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NO. 36063-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER TROSPER,

Appellant.

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

The Honorable Randall Krog, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it included two Oregon convictions in appellant's offender score without conducting a comparability analysis.

2. The trial court erred in failing to apply a mandatory "same criminal conduct" analysis to four of the appellant's prior convictions.

3. The trial court erred when it ordered mental health evaluation and treatment without making a finding that the appellant was a mentally ill person whose condition influenced the offense.

4. The legal financial obligations (LFOs) imposed for the criminal filing fee, appointed counsel, and DNA collection should be stricken under the Supreme Court's recent decision in State v. Ramirez.¹

Issues Pertaining to Assignments of Error

1. Did the court err by including the Oregon convictions in the offender score even though the State failed to prove, and the court failed to find, that the convictions were comparable to Washington felonies?

2. Did the trial court likewise err in failing to apply the statutorily mandated "same criminal conduct" analysis to the appellant's prior convictions?

¹ State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714 (2018).

3. Did the trial court err in ordering a mental health evaluation and treatment as a condition of community custody without entering a statutorily required finding that the appellant was a mentally ill person whose condition influenced the offense?

4. Under the Supreme Court's recent Ramirez decision, should the \$200 criminal filing fee, \$250 court-appointed attorney fee, and \$100 DNA fee be stricken?

B. STATEMENT OF THE CASE

The State charged appellant Christopher Trosper with second degree assault² (count 1) and bail jumping³ (count 2). CP 79-80 (Second Amended Information).

The jury acquitted Trosper of assault but convicted him of bail jumping, a class C felony. CP 59, 51.

The court determined Trosper had an offender score of 10, producing a standard range of 51-60 months. CP 64; RCW 9.94A.510 (sentencing grid reflecting range of 51-60 months for seriousness level "III" crime that is a class C felony); RCW 9.94A.515 (offense seriousness level).

² RCW 9A.36.021(1)(a) (reckless infliction of substantial bodily harm).

³ RCW 9A.76.170(1), (3)(c) (bail jumping based on underlying class B felony is a class C felony). The crime was alleged to have occurred on or about December 18, 2017.

The court ultimately sentenced Troser to a prison-based Drug Offender Sentence Alternative (DOSA)⁴ consisting of 27.75 months in prison plus 27.75 months of community custody.⁵ CP 65.

As a condition of community custody, the court ordered that Troser “obtain a mental health evaluation and comply with recommended treatment.” CP 66. The court also ordered that Troser pay the statutory rate of \$30 per month for urinalysis while on community custody. CP 66; RCW 9.94A.660(6)(a).

The court ordered Troser—who lived in his car part of the time charges were pending⁶—to pay \$1,050 in LFOs. CP 67. This total included the \$500 crime victim assessment,⁷ a \$100 DNA database fee,⁸ a \$200 criminal filing fee,⁹ and a \$250 fee for Troser’s court-appointed attorney.

⁴ RCW 9.94A.660(3)

⁵ Under RCW 9.94A.662(1) “[a] sentence for a prison-based special [DOSA] shall include [a] period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater [and one]-half the midpoint of the standard sentence range as a term of community custody.”

⁶ E.g. RP 219-20.

⁷ RCW 7.68.035 authorizes crime victim penalty assessments. In relevant part, RCW 7.68.035(1)(a) provides: “The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor.”

⁸ RCW 43.43.7541

⁹ RCW 36.18.020

CP 67 (imposing fee under RCW 9.94A.760¹⁰); RP 341 (clarifying that \$250 fee was for court-appointed attorney rather than reason indicated on judgment and sentence).

Absent any directed inquiry, the court commented that Trospen enjoyed “periods [when] things go well,” and therefore Trospen could earn income during those periods. RP 341.

However, the court also found Trospen indigent for purposes of appeal based on Trospen’s declaration that he had not earned any income during the previous year and had debts totaling \$45,000. CP 74-76.

Trospen timely appeals. CP 77-78.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT A COMPARABILITY ANALYSIS REGARDING OUT-OF-STATE CONVICTIONS AND FAILED TO CONSIDER WHETHER PRIOR CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT.

The trial court erred when it failed to conduct a comparability analysis regarding Trospen’s out-of-state convictions. It also erred when it failed to consider—as required by statute—whether two sets of Trospen’s

¹⁰ RCW 9.94A.760(1) provides broadly that “[w]henver a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence.” Court-appointed attorney fees constitute costs under RCW 10.01.160. *In re Dove*, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016), review denied, 188 Wn.2d 1008 (2017).

prior convictions, committed and sentenced on the same date, were the same criminal conduct for purposes of offender score calculation.

Remand is required.

- a. The trial court erred by failing to conduct a comparability analysis regarding two out-of-state convictions.

A court must conduct comparability analysis regarding out-of-state convictions. The trial court failed to do so in this case.

“[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999).

This Court reviews a sentencing court’s offender score calculation de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Illegal or erroneous sentences may be challenged for the first time on appeal. Ford, 137 Wn.2d at 484-85. This includes challenges to the comparability of out-of-state convictions. Id. at 485.

Unless affirmatively acknowledged by a defendant, the State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (citing In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005)). The State does not meet its burden through bare assertions.

Mendoza, 165 Wn.2d at 929 (citing Ford, 137 Wn.2d at 482); see also State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012) (recognizing 2008 amendments to RCW 9.94A.500 and .530 unconstitutionally shifted to defendant burden of proof relating to defendant's criminal history).

Failure to object to the criminal history proffered by the State does not constitute affirmative acknowledgment of prior convictions. Mendoza, 165 Wn.2d at 928. Moreover, a defendant's silence on the issue is not sufficient to constitute waiver. Cadwallader, 155 Wn.2d at 876. A defendant will not be deemed to have affirmatively acknowledged the State's assertion of criminal history based on (1) defense counsel's argument for a standard range within the range posited under the State's calculation,¹¹ Mendoza, 165 Wn.2d at 928-29, or even (2) defense counsel's agreement to the calculation of an offender score, State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010).

Under the Sentencing Reform Act (SRA), a foreign conviction is included in a defendant's offender score if it is "comparable" to a Washington felony. RCW 9.94A.030(11); RCW 9.94A.525(3). To determine whether there is comparability, a trial court must first consider whether the elements of

¹¹ Defense counsel spoke up to correct a calculation as to the midpoint of the standard range for purposes of the DOSA. RP 340-41. But Trosper did not agree to his offender score. RP 334-41.

the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the conduct underlying the foreign offense would have violated the Washington statute. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Thiefault, 160 Wn.2d at 415. Classification of an out-of-state conviction is a mandatory step. Ford, 137 Wn.2d at 483.

According to the criminal history contained in the judgment and sentence, Troser has two Oregon convictions, a 2007 conviction for “VUCSA Possession” and a 2001 conviction for “Unauthorized Use of a Motor Vehicle.” CP 63. The State offered no evidence to show these convictions were comparable to any Washington felony. The State did not provide the specific statutes under which Troser was convicted, the elements of either crime, or the judgment and sentences for the Oregon convictions. No details about the underlying crimes appear in the record.

It is worth noting that Division Two of this Court has held that the Oregon crime of unauthorized use of a motor vehicle is broader than the Washington crime of taking of a motor vehicle without permission. State v.

Tewee, 176 Wn. App. 964, 970-71, 309 P.3d 791 (2013). To commit the Washington crime, the State must prove the owner has not granted permission. Id. at 970 (citing State v. Clark, 96 Wn.2d 686, 692, 638 P.2d 572 (1982)). On the other hand, the Oregon statute may be violated when the taker has permission from the owner, but then exceeds its scope. Tewee, 176 Wn. App. at 970.

The trial court calculated Trosper's offender score as 10, with each Oregon conviction counting as one point. CP 63. But the court conducted no comparability analysis. RP 334-41 (sentencing proceedings containing no comparability analysis).

The court therefore erred by including the Oregon convictions in Trosper's offender score. For this reason alone, remand for resentencing is required.

- b. The trial court also erred in failing to apply a same criminal conduct analysis to Trosper's prior convictions, as required by statute.

The trial court also failed to apply a "same criminal conduct" analysis to Trosper's prior convictions, despite its statutory duty to do so. Such analysis is mandatory. Remand for resentencing is required for this reason as well.

A current sentencing court must calculate an offender score based on an offender's "other current and prior convictions." RCW 9.94A.589(1)(a).

A sentencing court is bound by an earlier court's finding under RCW 9.94A.589(1)(a) that multiple offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i).

If the previous court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current court must independently evaluate whether those prior convictions involve the same criminal conduct and, if they do, must count them as one offense. Id.; State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (“A sentencing court . . . must apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. The court has no discretion on this.”) (citing RCW 9.94A.525(5)(a)(i); State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735 (1995); State v. Lara, 66 Wn. App. 927, 931-32, 834 P.2d 70 (1992)), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013); cf. State v. Nitsch, 100 Wn. App. 512, 522, 997 P.2d 1000 (2000) (court has no duty to conduct a same criminal conduct analysis sua sponte as to *current* crimes).

The offender bears the burden of proving the prior offenses encompass the same criminal conduct. Graciano, 176 Wn.2d at 539. Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d

824 (1994). “Intent, in this context, is not the particular mens rea . . . of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)), review denied, 182 Wn.2d 1022 (2015); accord State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017 (2014); cf. State v. Chenoweth, 185 Wn.2d 218, 223, 370 P.3d 6 (2016) (comparing strict liability offenses to preclude same criminal conduct finding).¹²

Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995). Crimes may involve the same intent if they were part of a continuous transaction or involved a single,

¹² The Supreme Court’s decision in Chenoweth, 185 Wn.2d 218, does not change the objective criminal intent standard. There, the Court held that first degree incest and third degree child rape were not the same criminal conduct because “[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.” Id. at 223. But those crimes are strict liability offenses with no mens rea elements. RCW 9A.64.020 (1)(a); RCW 9A.44.079(1). The Chenoweth Court therefore did not create a new rule requiring that courts look to the statutory mens rea in determining criminal intent for the purposes of same criminal conduct.

uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). “[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the offenses encompass the same criminal conduct.” State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Here, two of Trospen’s Washington convictions, first degree theft and first degree malicious mischief,¹³ occurred on, and were sentenced on, the same dates in 2001.

Two others, each denoted “VUCSA Possession,” occurred on, and were sentenced on, the same dates in 1998. CP 63-64.

Presumptively, any prior sentencing court would have imposed concurrent sentences for these crimes. Former RCW 9.94A.589 (1)(a) (2000) (“Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed [as an] exceptional sentence.”).

¹³ Former RCW 9A.48.070 (1983) states in part that “a person is guilty of malicious mischief in the first degree if he or she knowingly and maliciously [c]auses physical damage to the property of another in an amount exceeding one five thousand five hundred dollars.”

Under former RCW 9A3.56.030 (1995), “a person is guilty of theft in the first degree if he or she commits theft of [p]roperty or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010; or [p]roperty of any value other than a firearm as defined in RCW 9.41.010 taken from the person of another.”

Under these circumstances, the court was required under RCW 9.94A.525(5)(a)(i) to apply the same criminal conduct test to the prior convictions. Torngren, 147 Wn. App. at 563; see also State v. Williams, 176 Wn. App. 138, 144, 307 P.3d 819 (2013) (sentencing court erred by relying on the burglary anti-merger statute to count Williams’s prior burglary and robbery convictions separately rather than relying on the same criminal conduct test), aff’d, 181 Wn.2d 795, 336 P.3d 1152 (2014).

The trial court erred by failing to exercise its statutory duty under RCW 9.94A.525(5)(a)(i) to apply the same criminal conduct analysis to the prior convictions. Williams, 176 Wn. App. at 144; Torngren, 147 Wn. App. at 563. Remand is required for the Court to comply with RCW 9.94A.525(5)(a)(i).

c. Remand for resentencing is required.

The remedy for a miscalculated offender score is to remand for resentencing. Mendoza, 165 Wn.2d at 930. This Court should remand for resentencing so the trial court may engage in comparability and “same criminal conduct” analysis as to Trosper’s prior convictions.

2. THE COURT ERRED IN ORDERING A MENTAL HEALTH EVALUATION AND TREATMENT WITHOUT ENTERING A FINDING THAT TROSPER WAS A MENTALLY ILL PERSON WHOSE CONDITION INFLUENCED THE OFFENSE.

As a condition of community custody, the sentencing court ordered that Trospen complete a mental health evaluation and comply with recommended treatment. CP 66. The applicable statutes, however, did not authorize the imposition of this condition.

A trial court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Under the SRA, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. RCW 9.94A.703(3)(c) provides that a sentencing court may order an offender to “[p]articipate in crime-related treatment or counseling services.” Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

Mental health counseling and treatment may be required as a sentencing condition under RCW 9.94A.703(3)(c) and (d) as long as the

counseling and treatment is “crime-related” or “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” In addition, the DOSA statute permits a court to impose “other affirmative conditions as the court considers appropriate.” RCW 9.94A.660(6)(a).

However, RCW 9.94B.080 further requires that mental health evaluation and treatment may only be imposed

if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender’s competency or eligibility for a defense of insanity. . . .¹⁴]

In State v. Jones, Division Two of this Court held that mental health treatment and counseling “reasonably relates” to the offender’s risk of reoffending and to the safety of the community “only if the court obtains a presentence report or mental status evaluation *and* finds that the offender was a mentally ill person whose condition influenced the offense.” 118 Wn.

¹⁴ Although the heading of chapter 9.94B RCW states that the chapter applies to crimes committed prior to July 1, 2000, the relevant provision, RCW 9.94B.080, authorizing the trial court to order an offender to undergo a mental status evaluation and mental health treatment, is applicable to crimes committed *after* 2009. Laws of 2008, ch. 231, §§ 53, 55.

App. 199, 210, 76 P.3d 258 (2003) (emphasis added);¹⁵ accord State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008).

Here, the applicable statute no longer requires that such a condition “must” be based on a presentence report. Rather, the statute uses the term “may.” Laws of 2015, ch. 80, § 1. Nonetheless, the trial court made no finding that Trosper was mentally ill, nor did it find that mental illness influenced the crime of bail jumping. CP 63 (leaving unchecked box corresponding to related preprinted language).

Nor could the court have so found. The court found Trosper suffered from substance abuse issues. RP 339-40. But, under current RCW 71.24.025(28), “‘mentally ill persons,’ ‘persons who are mentally ill,’ and ‘the mentally ill’ mean persons and conditions defined in subsections (1), (10), (36), and (37) of this section.”¹⁶

The criteria under subsections (1), (10), (36), and (37) are strict, denoting severe and debilitating mental illness. None apply in this case.

Under Jones, Brooks, RCW 9.94B.080, and RCW 71.24.025, the trial court was not authorized to require that Trosper undergo a mental

¹⁵ A prior version of the statute in effect before July of 2015 provided that the order “must” be based on a presentence report. Laws of 2015, ch. 80, § 1.

¹⁶ Laws of 2018, ch. 201, § 4002, effective July 1, 2018, changed the numbering but did not substantively change the relevant provisions of the statute.

health evaluation. Because the condition was not authorized under the SRA, it was illegal, and it must be stricken.

3. THIS COURT SHOULD ALSO ORDER THE \$200 FILING FEE, \$250 APPOINTED COUNSEL FEE, AND \$100 DNA FEE TO BE STRICKEN UNDER THE SUPREME COURT'S RECENT *RAMIREZ* DECISION.

Trosper is indigent under the applicable statutory criteria. The \$200 filing fee, \$250 fee for appointed counsel, and \$100 DNA fee, each now discretionary, should be stricken under Ramirez.

In Ramirez, an appellant challenged discretionary LFOs on the grounds that the trial court had not engaged in an appropriate inquiry regarding his ability to pay under State v. Blazina.¹⁷ Ramirez, 426 P.3d at 717. The Supreme Court agreed, setting forth detailed instructions regarding the appropriate inquiry. Id. at 719-21.

But, based on watershed statutory amendments that took effect while Ramirez's appeal was pending, the Supreme Court ultimately granted relief on statutory grounds.

The Supreme Court explained that Laws of 2018, ch. 269, § 6 (3) ("House Bill 1783") made substantial modifications to several components of Washington's LFO system. In doing so, the legislature "address[ed]

¹⁷ State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.” Ramirez, 426 P.3d at 721.

For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, establishes that the DNA database fee is no longer mandatory if the offender’s DNA has been collected because of a prior conviction, and provides that a court may not sanction an offender for failure to pay LFOs *unless* the failure to pay is willful. Ramirez, 426 P.3d at 721-22 (citing Laws of 2018, ch. 269, §§ 1, 18, 7).

House Bill 1783 amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Ramirez, 426 P.3d at 722 (citing Laws of 2018, ch. 269, § 6 (3)). It also prohibits imposing the \$200 filing fee on indigent defendants. Ramirez, 426 P.3d at 722 (citing Laws of 2018, ch. 269, § 17).¹⁸

As Ramirez further noted, a trial court “shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined

¹⁸ RCW 36.18.020(2)(h) now provides that

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

in RCW 10.101.010(3)(a) through (c).” Ramirez, 426 P.3d at 722 (quoting Laws of 2018, ch. 269, § 6 (3)). Thus, indigency may be established by three objective criteria. “Under RCW 10.101.010(3)(a) through (c), a person is ‘indigent’ if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.” Ramirez, 426 P.3d at 722. If none of these criteria apply, however, the trial court must still engage in an individualized inquiry into current and future ability to pay. Id.

Crucially to this case, the Court also held that the House Bill 1783 amendments applied prospectively to cases not yet final on appeal. Ramirez, 426 P.3d at 722-23 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)).

The Supreme Court concluded that the trial court impermissibly imposed discretionary LFOs, as well as the \$200 criminal filing fee, on Ramirez. The Court remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. Ramirez, 426 P.3d at 723.

Here, the record indicates Trosper is indigent under RCW 10.101.010(3) based on his income. CP 74. Should further inquiry be necessary, he also has significant debt. CP 74. And House Bill 1783 applies

prospectively to his case. Consistent with Ramirez, this Court should remand for the \$200 filing fee to be stricken.

The \$250 fee for appointed counsel must also be stricken due to indigency. This fee has always been considered discretionary. State v. Malone, 193 Wn. App. 762, 764, 376 P.3d 443 (2016). But the current statute amended as part of HB 1783 now outright prohibits imposition of discretionary costs on indigent offenders. RCW 10.01.160(3). The \$250 fee for appointed counsel is therefore unauthorized by statute.

Finally, the \$100 DNA fee should also be stricken. As Ramirez indicates, RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was amended under House Bill 1783. The statute now provides that

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

RCW 43.43.7541 (emphasis added, reflecting amendment to statute); Laws of 2018, ch. 269, § 18.

Trosper appears to have several in-state felony convictions. CP 63. Thus, his DNA would previously have been collected. See, e.g., former RCW 43.43.754(1) (2002) (requiring collection of DNA for all juvenile and adult felonies). Under Ramirez, the DNA fee must be considered a

discretionary LFO, which may not be imposed on an indigent defendant. Id. at 721-23. Thus, the \$100 DNA fee should be stricken as well.

D. CONCLUSION

Remand is required for the trial court to conduct a comparability analysis as to the out-of-state convictions and to consider whether crimes committed and sentenced on the same date constituted same criminal conduct. Remand is also required for the condition requiring a mental health evaluation to be removed. Finally, under the Supreme Court's recent decision in Ramirez, \$550 in discretionary LFOs should be stricken based on Trosper's indigency.

DATED this 29th day of October, 2018.

Respectfully submitted,

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