NO. 35601-9-III

No. 96873-0

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SHANNON BLAKE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

"I'm not a drug addict. I'm not a bad person; I'm not the criminal I've been made out to be in this court." RP 119. Police searched the home where Shannon Blake was staying. Although Ms. Blake was never convicted of a crime connected to the homeowner's criminal activity, police arrested her.

Two days before this search, Ms. Blake received a pair of Goodwill jeans from her friend. Ms. Blake did not know there was a small baggy containing methamphetamine in the coin pocket of the jeans. Ms. Blake was wearing those jeans at the time of her arrest, and for the first time learned of the drugs when jail officers discovered the baggy during a search while booking her into jail. In the absence of any evidence contrary to her claimed lack of knowledge, the court found Ms. Blake had not proved unwitting possession.

Following her conviction, based only on a judicial finding that Ms. Blake suffers from drug addiction, the court increased Ms. Blake's maximum sentence. It was unconstitutional for the judge, and not a jury, to make a finding of chemical dependency not proven beyond a reasonable doubt. Ms. Blake is entitled to a new sentence.

After Ms. Blake's conviction, the legislature amended RCW 36.18.020 to eliminate the imposition of the $200 criminal filing fee on indigent defendants and eliminate interest. These amendments to the legal financial obligations statute are retroactive and should be applied to Ms. Blake.

B. ASSIGNMENTS OF ERROR

1. The trial court violated the Fourteenth Amendment's Due Process Clause and the Sixth Amendment, by making a finding of fact in the absence of proof beyond a reasonable doubt and without a jury verdict that increased the penalty beyond the standard range.

2. The trial court imposed an erroneous sentence by requiring Ms. Blake to pay the $200 criminal filing fee even though she is indigent.

3. The strict liability statute for possession of a controlled substance violates due process under the Fourteenth Amendment and article 1, § 3 of the Washington Constitution, by shifting the burden on defendants to prove unwitting possession.

4. The community custody conditions violate due process under the Fourteenth Amendment and article 1, § 3 of the Washington Constitution, because they do not provide a fair warning of the

proscribed conduct or provide standards to protect against arbitrary enforcement.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The statutory maximum is the maximum sentence a judge may impose based only on the facts in the jury verdict or admitted by the defendant. The judge made a finding that Ms. Blake had a chemical dependency, which increased her community custody to twelve months. This issue was not submitted to the jury or proved beyond a reasonable doubt. Should the sentence be reversed and remanded because the judge's finding deprived Ms. Blake of her due process rights?

2. HB 1783 amends RCW 36.18.020 to prevent courts from imposing a criminal filing fee of $200 on indigent defendants. A statutory amendment should be applied retroactively if it: (1) reduces the punishment for an offense, or (2) is remedial and does not affect a substantive or vested right. Should the statutory amendment apply to Ms. Blake's case and the $200 criminal filing fee be stricken because she is indigent?

3. The State is required to prove every element of a crime beyond a reasonable doubt. Washington is the only state that makes possession of a controlled substance a strict liability crime and places the burden on the defendant to prove unwitting possession. Did Ms. Blake's conviction violate due process because the State was relieved of proving an element of the crime?

4. Community custody conditions must provide ordinary people with a fair warning of the proscribed conduct or standards to protect against arbitrary enforcement. During sentencing, the court imposed community custody conditions that restricted Ms. Blake's geographical boundaries "as directed by CCO" and required her to obey all conditions "imposed by the DOC." Should these conditions be stricken as void because they are susceptible to arbitrary enforcement?

D. STATEMENT OF THE CASE

"My boyfriend and I were homeless, winter was coming, and Mr. Westman offered us a cheap room to rent." RP 72. Jobless and in need of a place to stay, Ms. Blake and her boyfriend moved into Kenneth Westman's home in Spokane. RP 72–73.

About two weeks later, they were still in the process of moving when police arrived. RP 74. The officers executed a search warrant to

recover evidence at Mr. Westman's home as part of a chop-shop investigation. RP 19. Since Ms. Blake was present, she was arrested for an unrelated charge of taking a motor vehicle without permission. RP 75; CP 11.

At the time of the arrest, Ms. Blake was wearing second-hand jeans she had received from her friend Lynn Millay two days earlier. *Id*. Ms. Millay "got them at the Goodwill outlet store thinking they would fit her but she was a little too chubby for them and thought they would be a good fit for [Ms. Blake]." RP 76. Ms. Blake modified and extended the bottom of the jeans so that they would fit. *Id.* The first day Ms. Blake wore the jeans was the day of her arrest. RP 86.

While booking her into jail, a corrections officer removed a baggy containing a small amount of a white substance form the coin pocket of the jeans. RP 33. A field test of the substance was positive for methamphetamine. RP 34. The arresting officer opined the baggy contained "[a] user amount or a single dosage." RP 49. The baggy was later tested by the Washington State Patrol Crime Lab where it was found to contain methamphetamine hydrochloride. RP 61.

The State charged Ms. Blake with unlawful possession of a controlled substance. CP 18. Ms. Blake waived her right to a jury trial on that charge. CP 19.

Ms. Blake explained at trial that she did not know there were drugs in the jeans and that she had "never seen [the] bag before." RP 81. She had only received the jeans from her friend a few days before. RP 76. The day of the arrest was the first day she wore the jeans, and she had never put her hands in the coin pocket of the jeans. RP 85. Ms. Blake stated emphatically she had never used methamphetamines. RP 76. Ms. Blake, forty-years-old, had never been arrested for a drug possession offense. RP 81.

Her boyfriend confirmed at trial that Ms. Millay had given Ms. Blake the jeans. RP 89. He also had observed Ms. Blake adding extensions to the bottom of the jeans to make them longer. RP 90.

The trial court made a finding that Ms. Blake and her boyfriend were not credible. CP 25–26. The court determined that Ms. Blake did not meet her burden of proving unwitting possession by a preponderance of evidence and found her guilty. CP 26.

During sentencing, the court determined that the First Time Offender Waiver was appropriate, but made a finding that Ms. Blake

had a chemical dependency. RP 122. The court determined this even though there was "no showing that she used meth, been arrested for meth, [or] tried meth." RP 118. Ms. Blake's waiver of her right to a jury trial did not encompass any allegation of chemical dependency. Nonetheless, based on this judicial finding, Ms. Blake's sentence for community custody increased from a maximum of six months to twelve months. CP 34.

In total, the court imposed three days of total confinement and twelve months of community custody. CP 32–34. The conditions of community custody included geographical restrictions to be set at the discretion of the CCO as well as a condition that Ms. Blake "obey all conditions of probation imposed by the DOC." CP 34.

The court also imposed $800 in legal financial obligations including: a $200 criminal filing fee, a $100 DNA collection fee, and a $500 victim assessment, even though Ms. Blake was indigent. CP 34–35. The court rejected counsel's argument that Ms. Blake had no money and stated that she could afford to pay the legal financial obligations because he believed she qualified for Social Security Disability. RP 118.

E. ARGUMENT

1. The sentencing court's finding of fact that increased the penalty beyond the standard range violated Ms. Blake's Sixth and Fourteenth Amendment rights to a jury finding beyond a reasonable doubt.

During sentencing, the court determined that Ms. Blake had a chemical dependency and instead of sentencing her within the statutory guidelines to six months of supervision, he increased her community custody to twelve months. RP 122. The judge relied on findings outside of the basis of the facts in the verdict or admitted by Ms. Blake. RP 121. There was no showing during trial that Ms. Blake used methamphetamine, let alone had a chemical dependency. Ms. Blake emphasized that she was "not a drug addict" and that the baggy in the second-hand jeans were not hers. RP 119. Therefore, it was unconstitutional for the judge, and not a jury, to make a finding of chemical dependency not proven beyond a reasonable doubt.

a. A fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

The Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466,

490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). It is unconstitutional under the Fourteenth Amendment's Due Process Clause, and the Sixth Amendment "to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*.; *see also Alleyne v. United States*, 570 U.S. 99, 114–15, 133 S. Ct. 2151, 188 L. Ed. 2d 314 (2013) (determining that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

These facts are the equivalent of elements, which is why they must be proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *see e.g.*, *State v. Goodman*, 150 Wn.2d 774, 786–87, 83 P.3d 410 (2004) (finding that the State must allege and prove the specific identity of a controlled substance beyond a reasonable doubt because the statutory maximum increased depending on the controlled substance). The statutory maximum means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The statutory maximum is

the maximum a judge "may impose *without* any additional findings." *Id*. at 304.

Additionally, in order for the defendant to provide an adequate defense against aggravating circumstances, "the defendant must receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury." *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). The Sentencing Reform Act of 1981 codifies these constitutional requirements. RCW 9.94A.537. It requires that the State give notice that it is seeking a sentence above the sentencing range, and that the notice state the aggravating circumstances. *Id*. Thus, a defendant is entitled to the essential protections of notice, a jury trial, and a heightened standard of proof with respect to facts that increase the statutory maximum.

Additionally, there is a difference between a waiver of a jury trial on the underlying charges, and the waiver of a jury determination of factual findings only for sentencing. *State v. Giles*, 132 Wn. App. 738, 739, 132 P.3d 1151, 1151 (2006). When defendants consent to a bench trial, they do not waive their rights to a jury determination of aggravating factors. *See State v. Suleiman*, 158 Wn.2d 280, 293, 43 P.3d 795 (2006) (holding that the facts used in sentencing were outside

the stipulated facts in a plea agreement and therefore violated *Blakely*); *see also State v. Harris*, 123 Wn. App. 906, 920, 99 P.3d 902 (2004) (explaining that consent to a judicial fact finder is valid only if it is a voluntary waiver of a *known* right) (overruled on other grounds by *State v. Harris*, 154 Wn.2d 118, 110 P.3d 192 (2005)).

b. Because it increases the maximum punishment it was unconstitutional for the court to make a finding that Ms. Blake had a chemical dependency that contributed to her offense.

Ms. Blake's sentencing court violated the Sixth and Fourteenth Amendments when it did not give her notice and make findings of fact that increased her sentence. Additionally, the court imposed the increased sentence on Ms. Blake without a jury finding and without proof beyond a reasonable doubt. Instead, the judge found that Ms. Blake had a chemical dependency and ordered her to serve twelve months of community custody, rather than the six months the court could impose without a jury finding. RP 122. The judge's reasoning for imposing the treatment and therefore the twelve months community custody was that "[he] didn't believe [her] testimony" and that she had prior drug treatment in the past, although she never had prior drug possession convictions. RP 126. This finding of fact falls outside of the

"basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303.

The first-time offender waiver provisions provide that the "court may impose up to six months of community custody *unless treatment is ordered*, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year." RCW 9.94A.650 (3) (emphasis added). Furthermore, treatment may be ordered where "the court finds that the offender has any chemical dependency that has contributed to his or her offense." RCW 9.94A.607 (1).

Here, the judicial finding of chemical dependency was made without notice, without proof beyond a reasonable doubt, and without a jury. The maximum permissible term of community custody the judge could impose based on the facts in the verdict or admitted by Ms. Blake was six months. RCW 9.94A.650. Only on finding Ms. Blake had a chemical dependency could the court impose twelve months of community custody. While Ms. Blake waived her right to a jury, that waiver was only for the trial and not for sentencing. RP 5–6, CP 19. The waiver does not mention "chemical dependency" at all. Ms. Blake never waived her right to have a jury determine that additional element.

It was unconstitutional for the judge, and not a jury, to make that finding of fact in the absence of proof beyond a reasonable doubt.

This Court should reverse the exceptional sentence and remand for resentencing within the standard range of six months.

2. The amendment to RCW 36.18.020 must apply to Ms. Blake's case.

On March 27, 2018, the governor signed HB 1783 into effect. The bill, which concerns legal financial obligations, amended RCW 36.18.020 to forbid courts from imposing the $200 criminal filing fee on indigent defendants. S.S.H.B. 1783, 65th Leg., Reg. Sess. (Wa. 2018); RCW 36.18.020.

The amendment to RCW 36.18.020 should be applied here. Statutory amendments apply to pending cases on appeal when they reduce the penalty for a crime or are remedial. This statutory amendment reduces the penalty of a crime for indigent persons and is remedial because it provides a remedy for indigent defendants who cannot afford to pay the filing fee.

Ms. Blake is indigent. At sentencing, defense counsel alerted the court Ms. Blake lacked the ability to pay any financial obligations saying, "she has no money, she has no income." RP 119. Counsel further stated he believed Ms. Blake qualified for Social Security

Disability and that she had been appealing to the Social Security Administration. RP 118. Ms. Blake had been moving around from home to home and she is "a single mom with a little girl." RP 119. She also was recently involved in a motorcycle accident and suffered serious injuries including a fractured skull, a fractured scapula, a brain hemorrhage, and hearing loss. RP 70–71. Nonetheless, the court ordered Ms. Blake to pay the $200 criminal filing fee according to former RCW 36.18.020. RP 124.

Because Ms. Blake is indigent, this Court should strike the $200 filing fee pursuant to recently enacted HB 1783 amending RCW 36.18.020.

a. When an amended statute reduces the penalty for a crime the new penalty applies.

Newly amended statutes can be applied to pending cases. *See State v. Heath*, 85 Wn.2d 196, 197–98, 532 P.2d 621 (1975) (holding that amendments to the Washington Habitual Traffic Offenders Act applied to a pending case); *State v. Grant*, 89 Wn.2d 678, 683, 575 P.2d 210, 213 (1978) (finding that the statute applied to pending litigation after the effective date of the statute); *State v. Abraham*, 64 Wash. 621, 627–28, 117 P. 501, 503 (1911) (noting that curative

statutes intended to be retroactive are applicable to cases pending in trial courts or pending upon appeal in appellate courts).

Furthermore, "where a controlling law changes between the entering of judgment below and consideration of the matter on appeal, the appellate court should apply the new or altered law, especially where no vested rights are involved, and the Legislature intended retroactive application." *Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 620, 694 P.2d 697, 703–04 (1985). In determining legislative intent, the Washington Supreme Court has held "the statute does not require that an intent to affect pending litigation be stated in express terms but that it must be expressed in words that fairly convey that intention." *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

In conducting a similar analysis to new principles of law from cases, courts have found that new decisional law can apply "to all cases, state or federal, pending on direct review or not yet final, with no exceptions for cases in which the new rule constitutes a clear break from the past." *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (quoting *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492, 495 (1992). Final is defined as "a case in which a judgment of

conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Matter of St. Pierre,* 118 Wn.2d at 327. Thus, a statutory change can apply to pending cases not yet final including cases pending on direct review.

When a statute reduces the penalty for a crime, "the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one." *Heath*, 85 Wn.2d at 198. This is contrary to the general presumption that statutory amendments apply prospectively. *State v. Humphrey*, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999).

In *Heath,* the Washington Supreme Court determined a newly enacted statute that permitted a judge to stay a revocation order applied retroactively. *Heath,* 85 Wn.2d at 198. Heath was found to be a habitual traffic offender and his license was revoked. *Id.* at 197. After his conviction, he began a course of treatment for his alcoholism. *Id.* About a year later, a new amendment to the statute went into effect that allowed stays of revocation orders where the offenses resulted from alcoholism and the offender obtained treatment. *Id*. The Washington Supreme Court found the legislation applied retroactively to Heath and

to all pending cases for two reasons. First, it was remedial because it allowed alcoholics to receive treatment. *Id*. at 198. Second, it reduced the penalty for a crime. *Id*. The court noted this "rule has even been applied in the face of a statutory presumption against retroactivity and the new penalty applied in all pending cases." *Id*.

In making this determination, the Washington Supreme Court relied on cases from California and New York. These cases discussed how statutes that reduce the punishment for a crime may be applied even if the state has a savings statute. *Id.* at 198 (citing *In re Estrada*, 63 Cal.2d 740, 408 P.2d 948 (1965); *People v. Oliver*, 1 N.Y.2d 152, 134 N.E.2d 197 (1956)).

Washington has also enacted a savings statute that states:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act.

RCW 10.01.040. In *State v. Kane*, 101 Wn. App. 607, 615, 5 P.3d 741 (2000), Division One opined that Washington's criminal savings statute was not at issue in *Heath*, yet the Washington Supreme Court has recognized exceptions to the savings statute, particularly when a statute

reduces the punishment for a crime. *See State v. Wiley*, 124 Wn.2d 679, 688, 880 P.2d 983 (1994); *State v. Ross*, 152 Wn.2d 220, 235, 95 P.3d 1225 (2004).

b. Because it reduces the punishment for Ms. Blake's crime, HB 1783 applies to her case.

On March 27, 2018 Governor Jay Inslee signed HB 1783. HB 1783 amends RCW 36.18.020 to read:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, *except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).*

S.S.H.B. 1783, 65th Leg., Reg. Sess. (Wa. 2018) (emphasis added); RCW 36.18.020. Indigent means a person who is receiving statutorily specified forms of public assistance, is involuntarily committed to a public mental health facility, or is receiving an annual income of 125% or less of the poverty level. RCW 10.101.010(3)(a)(b)(c).

Ms. Blake is indigent. At trial she was represented by appointed counsel. On appeal, counsel was appointed pursuant

to RCW 10.73.150 requiring appointment of counsel on appeal for persons found "indigent" under RCW 10.101.010.

HB 1783 reduces the penalty of a criminal conviction by not imposing a $200 filing fee on indigent defendants. By enacting this amendment, the legislature determined that no purpose would be served by imposing the harsher penalty on indigent persons. Because it reduces the penalty for a crime, the new amendment to RCW 36.18.020 should be applied retroactively.

c. Amendments that are remedial will be applied retroactively.

Amendments to a statute that are remedial will also be applied retroactively "when [they] relate[] to practice, procedure, or remedies, and [do] not affect a substantive or vested right." *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462–63, 832 P.2d 1303 (1992). The Washington Supreme Court has defined a right as "a legal consequence deriving from certain facts." *State v. McClendon*, 131 Wn.2d 853, 861, 953 P.2d 1334 (1997). On the other hand, a remedy "is a procedure prescribed by law to enforce a right." *Id*; *see also, Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (finding that the Crime Victims Compensation Act was remedial because its purpose was to

compensate and assist victims); *Addleman v. Board of Prison Terms and Paroles,* 107 Wn.2d 503, 510, 730 P.2d 1327 (1986) (holding that a sentencing statute that required the Board of Prison Terms and Paroles to consider the purpose, standards, and sentencing ranges of the Sentencing Reform Act of 1981was remedial and applied retroactively); *cf. State v. Humphrey*, 139 Wn.2d 53, 64, 983 P.2d 1118 (1999) (determining that increasing the victim penalty assessment from $100 to $500 created a new liability so it was not remedial).

Amendments that are remedial will be applied retroactively even if they are "completely silent as to legislative intent for retroactive application." *Kane*, 101 Wn. App. at 613. Statutes are enforced retroactively if they are "remedial in nature and retroactive application would further [their] remedial purpose." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007) (quoting *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). This Court when determining whether a statute is remedial should "look to the effect, not the form of the law." *Humphrey*, 139 Wn.2d at 63.

d. HB 1783 is remedial.

The amendment to RCW 36.18.020 is purely procedural and remedial in nature. The amendment's purpose is to afford a remedy to

indigent defendants who do not have the means to pay the $200 filing fee. The amendment implements a procedure delineating when a court may not impose the criminal filing fee. Additionally, the amendment does not take away any rights of the defendants, but rather remedies a problem. Applying the amendment would further the remedial purpose. Since the amendment is remedial, this Court should find that it applies retroactively to Ms. Blake's case.

3. RCW 69.50.4013 relieves the State of its burden of proving every element of the offense and, as applied, deprives Ms. Blake of due process.

During trial, Ms. Blake had the burden of demonstrating that she did not know the drugs were in her second-hand jeans. Ms. Blake testified that her friend gave her the Goodwill jeans only two days before the arrest and Ms. Blake did not know methamphetamine was in the coin pocket. The court found that Ms. Blake did not meet her burden and the State was relieved of its burden of proving an essential element of the crime—knowledge. Ultimately, this deprived Ms. Blake of due process.

a. Placing the burden on the defendant to prove lack of knowledge violates due process.

The Supreme Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). There is also a general rule that consciousness of wrongdoing is "a necessary element in the indictment and proof of every crime." *United States v. Balint*, 258 U.S. 250, 251, 42 S. Ct. 301, 66 L. Ed. 604 (1922).

When a statute does not contain a mental element, this "does not mean that none exists." *Elonis v. United States*, __U.S. __, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). The courts have imposed mental elements on strict liability statutes. *See Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct 1793, 128 L. Ed. 2d 608 (1994) (imposing an element of knowledge to a statute with no mens rea that criminalized possession of unregistered firearms); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) (holding that "knowingly" applied to elements of a crime concerning minority of performers and sexually explicit nature of material); *Liparota v. United States*, 471 U.S. 419, 433, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985) (finding that the offense had a mens rea requirement and the State must prove that a defendant knew his acquisition or possession of food stamps was unauthorized); *Morissette v. United*

States, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952) (holding that intent is an essential element of the crime of knowing conversion of Government property). Courts do so to avoid punishing an innocent person for an involuntary act or punishing a defendant who does not know that they possess a prohibited item. *See State v. Eaton*, 143 Wn. App. 155, 160, 177 P.3d 157 (2008) (finding that a strict liability sentence enhancement for someone who possesses a controlled substance in a county jail requires an element of volition). Washington courts have determined "a statute will not be deemed to be one of strict liability where such construction would criminalize a broad range of apparently innocent behavior." *State v. Anderson*, 141 Wn.2d 357, 364, 5 P.3d 1247, 1251 (2000) (holding that second degree unlawful possession of a firearm was not a strict liability crime because it required proof of knowing possession).

Generally, courts "do not favor statutory constructions recognizing strict liability." *State v. Warfield*, 119 Wn. App. 871, 876, 80 P.3d 625 (2003), *as amended* (Jan. 21, 2004). But it is within the legislature's prerogative to create strict liability crimes that do not contain a mens rea element. *Lambert v. People of the State of California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957).

However, they are subject to due process limits. *Warfield*, 119 Wn. App. at 876; *see also Lambert*, 355 U.S. at 229–30 (holding that a strict liability registration law violated due process when applied to a person who had no actual knowledge of their duty to register, and no showing was made of the probability of such knowledge); *United States v. Wulff*, 758 F.2d 1121, 1122 (6th Cir. 1985) (finding that a felony provision of the Migratory Bird Treaty Act violated due process because it did not require proof of scienter and it imposed a serious penalty).

Requiring a defendant to prove a fact or defense violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 2322, 53 L. Ed. 2d 281 (1977). One of these fundamental principles includes the presumption of innocence in favor of the accused and that the State must prove beyond a reasonable doubt "every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In determining whether there is a due process violation, courts "have often found it useful to refer both to history and to the current practice of other States." *Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491,

115 L. Ed. 2d 555 (1991) (plurality opinion). When there is a "freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions" it is more likely that the burden-shifting is unconstitutional. *Id.*

In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), the United States Supreme Court addressed the requirement that the State prove every element beyond a reasonable doubt. The statutory scheme in that case violated due process because it required the defendant, as an affirmative defense, to establish by a preponderance of evidence that he acted in the heat of passion. *Id.* at 703. The Court ultimately overturned the defendant's murder conviction because the law unconstitutionally shifted the burden to the defendant. *Id.*

Likewise, in *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017), the court found that the burden-shifting scheme in Arizona's child molestation law violated due process. The law did not require the State to prove sexual intent, but instead required the defendant to prove by a preponderance of evidence that he did not have sexual motivation. *Id.* at 1149. Therefore, innocent conduct such as: bathing a child, providing medical care to a child, and changing a baby's diaper could

be punished—even though they were not wrongful acts. *Id*. at 1164. One test the court employed to determine whether this was impermissible burden-shifting was "whether the only quality that separates a small amount of wrongful conduct from a great sweep of prohibited benign conduct is the very factor the accused is charged with disproving." *Id.* Because the law placed the burden on the defendant to prove an essential element of the crime the court found that this violated due process. *Id*. at 1172.

The Washington Supreme Court has held that possession of a controlled substance is a strict liability crime. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); RCW 69.50.4013. Unwitting possession must be proved by a preponderance of evidence. *Id*. at 538. Washington is the only remaining state that makes drug possession a strict liability crime with no required mental element. *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring) (except for Washington and Florida "the remaining forty-eight states require knowledge to be an element of a narcotics possession law"); *Bradshaw*, 152 Wn.2d at 534 (recognizing North Dakota and Washington as the exception); *Dawkins v. State*, 313 Md. 638, 547 A. 2d 1041, 1045 n.7 (1988) (only North Dakota and Washington do not require knowledge

to be an element of drug possession); *State v. Bell*, 649 N.W.2d 243, 252 (2002) (the legislature changed North Dakota's law to require a mental element). Unlike Washington, while Florida's statute eliminates "knowledge of the illicit nature of the controlled substance" it "does not eliminate the element of knowledge of the presence of the substance." *Adkins*, 96 So. 3d at 416. Additionally, the Uniform Controlled Substances Act of 1970, requires a defendant to "knowingly or intentionally" possess a controlled substance. Unif. Controlled Substances Act 1970 § 401(c); *Bradshaw*, 152 Wn.2d at 534. In looking at "the current practice of other states," Washington's burden-shifting scheme is "freakish" and likely unconstitutional. *Schad*, 501 U.S. at 640.

Additionally, by eliminating the element of "knowledge" Washington's possession statute criminalizes a broad range of innocent conduct. Similar to *May*, here a defendant could also be found guilty for acts that are not wrongful. For example, Ms. Blake was found guilty of unlawful possession even though she did not know the drugs were in her jeans. The State was relieved of their burden and only had to show that she had methamphetamine in her possession. But, no purpose is served by punishing a person who unwittingly possesses drugs. In

applying the test from *May*, here the element of "knowledge" is what separates wrongful conduct from innocent conduct, and it is also the element the defendant has the burden of disproving. Therefore, Ms. Blake's conviction violates due process because the State was relieved of proving the element of knowledge.

The State may rely on the Supreme Court's holding in *United State v. Balint*, 258 U.S. 250, 42 S. Ct. 301, 66 L. Ed. 604 (1922), that due process did not require proof the defendant knew the character of the drugs sold. However, the statute at issue was not a strict liability statute because it still required that the defendant knew he was selling narcotics. *See Staples v. United States*, 511 U.S. 600, 606, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (discussing *Balint*). In comparison, the possession statute at issue here does not contain any element of knowledge.

The State may also rely on the Washington Supreme Court cases *Bradshaw* and *Cleppe.* In *Bradshaw* and *Cleppe*, the courts determined that the legislative history of the possession statute is clear and the legislature intended to omit the "knowingly or intentionally" language from the statute. *Bradshaw*, 152 Wn.2d at 537–38; *State v. Cleppe*, 96 Wn.2d 373, 380–81, 635 P.2d 435 (1981). Yet, both cases

were decided based on statutory interpretation, and the court did not address the issue of whether the statute violated due process. *Bradshaw*, 152 Wn.2d at 539; *Cleppe*, 96 Wn. 2d at 380–81. Therefore, they are not controlling on this issue because "[a]n opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *In re Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007, 1014 (2014) (quoting *Continental Mut. Sav. Bank v. Elliot*, 166 Wash. 283, 300, 6 P. 2d 638, 81 A.L.R. 1005 (1932).

Additionally, *State v. Schmeling*, 191 Wn. App. 795, 365 P.3d 202 (2015), relied on *Bradshaw* and *Cleppe* to reject a due process challenge to the possession of controlled substances statute. *Schmeling* noted that "[t]he court did not express any concerns in either *Bradshaw* or *Cleppe* that allowing a conviction for the possession of a controlled substance without showing intent or knowledge somehow was improper." *Id.* at 802. However, since *Bradshaw* and *Cleppe* did not address due process and are not controlling on this issue, Division Three should not follow Division Two's decision.

b. Requiring Ms. Blake to prove that she did not know the methamphetamine was in her jeans violated due process.

At trial, placing the burden on Ms. Blake to prove by a preponderance of the evidence that she did not know methamphetamine was in the jeans violated her due process rights. Ms. Blake and her boyfriend testified that Ms. Blake received the second-hand jeans from her friend two days before and that she did not know the single dosage of methamphetamine was in the coin pocket. RP 81, 89. They also testified that she altered her friend's jeans to fit by adding extensions. RP 76, 89. The court made a finding that the defendant "failed to meet [her] burden." CP 25–26. Placing the critical element of disproving knowledge on Ms. Blake violated due process. This Court should reverse her conviction and find that there was a due process violation.

4. The community custody conditions are unconstitutionally vague.

At sentencing, the court included community custody conditions that gave Ms. Blake's community correction officer discretion in proscribing geographical conditions. CP 34. Additionally, another condition required Ms. Blake to "obey all conditions of probation imposed by the DOC." *Id*. These community custody conditions are unconstitutionally vague. They do not provide Ms. Blake with a fair

warning of the proscribed conduct and they do not provide standards to protect against arbitrary enforcement.

a. A community custody condition must provide ordinary people with a fair warning of the proscribed conduct or provide standards to protect against arbitrary enforcement.

The Due Process Clause requires laws not to be vague. U.S. Const. amend. 14; Const. art. 1, § 3. A condition is unconstitutionally vague unless it: (1) provides ordinary people with a fair warning of the proscribed conduct, or (2) provides standards to protect against arbitrary enforcement. *State v. Bahl,* 164 Wn.2d 739, 752–53, 193 P.3d 678 (2008) (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). The Washington Supreme Court has held that "vagueness challenges to conditions of community custody may be raised for the first time on appeal." *Id*. The courts apply an abuse of discretion standard of review. *State v. Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). If a condition is found to be unconstitutionally vague it will be "manifestly unreasonable" and void. *Id.*

Under the first prong of the vagueness analysis, where the condition does not contain "clarifying language or an illustrative list of prohibited locations," it does not provide ordinary people with a fair

warning of the proscribed conduct. *State v. Irwin*, 191 Wn. App. 644, 655, 364 P.3d 830 (2015). The Washington Supreme Court has also found that conferring boundless discretion on a CCO is unconstitutionally vague. *Bahl*, 164 Wn.2d at 753; *Valencia*, 169 Wn.2d at 792 (2010). In *Bahl*, the Washington Supreme Court addressed the second prong and found that a condition requiring a CCO to "direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." *Bahl*, 164 Wn.2d at 758; *see also State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016) (holding that "a community custody condition that empowers a CCO to designate prohibited spaces is constitutionally impermissible because it is susceptible to arbitrary enforcement."); *State v. Sage*, 1 Wn. App. 2d 685, 706–707, 407 P.3d 359 (2017) (holding that a condition restricting daily travel at the CCO's discretion was unconstitutionally vague and should be stricken).

b. The community custody conditions are unconstitutionally vague because they do not specify proscribed conduct and they allow Ms. Blake's CCO and the DOC boundless discretion.

Here, the court ordered Ms. Blake to "remain within prescribed geographical boundaries; as directed by CCO" and to "obey all conditions of probation imposed by the DOC." CP 34.

These community custody conditions do not provide Ms. Blake with a fair warning of the proscribed conduct. In *Irwin,* the condition did not contain clarifying language or a list of prohibited locations and was found to be unconstitutionally vague. The condition stated: "Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO." *Irwin,* 191 Wn. App. at 649. In this case, the conditions are even more vague than in *Irwin* and likewise, they do not clarify or contain a list of prohibited locations or conditions. Therefore, Ms. Blake lacks notice of what conduct is proscribed. These conditions are also susceptible to arbitrary enforcement because they give unlimited discretion to the CCO and DOC. Because these conditions are unconstitutionally vague, they should be stricken as void.

F. CONCLUSION

The trial court erred in placing the burden on Ms. Blake to prove by a preponderance of the evidence that she unwittingly possessed the drugs. Her conviction should be reversed.

Alternatively, the sentence should be reversed because the judge made a finding without a jury and not proved beyond a reasonable doubt that Ms. Blake had a chemical dependency that increased her sentence.

The $200 criminal filing fee should also be stricken because Ms. Blake is indigent.

Finally, the community custody conditions should be stricken as void because they are unconstitutionally vague.

DATED this 12th day of April, 2018.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35601-9-III
	)	
SHANNON BLAKE,	)	
	)	
APPELLANT.	)	

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