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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JOSEPH P. STONE, Jr., APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Monty D. Cobb, Judge
Mason County Superior Court No. 17-1-00065-5

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The State does not contest Stone's contention that on remand the trial court should add language to the judgment and sentence that clarifies that social security benefits may not be attached, garnished, or otherwise encumbered for the collection of LFOs.

2. The State contends that the anti-attachment provision of 42 U.S.C. § 407 does not bar the imposition of LFOs against a defendant who receives social security benefits (but instead, only bars attachment of the benefits). However, this issue is currently under consideration by the Supreme Court at *State v. Catling*, 191 Wn.2d 1001, 422 P.3d 915 (2018).

3. RCW 9.94A.704(3)(d) requires DOC to instruct supervised defendants to pay a supervision fee, and RCW 9.94A.703(1)(b) requires the sentencing court to require the defendant to comply with conditions imposed by DOC.

4. The State concedes that the community custody conditions prohibiting Stone from possessing alcohol was not statutorily authorized because there is no evidence that alcohol contributed to his offense, and that the reference to "mood or mind-altering substances" should be redacted because it is not clear that the phrase refers only to controlled substances, but the remaining conditions are lawful.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Stone's statement of facts, except where additional or contrary

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PO Box 639
Shelton, WA 98584
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facts are provided in the arguments section, below, as needed to develop the State's arguments. RAP 10.3(b).

C. ARGUMENT

1. The State does not contest Stone's contention that on remand the trial court should add language to the judgment and sentence that clarifies that social security benefits may not be attached, garnished, or otherwise encumbered for the collection of LFOs.

At sentencing, the trial court judge ordered as a condition of community custody that:

> A notice of payroll deduction may be issued or other income withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed[.]

CP 146. Circumstances in this case suggest that social security disability payments may be Stone's only source of income. Br. of Appellant at 4-5 (citing RP 196). Under federal law, social security disability proceeds are exempt from "execution, levy, attachment, garnishment, or other legal process…." 42 U.S.C. § 407(a). However, the community custody condition set forth above does not seek to clarify that social security proceeds are exempted from its scope.

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In circumstances similar to those described above, the Court of Appeals recently held "that the federal anti-attachment statute precludes a court from collecting LFO payments where the sole source of income is social security." *State v. Catling*, 2 Wn. App.2d 819, 822-23, 413 P.3d 27 (2018), *review granted in part,* 191 Wn.2d 1001, 422 P.3d 915 (2018). The Court of Appeals remanded "the case to superior court to amend its judgment and sentence to indicate that the LFOs may not be satisfied out of any funds subject to 42 U.S.C. § 407(a)." *Id.* at 826.

Although 42 U.S.C. § 407(a) should operate to preclude collection of LFO payments from social security benefits irrespective of whether there is clarifying language in the trial court's order, the State agrees that *State v. Catling*, 2 Wn. App.2d 819, 822-23, 413 P.3d 27 (2018), *review granted in part,* 191 Wn.2d 1001, 422 P.3d 915 (2018), stands for the proposition that the instant case should be remanded for the trial court to add clarifying language that exempts social security proceeds from the State's collection efforts.

2. The State contends that the anti-attachment provision of 42 U.S.C. § 407 does not bar the imposition of LFOs against a defendant who receives social security benefits (but instead, only bars attachment of the benefits). However, this issue is currently under consideration by the Supreme Court at *State v. Catling*, 191 Wn.2d 1001, 422 P.3d 915

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PO Box 639
Shelton, WA 98584
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(2018).

On appeal, Stone contends that the anti-attachment provision of 42 U.S.C. § 407 operates to prohibit the trial court from imposing *mandatory* LFOs even if the creditor takes no action to enforce payment from social security benefits. Br. of Appellant at 7-12.

The record of this case shows that, at sentencing, Stone's trial court attorney preserved an "objection on the record to all legal financial obligations." RP 196. Without providing any citation or case name, Stone's trial counsel explained the basis of the objection as follows: "I believe the latest case law and the latest reworking of the statute allows the Court great discretion, even with mandatories – so-called mandatory legal financial obligations." *Id.* Trial counsel then informed the court that "Mr. Stone is not in a position where he will ever be able to pay these off, and at this point it is not premature to request this Court to not impose them based on the latest case law." *Id.* From this exchange, Stone contends that the record shows that his only source of income or assets is from social security benefits and that he will never, ever, have any other source of income or assets. Br. of Appellant at 11. From this record Stone contends that the trial court order requiring him to pay the mandatory victim assessment of $500 is unlawful because his only means of paying it

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

is to use social security benefits that are exempted from collection under 42 U.S.C. § 407(a). Br. of Appellant at 7-12.

The anti-attachment provision of 42 U.S.C. § 407 does not bar attachment or payment of a debt from the estate of a beneficiary after the beneficiary's death. *In re Estate of McPherson*, 170 Wn. App. 411, 417–18, 283 P.3d 1135 (2012). Therefore, unless Stone dies penniless, his estate will eventually have funds to contribute toward his LFOs. Id. Additionally, LFOs are not exempt from sources of income or assets that derived from sources other than social security benefits. *State v. Catling*, 2 Wn. App.2d 819, 825, 413 P.3d 27 (2018), *review granted in part,* 191 Wn.2d 1001, 422 P.3d 915 (2018).

In *Catling* the Court of Appeals noted a distinction between forcing collection of LFO payments, as compared to merely imposing them in the first instance, and held that neither case law nor 42 U.S.C. § 407(a) prohibits the trial court from imposing *mandatory* LFOs on a criminal defendant who receives social security disability payments. *Catling* at 826. However, the Supreme Court has accepted review of *Catling* "only on the issue whether the imposition of mandatory legal financial obligations on the Petitioner violates the Social Security Act's antiattachment provision." *State v. Catling*, 191 Wn.2d 1001, 422 P.3d

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

915 (2018). Therefore, the State asks this Court to stay the instant case until after the Supreme Court rules on this issue.

3. RCW 9.94A.704(3)(d) requires DOC to instruct supervised defendants to pay a supervision fee, and RCW 9.94A.703(1)(b) requires the sentencing court to require the defendant to comply with conditions imposed by DOC.

As one of several community custody conditions, the trial court ordered as follows: "Defendant shall pay a community placement fee as determined by the Department of Corrections[.]" CP 146. On appeal, Stone points to footnote 3 in *State v. Lundstrom*, ___ Wn. App.2d ___, 429 P.3d 1116 (No. 49709-3-II, Nov. 15, 2018), for dicta to support his contention that community placement fees are discretionary fees that the trial court must waive if the defendant is indigent. Br. of Appellant at 11-12.

The State does not dispute Stone's basic contention that *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018), prohibits the imposition of discretionary costs against an indigent defendant. However, it is not clear that community custody placement fees are discretionary costs.

The uncertainty is derived from RCW 9.94A.704(3)(d), which requires that "[i]f the offender is supervised by the department, the

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PO Box 639
Shelton, WA 98584
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department shall at a minimum instruct the offender to… [p]ay the supervision fee assessment[.]" In turn, RCW 9.94A.703(1)(b), under the heading "[m]andatory conditions[,]" states that "[a]s part of any term of community custody, the court shall… (b) [r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704[.]" Thus, it would appear, that but for the discretionary provision at RCW 9.94A.703(2)(d), the supervision fee would be mandatory rather than discretionary.

4. The State concedes that the community custody conditions prohibiting Stone from possessing alcohol was not statutorily authorized because there is no evidence that alcohol contributed to his offense, and that the reference to "mood or mind-altering substances" should be redacted because it is not clear that the phrase refers only to controlled substances, but the remaining conditions are lawful.

At sentencing, the trial court ordered a list of community custody conditions that included the following two conditions: "The defendant shall not possess or consume any mind or mood-altering substances, to include the drug alcohol, Marijuana, or any controlled substances, except pursuant to lawfully issued prescriptions;" and "[t]he defendant shall, at his/her own expense, submit to urinalysis/breathalyzer testing at the request of the CCO or treatment provider to verify compliance;" CP 145-

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

46. On appeal, Stone contends that these conditions are unlawful because there is no evidence that substance abuse contributed to his crimes. Br. of Appellant at 12-14.

RCW 9.94A.703(2) enumerates several "waivable" community custody conditions. One of these conditions states that, "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to… "(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions[.]" Because this condition is "waivable" rather than "discretionary," the sentencing court has authority to impose it irrespective of whether it is crime related. *Matter of Brettell*, ___ Wn. App.2d ___, 430 P.3d 677, 681 (No. 76384-9-I, Nov. 19, 2018). And, because marijuana remains illegal under federal law, the trial court had authority to order Stone not to possess or consume marijuana. *Id.*

However, the condition at issue in the instant case includes a reference to "mind or mood-altering substances" in addition to controlled substances. CP 145. The community custody conditions do not define these terms, and, therefore, this condition could include substances that are not controlled substances. Thus, the State agrees that on remand the

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

wording of this condition should be modified to mirror the wording of RCW 9.94A.703(2)(c).

Additionally, review of the record reveals no citation to support an assertion that alcohol contributed to Stone's criminal conduct. A community custody condition that prohibits the consumption of alcohol is lawful irrespective of whether the underlying crime is alcohol related, but where the crime is not alcohol related, a community custody condition that prohibits the possession of alcohol is not statutorily authorized. *State v. Norris*, 1 Wn. App. 2d 87, 100, 404 P.3d 83 (2017), *aff'd in part, rev'd in part sub nom. State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 848 (2018). Therefore, because there is no evidence that alcohol played a role in Stone's offense, the sentencing court did not have authority to order Stone to refrain from the possession of alcohol. *Id.* Accordingly, the State concedes that on remand the condition prohibiting Stone from possession of alcohol should be stricken.

Finally, the trial court did not err by ordering Stone to submit to urinalysis or breathalyzer testing as a means of verifying compliance with the community custody conditions, because trial courts are authorized to impose community custody conditions that monitor an offender's compliance with other valid conditions. *State v. Riles*, 135 Wn.2d 326,

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

342–43, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

D. CONCLUSION

The State does not disagree that on remand the judgment and sentence should be modified to clarify that Stone's social security benefits may not be encumbered for the purpose of forcing payment of outstanding LFOs.

It is not clear that supervision fees imposed by the DOC are discretionary rather than mandatory fees, and the State contends that the trial court did not err by ordering Stone to comply with the DOC directive that he pay supervision fees.

The State concedes that the community custody condition prohibiting Stone from possessing alcohol is unlawful because his crime was not alcohol related and the condition is not otherwise authorized by statute. The State also concedes that the phrase "mood or mind-altering substances" should be deleted from the community custody conditions because it is not statutorily authorized (except to the extent that it is encompassed by the prohibition against possession of a controlled substance without a valid prescription). Otherwise, the State contends that

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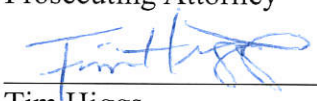
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the community custody conditions are valid and lawful and should be sustained on appeal.

Finally, the State requests that this case be stayed pending the Supreme Court's decision in the matter of *State v. Catling*, 191 Wn.2d 1001, 422 P.3d 915 (2018), which is deciding the issue of "whether the imposition of mandatory legal financial obligations on the Petitioner violates the Social Security Act's antiattachment provision."

DATED: February 7, 2019.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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