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Court of Appeals
Division III
State of Washington

No. 32840-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

EMILY K. DALHAUG,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in declining to give a jury instruction on self-defense.

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

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

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Ms. Dalhaug entitled to a jury instruction on self-defense where evidence of self-defense was presented in the State's case in chief?

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. Dalhaug '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

While driving his car in Warden, Washington, Russ Rumbolz saw Emily Dalhaug, who was the passenger in an oncoming car, reach over and strike her sister who was the driver of the oncoming car. RP¹ 76, 78. Ms. Dalhaug was subsequently arrested, charged and convicted of fourth degree assault and possession of a controlled substance, methamphetamine. RP 94-105; CP 1, 69-70.

At trial the arresting officer testified Ms. Dalhaug admitted hitting her sister but only after her sister hit her first. RP 91, 93. The officer also testified the sister also admitted hitting Ms. Dalhaug first. RP 155. Ms. Dalhaug's sister did not testify. RP 273.

Ms. Dalhaug requested a jury instruction on self-defense. RP 233. The Court declined to give the instruction. RP 234-41.

At sentencing the Court imposed discretionary costs of \$189.60 and mandatory costs of \$800², for a total Legal Financial Obligation (LFO) of \$989.60. CP 80-81. The Judgment and Sentence contained the following language:

¶ 2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the

¹ "RP" refers to the trial transcript consisting of two volumes transcribed by Tom Bartunek. Citations to the sentencing will include the date of the hearing.

² \$500 Victim Assessment, \$200 criminal filing and \$100 DNA fee. CP 80.

defendant's financial resources and the likelihood that the defendant's status will change.

CP 76.

The Court did not inquire into Ms. Dalhaug's financial resources or consider the burden payment of LFOs would impose on her. 10/21/14 RP 30. The Court ordered Ms. Dalhaug to commence making payments immediately at a schedule set by the court clerk or DOC. CP 81. The Court found Ms. Dalhaug indigent for this appeal. 10/21/14 RP 32.

This appeal followed. CP 93-94.

D. ARGUMENT

1. Since evidence of self-defense was presented in the State's case in chief, Ms. Dalhaug was entitled to a jury instruction on self-defense.

A defendant is entitled to a jury instruction on self-defense once some evidence demonstrating self-defense has been produced. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Once such evidence is produced, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *Id.* The evidence demonstrating self-defense may derive from any evidence admitted in the case. *State v. McCullum*, 98 Wash. 2d 484, 488, 656 P.2d 1064 (1983) (citing *State v. Adams*, 31 Wash.App. 393, 395, 641 P.2d 1207 (1982)). Although it is essential that some evidence be admitted in the case as to self-defense,

there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of the jurors on that issue. *Id.* (citing *State v. Roberts*, 88 Wash.2d 337, 345–46, 562 P.2d 1259 (1977); *State v. Adams, supra.*)).

The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense. *Id.* (citing *Roberts*, 88 Wash.2d at 346, 562 P.2d 1259). In determining whether sufficient evidence has been produced to justify a jury instruction on self-defense, the trial court must apply a subjective standard and view the evidence from the defendant's point of view as conditions appeared to him or her at the time of the act. *McCullum*, 98 Wash. 2d at 488-89 (citing *State v. Wanrow*, 88 Wash.2d 221, 234–36, 559 P.2d 548 (1977)). The defendant need not have been in actual danger of great bodily harm and is entitled to act on appearances, even if it is later determined her or she was mistaken as to the extent of the danger. *McCullum*, 98 Wash. 2d at 89.

Applying these principals to the present case, the trial court clearly erred in refusing to give a self-defense instruction. During the State's case in chief, the arresting officer testified Ms. Dalhaug admitted hitting her sister but only after her sister hit her first. RP 91, 93. The officer also

testified the sister admitted hitting Ms. Dalhaug first. RP 155. Ms. Dalhaug's sister did not testify. RP 273. Russ Rumbolz, the independent witness did not see what acts occurred prior to Ms. Dalhaug striking her sister. RP 81.

Based on the evidence presented, there was credible evidence to support Ms. Dalhaug's claim of self-defense. The evidence showed the sister was the undisputed initial aggressor by striking Ms. Dalhaug first. That evidence is sufficient to warrant the giving of the self-defense instruction. It would then be up to the jury to decide whether Ms. Dalhaug's actions constituted self-defense or retaliation. Therefore, the trial court was not justified in denying her request for a self-defense instruction.

Not harmless error. An error affecting a defendant's self-defense claim is constitutional in nature and requires reversal unless it is harmless beyond a reasonable doubt. *State v. Arth*, 121 Wash. App. 205, 213, 87 P.3d 1206 (2004) (citing *McCullum*, 98 Wash. 2d at 497). A self-defense instruction is necessary to inform the jury the State has the burden of proving the *absence* of self-defense. *Arth*, 121 Wash. App. at 214. Washington cases clearly require that self-defense instructions tell the jury the State has the burden of proving the elements of the crime charged *and*

the absence of self-defense. *Id.* (citing *State v. Acosta*, 101 Wash.2d 612, 621, 683 P.2d 1069 (1984)). The proper instruction here would have changed the way the jury evaluated the evidence, placing the burden on the State. *Id.* Since the sister did not testify, the State would have had difficulty meeting that burden. Therefore, the error was not harmless beyond a reasonable doubt.

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. Dalhaug 's current and future ability to pay before imposing LFOs.

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

Ms. Dalhaug 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. Dalhaug's case regardless of any 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. Dalhaug 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. Dalhaug 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. Dalhaug's present or future ability to pay legal financial obligations. 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. Dalhaug’s financial resources and the potential burden of imposing LFOs. 10/21/14 RP 30. Nevertheless, The Court ordered Ms. Dalhaug to commence making payments immediately at a schedule set by the court clerk or DOC. CP 81. Ironically, the Court also found Ms. Dalhaug indigent for this appeal. 10/21/14 RP 32.

The boilerplate finding that Ms. Dalhaug 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. Dalhaug '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. amends. 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 43.43.7541³. 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 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

³ 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.

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, a defendant will be saddled with a 12% rate on his or her 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. Dalhaug's indigent status, the order to pay the \$100 DNA collection fee should be vacated.

E. CONCLUSION

For the reasons stated, the assault conviction should be reversed, or in the alternative, the case should be remanded to make an individualized inquiry into Ms. Dalhaug'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 26, 2015,

s/David N. Gasch
Attorney for Appellant
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on May 26, 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:

Emily K Dalhaug
PO Box 371
Warden WA 98857

E-mail: kburns@co.grant.wa.us
Garth Dano
Grant County Prosecutor's Office

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com