NO. 77162-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM CASTORENA GONZALEZ,

Appellant.

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

The Honorable George Appel, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's rights under the state and federal constitutions when it failed to suppress evidence discovered in an illegal warrantless search of a backpack.

2. The court erred in entering the conclusion of law determining that the warrantless search was valid and the evidence admissible. CP 24 (conclusions of law on CrR 3.6 hearing, first, second, and third paragraphs).[1]

3. The trial court's factual findings are erroneous to the extent that they fail to note that the search occurred at great distance from the location of the seizure of the items and after the appellant was secured. CP 24 (findings of fact on CrR 3.6 suppression hearing, first and second complete paragraphs of second page).

4. The trial court erred in ordering the indigent appellant to pay non-mandatory legal financial obligations (LFOs). 6RP 4-13.[2]

5. The court's "boilerplate" written finding that the appellant was able to pay discretionary LFOs violates RCW 10.01.160(3). CP 30.

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[1] The trial court's CrR 3.6 findings and conclusions are appended to this brief.

[2] The verbatim reports in this case consist of the following volumes: 1RP – 6/2/17; 2RP – 6/12/17; 3RP – 6/13/17; 4RP – 6/14/17; 5RP – 6/16/17; and 6RP – 6/30/17.

Issues Pertaining to Assignments of Error

1. Police searched a backpack that was not in the appellant's actual possession, either at the time of his seizure or formal arrest. At best, the backpack was within reaching distance. Under State v. Byrd, 178 Wn.2d 611, 617, 310 P.3d 793 (2013), such proximity to the searched item is inadequate to support a warrantless search of the item incident to arrest.

Did the trial court therefore violate the appellant's rights under article 1, section 7 and the Fourth Amendment when it failed to suppress evidence discovered in the illegal search of the backpack?

2. RCW 10.01.160(3) permits a trial court to order a defendant to pay LFOs, but only if the court has first considered the defendant's individual financial circumstances and concluded he has the ability, or likely future ability, to pay.

Over objection, the trial court ordered the appellant to pay nearly $2,000 in discretionary LFOs. The court's analysis, in response to the appellant's factually-supported assertion that he was indigent, consisted of speculation that the appellant must have earned some money from involvement in drug trafficking. Implicitly, the court suggested that the appellant could earn money in the future in the same manner. However, the court's belief that the appellant could pay substantial non-mandatory LFOs

focused on one activity that the appellant clearly could not pursue in the future: Drug trafficking.

a. Did the court's ruling, declining to find the appellant indigent due to his supposed ability to earn money via drug dealing, violate RCW 10.01.160(3)?

b. Did the court's analysis also reflect a manifest abuse its discretion?

c. Was the court's boilerplate written finding that the appellant was able to pay LFOs inadequate under RCW 10.01.160(3)?

B. STATEMENT OF THE CASE

The State charged Abraham Castorena Gonzalez (Castorena) with possession of heroin with intent to deliver. CP 95-96; RCW 69.50.401(1), (2)(a).[3]

[3] RCW 69.50.401 provides in part that

> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> (2) Any person who violates this section with respect to [a] controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony . . . .

Following a pretrial hearing, the court denied Castorena's motion to suppress evidence police discovered in a jacket and backpack following his arrest. CP 82-90 (defense motion to suppress evidence); 1RP 73-78 (oral ruling denying motion to suppress evidence, but suppressing Castorena's statement to police); CP 23-24 (written findings). A detailed description of the suppression hearing testimony is set forth in the argument section below.

The case was tried to a jury. The evidence at trial indicated that, after Castorena entered a gas station bathroom in Everett, the clerk heard singing and screaming within. 2RP 72-73, 75. Castorena remained in the bathroom for "40 to 50 minutes." 2RP 73. When the clerk ordered Castorena to leave the bathroom, Castorena was nonresponsive. 2RP 73, 75.

The clerk contacted police, who also ordered Castorena to leave the bathroom. 2RP 73; 3RP 99-100. After a period of time, the bathroom door opened, revealing Castorena, his belongings, and a messy bathroom. 3RP 99-100, 102. Police notified Castorena he was being trespassed from the gas station, and they ordered him to leave. 3RP 216. Castorena was slow to respond to police commands. 3RP 216. As Castorena picked up a jacket from the floor, a measuring spoon coated with brown residue fell out. Police suspected the spoon had been used as a heroin "cooker." 3RP 104-05. Such a device is used to heat heroin before a user injects it. 3RP 105.

Police arrested Castorena. In a search of the jacket, police found a baggie containing brown powder. In a search of the backpack police had found in the bathroom, they discovered a syringe containing brown liquid, 13 small plastic-wrapped bundles containing a blackish-brownish substance, plastic that appeared to be packaging material, and a small scale. 3RP 106-10, 132-33, 137, 218-21, 242-44; 4RP 297. The baggie from the jacket and one of the bundles from the backpack were tested by the state crime lab and found to contain heroin. 4RP 293-95.

Upon arrest, Castorena appeared to be under the influence of heroin. Castorena was evaluated by medical personnel on two occasions before he could be booked into jail because police feared he might suffer an overdose. 3RP 210, 232; see also 1RP 43-45, 58-59 (pretrial hearing testimony).

Testifying police officers acknowledged they found no cash, no cell phone, and no "ledger"-type paperwork on Castorena's person or in the other items. One officer acknowledged that the absence of such evidence could mean that Castorena was merely a "runner" that is, a transporter of drugs, but not himself a drug dealer. 3RP 185, 202-04.

Although the jury was instructed on the lesser offense of possession of a controlled substance, it found Castorena guilty as charged. CP 45 (guilty verdict); CP 54, 59 (jury instructions).

Based on an offender score of zero, the court sentenced Castorena to a standard range sentence of 16 months of incarceration. CP 27-40; RCW 9.94A.517 (drug offense sentencing grid); RCW 9.94A.518 (drug offense seriousness levels).

The court also ordered Castorena to pay $2,762 in LFOs, including $1,962 in discretionary LFOs. CP 34. A detailed discussion of the sentencing hearing is set forth in the argument section below.

Castorena timely appeals. CP 22.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED CASTORENA'S RIGHTS UNDER ARTICLE 1, SECTION 7 AND THE FOURTH AMENDMENT WHEN IT FAILED TO SUPPRESS EVIDENCE DISCOVERED IN THE ILLEGAL WARRANTLESS SEARCH OF THE BACKPACK

The trial court violated the Castorena's rights under the state and federal constitutions when it failed to suppress evidence discovered in an illegal search of a backpack. Because the evidence discovered in the jacket was insufficient to support a conviction of possession with intent to deliver, the conviction must be reversed.

a. Suppression hearing testimony

Sergeant Timothy McAllister responded to call that a man had locked himself in an Everett gas station bathroom and was creating a

disturbance. McAllister arrived at the gas station around 12:30 a.m. 1RP 6-7. McAllister and additional officers, who arrived shortly after McAllister, heard yelling from within the bathroom. They ordered Castorena to come out, although he was slow to comply. 1RP 8-9. When the door opened, Castorena emerged from the single-occupancy bathroom. 1RP 30-31. The bathroom was a "mess." 1RP 16. McAllister saw toilet paper "all over the floor." 1RP 9. He also saw a backpack and a few jackets on the floor. 1RP 9. Castorena appeared agitated. 1RP 9.

The officers frisked Castorena for weapons and found nothing. 1RP 48. They had Castorena move five to six feet away from the bathroom entrance. 1RP 9-10. McAllister gathered the jackets and backpack from the bathroom and set the items about five to six feet from Castorena. 1RP 10, 31-32, 40-41. Police ascertained Castorena's identity, provided the information to the gas station clerk, and then notified Castorena he was no longer welcome at the gas station. 1RP 11, 39-40. The officers told Castorena he was, however, free to leave. 1RP 11, 17.

Castorena moved slowly in response to the officers' commands. 1RP 33, 41. As Castorena went to pick up a jacket, the object police described as a "cooker" fell onto the floor. 1RP 11. McAllister took the

jacket from Castorena's hand[4] and told Castorena he was under arrest. 1RP 12. Police officers handcuffed Castorena. 1RP 51.

McAllister and the other officers never saw Castorena touch the backpack or the second jacket. 1RP 19, 52. According to McAllister, however, the clerk reported Castorena had been carrying a backpack when he entered the bathroom. 1RP 27.[5]

Police escorted Castorena outside and secured him in a patrol car. 1RP 12, 34. McAllister, meanwhile, gathered the jackets and backpack and set them on the hood of a patrol car outside. 1RP 12, 19. McAllister then searched the jacket the "cooker" had fallen from and found the baggie full of brown powder. 1RP 12-13. McAllister began searching the backpack and discovered the syringe. 1RP 14. Another officer completed the search of the backpack, which revealed the additional items described above. 1RP 14, 36-37, 51-52.

McAllister acknowledged he searched the items to look for evidence. 1RP 22. But he believed the backpack—which was likely to be

[4] Another officer who testified at the suppression hearing said he believed McAllister picked up the jacket for Castorena. 1RP 33. But the trial court adopted McAllister's version of events. 1RP 74-75.

[5] At trial, the gas station clerk said he saw Castorena enter the bathroom carrying a "bag" and a baseball bat. 2RP 73. He did not recall if Castorena was wearing a jacket. The clerk did not, however, testify at the suppression hearing. 2RP 71-73.

sent to jail with Castorena—was too large for the jail to accept and might have to be "impounded." 1RP 19-21, 23.

Following testimony and argument, the trial court denied the motion to suppress. CP 23-24; 1RP 73-78.

b. Standard of review

In reviewing a trial court's decision on an accused person's motion to suppress evidence, this Court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial if it is enough "'to persuade a fair-minded person of the truth of the stated premise.'" Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). This Court reviews de novo conclusions of law relating to the suppression of evidence. Garvin, 166 Wn.2d at 249.

c. Consistent with the Supreme Court's *Byrd* decision, the search of the backpack violated Castorena's rights under the state and federal constitutions.

Unless an exception is present, a warrantless search is impermissible under the state and federal constitutions. U.S. CONST. amend. IV; CONST. art. I, § 7; State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Generally, the trial court suppresses evidence seized from an illegal search

under the exclusionary rule or the "fruit of the poisonous tree" doctrine. Id. at 716-17.[6]

A warrantless search is presumed unlawful unless the State proves it falls within one a few narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears a "heavy burden" of establishing an exception to the warrant requirement by a preponderance of the evidence. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

A search incident to arrest has historically been an exception to the warrant requirement. As the Supreme Court explained in Byrd, the search incident to arrest exception embraces two analytically distinct concepts. 178 Wn.2d at 617. In United States v. Robinson, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed .2d 427 (1973), the United States Supreme Court explained that the exception "has historically been formulated into two distinct propositions."

The first of these propositions is that "a search may be made of the area within the control of the arrestee." Id. In Chimel v. California, 395

[6] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Article I, section 7 does not turn on reasonableness, instead guaranteeing that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." CONST. art. I, § 7.

U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), the Court held that these searches must be justified by concerns that the arrestee might otherwise access an article to obtain a weapon or destroy evidence. New York v. Belton, 453 U.S. 454, 459-61, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), was a short-lived exception to Chimel that permitted police to search the interior of a car incident to an occupant's arrest without demonstrating concerns for officer safety or evidence preservation. However, in Arizona v. Gant, 556 U.S. 332, 335, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the Court overruled Belton and held that all searches of an arrestee's surroundings, including the interior of a car, must comply with Chimel. Searches of an arrestee's surroundings require the same justifications under article I, section 7. State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Under the second form of search incident to arrest, "a search may be made of the person of the arrestee by virtue of the lawful arrest." Robinson, 414 U.S. at 224. In Robinson, the Court held that under "the long line of authorities of this Court dating back to Weeks[v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914)]" and "the history of practice in this country and in England," searches of an arrestee's person, including articles of the person such as clothing or personal effects, require "no additional justification" beyond the validity of the custodial arrest.

Robinson, 414 U.S. at 235. Instead, a search of the arrestee's person is "not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." Robinson, 414 U.S. at 224.

As explained in Byrd, unlike searches of surroundings, searches of the arrestee's person and personal effects do not require "'a case-by-case adjudication'" because they always implicate Chimel officer safety/evidence preservation concerns. Byrd, 178 Wn.2d at 618 (citing Robinson, 414 U.S. at 224). Thus, their validity "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." Robinson, 414 U.S. at 224.

Under this rule, an article is "immediately associated" with the arrestee's person and can be searched under Robinson if the arrestee has actual possession of it at the time of a lawful custodial arrest. Byrd, 178 Wn.2d at 621 (collecting cases). "The time of arrest rule recognizes that the same exigencies that justify searching an arrestee prior to placing him into custody extends not just to the arrestee's clothes . . . but to all articles closely associated with his person." Id. at 622.

In Byrd, for example, the court held that a purse held in an automobile passenger's lap at the time of arrest was an "article of her

person" under the "time of arrest" rule, and could be searched without a warrant. Id. at 624.

The Byrd Court cautioned, however, against an excessively broad application of the rule. The rule "does not extend to all articles in an arrestee's *constructive* possession, but only those personal articles in the arrestee's *actual and exclusive possession at or immediately preceding the time of arrest*." Id. at 623 (emphasis added).

The Court continued

> Some of our cases contain dicta, based on loose language from Belton, suggesting that the rule covers articles within the arrestee's reach. See, e.g., [State v. Smith, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992) . . . .] This suggestion is incorrect. Searches of the arrestee's person incident to arrest extend only to articles "in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person." United States v. Rabinowitz, 339 U.S. 56, 78, 70 S. Ct. 430, 94 L. Ed. 653 (1950) (Frankfurter, J., dissenting) (describing the historical limits of the exception).

Byrd, 178 Wn.2d at 623.

The Court continued, "[e]xtending Robinson to articles *within the arrestee's reach* but not actually in his possession exceeds the rule's rationale and infringes on territory reserved to Gant and Valdez." Byrd, 178 Wn.2d at 623 (emphasis added).

That is precisely what occurred in this case. The backpack was potentially within reach, but not actually in Castorena's possession, either

at the time of his seizure or his formal arrest. Yet the court determined the search of the backpack was lawful, despite the lack of warrant. CP 24. Under Byrd, this conclusion was erroneous as a matter of law.[7] The contents of the backpack should have been suppressed. State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) ("[E]xclusionary rule mandates the suppression of evidence gathered through unconstitutional means.").

Moreover, because the evidence discovered in the jacket did not itself support a conviction for possession with intent to deliver, Castorena's conviction for that crime should be reversed and the charge dismissed. See, e.g., State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995) (evidence of intent to deliver must be based on more than mere possession of the controlled substance).[8]

d. Contrary to the trial court's erroneous conclusions, *Brock* and *MacDicken* do not support the warrantless search in this case.

The trial court also erred as a matter of law when it relied on State v. Brock, 184 Wn.2d 148, 355 P.3d 1118 (2015) and State v. MacDicken,

[7] As indicated in the third assignment of error, above, the court's findings also fail to note that the search of the backpack and jacket occurred, not in the gas station, but on the hood of the patrol car, after Castorena was secured and in custody. These facts were uncontested. 1RP 12, 19, 34 (suppression hearing testimony).

[8] Uncontested testimony indicated the "cooker" that fell out of the jacket was associated with personal use. 3RP 105.

179 Wn.2d 936, 319 P.3d 31 (2014) to find that the evidence discovered in the backpack was subject to warrantless search incident to arrest. CP 24.

In MacDicken, police searched a laptop bag and rolling duffel bag in MacDicken's "actual and exclusive possession at the time of his arrest" without a warrant. 179 Wn.2d at 942. The Court upheld the search, even though the items were out of MacDicken's reach at the time of the search itself. Id. at 938. Applying the rule from Byrd, the Court observed the bags "were immediately associated with [MacDicken's] person." MacDicken, 179 Wn.2d at 942. Moreover, "[b]ecause there was no significant delay between the arrest and the search that would render the search unreasonable," the Court held that the search of the bags was part of the lawful search of MacDicken's person incident to his arrest. Id.

Later, in Brock, the Supreme Court held that a police officer was permitted to search an arrestee's backpack incident to arrest when the arrestee was wearing the backpack at the moment he was stopped by police, but not at the time he was formally arrested no more than 10 minutes later. Brock, 184 Wn.2d at 150. The Court rejected an argument that too much time had passed between the initial contact, when the police officer seized the backpack, and the formal arrest. Id. at 157-59.

The Court cautioned, nonetheless, that the possession of the personal item in question must "so immediately precede[] arrest that the

item is still functionally a part of the arrestee's person." Id. at 158. Moreover, the Court was careful to note that the officer himself had removed the backpack from Brock's person. Id. at 159 ("We hold that when the officer removes the item from the arrestee's person during a lawful [investigative detention] and [it] ripens into a lawful arrest, the passage of time does not negate the authority of law justifying the search incident to arrest.").

These cases are factually distinguishable. Here, the State presented no evidence that Castorena actually possessed the backpack at the time of initial seizure or arrest, such that the backpack was "functionally a part of" his person. Id. at 158. Castorena was five to six feet from the backpack during the officers' initial seizure of him. 1RP 10, 31-32, 40-41. While Castorena may have been somewhat closer when he reached for the jacket ("within the arrestee's reach") the backpack was not in his actual possession at that point, either. Byrd, 178 Wn.2d at 623. Unlike in the case of the MacDicken and Brock defendants, the person most intimately connected with the backpack—from Castorena's seizure to his arrest—was Sergeant McAllister.

In summary, under Byrd—which remains good law—any "reaching distance" proximity was not good enough. Byrd, 178 Wn.2d at 623. As

stated on page 14 above, the evidence discovered in the backpack should have been suppressed, and the charge dismissed.

2. THE TRIAL COURT ERRED WHEN IT FOUND CASTORENA HAD THE ABILITY TO PAY NEARLY $2,000 IN DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS BASED ON SPECULATION THAT HE COULD EARN MONEY THROUGH DRUG DEALING.

RCW 10.01.160(3) permits a trial court to order a defendant to pay LFOs, but only if that court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. The trial court's inquiry fell short of satisfying RCW 10.01.160(3), as did the court's oral and written findings.

This Court should strike the non-mandatory LFOs. At sentencing, Castorena established he does not have the ability to pay them. But, in the event that this Court disagrees, Castorena asks that the case be remanded for a proper inquiry into his ability to pay.

a. Sentencing hearing and refusal to find Castorena indigent based on involvement in drug dealing

At the sentencing hearing, the State asked the court to order Castorena to pay non-mandatory LFOs, including $962 for appointed

counsel[9] and a $1,000 "VUCSA" fine.[10] The State therefore sought LFOs totaling $2,762. 6RP 4-5.

In response, the court asked how much money was found on Castorena at the time of his arrest. 6RP 5. The parties confirmed Castorena had no money. 6RP 5-6.

Castorena's counsel then argued that her client was indigent and therefore the court should waive discretionary fines.

> Mr. Castorena Gonzalez does not have stable financial resources. He does not have a stable job, and didn't have a stable place to stay when he was booked in. He has screened very recently and been appointed a public defender. I would ask the Court to make a finding of indigency, and I would ask the court to waive the VUCSA fine, as well as the public defender recoupment fees.

6RP 9.

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[9] The court imposed this LFO under RCW 9.94A.760, which addresses LFOs in general.

[10] RCW 69.50.430(1) provides in part that:

> Every adult offender convicted of a felony violation of RCW 69.50.401 through 69.50.4013, 69.50.4015, 69.50.402, 69.50.403, 69.50.406 69.50.407, 69.50.410, or 69.50.415 must be fined one thousand dollars in addition to any other fine or penalty imposed. *Unless the court finds the adult offender to be indigent, this additional fine may not be suspended or deferred by the court*.

(Emphasis added.)

But the court imposed all LFOs the State requested. It imposed $800 in mandatory fees and assessments. 6RP 10. The court also addressed the non-mandatory obligations as follows:

> I have heard the question raised as to whether you were indigent, and I understand that you have no stable job, nor a place to stay, and *I think it may well be, sir, that you have no legitimate, stable job. I don't really know what your job prospects are. I know that based on the evidence in this case, you had sufficient product on you to make a substantial amount of money. I also understand you successfully screened at the Office of Public Defense and were found to be indigent for those purposes,* but of course that's all self-reported. They have nothing to go on, other than what is provided by you, sir, and now of course things are different because we had 12 citizens who feel that you were possessing those drugs with the intent to deliver, which is a lucrative business. There's no question about it.
>
> *So I don't think I can find that you are indigent. In fact, I think it may well be that you have been earning and could earn considerable money,* simply based on the verdict that the jury has entered. On the other hand, I don't have any credible evidence to the contrary.

6RP 10-11 (emphasis added).

Given leave to respond to these assertions, defense counsel pointed out that:

> [O]ne piece of testimony that came out during trial was that, you know, somebody may be a runner and that may be why they don't have cash on them and are taking an amount of drugs from one place to another, that I don't think would entail having access to the actual money that requires securing the amount of drugs that they were found with, and I believe that testimony was provided during the trial.

> THE COURT: Indeed, it was.
>
> [Defense counsel]: I . . . would just like the Court to consider that, in terms of Your Honor's indigency finding.

6RP 11.

The court again declined to find Castorena indigent, commenting that even if Castorena were simply a "runner" he would still have earned money for his role. 6RP 12. "Perhaps it's not much, but on the other hand, perhaps it's a good deal. Here, after all, we have a case of a person who apparently felt there was sufficient reason to dip into the product himself." 6RP 12.

The court continued, appearing to express frustration that drug dealers did not pay taxes:

> I simply cannot find that he is indigent. I don't think that there is credible evidence that he is indigent, and I think that there is, on the contrary, credible evidence that he was in a position to be earning significant money tax-free. Most people have to pay taxes on their income, but people who make money illegally don't. At least I find it very difficult to imagine that anybody would report money earned as a runner for a drug dealer on their tax forms. So I don't find that he is indigent.
>
> . . . . I have not found any evidence to support a conclusion that he is indigent. I have found evidence to support a conclusion that he is not indigent. And I think a reasonable inference might be that he is perhaps even less indigent than a lot of folks who pay their taxes . . .

6RP 12-13.

The court also remarked that $962 was a good price for an attorney:

> I will impose the $1,000 VUCSA fine and the $962 for his court-appointed attorney *which by the way is a deal. If you were going to purchase your attorney's services on the open market, $962 wouldn't begin to cover it*. . . .

6RP 13 (emphasis added).

The court ordered Castorena to pay $50 per month following release from incarceration. 6RP 13-14. The court commented that Castorena—who did not have stable housing—should pay his legal debts before other debts because the threat of jail loomed:

> I will set your mandatory minimum payment at $50 a month. However, if for any reason you can't pay $50, try to pay something. If, on the other hand, for whatever reason you happen to have a lot of money, you might want to get out from under this debt as quickly as possible. *After all, you will never have another creditor who can put you in jail, right?*

6RP 14-15 (emphasis added).

The court ordered Castorena to pay $2,782 in total LFOs, to accrue interest from the date of the judgment "at the rate applicable to civil judgments"—12 percent—under RCW 10.82.090. CP 33; State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015).

The judgment and sentence also contains a boilerplate finding that Castorena had the ability to pay LFOs. CP 30.

b. Discretionary legal financial obligations and standard of review

As a preliminary matter, the LFOs challenged in this case were discretionary. See In re Pers. Restraint of Dove, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016) (court-appointed attorney fees and defense costs are discretionary), review denied, 188 Wn.2d 1008 (2017); see also RCW 69.50.430(1) (providing that VUCSA fine may be waived based on indigency).

This Court reviews a decision to impose discretionary LFOs for abuse of discretion. State v. Clark, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A decision constitutes an abuse of discretion when it is exercised on untenable grounds or for untenable reasons. Id.

c. RCW 10.01.160(3) through the lens of *Blazina*

RCW 10.01.160(3) permits a trial court to order a defendant to pay LFOs, but only if the court has first considered his individual financial circumstances and has concluded he has the ability, or likely future ability, to pay.

Here, the trial court's inquiry fell short of satisfying the applicable statute. RCW 10.01.160(3) provides,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take

> account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

This statute is mandatory: "it creates a duty rather than confers discretion." Blazina, 182 Wn.2d at 838. "Practically speaking . . . the [trial] court must do more than sign a judgment and sentence with boilerplate stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id.

This inquiry must include consideration of "important factors . . . such as incarceration and a defendant's other debts . . . when determining a defendant's ability to pay." Id. The Blazina Court also instructed courts engaged in this inquiry to "look to the comment in court rule GR 34[11] for

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[11] The Supreme Court appears to be referring to the text of the rule itself, found below the first comment. That portion of the rule states that a person should be found indigent for purposes of the rule if he or she:

> (3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that;
>
> (A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:
>
> (i) Federal Temporary Assistance for Needy Families (TANF);

guidance." Blazina, 182 Wn.2d at 838. Indeed, that rule provides specific criteria to be considered in determining indigency. GR 34(a)(3).

The Court also characterized Washington's LFO system as "broken" and noted in detail how, as wielded by courts, it had created a permanent underclass. Blazina, 182 Wn.2d at 836-37. As delineated in Blazina, at a national level, organizations have chronicled problems associated with LFOs imposed against indigent defendants. These problems include "increased difficulty in reentering society, the doubtful recoupment of

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> (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
>
> (iii) Federal Supplemental Security Income (SSI);
>
> (iv) Federal poverty-related veteran's benefits; or
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> (v) Food Stamp Program (FSP); or
>
> (B) his or her household income is at or below 125 percent of the federal poverty guideline; or
>
> (C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or
>
> (D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

GR 34(a)(3).

money by the government, and inequities in administration." Id. at 835-36 (citing state and national studies recognizing that criminal debt "creates [impediment] to reentry and rehabilitation").

As the Blazina Court warned, the cascading effects of substantial LFOs may, rather than deterring criminal activity, actually lead to recidivism: LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees. Id. at 836-37. Many defendants cannot afford to pay at a rate that reduces the principal amount, so they end up owing more 10 years after their conviction than at the time of conviction. Id. at 836. In addition,

> The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs . . . . The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. . . . This active record can have serious negative consequences on employment, on housing, and on finances. . . . . LFO debt also impacts credit ratings, making it more difficult to find secure housing. . . ..

Id. at 836-37 (emphasis added, citations omitted). The Court concluded, "All of these reentry difficulties increase the chances of recidivism." Id. at 837.

Of special relevance to this case, the Blazina Court lamented that "[s]ignificant disparities also exist in the administration of LFOs in

Washington." Id. "For example, drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties. Id.

In summary, RCW 10.01.160(3) and Blazina delineate what constitutes a proper inquiry into ability to pay. Moreover, Blazina highlights the serious consequences flowing from courts' failures to engage in such inquiries.

d. The court's inquiry was procedurally deficient, and its oral and written findings were substantively deficient.

Here, the trial court's inquiry failed to satisfy the applicable statute, and its oral and written findings constituted a manifest abuse of discretion.

i. *The court's inquiry was procedurally deficient*.

First, the court's inquiry failed to satisfy RCW 10.01.160(3) and Blazina. In response to the State's request for nearly $2,000 in non-mandatory fines, defense counsel argued that Castorena had no source of income and no stable residence. 6RP 9.

In determining Castorena was *not* indigent, rather than engaging in an appropriate inquiry, the court only speculated that Castorena—a heroin user nearly incapacitated by heroin use at the time of his arrest—must have earned some money from involvement in drug trafficking. Implicitly, the

court's reasoning suggested Castorena could earn money in the future in the same manner. 6RP 10-11 ("In fact, I think it may well be that you have been earning *and could earn considerable money*, simply based on the [possession with intent to deliver] verdict that the jury has entered.") (Emphasis added); see generally 6RP 10-15. Thus, the court's belief Castorena could pay substantial non-mandatory fines focused on one activity that Castorena could not pursue in the future: Drug trafficking.

The trial court also remarked that Castorena appeared to be using the drugs he was discovered transporting. 6RP 12. This comment sheds little light on whether the court believed Castorena's drug use indicated he was earning a lot of money or little money for his role. In any event, common sense would suggest he was earning little. For example, consumption of the drugs might indicate Castorena felt otherwise undercompensated. Or it might indicate that he was being compensated in drugs rather than money. In neither scenario can Castorena be considered a handsomely-compensated drug kingpin.

The other possible inference from the court's comments would be that Castorena had accumulated substantial savings. This notion is belied by the dire circumstances in which Castorena found himself when apprehended by police—singing and screaming in a gas station bathroom,

in possession of no money and no cell phone—as well as defense counsel's uncontested assertion that Castorena lacked stable housing. 6RP 9.

In Blazina, this court emphasized the importance of adhering to established procedural safeguards prior to imposing discretionary LFOs. In re the Pers. Restraint of Flippo, 187 Wn.2d 106, 113, 385 P.3d 128 (2016). The trial court's wildly speculative digressions do not come close to satisfying the serious inquiry required following Blazina. The written finding, mere boilerplate, fares no better. CP 30; Blazina, 182 Wn.2d at 838 (rejecting reliance boilerplate paragraph in judgment and sentence).

ii. *The court's oral ruling was substantively untenable*.

In addition to the procedural shortcomings of the court's ruling, the ruling constituted an abuse of discretion. The court's incomprehensible reliance on drug dealing as a form of future income is untenable. Clark, 191 Wn. App. at 372.

The goal of the criminal justice system cannot be promotion of recidivism, although, as indicated in Blazina, that can be its unintended consequence. Blazina, 182 Wn2d at 837. But, incredibly, taken to its logical conclusion, the trial court's reasoning seems to promote just that outcome.

Castorena's situation is, moreover, particularly problematic, considering Castorena fits the precise demographic characteristics the Blazina Court found particularly concerning: The Blazina Court lamented that "drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties." Id. Castorena, a Hispanic male accused of drug dealing who exercised his right to a jury trial, is, unfortunately, a member of a select group burdened by disproportionately onerous LFOs. The trial court's untenable reasoning in this case shows how that situation may have come to pass. Blazina demands that courts do better.

e. This Court should strike the non-mandatory legal financial obligations or, alternatively, remand for consideration of indigency based on the appropriate factors.

The trial court's reasoning does not reflect the careful inquiry contemplated by Blazina and RCW 10.01.160(3). Because the existing record supports Castorena's indigency, this Court should strike the improperly-imposed non-mandatory LFOs. 6RP 9, 11.[12]

Alternatively, this Court should remand for a reasoned consideration of Castorena's ability to pay non-mandatory LFOs in light of the appropriate factors. Blazina, 182 Wn.2d at 839.

[12] This is Castorena's preferred remedy.

D. CONCLUSION

The court erred in failing to suppress the evidence discovered in the backpack. Because the remaining evidence is insufficient to support Castorena's conviction for possession with intent to deliver, the conviction should be reversed and dismissed.

In any event, because Castorena demonstrated that he is indigent, the non-mandatory LFOs should be stricken. Alternatively, this Court should remand for an appropriate inquiry regarding his ability to pay.

DATED this 29th day of December, 2017.

Respectfully submitted,

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