

NO. 34766-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TAMMY DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT..... 1

 1. The court impermissibly mandated Ms. Davis to pay LFOs each month and probation fees despite undisputed evidence that her only source of income is federal disability assistance. 1

 a. The court lacks authority to order a person pay court fees with federal disability assistance 1

 b. The court abused its discretion by imposing LFOs even though it knew Ms. Davis was too impoverished to pay....3

 2. The prosecution egregiously misrepresents the record in an effort to justify the imposition of unauthorized sentencing terms5

B. CONCLUSION.....9

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016)...2,
3, 4, 5

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....4

State v. Lee, _ Wn.2d _, S.Ct. No. 92475-6 (June 15, 2017).....4

State v. Talley, 134 Wn.2d 176, 949 P.2d 358 (1998).....5

State v. Walker, 182 Wn.2d 463, 341 P.3d 976, *cert. denied*, 135 S. Ct.
2844 (2015).....5

Washington Court of Appeals Decisions

State v. Warnock, 174 Wn. App. 608, 299 P.3d 1173(2013).....7

Statutes

RCW 9.94A.6077

Court Rules

RPC 3.35

Other Authorities

In re Lampart, 856 N.W.2d 192 (Mich. App. 2014)2

In re Michael S., 524 S.E.2d 443 (W. Va. 1999).....2

State v. Eaton, 99 P.3d 661, 666 (Mont. 2004)2

A. ARGUMENT.

1. The court impermissibly mandated Ms. Davis to pay LFOs each month and probation fees despite undisputed evidence that her only source of income is federal disability assistance.

a. The court lacks authority to order a person pay court fees with federal disability assistance.

The prosecution asks this Court to perpetuate the injustice of having a demonstrably indigent person continue to sacrifice her basic needs in order to pay legal financial obligations (LFOs), and insists that she must either pay the principal or move for remission after sentencing. These arguments are untenable and contrary to recent case law.

The court's sentencing order does not merely impose \$1650 in LFOs, it mandates a specific payment scheme of \$25 per month. CP 29. The court reduced this monthly requirement to \$15 per month, but highlighted the mandatory nature of this payment scheme in an order modifying the sentence, requiring Ms. Davis "shall" pay this monthly amount. CP 54. This mandatory sentencing order is compounded by a community custody fee of \$40 per month. CP 60.

Ms. Davis' monthly LFOs payment can only be satisfied through her social security income. In *City of Richland v. Wakefield*,

186 Wn.2d 596, 608-09, 380 P.3d 459 (2016), the Supreme Court held that a court may not require a person pay legal financial obligations from federal social security income. *Wakefield* agreed with other states that have barred mandatory restitution for defendants whose social security benefits were their income source. *Id.* (citing *State v. Eaton*, 99 P.3d 661, 666 (Mont. 2004); *In re Lampart*, 856 N.W.2d 192, 199-200 (Mich. App. 2014)); *see also In re Michael S.*, 524 S.E.2d 443, 446 (W. Va. 1999) (“a circuit court may not order a juvenile criminal defendant to pay restitution from his future supplemental security income benefits because such benefits are not subject to execution, levy, attachment, garnishment or other legal process” under federal law).

“[F]ederal law prohibits courts from *ordering* defendants to pay LFOs if the person’s only source of income is social security disability.” *Wakefield*, 186 Wn.2d at 609 (emphasis added). This construction of federal law controls the case at bar and supercedes other state statutes, under the supremacy clause. U.S. Const. art. VI; *see Rose v. Arkansas State Police*, 479 U.S. 1, 3, 107 S.Ct. 334, 93 L.Ed.2d 183 (1986) (“the Supremacy Clause invalidates all state laws that conflict or interfere with an act of congress”).

Ms. Davis relies on social security to support herself and her grandson because she is disabled. Her disability barred her from work crew, resulting in a longer jail term than the court would have imposed. RP 172-73, 175. She may not be further punished by being ordered to pay LFOs from her limited income derived from social security disability. *Wakefield*, 186 Wn.2d at 609.

b. The court abused its discretion by imposing LFOs even though it knew Ms. Davis was too impoverished to pay.

The prosecution's brief substantially misrepresents Ms. Davis' ability to pay and the court's consideration of her individual circumstances. After hearing that Ms. Davis relies on social security income and is unable to work due to disabling arthritis, the court announced it was imposing \$1650 in LFOs. RP 166. The court construed her lack of income only to the extent it would reduce her monthly payment obligations, not to strike non-mandatory LFOs. RP 167.

Despite learning of Ms. Davis's financial constraints, the court imposed these LFOs and only after imposing them asked Ms. Davis, "How much can you pay per month?" RP 166. At that point, Ms. Davis answered, "50," but her lawyer warned the court that her financial

circumstances were likely to get worse because her conviction would lead to the revocation of federal housing assistance. *Id.* The court ordered \$25 per month based on her limited income. RP 167; CP 29.

Contrary to the prosecution's depiction of events, Ms. Davis was simply responding to the court's imposition of sentence at a time when she was hoping to avoid spending time in jail. No reasonable person in her shoes would want the court to see her as a scofflaw at a time when the court was deciding the extent of jail to imposed. Her willingness to sacrifice her basic needs to pay the financial penalties ordered by the court is not a concession that she had the financial ability to meet the court's LFO order.

In any event, this Court has the discretion to consider LFOs imposed despite evidence of the defendant's inability to pay and should do so here. *State v. Lee*, _ Wn.2d _, S.Ct. No. 92475-6, Slip op. at 32 (June 15, 2017); *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Ms. Davis' poverty is clear from the record. Although *Wakefield* had been decided before the final sentencing order, the prosecution elected not to inform the court of this important decision regarding the imposition of LFOs upon a person who relies upon federal benefits. RP 174. Instead the prosecution vaguely noted, "there

is recent case law on SSI and discretionary LFOs that may have an impact on that.” RP 174. The prosecution’s duty of candor to the court, coupled with its obligation to do justice, compelled it to precisely inform the court about this pertinent, controlling authority. RPC 3.3(a)(3); *see also State v. Talley*, 134 Wn.2d 176, 183, 949 P.2d 358 (1998) (prosecutor’s duty to not mislead court); *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976, *cert. denied*, 135 S. Ct. 2844 (2015) (discussing prosecutor’s duty to seek justice by acting impartially).

The court’s failure to meaningfully consider Ms. Davis’s difficult financial circumstances when imposing numerous LFOs requires remand for the necessary individualized sentencing. Because the court was unaware of *Wakefield*, it has not yet exercised its discretion with an understanding of controlling legal authorities.

2. The prosecution egregiously misrepresents the record in an effort to justify the imposition of unauthorized sentencing terms.

The response brief takes the factual record and defense counsel’s words out of context, misrepresenting his sentencing arguments and the information before the court. The prosecution’s arguments on appeal

are unreliable and should not be credited based on its incorrect portrayal of the record and failure to address controlling law.

At sentencing, the prosecution told the court Ms. Davis deserved a less serious punishment because of her “lack of history.” RP 161. The only prior offense it noted to the court was a “substance related” offense from 1991. RP 161. The prosecution called this “a very old DUI.” RP 159. Defense counsel objected to considering this purportedly old DUI because it was not even listed in the criminal history report. RP 162.

Despite these sentencing arguments, on appeal the prosecution portrays this “very old DUI” as evidence of current substance abuse, describing it as a “serious substance abuse crime.” Resp. Brief at 12. It gives this Court no context for its remarks and instead implies the DUI reflects recent behavior. A DUI conviction from 25 years earlier does not paint Ms. Davis as a person with a serious substance abuse problem, as the prosecution unreasonably contends on appeal. The State’s exaggeration of the record should be disregarded.

The prosecution also misrepresents defense counsel’s sentencing remarks as if it constituted a concession Ms. Davis was an addict. Counsel never conceded Ms. Davis was an addict – on the contrary, the

quoted remarks arise in the context of counsel asking the court to take notice of the absurdity of deeming Ms. Davis an addict based on her appearance and demeanor in court. RP 163. Counsel made this remark when trying to dissuade the court from sentencing Ms. Davis to jail, as the prosecution was requesting, not as a part of a request for treatment as the State pretends. RP 160, 162.

The prosecution does not address the case law addressing the court's authority to order a chemical dependency evaluation discussed in Appellant's Opening Brief. In *State v. Warnock*, 174 Wn. App. 608, 613-14, 299 P.3d 1173 (2013), the court construed RCW 9.94A.607 to authorize a chemical dependency evaluation only when there is actual evidence presented of a chemical dependency. In *Warnock*, the defendant's alcohol use did not suffice for the court to order a chemical dependency evaluation. *Id.* at 613. The State's argument is directly contrary to *Warnock*, as it tries to bootstrap a "very old DUI," contested by the defense, into a basis for declaring a substance abuse addiction. The prosecution's legal argument is unsupported by precedent.

Because there was no factual basis for finding proven chemical dependency, the court lacked authority to impose 12 months of

community custody, together with the monthly supervision fee Ms. Davis must pay for such supervision.

Finally, the court must strike the conditions of community custody that are unrelated and unauthorized. As this Court recently ruled in *State v. Martin*,¹ the trial court exceeds its authority by barring a person from entering an establishment where alcohol is a main source of revenue if it is not directly related to the circumstances of the crime of conviction. In *Martin*, the defendant was convicted of possession of a controlled substance with intent to deliver, and this Court concluded a controlled substance conviction does not provide a basis to prohibit entering businesses that primarily sell alcohol.

Likewise, this condition does not relate to the circumstances of Ms. Davis's conviction and should be stricken. The same rationale prohibits the court from ordering random urinalysis and BAC tests to monitor alcohol use. CP 27.

¹ COA no. 34037-6-III, Slip op. at 6-7, 2017 WL 1827028 (May 4, 2017) (unpublished, cited as non-binding authority under GR 14.1).

B. CONCLUSION.

Ms. Davis respectfully requests this Court order the court to strike the imposition of unauthorized LFOs, the 12-month term of community custody, and other conditions regarding the unfounded claim of chemical or alcohol dependence.

DATED this 20th day of June 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'N. Collins', written in a cursive style.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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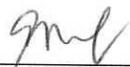
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)	NO. 34766-4-III
)	
TAMMY DAVIS,)	
)	
Appellant.)	

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[lee.obrien@co.chelan.wa.us]
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PO BOX 2596
WENATCHEE, WA 98807-2596 | () U.S. MAIL
() HAND DELIVERY
(X) E-SERVICE VIA
PORTAL |
| [X] | TAMMY DAVIS
513 E ALLEN AVE
CHELAN, WA 98816 | (X) U.S. MAIL
() HAND DELIVERY
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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎ (206) 587-2711

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