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Court of Appeals
Division II
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHEDRICK NELSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft

No. 17-1-01439-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this Court order that the imposition of the criminal filing fee and accrual of interest on non-restitution legal financial obligations be stricken from defendant's judgment and sentence but affirm the imposition of the crime victim penalty assessment and DNA collection fee in accordance with House Bill 1783?
2. Should this Court affirm the trial court's imposition of the minimum fine in the judgment and sentence for defendant's DUI where the fine is mandatory under Former RCW 46.61.5055 and defense counsel failed to object based on defendant's indigency status?
3. Should this Court decline to review the issue of appellate costs where it is unripe given that the State has not requested such an award?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On March 17, 2017, the State charged Shedrick Nelson (“defendant”) with one count each of aggravated attempting to elude a pursuing police vehicle, driving under the influence, and driving while license suspended in the third degree. CP 1-3. The State filed an amended information on July 18, 2017, charging defendant with aggravated attempting to elude a pursuing police vehicle and driving under the influence in exchange for defendant’s guilty pleas. CP 8-25. Defendant entered pleas of guilty to the amended charges the same day. CP 10-25. Defendant made a factual statement in his written plea of guilty:

On 3/17/17 I unlawfully operated a motor vehicle while under the influence and had a breath or blood test over .15. I also failed to stop after being signaled to do so by law enforcement and endangered persons and property by my failure. This act occurred in Pierce County, WA. I tried to escape the officers by driving in a reckless manner. The officers that chased me were in uniform and driving a vehicle equipped w/ lights and sirens. I also agree that my unscored misdemeanors result in a standard range that is clearly too lenient.

CP 18. In addition to his factual statement, defendant also permitted the trial court to review the police reports and probable cause declaration to establish a factual basis for his plea. *Id.* A recitation of facts is provided below.

The court accepted defendant's guilty pleas to the amended information, finding them made "knowing, voluntary, and intelligent with an understanding of the nature of the charges and consequences of the plea." RP 14.¹ Separate judgment and sentence orders were entered for each count. CP 32-47.

The trial court entered written findings of fact and conclusions of law for an exceptional sentence, finding that "defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010 and RCW 9.94A.535(2)(b)." CP 31 (FoF 2). Defendant's prior misdemeanor history includes a DUI "in 1993, physical control in 1995, DUI in 1995 again, DUI in 1996, DUI in 1997, and then in 2012 a DUI that was amended to a Reckless Driving[.]" RP 15; CP 30-31. Defendant had no prior felonies. *Id.* Defendant's standard range for the eluding charge was 2-5 months. CP 36. The trial court imposed an exceptional sentence of 12 months on that count. CP 36, 39. The trial court also imposed 51 days in the DUI to run concurrently with his sentence in the attempting to elude. CP 46.

¹ The Verbatim Report of Proceedings (RP) are contained in a single file folder and are referred to by page number.

The trial court also imposed mandatory legal financial obligations (LFOs) in the judgment and sentence for Count I (Attempting to Elude a Pursuing Police Vehicle). CP 37. Those included a \$100 DNA database fee, a \$200 criminal filing fee, and a \$500 crime victim assessment. *Id.* Interest was ordered on all mandatory financial obligations. CP 38. The trial court imposed a \$1,620.50 fine in the Count II (DUI) judgment and sentence, consecutive with the financial obligations imposed in Count I. CP 46. Defendant was found indigent. CP 54-55.

Defendant timely filed his opening brief on December 5, 2017. Brief of Appellant. The case was stayed pending this Court's decision in *State v. Chesley*, No. 50098-1-II, 2018 WL 3039829, at *1 (Wash. Ct. App. June 19, 2018) (unpublished).²

2. FACTS

According to the declaration for determination of probable cause, on March 17, 2017, Pierce County Sheriff's Deputy J. Mills observed defendant driving "erratically," "straddling the dashed white line between the two Northbound lanes," "swerving wildly" back and forth and preventing other cars from passing. CP 4-7. "The erratic path of the car"

² GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

led Deputy Mills “to suspect the driver was impaired[,]” and he conducted a traffic stop. CP 5. Defendant’s vehicle “stopped immediately.” *Id.* However, Deputy Mills saw that defendant’s brake lights were still on, indicating that the car was still in drive and defendant may attempt to flee. *Id.* As Deputy Mills started to exit his car, defendant’s vehicle “lurched forward[;]” Deputy Mills got back in his car and pursued defendant. *Id.*

As Deputy Mills followed defendant, he looked ahead and saw a red light coming up. *Id.* Defendant was not slowing down. *Id.* Fearful that defendant would continue to elude him and drive into crossing traffic, Deputy Mills conducted a PIT maneuver. *Id.* This caused defendant’s vehicle to spin “almost 180 degrees” and come to rest with defendant’s driver window facing Deputy Mills’ driver window. *Id.* Deputy Mills began to conduct a felony stop when defendant started to back up his vehicle and disengage from Deputy Mills’ car. CP 5-6. Deputy Mills got back in his car and struck defendant’s vehicle again, bringing it to a final stop on the sidewalk. CP 6.

Defendant finally exited his vehicle at Deputy Mills’ commands. *Id.* He “stumbled horribly” as he walked and had to hold on to his vehicle or Deputy Mills’ car. *Id.* Defendant was yelling at Deputy Mills, but his speech was so slurred that Deputy Mills could not understand what he was saying. *Id.* Defendant was ultimately apprehended and transported to St.

Joseph Hospital. CP 6-7. Deputy J. Sousley was present when defendant's blood was drawn. CP 7. The blood was sent to the State Toxicology Lab for testing. *Id.* Defendant's blood alcohol concentration was at least .15. CP 8-9.

C. ARGUMENT.

1. THIS COURT SHOULD REMAND WITH ORDERS TO STRIKE THE IMPOSITION OF THE CRIMINAL FILING FEE AND NON-RESTITUTION INTEREST FROM DEFENDANT'S JUDGMENT AND SENTENCE, BUT IT SHOULD AFFIRM THE IMPOSITION OF THE CRIME VICTIM PENALTY ASSESSMENT AND THE DNA COLLECTION FEE.

Defendant's direct appeal, submitted December 5, 2017, was stayed pending this Court's decision in *State v. Chesley*, No. 50098-1-II, 2018 WL 3039829, at *1 (Wash. Ct. App. June 19, 2018) (unpublished).³ *Chesley* held that "the imposition of mandatory LFOs on indigent defendants does not violate substantive due process[.]" 2018 WL 3039829, at *3; see *State v. Seward*, 196 Wn. App. 579, 384 P.3d 620 (2016). *Chesley* further held that the "crime victim penalty assessment, DNA collection fee, and criminal filing fee do not fall within" the

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definition of “costs” under Former RCW 10.01.160(2). *Id.* Therefore, RCW 10.01.160(3) does not apply here.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, prohibits imposition of the \$200 criminal filing fee on defendants who were indigent at the time of sentencing, prohibits imposition of the \$100 DNA collection fee where the offender’s DNA has been previously collected, and eliminates any interest accrual on non-restitution LFOs. House Bill 1783 applies to cases that are on appeal and not yet final. *State v. Ramirez*, __ Wn.2d __, 426 P.3d 714 (2018).

The State agrees that defendant was found indigent. CP 54-55. The State further agrees that defendant’s appeal is still pending; therefore, the new provisions set forth in House Bill 1783 apply. *Ramirez*, __ Wn.2d __, 426 P.3d 714 (2018).

- a. This Court should remand this case with orders to strike the imposition of the criminal filing fee and interest on non-restitution legal financial obligations.

Based on the trial court’s finding of indigency, CP 54-55, the State agrees that the criminal filing fee of \$200 should be stricken from defendant’s judgment and sentence under House Bill 1783. LAWS OF 2018, ch. 269, §17. The State also agrees that House Bill 1783 eliminates

any interest accrual on non-restitution LFOs, and that provision should therefore be stricken as well. LAWS OF 2018, ch. 269, §1.

- b. This Court should affirm the imposition of the crime victim penalty assessment.

Under House Bill 1783, “[a]n offender being indigent... is not grounds for failing to impose restitution or the crime victim penalty assessment under RCW 7.68.035.” LAWS OF 2018, ch. 269, §14. The State acknowledges that defendant was found indigent. CP 54-55. However, without grounds to strike the crime victim penalty assessment, this Court should affirm it. LAWS OF 2018, ch. 269, §14; *see also*, *Chesley*, 2018 WL 3039829, at *3 (imposition of the crime victim penalty assessment does not violate substantive due process).⁴

- c. This Court should affirm the imposition of the DNA collection fee.

House Bill 1783 establishes that the DNA collection fee is no longer mandatory if the defendant’s DNA has been collected as part of a prior conviction. LAWS OF 2018, ch. 269, §18. In this case, the defendant has failed to show, nor merely allege, that his DNA has ever been previously collected. The party seeking appellate review has the

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burden of perfecting the record so that the reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors. *State v. Thornton*, 188 Wn. App. 371, 374, 353 P.3d 642 (2015) (citing *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994)). The record indicates this is defendant's first felony conviction. CP 34-36. Thus, despite the lack of proof by defendant that defendant's DNA has been collected, it is unlikely that defendant's DNA has ever been previously collected. Accordingly, the State does not agree that the \$100 DNA collection fee should be stricken from defendant's judgment and sentence. LAWS OF 2018, ch. 269, §18; *see also, Chesley*, 2018 WL 3039829, at *3 (imposition of the DNA collection fee does not violate substantive due process).⁵

2. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S IMPOSITION OF THE MANDATORY DUI FINE.

Defendant admitted that on March 17, 2017, he "unlawfully operated a motor vehicle while under the influence and had a breath or blood test over .15." CP 18. The DUI sentencing grid effective at the time mandated that a defendant with a BAC equal to or greater than .15, or test refusal, and with one prior offense within the last seven years, be ordered

⁵ If defendant has evidence that a prior DNA sample was actually taken, he would need to pursue relief via a personal restraint petition, not by way of supplemental briefing on a direct appeal.

to pay a mandatory minimum fine of \$1,620.50. Former RCW 46.61.5055. The trial court has discretion to reduce, waive, or suspend the mandatory minimum fine if the defendant is indigent. RCW 46.61.5055 (“Mandatory Minimum fines may be reduced, waived, or suspended if defendant is indigent, as provided by law”). Current RCW 46.61.5055 mirrors Former RCW 46.61.5055, imposing mandatory maximum and minimum fines for DUI convictions and giving the trial court discretion to reduce, waive, or suspend the fine if the defendant is indigent.

Defendant was sentenced on July 18, 2017. CP 32-47. The trial court ordered defendant to pay a fine of \$1,620.50 in his judgment and sentence for DUI, consistent with the statutory minimum and defendant’s criminal history. CP 36, 46.⁶ Defendant was found indigent prior to sentencing on May 11, 2017. CP 51-53. Defense counsel, however, did not object to the imposition of the mandatory DUI fine on the basis of defendant’s indigency status at the sentencing hearing. *See* RP 16-21.

The statutory requirement that the trial court consider the defendant's ability to pay applies only to discretionary LFOs. *State v. Chesley*, No. 50098-1-II, 2018 WL 3039829, at *3 (Wash. Ct. App.2d June 19, 2018) (unpublished); *State v. Ma*, No. 47226-1-II, 2016 WL

⁶ The trial court did not impose any discretionary LFOs in either judgment and sentence.

4248585, at *3 (Wash. Ct. App. August 9, 2016) (unpublished) (*citing State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015)).⁷ The trial court is not required to conduct an inquiry into a defendant's ability to pay when imposing a mandatory fine. *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015). And "a previously unchallenged fine is not subject to review initially on appeal." *Clark*, 191 Wn. App. at 376 (*citing* RAP 2.5(a)).

Because the fine was mandatory, and defendant failed to challenge it at sentencing, this Court should refuse to address the trial court's failure to conduct a *Blazina*, 182 Wn.2d at 837, inquiry before imposing the statutory minimum DUI fine. Former RCW 46.61.5055; *Clark*, 191 Wn. App. at 376; RAP 2.5(a). Further, because "[t]he definition of 'costs' in RCW 10.01.160(2) does not include 'fines[,]'" RCW 10.01.130(3) does not apply here. *Clark*, 191 Wn. App. at 376.

⁷ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decisions cited above have no precedential value, are not binding on any court, and are cited only for such persuasive value as the court deems appropriate.

This Court should affirm the trial court's imposition of the mandatory minimum fine for defendant's offense. *Clark*, 191 Wn. App. at 376; RAP 2.5(a); RCW 46.61.5055.

3. THE ISSUE OF APPELLATE COSTS IS NOT YET RIPE AS THE STATE HAS NOT REQUESTED SUCH AN AWARD AND THE STATE WILL NOT BE SEEKING COSTS IN THIS CASE.

The State has not yet requested an award of appellate costs. The State agrees with defendant that this Court has the discretion to grant or deny a request for appellate costs once a cost bill has been filed. *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

The decision of whether to award appellate costs is the prerogative of this Court in the exercise of its discretion under RCW 10.73.160 and RAP 14.2. In light of current RAP 14.2, the State will not be seeking appellate costs in this case.

D. CONCLUSION.

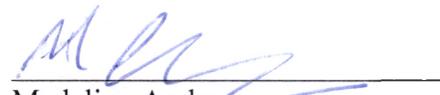
This Court should remand this case to the trial court with orders to strike the imposition of the \$200 criminal filing fee and interest on all non-restitution LFOs. The State respectfully request this Court affirm all other

issues, including the trial court's imposition of the \$500 crime victim penalty assessment, \$100 DNA collection fee, and \$1,620.50 mandatory DUI fine.

DATED: December 26, 2018.

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Pierce County Prosecuting Attorney


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WSB # 34012


Madeline Anderson
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-26-18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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