

Supreme Court No. 96768-7  
Court of Appeals No. 35379-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

**WINDY SCHATZ,**

Petitioner.

---

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

The Honorable Randall C. Krog, Judge

---

PETITION FOR REVIEW

---

LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1319  
Winthrop, WA 98862  
(509) 996-3959

**TABLE OF CONTENTS**

	<b>Page</b>
<b>A. IDENTITY OF PETITIONER.....</b>	<b>1</b>
<b>B. COURT OF APPEALS DECISION.....</b>	<b>1</b>
<b>C. ISSUE PRESENTED FOR REVIEW.....</b>	<b>1</b>
<b>Whether the appellate court opinion is contrary to legal precedent which requires sufficient evidence to support a school bus stop enhancement?.....</b>	<b>1</b>
<b>D. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>E. ARGUMENT WHY REVIEW SHOULD BE GRANTED.....</b>	<b>4</b>
<b>Ms. Schatz’s petition for review should be accepted because the Court of Appeals’ opinion conflicts with the constitutional requirement that evidence of a sentencing enhancement must be proved beyond a reasonable doubt.....</b>	<b>4</b>
<b>F. CONCLUSION.....</b>	<b>7</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>8</b>

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Washington Court of Appeals Cases</b>	
<i>State v. Boyle</i> , 183 Wn. App. 1, 335 P.3d 954 (2014) .....	5
<i>State v. Cardenas-Flores</i> , 194 Wn. App. 496, 374 P.3d 1217 (2016) .....	5
<i>State v. Hennessey</i> , 80 Wn. App. 190, 907 P.2d 331 (1995) .....	5
<i>State v. Jones</i> , 140 Wn. App. 431, 166 P.3d 782 (2007) .....	7
<i>State v. Kohonen</i> , 192 Wn. App. 567, 370 P.3d 16 (2016) .....	5
<i>State v. Liden</i> , 138 Wn. App. 110, 156 P.3d 259 (2007) .....	6
<i>State v. Prestegard</i> , 108 Wn. App. 14, 28 P.3d 817 (2001) .....	5
<b>Statutes</b>	
RCW 69.50.401 .....	4
RCW 69.50.435 .....	4
RCW 9.94A.533 .....	5
<b>Other Authorities</b>	
RAP 13.4 .....	4

#### **A. IDENTITY OF PETITIONER**

Petitioner, Windy Schatz, through her attorney, Lisa E. Tabbut, requests the relief designated in part B.

#### **B. COURT OF APPEALS DECISION**

Ms. Schatz seeks review of the December 18, 2018, unpublished opinion of Division Three of the Court of Appeals (Appendix).

#### **C. ISSUE PRESENTED FOR REVIEW**

Whether the appellate court opinion is contrary to legal precedent which requires sufficient evidence to support a school bus stop enhancement?

#### **D. STATEMENT OF THE CASE**

On February 23, 2017, Ms. Schatz sold methamphetamine to Echo Nelson at Goldendale grocery store. RP 115-17. The sale provided the basis for count 2. RP 316; CP 12.

Later the same day, Ms. Schatz and her girlfriend, Ashley Barrett, arrived at their home, 229 West Putman Street, only to find police officers on their front porch. RP 146.

Ms. Schatz told the police she had methamphetamine in her purse, and the purse was in her truck. RP 154. Ms. Schatz retrieved the purse from the truck and gave it to Sergeant Smith. RP 185.

Sergeant Smith took the purse to the police station and searched it but found no methamphetamine. RP 185. Chief Bartkowski returned to the Putman home and confronted Ms. Schatz about not finding methamphetamine in the purse. RP 160-61, 186-87. Police detained Ms. Schatz on the porch. RP 161.

Barrett was in the house near a window. RP 247. Ms. Schatz yelled at Barrett telling her not to take the fall for her on the possession of the methamphetamine. RP 247. Shortly after that, Barrett, in the presence of a female police officer, removed a baggie from her person. RP 264-65.

The baggie contained three individual packages of a crystalline substance. RP 210. Each package later tested positive as containing methamphetamine. RP 291. The total weight of the methamphetamine was 8.1 grams. RP 291. The three individual packages of methamphetamine were the evidence the court relied on in finding Ms. Schatz guilty of Count 1, possession of methamphetamine with intent to deliver. RP 321-24.

On an unspecified date, Sergeant Smith went to the Goldendale School District bus barn and spoke with a person he identified as John Holm. RP 201. Holm showed him a paper with the "bus stops on it." RP

201. Sergeant Smith determined the closest bus stop to the West Putman address was mid-block in the 300 block of West Putman. RP 200-01.

On March 2, Sergeant Smith used a rolling device to measure from the front door of the West Putman home to mid-block in the 300 block of West Putman. He measured the distance as under 300 feet. RP 199, 234. Sergeant Smith put an "x" on Exhibit 4, an aerial photo, to mark the location of Ms. Schatz's West Putman home. RP 201.

The State presented testimony from Goldendale School District transportation supervisor Clay West. RP 296. West identified a school bus stop near Klickitat and Putman on an aerial map of the city. RP 298-98. He agreed that the "x" placed on the map, Exhibit 4, was a "school bus route area." RP 299. He did not testify whether there was a bus route stop there on February 23, 2017. RP 295-303.

The court found sufficient evidence Count 1 occurred within 1,000 feet of the West Putnam home and less than 1,000 from a school bus route stop. CP 18. The court's written findings of fact and conclusions of law entered to support its trial findings do not specify the location of any school bus route stop in existence on February 23, 2017. CP 15-19.

### **E. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

**Ms. Schatz's petition for review should be accepted because the Court of Appeals' opinion conflicts with the constitutional requirement that evidence of a sentencing enhancement must be proved beyond a reasonable doubt.**

Under RAP 13.4, a petition for review will be accepted by the Supreme Court,

- (1) If the decision of the Court of Appeals conflicts with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals conflicts with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The evidence does not support the school bus route stop enhancement as no evidence proved the existence of a school bus route stop on February 23, 2017. As the evidence is insufficient, the school bus route stop enhancement must be reversed, and Ms. Schatz resentenced without the enhancement.

The school bus route stop penalty is authorized by RCW 69.50.435 which provides that any person who violates RCW 69.50.401 by possessing with intent to deliver a controlled substance within one

thousand feet of a school bus route stop designated by the school district may be penalized. The specific penalty is a 24-month sentencing enhancement. RCW 9.94A.533(6).

A defendant may raise a sufficiency argument for the first time on appeal. *State v. Cardenas-Flores*, 194 Wn. App. 496, 508, 374 P.3d 1217 (2016). It is the state's burden to prove each element of a sentence enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995).

Evidence will support a verdict on an enhancement only if, when viewed in the light most favorable to the state, any rational trier of fact could have found the elements of the enhancement beyond a reasonable doubt. *State v. Kohonen*, 192 Wn. App. 567, 573, 370 P.3d 16 (2016). In determining whether the quantum of proof exists, the court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the state's case. *State v. Boyle*, 183 Wn. App. 1, 7, 335 P.3d 954 (2014).

Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). In making this determination, both circumstantial evidence



and direct evidence are equally reliable. Circumstantial evidence and direct evidence are equally reliable. *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007).

The State, to provide proof beyond a reasonable doubt the existence of the school bus route stop enhancement, relied on the testimony of Sergeant Smith and Goldendale School District transportation supervisor Clay West. Sergeant Smith testified to seeing a list of bus stops provided to him by bus barn employee John Holm. RP 201. But Sergeant Smith did not testify that list addressed school bus stops as of February 23, 2017. Similarly, transportation supervisor West testified to there being a bus stop on West Putman but not that it existed at that location on February 23, 2017. Both Sergeant Smith and West looked at an aerial photo of Goldendale, but an aerial photo documents only the topography of the city and says nothing about the location of school bus stops on a certain date.

The purported delivery occurred on February 23, Sergeant Smith got his information about school bus stops from Holm on March 2, and West's trial testimony occurred on May 18. No one testified on the location of the school bus stops three months earlier on February 23.

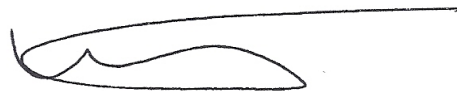
West did not explain how bus stops are created or designated, for how long, and what happens if a bus stop no longer serves any children.

The State failed to prove beyond a reasonable doubt the school bus stop existed as of the February 23, 2017, incident date. The Court of Appeals erred when it affirmed the trial court's finding of sufficient evidence to support the school bus stop enhancement. The remedy for insufficient evidence of an enhancement is remand for imposition of the sentence without the enhancement. *State v. Jones*, 140 Wn. App. 431, 438, 166 P.3d 782 (2007).

#### **F. CONCLUSION**

This court should accept review and reverse Ms. Schatz's sentencing enhancement.

Respectfully submitted January 17, 2019.



---

LISA E. TABBUT/WSBA 21344  
Attorney for Windy Schatz

**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I filed the Petition for Review to (1) Klickitat County Prosecutor's Office, at davidq@klickitatcounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Windy Schatz/DOC#843852, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 17, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Windy Schatz, Petitioner

APPENDIX

**FILED**  
**DECEMBER 18, 2018**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 35379-6-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
WINDY SCHATZ,	)	
	)	
Appellant.	)	

PENNELL, J. — Windy Schatz appeals a 24-month school bus route stop enhancement, imposed in connection with her conviction for possession with intent to deliver methamphetamine. We affirm.

FACTS

On February 23, 2017, Ms. Schatz was arrested at her residence in Goldendale, Washington, for methamphetamine-related offenses. After Ms. Schatz’s arrest, a police officer consulted with a representative from the Goldendale School District and was provided the location for a bus stop near Ms. Schatz’s residence. On March 2, eight days after Ms. Schatz’s arrest, the officer went out to the school bus route stop and used a rolling device to measure the distance from the bus stop to Ms. Schatz’s front door. The officer estimated the distance as 300 feet based on an actual measurement of 281 feet.

Ms. Schatz's case proceeded to a bench trial on May 18, 2017. At trial, the State produced an aerial map documenting the location of Ms. Schatz's house and the school bus route stop. The officer testified and placed a circle on the map to mark the location of the house and an "X" to mark the location of the bus stop. Ex. 4. A representative of the Goldendale School District then testified and affirmed that the area marked with an "X" pertained to an official school bus route stop.

The trial judge convicted Ms. Schatz of one count of possession of methamphetamine with intent to deliver and one count of delivery of methamphetamine. The court also imposed a 24-month school bus route stop enhancement related to the conviction for possession with intent to deliver. Ms. Schatz appeals her sentence enhancement.

## ANALYSIS

### *Sufficiency of evidence to support school bus route stop enhancement*

Ms. Schatz argues that the State failed to produce sufficient evidence to support the imposition of the school bus route stop enhancement because the evidence did not prove the existence of the school bus stop on the day of her offense conduct. We disagree with this assessment.

Due process requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. Washington*, 135 Wn. App. 42, 48, 143 P.3d 606 (2006). The

No. 35379-6-III  
*State v. Schatz*

same is true of any sentencing enhancements. *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). In a sufficiency challenge, the inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in the State’s favor, and the evidence is interpreted most strongly against the defendant. *Id.* This court’s role is not to reweigh the evidence and substitute its judgment for that of the trier of fact. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial evidence and direct evidence carry equal weight. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

Under RCW 69.50.435(1)(c), a defendant convicted of possessing a controlled substance with the intent to deliver within 1,000 feet of a school bus route stop is subject to a sentencing enhancement. A mandatory 24-month sentence enhancement is added to the presumptive sentence for a violation of RCW 69.50.435. RCW 9.94A.533(6).

Here, the evidence was sufficient for the fact finder to conclude that the school bus route stop was located within 1,000 feet of Ms. Schatz’s residence on the date of her offense. The testifying officer first obtained information regarding the location of the bus stop a few days after Ms. Schatz’s arrest. Approximately two months later, a school district official confirmed the location of the bus stop during trial. All the information regarding the bus stop was gathered within the same school year as Ms. Schatz’s offense.

While it would have been preferable for the school district official to confirm that the location of the bus stop had not changed since the date of Ms. Schatz's offense, the evidence presented was sufficient for the fact finder to make this inference. Ms. Schatz's sufficiency challenge therefore fails.

#### REQUEST TO STRIKE FEES ASSESSED BY TRIAL COURT

Citing *State v. Ramirez*, \_\_ Wn.2d \_\_, 426 P.3d 714 (2018), Ms. Schatz has filed a supplemental brief requesting that we strike the \$200 criminal filing fee and \$100 deoxyribonucleic acid (DNA) collection fee imposed by the trial court at sentencing. *Ramirez* was decided after the close of briefing in this case. The decision held that the 2018 amendments<sup>1</sup> to Washington's legal financial obligation scheme apply prospectively to cases on direct review at the time of enactment. Of interest to Ms. Schatz, the 2018 amendments prohibit imposition of a \$200 criminal filing fee on defendants who are indigent at the time of sentencing as defined by RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h). Also prohibited is the assessment of a DNA database fee if the State has previously collected the defendant's DNA as a result of a prior felony conviction. RCW 43.43.7541.

The record before us indicates Ms. Schatz's motion is controlled by *Ramirez*.<sup>2</sup>

---

<sup>1</sup> LAWS OF 2018, ch. 269.

<sup>2</sup> The State has not responded to Ms. Schatz's supplemental brief.


No. 35379-6-III  
*State v. Schatz*

Specifically, Ms. Schatz was indigent at the time of sentencing and Ms. Schatz's numerous felony convictions indicate a DNA fee has previously been collected. Accordingly, we grant Ms. Schatz's request and direct the trial court to strike the \$200 filing fee and \$100 DNA fee from Ms. Schatz's judgment and sentence.

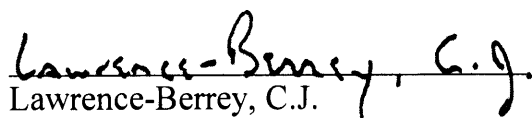
### CONCLUSION

Because the evidence was sufficient to justify imposition of a school bus route stop enhancement, the judgment of conviction is affirmed. This matter is remanded with instructions to strike the \$200 filing fee and \$100 DNA collection fee from Ms. Schatz's judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Pennell, J.

WE CONCUR:

  
\_\_\_\_\_  
Lawrence-Berrey, C.J.

  
\_\_\_\_\_  
Siddoway, J.



**LAW OFFICE OF LISA E TABBUT**

**January 17, 2019 - 11:40 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35379-6  
**Appellate Court Case Title:** State of Washington v. Windy Anne Schatz  
**Superior Court Case Number:** 17-1-00016-9

**The following documents have been uploaded:**

- 353796\_Petition\_for\_Review\_20190117113926D3105111\_0679.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was Petition for Review.pdf*

**A copy of the uploaded files will be sent to:**

- davidq@klickitatcounty.org
- paapeals@klickitatcounty.org

**Comments:**

indigent petitioner

---

Sender Name: Lisa Tabbut - Email: ltabbutlaw@gmail.com  
Address:  
PO BOX 1319  
WINTHROP, WA, 98862-3004  
Phone: 877-856-9903

**Note: The Filing Id is 20190117113926D3105111**