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NO. S1540-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHELSEA K. HAYES,

Appellant.

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

The Honorable John Skinder, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing a school bus route stop enhancement regarding a conviction for conspiracy to deliver a controlled substance—an unranked felony offense.

2. The \$200.00 criminal filing fee and \$100.00 felony DNA fee should be reversed.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The general enhancement statute—RCW 9.94A.533—specifies that it applies only to ranked offenses. Did the sentencing court act without statutory authority in imposing a school bus route stop enhancement on Ms. Hayes' unranked felony offense for conspiracy to deliver a controlled substance? Assignment of Error 1.

2. Recent changes to Washington's statutory scheme prohibit the imposition of discretionary costs and criminal filing fees on indigent defendants. The Supreme Court recently held in *State v. Ramirez*¹ that these statutory changes apply retroactively to cases that were pending on direct appeal when the statutes were amended. Should the discretionary legal financial obligations, including the \$200 criminal filing fee and \$100 DNA

¹191 Wash.2d 732, 426 P.3d 714 (2018).

fee, be reversed? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural history:

Chelsea Hayes was convicted of conspiracy to deliver a controlled substance—methamphetamine (Count I), unlawful possession of methamphetamine with the intent to deliver (Count II), and unlawful possession of oxycodone (Count III). 3RP at 536. The State alleged conspiracy under RCW 69.50.407. Clerk’s Papers (CP) 23. The jury found by special verdict that Counts I and II were committed within 1000 feet of a school bus route stop. 3RP at 535; CP 129, 130, 131, 132, 133.

The court imposed legal financial obligations (LFOs) consisting of \$500.00 victim assessment, \$200.00 in court costs, \$100.00 felony DNA fee, and \$1000.00 restitution. 3RP at 577; CP 149-160.

The corrected opening Brief of Appellant was filed November 2, 2018. Counsel was granted leave to file a supplemental brief.

D. ARGUMENT

1. THE SCHOOL BUS ROUTE STOP ENHANCEMENT OF RCW 9.94A.533(6) DOES NOT APPLY TO UNRANKED OFFENSES.

A trial court errs when it exceeds the authority that the legislature has expressly conferred. *State v. Steen*, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010) (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002)). A party may challenge illegal or erroneous sentences for the first time on appeal. *State v. Bahl*, 164 Wn. 2d 739, 744, 193 P.3d 678 (2008).

Ms. Hayes was convicted of conspiracy to deliver methamphetamine and possession with intent to deliver. CP 149-160. The jury found both offenses were committed within 1,000 feet of a school bus stop, in violation of RCW 69.50.435(1)(c) (school bus stop enhancement). CP 132, 133. RCW 9.94A.533 carries a 24-month enhancement pursuant to subsection (6). However, the school bus route stop enhancement is inapplicable to unranked felonies under RCW 9.94A.533(6). RCW 9.94A.533(6) provides:

An additional twenty-four months shall be added to the standard sentence range *for any ranked offense* involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(emphasis added).

Here, the trial court imposed 12 months for the conspiracy charge, to run concurrently with a 36-month sentence for possession with intent to deliver. CP 149-160. The court also sentenced Ms. Hayes to two 24-month school bus stop enhancements to be served consecutively to Ms. Hayes' 36-month base sentence and consecutively to each other. CP 149-160.

The provisions of section .533 of RCW 9.94A do not apply to unranked offenses. RCW 9.94A.533(1) ("The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517"); RCW 9.94A.533(6) (specifying that the statute applies to ranked felonies only). See also, *State v. Soto*, 177 Wn. App. 706, 712-14, 309 P.3d 596 (2013). Conspiracy to deliver a controlled substance is an unranked offense. *State v. Hebert*, 67 Wash.App. 836, 841 P.2d 54 (1992), (citing *State v. Mendoza*, 63 Wash.App. 373, 819 P.2d 387 (1991)). This Court held in *Hebert* that "conspiracy under RCW 69.50.407 was an unranked offense with a standard range of not more than a year of confinement." *Id.*, 67 Wn.App. at 837.

In *Soto*, Division Three addressed whether an enhancement could increase the period of incarceration for an unranked felony. Based on its self-

imposed limitation to “standard range” sentences, *Soto* concluded RCW 9.94A.533 was inapplicable to unranked offenses, which carry no standard range. *Soto*, 177 Wn. App. at 714-15.

In *State v. Vasquez*, 200 Wn. App. 220, 225-26, 402 P.3d 276 (2017), review denied, 189 Wn.2d 1040 (2018), Division Three re-affirmed its *Soto* analysis. *Vasquez* confirmed the *Soto* holding that section .533's “prefatory language, set forth at RCW 9.94A.533(1), limits application of the statute to ranked offenses, punishable under either the standard sentencing grid (RCW 9.94A.510) or the drug offense sentencing grid (RCW 9.94A.517).” *Vasquez*, 200 Wn. App. at 226.

Because the provisions of section .533 of RCW 9.94A do not apply to unranked offenses, (*Soto*, 177 Wn. App. at 712-14), the school bus route stop allegation should not have been attached to the conspiracy charge and the judgment and 24 month enhancement subsequently entered thereon exceeded legislative authority. The enhancement in Count 1 therefore must be stricken.

2. THIS COURT SHOULD REVERSE ALL DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS, INCLUDING THE \$200.00 CRIMINAL FILING FEE AND \$100 DNA FEE

In late 2018, the legislature passed amendments to the state's legal

financial obligation system to prohibit the imposition of discretionary costs and criminal filing fees on indigent defendants. See Laws of 2018, ch. 269, §§ 6(3), 17(2)(h). Generally, RCW 10.01.160 discusses a court's authority to impose legal financial obligations (LFOs) on criminal defendants. Subsection .160(3) provides: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3).

In *State v. Ramirez*, an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018).

In this case the trial court imposed a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h). RCW 36.18.020(2)(h) states that “this fee shall not be imposed on a defendant who is indigent.”

Sentencing courts are required to conduct an individualized inquiry into a defendant's ability to pay before imposing discretionary costs. *Ramirez*, 191 Wn.2d at 744; *Blazina*, 182 Wn.2d at 839. “State law requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay

discretionary costs.” *Ramirez*, 191 Wn.2d at 744 (citing former RCW 10.01.160 (3)(2015)); *Blazina*, *Id.*

Ramirez noted that the financial statement section of a motion for indigency asks defendants questions relating to five categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. *Id.* at 744. The Court held that “[t]o satisfy *Blazina* and RCW 10.01.160(3)’s mandate that the State cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs.” *Id.* The Supreme Court held that these statutory changes apply retroactively to cases that were “pending on direct review and thus not final when the amendments were enacted.” *Ramirez*, 191 Wn.2d at 747.

In this case, the filing fee should be reversed. The court made no inquiry into Ms. Hayes’ ability to pay. RP at 576. The record shows, however, that Ms. Hayes is indigent and that she qualified for court appointed trial and appellate counsel. RP at 5; CP 141.

The trial court also imposed a \$100.00 DNA collection fee. CP 149. The legislature recently amended RCW 43.43.7541 to direct the DNA fee not

be imposed upon an individual who had previously provided a DNA sample.

Under RCW 43.43.754(1)(a), a DNA sample is collected whenever an individual is convicted of a felony. Ms. Hayes has felony convictions from June 2014. CP 144. Thus, her DNA would previously have been collected. See former RCW 43.43.754 (1999) (requiring collection of DNA for adult and juvenile felonies). Therefore, pursuant to the statutory directive and Ms. Hayes' criminal history, she has already provided a DNA sample.

In addition, under *Ramirez*, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. *Ramirez*, 191 Wn.2d at 721-22.

In accordance with the amendment to RCW 43.43.7541 and *Ramirez*, this Court should reverse the imposition of LFOs, including the filing fee and DNA fee, and remand to the trial court for individualized inquiry into her ability to pay and to impose LFOs consistent with the recent amendments and holding in *Ramirez*.

E. CONCLUSION

Chelsea Hayes respectfully requests that this Court reverse her convictions, or in the alternative, remand this case for resentencing consistent with the arguments presented herein and in her opening brief.

Last, Ms. Hayes is indigent. Recent amendments to the LFO statute apply retroactively to prohibit the imposition of discretionary costs. Moreover, the sentencing court failed to conduct an adequate *Blazina* inquiry.

Ms. Hayes respectfully requests this Court remand to the sentencing court with instructions to reverse the criminal filing fee and DNA collection fee.

DATED: January 18, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 18, 2019, that this Supplemental Brief was sent by JIS link to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Joseph Jackson, at Thurston County Prosecutor's office and copies were mailed by U.S. mail, postage prepaid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 18, 2019.



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