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No. 53013-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CYRUS PLUSH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES III

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT 4

 1. Mr. Plush’s conviction for failure to register is unconstitutional
 in light of the prohibitions on ex post facto laws and double
 jeopardy..... 4

 2. Resentencing is required on Mr. Plush’s legal financial
 obligations..... 8

 a. The sentencing court improperly imposed the DNA
 collection fee because Mr. Plush was previously convicted
 of a felony in Washington..... 8

 b. The sentencing court should strike the supervision fees
 because Mr. Plush is indigent. 8

 c. The sentencing court erroneously imposed interest on the
 legal financial obligations..... 9

F. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798) 4

Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450
(1997)..... 4

In re Arseneau, 98 Wn. App. 368, 989 P.2d 1197 (1999) 5

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005)..... 7

State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993)..... 6

State v. Boyd, 1 Wn. App. 2d 501, 408 P.3d 362 (2017) 5

State v. Enquist, 163 Wn. App. 41, 256 P.3d 1277 (2011)..... 7

State v. Fort, 190 Wn. App. 202, 360 P.3d 820 (2015) 6

State v. Plush, 2018 WL 1508707, 3 Wn. App. 2d 1002 (Mar. 27, 2018)
(unpublished) 3, 7

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 6

State v. Reamer, 2019 WL 3416868, 9 Wn. App. 2d 1077 (Jul. 29, 2019)
(unpublished) 9

State v. Sauve, 100 Wn.2d 84, 666 P.2d 894 (1983)..... 6

State v. Schwab, 163 Wn.2d 664, 185 P.3d 1151 (2008)..... 7

State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994) 4

Other Authorities

Answer to Petition for Review, *State v. Batson*, No. 97617-I at 12–21
(Oct. 4, 2019)..... 6

Order Granting Review, *State v. Batson*, No. 97617-1 (Dec. 4th, 2019) ... 6

Statutes

RCW 10.01.160 9
RCW 43.43.7541 8
RCW 9.94A.703..... 8

Rules

GR 14.1 3, 9
RAP 12.2..... 7
RAP 2.5..... 6

Constitutional Provisions

Const. art. I, § 12..... 1, 4
Const. art. I, § 9..... 1, 4
U.S. Const. amend V..... 1, 4
U.S. Const. art. I, § 10..... 1, 4

A. INTRODUCTION

Cyrus Plush was resentenced for a failure to register conviction following remand from this Court. At the new sentencing hearing, the court found him indigent and ordered waiver of all “non-mandatory fines and fees.” Contrary to this order and statute, the sentencing court imposed a \$100 DNA fee and supervision fees. The court also imposed interest on Mr. Plush’s legal financial obligations.

Mr. Plush appealed to this Court. As his appeal was pending, the Washington Supreme Court took review of whether the duty to register is unconstitutional under the prohibitions on ex post facto laws and double jeopardy.

Should the Supreme Court hold that the duty to register is unconstitutional, Mr. Plush should benefit from that decision. In the alternative, this Court should remand for resentencing with instructions that the DNA fee, supervision fees, and interest be stricken from Mr. Plush’s judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The conviction was unconstitutional because Mr. Plush’s duty to register is punitive and thus violates the prohibitions on ex post facto and double jeopardy. U.S. Const. art. I, § 10; U.S. Const. amend V; Const. art. I, § 9; Const. art. I, § 12.

2. The sentencing court erred when it imposed a DNA fee, supervision fee, and interest on legal financial obligations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal law violates the prohibition on ex post facto if it imposes a greater punishment than applied when the crime was committed. Similarly, double jeopardy prohibits multiple punishments for the same offense. Here, Mr. Plush's duty to register as a sex offender is so punitive that it constitutes a criminal penalty. Should this Court vacate Mr. Plush's conviction because it violates the prohibitions on ex post facto and double jeopardy?

2. DNA fees must not be imposed if the state has previously collected the defendant's DNA as a result of a prior felony conviction. Here, Mr. Plush was previously convicted of a felony in Washington. Should the DNA fee be stricken?

3. Supervision fees are discretionary and should not be imposed on defendants who are indigent. The sentencing court found Mr. Plush indigent but still imposed community supervision fees. Should the provision ordering payment of supervision fees be stricken?

4. Excluding restitution, legal financial obligations do not accrue interest. However, the sentencing court imposed interest on Mr. Plush's legal financial obligations. Should the interest provision be stricken?

D. STATEMENT OF THE CASE

Mr. Plush was convicted of a sex offense in 1992. CP 27. He has been convicted for failing to register as a sex offender several times, and was sentenced to 15 days in 2010 and 43 months in 2012. CP 235, 239, 249, 253. In this case, he was convicted of failure to register for a third time and received a sentence of 50 months. CP 26–27, 29.

Mr. Plush appealed the third failure to register conviction and sentence. In an unpublished decision, this Court affirmed the conviction but remanded for resentencing because the State failed to prove Mr. Plush’s prior convictions by a preponderance of the evidence. *See State v. Plush*, 2018 WL 1508707 at *3–4, 3 Wn. App. 2d 1002 (Mar. 27, 2018) (unpublished).¹ On remand, the State presented certified copies of Mr. Plush’s prior judgment and sentences and Mr. Plush stipulated to the veracity of these documents for the purpose of his offender score. RP 5–6; CP 39 (stipulation); CP 40–151 (copies of judgments and sentences).

The court re-imposed a 50-month sentence as well as 36 months of community custody and legal financial obligations, including a \$100 DNA fee and supervision fees. CP 29–33. The judgment and sentence also included a clause stating “[t]he financial obligations imposed in this

¹ Cited pursuant to GR 14.1.

judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 32.

Mr. Plush filed a notice of appeal of the judgment and sentence that was accepted by this Court in May 2019. *See* CP 1–16; Supp. CP ___ (Sub. No. 184).

E. ARGUMENT

1. Mr. Plush’s conviction for failure to register is unconstitutional in light of the prohibitions on ex post facto laws and double jeopardy.

Both the federal and state constitutions forbid the legislature from passing any ex post facto law. *See* U.S. Const. art. I, § 10; Const. art. I, § 23. A criminal law violates the ex post facto prohibition if it “*changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.*” *State v. Ward*, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (quoting *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648 (1798)) (emphasis in *Ward*). Similarly, both the federal and state constitutions prohibit double jeopardy. U.S. Const. amend. V; Const. I, § 9. In order to violate double jeopardy, duplicate punishments must be criminal, as opposed to a “civil penalty.” *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

To determine whether a law is punitive or merely a “regulatory” civil penalty, Washington courts consider the following four factors:

(1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether its operation will promote retribution and deterrence, the traditional aims of punishment, and (4) whether it appears excessive to its non-punitive purpose. *See Ward*, 123 Wn.2d 488 at 500–11 (applying these factors in the context of ex post facto); *see also In re Arseneau*, 98 Wn. App. 368, 379–80, 989 P.2d 1197 (1999) (applying these factors in analyzing ex post facto and double jeopardy challenges).

In 1994, the Washington Supreme Court held that sex offender registration did not violate the prohibition on ex post facto laws because registration was regulatory, not punitive. *See generally Ward*, 123 Wn.2d. Lower courts have dutifully followed *Ward* as binding precedent in the decades since, despite the fact that today’s registration requirements are significantly more burdensome, and have more severe attending consequences, than the requirements considered by the *Ward* court in 1994. *See State v. Boyd*, 1 Wn. App. 2d 501, 522–24, 408 P.3d 362 (2017) (Becker, J., dissenting). The changes to the requirements include weekly in-person reporting for registrants who lack a fixed address, the imposition of a Class B felony for a second failure to register conviction, and the dissemination of personal information on a publicly available website. *See id.* at 523–24.

In light of the significant changes to the sex offender registration scheme, the Supreme Court recently accepted review of whether registration is now punitive and thus violates the prohibitions on ex post facto and double jeopardy. *See* Order Granting Review, *State v. Batson*, No. 97617-1 (Dec. 4th, 2019); Answer to Petition for Review, *State v. Batson*, No. 97617-I at 12–21 (Oct. 4, 2019) (cross-petitioning for review on the grounds of ex post facto and double jeopardy). Should the Supreme Court hold that registration violates the prohibition on ex post facto and/or double jeopardy, Mr. Plush should benefit from that decision and his conviction vacated. *See State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018) (defendant’s case was on appeal as a matter of right and thus he was entitled to the benefit of changes in the law that came into effect following his conviction).

Appellants are typically prohibited from raising new issues in a second appeal. *See State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983). However, this prohibition only applies to “clear and obvious” issues that could have been raised in the first appeal. *See id*; *State v. Barberio*, 121 Wn.2d 48, 52, 846 P.2d 519 (1993); *see also State v. Fort*, 190 Wn. App. 202, 234, 360 P.3d 820 (2015) (noting that this prohibition only applies to “[m]ature rules”); RAP 2.5(c)(2) (permitting discretionary review of a trial court decision not previously appealed). Further, “a

decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, *must* be followed on the second appeal.” *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) (internal citations and quotation marks omitted) (emphasis in the original); *see also State v. Schwab*, 163 Wn.2d 664, 672–73, 185 P.3d 1151 (2008) (acknowledging that “a prior appellate holding in the same case [can] be reconsidered where there has been an intervening change in the law.”).

Although Mr. Plush did not raise *ex post facto* or double jeopardy challenges in his first appeal, this Court had definitively expressed its reluctance to revisit the issue of whether registration was unconstitutional, strictly adhering to *Ward’s* analysis. *See generally Plush*, 2018 WL 1508707; *State v. Enquist*, 163 Wn. App. 41, 46–50, 256 P.3d 1277 (2011). Thus the issue was neither “clear” nor “obvious” at the time of Mr. Plush’s first appeal. *See Sauve*, 100 Wn.2d at 87. Accordingly, should the Supreme Court determine that sex offender registration violates *ex post facto* and/or double jeopardy – thus announcing a new rule of law – this Court should reverse Mr. Plush’s conviction in the interest of justice. *See Roberson*, 156 Wn.2d at 42; RAP 12.2.

2. Resentencing is required on Mr. Plush’s legal financial obligations.

- a. The sentencing court improperly imposed the DNA collection fee because Mr. Plush was previously convicted of a felony in Washington.

The sentencing court imposed a \$100 DNA collection fee. *See* CP 32. However, the statute authorizing the collection of this fee states it should not be imposed if “the state has previously collected the offender’s DNA as a result of a prior conviction.” RCW 43.43.7541. Washington law requires a DNA sample to be taken from all individuals convicted of a felony. *See* RCW 43.43.7541. Mr. Plush’s criminal history shows he was convicted of several felonies in Washington, and thus he has already given a DNA sample. *See* CP 27–28. Accordingly, the \$100 DNA fee should be stricken from the judgment and sentence.

- b. The sentencing court should strike the supervision fees because Mr. Plush is indigent.

Mr. Plush is indigent and lacks the ability to pay legal financial obligations. CP 35 (“All non-mandatory fines and fees are waived as Defendant is indigent.”) Regardless, the sentencing court ordered Mr. Plush to “pay supervision fees as determined by DOC.” CP 30–31, 33. The supervision costs of community custody are discretionary and are subject to an ability to pay inquiry. *See State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018); *see also* RCW 9.94A.703(2)(d)

(“Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.”); *see also* RCW 10.01.160(3) (“The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent.”) Consistent with the trial court’s intent to waive other discretionary costs, this Court should strike the provision ordering payment of supervision fees. *See* CP 35; *see also* *State v. Reamer*, 2019 WL 3416868 at *5, 9 Wn. App. 2d 1077 (Jul. 29, 2019) (unpublished) (concluding that supervision fees should not be imposed on indigent defendants and remanding with instructions to strike such fees).²

c. The sentencing court erroneously imposed interest on the legal financial obligations.

The judgment and sentence includes a provision stating “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 32. However, legal financial obligations, excluding restitution, do not accrue interest. RCW 3.50.100(4)(b). Accordingly, this Court should order the sentencing court to strike the interest accrual provision.

² Cited pursuant to GR 14.1.

F. CONCLUSION

For the reasons stated above, this Court should reverse Mr. Plush's conviction. In the alternative, the Court should remand for resentencing.

DATED this 6th day of December, 2019.

Respectfully submitted,

/s Jessica Wolfe

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