

No. 50108-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CORY TASH,

Appellant.

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

The Honorable Chris Lanese  
Cause No. 16-1-01745-6

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Does RCW 9A.44.130 require a sex or kidnapping offender to re-register with the sheriff in the county where the offender resides after being released from custody?

2. Did the trial court err in finding that Tash was given reasonable notice of his requirement to re-register?

3. Did the trial court correctly impose mandatory legal financial obligations at sentencing?

B. STATEMENT OF THE CASE.

Cory Tash was convicted of indecent Liberties in Thurston County as a minor on November 20, 2003. CP 51. As a result he is required to register as a Sex Offender. CP 51. Tash was registered with the Thurston County Sheriff's Office. CP 32. On December 26, 2014 Tash was given written notice by the Thurston County Sheriff's Office and signed the Sex Offender / Kidnapping Registration Requirements Form. CP 57-58. On February 8, 2016 Tash was convicted of the crime of Violation of Sex Offender Registration. CP 59. Tash was last released from custody on June 1, 2016 and did not register his address as he was required to do. CP 33. Tash was informed of his need to contact the Sheriff's

Office after his release “in order to stay in compliance.” CP 51. Also on June 3, 2016 the Thurston County Sheriff’s Office left Tash “A PHONE MESSAGE AT HIS LAST REGISTERED ADDRESS INSTURCTING CORY TO SUBMIT A CHANGE OF ADDRESS.” CP 53.

At trial Tash waived his right to a jury trial, CP 42, and the judge found beyond a reasonable doubt that he was “required to register within three business days of (his) release on June 1st, 2016.” RP 76. Also the court found beyond a reasonable doubt that he failed to register. RP 76. The court also found that the notice given to Tash in December of 2014, and the voicemail left at his last address was sufficient notice to satisfy the requirements. RP 77.

### C. ARGUMENT.

1. The trial court accurately applied RCW 9A.44.130 concluding that Tash should have re-registered.

The trial court did not err in its application of RCW 9A.44.130 holding that Tash failed to re-register with the Thurston County Sheriff’s Office. The court of appeals should affirm the trial court’s decision that Tash is guilty beyond a reasonable doubt of failing to re-register as a sex offender. Statutory interpretation is a question

of law that is reviewed de novo. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). “The court’s objective is to determine the legislature’s intent.” Id. quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). “If the statute’s plain meaning is unambiguous, our inquiry is at an end and we enforce the statute “in accordance with its plain meaning.” State v. Wilcox, 196 Wn. App. 206, 210, 383 P.3d 549 (2016) (quoting In re Det. Of Coppin, 157 Wn. App. 537, 552, 238 P.3d 1192 (2010)). However, if there are multiple interpretations then the statute is ambiguous and we “resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” Ervin, 169 Wn.2d at 820 (quoting Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).

The plain meaning of RCW 9A.44.130(4)(a)(i) should be applied as it states “the offender must also register within three business days from the time of release with the county sheriff for the county of the person’s residence.” RCW 9A.44.130(4)(a)(i). Elsewhere in the statute the legislature specifies when a sex offender who is convicted of a sex offense must re-register. In RCW 9A.44.130(4)(iii) the legislature makes clear “sex offenders who are convicted of a sex offense... shall report to the county sheriff to

register within three business days of being sentenced.” RCW

9A.44.130(4)(iii). Also RCW 9A.44.130(1)(a) states

“when a person required to register under this section is in custody of the state department of corrections, state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility *as a result of a sex offense or kidnapping offense*, the person shall also register at the time of release from custody with an official...”

RCW 9A.44.130(1)(a) (italics ours).

In RCW 9A.44.130(4)(a) the legislature uses the same language as RCW 9A.44.130(1)(a) however it omits the clause that states “as a result of a sex offense or kidnapping offense.” This omission shows the legislature intended for sex offenders to re-register after release from custody for any reason, not just sex offenses. Had the legislature intended for re-registration only after sex offenses then it would have specified in this section as it did in other sections in the statute. Moreover, the legislature intent is clear in the legislation that amended RCW 9A.44.130(4)(a)(i). Prior to the 2015 amendment, RCW 9A.44.130(4)(a)(i) specifically applied to “sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense.” The legislature specifically

removed that language in the 2015 amendment. 2015 Wa.SB 5151 (May 14, 2015), 2015 WA ALS 261.

Sex offenders often pose a risk to the community, and it is in the best interest of the community to be aware of the location of sex offenders. “This state’s policy is to assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies.” State v. Ward, 123 Wn.2d 488, 493, 869 P.2d 1062 (1994). The reasoning from State v. Ward supplements why the legislature requires re-registration after release from custody for all offenses not just sex offenses, because it allows for law enforcement to protect the community from high risk persons. The trial court correctly interpreted RCW 9A.44.130 by applying the plain meaning of the statute following the legislative amendment in 2015.

2. The trial court did not err in finding the state gave Tash reasonable notice.

The trial court did not err in holding Tash was given proper notice of his requirements to re-register after his release from custody. The court of appeals should affirm the trial court’s finding that Tash received notice of his registration requirements. “The

court shall provide written notification to any defendant charged with a sex offense or kidnapping offense of the registration requirements of RCW 9A.44.130.” RCW 10.01.200. The remedy for lack of notice is to provide actual, written, notice, which in turn triggers the duty to register. State v. Clark, 75 Wn. App. 827, 833, 880 P.2d 562 (1994). Furthermore, “lack of notice of the duty to register constitutes a defense to the crime of knowingly failing to register as a sex offender – but only for the first such offense.” Id. at 832.

In State v. Clark, the trial court granted Clark’s motion to withdraw his guilty plea “because notification of the registration requirement was “critical” to a voluntary plea.” Id. at 829. The State then appealed and the appellate court stated “the remedy for a violation of RCW 10.01.200 is not to allow a defendant to withdraw his or her guilty plea but rather to provide actual notice of the registration requirement.” Id. The appellate court reversed the trial court’s decision stating that Clark had received actual notice at the time of sentencing which remedied the error. Id. at 833.

This is not the first time Tash has failed to register. On January 1, 2014 Tash was found guilty of failure to register. CP 67. Also following his August 4, 2015 release he did not report to the

sheriff's office to submit a change of address. This is now Tash's third time failing to register and so the defense of lack of notice is no longer available to him. Tash received written notice before on December 26, 2014. CP 57. He was given written notice when he filled out the SEX OFFENDER / KIDNAPPING REGISTRATION REQUIREMENT FORM at the Thurston County Sheriff's Office. CP 57. Tash also was given additional notice when a voicemail was left at his last registered address two days after his release from the Nisqually Jail. CP 53.

The trial court identified the notice given to Tash in December of 2014, and stated "while there would come a time where that would be too distant in time, in the Court's opinion, for that to satisfy the requirements of giving you notice for this to be a knowing violation, this is not that case." RP 77. Also, RCW 10.01.200 does not provide an expiration date for a written notice. Tash had received written notice prior to the offense. Additionally, the trial court recognized that the phone call to his last address as an additional form of notice. RP 77. The trial court correctly held that Tash had received adequate notice of his need to re-register as a sex offender.

3. The trial court did not err in imposing the mandatory legal financial obligations upon Tash.

The trial court accurately imposed the \$500 Crime Victim Assessment fee, the \$200 Court Costs and the \$100 Felony DNA Collection Fee. The court of appeals should affirm these mandatory legal financial obligations. RCW 7.68.035(1)(a) imposes upon convicted persons a penalty assessment, setting the fine at five hundred dollars. RCW 43.43.7541 levies a DNA fee, stating that “every sentence... must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation.” RCW 43.43.7541. RCW 36.18.020(2)(h) issues a fee of two hundred dollars upon a convicted defendant in a criminal case. These fees are to be administered “irrespective of the defendant’s ability to pay.” State v. Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). “For victim restitution, 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.” Id. at 102.

In State v. Lundy, evidence suggested Lundy would have a future ability to pay his legal fees, despite Lundy’s argument to the contrary. Id. The legislatures directing the trial courts to impose certain mandatory fees rendered Lundy’s argument meritless. Id. at

110. “Because the legislature has mandated imposition of these legal financial obligations, the trial court’s “finding” of a defendant’s current or likely future ability to pay them is surplusage.” Id. at 103. Lundy also distinguishes between legal financial obligations that are mandatory from those that are discretionary. Id. at 103. If discretionary legal financial obligations are to be handed down then the defendant’s ability present or likely future ability to pay must be considered. Id.

In State v. Kuster, Kuster challenged the findings that he has the ability to pay his mandatory legal financial obligations. State v. Kuster, 175 Wn. App. 420, 422, 306 P.3d 1022 (2013). The court concluded that the legal financial obligations are mandatory and Kuster’s “arguments have no application.” Id. The court reasoned that the five hundred dollar victim assessment fee, the one hundred dollar DNA collection fee, and the two hundred dollar criminal filing fee are not discretionary costs governed by RCW 10.01.160, instead they are mandatory obligations. Id. at 424. The court also addressed whether a trial court must take into consideration a defendant’s ability to pay the fines, stating that “monetary assessments that are mandatory may be imposed on indigent

offenders at the time of sentencing without raising constitutional concerns.” Id.

Here Tash’s legal financial obligations are mandatory, not discretionary, so the court is not at liberty to take into account his ability to pay these fines before commanding them. Also State v. Blazina makes clear that an appellate court is not mandated to review claims that were not first raised in the trial court. State v. Blazina, 182, Wn.2d 827, 832, 344 P.3d 680 (2015). RAP 2.5 does provide several exceptions to issues first raised on appeal, one of them being “manifest error affecting a constitutional right.” RAP 2.5(a). However, Kuster makes clear that mandatory fees may be imposed without raising constitutional concerns because

“[c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of his own, to comply,” and “[i]t is at the point of enforced collection ..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of indigency.”

Kuster, 175 Wn. App. at 424 (quoting State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997)).

Therefore because the mandatory legal financial obligations imposed upon Tash did not raise constitutional concerns, the

appellate court may refuse to review the claims under RAP 2.5. The trial court accurately imposed the mandatory legal financial obligations upon Tash.

D. CONCLUSION.

For the reasons stated above, the trial court did not err in finding Tash had a duty to re-register as a sex offender, that the State provided Tash with adequate notice, and that the mandatory legal financial obligations were appropriate. The State respectfully request this court to affirm the trial courts findings.

Respectfully submitted this 1 day of August, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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

Dated this 2<sup>nd</sup> day of August, 2017, at Olympia,

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\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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