

No. 1035829

COA 39733-5-III

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KELLY JAY BALLEs, Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the Court of Appeals' published decision, filed on September 27, 2024 in Division Three of the Court of Appeals. One judge (Judge Fearing) dissented from the Court of Appeals' decision.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision reversing the trial court's orders suppressing evidence and dismissing the charges meet the criteria for review under RAP 13.4(b)(1)?
2. Does the Court of Appeals' decision reversing the trial court's orders suppressing evidence and dismissing the charges meet the criteria for review under RAP 13.4(b)(2)?
3. Does the Court of Appeals' decision reversing the trial court's orders suppressing evidence and dismissing the charges meet the criteria for review under RAP 13.4(b)(3)?
4. Does the Court of Appeals' decision reversing the trial court's orders suppressing evidence and dismissing the charges meet the criteria for review under RAP 13.4(b)(4)?

D. STATEMENT OF THE CASE

Kelly Jay Balles was found guilty of one count of possession of a controlled substance, in Yakima County cause number 14-1-00135-39. (CP 34, 52, 85). His sentence included a term of community custody, along with conditions of community custody. (CP 34, 52, 85; RP 16, 41-44).

Balles missed a meeting with his community corrections officer. (CP 85). The Department of Corrections (DOC) then issued, on January 28, 2020, a Secretary's warrant for Balles. (CP 2, 48, 52, 85). The Secretary's warrant lacked any reference to Balles' crime of conviction or to RCW 69.50.4013. (CP 48).

On March 31, 2021, members of DOC and the Pacific Northwest Violent Offender Task Force were attempting to locate Balles. (CP 2, 52, 56, 60, 63, 85). They went to the residence located at 1300 Ashue Road in Wapato, which was Balles' listed address according to the Washington State

Department of Licensing, local Spillman returns, the court system Jabs, and DOC records. (CP 2, 52, 56, 60, 63, 85).

Approval was granted under DOC jurisdiction to force entry into the residence and take Balles into custody. (CP 52-53).

Officers entered the residence and located a bedroom that was secured by a padlock from the outside of the room. (CP 2, 53, 56, 60, 85). They cut the padlock and entered the room, discovering Balles inside the room, lying on a bed. (CP 2, 53, 56, 60, 63, 85). They also saw a plate with a rock of powdery crystal substance on it, consistent with contraband methamphetamine. (CP 2, 53, 56, 61, 63, 85).

Officers arrested Balles and brought him upstairs and placed him in a patrol vehicle. (CP 55, 60, 63, 85). Officers then requested permission to conduct a DOC search of the room where he was located, for drugs and/or drug paraphernalia. (CP 53, 56, 60-61, 85). During the search of his room, officers found a full box of ammunition under the mattress. (CP 53, 61, 63). Officers then requested permission to include firearms and

ammunition in the DOC search, which was approved. (CP 53, 61).

Officers then continued to search the room, including unzipping a duffel bag found under the bed. (CP 2, 53, 61, 63, 85). They located contraband in the duffel bag, including a likely controlled substance, what an officer believed to be approximately four to six pounds of suspected methamphetamine. (CP 2, 53, 56, 61-62, 63, 85).

The DOC search was then stopped. (CP 2, 53, 61, 63). Based on the information found in the search, the officers then contacted the Yakima County Superior Court to obtain a search warrant for the residence and outbuildings for drugs and firearms, which was approved. (CP 2, 53, 56, 61, 63-64, 86). Officers then resumed searching Balles' room and found a firearm, dominion items for Balles, U.S. currency, several pounds of suspected marijuana, a digital scale, and unused packaging materials. (CP 2-3, 53, 57, 61-62). The firearm, dominion items for Balles, some U.S. currency, and some

suspected marijuana were located in a dresser drawer. (CP 61-62).

On April 9, 2021, the State charged Balles with four crimes: possession of a controlled substance, methamphetamine, with intent to deliver; possession of a controlled substance, marijuana, with intent to deliver; first degree unlawful possession of a firearm; and possession of a stolen firearm. (CP 8-9).

On August 4, 2021, the State submitted, and the trial court entered, an order vacating Balles' 2014 conviction and dismissing it with prejudice. (CP 35, 86; RP 16, 41-44).

Balles filed a motion to suppress, arguing that any evidence seized during the search of his residence should be suppressed. (CP 33-69). He argued the evidence seized during the search of his residence should be suppressed, because his 2014 conviction for possession of a controlled substance was void under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), and therefore, he was not lawfully serving a term of community

custody and was not lawfully a probationer at the time of the search conducted here, which may have previously allowed a community corrections officer to search. (CP 38-45).

The trial court granted Balles' motion to suppress. (CP 84-88; RP 45-48). In its written conclusions of law, the trial court concluded that Balles' 2014 conviction was void on February 25, 2021, under the *Blake* decision, and therefore, the Secretary's warrant issued under that cause number was no longer valid, and the DOC search was also invalid. (CP 86).

The trial court entered an order dismissing the charges against Balles without prejudice. (CP 74; RP 52-53).

The State appealed. (CP 75-77).

In a published opinion, issued on September 27, 2024, the Court of Appeals, 2-1, reversed the trial court's orders that suppressed evidence and dismissed the charges, and remanded the case for further proceedings. The Court of Appeals concluded that on March 31, 2021, Balles was still subject to

the terms of his 2014 judgment and sentence, until his conviction was vacated.

Balles filed a Petition for Review, arguing this Court should grant review for the following reasons:

Review of the Court of Appeals decision in Balles is warranted under RAP 13.4(b)(1)-(4) because the majority opinion conflicts with decisions of this Court and numerous Court of Appeals decisions, involves significant questions of law under the Fourth Amendment and Wash. Const. art 1, sec. 7, and involves an issue of substantial public interest that should be decided by this Court.

See Petition for Review, pg. 1.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

- 1. The Court of Appeals' decision reversing the trial court's orders suppressing evidence and dismissing the charges does not meet the criteria for review under RAP 13.4(b).**

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

- (2) If the decision of the Court of Appeals is in conflict with another 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.

RAP 13.4(b).

Contrary to Balles' assertions, the Court of Appeals' decision reversing the trial court's orders suppressing evidence and dismissing the charges does not meet the criteria for review under RAP 13.4(b).

First, under RAP 13.4(b)(1), Balles argues the Court of Appeals' decision conflicts with this Court's decision in *State v. White*. See Petition for Review, pgs. 10-12; *see also State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), *superseded by statute as recognized in State v. Graham*, 130 Wn.2d 711, 716 n.2, 927 P.3d 227 (1996). Balles argues:

Based on this Court's reasoning in White, following Blake, a reasonable person, and in particular law enforcement officers, should have recognized that convictions and associated

punishment under RCW 69.50.4013(1) were void and unenforceable.

See Petition for Review, pg. 11.

However, *White* does not control here. *See White*, 97 Wn.2d at 102-04. In *White*, the defendant was arrested based upon a statute that had not yet been invalidated. *White*, 97 Wn.2d at 102-03. However, an ordinance with substantially similar language had previously been invalidated. *Id.* This Court invalidated the defendant's arrest, finding that based upon the similar ordinance previously invalidated, "[a] reasonable person would recognize the infirmities" of the statute upon which the defendant was arrested. *Id.* at 103-04.

In contrast here, a DOC officer complying with a court order that was based on a statute found unconstitutional is distinguishable from a law enforcement officer arresting an individual in the first instance. The DOC officer here was not enforcing an unconstitutional statute, but rather, complying with a court order. The DOC officer's actions here are a step

removed from a law enforcement officer enforcing a statute in the first instance.

Further, as the Court of Appeals recognized, the Secretary's warrant lacked any reference to Balles' crime of conviction or to RCW 69.50.4013. (CP 48); *see also* Slip Opinion, pg. 3.

In addition, this Court recently rejected the claim that unlawful possession of a controlled substance is a nonexistent crime, and void ab initio. *State v. Olsen*, 555 P.3d 868, 874-75 (Wash. 2024); *State v. Willyard*, 555 P.3d 876, 881-83 (Wash. 2024). This Court rejected attempts to withdraw guilty pleas to unlawful possession of a controlled substance entered prior to *Blake*, concluding that the crime was valid at the time of the guilty pleas. *Id.* These opinions support the Court of Appeals' conclusion here that "a conviction under RCW 69.50.4013(1) is not automatically vacated or invalidated." *See* Slip Opinion, pg. 12.

Balles also argues the Court of Appeals' decision conflicts with this Court's opinion in *State v. Jennings*. See Petition for Review, pgs. 6, 12-14; see also *State v. Jennings*, 199 Wn.2d 53, 502 P.3d 1255 (2022). However, *Jennings* is distinguishable from this case, because it considered a trial court's sentencing authority, as opposed to the question here, whether a DOC officer could ignore a court order. See *Jennings*, 199 Wn.2d at 67 (holding that a sentencing court may not consider a prior conviction for possession of a controlled substance under RCW 69.50.4013(1) when calculating an offender score).

Second, under RAP 13.4(b)(2), Balles argues the Court of Appeals' decision conflicts with decisions of the Court of Appeals. See Petition for Review, pgs. 6-10, 12-14. Balles argues the Court of Appeals' decision conflicts with *State v. French* and *State v. Markovich*. See *State v. French*, 21 Wn. App. 2d 891, 508 P.3d 1036 (2022); *State v. Markovich*, 19 Wn. App. 2d 157, 492 P.3d 206 (2021).

However, *French* and *Markovich* are distinguishable from this case, because they considered a trial court's sentencing authority, as opposed to the question here, whether a DOC officer could ignore a court order. *See French*, 21 Wn. App. 2d at 894 (holding the sentencing court properly declined add a point to the defendant's offender score for "commit[ing] the current offense while he was on community custody as a direct consequence of an invalid conviction."); *Markovich*, 19 Wn. 2d at 172-74 (concluding that an out-of-state drug possession conviction cannot be counted in the defendant's offender score post-*Blake*).

Finally, under RAP 13.4(b)(3) and (4), Balles argues the Court of Appeals' decision "raises significant question of law [sic] under the Fourth Amendment and Wash. Const. art. 1, sec. 7, and involves an issue of substantial public interest that should be decided by this Court." *See* Petition for Review, pgs. 15-19.

Balles argues:

Specifically, this Court should decide whether law enforcement should be expected to know the current state of the law regarding the constitutional right of citizens to privacy and under what limited circumstances that right must lawfully give way to law enforcement efforts.

Petition for Review, pg. 15.

He further argues “[i]t would seem to defy logic and common-sense to conclude that those responsible for enforcing the law are not required to know what it is.” Petition for Review, pgs. 18-19.

However, as discussed above, the law enforcement officers here were not enforcing an unconstitutional statute, but rather, complying with a court order. Balles had a remedy; seek to invalidate the court order, which he later did. (CP 35, 86; RP 16, 41-44). This was the proper solution, rather than willfully violating the court order. *See, e.g., State v. Biggs*, No. 38830-1-III, 2023 WL 6121040, *1-5 (Wash. Ct. App. Sept. 19, 2023), *review denied*, 2 Wn. 3d 1025, 544 P.3d 30 (2024) (concluding

the trial court erred when it dismissed a charge of escape from community custody following *Blake*, where the defendant was on community custody for a possession of a controlled substance conviction; finding “[w]hen faced with a potentially invalid court order, the solution is not to willfully violate it.”); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

Balles does not meet the criteria for review by this Court, set forth in RAP 13.4(b). Accordingly, Balles’ petition for review should be denied.

F. CONCLUSION

For the reasons stated above, the Court of Appeals’ opinion does not meet the criteria in RAP 13.4(b). As such, Balles’ petition for review should be denied.

WORD COUNT CERTIFICATION

This document contains 2,197 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 14th day of November, 2024.

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SERVICE	Service was electronic, or if no email address appears at left, via U.S. Mail. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 14, 2024, Spokane, WA <u>s/ Jill S. Reuter</u> Original to Washington Supreme Court by email to <u>supreme@courts.wa.gov</u>; Copy as listed at left.
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