

No. 32582-2-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CRYSTAL R. PURCELL,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. Ms. Purcell was denied her constitutional right to a fair trial due to ineffective assistance of counsel.

2. The record does not support the finding Ms. Purcell has the current or future ability to pay the imposed legal financial obligations.

3. The trial court erred when it ordered Ms. Purcell to pay a \$100 DNA-collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Ms. Purcell denied her constitutional right to effective assistance of counsel when her attorney failed to move to suppress the drugs police found in the search of her vehicle?

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into Ms. Purcell 's current and future ability to pay before imposing LFOs?

3. Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?

C. STATEMENT OF THE CASE

On 12/31/13, Crystal Purcell's male companion was stopped for a traffic violation while driving her car in Pomeroy, Washington, and arrested on an outstanding warrant. Ms. Purcell was the passenger. RP 6. After verifying the car was registered to Ms. Purcell, the officer had the driver wait by his patrol car while he returned to Ms. Purcell's car to speak with her. RP 7-8. While speaking with Ms. Purcell, the officer noticed a small one by one and a half inch cannister hanging from the ignition keyring. RP 8-9. The officer asked Ms. Purcell if he could look at the key ring. Ms. Purcell removed the key from the ignition and handed the key ring to the officer. RP 9. The officer then opened the canister and dumped out the contents, which consisted of a few pills. RP 10. The officer suspected and later confirmed several of the pills were controlled substances requiring a prescription. RP 10-11.

Ms. Purcell was convicted following a bench trial of possession of a controlled substance, morphine, and possession of a controlled substance, oxycodine. CP 2.

At sentencing the Court imposed discretionary costs of \$1750 and mandatory costs of \$800¹, for a total Legal Financial Obligation (LFO) of

¹ \$500 Victim Assessment, \$200 criminal filing and \$100 DNA fee. CP 6-7.

\$2550. CP 6-7. The Judgment and Sentence contained the following language:

¶ 2.7 Legal Financial Obligations/Restitution. (RCW 9.94A760)
The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 4.

The Court did not inquire into Ms. Purcell's financial resources or consider the burden payment of LFOs would impose on her. RP 64-65. Ms. Purcell indicated she was already making payments on fines imposed on several previous cases. *Id.* The Court ordered Ms. Purcell to pay \$25 per month commencing 60 days after her release from custody. CP 7.

This appeal followed. CP 15-16.

D. ARGUMENT

1. Ms. Purcell was denied her constitutional right to effective assistance of counsel when her attorney failed to move to suppress the drugs police found in the search of her vehicle.

In order to show she received ineffective assistance of counsel, Ms. Purcell must show (1) defense counsel's conduct was deficient, i.e., it fell below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice, i.e., there is a reasonable possibility

that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption that defense counsel's conduct is not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

As a general rule, warrantless searches and seizures are per se unreasonable. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). However, there are a few “jealously and carefully drawn exceptions” to the warrant requirement, including consent. *State v. Hendrickson*, 129 Wn.2d 61, 70–71, 917 P.2d 563 (1996) (quoting *State v. Bradley*, 105 Wn.2d 898, 902, 719 P.2d 546 (1986) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971))). The State must meet three requirements in order to show a valid consensual search: (1) the consent must be voluntary, (2) the person granting consent must have authority to consent, and (3) the search must not exceed the scope of the consent. *State v. Thompson*, 151 Wn.2d 793,

803, 92 P.3d 228 (2004); *State v. Nedergard*, 51 Wn. App. 304, 308, 753 P.2d 526 (1988). Here, only the third requirement is at issue.

A consensual search may go no further than the limits for which the consent was given. *State v. Reichenbach*, 153 Wash. 2d 126, 133, 101 P.3d 80 (2004) (citing *State v. Bustamante–Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)). Any express or implied limitations or qualifications may reduce the scope of consent in duration, area, or intensity. *Id.* (citing *State v. Cotten*, 75 Wn. App. 669, 679, 879 P.2d 971 (1994)).

In the present case, the officer only asked Ms. Purcell if he could look at the key ring with the pill canister. Ms. Purcell consented to the officer “looking” at the key ring by removing the key from the ignition and handed the key ring to the officer. RP 9. The officer did not ask, nor did Ms. Purcell consent to him opening the canister and removing the contents as he did. By consenting only to the officer’s request to *look* at the key ring, Ms. Purcell placed an implied limitation on the scope of her consent. That limitation was “look but do not open.” Therefore, the officer exceeded the scope of her consent by opening the canister and dumping out the contents.

Absent Ms. Purcell’s consent, the officer had no legal authority to open the canister. The Washington State Constitution, article I, section 7,

provides greater protection for automobile passengers than is guaranteed by the Fourth Amendment. *Reichenbach*, 153 Wash. 2d at 134 (citing *State v. Parker*, 139 Wn.2d 486, 497, 987 P.2d 73 (1999)). Moreover, constitutional protections are possessed individually under article I, section 7 of the state constitution. *Id.* Thus, in the context of an automobile search, the rights of a passenger are independent from those of a driver. *Id.* The arrest of the driver, as occurred here, does not provide the authority to search a nonarrested passenger. *Parker*, 139 Wn.2d at 497–98. Additionally, the search of a nonarrested passenger is not justified where officers lack articulable suspicion that he or she is armed or dangerous and there is no evidence to independently connect the passenger to illegal activity. *Id.*

Deficient performance. Here, the pills found in the keychain canister was the most important evidence the State offered yet counsel did not challenge the admissibility despite the fact that the officer exceeded the scope of Ms. Purcell’s consent upon which the search was based. This argument was available to counsel and his failure to challenge the search cannot be explained as a legitimate tactic. See *Reichenbach*, 153 Wash. 2d at 130-31. Thus, counsel's conduct was deficient.

Prejudice. The next consideration is whether counsel's deficient performance resulted in prejudice. Because the pills were illegally seized and there was no tactical reason for failing to move to suppress them, counsel's deficient performance was clearly prejudicial. Ms. Purcell's convictions for possession of controlled substances were totally dependent on the pills found in the canister that was seized. Without that evidence, the State could not prove possession beyond a reasonable doubt. Therefore, Ms. Purcell's right to effective assistance of counsel was violated. See *Reichenbach*, 153 Wash. 2d at 137.

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Ms. Purcell 's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review.*

Ms. Purcell did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, __Wn.2d__, 344 P.3d 680, 683 (March 12, 2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems

demand ... reach[ing] the merits” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Ms. Purcell’s case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”)(citations omitted).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is

wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Ms. Purcell respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Ms. Purcell has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay without proof the defendant has the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth

Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a

waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has “considered” Ms. Purcell’s present or future ability to pay legal financial obligations. CP 4. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into

account Ms. Purcell's financial resources and the potential burden of imposing LFOs on him. RP 64-65. Nevertheless, the Court ordered Ms. Purcell to pay \$25 per month commencing 60 days after her release from custody. CP 7.

The boilerplate finding that Ms. Purcell has the present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Ms. Purcell's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

3. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V, XIV; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to

constitutionally adequate procedures.” *Id.* at 218–19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen*, 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.* Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test “is not a toothless one.” *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not

rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541². This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, “the state cannot

² RCW 43.43.7541 provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

collect money from defendants who cannot pay.” *Blazina*, ___ Wn.2d ___, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the \$100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is “payable by the offender after payment of all other legal financial obligations included in the sentence.” RCW 43.43.7541. Thus, the fee is paid only after restitution, the victim’s compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, *Blazina*, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact

to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Ms. Purcell' indigent status, the order to pay the \$100 DNA collection fee should be vacated.

E. CONCLUSION

For the reasons stated, the convictions should be reversed, or in the alternative, the case should be remanded to make an individualized inquiry into Ms. Purcell's current and future ability to pay before imposing LFOs. In addition, the order to pay the \$100 DNA collection fee should be vacated.

Respectfully submitted May 13, 2015,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on May 13, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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