

FILED
Court of Appeals
Division II
State of Washington
2/4/2020 12:35 PM
NO. 53013-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

CYRUS NELSON PLUSH, II,
Appellant.

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

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. Unconstitutional Conviction Argument**
- 2. Resentencing for Legal Financial Obligations Argument**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

On September 12, 2018, the Appellant's appeal under No. 49104-4-II was mandated following termination of review on September 5, 2018. On that appeal, the Appellant challenged three issues – that the trial court erred in granting the State's motion to amend the information, that the prosecutor had committed prosecutorial misconduct during closing remarks, and that at sentencing, the State failed to provide proof of the Appellant's prior offenses. The conviction was confirmed and mandated for re-sentencing in order for both parties to present the Appellant's criminal history under RCW 9.94A.530(2). The Appellant was re-sentenced on November 27, 2018 and found by the trial court to have an offender score of 9+ based on certified judgment and sentence documents submitted to the court.

ARGUMENT

- 1. Unconstitutional Conviction Argument**

This is the Appellant's second appeal for the same Grays Harbor County Superior Court matter and he is now raising new issues that were not previously argued in his prior appeal. Additionally, the new issue being raised related to ex post facto laws and double jeopardy is based on a yet decided Supreme Court case that has apparently been accepted under review that the Appellant believes may have on his case. The matter before the Supreme Court cited by the Appellant was *State v. Batson*, which specifically addresses sex offenders who have been convicted of sex offenses out of state and were found to have a duty to register in Washington State based on that out of state conviction. *State v. Batson*, 9 Wash.App. 2d 546, 447 P.3d 202 (2019). The Appellant, however, was not convicted of a sex offense out of state. The Appellant's underlying sex offense conviction was for Child Molestation in the First Degree out of Cowlitz County in the State of Washington. Therefore, not only is the issue being presented untimely, but any decision on the *Batson* matter would not apply to the Appellant. Therefore, the Respondent respectfully requests that the court deny the Appellant's issue related to ex post facto laws and double jeopardy as untimely and inapplicable.

2. Resentencing for Legal Financial Obligations Argument

The second issue being raised related to fees is also a new issue not previously argued in his first appeal. In his first appeal, the Appellant argued that the basis for his offender score was not sufficiently proven and the case was remanded for re-sentencing on that issue. The Appellant is now essentially arguing for a waiver of his fees, which is most commonly argued under *State v. Ramirez*. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The State has no information as to whether or not the Appellant has or has not previously submitted to DNA testing so that provision remained in the judgment and sentence to be determined by the Department of Corrections. With regard to the legal financial obligations argument, had this issue been raised by the Appellant in his initial appeal, the Respondent would have agreed that under *Ramirez*, non-mandatory fines and fees and any interest should be waived because the Appellant was found to be indigent by the trial court. However, as the issue of legal financial obligations is not a new or novel argument, it should have been raised in his initial appeal and the Appellant is barred from raising such an issue in a second appeal.

Therefore, the Respondent respectfully requests that the court deny the Appellant's issue related to legal financial obligations as untimely. However, should the court otherwise allow for the Appellant's non-mandatory fines and fees and interest to be waived on his second appeal,

the Respondent would be more than willing to submit on order to the trial court by stipulation of the parties striking any legal financial obligations the court sees fit.

CONCLUSION

Based on the arguments presented above, the Respondent respectfully requests that the requests of the Appellant be denied and confirm the conviction once again.

DATED this 4th day of February, 2020.

Respectfully Submitted,

BY: 
ERIN C. RILEY
Deputy Prosecuting Attorney
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ECR /

February 04, 2020 - 12:35 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53013-9
Appellate Court Case Title: State of Washington, Respondent v. Cyrus N. Plush, II, Appellant
Superior Court Case Number: 16-1-00096-0

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