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SEP 13, 2016
Court of Appeals
Division III
State of Washington

No. 34056-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

WENDELL LEE MUSE,

Appellant

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

NO. 15-1-00802-5

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. RCW 69.50.4013 is constitutional when applied to simple possession of drug residue.
- B. The “reasonable doubt” jury instruction was lawful.
- C. Appellate costs are appropriate in this case if the Court affirms the judgment.

II. STATEMENT OF FACTS

On April 14, 2015, Detective Holly Baynes of the Kennewick Police Department responded to a report of a house fire at 4114 West Kennewick Avenue, in Kennewick, Washington. 1RP¹ at 15-16. During the course of the investigation, Detective Baynes made contact with the defendant, Wendell Muse. 1RP at 15. Detective Baynes searched the defendant’s name in the law enforcement database and discovered that he had a warrant for his arrest. 1RP at 16. After he was placed under arrest, Detective Baynes conducted a search of the defendant’s person. 1RP at 16-17. In the defendant’s pocket, the detective located a clear glass smoking device wrapped in a piece of green fabric that appeared to be consistent with the use of methamphetamine. 1RP at 17-18. She observed a white, powdery substance in the glass bowl part of the pipe. 1RP at 18. The defendant denied owning the pipe, stating that it belonged to his

¹ The Verbatim Report of Proceedings is comprised of two volumes referenced as

girlfriend. 1RP at 18. The glass pipe was subsequently seized and placed into evidence for testing. 1RP at 18. The defendant was charged with Unlawful Possession of a Controlled Substance. CP 1-2.

Forensic Scientist Jason Trigg of the Washington State Patrol Crime Laboratory testified that he received and tested the glass smoking pipe recovered in this case. 1RP at 29-31. Mr. Trigg testified that the white, powdery substance found in the glass smoking pipe tested positive for methamphetamine hydrochloride. 1RP at 31.

The trial court instructed the jury as to reasonable doubt.

Instruction No. 3 included the standard language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 11; 1RP at 42.

Defense counsel did not object to the proposed jury instructions.

1RP at 36-37.

The defendant was found guilty of the crime of Unlawful Possession of a Controlled Substance. CP 23; 1RP at 58.

follows: 1RP – January 19, 2016; 2RP – February 2, 2016.

III. ARGUMENT

A. **RCW 69.50.4013 IS CONSTITUTIONAL WHEN APPLIED TO SIMPLE POSSESSION OF DRUG RESIDUE.**

The defendant contends that RCW 69.50.4013 is unconstitutional when applied to simple possession of drug residue because it creates felony liability without proof of any culpable mental state. Br. Appellant at 4.

In Washington State, felony liability is attached to simple possession of drug residue even where the accused person had no idea that residue was present. *See State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). There is no minimum quantity requirement in the unlawful possession of a controlled substance statute, and therefore evidence that the defendant possessed methamphetamine residue was sufficient to support a conviction for possession, where the statute did not contain a “measurable amount” element. *State v. Higgs*, 177 Wn. App. 414, 311 P.3d 1266 (2013), *as amended* (Nov. 5, 2013), *review denied*, 179 Wn.2d 1024, 320 P.3d 719 (2014).

The Court reviews constitutional challenges de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Statutes are presumed constitutional. *In re Welfare of A.W. & M.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015). The challenger bears the heavy burden of

convincing the court that there is no reasonable doubt that the statute is unconstitutional. *Id.*

1. RCW 69.50.4013 does not violate the defendant's Eighth Amendment right because it imposes felony punishment for a strict liability crime.

The defendant argues that RCW 69.50.4013 imposes cruel and unusual punishment because it creates felony liability without proof of any culpable mental state. Br. Appellant at 4.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. The basic concept of the Eighth Amendment is that punishment for a crime must be proportionate to the offense. *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). There are two types of Eighth Amendment analysis: (1) determining whether a sentence is disproportionate to the particular crime; and (2) using categorical rules to define constitutional standards for certain classes of crimes or offenders. *Graham*, 560 U.S. at 59-60.

To determine whether a sentence is disproportionate to the crime, the court looks at “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a “national consensus” against imposing the punishment. *Graham*, 560 U.S. at 61 (quoting *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). If such a consensus exists, the court looks to “the

standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose” *Graham*, 560 U.S. at 61 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008)).

In *State v. Schmeling*, 191 Wn. App. 795, 365 P.3d 202 (2015), the defendant argued that RCW 69.50.4013 violated his right against cruel and unusual punishment because it makes possession of drug residue a felony without requiring any culpable mental state.

The Court disagreed, citing *State v. Smith*, 93 Wn.2d 329, 345, 610 P.2d 869 (1980). In *Smith*, the defendant was convicted of a felony for possessing more than 40 grams of marijuana. *Id.* at 332. The defendant argued that the seriousness of the offense did not warrant classifying his crime as a felony. *Id.* at 342. The court rejected Smith's argument, holding that classification alone could not constitute cruel and unusual punishment. *Id.* at 345. The court also held that Smith's actual sentence was not grossly disproportionate to his offense. *Id.* at 344-45. Relying on the holding in *Smith*, the *Schmeling* court held that RCW 69.50.4013 does not violate the Eighth Amendment even though it punishes the possession of small amounts of controlled substances as a felony without imposing a mens rea requirement. 191 Wn. App. at 800-01.

The defendant here urges this Court to apply the categorical approach adopted by the *Graham* Court. In *Graham*, the Court applied the categorical approach in holding that the Eighth Amendment prohibits the imposition of a life sentence without the possibility of release on a juvenile offender who did not commit homicide. 560 U.S. at 61-62, 82. In *State v. Witherspoon*, 180 Wn.2d 875, 890, 329 P.3d 888, *as amended* (Aug. 11, 2014), our Supreme Court recognized that the holding in *Graham* was based on the differences between juveniles and adults and the propriety of sentencing juveniles to prison. The court in *Schmeling* noted that “[i]n the absence of any authority extending the categorical approach to cases not involving the death penalty or juvenile offenders, we decline to apply the categorical approach to punishment of adult drug offenders like Schmeling.” *Schmeling*, 191 Wn. App. at 800.

Identical to the argument made in *Schmeling*, the defendant in the present case asserts that classifying possession of small amounts of a controlled substance as a felony without a mens rea requirement constitutes a cruel and unusual punishment. Like the Court held in *Schmeling*, RCW 69.50.4013 does not violate the defendant’s Eighth Amendment right.

2. RCW 69.50.4013 does not violate the defendant's right to due process because it imposes felony punishment for a strict liability crime.

The defendant argues that RCW 69.50.4013 violates due process as applied to possession of drug residue absent proof of some culpable mental state. RCW 69.50.4013 is constitutional because it allows for the unwitting possession of defense without requiring the State to prove a mens rea.

The Fourteenth Amendment to the United States Constitution provides that no state may deprive a person of liberty without due process of law. The legislature may create strict liability crimes, but this prerogative is subject to due process limits. *State v. Warfield*, 119 Wn. App. 871, 876, 80 P.3d 625 (2003). The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute—the nature of the substance and the fact of possession—but defendants then can prove the affirmative defense of unwitting possession. *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005). This affirmative defense ameliorates the harshness of the almost strict criminal liability the law imposes for unauthorized possession of a controlled substance. *State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011). Where a defendant asserts an unwitting possession defense to the charge of unlawful possession of a

controlled substance, the defendant bears the burden to present evidence in support of the defense. *State v. Sundberg*, 185 Wn.2d 147, 370 P.3d 1 (2016). The defendant may assert that he unwittingly possessed the substance, either because he did not know he possessed it or because he was unaware of the nature of the substance. *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000).

Our Supreme Court has directly addressed whether the elements of possession of a controlled substance under prior versions of RCW 69.50.4013 contains a mens rea element in both *Bradshaw* and *Cleppe*. In both cases, the court held that the legislature deliberately omitted knowledge and intent as elements of the crime and that it would not imply the existence of those elements. *Schmeling*, 181 Wn. App. at 801; *Bradshaw*, 152 Wn.2d at 534-38; *Cleppe*, 96 Wn.2d at 380-81.

In *Bradshaw*, the defendant argued that the possession statute violated due process because it criminalized innocent behavior. 152 Wn.2d at 539. The court denied Bradshaw's arguments and held that the legislative history for the mere possession statute supports the court's conclusion that no mens rea element should be implied. *Id.*

In denying Schmeling's arguments, the court noted that "given our Supreme Court's repeated approval of the legislature's authority to adopt strict liability crimes and the express findings in *Bradshaw* and *Cleppe*

that the possession of controlled substances statute contains no intent or knowledge elements,” RCW 69.50.4013 does not violate due process even though it does not require the State to prove intent or knowledge to convict an offender of possession of a small amount of a controlled substance. *Schmeling*, Wn. App. at 802.

The State asks this Court to follow Division II’s decision in *Schmeling* and hold that RCW 69.50.4013 does not violate due process even though it does not require the State to prove intent or knowledge to convict an offender of possession of a small amount of a controlled substance. RCW 69.50.4013 does not violate the defendant’s right to due process.

B. THE “REASONABLE DOUBT” JURY INSTRUCTION WAS LAWFUL.

The defendant argues that the language in WPIC 4.01 that defines a “reasonable doubt” as “one for which a reason exists” improperly focused the jury on a search for “the truth” in violation of the defendant’s right to due process and to a jury trial. Br. Appellant at 17-20.

The defendant did not object to WPIC 4.01 at trial. 1RP at 36-37. A defendant generally waives the right to appeal an error unless he or she raised an objection at trial. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception to this rule is made for manifest errors

affecting a constitutional right. RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. An error is manifest if the appellant can show actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* To determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error. *Id.* at 100.

The Washington State Supreme Court in *Kalebaugh* reaffirmed that WPIC 4.01 was the correct legal instruction on reasonable doubt. 183 Wn.2d at 584. The State submits that this Court is bound by the approval of the WPIC 4.01 reasonable doubt language in *Kalebaugh* and its predecessors. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The defendant cannot show manifest error justifying review under RAP 2.5(a)(3) of the unpreserved objection to the WPIC 4.01 beyond a reasonable doubt.

C. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE CONVICTION.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*,

131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the Court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court can decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976², the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate or even “chill” the right to counsel. *Id.* at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, the Supreme Court held this

² Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

statute constitutional, affirming the court's holding in *State v. Blank*, 80 Wn. App. 638, 641-42, 910 P.2d 545 (1996). 131 Wn.2d at 239.

Nolan noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. *Nolan*, 141 Wn.2d at 623.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, 141 Wn.2d at 624-25, 628.

Under RCW 10.73.160, the time to challenge the imposition of legal financial obligations (LFOs) is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, 63 Wn. App. at 311; *see*

also *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-42; see also *State v. Wright*, 97 Wn. App. 382, 985 P.2d 411 (1999).

The defendant has the initial burden to show indigence. See *State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. See *State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See *Blank*, 131 Wn.2d at 236-37 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53-54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts of late. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015),

the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that

[t]he legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id. at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.* at 835-37. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.* at 838-39.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burdens of persons convicted of crimes, the Legislature has yet to show any shift toward eliminating the imposition of financial obligation on indigent defendants.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these

defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. Ideally, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determinations about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

During sentencing, the record reflects that the defendant had the present and future ability to pay. 2RP at 5. In reference to the defendant's employment status, defense counsel stated, ". . . I know he and I did

discuss previously that he certainly is capable of working, and he wants to be working, and he has worked his entire life. He's not the type of person that would abandon his duties and his obligations." 2RP at 5. There is nothing in the record to support the assertion that the defendant will never be able to pay the appellate costs associated with this case.

In this case, the State submits that it has "substantially prevailed." Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should exercise discretion to impose appellate costs.

IV. CONCLUSION

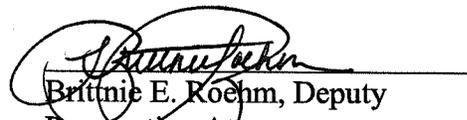
For the foregoing reasons, the State respectfully requests that this Court affirm the conviction. Additionally, the Legislature has expressed its intent that criminal defendants contribute to the costs of the prosecution and appeal of their cases. Whether this is good or bad policy is a matter for the Legislature. The State respectfully requests that costs be taxed as requested, should the State substantially prevail.

RESPECTFULLY SUBMITTED this 12th day of September,

2016.

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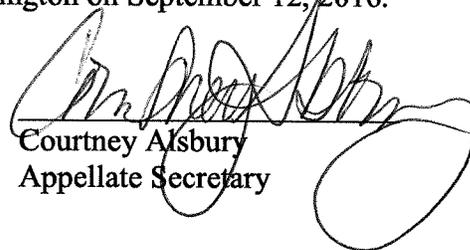
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on September 12, 2016.


Courtney Alsbury
Appellate Secretary