

October 6, 2020

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

LOUIS JAMES THIBODEAUX,

Appellant.

No. 53091-1-II  
(consolidated with)  
No. 53095-3-II

UNPUBLISHED OPINION

SUTTON, A.C.J.—Louis James Thibodeaux appeals his jury trial convictions under two separate cause numbers.<sup>1</sup> In one case, a jury convicted Thibodeaux of three counts of unlawful delivery of a controlled substance, methamphetamine. He argues that (1) the evidence is insufficient to support the conviction on count I because it did not prove that he delivered the drugs to the police operative (PO) who purchased the drugs, and (2) the trial court erred when it imposed community custody supervision fees without first conducting an individualized inquiry into whether he could pay and because he is indigent. In the other case, a jury convicted Thibodeaux of unlawful possession of a controlled substance, methamphetamine. He again argues that the trial court erred when it imposed community custody supervision fees.

In a statement of additional grounds for review<sup>2</sup> (SAG) that raises claims related to both cases, Thibodeaux further contends that (1) the evidence was insufficient to support the convictions on two of the delivery charges, counts II and III, (2) he received ineffective assistance

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<sup>1</sup> We sua sponte consolidated these appeals for purposes of issuing a single opinion.

<sup>2</sup> RAP 10.10.

of counsel in both trials on numerous grounds, and (3) his offender scores in both cases were incorrect.

Because the PO's and officers' testimonies provide sufficient evidence to prove each of the unlawful delivery charges, Thibodeaux failed to object to the community custody supervision fees, and Thibodeaux's remaining SAG claims either fail or we cannot address them, we affirm Thibodeaux's convictions, sentences, and the imposition of the community custody supervision fees.

## FACTS

### I. BACKGROUND AND CHARGES

In a series of drug transactions in May and July 2016, a PO working with the Longview Police Department Street Crimes Unit purchased drugs from Thibodeaux. The State charged Thibodeaux with three counts of unlawful delivery of methamphetamine. The State alleged that count I occurred on May 3, 2016, count II occurred on May 5, 2016, and count III occurred on July 5, 2016.

On September 7, 2017, before this case went to trial, law enforcement officers arrested Thibodeaux on outstanding warrants and discovered methamphetamine in one of his pockets. The State charged Thibodeaux with unlawful possession of a controlled substance, methamphetamine.

Thibodeaux pleaded not guilty to all charges and the cases proceeded to separate jury trials.

### II. POSSESSION OF CONTROLLED SUBSTANCE

On the day of trial on the possession charge, Thibodeaux requested new counsel. During the colloquy on this issue, Thibodeaux asserted that he had received ineffective assistance of counsel in part because his "speedy trial" rights had been violated. Verbatim Report of

Proceedings (VRP) (Oct. 30, 2018) at 61. Thibodeaux claimed that he had been in jail 70 days and that he had not waived “speedy trial.” VRP (Oct. 30, 2018) at 61. The trial court denied Thibodeaux’s motion for new counsel and did not discuss the alleged time for trial violation beyond advising Thibodeaux that there were a lot of reasons he could have been held for more than 60 days.

A jury found Thibodeaux guilty of unlawful possession of a controlled substance, methamphetamine. The sentencing hearing was deferred until after the trial on the delivery charges.

### III. DELIVERIES OF CONTROLLED SUBSTANCE

#### A. TESTIMONY

At the trial on the delivery charges, the PO testified that on three separate occasions, she gave Thibodeaux cash in exchange for methamphetamine. The officers involved in the investigation also testified about their observations of each of the transactions.

##### 1. MAY 3, 2016 TRANSACTION

The officers conducting the investigations testified that the first of the three transactions was on May 3. Before the May 3 transaction, the PO contacted Thibodeaux by text and asked him if she could purchase \$40 of methamphetamine from him. Thibodeaux texted back and agreed to sell the PO drugs. The officers photographed the text messages on the PO’s phone.

Because the May 3 transaction took place inside a house and the PO was not wearing a listening device, the officers did not personally observe or hear the transaction take place. But the officers thoroughly searched the PO before and after her contact with Thibodeaux and found no money or drugs other than the drugs she brought back from her contact with Thibodeaux. The

officers also watched and videotaped the PO as she walked to and from the house where she met with Thibodeaux. Although the PO stopped to talk to people outside the house, the officers did not observe her engage in any unusual or suspicious behavior. When she returned to the officers, the PO turned over a small baggie containing methamphetamine.

2. MAY 5, 2016 TRANSACTION

The second transaction occurred on May 5, on the sidewalk outside of a motel. Before the transaction occurred, the PO again contacted Thibodeaux and arranged to purchase \$40 of drugs from him.

This time, the PO wore a recording device during her contact with Thibodeaux. The contact was also videotaped.

Before the PO contacted Thibodeaux in person, the officers searched her and found no drugs or money. They then gave her money to purchase the drugs, dropped her off near the location she was to meet Thibodeaux, and watched her as she walked directly to the designated location. The officers did not observe the PO make any unusual movements or contact anyone but Thibodeaux. The PO and Thibodeaux talked for a few minutes. The PO testified that she “gave him a hug while handing him the money and he gave [her] the drugs.” VRP (Nov.7, 2018) at 286. The officers testified that they observed the PO and Thibodeaux engage in “a hand-to-hand motion.” VRP (Nov. 7, 2018) at 316.

The officers watched as the PO returned to a vehicle where one of the officers was waiting for her. The officers then searched the PO and took the recording device, and the PO gave the officers the drugs she had purchased.

3. JULY 5, 2016 TRANSACTION

The third transaction between the PO and Thibodeaux occurred on July 5, outside of a grocery store. This interaction was also videotaped by the officers.

Before meeting with Thibodeaux, the PO once again contacted Thibodeaux and asked if she could purchase \$40 of methamphetamine from him. The PO agreed to meet him outside of the store.

After the officers searched the PO for drugs and money and found none, they gave her money and watched her as she walked to the designated location. The officers did not observe the PO make any unusual movements or talk to anyone but Thibodeaux.

The PO and the officers testified that Thibodeaux came out of the store, the PO talked to him for a few minutes, he gave her the drugs, and she gave him the money. The PO then returned directly to the officers without any unusual activity and without contacting anyone else. The officers searched the PO again, and she gave them the drugs.

4. THIBODEAUX'S STATEMENT

In addition to testifying about the three transactions, Officer Brian Durbin testified about his interview with Thibodeaux following Thibodeaux's arrest.

After Durbin told Thibodeaux that they had conducted three drug transactions with him using a PO, Thibodeaux responded that "he doesn't deal drugs, he hustles." VRP (Nov. 7, 2018) at 337. Thibodeaux explained to Durbin "that hustling was that he was the middle man, and as the middle man he would take the drugs and deliver them to the customer; but, prior to delivering to the customer he would pinch a little bit of drugs for himself and then collect the money for it." VRP (Nov. 7, 2018) at 337.

5. THIBODEAUX'S TESTIMONY

Thibodeaux testified at trial. He denied selling any methamphetamine to the PO. He also denied admitting to Detective Durbin that he delivered drugs.

B. STIPULATION

In lieu of presenting additional witnesses, the parties agreed to stipulate that (1) the substances the PO delivered to the officers after each of the three transactions were tested by the Washington State Patrol Crime Laboratory and found to contain methamphetamine and (2) the locations of the May 3 and July 5 transactions were within 1,000 feet of school bus stops. Before accepting these stipulations, the trial court explained them to Thibodeaux and explained that by agreeing to the stipulations he was agreeing to allow the stipulations to be read to the jury and for the jury to consider the stipulations as evidence in lieu of the State presenting the witnesses.

The trial court also verified that Thibodeaux had the opportunity to discuss the use of the stipulations with his counsel. When the trial court asked Thibodeaux if he wanted the court to accept the stipulations, Thibodeaux responded, "Yes, please." VRP (Nov. 8, 2018) at 395.

After accepting the stipulations, the trial court and the parties discussed how the trial court would introduce the stipulations to the jury. The trial court gave the parties two choices, but because of a recording malfunction, the record does not show which introductory language Thibodeaux requested.

After the State presented its witnesses, the trial court introduced the stipulations, stating, "So, the parties in this case . . . have agreed that certain facts are true, so you must accept as true the following facts." VRP (Nov. 8, 2018) at 457. Defense counsel did not object to this introduction. The trial court then read the stipulations to the jury.

The jury found Thibodeaux guilty of three counts of unlawful possession of a controlled substance, methamphetamine.<sup>3</sup>

#### IV. JOINT SENTENCING

The trial court sentenced Thibodeaux on both the delivery and the possession charges on December 18, 2018.

On the delivery case, the trial court determined that the offender score for each of the three offenses was 9 points. Based on this offender score, the trial court sentenced Thibodeaux to 84 months of confinement on counts I and III, which included 24-month school bus stop route sentencing enhancements, and to 60 months of confinement on count II. The court ran all three sentences concurrently.

An appendix to the judgment and sentence for the delivery charges shows that Thibodeaux's criminal history included the following offenses:

- (1) A 1989 Oregon conviction for second degree robbery committed in 1987;
- (2) A 2000 Oregon conviction for first degree robbery committed in 2000;
- (3) A 2014 Cowlitz County conviction for attempted possession of methamphetamine committed on December 5, 2013;
- (4) A 2014 Cowlitz County conviction for forged application for transfer of a vehicle title committed on December 5, 2013, and charged under the same cause number as the 2014 conviction for attempted possession of methamphetamine;
- (5) A second 2014 Cowlitz County conviction for forged application for transfer of a vehicle title committed in 2014 and charged under a different cause number than the first similar conviction; and

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<sup>3</sup> The jury also found by special verdict that Thibodeaux had committed counts I and III within 1,000 feet of a school bus route stop. Thibodeaux does not challenge these special verdicts.

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- (6) A 2015 Cowlitz County conviction for attempted possession of methamphetamine committed in 2015.

The list of prior offenses did not include any offenses charged in 2018.

On the possession case, the trial court again calculated Thibodeaux's offender score for his single conviction as 9 points. Based on this offender score, the trial court sentenced him to 12 months and a day in custody and to 12 months of community custody. The trial court ran this sentence concurrent to the sentences imposed in the delivery case. The appendices in both cases showed the same criminal history.

During the sentencing hearing, the trial court did not discuss any legal financial obligations (LFOs), costs, or fees or inquire into Thibodeaux's ability to pay LFOs. In the judgment and sentences for both cause numbers, the trial court ordered that "[w]hile on community custody, the defendant shall: . . . . pay supervision fees as determined by [the Department of Corrections]." Clerk's Papers (CP) (no. 53091-1-II) at 171 (sec. 4.2(B)(7)); CP (no. 53095-3-II) at 100 (sec. 4.2(B)(7)). Thibodeaux did not object to the requirement that he pay the community custody supervision fees.

Thibodeaux appeals his convictions, his sentences, and the imposition of the community custody supervision fees.

## ANALYSIS

### I. SUFFICIENCY OF THE EVIDENCE – MAY 3, 2016 TRANSACTION

Thibodeaux first argues that the evidence was insufficient to support the conviction based on the May 3 transaction. He argues that there is insufficient evidence that he "delivered anything to the [PO] on May 3, 2016." Br. of Appellant (no. 53091-1-II) at 11. We disagree.



Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence.” *Salinas*, 119 Wn.2d at 201. And all reasonable inferences “must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201. “[W]e must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Killingsworth*, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

“[D]elivery” is defined as “the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(i).<sup>4</sup> Thus, to prove unlawful delivery of a controlled substance, the State had to prove that Thibodeaux transferred the drugs to the PO.

Thibodeaux argues that there is insufficient evidence that he delivered anything to the PO on May 3, because no witness other than the PO testified that she delivered the drugs to him, there were no other witnesses who saw Thibodeaux enter or leave the residence, and there were no audio or video recordings of the transfer. But taking the PO’s and the officers’ testimonies in the light most favorable to the State, the State presented sufficient evidence that during the May 3 drug transaction, Thibodeaux transferred the drugs to the PO.

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<sup>4</sup> This statute has been amended several times since May 3, 2016, but the amendments did not substantively change this subsection. LAWS OF 2020, ch. 133, § 2; LAWS OF 2019, ch. 394, § 9; LAWS OF 2019, ch. 158, § 12; LAWS OF 2019, ch. 55, § 11; LAWS OF 2018, ch. 132, § 2; LAWS OF 2017, ch. 317, § 5; LAWS OF 2017, ch. 153, § 1. Accordingly, we cite to the current version of the statute.

The PO testified that Thibodeaux gave her the drugs in exchange for cash during the first transaction and the officers identified the date of the first transaction as May 3. The fact that there were no other witnesses or recordings of the event go to issues of credibility, weight, and the persuasiveness of the evidence, which we do not review. *Killingsworth*, 166 Wn. App. at 287. Because the PO's and officers' testimonies provide sufficient evidence that Thibodeaux delivered the drugs to the PO on May 3, this sufficiency argument fails.

## II. COMMUNITY CUSTODY SUPERVISION FEES

Thibodeaux next argues that the trial court erred in imposing community custody supervision fees in both cases without conducting an adequate inquiry into his ability to pay and that, under the current law, he should not be required to pay the supervision fees because he is indigent.

In September 2018, three months before Thibodeaux's joint sentencing hearing, our Supreme Court issued *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). In *Ramirez*, the court emphasized that the trial court was required to conduct an adequate inquiry into a defendant's current and future ability to pay discretionary LFOs under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). The court further discussed what factors a trial court should consider for an adequate inquiry. *Ramirez*, 191 Wn.2d at 742-46. Thus, it was well established by the time of Thibodeaux's sentencing in December 2018 what inquiry the trial court was required to make, and Thibodeaux should have objected when the trial court failed to comply with these requirements at the sentencing hearing.

Because Thibodeaux did not object to the imposition of the community custody supervision fees when the trial court imposed these fees, we decline to address this issue under RAP 2.5(a).

*Blazina*, 182 Wn.2d at 834 (appellate court has the discretion to accept or reject review of issues related to LFOs raised for the first time on appeal).

### III. SAG ARGUMENTS

In his SAG, Thibodeaux contends that (1) the evidence was insufficient to support his convictions for the deliveries in counts II and III, (2) he received ineffective assistance of counsel on numerous grounds, and (3) his offender scores were incorrect. Thibodeaux is not entitled to relief on any of these grounds.

#### A. ADDITIONAL SUFFICIENCY ARGUMENTS

Thibodeaux asserts that the evidence was insufficient to support the deliveries charged in counts II and III.<sup>5</sup> We disagree.

To prove unlawful delivery of a controlled substance, methamphetamine, as charged in counts II and III, the State had to prove that (1) on or about May 5 and July 5, Thibodeaux delivered methamphetamine, (2) he knew the substances delivered were controlled substances, and (3) these acts occurred in the state of Washington. As noted above, “delivery” is defined as “the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(i).

Taken in the light most favorable to the State, the PO and the officers’ testimonies establish that on May 5 and July 5, Thibodeaux met with the PO and exchanged controlled substances with her for money in Cowlitz County, Washington. The parties stipulated that testing showed that the substances were methamphetamine. And before either of these transactions occurred, the PO had

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<sup>5</sup> Thibodeaux also appears to contend that the evidence was insufficient to support the conviction on count I. This sufficiency issue was raised by counsel, so we decline to address it separately.

contacted Thibodeaux and asked if she could purchase methamphetamine from him. Therefore, there is evidence that he understood that he was transferring methamphetamine, a controlled substance, to the PO. The officers also testified to the location of the transactions. Sufficient evidence supports the convictions on counts II and III.

#### B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Thibodeaux raises several ineffective assistance of counsel claims related to both the delivery and possession charges. He is not entitled to relief on any of these grounds.

##### 1. LEGAL PRINCIPLES

To prevail in an ineffective assistance of counsel claim, Thibodeaux must show that (1) his counsel's performance was deficient and (2) this deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33.

When evaluating an ineffective assistance of counsel claim, we engage in a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d 32. Thibodeaux may overcome this presumption by showing that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d. 80 (2004)).

##### 2. FAILURE TO MOVE TO DISMISS BASED ON TIME FOR TRIAL VIOLATIONS

Thibodeaux claims that he received ineffective assistance of counsel because his counsel failed to move to dismiss all of the charges for time for trial violations under CrR 3.3. But because Thibodeaux does not challenge any specific delay, we decline to address this claim. RAP 10.10(c)

(appellant must inform the court of the nature of an occurrence of alleged errors and court is not obligated to search the record in support of appellant's claims).

### 3. FAILURE TO MOVE TO SEVER

Thibodeaux claims that counsel was ineffective because he did not move to sever the delivery charges. We hold that his SAG claim fails.

To prove ineffective assistance of counsel, Thibodeaux must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Because there is nothing in the record about counsel's strategic or tactical decisions regarding severance, we cannot determine, based on this record, whether counsel had legitimate, tactical reasons for not moving to sever. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842 (2018) (citing *McFarland*, 127 Wn.2d at 335). Accordingly, we decline to address this issue further.

### 4. FAILURE TO CHALLENGE STIPULATIONS

Thibodeaux further contends that his trial counsel was ineffective by failing to challenge the stipulations in the delivery case, the trial court's introduction of the stipulations to the jury, and the trial court's reading of the stipulations to the jury. We disagree.

Because the stipulations were in lieu of testimony, the trial court was required to present the stipulations to the jury. The parties agreed to the stipulations. In fact, Thibodeaux himself affirmatively agreed to the stipulations after the trial court fully explained their purpose, including that the stipulations would be presented to the jury in lieu of the State presenting evidence. Thus, any objection to the trial court reading the stipulations to the jury would have been overruled, and Thibodeaux cannot establish ineffective assistance of counsel on this ground.

Thibodeaux may also be asserting that his trial counsel was ineffective for agreeing to the stipulations. Because Thibodeaux does not show that this same information would not have been presented by live testimony had he and his counsel not agreed to the stipulations, Thibodeaux does not establish prejudice and, therefore, cannot establish ineffective assistance of counsel on this ground.

Thibodeaux also appears to assert that the stipulations the trial court read to the jury were not the same as the stipulations to which the parties agreed. But the record shows that the trial court read the stipulations from the written stipulations that the parties agreed to. To the extent Thibodeaux is arguing that the written stipulations differed from what he agreed to with his counsel, there is nothing in the record to support that assertion. Accordingly, Thibodeaux is not entitled to relief on this ground. *McFarland*, 127 Wn.2d at 335 (when reviewing an ineffective assistance of counsel claim on appeal, the appellate court may consider only facts within the record).

Thibodeaux also appears to assert that the trial court should not have instructed the jury to accept the stipulations as true and that the stipulations were “false.” SAG at 1. Thibodeaux may be arguing that the trial court’s introduction of the stipulations to the jury was not appropriate. The record shows that the parties discussed how the trial court would introduce the stipulations, but the resolution of this issue is missing from the record. Thus, we cannot review whether the defense counsel agreed to this introductory language. Accordingly, we cannot review this claim on this record. *McFarland*, 127 Wn.2d at 335.

5. FAILURE TO INVESTIGATE AND FAILURE TO COMMUNICATE

Thibodeaux next contends that he received ineffective assistance of counsel because his trial counsel did not investigate the May 3 transaction related to the delivery charges, hire an investigator, or interview the PO. But the nature of Thibodeaux's counsel's investigation, whether counsel hired an investigator, or whether counsel interviewed the PO are outside the record, so we cannot review this claim. *McFarland*, 127 Wn.2d at 335.

Thibodeaux also appears to assert that he received ineffective assistance of counsel because his counsel never gave him access to the discovery related to the delivery charges. But any information about what access Thibodeaux had to the discovery is outside the record, so we cannot review this claim. *McFarland*, 127 Wn.2d at 335.

6. FAILURES TO OBJECT

Thibodeaux further contends that he received ineffective assistance of counsel because trial counsel failed to “challenge the admission of tainted evidence, altered video, [and] altered audio” related to the delivery charges. SAG at 4. There is nothing in the record suggesting that this evidence was altered, so Thibodeaux does not show that any objection to this evidence would have been successful. Thus, Thibodeaux does not establish ineffective assistance of counsel on this ground. *McFarland*, 127 Wn.2d at 335.

7. FAILURE TO CALL WITNESSES

Thibodeaux also contends that he received ineffective assistance of counsel because his trial counsel failed to “call[ ] witness[s] given to him a year before trial” on the delivery charges. SAG at 4. Any evidence related to the witness information Thibodeaux gave his counsel or

counsel's investigation into these witnesses is outside the record. Accordingly, we do not address this claim. *McFarland*, 127 Wn.2d at 335.

### C. OFFENDER SCORES

Citing RCW 9.94A.525(5)(a)(i), on both appeals, Thibodeaux next contends that the offender scores for each offense should have been 4 points rather than 9 points because his other offenses were based on the same criminal conduct. Thibodeaux does not, however, demonstrate that any of his prior or current offenses qualify as same criminal conduct.

Thibodeaux also contends that his offender scores should not have included points for four prior Cowlitz County convictions because those offenses were pled down to gross misdemeanor convictions. This argument fails because nothing in either record establishes that these four prior offenses, assuming Thibodeaux is referring to the Cowlitz County prior convictions that were included in his criminal history, were pled down to gross misdemeanors. Thibodeaux also appears to argue that the offender scores should not have included "5 pending charges, 1 found guilty and 4 dismissed." SAG at 6. But the record does not show that the other 5 pending charges were included in his offender scores.

Thibodeaux also asserts there was a scrivener's error in his judgment and sentences. But Thibodeaux identifies no scrivener's error; he merely reiterates his offender score arguments, which we conclude above have no merit or cannot be addressed on this record.

### CONCLUSION

Because the PO's and officers' testimonies provide sufficient evidence to prove each of the delivery charges, Thibodeaux failed to object to the community custody supervision fees, and Thibodeaux's remaining SAG claims either fail or we cannot address them, we affirm



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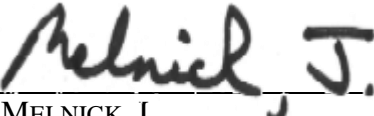
Thibodeaux's convictions, sentences, and the imposition of the community custody supervision fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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SUTTON, A.C.J.)

We concur:

  
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WORSWICK, J.

  
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MELNICK, J.