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Court of Appeals
Division II
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NO. 54191-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

HOMER C. TAYLOR III,

Appellant.

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

The Honorable David L. Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The Department of Corrections supervision fee in appellant Homer Taylor’s judgment and sentence is no longer authorized pursuant to the Supreme Court’s decision in *State v. Ramirez* and after enactment of House Bill 1783 and should be stricken.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the case be remanded to the trial court to strike the community supervision fee in the judgment and sentence in violation RCW 10.01.160(3) where the trial court found Mr. Taylor indigent? Assignment of Error 1.

C. STATEMENT OF THE CASE

1. Procedural facts and trial testimony:

Homer Taylor III was charged by information in Grays Harbor County Superior Court with failure to register as sex offender on June 4, 2019 contrary to 9A.44.132(1)(a) and 9A.44.130.¹ Clerks Papers (CP) at 1-3. Mr. Taylor was released following a hearing on July 1, 2019, at which he was advised by the court to register. Report of Proceedings (RP)² (7/1/19) at 6. Despite the court’s admonishment, he was charged with another count of

¹Grays Harbor County cause no. 19-1-361-14.

²The record of proceedings consists of the following transcribed hearings: RP – July 1, 2019; September 3, 2019; September 4, 2019 (entry of waiver of speedy trial); September 30, 2019 (motion to dismiss); October 4, 2019, October 7, 2019 (waiver of jury trial); September 20, 2019; October 18, 2019; October 25, 2019 (bench trial); and November 1, 2019 (sentencing).

failure to register in Grays Harbor County cause no. 19-1-552-14.³ RP (9/3/19) at 3; RP (10/25/19) at 3.

In 1988, Taylor pleaded guilty to statutory rape in the third degree in violation of former RCW 9A.44.090 (1979). Later in 1988 the legislature repealed former RCW 9A.44.090. LAWS OF 1988, ch. 145, § 24. The legislature replaced the statutes defining three degrees of statutory rape with three degrees of the crime of rape of a child. *State v. Taylor*, 162 Wn.App. 791, 796 n. 4, 259 P.3d 289 (2011).

In August 2009, Mr. Taylor was charged with failure to register as a sex offender, contrary to former RCW 9A.44.130 (2006). *Taylor*, 162 Wn.App. at 794. The State alleged that Mr. Taylor failed to register on July 8, 2009, citing the 1988 statutory rape conviction as his predicate offense. *Id.* In February 2010, the trial court found Mr. Taylor guilty and sentenced him to a standard range sentence of 43 months in prison. *Id.*

At the time of Mr. Taylor's 2009 failure to register offense, the sex offender registration statute required any adult who had been convicted of a sex offense to register with the county sheriff. Former RCW 9A.44.130(1)(a). *Taylor*, 162 Wn.App. at 794.

In 2011, Division One decided *State v. Taylor*, supra, which held that offenders who were convicted under former RCW 9A.44.070, .080, and .090 (1979), do not have to register as sex offenders because the period when those

³ Court of Appeals cause no. 54049-5-II.

crimes were in effect was not covered by the failure-to-register statute. The Court found those convictions fell within a statutory time period “gap” in the registration requirement. *Taylor*, 162 Wn.App. at 799. The offense of statutory rape was repealed in 1988 and, therefore, not a violation of chapter 9A.44 RCW in July 2009. See also *In re the Pers. Restraint of Wheeler*, 188 Wn.App. 613, 619, 354 P.3d 950 (2015).

Because the predicate offense for Mr. Taylor's 2009 failure to register conviction-- statutory rape in the third degree-- was not a violation of chapter 9A.44 RCW in 2009, Division One reversed the conviction. *Taylor*, 162 Wn.App. at 801.

In 2018, the Supreme Court decided *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 410 P.3d 1133 (2018), which addressed a split in the Divisions whether the sex offender registration statute, RCW 9A.44.130, requires registration after former RCW 9A.44.080 was repealed. The Supreme Court initially determined whether Arnold's conviction under former RCW 9A.44.080 (1979) was a felony under chapter 9A.44 RCW to determine if it qualified as a “sex offense.” *Id.* at 142. Then, the Court moved on to subsection (b) of RCW 9.94A.030. *Id.* The Court interpreted subsection (b) as containing a two-part inquiry: first, the reviewing court decides whether the prior crime of conviction was in effect prior to July 1, 1976; and, second, the court determines whether the prior crime of conviction is comparable to a felony listed under subsection (a) of

the statute. *Id.* at 142-44. In deciding *Arnold*, the Court rejected the *Taylor* holding. *Arnold*, 190 Wn.2d at 146-47.

In this case, the court heard Mr. Taylor's motion to dismiss on September 30, 2019. RP (9/30/19) at 1-6. Defense counsel argued that in *Arnold*, the Court did not explicitly overrule *State v. Taylor*, but that the Court said that it "disagreed with the logic in *Taylor*" and that *Taylor* still provides that Mr. Taylor is not required to register. RP (9/30/19) at 2-5. The State argued that *Arnold* overruled *Taylor*. RP (9/30/19) at 3. The trial court found that the Supreme Court "clearly overturned that decision and reinstated the duty to register for Mr. Taylor, and every other person similarly situated." RP (9/30/19) at 5.

Mr. Taylor waived jury trial on October 7, 2019 and the case came on for bench trial on October 25, 2019, the Honorable David Edwards presiding. RP (10/25/19) at 3-67.

Department of Corrections records custodian Lynn Jones testified that Mr. Taylor was released from Airway Heights on September 6, 2018 was he was to be transported to Thurston County. RP (10/25/19) at 13. DOC records tech at Airway Heights Jon Christner stated that Mr. Taylor refused to sign the sex offender registration notice at the time of his release. RP (10/25/19) at 17.

Thurston County Deputy Sheriff Roland Weiss stated that in March 2019 his unit became aware of a change in the law following a Supreme

Court ruling that reinstated the requirement that Mr. Taylor register as a sex offender. RP (10/25/19) at 27. Deputy Weiss stated that a letter informing Mr. Taylor of the reinstated duty to register was prepared and put in Mr. Taylor's property, which he would receive when released from jail. RP (10/25/19) at 28. Exhibit 4.

Mr. Taylor was arrested in Aberdeen, Washington for failure to register on May 31, 2019. RP (10/25/19) at 33-34. The arresting officer George Kelley testified that Mr. Taylor told him that he did not have the duty to register. RP (10/25/19) at 35.

Grays Harbor County Deputy Sheriff and records custodian Paul Logan testified that Mr. Taylor registered as a sex offender on July 1, 2019 while incarcerated at the Grays Harbor County jail prior to his release and had not registered since that date. RP (10/25/19) at 41. Exhibits 5 and 6.

Mr. Taylor acknowledged that he was told that he had to register when he was released from Airway Heights but stated that he was not allowed to take the paperwork they gave him when he left. RP (10/25/19) at 62. He stated that he received a letter from the Thurston County Sheriff that he had to register. RP (10/25/19) at 63. Mr. Taylor stated that he did not read the letter until later, and that he has a brain injury that has affected his memory following an assault. RP (10/25/19) at 63. He stated that after his release in July 2018, he was homeless. RP (10/25/19) at 63. He acknowledged that he did not register, but did not have his paperwork and

stated that the DOC officials would not let them take his papers with him because there was not enough room in the transportation van for his box containing his paperwork. RP (10/25/19) at 62, 63.

After hearing testimony and argument of counsel, the court found that Mr. Taylor had a duty to register between April 1, 2019 and May 31, 2019 that he did not register. RP (10/25/19) at 67.

The court found that Mr. Taylor waived nonmandatory legal financial obligations. RP (11/1/19) at 7; CP at 50-51. At sentencing, the State recommended a top of the range sentence of 57 months to be served consecutively to the sentence in cause no. 19-1-361-14. RP (11/1/19) at 4. The trial court imposed a standard range sentence of 57 months for each cause number, to be served concurrently, followed by 36 months of community custody. RP (11/1/19) at 7; CP at 35, 36. Section 4.2 (B)(7) of the judgment and sentence provides that the defendant shall “pay supervision fees as determined by DOC.” CP at 36.

Findings of Fact and Conclusions of law were entered on November 1, 2019. CP at 26-30.

Mr. Taylor timely filed a notice of appeal on November 8, 2019.

D. ARGUMENT

- 1. THIS COURT SHOULD STRIKE THE DOC SUPERVISION FEE PROVISION BECAUSE MR. TAYLOR IS INDIGENT**

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

The recently amended statute on legal financial obligations (LFOs) prohibits the imposition of discretionary costs on indigent defendants. Here, the court imposed the cost of Department of Corrections supervision. CP at 36. Because Mr. Taylor is indigent, this discretionary cost must be stricken.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court “may require the defendant to pay costs.” RCW 10.01.160(1). Recent amendments to the LFO statute prohibit the imposition of discretionary costs on indigent defendants. “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). This language became effective on June 7, 2018. Mr. Taylor was sentenced on November 1, 2019. CP at 31-47.

The statute defines “indigent” as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines. RCW 10.101.010(3).

b. Remand is necessary to strike DOC supervision fee

The record indicates that Mr. Taylor was indigent under RCW 10.101.010(3) at the time of the sentencing hearing. Mr. Taylor was homeless and at times was living under a bridge following his release in September 2018.

RP (11/1/19) at 63. The sentencing court found Mr. Taylor indigent and allowed this appeal at public expense. CP at 50-51. Mr. Taylor has remained incarcerated since that time. CP at 31. See *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing). At sentencing, the court found that Mr. Taylor is indigent and imposed mandatory legal financial obligations only. RP (11/1/19) at 7; CP at 34. Despite the trial court's finding of indigency during the sentencing hearing, in Section 4.6(B)(7) of the judgment and sentence, the court directed Mr. Taylor to pay a community supervision fee to the Department of Corrections. CP at 36. This language was imposed in pre-printed text, in a block paragraph requiring no affirmative “check mark” by the trial court. CP at 36.

RCW 9.94A.703(2)(d) provides that this is discretionary: “Unless waived by the court ... the court shall order an offender to ... [p]ay supervision fees as determined by the department.” Since the supervision fees are waivable by the trial court they are discretionary LFOs. *State v. Lundstrom*, 6 Wn.App.2d 388, 396 n. 3, 429 P.3d 1116 (2018). In *Lundstrom*, this Court noted the sentencing court intended to impose only mandatory fees, yet imposed discretionary community custody costs, apparently through an oversight. *Lundstrom*, at 396, n.3,

Discretionary costs cannot be imposed on an indigent defendant. RCW 10.01.160(3). When legal financial obligations are impermissibly imposed, the

remedy is to strike them. *Ramirez*, 191 Wn.2d at 749-50. Here, the court found he was “indigent” in the judgment and sentence and expressly waived the non-mandatory LFOs and left other spaces for various costs and fees blank. CP at 34, 37-38. Under the section in the judgment and sentence on community custody conditions, the requirement that Mr. Taylor “pay supervision fees as determined by DOC” is buried in a lengthy paragraph on community custody. CP at 36. Combined with the oral statement waiving all non-mandatory LFOs, this strongly suggests it was not the court's intention to impose DOC supervision costs. This shows the discretionary community custody fee was likely imposed through mere oversight, just as in *Lundstrom*. Where, as here, the cost violates recent statutory amendments, the court should remand to strike the unauthorized cost. *Ramirez*, 191 Wn.2d at 746.

E. CONCLUSION

Mr. Taylor respectfully requests this Court to remand for resentencing with instructions to strike the DOC supervision fee.

DATED: July 13, 2020.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on July 13, 2020, that this Appellant's Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Katherine Lee Svoboda, and copies were mailed by U.S. mail, postage prepaid, to the Appellant.

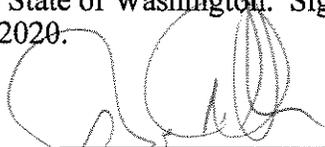
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 13, 2020.



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