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No. 51026-o-II  
Skamania County No. 16-1-00060-4

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD McLAUGHLIN,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
SKAMANIA COUNTY

The Honorable Judge Randall Krog

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*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. The Court should remand for resentencing with an offender score of “2,” because the sentencing court erred in finding Ohio convictions “factually comparable” and increasing the offender score to a “4” as a result.
2. The state failed to prove legal or factual comparability and cannot prove factual comparability on remand without violating Mr. McLaughlin’s state and federal rights to trial by jury and proof beyond a reasonable doubt.
3. The sentencing court erred in ordering appellant to pay legal financial obligations and to make monthly payments of \$25 towards those obligations when appellant was and is indigent and his only source of income is federal social security as a source of income, under State v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016).

B. QUESTIONS PRESENTED

1. The sentencing court first found that an Ohio conviction was not “legally comparable” to a Washington offense because the Ohio statute was more broad than our state’s law. The court then found that the Ohio convictions were nevertheless “factually comparable” - and thus should count towards the offender score calculation.

In making a determination of factual comparability, did the sentencing court err in relying on allegations of fact contained in a charging document but not agreed to, stipulated or set forth in the plea agreement or established in any other part of the existing record, and then speculating as to the “minimum” conduct likely committed in Ohio and using those “facts” to support the court’s conclusion?

Did the sentencing court err in concluding that there was “factual comparability” where the evidence indicated only that the defendant entered a plea to a specific statute in Ohio but that statute covers a wide range of conduct and the state presented no factual admission, stipulation or proof sufficient to establish that the Ohio convictions were for conduct which would have amounted to a Washington offense?

2. Further, is reversal and remand for resentencing required with a corrected, lower offender score because the state cannot prove factual comparability without violating Mr. McLaughlin's rights to trial by jury and proof beyond a reasonable doubt?
3. In Wakefield, the state's Supreme Court held that it is a violation of state and federal laws to impose state legal financial obligations on a person whose sole source of income is federal social security benefits. Should the legal financial obligations imposed on Mr. McLaughlin be stricken under Wakefield where the only evidence presented at sentencing was that such federal benefits were his sole source of income for the foreseeable future?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Richard S. McLaughlin was charged by information filed in Skamania County superior court with delivery of a controlled substance (methamphetamine). CP 1-2; RCW 69.50.401(2)(b).

Pretrial proceedings were held before the Honorable Randall Krog on September 6, 2016, the Honorable Brian Altman on September 15 and 29 and December 1, 2016, Judge Krog on February 16, May 11, May 25 and June 12, 2017, pro tem Michael Fitzsimmons on June 29, 2017, Judge Krog on July 10 and 27, August 17 and 31, 2017, after which trial was held before Judge Krog on September 11, 12 and 14, 2017.<sup>1</sup> The jury found Mr. McLaughlin guilty as charged and, after a continuance on September 28, 2017, on October 12, 2017, Judge Krog ordered Mr. McLaughlin to serve a standard-range sentence.

Mr. McLaughlin appealed and this pleading follows. CP 138.

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<sup>1</sup>The verbatim report of proceedings consists of one chronologically paginated volume.

b. Testimony at trial

Mr. Richard McLaughlin was accused of having sold methamphetamine to a “confidential informant” who was sent to the trailer park where McLaughlin had a home one day in early August, after a planned “controlled buy” at another location fell through. RP 39, 167-68.

Also living in the same trailer park, nearby, was another man, Randy Patton, who police suspected to be the main dealer of methamphetamine in the area. RP 158.

Michael Henery, the “informant,” would testify at Mr. McLaughlin’s later trial for allegedly selling Henery methamphetamine that early August day. RP 166-67. Henery said he approached police on his own to offer to do “controlled buys.” RP 166-67. Henery was a former addict himself and he told the jury he went to police because “all” of his friends “were getting beat up and it was just people were all overdosing and it was just getting to be a nightmare out there.” RP 166-67.

But eventually at trial Henery, who admitted to having previously committed a crime of dishonesty, admitted that he got a few non-community benefits for his work on this case. RP 178. He apparently had lost his driver’s license and an officer helped him get it renewed. RP 178. An officer also gave Henery money, an undisclosed amount, for his work that August day. RP 177-78. It appeared to be an amount potentially related to the driver’s license renewed, however. RP 177-78.

Police also gave Henery rides to “White Salmon” an unspecified number of times as a result of his role in this case, too. RP 178.

Mr. Henery knew Mr. McLaughlin because Henery had fathered a child with McLaughlin’s daughter. RP 168-69, 186. As Henery would concede at trial, McLaughlin was Henery’s son’s “grandpa.” RP 168-69, 186. About a year earlier, McLaughlin’s daughter had left town with Henery’s child. RP 187.

That August day, after the first planned “controlled buy” fell through, Henery said he might be able to buy drugs from someone else. RP 168-69. He then used his cellular telephone to send a “text” message to someone whose only identifying information on the screen was the name, “Rick dad” without any associated phone number. RP 168-69.

Henery identified “Rick dad” as McLaughlin RP 168-69, 186. He showed the “text” to an officer, who took a “screen shot” - a photograph of the text message on the phone taken with the officer’s own phone. RP 168. That message did not show the phone number to which it was sent but said it was to “Rick Dad” and said, “Hay do you have a 20.” Exhibit 1. Henery also told the officer that McLaughlin had responded, and the officer took a “screen shot” of that. RP 168-69. That photo showed a message “From: Rick Dad” saying “Come see me.” Exhibit 2.

After that, officers searched Henery and sent him into the trailer park where Mr. McLaughlin lived. RP 133. The officers did

not conduct a full search and left out the informant's anal and oral cavities. RP 155.

Both the lead officer and the viewing officer would admit that Henery was out of their sight for much of the time once he walked away. RP 135-36, 161. The lead officer testified at trial that Henery was out of his sight for awhile and then emerged with a man identified as McLaughlin. RP 135-36. The officer then watched the two walk in the direction of McLaughlin's trailer, but they went out of sight again. RP 135-36, 161. A few moments later, Henery reappeared and walked over to where the officers were scheduled to pick him up. RP 135-36. 161.

At trial, the officer would admit that, of the eight minutes the entire operation went on, the informant was out of sight for nearly half of the time. RP 161. The "viewing" officer confirmed "intermittently losing sight" of the informant and McLaughlin, too. RP 204-205.

Neither officer saw Henery exchange anything with McLaughlin, or go into McLaughlin's trailer, or anything similar. RP 161-65, 203-207.

The officers took Henery away, searched him and got from him a bag of suspected methamphetamine which he said he got from McLaughlin. RP 137. The substance in the bag later tested positive for the drug. RP 137, 229. The \$20 the undersheriff gave to the informant was not recovered. RP 161-62.

The lead officer in the case did not know when he used

Henery that Henery had a prior conviction for a crime of dishonesty. RP 154. The officer admitted he would not have used Henery for “controlled buys” if he had known. RP 154.

Although Henery used his cellular phone to communicate during the deal, no officers ever searched his phone or sought a warrant or any information about the phone number used to contact “Rick dad.” RP 154. Police did not search McLaughlin’s phone or his phone number, either. RP 155. No investigation was done or search warrant sought for McLaughlin’s phone records or those of Henery. RP 154. Indeed, the officer admitted, he never asked to look at McLaughlin’s phone. RP 155.

Even though the transaction supposedly occurred in McLaughlin’s trailer, officers sought no warrant to search the trailer as a result of the “buy,” so there was no evidence from the home supporting the claim Henery made that it was being used for drug sales RP 154, 155. An officer admitted that Randy Patton is suspected to be the main dealer of methamphetamine in the area and has a trailer in the trailer park. RP 158.

Mr. McLaughlin was not arrested until September 2, about a month after the “controlled buy.” RP 163. That day, Undersheriff went with a supervisor to knock on McLaughlin’s door. RP 142-43. The officers identified themselves and asked McLaughlin to come out and he did, then was taken into custody. RP 143.

The undersheriff read Mr. McLaughlin his rights. RP 143. At trial, the officer testified that Mr. McLaughlin “declined to make any

statements” after that. RP 143. When in the back of the police car, however, McLaughlin responded after the officer said he knew the identity of McLaughlin’s own “dealer.” RP 143. According to the officer, McLaughlin asked if the officer was going to arrest that person and the officer responded, “who, Randy Patton?” RP 144. The officer testified that Mr. McLaughlin responded, “[y]es.” RP 144. The officer then told McLaughlin “not at that time.” RP 144.

D. ARGUMENT

1. THE COURT SHOULD REMAND FOR RESENTENCING WITHOUT THE OHIO CONVICTIONS INCLUDED IN THE OFFENDER SCORE CALCULATION

Mr. McLaughlin is entitled to remand for resentencing, because the sentencing court erred in counting foreign offenses in the offender score when the state failed to prove those offenses were factually “comparable” to a Washington state offense.

Under the Sentencing Reform Act (SRA), a defendant is sentenced based upon a combination of his “offender score” and the “seriousness level” of the current offense, as set forth in the sentencing statutes. See RCW 9.94A.530(1); State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). To calculate the “offender score,” the sentencing court looks at the defendant’s current and prior convictions. RCW 9.94A.525; State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The “score” is determined by formulas set forth in the sentencing statutes. Ross, 152 Wn.2d at 229.

It is the state's burden to prove the existence of prior convictions, including convictions from another state that the prosecution wants to include in the offender score calculation. State v. Arndt, 179 Wn. App. 373, 320 P.3d 104 (2014). Where a prior conviction is from another state, that means the prosecution must prove the conviction was "comparable" to one in Washington state before that other state (or "foreign") conviction can be counted. RCW 9.94A.525(3); see State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). This Court reviews de novo the sentencing court's determination that the state has met that burden and properly calculated the offender score Bergstrom, 162 Wn.2d at 92.

Applying such review here, this Court should reverse. While the trial court correctly found that the Ohio offenses were not "legally comparable" to a Washington offense, the court erred in holding that the state had shown the convictions in Ohio were "factually comparable" and in calculating the offender score as a result.

a. Relevant facts

The main concern at sentencing was whether the offender score should be calculated including some convictions from Ohio. Several times, the prosecution asked for a continuance to try to get Ohio records. RP 298, 301-302. The state's sentencing memo argued that the court should include Ohio convictions as "sex offenses," causing a "multiplier" and resulting in an offender score of "4." CP 122-25. The documents presented by the prosecutor to prove the Ohio crimes were contained in Sentencing Exhibit 1 (attached hereto

as Appendix A). Those documents were described by the judge below:

All right, exhibit number one, is a prosecuting attorney's request for issuance of a warrant upon indictment out of Hamilton County, Ohio, as well as the copy of the information in that matter and a[n] entry of withdrawing plea of not guilty and entering plea of guilty document signed off out of Hamilton County, Oregon [sic], as well as a judgment of entry, sentence and incarceration involving, State of Ohio vs. Richard S. McLaughlin, all certified copies of those documents.

RP 310.

The charging document from Ohio alleged two counts, one alleged under Ohio Revised Code 2907.12 and one under 2907.05. App. A. There was then a notation indicating that the defendant pled to "the reduced charge of GSI 2907.05 RC (F-3)cnt1). GSI 2907.05 RC (F-3) cnt 2." App. A. The plea form documents did not contain a statement of facts but just indicated the crimes were "Gross Sexual Imposition F/3" for count 1 and "Gross Sexual Imposition WITH SPECIFICATION F/3 WITH SPEC" for count II. App. A. The judgment entry minute of the Ohio clerk indicated that the defendant pled to "THE REDUCED CHARGE OF GROSS SEXUAL IMPOSITION 2807.05 R.C. (F-3) IN COUNT 1; AND GROSS SEXUAL IMPOSITION 2907.05 R.C. (F-3) WITH SPECIFICATION IN COUNT 2." App. A (emphasis in original).

Mr. McLaughlin argued that the Ohio law was significantly broader, so there was no legal comparability. RP 319-22. He also argued that the state had not met its burden of proving the Ohio crimes were "factually comparable," because there was nothing in the

record provided by the prosecution that established the facts underlying the Ohio crimes. RP 319-22. He pointed out that the court had to rely only on facts proven or admitted beyond a reasonable doubt in making its determination of “factual comparability.” RP 321. And counsel argued that the court could not rely on any factual claims in the charging document, because those were just allegations and did not meet the definition of facts proven or admitted to for the purposes of determining factual comparability. RP 319-22.

The judge first found that the Ohio statute was more broad than the Washington statute defining the allegedly comparable Washington crime of second-degree child molestation. RP 323-25. He then asked “whether under the Washington statute could the defendant have been convicted if he committed the same acts in the State of Washington.” RP 323.

At that point, the judge stated he was looking at the documents the state had submitted and was allowed to consider any additional information as long as it was “substantiated.” RP 323-24. The judge then looked at the Ohio statute and said, “even presuming” the Ohio crimes were committed in the “least egregious way” that the Ohio statute covered, such conduct would amount to second-degree child molestation in Washington because the conduct would have to be for “purposes of sexual arousal.” RP 325.

The judge declared, “they are comparable with regards to the charge of gross sexual imposition with specification for an (F)(3), in that it’s comparable to a sex offense in the state of Washington” of

“child molestation in the second degree.” RP 324-25. The judge then imposed a sentence based on an offender score of “4” rather than the “2” the defense urged. RP 325; see CP 110-127.

b. The trial court erred in finding “factual comparability” based on unproven facts below

The sentencing court erred in several ways in holding that the state had proven “factual comparability” as required. Further, the prosecution cannot present “facts” to prove comparability without violating Mr. McLaughlin’s state and federal rights to proof beyond a reasonable doubt and trial by jury.

Under RCW 9.94A.525(3), the state bears the burden of proving comparability at sentencing (even if counsel does not object below). See State v. McCorkle, 137 Wn.2d 490, 496, 973 P.2d 461 (1999). A two part test is used. State v. Olsen, 180 Wn.2d 468, 472-73, 325 P.3d 187 (2014). First, the court asks if the foreign conviction was “legally comparable” to a similar Washington offense. Id. Second, if the crimes are not “legally comparable” and the foreign crime is defined more broadly than the crime in Washington, the out-of-state offense cannot be counted in the offender score unless the state shows that the prior conviction was for conduct which would have amounted to a Washington state offense. State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009 (2007).

This “factual comparability” is constitutionally limited, however, so that the court can only rely on facts which have been admitted or proven beyond a reasonable doubt in the out-of-state

proceeding. Id.

Thus, in Thomas, the question was whether a California burglary conviction was “comparable” to a Washington offense. 135 Wn. App. at 483. First, the reviewing court looked at the statutes defining the crimes in each state. Like the trial court in this case, in Thomas, the Court found that the California statute was more broad (and thus not “legally comparable”), because our state required proof of unlawful entering or remaining but California did not. 135 Wn. App. at 483.

The Court then addressed “factual comparability,” describing the question posed as whether the facts admitted to, agreed to or proven beyond a reasonable doubt in the documents submitted about the prior conviction established, as a matter of fact, that the conduct committed in the other state would have amounted to a Washington felony, if committed here. 135 Wn. App. at 483-84. The Court approved consideration of documents such as a charging document and judgment and sentence but did so with caution. 135 Wn. App. at 484. While a sentencing court can examine the indictment or information to get some indication of the underlying conduct, the Court noted, it must do so with care and “the elements of the crime remain the focus of the analysis.” 135 Wn. App. at 485.

The state’s Supreme Court has explained the reason for this care. See In re the Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Where there are facts or allegations “contained in the record. . . not directly related to the elements of the charged

crime,” the court must take care not to rely on them because those facts may not have been sufficiently proven or agreed to. Lavery, 154 Wn.2d at 255.

A further concern is that where, as here, “the elements of the foreign crime are broader, there may be no incentive for a defendant to prove that he is guilty of more narrow conduct.” Thomas, 135 Wn. App. at 485; citing, Lavery, 154 Wn.2d at 255. Because a sentencing court may only rely on facts proven beyond a reasonable doubt or admitted to by the defendant, relying on other factual claims in supporting documents is not allowed. See Lavery, 154 Wn.2d at 255.

Thus, factual comparability analysis is subject to constitutional constraint. Id. The state and federal rights to trial by jury and proof beyond a reasonable doubt require that the sentencing court comply with the relevant limits and only rely on facts properly and sufficiently proven beyond a reasonable doubt or admitted to by the defendant and which further relate to the elements of the case, so that the defendant would have had a motive to challenge those “facts.” Id.; see Olsen, 180 Wn.2d at 475.

Put another way, when a sentencing court is trying to determine “factual comparability,” the court can only consider facts admitted to, stipulated to or proven beyond a reasonable doubt in that out-of-state proceeding. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). Otherwise, if the judge finds “facts” and then uses them to find comparability - and thus increase the sentence - those acts by the judge will violate the defendant’s rights to proof

beyond a reasonable doubt and trial by jury on any facts used in such a way. Id.; see, Olsen, 180 Wn.2d at 477-78; Lavery, 154 Wn.2d at 258.

The sentencing court thus erred in multiple ways in finding factual comparability in this case. The evidence below was that Mr. McLaughlin was charged in Ohio with “Felonious Sexual Penetration” of a named victim who was age 13, and “a violation of section 2905.05” for having “sexual contact with” someone not his spouse and who was “less than 13 years of age.” RP 313-15. And the prosecutor specifically relied on the allegation that the victim was less than 13 as if it was proven, saying that proved that the defendant was convicted in Ohio of a specific section of the statute affected people that age, rather than any of the other sections of the Ohio law. RP 314. But the defendant pled to “the reduced charge of GSI 2907.05 RC (F-3)cnt1). GSI 2907.05 RC (F-3) cnt 2.” App. A. And the plea form documents did not contain a statement of facts regarding age but just indicated the crimes were “Gross Sexual Imposition F/3” for count 1 and “Gross Sexual Imposition WITH SPECIFICATION F/3 WITH SPEC” for count II. App. A. The judgment entry minute of the Ohio clerk is similarly silent on facts, indicating only that the defendant pled to “THE REDUCED CHARGE OF GROSS SEXUAL IMPOSITION 2907.05 R.C. (F-3) IN COUNT 1; AND GROSS SEXUAL IMPOSITION 2907.05 R.C. (F-3) WITH SPECIFICATION IN COUNT 2.” App. A (emphasis in original).

Age is an essential element of child molestation in the second degree in our state, which defines the crime in RCW 9A.44.086(1) as

follows:

A person is guilty of child molestation in the second degree when the person has sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

Thus, the defendant must have “sexual contact” as that is defined, with someone at least 12 years old but not yet 14, must not be married to the victim and must be at least three years older than the victim for the Washington crime to occur.

In Ohio in 1991, in contrast, the crime of “gross sexual imposition” was defined by former 2907.05 (1991), in relevant part as follows:

- (A) No person shall have sexual contact with another, not the spouse of the offender, cause another, not the spouse of the offender, to have sexual contact with the offender, or cause two or more persons, to have sexual contact when any of the following applies:
  - (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.
  - (2) For the purpose of preventing resistance, the offender substantially impairs the other person’s judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.
  - (3) The offender knows that the other person’s judgment or control is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with his consent for the purpose of any kind of medical or dental examination, treatment, or surgery.
  - (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

See 1990 Ohio Laws File 118, HB 208. Thus, the range of conduct which could have been involved is vast. Under former 2907.01(1990), sexual contact was “any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.”

But the law in Ohio did not define “sexual arousal or gratification.” See State v. Astley, 523 N.E.2d 322. (1987). Ohio adopted the idea that it included “any touching of the described area which a reasonable person would perceive as sexually stimulating or gratifying.” Id. Further, the offense defined in former 2907.05(A)(3) was a “strict liability offense and require[d] no precise culpable state of mind.” Astley, 523 N.E.2d at 250. This holding was not changed until 1994, when the “gross sexual imposition” statute was challenged and the Ohio courts found that the state had to prove not only the touching but also that the touching was committed “for the specific purpose or intention of sexually arousing or gratifying either himself or the victim.” See State v. Mundy, 650 N.E.2d 502 509 (1994).

The prosecution failed to prove that the plea to having committed an offense under former 2907.05 was for conduct which would have amounted to second-degree child molestation if committed in Washington. Further, at the time the convictions were entered in Ohio, the Ohio crime did not require proof of *any intent* and was instead a strict liability crime. The evidence presented by the state was simply insufficient to prove “factual comparability.” The

trial court erred and further violated Mr. McLaughlin's rights to trial by jury and proof beyond a reasonable doubt in making assumptions about the conduct the Ohio offenses must have involved. This Court should reverse and remand for resentencing with an offender score of "2" as calculated by the defense without the Ohio offenses.

2. IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS AND ONEROUS REPAYMENT TERMS WHEN THE DEFENDANT IS ON FEDERAL ASSISTANCE IS IMPROPER UNDER WAKEFIELD

Legal financial obligations (LFOs) - costs and fees imposed as a result of a criminal conviction - are subject to constitutional restraints. See State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976); Fuller v. Oregon, 417 U.S. 40, 44-47, 94 S.Ct. 2116, 40 L. Ed. 2d 642 (1974). While a state may impose such obligations in general, it may not do without considering the defendant's financial situation. See State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015); Fuller, 417 U.S. at 44. The sentencing court here violated the constitutional and statutory limits on LFOs by imposing "mandatory" legal financial obligations and onerous financial terms despite Mr. McLaughlin's indigence and even though his only income was from federal benefits.

a. Relevant facts

At sentencing, the judge first declared, "I will go ahead and impose. . .the mandatory cost[s]," then imposed a \$500 victim penalty assessment, \$200 filing fee, \$100 DNA collection fee and a crime lab fee of \$100. RP 326.

The judge then turned to Mr. McLaughlin, asking about his

financial situation. RP 326. Mr. McLaughlin said, “I get disability.” RP 326. McLaughlin told the judge he got about \$700 a month and had been receiving disability payments for about two and a half years after “[f]alling apart.” RP 326-27.

When the court asked, “any prospect for any future employment,” McLaughlin answered, “[n]o, I’m disabled.” RP 327.

The judge found Mr. McLaughlin “indigent” and entered an order of indigency for appeal. RP 328. The judge then waived a drug fine. RP 328. The judge declared that he could not find that McLaughlin would in any way be able to earn income going forward. RP 328.

But the judge went on, saying, “I’m going to go ahead and set payments at \$25.00 a month though.” RP 328. The payments were scheduled to start on January 1, 2018, before Mr. McLaughlin will have completed his sentence. See CP 117-19.

Mr. McLaughlin personally objected to the DNA fee, asking, “why do I have to have a DNA collection fee, they already have my DNA.” RP 328. The court said it was required to order DNA fees for “each conviction.” RP 328.

b. The sentencing court erred, abused its discretion and violated state and federal law

The sentencing court erred in multiple ways in ordering these conditions below. The court violated federal law and the Supreme Court’s decision in Wakefield in 1) imposing the legal fines and fees despite the evidence that McLaughlin has no income and survives

solely on federal benefits, and 2) ordering the payments to be made at \$25 per month despite McLaughlin's potential income of about \$700 of federal benefits.

In Wakefield, supra, the Supreme Court addressed whether it is proper for federal disability and subsistence benefits to be used to pay legal financial obligations. 186 Wn.2d at 608. Ms. Wakefield was on SSI but the superior court found that she presented "no evidence" that she had "a permanent disability that prevents her from working." 186 Wn.2d at 607.

On review, the Supreme Court chided the lower court for these conflicting findings. 186 Wn.2d at 607-608. The only evidence below was that Wakefield had qualified for SSI because she had a permanent disability preventing her from working, the Court noted - which meant the Social Security Administration of the federal government had made a determination of actual disability. Id. That determination had to be given "evidentiary weight" in our state's courts, the Wakefield Court held, when examining issues "regarding an individual's disability and whether it prevents them from working." 186 Wn.2d at 607-608.

The Wakefield Court also reiterated its concern about "the particularly punitive consequences of LFOs for indigent individuals," calling out the same kind of payment plan as that imposed in this case - and on Wakefield. 186 Wn.2d at 607. Wakefield was ordered to pay \$15 per month on her LFOs. 186 Wn.2d at 607. The Supreme Court noted that such a payment would not even make a dent in the

principal due, because of the applicable interest rate, collection fees and other terms statutorily allowed. 186 Wn.2d at 607.

For people on federal disability like Wakefield, the Court held, “with no prospects of any change in their ability to pay, it is unjustly punitive to impose payments that will only cause the amount to increase.” Wakefield, 186 Wn. 2d at 607.

Here, as noted below, Mr. McLaughlin has not worked for years due to his disability and his only income is federal assistance of \$700 per month. There was no evidence of any possibility of anything more - instead, the evidence below was that this status was permanent. It is unjustly punitive to impose \$25 per month on someone whose entire monthly income is about \$700 - especially as the court also ordered 12% interest and other punitive conditions to apply. See CP 117-19.

Wakefield also controls on the issue of whether the obligations should have been ordered at all. In that case, like here, the only income Wakefield had was federal benefits (social security disability), yet she ordered to pay state legal financial obligations with that income. 186 Wn.2d at 607-608.

In Wakefield, the Supreme Court held that it was a violation of the federal Social Security Act to impose state criminal fines and fees in such situations. 186 Wn.2d at 608. The Court pointed to 42 U.S.C. §407(a), which provides, “none of the moneys paid” as part of social security benefits “shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any

bankruptcy or insolvency law.” Id. Our state’s highest court concluded this meant it was improper for a state court to impose legal financial obligations when the defendant’s only source of income is social security benefits. Id.

In reaching this conclusion, the Wakefield Court noted the U.S. Supreme Court’s holding in Philpott v. Essex County Welfare Board, 409 U.S. 413, 417, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973). In that case, the Court held that social security disability payments are “protected benefits,” free from the reach of “the use of any legal process,” even a claim from a state court. Philpott, 409 U.S. at 417. Thus, the state may not attach social security benefits of prisoners in order to pay for the cost of their imprisonment, without violating the Supremacy Clause. Id.; see Bennet v. Arkansas, 485 U.S. 395, 397, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988).

This is distinct from the situation in Kays v. State, 963 N.E. 2d 507 (Ind. 2012), for example, where the court found it proper to consider SSI as potential income in setting restitution, because “a debt-free defendant” getting free room and board from a family member “may very well have the ability to pay” even if her only income is from social security. 963 N.E. 2d at 510-11. As the Kays Court noted, that is different than ordering a “levy against that income,” which is not permitted.

Under the federal statutes and Wakefield, the sentencing court erred in ordering legal financial obligations to be paid by a person whose sole source of income is social security disability. Wakefield,

186 Wn.2d at 608. This Court should so hold and should strike those obligations from the judgment and sentence.

E. CONCLUSION

Mr. McLaughlin was entitled to a fair trial and those rights were violated when the trial court admitted the improper, highly prejudicial “propensity” evidence over counsel’s objection. Even if the Court does not order a new trial, reversal and remand for resentencing with a corrected offender score is required. Finally, the Court should strike the improperly imposed legal financial obligations.

DATED this 20th day of July, 2018.

Respectfully submitted,

/s/ Kathryn Russell Selk  
KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 N.E. 65<sup>th</sup> Street, Box 176  
Seattle, Washington 98115  
(206) 782-3353

DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court’s upload service, to Skamania County Prosecutor's Office, kick@co.skamania.wa.us, and to Richard McLaughlin, DOC 837031, Coyote Ridge Corrections Center, P.O. 769, Connell, WA. 99326.

DATED this 20th day of July, 2018,

/S/Kathryn A. Russell Selk  
KATHRYN RUSSELL SELK, No. 23879  
1037 Northeast 65<sup>th</sup> St., Box 176  
Seattle, WA. 98115  
(206) 782-3353

# APPENDIX A

FILED  
Court of Appeals  
Division II  
State of Washington  
7/17/2018 1:09 PM

SUPERIOR COURT OF WASHINGTON FOR SKAMANIA COUNTY

State of Washington,  
Petitioner,

No. 16-1-00060-4

vs.

COA No. 51026-0-II

Richard S. McLaughlin,  
Respondent/Appellant.

Second Suppl  
INDEX TO EXHIBIT'S

<u>EXHIBIT #</u>	<u>DESCRIPTION OF EXHIBIT</u>
1 Certified Copy of Ohio Indictment .....	001-007
2 Certified Copy of Clark Co J&S .....	008-019
3 Copy of Skamania Co J&S .....	020-033



**AFTAB PUREVAL  
HAMILTON COUNTY CLERK OF COURTS**

COMMON PLEAS  
HAMILTON COUNTY COURTHOUSE  
1000 MAIN STREET  
CRIMINAL DIVISION, ROOM 315  
CINCINNATI, OHIO 45202  
PHONE: (513) 946-5672  
FAX: (513) 946-5670  
www.courtclerk.org

**FAX TRANSMITTAL**

DATE: 10/05/2017

TO: Skamania Co. Prosecutor

ATTN: Linda

FAX#: (509) 427-3798

FROM: Hamilton Co Clerk

TOTAL PAGES (including cover sheet): 7

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Date 10/10/17  
Attorney TP 0-00000001

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

State of Ohio

Plaintiff

-vs-

Case No. B914528

Richard S. McLaughlin

Defendant

PROSECUTING ATTORNEY'S REQUEST  
FOR ISSUANCE OF WARRANT  
UPON INDICTMENT

TO THE CLERK OF THE COURT OF COMMON PLEAS:

Richard S. McLaughlin

has been named a defendant in an indictment returned by the Grand Jury.

Pursuant to Rule 9, Ohio Rules of Criminal Procedure, the undersigned requests that you or a Deputy Clerk forthwith issue a warrant to an appropriate officer and direct him to execute it upon the above-named defendant at the following address: Hamilton County Justice Center, or at any place within this State.

*Arthur M. May, Jr.*

Prosecuting Attorney  
Hamilton County, Ohio

By: *Pam R. McLaughlin*  
Assistant Prosecuting Attorney

A TRUE COPY OF THE ORIGINAL  
ENTERED 07/12/1991  
ATTEST AFTAB PUREVAL  
CLERK.  
BY *[Signature]*  
DATE 10/05/2017

0-00000002

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

THE STATE OF OHIO

Case No. BA10528

HAMILTON COUNTY, ss:

INDICTMENT FOR: Felonious Sexual  
Penteration 2907.12 R.C. and Gross  
Sexual Imposition 2907.05 R.C. With  
Specification

In the Court of Common Pleas, Hamilton County, Ohio, of  
the Grand Jury Term Nineteen Hundred and Ninety-One.

FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name  
and by authority of the State of Ohio, upon their oaths do find and  
present that Richard S. McLaughlin, on or about the 3rd day of July in  
the year Nineteen Hundred and Ninety-One at the County of Hamilton and  
State of Ohio aforesaid, without privilege to do so, inserted an  
instrument, apparatus, any part of the body, or other object into the  
vaginal cavity of Deana L. Burton, and the said Richard S. McLaughlin  
was not the spouse of Deana L. Burton, or the said Richard S. McLaughlin  
was the spouse of the said Deana L. Burton but was living separate and  
apart from the said Richard S. McLaughlin and the said Deana L. Burton  
was less than thirteen years of age, and the said Richard S. McLaughlin  
purposely compelled Deana L. Burton to submit by force or threat of  
force, in violation of Section 2907.12 of the Ohio Revised Code and  
against the peace and dignity of the State of Ohio.

SECOND COUNT

The Grand Jurors of the County of Hamilton, in the name  
and by authority of the State of Ohio, upon their oaths do find and  
present that Richard S. McLaughlin, on or about the 3rd day of July in  
the year Nineteen Hundred and Ninety-One at the County of Hamilton and

State of Ohio aforesaid, had sexual contact with Deana L. Burton, a person who was not Richard S. McLaughlin's spouse at the time, and the said Deana L. Burton was less than thirteen years of age, in violation of Section 2907.05 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

SPECIFICATION

The Grand Jurors further find and specify that the said Richard S. McLaughlin at the time of the offense alleged in count two, had previously been convicted of an offense of violence, to wit: Attempt (Carrying Concealed Weapons), in the Hamilton County, Ohio Municipal Court, Case No. 87CRB18098, on the 18th day of December, in the year Nineteen Hundred and Eighty-Seven.

*Arthur M. May, Jr.*

Prosecuting Attorney  
Hamilton County, Ohio

Reported and filed this

12th day of  
July A.D. 19 91

by \_\_\_\_\_  
Clerk of Hamilton County  
Common Pleas

By: 3  
Deputy

By: *[Signature]*  
Assistant Prosecuting Attorney

A TRUE BILL

By: *Dennis M. Kenger*  
Foreperson, Grand Jury

BA 91-04528  
RICHARD S MCLAUGHLIN

ARRESTMENT 7-19 91  
Plea of not Guilty Entered /

Aug 28, 1991

Plead guilty the reduced charge of GSI 2907.05 RC  
(F-3) cnt1, GSI 2907.05 RC (F-3) cnt 2. Sentenced:  
DOC 1 yr cnt 1, 2-10 yrs cnt 2 concurrent w/ credit  
for time served, pay costs.

Winkler ✓

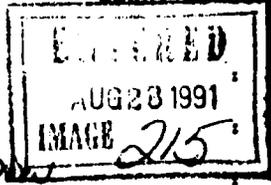
*Handwritten notes:*  
7-19-91  
Winkler

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

*Winkler*  
RALPH WINKLER, Jr.

THE STATE OF OHIO

CASE NO. B 914528 AUG 26 1991



-vs-

RICHARD S. McLAUGHLIN  
Defendant

ENTRY WITHDRAWING PLEA OF NOT  
GUILTY AND ENTERING PLEA OF GUILTY

I, RICHARD S. McLAUGHLIN, Defendant in the above cause, hereby freely and voluntarily retract and withdraw my Plea of Not Guilty to the charge(s) in the Indictment entered herein on a former day of this Court and offer a Plea of Guilty to the following with the indicated maximum penalties:

COUNT	CHARGE(S) & DEGREE	*DEFINITE TERM			INDETERMINATE TERM		MAXIMUM FINE
		1	1/2	2	MINIMUM TERM	MAXIMUM TERM	
<u>1</u>	<u>GROSS SEXUAL IMPOSITION F13</u>	<u>1</u>	<u>1/2</u>	<u>2</u>			<u>\$ 5000</u>
<u>2</u>	<u>GROSS SEXUAL IMPOSITION WITH SPECIFICATION F13 W/SPC</u>				<u>2, 2 1/2, 3, 4</u>	<u>10</u>	<u>\$ 5000</u>
							\$

I understand the nature of the charge(s) to which I plead Guilty, and whether or not I will be eligible for probation. I have been informed and understand the following: That my Plea of Guilty is a complete admission of my guilt of said charge(s) and a Waiver of any and all constitutional, statutory and factual defenses to such charges in this case; that upon acceptance of the Plea, the Judge may proceed with judgment and sentence; that I am waiving my constitutional rights to Jury trial, to confront witnesses against me, to have compulsory process for obtaining witnesses in my favor and to require the State to prove my guilt beyond a reasonable doubt at a trial at which I cannot be compelled to testify against myself.

Are you a citizen of the United States of America? RM  Yes  No (initial), If you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading guilty may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

I have not been forced or threatened in any way to cause me to sign and offer this Plea. I offer this Plea knowingly, intelligently and voluntarily. I have consulted with my Attorney and have his/her advice and counsel. I am satisfied with the legal representation and advice I have received from my Attorney.

Richard McLaughlin  
Defendant

I have explained to the Defendant prior to his/her signing this plea, the charge(s), in the information, the penalties therefore and his/her constitutional rights in this case. I represent that, in my opinion, the Defendant is competent to enter his/her Plea, and now does so knowingly, intelligently and voluntarily.

Eric C. Hagedorn  
Attorney for Defendant

Violation of Revised Code 2907.05  
Dismiss Counts N/A

• If Applicable

Revised (2 Oct. 1989)

A TRUE COPY OF THE ORIGINAL  
ENTERED 08/28/1991  
ATTEST AFTAB PUREVAL  
CLERK.  
BY [Signature]  
DATE 10/05/2015 0-000000006

date: 08/28/91  
code: GJE1  
judge: 031  
form: B

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

\*\*\*\*\*  
\*  
\* ENTERED \*  
\* DATE : 8-28-91 \*  
\* IMAGE: 232 \*  
\*  
\*\*\*\*\*

*Ralph Winkler*  
-----  
Judge: RALPH WINKLER

NO. B 914528

THE STATE OF OHIO  
v.

JUDGMENT ENTRY : SENTENCE:  
INCARCERATION

RICHARD S MCLAUGHLIN

Defendant was present in open Court with Counsel ERIC C. HAGERSTRAND on the 28th day of August 1991 for sentence. The court informed the defendant that, as the defendant well knew, after the defendant had pleaded guilty and was found guilty of the offense(s) of THE REDUCED CHARGE OF GROSS SEXUAL IMPOSITION 2907.05 R.C. (F-3) IN COUNT 1; AND GROSS SEXUAL IMPOSITION 2907.05 R.C. (F-3) WITH SPECIFICATION IN COUNT 2.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Department of Corrections for a period of ONE (1) YEAR ON COUNT 1; AND TWO (2) TO TEN (10) YEARS ON COUNT 2 CONCURRENT TO COUNT 1. DEFENDANT IS TO BE CREDITED WITH ANY TIME SERVED TO WHICH HE MAY BE ENTITLED UNDER THE LAW. PAY COSTS.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

A TRUE COPY OF THE ORIGINAL  
ENTERED 08/28/1991  
ATTEST AFTAB PUREVAL  
CLERK.  
BY *[Signature]*  
DATE 10/05/2017

0-000000007

**RUSSELL SELK LAW OFFICE**

**July 20, 2018 - 4:53 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51026-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Richard S. McLaughlin, Appellant  
**Superior Court Case Number:** 16-1-00060-4

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