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FEBRUARY 4, 2015
Court of Appeals
Division III
State of Washington

32188-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH HART,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted:
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I. RESTATEMENT OF SUPPLEMENTAL ISSUE

Is the court's finding that the Defendant has the present and future ability to pay an abuse of discretion under RCW 9.94A.777 where there is no record of the necessary condition precedent that the Defendant has a mental health condition which prevents him "from participating in gainful employment"?

II. SUPPLEMENTAL STATEMENT OF THE CASE

Previously the Defendant Joseph Hart had challenged the sentencing court's finding that he had the ability to pay legal financial obligations (LFO's) and the sentencing court's imposition of LFO's. Appellant's Opening Brief at 3. In a supplemental assignment of error, the Defendant now argues that the imposition of LFO's violates RCW 9.94A.777, regarding the court's obligation to determine whether there are other means of payment available to a defendant whose mental illness prevents him from participating in gainful employment. Appellant's Reply Brief at 1.

The Defendant's schizophrenia is treatable and was being managed successfully at the time of his last offense. CP 55-57, 62. There is no indication that his schizophrenia contributed to the

murder. CP 64 at 4(a) (“Mr. Hart denied experiencing symptoms of his mental disease (hallucinations, delusions, paranoia) around the time of the stabbing.”). When the Defendant takes his medications, he describes himself as symptom free. CP 62, para. 3.

The Defendant’s competency became an issue after incarceration -- when he stopped taking his medication. 1RP¹ 2, ll. 22-25; 1RP 4, ll. 16-19; CP 56-57; CP 64 at 8 (Mr. Hart may decompensate while incarcerated which results in symptoms which render him gravely disabled). After he resumed his medication, he was evaluated to be competent for trial and sane at the time of the offense. CP 57-58, 62-63; 1RP 10.

Although defense counsel planned to argue that his client was not guilty by reason of insanity (2RP² 12, 21-22, 30, 36), the Defendant objected to that strategy. 1RP 10-11 (opting to preserve his right to appeal and to avoid Eastern State Hospital); 2RP 37 (“he preferred to go to DOC instead of Eastern, for a variety of reasons”). Accordingly, defense counsel did not present evidence

¹ Consistent with the Appellant’s Opening Brief, 1RP refers to the transcript prepared by Joseph D. King for 3/13/2012, 4/24/2012, 8/7/2012, 3/5/2013, and 1/6/2014.

² Consistent with the Appellant’s Opening Brief, 2RP refers to the transcript prepared by Patricia L. Adams for 8/27/2013, 10/8/2013, 11/21/2013, 12/4/2013, and 1/14/2014.

of the Defendant's mental condition to the court. 2RP 36. Instead, the court was advised that the Defendant was competent to stand trial (CP 57-58) and sane at the time of the offense (CP 63-64).

Defense counsel acknowledged that the Honorable Judge Carrie Runge is a supporter of alternative treatment courts like Drug Court and Mental Health Court. 2RP 37.

Judge Runge explained that because the trial was by stipulated facts, she had "little to no background information, other than the charging documents in this case and the materials that were submitted to the Court at the time of the stipulated facts trial." 2RP 40.

The judge would have been aware that the Defendant said that he had been depressed at the time of the murder because he had no job and he had quit training in martial arts. CP 62. He spent his time "lying around, doing nothing." CP 62. When he had the money, he would buy beer and marijuana. CP 62. The judge was aware of the Defendant's many prior crimes, seven felonies over eight years. CP 7; 2RP 39. She would also have seen that in his previous, most serious offense cases, Walla Walla and Spokane superior courts had imposed costs on the Defendant,

including discretionary costs related to attorney fees. CP 19-20, 32-33.

Defense counsel made no argument as to the imposition of LFO's. 2RP 35-38, 39. Counsel explained that his client understood that the court had no discretion but to sentence him to life without the possibility of early release. CP 12; 2RP 38.

The judge found that the Defendant has the past, present, and future ability to pay LFO's, and she imposed mandatory and discretionary costs and fees. CP 8-9.

III. ARGUMENT ON SUPPLEMENTAL ASSIGNMENT OF ERROR

The Defendant claims that the sentencing court failed to consider his mental illness when assessing whether he had the ability to pay. Appellant's Reply Brief at 1. The Defendant's issue statement misstates the law. The statute does not require the court to investigate the Defendant's mental illness. It requires that, *when* it is established that a defendant has a mental disorder which *prevents him from participating in gainful employment*, then the

court should determine whether the Defendant has other means than employment to pay discretionary costs.

Legal financial obligations — Defendants with mental health conditions

(1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, ***under the terms of this section***, has the means to pay such additional sums.

(2) ***For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment***, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777 (emphasis added).

But it is not established that Mr. Hart is prevented from participating in gainful employment as a result of a mental disorder. It is not established that the Mr. Hart was receiving supplemental income as a result of disability due to a mental disorder. Indeed it is unlikely that Mr. Hart could have established that he is prevented by mental disorder from gainful employment having lost his job only

shortly before the murder. CP 62 (Defendant reported feeling depressed the day of the murder because he had no job, suggesting this was a change in circumstance)³. Because there was no suggestion that the Defendant could not be gainfully employed, RCW 9.94A.777 was not triggered. Absent proof of the condition precedent (inability to be gainfully employed), the court was under no obligation to determine what means, other than gainful employment, the defendant had to pay discretionary costs.

The necessary information which would have triggered RCW 9.94A.777 was not presented to the judge -- if it exists at all. Therefore, the judge did not abuse her discretion in failing to consider a condition that was not established or even suggested to her, i.e. mental illness *which prevents gainful employment*.

The State maintains the arguments made in the original Respondent's Brief. Consistent with *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), this Court should refuse to review a challenge to LFO's raised for the first time on appeal. Many defendants fail to challenge the imposition of LFO's at sentencing,

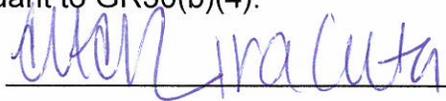
³ Because the Defendant made no timely objection, the State was prevented from presenting evidence that, per the Defendant's self-report at booking, he had been recently employed at South Columbia Basin.

because the state's burden is so low and because there will be other, better opportunities to challenge LFO's. *State v. Duncan*, 180 Wn. App. at 250-51.

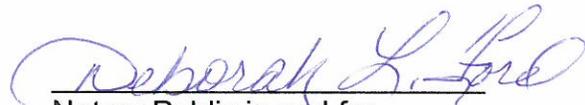
Mr. Hart is unlikely ever to be subject to collections for any LFO's, because he has been sentenced to life without possibility of parole. As previously explained, "[m]andatory Department of Corrections deductions from inmate wages for repayment of legal financial obligations are not collection actions by the State requiring inquiry into a defendant's financial status." *State v. Crook*, 146 Wn. App. 24, 27-28, 189 P.3d 811 (2008). If he has some ability to pay while incarcerated (as argued at Appellant's Reply at 19), there is no lawful or public policy reason to challenge the order of LFO's.

However, should he be released, the appropriate time to challenge LFO's is at the time of collection. *State v. Hathaway*, 161 Wn. App. 634, 651, 251 P.3d 253 (2011); *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009). Washington's recoupment statute contains sufficient safeguards to prevent imprisonment solely for a person's inability to pay. *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). Because indigency (and mental health) are not static conditions, the time of actual collection is also

I hereby certify that on the 4th day of February, 2015, a copy of the foregoing was delivered to Joseph William Hart #845637, Appellant, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla WA 99362 by depositing in the mail of the United States of America a properly stamped and addressed envelope and to Elaine Winters, opposing counsel, Elaine@washapp.org by e-mail per agreement of the parties pursuant to GR30(b)(4).



Signed and sworn to before me this 4th day of February, 2015.



Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2018