

No. 34766-4-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

Chelan County Superior Court  
Cause No. 16-1-00261-8

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

TAMMY LYNN DAVIS,  
Defendant/Appellant.

---

BRIEF OF RESPONDENT

---

Douglas J. Shae  
Chelan County Prosecuting Attorney

Lee O'Brien WSBA #39847  
Deputy Prosecuting Attorney

Chelan County Prosecuting Attorney's Office  
P.O. Box 2596  
Wenatchee, Washington 98807-2596  
(509) 667-6204

TABLE OF CONTENTS

	<u>Page</u>
A. <u>COUNTER-STATEMENT OF ISSUED-----</u>	1
1. The trial court did not err by imposing discretionary financial obligations because the court considered evidence of her financial circumstances and the trial court did not err by imposing mandatory financial obligations as those costs are non-discretionary.	
-----	1
2. The trial court did not err by imposing 12 months of community custody since the court imposed affirmative treatment conditions.	
-----	1
3. The trial court did not err by imposing affirmative treatment conditions because the court found that Ms. Davis had a chemical dependency and that the treatment conditions were crime related.	
-----	1

TABLE OF CONTENTS (con't)

	<u>Page</u>
4. The State did not err by finding that Ms. Davis had a chemical dependency because the court considered the nature of the charge, the evidence presented at trial and the defendant's criminal history and there were sufficient facts for the court to conclude that Ms. Davis had a chemical dependency. -----	1
B. <u>STATEMENT OF THE CASE</u> -----	2
C. <u>ARGUMENT</u> -----	5
1. The court engaged in an inquiry on the record regarding Ms. Davis ability to pay. -----	5
2. The court did not abuse its discretion in finding Ms. Davis had a chemical dependency, requiring substance abuse treatment, or requiring her to abstain from alcohol. -----	9
D. <u>CONCLUSION</u> -----	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>City of Richland v. Wakefield</i> 186 Wn.2d 596, 380 P.3d 459 (2016)-----	5
<i>State v. Blazina</i> 182 Wn.2d 827, 344 P.3d 680 (2015)-----	5,6
<i>State v. Curry</i> , 118 Wn.2d 911, 916, 829 P.2d 166 (1992)-----	8
<i>State v. Lundy</i> , 176 Wn. App. 96, 102, 308 P.3d 755 (2013)-----	6
<i>State v. Riley</i> , 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)-----	10
<i>State v. Stoddard</i> , 192 Wn. App. 222, 225, 366 P.3d 47 (2016)-----	6
<i>State v. Warren</i> , 165 Wn.2d 17, 32, 195 P.3d 940 (2008)-----	10
<u>Rules and Statutes</u>	<u>Page</u>
RAP 2.5(a)-----	5,10
RCW 9.94A.607(1)-----	10,11
RCW 9.94A.703(3)-----	11
RCW 46.20.311(1)(c)-----	13

TABLE OF AUTHORITIES (con't)

<u>Rules and Statutes</u>	<u>Page</u>
RCW 9.94A.650(3) -----	14
<u>Other</u>	<u>Page</u>
Engrossed Second Substitute H.B. 1006 (1999) -----	13

### **A. COUNTER-STATEMENT OF ISSUES**

1. The trial court did not err by imposing discretionary financial obligations because the court considered evidence of her financial circumstances and the trial court did not err by imposing mandatory financial obligations as those costs are non-discretionary.
2. The trial court did not err by imposing 12 months of community custody since the court imposed affirmative treatment conditions.
3. The trial court did not err by imposing affirmative treatment conditions because the court found that Ms. Davis had a chemical dependency and that the treatment conditions were crime related.
4. The State did not err by finding that Ms. Davis had a chemical dependency because the court considered the nature of the charge, the evidence presented at trial and the defendant's criminal history and there were sufficient facts

for the court to conclude that Ms. Davis had a chemical dependency.

#### **B. STATEMENT OF THE CASE**

On August 16, 2016, Tammy Davis was tried on a charge of Unlawful Possession of a Controlled Substance. She put forward a defense of unwitting possession and testified to that defense. She was unanimously convicted by a 12 person jury.

At sentencing on September 12, 2016, the State recommended a first-time offender sentence and the following financial obligations: the \$500 victim assessment, the \$200 filing fee, a \$250 drug enforcement fund fee, a \$100 crime lab fee, a \$100 DNA fee, an appropriate public defender fee, witness costs, and a jury fee. RP 160. The \$500 victim assessment, the \$200 filing fee, and the \$100 DNA fee are non-discretionary costs. The rest are discretionary. The State also recommended 12 months of community custody with an affirmative condition of chemical dependency treatment and prohibitions related to controlled substances and alcohol. RP 160-161. The State drew the court's

attention to the nature of the charge and the prior offense for DUI. RP 159; 161-162.

Ms. Davis' attorney indicated that the defendant was on social security disability and asked the court to take that into account when setting costs, but did not make specific recommendations regarding costs. RP 162; 164. Ms. Davis' attorney asked the court to impose work crew instead of jail and indicated that she was able to perform work crew. RP 163-164. Ms. Davis also stated that she believed she could perform work crew. RP 165.

Ms. Davis' attorney, in his recommendation, asked the court “. . . is this woman an addict?” and stated that if she was she needed treatment rather than jail. RP 163.

The court imposed the following non-discretionary fees: a \$500 crime victim fee, a \$200 filing fee, and a \$100 DNA fee; and imposed the following discretionary costs: a \$100 crime lab fee, a \$250 jury fee, and undetermined witness fee, and a \$500 public defender fee. The court did not impose the \$250 drug fund fee requested by the state. RP 166.

The court inquired of Ms. Davis what she could afford per month. Ms. Davis indicated that she could pay \$50 per month. Ms. Davis' attorney informed the court that Ms. Davis was on Section 8 housing and might lose that and face increased rent. The court reduced the monthly payment to \$25 per month. RP 166-167.

The court imposed a 12 month community custody term with the affirmative condition of a chemical dependency evaluation and treatment, and imposed conditions related to alcohol. RP 167-168.

On October 17, 2016, a hearing was held regarding the imposed witness fees. Ms. Davis' attorney provided the court with some documentation related to her social security status. RP 172. The state requested the witness fee based on the court having found she had an ability to pay, and also indicated to the court that recent case law had been published relating to social security and the imposition of discretionary fees. RP 173-174. The court declined to impose the witness fees and readdressed the payment amount. Ms. Davis indicated her housing assistance was terminated and the court reduced her monthly payment to \$15 per month. RP 175-176.

### C. ARGUMENT

Ms. Davis raises essentially two arguments. First, she challenges the imposition of costs due to her indigence and relying on *State v. Blazina* 182 Wn.2d 827, 344 P.3d 680 (2015), and *City of Richland v. Wakefield* 186 Wn.2d 596, 380 P.3d 459 (2016). It should be noted that *Wakefield* was decided after the sentencing hearing was held but before the issue of witness fees was addressed. Second, she challenges the finding of a chemical dependency, the imposition of substance abuse treatment, and the consequent duration of community custody.

**1. The court engaged in an inquiry on the record regarding Ms. Davis ability to pay.**

Ms. Davis challenges the imposition of LFOs by the sentencing court. The court should decline to review this issue because trial counsel failed to preserve the issue for appeal by not objecting to the imposition of the discretionary LFOs. RP 162-167 (court's imposition of LFOs); RAP 2.5(a).

If the court chooses to review this issue, the court should be aware that only \$850 of the \$1,650 in LFOs imposed by the sentencing court were discretionary. The \$500 victim assessment,

\$200 criminal filing fee, and \$100 DNA collection fee were all mandatory, and therefore are not subject to the defendant's challenge. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 47 (2016). Accordingly, the only fees at issue here are the following: \$250 jury demand fee, \$500 public defender fee, and the \$100 crime lab fee.

When imposing discretionary LFOs, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina*, at 838.

Here, the court did more than just sign a boilerplate statement in the judgment and sentence. During sentencing, the court considered Ms. Davis' statements and her attorney's statements regarding her social security status, and her ability to work on the record when making its finding. Ms. Davis put forward through her attorney that she was on disability solely for arthritis but that she could perform work crew. RP 162-166. It should be noted that the

court found Ms. Davis' trial testimony to be "disingenuous" regarding her prior contact with law enforcement. RP 165. In addition, the court had heard Ms. Davis' trial testimony where she put forward what was essentially a "not my pants" defense. RP 119-123. Faced with a person who claimed physical disability but also claimed the ability to perform work crew and whose credibility the court had reason to question, it was not error for the court to find she had an ability to pay, notwithstanding Ms. Davis' unsupported claims to support herself and a grandchild on only \$960 a month and some housing assistance. The fact that the court declined to impose the \$250 drug fund fee demonstrates that the court considered her financial circumstances.

In the October hearing, Ms. Davis proffered some documentation regarding her social security status. The court again declined to impose a discretionary fee, in this case witness fees. The court also reduced the monthly payment. This was after the *Wakefield* decision. However, unlike in *Wakefield*, there was no lengthy testimony or supporting evidence to bolster Ms. Davis' claims. Given that Ms. Davis never objected to any particular fee,

never put forward *Blazina* or *Wakefield* as a basis for an objection to any discretionary fee, and that Ms. Davis claimed to be able to pay \$50 a month, it was reasonable for the court to draw the conclusion that Ms. Davis had the ability to pay.

The fact that the sentencing court did not orally go over every minute detail of Ms. Davis resume should not be a prerequisite for a court to find that someone has the ability to pay LFOs. To hold otherwise would effectively overrule the Supreme Court's decision in *Curry*, which held that "[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." *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Importantly, the Supreme Court had the opportunity to overrule *Curry* with *Blazina*, but chose not to.

Furthermore, to hold otherwise would be for this court to substitute its judgment for that of the lower court on a matter of discretion. Typically LFO challenges are reversed as a matter of law because the sentencing court did not expressly consider the defendant's current or likely future ability to pay. But, when faced with the situation here of a court that expressly considered the matter

and a defendant who simply disagrees with the court's assessment, the issue becomes a matter of discretion for the lower court. Accordingly, this court should affirm the lower court's imposition of discretionary LFOs in this case as meeting the minimum requirements established by statute. The sentencing court had ample evidence from which to find that Ms. Davis had the likely future ability to pay discretionary legal financial obligations.

Additionally, Ms. Davis has two other remedies available to her to reduce her financial obligations. Once she has completed payment of the principal on her costs, she may move for the court to waive interest on her judgment under RCW 10.82.90(2). And if her circumstances have changed or if she wishes to present evidence that she did not present at sentencing, she can move for remission of payment of costs under RCW 10.01.160(4). The *Wakefield* decision arose out of just such a proceeding under the latter statute.

**2. The court did not abuse its discretion in finding Ms. Davis had a chemical dependency, requiring substance abuse treatment, or requiring her to abstain from alcohol.**

Ms. Davis challenges the imposition of sentencing conditions by the sentencing court. The court should decline to review this

issue because trial counsel failed to preserve the issue for appeal by not objecting to the imposition of the conditions at sentencing. RP 167-168; RAP 2.5(a). In fact, Ms. Davis, through her attorney, suggested the evaluation for substance abuse. RP 163.

If the court chooses to review the issue, the standard of review for a sentence condition is whether the trial court abused its discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). In the context of determining whether a sentence condition was reasonably crime-related, our Supreme Court has observed that sentence conditions "are usually upheld." *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Sentence conditions will be reversed only if manifestly unreasonable such that no reasonable person would take the view adopted by the trial court. *Riley*, 121 Wn.2d at 37.

Two provisions of the SRA provide a statutory basis for the court's drug treatment sentencing condition. One is RCW 9.94A.607(1), which provides in part:

Where the court finds that the offender has any chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender

to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender. A rehabilitative program may include a directive that the offender obtain an evaluation as to the need for chemical dependency treatment related to the use of alcohol or controlled substances, regardless of the particular substance that contributed to the commission of the offense. The court may also impose a prohibition on the use or possession of alcohol or controlled substances regardless of whether a chemical dependency evaluation is ordered. A rehabilitative program may include a directive that the offender obtain an evaluation as to the need for chemical dependency treatment related to the use of alcohol or controlled substances, regardless of the particular substance that contributed to the commission of the offense. The court may also impose a prohibition on the use or possession of alcohol or controlled substances regardless of whether a chemical dependency evaluation is ordered.

Another is RCW 9.94A.703(3), which authorizes courts to order as conditions of community custody (among others) that an offender "[p]articipate in crime-related treatment or counseling services" or "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c) and (d).

The facts available to the court in sentencing Ms. Davis included that she was in possession of methamphetamine, that she denied that she knowingly possessed it, that the jury did not find her denial credible, that she had a prior conviction for a substance abuse related offense, and that at sentencing she suggested through her attorney that she needed a substance abuse evaluation. Unlike alcohol or marijuana, which can be possessed legally, Ms. Davis' possession of methamphetamine subjected her to the risk of prosecution and punishment. While no direct evidence was presented at trial of use of the drug on that particular occasion, the court could conclude from Ms. Davis' knowing possession that she either used, intended to use, or intended to deliver methamphetamine, a more serious crime than mere use. While it may be minimal evidence of a chemical dependency, Ms. Davis' willingness to expose herself to substantial criminal penalties in order to possess methamphetamine is some evidence of a chemical dependency. In addition, she has a prior conviction for a serious substance abuse crime, driving under the influence. The connection between DUI and substance abuse is so significant that the

legislature has mandated substance abuse treatment for defendants convicted of DUI as a condition of reinstatement of driving privileges. RCW 46.20.311(1)(c).

The history of RCW 9.94A.607, enacted in 1999 with the passage of Engrossed Second Substitute H.B. 1006 (E2SHB), indicates that the legislature had a low threshold in mind for the chemical dependency finding, viewing drug treatment as something from which a large number of offenders would benefit. The final bill report for E2SHB 1006 states, by way of "background," that "[t]he Department of Corrections reports that 80 percent of offenders that are sentenced are arrested for a drug offense or a crime that is a result of a chemical dependency."

Ms. Davis asks this court to consider her testimony that she didn't know there were drugs in her pants despite a jury finding that that testimony was not credible when convicting her in spite of the unwitting possession instruction. She does not get to re-litigate those facts before this court.

There was more than enough evidence for the trial court to conclude that Ms. Davis is chemically dependent. In any case, even

without a finding of chemical dependency, RCW 9.94A.703(3) gives the court even broader discretion to order crime related and rehabilitative treatment. Absent any record of an improper basis for the court to impose the conditions it did, this court should not conclude that the trial court committed a manifest abuse of discretion in making the chemical dependency finding and imposing the treatment condition.

Since the trial court did not abuse its discretion in ordering affirmative treatment conditions, the imposition of up to 12 months of community custody was proper. RCW 9.94A.650(3).

Ms. Davis asks this court to find that the condition of not entering alcohol establishments and the requirement to submit to random UA, BAC, or other tests were not “crime-related prohibitions” and thus were impermissible. When ordering those conditions the trial court said:

You do need to obtain a chemical dependency evaluation, in essence, a drug assessment. You're to comply with the recommended treatment. You're to submit to random BAC and UA testing as directed by your community corrections officer and your drug treating counselor and it is at your own expense. . . . You're also prohibited from using or possessing alcoholic beverages in that we don't want you to trade

one chemical for another. Consequently, you can't be in cocktail lounges or taverns unless you have the prior approval of your community corrections officer and alcohol/drug treating counselor. RP 167.

The trial court clearly considered Ms. Davis' chemical dependency and her history of substance abuse including her prior DUI when ordering the prohibition relating to alcohol establishments. The trial court clearly related that prohibition to Ms. Davis' substance abuse issues and the treatment requirements. It was also not a complete prohibition in that it only prohibited specific conduct without prior approval by her DOC officer and treatment provider.

Regarding the random tests, these are affirmative conditions and part of rehabilitative programs specifically authorized by both RCW 9.94A.607 and RCW 9.94A.703(3). Ms. Davis was properly found to be chemically dependent, properly ordered to comply with substance abuse evaluation and treatment, properly ordered to comply with treatment related tests, and properly ordered to comply with crime related prohibitions.

As with the LFO argument, to hold otherwise would be for this court to substitute its judgment for that of the trial court on a matter of discretion. When faced with the situation here of a court

that expressly considered the matter and a defendant who later disagrees with the court's assessment, the issue is a matter of discretion for the lower court. Accordingly, this court should affirm the lower court's imposition of sentencing conditions in this case as meeting the minimum requirements established by statute.

#### D. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests this court affirm Ms. Davis' sentence and its conditions.

DATED this 8 day of June, 2017.

Respectfully submitted,

Douglas J. Shae  
Chelan County Prosecuting Attorney

  
By: Lee O'Brien WSBA #39847  
Deputy Prosecuting Attorney

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

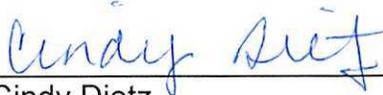
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	No. 34766-4-III
Plaintiff/Respondent,	)	Superior Court No. 16-1-00261-8
	)	
vs.	)	DECLARATION OF SERVICE
	)	
TAMMY LYNN DAVIS,	)	
	)	
Defendant/Appellant.	)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 8th day of June, 2017, I caused the original Brief of Respondent to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

Nancy P. Collins	( )	U.S. Mail
Washington Appellate Project	( )	Hand Delivery
1511 3 <sup>rd</sup> Avenue, Suite 701	(X)	E-Service via Appellate
Seattle, WA 98101-3647		Courts' Portal
nancy@washapp.org		
Tammy Lynn Davis	(X)	U.S. Mail
513 E. Allen Avenue	( )	Hand Delivery
Chelan, WA 98816	( )	E-Service via Appellate
		Courts' Portal

Signed at Wenatchee, Washington, this 8th day of June, 2017.

  
 \_\_\_\_\_  
 Cindy Dietz  
 Legal Administrative Supervisor  
 Chelan County Prosecuting Attorney's Office

DECLARATION OF SERVICE

DOUGLAS J. SHAE  
 CHELAN COUNTY  
 PROSECUTING ATTORNEY  
 P.O. Box 2596  
 Wenatchee, WA 98807  
 (509) 667-6202

**CHELAN COUNTY PROSECUTING ATTORNEY**

**June 08, 2017 - 9:59 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34766-4  
**Appellate Court Case Title:** State of Washington v. Tammy Lynn Davis  
**Superior Court Case Number:** 16-1-00261-8

**The following documents have been uploaded:**

- 347664\_Briefs\_20170608095515D3971719\_1161.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Davis 34766-4 Respondent Brief.pdf*

**A copy of the uploaded files will be sent to:**

- douglas.shae@co.chelan.wa.us
- nancy@washapp.org
- wapofficemail@washapp.org

**Comments:**

---

Sender Name: Cindy Dietz - Email: cindy.dietz@co.chelan.wa.us

**Filing on Behalf of:** Lee O'Brien - Email: lee.obrien@co.chelan.wa.us (Alternate Email: prosecuting.attorney@co.chelan.wa.us)

Address:  
P.O. Box 2596  
Wematchee, WA, 98807  
Phone: (509) 667-6204

**Note: The Filing Id is 20170608095515D3971719**