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COURT OF APPEALS

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STATE OF WASHINGTON

BY 

NO. 35209-5-II  
Cowlitz Co. Cause NO. 06-1-00623-0

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

**BRETT EAGLE TRACY,**

Respondent.

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**BRIEF OF APPELLANT**

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**I. ASSIGNMENT OF ERROR**

**THE TRIAL COURT ERRED WHEN IT WAIVED THE VICTIM PENALTY ASSESSMENT.**

**II. ISSUE PRESENTED**

**WHETHER THE VICTIM PENALTY ASSESSMENT MAY BE WAIVED BY THE TRIAL COURT.**

**III. SHORT ANSWER**

**No.** The victim penalty assessment is mandatory and cannot be waived by the trial court.

**III. STATEMENT OF THE CASE**

The amended information, filed on July 19, 2006, charged the defendant with assault in the third degree. CP 4. At a sentencing hearing held on August 3, 2006, the Honorable Stephen M. Warning presiding, the defendant entered an *Alford* plea to the charge of assault in the third degree. RP<sup>1</sup> 1-8. Subsequently, the court sentenced the defendant to three months confinement. RP 8-10; CP 19. Additionally, the court struck all costs, including the victim penalty assessment. RP 10-11. Specifically, the court stated:

Judge: Okay. I'll post three months, no community custody, I'll strike all the costs \_\_\_\_\_, and I have signed the no contact order.

...

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<sup>1</sup> There is one volume of transcript of proceedings, referred to herein as "RP." This single volume consists of the transcript from the August 3, 2006 sentencing hearing.

Judge: Thank you. Counsel I'm going to strike the crime victim as well \_\_\_\_\_ in the best interest of \_\_\_\_\_.

RP 10-11.

Also on August 3, 2006, the State filed a timely notice of appeal, appealing the portion of the Judgment and Sentence dealing with crime victim's assessments. CP 22.

#### **IV. ARGUMENT**

#### **THE VICTIM PENALTY ASSESSMENT IS MANDATORY AND CANNOT BE WAIVED BY THE TRIAL COURT.**

RCW 7.68.035(1)(a) specifies the victim penalty assessment imposed in superior court:

When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, *there shall be imposed by the court upon such convicted person a penalty assessment.* The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a) (emphasis added).

Furthermore, subsection (2) states that the penalty assessment shall not apply to certain motor vehicle crimes, enumerated therein. RCW 7.68.035(2).

In *State v. Curry*, two cases, *State v. Curry* and *State v. Lopez*, were consolidated on appeal. *State v. Curry*, 62 Wash.App. 676, 677-78, 814 P.2d 1252, 1253 (1991). In both cases, the trial courts imposed costs and the applicable victim's penalty assessment. *Id.* at 678, 814 P.2d at 1253. The defendants appealed, assigning error to the trial courts' failure to enter findings of fact regarding their ability to pay the ordered fees. *Id.* The court held "findings of fact are not constitutionally required to support the trial court's imposition of the [victim's penalty assessment] under RCW 7.68.035." *Id.* at 681, 814 P.2d at 1254. The court stated, "unlike the court costs statute, imposition of the [victim's penalty assessment] is mandatory and requires no consideration of a defendant's ability to pay." *Id.* Furthermore, the court found "no constitutional infirmity with the mandatory assessment itself." *Id.* at 681, 814 P.2d at 1254-55. Accordingly, the court affirmed the impositions of the victim's penalty assessment on both defendants. *Id.* at 683, 814 P.2d at 1255.

Here, the trial court waived the victim's penalty assessment. RP 11. Pursuant to *State v. Curry*, the victim's penalty assessment authorized by RCW 7.68.035 is mandatory. Therefore, the trial court erred when it waived the victim penalty assessment. With respect to the amount of the penalty, "[t]he assessment . . . shall be five hundred dollars," because this case includes a conviction of a felony. RCW 7.68.035(1)(a); *see also*

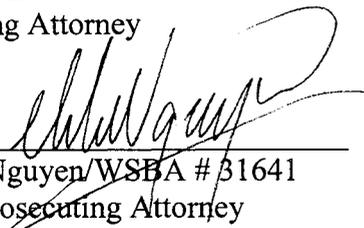
RCW 9A.36.031(2) (classifying third degree assault as a class C felony). Accordingly, the State requests the Court order the trial court to impose a victim penalty assessment in this case in the amount of five hundred dollars.

**VI. CONCLUSION**

The State requests the court remand the case to the trial court for imposition of the victim penalty assessment in the amount of five hundred dollars.

Respectfully submitted this   1   day of December, 2006

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**COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II**

<p><b>STATE OF WASHINGTON,</b> )</p> <p style="text-align: center;"><b>Appellant,</b> )</p> <p><b>vs.</b> )</p> <p><b>BRETT EAGLE TRACY,</b> )</p> <p style="text-align: center;"><b>Respondent.</b> )</p> <hr style="width: 100%;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>NO. 35209-5-II</b></p> <p><b>Cowlitz County No.</b></p> <p><b>06-1-00623-0</b></p> <p><b>CERTIFICATE OF</b></p> <p><b>MAILING</b></p>
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COURT REPORTERS  
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 STATE OF WASHINGTON  
 MAIL ROOM

I, Audrey J. Gilliam, certify and declare:

That on the 3 day of December, 2006, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Appellant addressed to the following parties:

Court of Appeals  
950 Broadway, Suite 300  
Tacoma, WA 98402

Lisa E. Tabbut  
Attorney at Law  
1402 Broadway  
Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of December, 2006.

  
 Audrey J. Gilliam