No. 46754-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT WADE NAILLON,

Appellant.

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

REPLY BRIEF

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A. ARGUMENT

1. MR. NAILLON WAS ENTITLED TO AN INDEPENDENT DEFENSE EXPERT WITNESS.

An independent defense expert was essential to Mr. Naillon's defense, and the trial court's denial of independent laboratory testing violated Mr. Naillon's right to a fair trial and his right to present a defense. U.S. Const. Amends. VI, XIV; Art. I, § 3.

a. The trial court abused its discretion by denying the defense motion for an independent expert.

The only case relied upon by the State is State v. Heffner, an entirely distinguishable scenario where this Court considered the necessity for an expert in a theft case at a casino. 126 Wn. App. 803, 810, 110 P.3d 219 (2005). As discussed in the Opening Brief, the vague assertions made in Heffner were found insufficient by this Court to justify the appointment of an expert. Id. Further, this Court found no substantial prejudice to the accused, because he had failed to state why an expert was needed, or to state with any specificity "the aspect of the evidence an expert was needed to rebut." Id. at 809. Mr. Naillon's case is entirely distinct from Heffner, as Mr. Naillon argued repeatedly and quite specifically that he did not know or believe that the "incense burner" recovered from him contained a controlled

substance. RP 12, 19, 26-27, 48-52, 65-66, 85-86, 146-47. Mr. Naillon's counsel called laboratories and prepared an order requesting funds for an expert to test the alleged controlled substance; this was different from the flimsy assertions of counting cards in the Heffner case. RP 65, 85-86. Lastly, Mr. Naillon presented a defense of unwitting possession, which was consistent with his request for re-testing of the alleged residue by a defense expert. RP 315; CP 41.

b. The State misrepresents the record when it argues the appointment of an expert was not necessary to an adequate defense.

In its response brief, the State misrepresents the record when it implies that Mr. Naillon did not contest whether the substance inside the pipe was, in fact, methamphetamine. Respondent's Brief at 5-7. In fact, Mr. Naillon argued repeatedly that someone had someone had slipped a glass "incense burner" into his pocket, and that he was not aware that it had any controlled substance on it. E.g., RP 12, 26-27, 48-52, 65-66, 85-86. Mr. Naillon even put on defense witness (a defense investigator) to testify to the ease with which incense burners can be purchased in stores. RP 294-304. For the State to argue that Mr. Naillon did not contest whether the substance inside the pipe was methamphetamine is disingenuous.

Because the court rejected, without any explanation or findings, Mr. Naillon's motion to have the alleged controlled substance re-tested, and to present an independent expert witness on this subject, reversal should be granted.

2. THIS COURT MAY REACH THE ISSUE OF THE IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS WITHOUT CONSIDERATION OF THE ABILITY TO PAY.

Courts may require an indigent defendant to reimburse the state for only certain authorized costs, and only if the defendant has the financial ability to do so. State v. Blazina, 182 Wn.2d 827, 833-34, 344 P.3d 680, 684 (2015) ("the state cannot collect money from defendants who cannot pay"); RCW 10.01.160(3) ("The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them"). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty.[1]

The State urges this Court to disregard our Supreme Court's recent mandate, and rather to apply its initial decision in State v. Blazina, 174 Wn. App. 906, 301 P.3d 494 (2013). Respondent's Brief at 11. Further, the State requests this Court apply its own decision in

[1] The LFOs in this matter exceed $4000. CP 55.

State v. Lyle, 2015 WL 4156773 (COA No. 46101-3-II, July 10, 2014).[2]

In Lyle, this Court declined to exercise the discretion that the Supreme Court stated is essential to crafting a "case-by-case analysis" of an LFO order "appropriate to the individual defendant's circumstances." 2015 WL 4156773 at *2; Blazina, 182 Wn.2d at 834; RCW 10.01.160(3) (the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose) (emphasis added).

The dissent in Lyle emphasized that the Supreme Court had reached this issue, despite the lack of preservation, because "the pernicious consequences of 'broken LFO systems' on indigent defendants demanded it. Lyle, 2015 WL 4156773 at *3 (Bjorgen, J., dissenting). The dissent continued, referring to the Supreme Court's holding in Blazina:

> [T]his holding cannot serve as a license to continue to decline review of the same issue, when the Supreme Court has also made clear that these same circumstances demand the exercise of discretion to review.

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[2] The State argues: "Ms. Brooks was sentenced on November 6, 2014, well after the decision in Blazina." CP 53-64. Respondent's Brief at 12. It is presumed the State intends to refer to Mr. Naillon, the appellant here, who was sentenced on September 19, 2014.

Lyle, 2015 WL 4156773 at *3 (Bjorgen, J., dissenting) (noting the "doctrinal tectonics" have shifted since the Court of Appeals 2013 Blazina decision, when "we followed the well-trampled path of declining to reach issues for the first time on appeal if they did not fall within the exceptions of RAP 2.5").

Due to the dramatic shift in the landscape since Blazina, the mandate to courts has been clarified: judicial discretion must be exercised when the issue of LFOs is considered, and the trial court must consider a defendant's "current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834.

The court's imposition of substantial legal financial obligations, even though it knew of Mr. Naillon's ongoing indigence, must be reviewed.

B. CONCLUSION

For the reasons stated above, as well as those raised in the Opening Brief of Appellant and Personal Restraint Petition, Mr. Naillon respectfully asks this Court to reverse his convictions and remand for a new trial. In the alternative, Mr. Naillon asks that this

Court remand this case for consideration of his ability to pay legal financial obligations.

DATED this 16th day of September, 2015.

Respectfully submitted,

S/ JAN TRASEN
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Attorneys for Appellant

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RESPONDENT,	)	
	)	NO. 46754-2-II
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	)	
ROBERT NAILLON,	)	
	)	
APPELLANT.	)	

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