

**NO. 49454-0-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**CLINTON FRYER,**

Appellant.

---

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

The Honorable Ronald E. Culpepper, Judge

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court exceeded its statutory authority by ordering a victim assessment on each of two judgment and sentences entered under the same cause number.

2. The trial court exceeded its statutory authority by ordering a \$200 court cost fee on each of two judgment and sentences entered under the same cause number.

3. The trial court exceeded its statutory authority when it imposed a \$2,895 fine on a simple misdemeanor.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court exceeded its statutory authority by ordering a victim assessment on each of two judgment and sentences entered under the same cause number?

2. Whether the trial court exceeded its statutory authority by ordering a \$200 court cost fee on two judgment and sentences entered under the same cause number?

3. Whether the trial court exceeded its authority when it imposed a \$2,895 fine on a simple misdemeanor?

## **C. STATEMENT OF THE CASE**

### **1. Procedural history**

Under a single information, the state charged Clinton Fryer with four crimes:

- Attempting to Elude a Pursuing Police Vehicle
- Driving Under the Influence of Alcohol (DUI)
- Failure to Have an Ignition Interlock
- Driving on a Suspended License in the Third Degree (DWLS 3)
- 

CP 1-3.

The court arraigned Mr. Fryer on February 2, 2016 and set an April 13, 2016, trial date. RP (February 16, 2016) at 8. At the omnibus hearing, defense counsel requested the trial date be continued because he needed more time to prepare the case for trial. RP (March 24, 2016) at 4-5. Mr. Fryer refused to agree to the continuance. RP (March 24, 2016) at 4. The court moved the trial to June 2. RP (March 24, 2016) at 4-5. Mr. Fryer filed a written objection with the court. CP 5-6.

Setting the matter out for trial was met with delays. On June 2, defense counsel was not ready for trial as he had prepared another, older case for trial thinking it would be the priority case called for trial. RP (June

2, 2016) at 3-4. The court noted that even if defense counsel was ready for trial, there was no courtroom available that day in which to try the case. RP (June 2, 2016) at 4.

The court called the case ready for trial on June 7 but there were not enough jurors available to hear the case. RP (June 6, 2016) at 9.

On June 8, defense counsel and Mr. Fryer agreed to a continuance to June 13 to accommodate witness availability. Supplemental Designation of Clerk's Papers, Clerk's Minutes of Proceeding for June 7 and 8, 2016, at page 3. On June 13 and again on June 14, there was no available courtroom. RP (June 13, 2016) at 4; RP (June 14, 2016) at 4.

On June 15, the assigned prosecutor was sent to trial on an older case. RP (June 15, 2016) at 3. Mr. Fryer's case was set out to June 27 to accommodate the prosecutor attending a CLE. RP (June 15, 2016) at 3-5. As he had often done before, Mr. Fryer objected to the continuance. RP (June 15, 2016) at 3.

The trial started on June 27. RP (June 27, 2017) at 7. The jury returned its verdicts on June 30 finding Mr. Fryer guilty on all counts. RP (June 30, 2016) at 344-46.

At the July 22 sentencing hearing, the court heard a defense motion for a mistrial. RP (July 22, 2016) at 1-6. Post-trial, counsel discovered the

jury had inadvertently received a copy of Mr. Fryer's driving record which included several other DUI convictions. RP (July 22, 2016) at 6. The court granted the mistrial and reset the trial for August 15. RP (July 22, 2016) at 11; CP 11.

The retrial commenced as scheduled. RP (August 15, 2016) at 5.

Mr. Fryer argued it was illegal for an unmarked police car to stop him. He filed a supporting pleading. Supplemental Designation of Clerk's Papers, Preliminary Motion to Dismiss, Friend of the Court Brief (filed May 17, 2016). The court denied the motion. RP (August 15, 2016) at 21-23; RP (August 16, 2016) at 210-12.

After a long deliberation, the jury assured the court it could not agree on a verdict on one of the counts but were ready with verdicts on three counts. RP (August 17, 2016) at 356-64. The court accepted the verdict on the DUI, Ignition Interlock, and DWLS 3. RP (August 17, 2016) at 365-66. The court declared a mistrial on the Attempting to Elude. RP (August 17, 2016) at 367.

The court sentenced Mr. Fryer using one judgment and sentence form for the DUI and a separate judgment and sentence form for the Ignition Interlock Violation and the DWLS 3. CP 21-34. On both judgment and sentences, the court imposed a \$500 victim assessment and a \$200

fee for court costs. CP 21, 32-33. The court also imposed a \$2,895 fine on each judgment and sentence. CP 21, 33. In its oral ruling, the court said it was imposing a fine for the DUI but was silent as to a fine on the Ignition Interlock Violation or the DWLS 3. RP (August 22, 2016) at 6. The judgment and sentence for the two non-DUI offenses did not specify which count or counts the fine pertained to. RP 32-34. The court noted on the non-DUI judgment and sentence that the imposed legal financial obligations were concurrent with Count II, the DUI. CP 32.

## **2. Trial Testimony**

Just after midnight on February 14, 2016, Trooper Brett Robertson was on traffic patrol in an unmarked Washington State Patrol car. RP (August 16, 2016) at 37. The car had a siren and flashing red, blue, and white lights in the grill and on both the front and rear windshield. RP (August 16, 2016) at 37-38. Trooper Robertson was wearing dark rain pants, a short sleeved French blue uniform shirt, his utility belt, and a knit cap with WSP displayed on it. RP (August 16, 2016) at 56, 100. All items he wore were provided to him by WSP. RP (August 16, 2016) at 56. From his perspective, it was an approved WSP uniform. Id.

Tacoma Police Officer Manuela Loth was driving behind Trooper Robertson. RP (August 16, 2016) at 38-39, 144. She was driving a marked

City of Tacoma patrol car and was wearing a jumpsuit-style uniform. RP (August 16, 2016) at 141-42. Her patrol shift had ended and she was heading home. RP (August 16, 2016) at 141. Officer Loth was unaware the car in front of her was WSP. RP (August 16, 2016) at 144. Both Trooper Robertson and Officer Loth had noticed Mr. Fryer's Dodge Durango weaving in its lane. RP (August 16, 2016) at 39-42, 143-44. Simultaneously, both officers hit their lights to signal Mr. Fryer to stop. RP (August 16, 2016) at 43, 145.

Mr. Fryer pulled over on the right shoulder. RP (August 16, 2016) at 43. Trooper Robertson pulled in behind him. RP (August 16, 2016) at 43. Officer Loth pulled in behind Trooper Robertson. RP (August 16, 2016) at 44. Trooper Robertson and Officer Loth talked briefly outside their cars before starting toward Mr. Fryer's car. RP (August 16, 2016) at 146. Mr. Fryer suddenly accelerated and drove away. RP (August 16, 2016) at 44. Both officers hurriedly returned to their cars and pursued Mr. Fryer. RP (August 16, 2016) at 44-45, 147-48. Mr. Fryer turned right on a nearby road. Both officers drove over 80 miles per hour to catch up to Mr. Fryer. Id. Within minutes, Mr. Fryer lost control of his Dodge Durango in some s-curves and came to a stop. RP (August 16, 2016) at 46.

Trooper Robertson helped get Mr. Fryer out of the Durango. RP (August 16, 2016) at 46. Both officers smelled alcohol on Mr. Fryer. RP (August 16, 2016) at 54, 62, 154. Trooper Robertson read Mr. Fryer his breath test implied consent warning. RP (August 16, 2016) at 64-65. Mr. Fryer declined to give a breath sample. Id. Trooper Robertson received a search warrant permitting a blood draw. Mr. Fryer's blood was drawn by a phlebotomist at Tacoma's Allenmore Hospital using a WSP's blood draw kit. RP (August 16, 2016) at 67, 125-28. The samples were submitted to the WSP lab for testing and provided a blood alcohol reading of .26. RP (August 16, 2016) at 73, 171, 183, 188.

Mr. Fryer stipulated at the time his driver's license was suspended in the third degree and he was required to drive vehicles equipped with an ignition interlock. RP (August 16, 2016) at 200; CP 12-15. Trooper Robertson noted there was no ignition interlock in the Durango. RP (August 16, 2016) at 93.

Mr. Fryer testified that he did not recognize Trooper Robertson's car as a Washington State Patrol car or his uniform as a WSP uniform. He did not see Officer Loth's car behind the trooper when he pulled over. Fearing for his safety, he left intending to go to an open bowling alley where there would be people and safety. RP (August 17, 2016) at 231-34.

#### **D. ARGUMENT**

**The trial court exceeded its authority by imposing a \$500 victim penalty assessment and a \$200 court cost fee twice for offenses filed under a single cause number and by imposing a \$2895 fine on a simple misdemeanor.**

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (imposition of a criminal penalty may be challenged for the first time on appeal because the sentencing court violated the authorizing statute). Whether the trial court had statutory authority to impose a sentencing condition is reviewed de novo. *State v. Rivera*, 198 Wn. App. 128, 392 P.3d 1146 (2017).

A court derives the authority to order payment of legal financial obligations (LFOs) from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011). A court exceeds its statutory authority by ordering an offender to pay LFOs beyond what the legislature has authorized. RCW 9.94A.760. The legislature authorized a superior court to impose a single \$500 victim penalty assessment per case:

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.

RCW 7.68.035.

Similarly, the legislature authorized a superior court to collect a single \$200 criminal filing fee per case:

(2) Clerks of superior court shall collect the following fees for their official services:

(h) Upon conviction or appeal of guilt ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h).

Mr. Fryer was convicted of two gross misdemeanors, DUI and violation of an ignition interlock order, and one simple misdemeanor, driving on a suspended license in the third degree. CP 17, 18, 20. RCW 46.61.502 (DUI); RCW 46.20.740 (ignition interlock); RCW 46.30.342(1)(c) (DWLS 3). The court used one judgment and sentence form for the DUI and a second judgment and sentence form for the ignition interlock violation and the DWLS 3. CP 21-22, 32-34. On both forms, the court imposed a \$500 victim assessment and a \$200 court cost fee. CP 21, 32-33. The court exceeded its authority by ordering Mr. Fryer pay double the statutorily-

authorized amount for his victim penalty assessment and for court costs.  
RCW 7.68.035(1)(a); RCW 36.18.020(2)(h).

The error is not saved by the court indicating on the ignition interlock and DWLS 3 judgment and sentence that the amounts are “concurrent to Count II” (the DUI). CP 32. There is simply no authority to impose costs on each judgment and sentence.

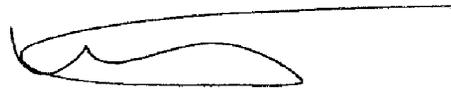
The court also erred by imposing a \$2,895 fine on the simple misdemeanor DWLS 3. CP 32-34. A simple misdemeanor is subject only to a maximum fine of \$1,000. RCW 9A.20.021(3). The judgment and sentence reflects a fine of \$2,895 but does not distinguish whether the fine pertains to the DWLS alone, for the gross misdemeanor ignition interlock violation, or for the combined offenses. CP 32-33. A gross misdemeanor is subject to a maximum \$5,000 fine. RCW 9A.20.021(2).

The requirement that Mr. Fryer pay the victim assessment and the court costs on each judgment should be remanded for correction. On remand, the court should also clarify the fine on the ignition interlock/DWLS 3 judgment and sentence. RCW 9.94A.760(1) (“The court must ... designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.”).

**E. CONCLUSION**

Mr. Fryer's case should be remanded for correction of the judgment and sentences.

Respectfully submitted May 12, 2017.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

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LISA E. TABBUT/WSBA 21344  
Attorney for Clinton Fryer

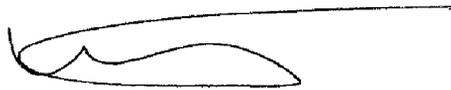
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Pierce County Prosecutor's Office, at [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us); (2) the Court of Appeals, Division II; and (3) I mailed it to Clinton Fryer, PO Box 60, Kapowsin, WA 98344.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 12, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Clinton Fryer, Appellant

**LISA E TABBUT LAW OFFICE**  
**May 12, 2017 - 4:57 PM**  
**Transmittal Letter**

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Objection to Cost Bill

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Letter

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