

NO. 48999-6-II

In the Court of Appeals of the State of Washington
Division 2

STATE OF WASHINGTON, Respondent

v.

DEREK J. KINNEY, Appellant

APPELLANT'S BRIEF

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A) ASSIGNMENT OF ERROR

1. Insufficient evidence was introduced at trial to allow the jury to have concluded Mr. Kinney possessed a controlled substance within 1000 feet of a school bus route stop.
2. The trial court failed to make an adequate individualized inquiry into Mr. Kinney's ability to pay costs.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue 1: Whether the jury was presented with sufficient evidence from which to conclude Mr. Kinney possessed a controlled substance within 1000 feet of a school bus route stop.

Issue 2:

- a) Whether the trial court made an adequate individualized inquiry into Mr. Kinney's ability to pay costs.
- b) Whether this Court should exercise its discretion under RAP 2.5(a) and *State v. Blazina*, 182 Wn.2d 827 (2015).

C) STATEMENT OF THE CASE

Mr. Kinney was charged by Second Amended Information with “unlawfully possess[ing] with intent to deliver a controlled substance, to wit: Methamphetamine” in Pacific County Superior Court under Case No. 16-1-00055-8. CP 81-82. The State also specially alleged “the commission

of said crime took place within 1000 feet of a school bus route stop designated by a school district.” *Id.*

At trial, the State introduced evidence that Mr. Kinney drove a vehicle from “603 Broadway Avenue, the home of Timothy Pratt,” near the intersection with “Monroe” Street in South Bend, Washington. RP 59, 61. Mr. Kinney was stopped by law enforcement two-to-three blocks away, near the intersection of “Monroe” and “Oregon Street.” RP 88. The jury convicted Mr. Kinney of “possession with intent to deliver a controlled substance.” CP 105.

South Bend School District employee Wyatt Kuiken testified about a “bus stop located at 602 Broadway” “[w]ithin the city of South Bend,” “at the intersection of Broadway and Monroe.” RP 129, 166-67. Mr. Kuiken testified that location was located “[s]eventy feet” from 603 Broadway, the Pratt residence. RP 131. Mr. Kuiken testified that bus stop was “[a]ctively” “visited by a South Bend School District school bus.” RP 166-67. However, the bus Mr. Kuiken described is “typically use[d]...for early education routes” and “[j]ust” picks up “preschool students.” RP 167. The vehicle that uses that particular bus stop does not pick up non-preschool attendees, such as kindergartners. RP 167-68.

The jury returned a verdict of “guilty of the crime of possession with intent to deliver a controlled substance.” CP 105. The jury also

answered the question, “Did the defendant possess a controlled substance within one thousand feet of a school bus route stop designated by a school district, with intent to deliver the controlled substance at any location” in the affirmative. CP 106.

The trial court “sentenc[ed]” Mr. Kinney to “[a] term of total confinement in the custody of the Department of Corrections (DOC)” of “40 months.” CP 110. The 40 months “includ[ed] 24 months as enhancement for...VUCSA in a protected zone.” *Id.*

At sentencing, the trial court also ordered Mr. Kinney to “pay the clerk of [Pacific County Superior Court]” “\$2150.00” in legal financial obligations. CP 112-13. Specifically, the trial court imposed a “\$500 [v]ictim assessment;” a “[c]riminal filing fee” of “\$200;” “\$250 [in] fees for court appointed attorney;” a “\$1000 [f]ine;” a “\$100 [c]rime lab fee;” and a “\$100 DNA collection fee.” *Id.* The judgment and sentence included the following boilerplate language:

“The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings: The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753, and the Court has made sufficient inquiry or such further inquiry was waived, pursuant to *State v. Blazina* as noted in the Plea Agreement, which is incorporated herein by reference.”

CP 110. The trial court's on-the-record inquiry of Mr. Kinney's financial situation consisted of inquiring about Mr. Kinney's "profession" and asking if he would "be able to pay payment on [the legal financial obligations] when [he] get[s] out." RP 251.

Mr. Kinney timely filed a notice of appeal. CP 120-21.

D) ARGUMENT

1. Insufficient evidence was introduced at trial to allow the jury to have concluded Mr. Kinney possessed a controlled substance within 1000 feet of a school bus route stop.

"To determine whether the evidence is sufficient to sustain a conviction, [appellate courts] view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Engel*, 166 Wn.2d 572, 576 (2009). "Interpretation of a statute is a question of law that [appellate courts] review de novo." *Id.* The standard of review is the same for enhancements as well as actual elements. *See State v. Clayton*, 84 Wn. App. 318, 320 (1996).

"Any person who violates RCW 69.50.401 by...possessing with the intent to...deliver a controlled substance listed under RCW 69.50.401...(c) Within one thousand feet of a school bus route stop designated by the

school district” “shall” have “[a]n additional twenty-four months...added to the standard sentence range.” RCW 69.50.435(1), 9.94A.533(6). A “[s]chool bus route stop” means a school bus stop as designated by a school district.” RCW 69.50.435(6)(c). Although “school bus stop” is not a term defined by the statute, the plain meaning of the term is a location where a school bus regularly stops. A “[s]chool bus” means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district.” RCW 69.50.435(6)(b). The superintendent of public instruction has defined “school bus” by rule to mean “every vehicle with a seating capacity of more than ten persons including the driver used to transport students to and from school or in connection with school activities.” WAC 392-143-010(1). A vehicle that regularly transports non-students is, therefore, not a “school bus.”

The term “students” is not defined by the superintendent. However, the use of the word “student” elsewhere in the rules indicates the term is limited to those attending or about to attend school in grades kindergarten through twelve. *See e.g.* WAC 392-121-106 (definition of “enrolled student” includes only an individual who “[a]fter the close the prior school year has presented himself or herself...to the school district’s...appropriate official to be entered on the school district’s rolls for the purpose of attending school in grades kindergarten through twelve”).

Moreover, individuals who are enrolled in a preschool program are typically referred to as “children,” not “students.” *See e.g.* RCW 28A.215.010 (“The board of directors of any school district shall have the power to establish and maintain preschools...for the care and instruction of infants and *children* residing in said district”) (emphasis added); WAC 392-164-165 (“preschool children” defined); RCW 43.215.010(26) (“Washington State preschool program’ means an education program for *children* three-to-five years of age who have not yet entered kindergarten”) (emphasis added).

Because individuals attending preschool are not referred to as “students,” but rather as “children;” and because “students” attend grades kindergarten through twelve; a vehicle that regularly transports preschool attendees is not a “school bus.” Therefore, the location where such a vehicle stops, then, cannot be considered a “school bus stop.” Thus, that location cannot be a “school bus route stop.”

Here, the only evidence regarding the existence and location of a “school bus route stop” came from South Bend School District employee Wyatt Kuiken. RP 128-31, 165-69. Mr. Kuiken testified about a “bus stop located at 602 Broadway” “[w]ithin the city of South Bend,” “at the intersection of Broadway and Monroe.” RP 129, 166-67. Mr. Kuiken testified that location was “[a]ctively” “visited by a South Bend School

District school bus.” RP 166-67. However, the vehicle Mr. Kuiken described is “typically use[d]...for early education routes” and “[j]ust” picks up “preschool students.” RP 167. The vehicle that uses that particular bus stop does not pick up non-preschool attendees, such as kindergartners. RP 167-68.

Because the vehicle at issue only regularly or actively picked up preschoolers, not students, the vehicle is not a “school bus” under WAC 392-143-010. Therefore, the location at 602 Broadway was not a “school bus route stop.”

Because there was no evidence about the existence or location of any other “school bus route stop,” the State introduced no evidence from which the jury could have concluded beyond a reasonable doubt that Mr. Kinney “possessed a controlled substance within one thousand feet of a school bus route stop designated by a school district, with the intent to deliver the controlled substance at any location.” CP 106. Therefore, this Court should reverse the school bus route stop enhancement.

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2. Trial court did not make an adequate individualized inquiry into Mr. Kinney's ability to pay costs; this Court should exercise its discretion under RAP 2.5(a) and *Blazina*.

a. Trial court did not make an adequate individualized inquiry into Mr. Kinney's ability to pay costs.

“The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “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.” *Id.*

Before ordering a defendant to pay costs, the trial court must make “an individualized inquiry into the defendant's current and future ability to pay.” *State v. Blazina*, 182 Wn.2d 827, 838 (2015). “Within this inquiry, the court must also consider important factors...such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* Moreover, a court should take into account whether a defendant qualifies as “indigent” under “the GR 34 standard for indigency.” *Id.* at 838-39. The trial court must “do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” *Id.* at 838.

Here, the judgment and sentence contains such boilerplate language. CP 110. Admittedly, the trial court did do “more.” *See* RP 250-252. The trial court inquired of Mr. Kinney if he was “going to be able to pay payment on [legal financial obligations, if ordered] when [he] get[s] out” of prison. RP 252. Mr. Kinney replied that he “[s]hould be able to” pay “35 bucks a month” “if [he could] get a job in a timely fashion.” *Id.* The trial court also considered that Mr. Kinney “was working sanitation at a cannery” “[w]hen [he] got arrested,” although he did not “have a sanitation license” at the time.

However, the trial court failed to inquire into Mr. Kinney's other debts, including restitution. Moreover, the trial court failed to explicitly consider on the record that Mr. Kinney was being sentenced to prison for 40 months, and the effect that would have on Mr. Kinney's current and future ability to pay. *See* CP 110. Furthermore, the trial court failed to explicitly consider on the record any factors that led to its conclusion that Mr. Kinney was indigent. *See* CP 126-27.

Finally, the trial court failed to inquire about the probability Mr. Kinney would be employed after his release on prison, or how much money he might earn if he did become employed. Mr. Kinney indicated he “should be able to” pay “35 bucks per month” “if [he could] get a job in a timely fashion.” RP 251. Mr. Kinney did not indicate, however, how likely

it was that he *could* get a job in a timely fashion. And the trial court did not seek clarification about how likely that was. Moreover, the trial court did not inquire further about the origin of Mr. Kinney's "35 bucks per month" estimate. All that the trial court could have gleaned from this estimate without further inquiry was that Mr. Kinney expected to have at least \$35.00 per month of income if he became employed, which would place him well-below 125 percent of the federal poverty guideline. *See* GR 34(a)(3)(B); 81 Fed. Reg. 4036 (2016) ("2016 poverty guidelines for 48 contiguous states" for household of one is \$11,880.00 per year, compared with \$420.00 per year, or \$35.00 per month).

The trial court imposed \$2,150.00 in legal financial obligations. CP 113. Of that total, the \$500.00 crime "[v]ictim [penalty] assessment," the \$200.00 "[c]riminal filing fee," and \$100.00 "DNA collection fee" are mandatory costs and assessments. CP 112-13; RCW 7.68.035(1)(a); RCW 36.18.020(2)(h); RCW 43.43.7541; *State v. Lundy*, 176 Wn. App. 96, 102 (2013) ("For...victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account."). Another \$1000.00 of the legal financial obligations consisted of a mandatory "[f]ine." CP 113; *see also State v. Mayer*, 120 Wn. App. 720, 725 (2004). The final \$350.00 of the legal financial obligations was comprised of costs: \$250.00 in "[f]ees for court

appointed attorney;” and \$100.00 in a “[c]rime lab fee.” CP 112-13. These final two costs were discretionary.

“[T]he cost of a court-appointed lawyer for an indigent defendant is one that can be imposed under RCW 10.01.160.” *State v. Diaz-Farias*, 191 Wn. App. 512, 521 (2015). The trial “court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). Therefore, the “[f]ees for court appointed attorney” in this sentence was a discretionary cost.

“When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory...the court shall levy a crime laboratory analysis fee of one hundred dollars.” RCW 43.43.690(1). However, “the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.” *Id.*; *see also* RCW 10.01.060(3). Therefore, the “[c]rime lab fee” imposed in this sentence was a discretionary cost.

Thus, because the trial court did not make an adequate individualized inquiry into Mr. Kinney's current and future ability to pay the \$350.00 in discretionary costs, the trial court erred in ordering Mr. Kinney to pay those costs.

b. This Court should exercise its discretion under RAP 2.5(a) and *Blazina*.

“The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). “While appellate courts normally decline to review issues raised for the first time on appeal...RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right.” *Blazina*, 182 Wn.2d at 834-35.

“[B]ecause [of] ample and increasing evidence that unpayable LFOs impose[]...significant burdens on offenders and our community, including increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration,” a trial court's failure to make “an individualized inquiry into [a] defendant['s] ability to pay before imposing LFOs” is an inquiry where appellate courts frequently exercise their RAP 2.5(a) discretion. *State v. Duncan*, 185 Wn.2d 430, 437-38 (2016).

Furthermore, “[a] lawyer shall not accept compensation for representing a client from one other than the client unless...(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.” RPC 1.8(f). “A lawyer shall not permit a person who...pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such

legal services. RPC 5.4(c). Generally, “[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client.” RPC 1.8(i).

Here, one of the discretionary costs ordered in the sentence were “[f]ees for court appointed attorney.” CP 112. The “fees of defense counsel” are “certain costs” “awarded for the specific reimbursement of costs incurred by...the county.” RCW 10.82.070(2). In other words, the “[f]ees for court appointed attorney” in the sentence will go Pacific County to—presumably partially—reimburse the County for fees it paid to Mr. Kinney's trial counsel. Although Mr. Kinney's trial counsel did not directly acquire a proprietary interest in the cause of action, the County who paid Mr. Kinney's trial counsel did. Thus, Mr. Kinney's trial counsel failure to object to the imposition of discretionary costs—*see* RP 250-52—suggests his professional judgment was being directed, at least with respect to court appointed attorney fees, by the County, in violation RPC 5.4(c).

Mr. Kinney therefore requests this Court exercise its discretion, consider the issue of discretionary costs on the merits, and remand for resentencing to allow the trial court to engage in an adequate individualized inquiry.

E) CONCLUSION

Because the only evidence of a bus stop introduced at trial concerned a bus stop that was regularly visited only by a vehicle that transported preschool children, not students, that bus stop was not a “school bus route stop” under RCW 69.50.435(6)(c). Therefore, there was insufficient evidence for the jury to have concluded Mr. Kinney possessed a controlled substance within 1000 feet of a school bus route stop with the intent to deliver. Thus, this Court should reverse the school bus route stop enhancement.

Because the trial court failed to conduct an adequate individualized inquiry into Mr. Kinney's current and future ability to pay, this Court should reverse the imposition of discretionary costs and remand to the trial court to conduct such an inquiry.

DATED this 20th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S BRIEF was mailed, postage prepaid, on this 20th of October, 2016 to counsel for the Respondent as follows:

Mark McClain
Pacific County Prosecuting Attorney
PO Box 45
South Bend, WA 98586

/s/ Christopher Taylor _____
Christopher Taylor

CR TAYLOR LAW, P.S.

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DIVISION 2

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)	
Respondent,)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
DEREK J. KINNEY,)	
)	
Appellant.)	

I hereby certify that on October 27, 2016, I mailed, postage prepaid, a copy of the Appellant's Brief filed in the above-captioned case on October 20, 2016 to DEREK J. KINNEY, Appellant, care of the Washington State Penitentiary at 1313 N 13th Ave, Walla Walla, WA 99362.

DATED this 27th day of October, 2016 at Olympia, Washington.

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