhancements consecutively to one another. Id. at 602.

The Jacobs court explained that RCW 9.94A.533(6) was silent on whether enhancements under RCW 69.50.435 or RCW 9.94A.605 "should be imposed consecutively or concurrently to one another or to other enhancements." Id. at 602. However, the court noted the legislature's presumption in favor of concurrent sentences. Id. at 603. The court also pointed out that the firearm and deadly weapon enhancements require courts to apply them consecutively. Id. "Thus, the legislature clearly knows how to require consecutive application of sentence enhancements and chose to do so only for firearms and other deadly weapons." Id.

Though the Jacobs court ultimately concluded RCW 9.94A.533(6) was ambiguous, it noted that, "[i]f anything, the statutory language and context seems to weigh in favor of intending concurrent sentences." Id. Under the rule of lenity, an ambiguous statute must be interpreted in the defendant's favor. Id. Therefore, the court held that the former version of RCW 9.94A.533(6) required courts to apply enhancements for violations of RCW 69.50.435 and RCW 9.94A.605 concurrently with one another. Id.

In 2006, the legislature added the second sentence to RCW 9.94A.533(6) in response to Jacobs: "All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all

offenses under this chapter." Laws of 2006, ch. 339, § 301; In re Post Sentence Review of Gutierrez, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008). Significantly, the legislature did not add language like the firearm and deadly weapons enhancements specifying they must run consecutively to one another. By contrast, the legislature amended the sexual motivation enhancement the same year and specified that it "shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements." Laws of 2006, ch. 123, § 1 (emphasis added).

The language of RCW 9.94A.533(6), read in conjunction with related statutory provisions and the legislature's response to Jacobs, shows that multiple school zone enhancements must run concurrently, not consecutively, with one another. This interpretation makes sense, because Jacobs involved two different enhancements applied to one underlying crime. Id. at 601. Conversely, Richter's case involves three underlying offenses, each with the same school zone enhancement. CP 48. Moreover, if the statute is ambiguous, the rule of lenity requires interpretation in Richter's favor. Jacobs, 154 Wn.2d at 603-04.

It is also logical to assume the legislature intended the school zone enhancements to run concurrently. This court has noted that the school zone enhancement simply extends the standard range. Gutierrez, 146 Wn. App. at 154-55. The Gutierrez court explained, "the enhanced range is considered a

standard range term." Id. at 155. Because standard range sentences run concurrently, RCW 9.94A.589(1)(a), then extended standard range sentences under the school zone enhancement should likewise run concurrently. This is consistent with the statutory language specifying that the enhancement must run consecutively to all *other* sentencing provisions, while remaining silent as to multiple applications of the same sentencing provision, as is the case here. RCW 9.94A.533(6).

This court must not read language into the statute that the legislature omitted. State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980). This is what would have to occur for the three school zone enhancements to be imposed consecutively. Because the trial court acted without statutory authority to impose consecutive school zone enhancements, Richter's sentence should be vacated. This court should remand with instructions to correct Richter's sentence to reflect that the three school zone enhancements must run concurrently with each other.

3. THE TRIAL COURT IMPOSED AN EXCEPTIONAL SENTENCE THAT IS CLEARLY EXCESSIVE.

An exceptional sentence should be reversed for one of three reasons: (1) under a clearly erroneous standard, insufficient evidence supports the reasons for imposing the sentence; (2) under a de novo standard, the sentencing court's reasons do not justify a departure from the standard range;

or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

Richter does not dispute that there is a legally adequate basis to impose an exceptional sentence under the free crimes aggravator, RCW 9.94A.535(2)(c). However, the trial court abused its discretion in imposing an excessive exceptional sentence where Richter's delivery convictions all arose from controlled buys involving the same CI and small amounts of drugs over a short period of time. This implicates the rule of Sanchez, which the trial court rejected based on an erroneous view of the law. 3RP 173. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A court necessarily abuses its discretion if it based its ruling on an error of law. Id.

The Sentencing Reform Act of 1981 (SRA) permits an exceptional sentence below the standard range when: "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g).

In Sanchez, the court considered whether the multiple offense policy caused Sanchez's presumptive sentence to be "clearly excessive" when

police and the same informant initiated three controlled buys involving small amounts of cocaine over a short period of time.[5] 69 Wn. App. at 260. The trial court imposed an exceptional sentence downward, reasoning that the second and third buys were arranged primarily to increase Sanchez's offender score and presumptive sentence. Id. at 257. In considering the trial court's discretion to impose this exceptional sentence, the appellate court focused on the difference between (1) the effects of the first buy alone and (2) the cumulative effects of all three buys. Id. at 261. "If it can be shown that this difference is nonexistent, trivial or trifling, the multiple offense policy should not operate," because it results in an excessive sentence. Id.

Under the facts of Sanchez, the court concluded that "the difference between the first buy, viewed alone, and all three buys, viewed cumulatively, was trivial or trifling." Id. All three buys were initiated and controlled by police. All three involved the same buyer, the same seller, and no one else. All three occurred within a residence within a nine-day span of time. And all three involved small amounts of drugs for a total of $370. Id. at 261, 256-57. The second and third buys "added little or nothing to the first" and therefore "had no apparent purpose other than to increase Sanchez's presumptive

[5] At the time of Sanchez, this mitigating factor was codified at former RCW 9.94A.390(1)(g) (1990).

sentence." Id. at 261. Thus, the sentencing court was justified in concluding that a standard range sentence was clearly excessive. Id. at 262.

In State v. Hortman, Division One agreed with Sanchez, explaining:

> Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective determination dependent upon the individual sentencing philosophy of a given judge. Rather, it is an objective inquiry based on the Legislature's own stated purposes for the act.

76 Wn. App. 454, 463-64, 886 P.2d 234 (1994). The purposes of the SRA include (1) ensuring punishments are proportionate to the seriousness of the offense and the offender's criminal history, (2) promoting respect for the law by providing just punishment, (3) encouraging commensurate punishments for offenders who commit similar offenses, (4) protecting the public, (5) offering the offender an opportunity for self-improvement, and (6) making frugal use of the State's resources. RCW 9.94A.010; Hortman, 76 Wn. App. at 464. The Hortman court held that "[n]one of these purposes is served by the multiple offense policy when the difference between the effects of the first act and the cumulative effects of the subsequent acts is de minimis." 76 Wn. App. at 464.

The rule of Sanchez and Hortman has been repeatedly upheld where police orchestrate several controlled buys involving the same buyer purchasing small amounts of drugs over a short period of time. For instance,

State v. Bridges involved two controlled buys of $50 of crack cocaine over less than a week's time. 104 Wn. App. 98, 100, 104, 15 P.3d 1047 (2001). In State v. Fitch, there were three controlled buys of small amounts of cocaine and marijuana over four days. 78 Wn. App. 546, 549, 897 P.2d 424 (1995). In Hortman, police initiated two controlled buys of $20 of rock cocaine over a 13-day period. 76 Wn. App. at 458. By contrast, the court in State v. McCollum held that imposing an exceptional sentence upwards was not an abuse of discretion where there were three delivery offenses, a fourth offense upon arrest, and a fifth traffic stop a year earlier. 88 Wn. App. 977, 986, 947 P.2d 1235 (1997). There, the buys took place in different locations and involved different buyers. Id.

The three controlled buys in Richter's case are analogous to the controlled buys in Sanchez and Hortman. All three were initiated and controlled by the Longview police. 2RP 48, 88-89, 106, 117. All three involved the same buyer (Curley) and the same seller (Richter). All three occurred at the same location over a 21-day span in June and July 2013. 2RP 90, 107-09, 120, 184; CP 12-15. And all three involved very small amounts of drugs and small amounts of cash: Curley exchanged $40 for less then a gram of methamphetamine each time. 2RP 98-100, 115, 122, 175-77, 185-86; 3RP 30-31, 35, 39. Furthermore, the police waited until August

28th to arrest Richter despite having probable cause after the first buy. See 2RP 134-35.

Like in Sanchez and Hortman, the difference here between the first, second, and third buys was trivial. The cumulative effect was $120 worth of methamphetamine, even less than in Sanchez. The second and third buys , along with the delayed arrest, had no apparent purpose except to subject Richter to an exceptional sentence. Under these circumstances, imposition of an exceptional 240-month sentence—the maximum term allowed by law—is clearly excessive.

Furthermore, the trial court's reason for rejecting a standard range sentence under Sanchez demonstrates an erroneous view of the law. The court stated, "I recognize what Sanchez is saying and I also recognize that no one is holding a gun to somebody's head and saying you need to sell drugs, you need to sell drugs. And there's that distinction between those two." 3RP 173. There is no such distinction. The judge referred to principles of duress, but failed to examine what Sanchez requires: whether the difference between the effects of the first buy and the cumulative effects of all three buys was nonexistence, trivial, or trifling. This is an error of law, and is therefore an abuse of discretion. Quismundo, 164 Wn.2d at 504.

Moreover, Washington courts have repeatedly recognized that standard range sentences represent the legislature's judgment as to how best

accommodate the SRA's purposes. State v. Gaines, 122 Wn.2d 502, 513, 859 P.2d 36 (1993); State v. Allert, 117 Wn.2d 156, 169, 815 P.2d 752 (1991). The Hortman court held that whether the Sanchez rule applies is not a subjective determination based "upon the individual sentencing philosophy of a given judge." 76 Wn. App. at 463. Rather, it is an "objective inquiry" based on the legislature's stated purposes for the SRA. Id.

Unfortunately, the record demonstrates that the trial judge made a subjective determination based on his belief that no one forced Richter to sell methamphetamine, and therefore Sanchez did not apply. But imposing a 240-month sentence for $120 of methamphetamine does not "[p]romote respect for the law by providing punishment which is just." RCW 9.94A.010(2). This is what Sanchez and its progeny recognizes. Such a penalty is excessive and "'unduly harsh.'" Fitch, 78 Wn. App. at 553 (quoting State v. Nelson, 108 Wn.2d 491, 740 P.2d 835 (1987)). A midrange presumptive sentence would best serve the purposes of the SRA.

If this court vacates the consecutive school bus zone enhancements, Richter's 240-month sentence would be 96 months above the standard range. Even if this court upholds the consecutive enhancements, Richter's sentence is still 48 months above the standard range. The excessiveness of this sentence for $120 of methamphetamine, all sold pursuant to police-initiated buys, "shocks the conscience." State v. Ross, 71 Wn. App. 556, 571, 861

P.2d 473 (1993). This court should accordingly reverse Richter's exceptional sentence and remand for resentencing within the standard range.

4. THE TRIAL COURT ERRED IN FAILING TO CONSIDER RICHTER'S ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

RCW 9.94A.760 states that superior courts "may order the payment of a legal financial obligation as part of" a criminal sentence. However, RCW 10.01.160(3) forbids the imposition of LFOs unless "the defendant is or will be able to pay them." In determining LFOs, the court "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3) (emphasis added). The word "shall" imposes a mandatory duty to consider a defendant's financial resources. See State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002).

Formal findings supporting the trial court's decision to impose LFOs are not required. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). However, the record must at least minimally establish that the court considered the defendant's particular financial circumstances and made an individualized determination regarding his present or future ability to pay. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011); State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991). The State bears the

burden of proving the defendant's current or likely future ability to pay. State v. Lundy, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).

The sentencing court made no inquiry into Richter's financial resources, debts, or employability. See 3RP 153-77. The court did not have authority to impose LFOs without first considering Richter's financial resources and the individual burdens of payment. Because the record does not show the court made these statutorily required considerations, the imposition of discretionary LFOs was erroneous.

The only part of the record that suggests the trial court complied with RCW 10.01.160(3) is a boilerplate finding in the judgment and sentence. CP 53. However, a boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Welfare of A.B., 168 Wn.2d 908, 922, 232 P.3d 1104 (2010) (recognizing that a boilerplate finding was insufficient to show the trial court gave independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir. 2004) (noting that boilerplate findings, without more, are insufficient to support a court's credibility determination). The judgment and sentence contained a pre-formatted conclusion that Richter had the ability to pay LFOs. CP 53. This type of finding does not reliably establish that the trial court complied with RCW 10.01.160(3).

The State will likely respond that this challenge cannot be raised for the first time on appeal. See RAP 2.5(a); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). But it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. Ford, 137 Wn.2d at 477-78 (citing illustrative cases); see also State v. Moen, 129 Wn.2d 535, 546-48, 919 P.2d 69 (1996) (criminal penalty that does not comply with sentencing statutes); State v. Hunter, 102 Wn. App. 630, 634, 9 P.3d 872 (2000) (imposition of a drug fund contribution).

Currently, all three divisions of the Court of Appeals have held that challenges to discretionary LFOs cannot be raised for the first time on appeal. See, e.g., State v. Duncan, 180 Wn. App. 245, 255, 327 P.3d 699 (2014) (Division Three); State v. Calvin, __Wn. App.__, 316 P.3d 496, 507-08 (2013) (Division One); State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (Division Two), review granted 178 Wn.2d 1010, 311 P.3d 27 (2013). However, the Washington Supreme Court granted review and consolidated Blazina and State v. Paige-Colter, noted at 175 Wn. App. 1010, 2013 WL 2444604, review granted 178 Wn.2d 1018, 312 P.3d 650 (2013), to consider this issue. The court heard oral argument on February 11, 2014. Petitions for review in both Calvin (No. 89518-0) and Duncan (No. 90188-1) were stayed pending the outcome in Blazina (No. 89028-5) and Paige-Colter (No. 89109-5).

Therefore, Richter recognizes that this issue is currently controlled by the Court of Appeals decisions. However, argument is included here to preserve any error pending the outcome in Blazina and Paige-Colter.

The record does not demonstrate that the trial court would have found sufficient evidence of Richter's ability to pay LFOs. For instance, the bail study shows that Richter has only a tenth grade education and did not graduate high school. CP 70. Richter reported he was self-employed with zero earnings, no real estate, no car, and no money in a check or savings account. CP 70. His motion for order of indigency also states his "financial situation remains the same or worse [than] it was when the court originally found that he was indigent." CP 75. No evidence establishes his future employment prospects. This is particularly true given the lengthy 240-month sentence imposed.

Given these facts, there is no indication the trial court would have imposed the same discretionary LFOs had it actually taken into account Richter's individualized financial circumstances. Therefore, depending on the outcome in Blazina and Paige-Colter, this court should vacate the discretionary LFOs and remand for resentencing. See State v. Parker, 132 Wn.2d 182, 192-93, 937 P.2d 575 (1997).

5. RICHTER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. 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). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance of counsel claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Richter's counsel was ineffective for failing to object to the imposition of discretionary LFOs. Reversal is required because the failure to object prejudiced Richter. The Duncan court recognized that when "an irretrievably indigent defendant whose lawyer fails to address his or her

inability to pay LFOs at sentencing and who is actually prejudiced, a claim of ineffective assistance of counsel is an available course for redress." 180 Wn. App. at 255.

As discussed above, RCW 10.01.160(3) permits the sentencing court to impose LFOs only if it first considers the defendant's individual finances and concludes he has the ability, or likely future ability, to pay. Here, the court imposed $400 in discretionary court costs, $825 in court-appointed attorney fees, a $2,000 fine under RCW 9A.20.021, $500 for the Cowlitz County Prosecutor drug enforcement fund, and a $400 crime lab fee. CP 54; Blazina, 174 Wn. App. at 911 (court-appointed attorney fees are discretionary); Curry, 118 Wn.2d at 915-16 (court costs are discretionary); Hunter, 102 Wn. App. at 634-35 (drug fund contributions are discretionary), but see Lundy, 176 Wn. App. at 102 (victim restitution, victim assessments, criminal filing fees, and DNA fees are mandatory).

Counsel's failure to object to these discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court to comply with the requirements RCW 10.01.160(3). See, e.g., State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel simply failed to

object. Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable); see also State v. Ermert, 94 Wn.2d 839, 848, 850-51, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance of counsel).

Counsel's failure to object to discretionary LFOs was also prejudicial. The hardships that can result from the erroneous imposition of LFOs are numerous. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. KATHERINE A. BECKETT ET AL., WASHINGTON STATE MINORITY AND JUSTICE COMMISSION, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 4 (2008). LFOs add to these difficulties by:

> reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing; hindering efforts to obtain employment, education and occupational training; reducing eligibility for federal benefits; creating incentives to avoid work and/or hide from the authorities; ensnaring some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

Id. at 4-5. Furthermore, in a remission hearing to set aside LFOs, Richter will not only be saddled with the burden of proving manifest hardship, but he will have to do so without appointed counsel. RCW 10.01.160 (4); State v.

Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999). Given Richter's financial hardships, he will likely be unable to retain private counsel and will therefore have to litigate the issue pro se.

There is a reasonable probability the outcome would be different but for defense counsel's deficient conduct. Richter's constitutional right to effective assistance counsel was violated.

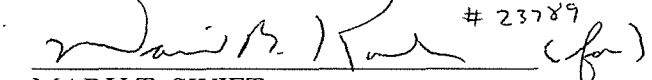
D. CONCLUSION

For the reasons stated above, this court should reverse Richter's convictions and remand for a new trial. This court should also vacate Richter's sentence and remand with instructions to run the school zone enhancements concurrently with one another. This court should also remand for resentencing within the standard range because Richter's exceptional sentence is clearly excessive. Additionally, this court should permit Richter to challenge the legal validity of the LFO order, vacate the order, and remand for resentencing.

DATED this 12th day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 46297-4-II
	)	
RANDY RICHTER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF DECEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RANDY RICHTER
DOC NO. 812747
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF DECEMBER, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 12, 2014 - 12:59 PM

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Court of Appeals Case Number: 46297-4

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