

FILED  
Court of Appeals  
Division II  
State of Washington  
10/31/2018 3:04 PM

NO. 51026-0-II

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

---

**STATE OF WASHINGTON,**

Respondent,

v.

RICHARD MCLAUGHLIN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAMANIA COUNTY

HONORABLE JUDGE RANDALL C. KROG

SKAMANIA COUNTY SUPERIOR COURT CASE NO. 16-1-00060-4

---

**BRIEF OF RESPONDENT**

---

ADAM NATHANIEL KICK  
Skamania County Prosecuting Attorney

Skamania County Prosecuting Attorney  
P.O. Box 790  
240 N.W. Vancouver Ave.  
Stevenson, Washington 98648

## TABLE OF CONTENTS

	Page
<b>A. ISSUES PRESENTED .....</b>	<b>1</b>
<b>B. STATEMENT OF THE CASE .....</b>	<b>1</b>
<b>C. ARGUMENT .....</b>	<b>2</b>
1. <u>Review of Sentencing Court's Comparability Analysis and Offender Score Calculation</u>	
a. Legal Comparability .....	3
b. Factual Comparability .....	4
c. An Out-of-State Conviction Involving a Comparable Offense Must be Included in the Defendant's Offender Score .....	6
d. The 1991 Ohio Conviction .....	6
2. <u>The Ohio crime of Gross Sexual Imposition is Not Legally Comparable to a Washington Offense</u> .....	9
3. <u>The Ohio crime of Gross Sexual Imposition is Factually Comparable to Second-Degree Child Molestation in Washington</u> .....	16
4. <u>The Sentencing Court Did Not Abuse its Discretion or Violate Federal Law in Imposing Mandatory Legal Financial Obligations on Mr. McLaughlin</u> .....	21
<b>D. CONCLUSION .....</b>	<b>29</b>
<b>E. CERTIFICATE OF SERVICE .....</b>	<b>30</b>

## TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<u>Washington Supreme Court</u>	
<i>City of Richland v. Wakefield</i> , 186 Wn.2d 596, 380 P.3d 459 (2016) .....	25, 26, 27
<i>In re Pers. Restraint of Adolph</i> , 170 Wn.2d 556, 243 P.3d 540 (2010) .....	3
<i>In re Pers. Restraint of Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005) .....	4, 5, 18, 19, 20
<i>State v. Barklind</i> , 87 Wn.2d 814, 557 P.2d 314 (1976) .....	23
<i>State v. Bergstrom</i> , 162 Wn.2d 87, 169 P.3d 816 (2007) .....	2
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997) .....	28
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	2, 3
<i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998) .....	3, 4
<i>State v. Theifault</i> , 160 Wn.2d 409, 158 P.3d 580 (2007) .....	3-6, 9-11, 15
<i>State v. Wiley</i> , 124 Wn.2d 679, 880 P.2d 983 (1994) .....	2
 <u>Washington Court of Appeals</u>	
<i>In re Adams</i> , 24 Wn. App. 517, 601 P.2d 995 (1979) .....	13
<i>State v. Arndt</i> , 179 Wn. App. 373, 320 P.3d 104 (2014) .....	5, 6
<i>State v. Bunting</i> , 115 Wn. App. 135, 61 P.3d 375 (2003) .....	5

<i>State v. Catling</i> , 413 P.3d 27 (Wn. App. 2018), <i>review granted in part</i> , 191 Wn.2d 1001, 422 P.3d 915 (2018) .....	23, 25
<i>State v. Collins</i> , 144 Wn. App. 547, 182 P.3d 1016 (2008) .....	19, 20, 21
<i>State v. Harstad</i> , 153 Wn. App. 10, 218 P.3d 624 (2009) .....	14
<i>State v. Lundy</i> , 176 Wash. App. 96, 308 P.3d 755 (2013) .....	23, 25
<i>State v. Ortega</i> , 120 Wn. App. 165, 84 P.3d 935 (2004) .....	20
<i>State v. R.P.</i> , 67 Wn. App. 663, 838 P.2d 701 (1992) .....	14
<i>State v. Shirts</i> , 195 Wn. App. 849, 381 P.3d 1223 (2016) .....	25
<i>State v. Young</i> , 63 Wn. App. 324, 818 P.2d 1375 (1991) .....	13
<i>State v. Wilson</i> , 198 Wn. App. 632, 393 P.3d 892 (2017) .....	27

#### OHIO CASES

<i>Core v. Ohio</i> , 191 Ohio App. 3d 651, 947 N.E.2d 250 (2010) .....	12
----------------------------------------------------------------------------	----

#### OREGON CASES

<i>State v. Woodley</i> , 306 Or. 458, 760 P.2d 884 (1988) .....	14
---------------------------------------------------------------------	----

#### FEDERAL CASES

<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1974) .....	23
<i>Shepard v. United States</i> , 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005) .....	5

Rules, Statutes, and Regulations

	Page
42 U.S.C. § 407(a) .....	26, 28
Ohio Rev. Code § 2907.05 (1991) .....	7, 9, 15, 16, 17
Ohio Rev. Code § 2907.01(B) (1991) .....	8
RCW 7.68.035 .....	22, 24
RCW 9.94A.030(31) .....	21, 22
RCW 9.94A.500(1) .....	2
RCW 9.94A.525(3) .....	3, 6
RCW 9.94A.760 .....	22, 23
RCW 9A.20.021 .....	22
RCW 9A.44.010(2) (1988) .....	8, 13
RCW 9A.44.083 (1988) .....	16
RCW 9A.44.086 (1988) .....	8, 9, 15, 16, 17
RCW 9A.44.130 .....	22
RCW 9A.56.190 .....	10
RCW 10.01.160 .....	23, 25, 26, 27, 28
RCW 10.101.010 .....	23, 24
RCW 36.18.020 .....	24
RCW 43.43.690 .....	22, 24
RCW 43.43.754 .....	22
RCW 43.43.7541 .....	22, 25
RCW 69.50.401(2)(b) .....	1
RCW 69.50.430 .....	22, 23

## **A. ISSUES PRESENTED**

1. Is the Ohio crime of Gross Sexual Imposition factually comparable to the Washington crime of Child Molestation?

Yes.

2. Does the sentencing court abuse its discretion and violate federal law by imposing mandatory legal financial obligations on a convicted felon as part of his sentence?

No.

## **B. STATEMENT OF THE CASE**

### **1. PROCEDURAL FACTS**

On September 6, 2016, Appellant Richard S. McLaughlin was charged by information with one count of delivery of a controlled substance (methamphetamine) in violation of RCW 69.50.401(2)(b). CP 1-2. Trial was held before the Honorable Randall Krog in September 2017 and the jury found Mr. McLaughlin guilty as charged. CP 102. Judge Krog entered judgment on October 12, 2017, and ordered Mr. McLaughlin to serve a standard-range sentence. CP 110-120. Mr. McLaughlin timely filed a notice of appeal on October 12, 2017. CP 138.

### **2. SUBSTANTIVE FACTS**

Because Mr. McLaughlin does not challenge the jury verdict, any evidentiary decisions of the court, or the performance of

the prosecutor or defense counsel, the State agrees with and relies on the Appellant's brief Statement of the Case regarding trial testimony. Brief of Appellant, § C (1) (b), at 3-7.

## **C. ARGUMENT**

### **1. Review of Sentencing Court's Comparability Analysis and Offender Score Calculation**

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the sentencing court uses the defendant's prior convictions to determine an offender score that, along with the "seriousness level" of the current offense, establishes the presumptive standard sentencing range. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (quoting *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994)). Washington courts review a sentencing court's calculation of an offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The State must prove the existence of prior felony convictions used to calculate an offender score by a preponderance of the evidence. *Ford*, at 479-80; see also RCW 9.94A.500(1).

If the convictions are from another jurisdiction, the State must also prove that the conviction would be a felony under Washington

law. *Ford*, at 480. “The existence of a prior conviction is a question of fact.” *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010). Where defendant’s offenses resulted in out-of-state convictions, RCW 9.94A.525(3) provides that such offenses “shall be classified according to the comparable definitions and sentences provided by Washington law.” RCW 9.94A.525(3) also requires the sentencing court to determine whether the out-of-state conviction is comparable to a Washington conviction. *State v. Morley*, 134 Wn.2d 588, 601, 952 P.2d 167 (1998) (citing former RCW 9.94A.360 (1996), recodified as RCW 9.94A.525 by laws of 2001, ch. 10, § 6). If the sentencing court finds the convictions comparable, then the out-of-state convictions may be included in the offender score. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

**a. Legal Comparability**

The Washington Supreme Court has adopted a two-part analysis for determining whether an out-of-state conviction is comparable to a Washington conviction. *Thiefault*, at 414-15. First, the sentencing court determines whether the offenses are *legally* comparable—whether the elements of the out-of-state offense are substantially similar to the elements of the Washington offense.

*Thiefault*, 160 Wn.2d at 415, 158 P.3d 580. If the elements of the out-of-state offense are broader than the elements of the Washington offense, they are not legally comparable. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

**b. Factual Comparability**

Second, even if the offenses are not legally comparable, the sentencing court can still include the out-of-state conviction in the offender score if the offense is *factually* comparable. *Thiefault*, 160 Wn.2d at 415, 158 P.3d 580; *Lavery*, 154 Wn.2d at 255, 111 P.3d 837. If the defendant's conduct underlying the out-of-state conviction would have violated the comparable Washington statute, then the out-of-state offense is *factually* comparable to a Washington offense. *Thiefault*, 160 Wn.2d at 415, 158 P.3d 580.

In addition to looking at the foreign statute's language, the sentencing court may look at the foreign indictment to determine comparability for offender score purposes. See *Morley*, 134 Wn.2d at 606, 952 P.2d 167. The sentencing court focuses on "the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute." *Lavery*, 154 Wn.2d at 255, 111 P.3d 837. In

making this factual comparison, the sentencing court may rely on facts in the out-of-state record only if they are admitted, stipulated to, or proved beyond a reasonable doubt. *Thiefault*, 160 Wn.2d at 415, 158 P.3d 580.

The United States Supreme Court has held that a trial court's factual comparability inquiry is limited to "examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005). In the factual comparability analysis, the sentencing court is not allowed to consider evidence not presented in the out-of-state proceeding; the facts must be admitted or proved beyond a reasonable doubt in the out-of-state conviction. *State v. Arndt*, 179 Wn. App. 373, 377-80, 320 P.3d 104, 108-10 (2014) (citing *Lavery*, 154 Wn.2d at 258, 111 P.3d 837). At minimum, the court may consider facts conceded by the defendant in his guilty plea. See *State v. Bunting*, 115 Wn. App. 135, 142-43, 61 P.3d 375 (2003).

**c. An Out-of-State Conviction Involving a  
Comparable Offense Must be Included in the  
Defendant's Offender Score**

Where an out-of-state conviction involves an offense that is *either* legally or factually comparable to a Washington offense, the sentencing court must include the out-of-state conviction in the defendant's offender score. RCW 9.94A.525(3). Conversely, if an out-of-state conviction involves an offense that is neither legally or factually comparable to a Washington offense, the sentencing court may not include the conviction in the defendant's offender score. *Arndt*, at 380 (citing *Thiefault*, 160 Wn.2d at 415). Here, Mr. McLaughlin's out-of-state conviction involved an offense that is, at minimum, factually comparable to a Washington offense. Therefore, the sentencing court did not err in including the out-of-state conviction in Mr. McLaughlin's offender score.

**d. The 1991 Ohio Conviction**

Mr. McLaughlin's Ohio indictment alleged:

"The Grand Jurors of the County of Hamilton . . . upon their oaths do find and present that Richard S. McLaughlin, on or about the 3<sup>rd</sup> day of July in the year

[1991] at the County of Hamilton and State of Ohio aforesaid, had sexual contact with Deana L. Burton, a person who was not [his] 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.”

Second Supplemental Designation of Clerk’s Papers, Skamania County Superior Court No. 16-1-00060-4, COA No. 51026-0-II (Filed July 11, 2018); Index to Exhibits (Filed July 17, 2018) (“Sentencing Exhibits”), at 3-4.

As relevant here, 29 Ohio Rev. Code § 2907.05 (1991) provided:

- (A) No person shall have *sexual contact* with another, *not the spouse of the offender . . .* when any of the following applies: [ . . . ]
- (4) The *other person is less than thirteen years of age*, whether or not the offender knows the age of such person.

(Emphases added.)

Washington's comparable crime, second-degree Child Molestation, is found in RCW 9A.44.086 (1988), which provided,

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 36 months older than the victim.

RCW 9A.44.086(1) (1988).

Ohio defined sexual contact as "any touching of an *erogenous zone* of another . . . for the purpose of sexually arousing or gratifying either person." Ohio Rev. Code § 2907.01(B) (1991). Similarly, Washington defined sexual contact as "any touching of the *sexual or other intimate parts* of a person done for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(2) (1988). (Emphases added.) One subtle difference is that the Ohio statute explicitly prohibited any touching of the thigh of another person for the purpose of sexually arousing or gratifying either person. By contrast, the Washington statute did not explicitly identify any particular "sexual or other intimate parts" of a person.

## **2. The Ohio Crime of Gross Sexual Imposition is Not Legally Comparable to a Washington Offense**

If the elements of the Ohio offense are substantially similar to the elements of the Washington offense, then the offenses are legally comparable. *Thiefault*, 160 Wn.2d at 415, 158 P.3d 580. In general, the Ohio and Washington statutes are substantially similar because both laws contemplate sexual contact rather than penetration of the victim, or other features of more serious sex offenses like rape. However, the Washington statute requires that the offender be at least 36 months older than the victim. RCW 9A.44.086(1). There is no substantially similar element required to prove a violation of Ohio Rev. Code § 2907.05 (1991). Therefore, the Ohio crime of Gross Sexual Imposition is likely not legally comparable to the Washington crime of second-degree child molestation.

In *Thiefault*, the Court of Appeals held that defendant's Montana conviction for attempted robbery was not legally comparable to Washington's version. *State v. Thiefault*, 128 Wn. App. 1056 (2005), *rev'd*, 160 Wn.2d 409, 158 P.3d 580 (2007). The court explained that the Montana offense was broader than its Washington counterpart because Montana's attempted robbery statute did not require injury or threat of injury to person or property;

in other words, a person could commit robbery in Montana by committing theft while committing or threatening to commit any felony other than theft. *Id.*

For example, bribery of an official is a felony in Montana. MCA 45-2-101(22) and MCA 45-1-201(1) (defining 'felony'); MCA 45-7-101 (bribery statute). Thus, in Montana, a person could be convicted of robbery if he obtained property of another by threatening to bribe a public official.

Conversely, Washington's statute requires injury or threatened injury to person or property. RCW 9A.56.190. Accordingly, threat of bribery would not turn a taking into a robbery in Washington. *Thiefault*, 128 Wn. App. 1056. Having determined that the elements of Montana's robbery statute were broader than Washington's robbery statute, the court held that the Montana crime of robbery was not legally comparable to the Washington crime of robbery. *Id.*

The court further held that it could not determine if the offenses were factually comparable because the superior court's record did not include facts Thiefault admitted. *State v. Thiefault*, 160 Wn.2d 409, 416. The only information the State provided to the superior court regarding the Montana conviction included an affidavit

from a prosecutor and the judgment. *Id.*, see fn. 2. The State did not produce the actual information or guilty plea agreement. *Id.*

Similar to *Thiefault*, the court in this case found that the defendant's Ohio conviction for Gross Sexual Imposition was likely not *legally* comparable to the crime of second-degree Child Molestation in Washington. RP 324-25. The court explained that the Ohio offense seemed broader than its Washington counterpart, in part because the Ohio definition of "sexual contact" potentially applied to a different set of prohibited areas. RP 324.

The court specifically pointed to the explanatory list of prohibited areas in the Ohio definition (" . . . thigh, genitals, buttock, pubic region . . .") and noted the absence of enumerated areas or body parts in the Washington definition. *Id.* Thus, the only conceivable disparity in the sexual contact element relates to the scope of areas covered by the definitions.

It is reasonable to assume that the "sexual or other intimate areas" covered by Washington's definition of sexual contact was intended to apply to many, if not all, of the specifically enumerated erogenous zones outlined in Ohio's definition. Both definitions focus

on the same mental state required for converting a touching into sexual contact.<sup>1</sup>

Furthermore, both statutes are intended to promote the general purpose of protecting children from sexual abuse. Practically speaking, both statutes prohibit touching children for the purpose of sexual gratification. By including an explanatory list in its definition of sexual contact, “the [Ohio] legislature intended that body parts that are not traditionally viewed as erogenous zones, may, in some instances, be considered erogenous zones.” *Core v. Ohio*, 191 Ohio App. 3d 651, 657, 947 N.E.2d 250, 254 (Ohio Ct. App. 2010).<sup>2</sup> Thus, it is clear that both the Ohio and Washington definitions of sexual contact contemplate the touching of prohibited areas (or body parts) when the touching is done for the specific purpose of sexual arousal or gratification.

Still, it is unclear whether a defendant in Washington in 1991 would have been convicted of second-degree Child Molestation if the

---

<sup>1</sup> Compare “. . . for the purpose of sexually arousing or gratifying either person” (Ohio Rev. Code § 2907.01(B) (1991)) with “. . . for the purpose of gratifying sexual desire of either party” (RCW 9A.44.010(2) (1988)).

<sup>2</sup> See *State v. Miesse* (Aug. 18, 2000), 2d Dist. No. 99–CA–74, 2000 WL 1162027 (rejecting argument that stomach was not an erogenous \*658 zone because it was not among the body parts listed in R.C. 2907.01(B)); See also *State v. Ball*, 4th Dist. No. 07CA2, 2008–Ohio–337, 2008 WL 274794 (“While the mouth is not specifically among the body parts listed in R.C. 2907.01, it may, under the facts of a particular case, be considered an erogenous zone”).

defendant had only touched the *thigh* of the other person. It seems reasonable to infer that, where one person touches another person for the specific purpose of sexual arousal or gratification, the precise area of contact is relevant only to the extent that it reinforces the general proposition that certain body parts and areas are more commonly seen as sexual or intimate. In other words, if a defendant touches another person's thigh for any purpose other than sexual gratification, then no sexual contact occurs – under either state's definition.

“The determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of fact.” *In re Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979). In *In re Adams*, the court interpreted the term “intimate parts” as including parts of the anatomy “in close proximity to the primary erogenous areas.” *Id.*, at 519–21. Similarly, the term “intimate parts” is not specifically defined in the criminal code.

Nevertheless, “[t]he rule of ejusdem generis provides that specific terms modify and restrict general terms where both are used in sequence.” *State v. Young*, 63 Wn. App. 324, 331, 818 P.2d 1375 (1991). Under RCW 9A.44.010(2), the area touched must be “the sexual or other intimate parts of a person” to constitute sexual

contact. *State v. R.P.*, 67 Wn. App. 663, 668, 838 P.2d 701, 704 (1992), *aff'd in part, rev'd in part*, 122 Wn.2d 735, 862 P.2d 127 (1993). Given this sequence, the phrase “intimate parts” must refer to parts of the human body commonly associated with sexual intimacy. *Id.*; see also *State v. Woodley*, 306 Or. 458, 760 P.2d 884, 886 (1988) (“ ‘Intimate parts’ are more than ‘sexual parts,’ but in context the words refer to parts that evoke the offensiveness of unwanted sexual intimacy, not offensive touch generally.”)

An overarching issue is whether the Washington legislature *specifically intended to exclude* thighs from the group of “sexual or other intimate areas” covered by the statute. Although, for the purposes of resolving Mr. McLaughlin’s challenge to the trial court’s comparability analysis, it is unnecessary for this court to decide that issue. The narrower issue, more appropriately considered in the factual comparability inquiry, is whether a defendant who touches the thigh of another person - who was at least 12 but less than 14 years old – for the purpose of sexual arousal or gratification commits Second-Degree Child Molestation. At the very least, Washington’s definition of sexual contact prohibits rubbing and touching a child’s upper inner thighs in a sexual manner. *State v. Harstad*, 153 Wn. App. 10, 24, 218 P.3d 624, 630 (2009).

Therefore, almost all of the elements of the Washington offense are substantially similar to the elements of the Ohio offense. However, because the Washington statute requires that the offender be at least 36 months older than the victim and the Ohio statute does not, the two offenses are not legally comparable. RCW 9A.44.086; Ohio Rev. Code § 2907.05(A)(4) (1991).

However, *Thiefault* is distinguishable. In *Thiefault*, the State did not produce the actual information or guilty plea agreement relevant to the prior Montana conviction. *Id.*, see fn. 2. Thus, the court in *Thiefault* simply had no reliable basis for determining the factual comparability of the offenses.

Here, by contrast, the State produced certified copies of the Ohio indictment, judgment and sentence, and Mr. McLaughlin's guilty plea agreement. Unlike in *Thiefault*, where the court could not determine if the offenses were factually comparable because the superior court's record did not include facts admitted by the defendant, the trial court's record in this case *did* include facts admitted by the defendant. *Thiefault*, 160 Wn.2d, at 416. Therefore, the trial court in this case was able to rely on admitted facts in making its factual comparability analysis.

### **3. The Ohio Crime of Gross Sexual Imposition is Factually Comparable to the Washington Crime of Second-Degree Child Molestation<sup>3</sup>**

Mr. McLaughlin's Ohio conviction for Gross Sexual Imposition ("GSI") involves an offense that is factually comparable to the crime of second-degree Child Molestation in Washington. 29 Ohio Rev. Code § 2907.05 (1991); RCW 9A.44.086. At trial, the State argued that Mr. McLaughlin's conduct underlying the Ohio conviction would also satisfy the necessary elements for the offense of second-degree Child Molestation in Washington. RP 315-17. Based on a careful examination of the documents relevant to the Ohio conviction (specifically, the indictment and plea agreement), the trial court agreed with the State and found that the underlying conduct would amount to second-degree Child Molestation in Washington. RP 323-25.

---

<sup>3</sup> The following factual comparability analysis applies with equal force to a comparison of Ohio Rev. Code § 2907.05 (1991) and First-Degree Child Molestation in Washington, RCW 9A.44.083; the only meaningful difference between Second- and First-Degree Child Molestation in Washington is that the latter requires the victim be less than 12 years old, whereas Second-Degree Child Molestation requires the victim be at least 12 but less than 14 years old. Therefore, the Ohio crime of Gross Sexual Imposition is factually comparable to *either* RCW 9A.44.083 (First-Degree Child Molestation) or 9A.44.086 (Second-Degree Child Molestation).

At the time of Mr. McLaughlin's Ohio conviction, *former* § 2907.05(A)(3) required the state to prove three basic elements. First, the state was required to prove the defendant had sexual contact with another person. Ohio Rev. Code § 2907.05(A)(4) (1991). Second, the person with whom defendant had sexual contact must not have been the spouse of the offender. *Id.* Finally, the state needed to prove that the victim was less than thirteen (13) years old. *Id.*

Similarly, in 1991, RCW 9A.44.086 (1988) required the state to prove four basic elements. The first two required elements (sexual contact and the offender is not married to the victim) are identical to those required under Ohio Rev. Code § 2907.05(A)(4) (1991). One subtle difference is that Washington's second-degree Child Molestation statute required that the perpetrator be at least 36 months older than the victim. RCW 9A.44.086(1). Finally, the state needed to prove that the victim was at least twelve (12) years old but less than fourteen (14) years old. *Id.*

Mr. McLaughlin admitted that he had sexual contact with another person who was less than 13 years old and not his spouse. Sentencing Exhibits, at 3, 4 (Indictment) and 6 (Entry Withdrawing Plea of Not Guilty and Entering Plea of Guilty, or "Plea Agreement").

The Indictment charged Mr. McLaughlin with having had “sexual contact with Deana L. Burton . . . who was not Richard S. McLaughlin’s spouse at the time, and the said Deana L. Burton was less than thirteen years of age.” *Id.*, at 4. Mr. McLaughlin freely and voluntarily plead guilty to the charge of Gross Sexual Imposition, affirmatively indicated that he understood the nature of the charge, and further understood that his guilty plea was a complete admission of his guilt of that charge. *Id.*, at 6.

In attempting to establish the element that Mr. McLaughlin was at least 36 months older than the victim of his 1991 Ohio sex offense, there appears to be little to no direct evidence on this point. However, Mr. McLaughlin was born in 1961. Sentencing Exhibits, at 8, 19, 20, 33. Therefore, in 1991, Mr. McLaughlin was either 29 or 30 years old and undoubtedly at least 36 months older than his victim (who was at least younger than thirteen years old).

Nonetheless, Mr. McLaughlin argues that “the sentencing court erred in several ways in holding that the [S]tate had proven ‘factual comparability’ as required.” Brief of Appellant, at 11. Mr. McLaughlin cites *Lavery* for the general proposition that where there are facts or allegations “contained in the record . . . not directly related to the elements of the charged crime,” the court must be

careful to not rely on facts not sufficiently proven, agreed to, or admitted. Br. of Appellant, at 12-13; *Lavery*, 154 Wn.2d at 255.

In general, *Lavery's* caution is probably the safest and most effective method for ensuring that appellate courts do not look outside the record and do not rely on unsubstantiated facts. However, in this case, the facts contained in the record *are directly related to the elements of the charged crime* and Mr. McLaughlin's admissions in his guilty plea obviate the need for any further proof on those unchallenged facts.

In *State v. Collins*, 144 Wn. App. 547, 182 P.3d 1016 (2008), the trial court conducted a factual comparability analysis to determine whether the conduct underlying the defendant's prior California rape conviction would have satisfied the elements of the comparable crime in Washington. During the course of plea negotiations the State obtained certified Shasta County court records showing that the defendant was convicted in California for two offenses arising out of the same act with the same victim. *Id.*, at 552. Similar to this case, the court records included the information, plea agreement, and judgment and sentence.

These documents proved that the defendant was 19 years old at the time of the criminal act in California; the California victim was

at least 15 years old; she was not married to the defendant; and she was at least three years younger than the defendant. *Id.* But the court records did not prove that the victim was at least four years younger than the defendant, a necessary element of the allegedly comparable Washington felony. *Id.* Recognizing this deficiency, the State also obtained a police report in the California case stating the victim's date of birth (four years and two days later than defendants' date of birth). *Id.*

The defendant argued that the State could not prove that the California convictions were truly comparable. As noted above, in order to prove a foreign conviction is factually comparable to a Washington offense, court records must show that the underlying facts were admitted or stipulated to, or proved to the finder of fact beyond a reasonable doubt in the foreign conviction. *See In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005) (citing *State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004)).

In *Collins*, the court relied on a statement of the victim's date of birth contained in a police report and found that the State had proved the victim in the California case was at least four years younger than the defendant. But the police report was not a certified court record and contained no facts that were admitted to by the

defendant. Ultimately, the *Collins* court remanded for resentencing to correct the erroneous inclusion of the California conviction in the defendant's offender score.

Unlike in *Collins*, the trial court in this case found that the facts contained in the Ohio indictment and guilty plea agreement definitively established all of the necessary elements of second-degree Child Molestation in Washington. RP 323-24. Furthermore, the trial court in this case based its decision solely on facts admitted by Mr. McLaughlin in the foreign conviction. Therefore, the trial court in this case correctly found factual comparability because the State proved defendant's conduct underlying his 1991 Ohio conviction would have amounted to second-degree Child Molestation in Washington.

**4. The sentencing court did not abuse its discretion or violate federal law in imposing mandatory legal financial obligations on Mr. McLaughlin**

Legal financial obligation ("LFOs") are sums of money ordered by a Washington superior court to be imposed as part of a criminal judgment upon conviction. RCW 9.94A.030(31). LFOs include restitution, fees, fines, county or interlocal drug funds, assessments,

court costs, and any other financial obligation that is assessed to the offender as a result of a felony conviction. *Id.* State law authorizes both mandatory and discretionary LFOs. Mandatory LFOs are to be imposed in every case or for every conviction for a certain type of offense *regardless of the defendant's ability to pay*. See RCW 9.94A.760.

For instance, where a conviction includes one or more felony or gross misdemeanor convictions, the sentencing court *must* impose a \$500.00 Victim Penalty Assessment. RCW 7.68.035. Additionally, a biological sample must be collected for purposes of DNA identification analysis from an adult individual convicted of a felony or, as relevant here, the crime of failure to register as a sex offender in violation of RCW 9A.44.130. See RCW 43.43.754(1)(a)(v). State law provides that every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of \$100.00. RCW 43.43.7541.

By contrast, *discretionary* LFOs may be imposed or waived at the court's discretion. RCW 9.94A.760; *see also* RCW 9A.20.021; RCW 69.50.430; RCW 43.43.690; RCW 43.43.7541. Discretionary costs, such as jury fees and costs of incarceration, are expenses

specially incurred in the case. RCW 10.01.160. Also, fines are generally discretionary and may be waived in full or in part on a finding of indigence. See RCW 69.50.430(1). Although whenever a person is convicted in superior court, the court may order LFOs as part of the sentence, the court may not order an offender to pay certain costs if the court finds that the offender at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 9.94A.760(1).

However, indigence is not grounds for failing to impose restitution or the crime victim penalty assessment. *Id.* The constitution does not limit the ability of the states to impose financial obligations on convicted offenders; it only prohibits the enforced collection of financial obligations from those who cannot pay them. *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1974); *State v. Barklind*, 87 Wn.2d 814, 817–18, 557 P.2d 314 (1976). Thus, ability to pay is not considered when imposing *mandatory* costs and need only be considered at the time of collection. *State v. Lundy*, 176 Wash. App. 96, 102–09, 308 P.3d 755 (2013). (Emphasis added.) On the other hand, Washington trial judges should consider a defendant's ability to pay prior to imposing *discretionary* court costs at sentencing. *State v. Catling*, 413 P.3d 27, 29 (Wn. App. 2018),

*review granted in part*, 191 Wn.2d 1001, 422 P.3d 915 (2018); RCW 10.01.160(3).

In this case, the court considered Mr. McLaughlin's ability to pay prior to imposing *discretionary* costs. At sentencing, the court questioned Mr. McLaughlin about his ability to pay LFOs imposed as part of his sentence. RP 326-28. Mr. McLaughlin stated that he had been receiving about \$700.00 per month in federal social security assistance (disability) for approximately two and one-half years. RP 327. The court also asked Mr. McLaughlin about past employment and whether he had any prospects for future employment. *Id.* Mr. McLaughlin responded that he was employed in 1995 (undisclosed position) and 2005 as a flagger, but that he had no prospects for future employment because he is disabled. *Id.*

Taking all of these factors into consideration, the court found Mr. McLaughlin indigent and waived the \$2,000.00 mandatory drug fine, attorney fees, and any additional costs on appeal. RP 328; CP 116. The court then imposed mandatory LFOs totaling \$900.00:

- (1) \$500.00 victim assessment as required by RCW 7.68.035;
- (2) \$200.00 criminal filing fee as required by RCW 36.18.020;
- (3) \$100.00 crime lab fee as required by RCW 43.43.690; and

(4) \$100.00 DNA collection fee as required by RCW 43.43.7541.

*Id.*; CP 116-17.

Under the laws of our state, trial courts must impose the victim's compensation penalty, the criminal case filing fee, and the DNA collection assessment regardless of a defendant's indigence. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Thus, in the context of mandatory legal financial obligations, the Washington legislature has divested courts of discretionary authority to consider a defendant's ability to pay when imposing these obligations. *Id.*; *State v. Catling*, 2 Wn. App. 2d 819, 831 (Fearing, C.J., dissenting).

Nonetheless, Mr. McLaughlin argues that the Washington Supreme Court's decision in *City of Richland v. Wakefield* effectively relieves Mr. McLaughlin of any responsibility for the mandatory LFOs imposed as part of his sentence. Br. of Appellant, 18-21; *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016). Mr. McLaughlin's argument misstates the law. *Wakefield* involved an action under RCW 10.01.160(4) for remission of discretionary costs imposed as part of the defendant's judgment and sentence.

However, mandatory legal financial obligations are not discretionary "costs" under RCW 10.01.160(1) and (2). *State v. Shirts*, 195 Wn. App. 849, 858 n.7, 381 P.3d 1223 (2016).

Furthermore, mandatory legal financial obligations are not subject to a motion to remit under RCW 10.01.160(4). Thus, *Wakefield* does not control the issue of whether the trial court's imposition of mandatory legal financial obligations violated state law in this case.

Based on Mr. McLaughlin's financial situation, the trial court waived the \$2,000.00 drug fine and imposed only the mandatory legal financial obligations required under state law. Furthermore, Mr. McLaughlin asserted to the court that he did have some assets (a vehicle, \$88.00 in a bank account, and \$40.00 cash on hand). CP 131. Accordingly, the court determined that there may be other sources from which Mr. McLaughlin could make payments on the debt. The trial court went to great lengths to avoid imposing any greater hardship on Mr. McLaughlin. Therefore, the trial court did not abuse its discretion or violate state law by imposing mandatory legal financial obligations as part of Mr. McLaughlin's sentence.

Lastly, Mr. McLaughlin argues that the sentencing court violated federal law in imposing any legal financial obligations on a person whose sole source of income is social security disability. The federal social security anti-attachment statute, 42 U.S.C. § 407(a), provides that "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.” In *Wakefield*, the Washington Supreme Court held that federal law prohibits courts from ordering defendants to pay LFOs if the person's only source of income is social security disability. However, in that case, the court was reviewing a motion to remit discretionary costs under RCW 10.01.160(4).

The appropriate statutory method for avoiding these mandatory costs, therefore, is a motion to remit under RCW 10.01.160(4). In reviewing such a motion, the court must adjudge the offender’s current or future ability to pay those costs and punishment for failure to pay can only be imposed if the refusal is willful. *Id.* If the offender has not willfully defaulted, the trial court must determine whether the court's imposition of financial obligations creates a “manifest hardship.” RCW 10.01.160(4); *Wakefield*, 186 Wn.2d 596, 605–06; *State v. Wilson*, 198 Wn. App. 632, 634–35, 393 P.3d 892 (2017). If payment will impose manifest hardship on the defendant or the defendant's immediate family, the court *may* remit all or part of the amount due or modify the method of payment under RCW

10.01.170. RCW 10.01.160(4); *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997).

While mandatory LFOs in the amount of \$25.00 per month may not be enforced against his social security disability income, the social security anti-attachment statute does not invalidate the underlying financial obligation, which may be satisfied out of any funds not subject to the statute. 42 U.S.C. § 407(a); RCW 10.01.160. Therefore, the sentencing court did not violate federal law in imposing mandatory LFOs as part of Mr. McLaughlin's sentence.

#### **D. CONCLUSION**

The Ohio crime of Gross Sexual Imposition is factually comparable to *either* the crime of first- or second-degree Child Molestation in Washington because the conduct underlying Mr. McLaughlin's 1991 Ohio conviction would amount to first- or second-degree Child Molestation in Washington. Therefore, the sentencing court did not err in finding factual comparability between the Ohio crime of Gross Sexual Imposition and the Washington crime(s) of first- or second-degree Child Molestation.

The sentencing court did not abuse its discretion, nor violate state or federal law, by imposing mandatory legal financial obligations as

part of Mr. McLaughlin's sentence. Therefore, this court should affirm  
the decision of the superior court.

DATED this 31st day of October, 2018.  
RESPECTFULLY submitted,

By: 

ADAM N. KICK, WSBA #27525  
Prosecuting Attorney  
Attorney for the Respondent

**E. CERTIFICATE OF SERVICE**

Electronic service was effected via the Division II upload portal upon opposing counsel:

KARSdrait@gmail.com  
Kathryn Russell Selk, WSBA 23879  
1037 NE 65<sup>th</sup> St., Box 176  
Seattle, WA 98115

A handwritten signature in black ink, appearing to read 'Adam N. Kick', written over a horizontal line.

Adam N. Kick, WSBA #27525  
October 31, 2018, City of Stevenson, Washington

# SKAMANIA COUNTY PROSECUTOR

October 31, 2018 - 3:04 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

### The following documents have been uploaded:

- 510260\_Briefs\_20181031150226D2741529\_2599.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Respondent brief 10.31.18.pdf*

### A copy of the uploaded files will be sent to:

- KARSdroit@gmail.com
- Valerie.kathrynussellselk@gmail.com

### Comments:

---

Sender Name: adam kick - Email: kick@co.skamania.wa.us

Address:

PO BOX 790

STEVENSON, WA, 98648-0790

Phone: 509-427-3790

**Note: The Filing Id is 20181031150226D2741529**