

FILED
Court of Appeals
Division III
State of Washington
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No. 36331-7-III

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

STATE OF WASHINGTON, Respondent

v.

BRENDA THORNTON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY
THE HONORABLE JUDGE RANDALL C. KROG

BRIEF OF APPELLANT - CORRECTED

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF FACTS	1
III.	ARGUMENT.....	4
	A. This Matter Must Be Remanded To The Trial Court To Determine If Ms. Thornton’s Offender Score Was Incorrectly Calculated In Light Of <i>State v. Schwartz</i>	4
	B. The DNA Collection Fee Must Be Stricken From The Judgment and Sentence	8
IV.	CONCLUSION	8

TABLE OF AUTHORITIES

Washington Cases

State v. Mehrabian, 175 Wn.App. 678, 308 P.3d 660 (2013)..... 6
State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 6
State v. Schwartz, 6 Wn.App.2d 151, 429 P.3d 1080 (2018)..... 5

Statutes

LAWS of 1989, ch. 350 § 4 8
LAWS of 2018 ch. 269 §18, 8
RCW 10.01.180 6
RCW 36.18.020 (2005) 5
RCW 43.43.754 8
RCW 43.43.7541 (2002) 5
RCW 7.68.035 (2000) 5
RCW 9.94A.505(5)(2007) 4
RCW 9.94A.525(2)(b)-(d)..... 6
RCW 9.94A.715(2006)..... 4
RCW 9.94A.760 (5) 5
RCW 9.94A.760(10)..... 5
RCW 9A.20.021 4
WAC 437-20-010 4

I. ASSIGNMENTS OF ERROR

- A. This Matter Must Be Remanded For A Reference Hearing To Determine If Ms. Thornton's 2014 Probation Violation Was The Result Of Nonpayment Of A Legal Financial Obligation.
- B. The DNA Collection Fee Must Be Stricken From The Judgment and Sentence.

ISSUES RELATING TO ASSIGNMENT OF ERROR

- A. In light of *State v. Schwartz*, 6 Wn.App.2d 151, 429 P.3d 1080 (2018) must this matter be remanded to the trial court for a reference hearing to determine whether her convictions washed out?
- B. Must the DNA collection fee be stricken from the judgment and sentence?

II. STATEMENT OF FACTS

On February 27, 2015, Klickitat County prosecutors charged Brenda Thornton with one count of bail jumping for failure to appear on July 14, 2014. CP 1. The charge resulted from an underlying allegation of burglary in the second degree filed in 2013. RP 7; CP 3-4. The prosecutor dismissed the burglary charge but continued

to prosecute the bail jump charge. RP 11. Ms. Thornton failed to appear for a hearing on May 18, 2015. CP 6; RP 14. The court orally ordered a bench warrant to be issued. RP 14. However, the court did not issue a written bench warrant until August 24, 2016. CP 10-11.

On August 14, 2018, the State filed an amended information, charging two counts of bail jumping (CP 12-13) and a second amended information on August 20, 2018. CP 14-15. The matter proceeded to a jury trial, and Ms. Thornton was convicted on both counts. CP 53-54.

At sentencing, the State asserted the offender score was '7'. RP 131. The State's sentencing memo recitation of criminal history outlined Ms. Thornton's convictions beginning in 1999. CP 59. Ms. Thornton's last felony conviction occurred in 2007 in Clark County. CP 59. The State asserted after that "She spent one day in jail with credit for one day served on a probation violation in the Clark County matter on March 21, 2014." CP 59. The State presented no documents to substantiate the claim.

Based on the 2014 probation violation, the State's position was that she had not spent five consecutive years in the community

crime free. CP 59. Defense counsel did not question the score but expressly did not stipulate to it. RP 132.

2.2 Criminal History:

	<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>	<i>DV* Yes</i>
1	VUCSA - POSSESSION	3/18/2007	6/15/2007	CLARK, WA	A	FC	
2	VUCSA - POSSESSION	9/13/2005	1/9/2006	YAMHILL, OR	A	FC	
3	VUCSA - POSSESSION	12/8/2003	3/12/2004	YAMHILL, OR	A	FC	
4	FAILURE TO APPEAR 1 ST	1/8/2002	9/3/2002	WASHINGTON, OR	A	FC	
5	POSSESSION OF COCAINE	6/15/2000	9/3/2002	WASHINGTON, OR	A	FC	
6	THEFT 1 ST	12/29/1998	9/22/1999	YAMHILL, OR	A	FC	

The felony judgment and sentence listed six prior convictions, the most recent being the 2007 Clark County conviction for a Class C felony. CP 91-92. The court imposed a 38-month sentence. CP 93. The court also imposed a DNA collection fee of 100 dollars. CP 96.

Ms. Thornton filed a timely notice of appeal. CP 86-87. The court signed an order of indigence for Ms. Thornton's appeal. CP 88.

III. ARGUMENT

A. This Matter Must Be Remanded To The Trial Court To Determine If Ms. Thornton's Offender Score Was Incorrectly Calculated In Light Of *State v. Schwartz*.

Prior to the 2018 convictions for bail jumping, Ms. Thornton's criminal history showed her most recent criminal conviction was a Class C felony in 2007, for violation of the uniform controlled substances act. CP 91-92. Including the term of confinement and up to one year of community supervision, the maximum sentence for a Class C felony was 60 months. RCW 9A.20.021; Former RCW 9.94A.715(2006); WAC 437-20-010 (superseded by section 5, Chapter 235 LAWS of 2009); RCW 9.94A.505(5)(2007).

Under the terms of the statutes, Ms. Thornton's combined period of incarceration and community custody had to have been completed no later than June 2012. The only authorization for continued court jurisdiction over Ms. Thornton in 2014, two years after the statutory maximum, would have been to monitor payment of legal financial obligations imposed in the judgment. RCW

9.94A.760 (5)¹ (effective through August 2009). At the time of her 2007 sentencing, the court was authorized to impose a fee of one hundred dollars for DNA collection, a two hundred dollar criminal filing fee, and a mandatory penalty of five hundred dollars. RCW 43.43.7541 (2002); RCW 36.18.020 (2005); RCW 7.68.035 (2000).

Ms. Thornton's 2007 legal financial obligations would have constituted a condition or requirement and subjected her to a penalty, such as jail time, for noncompliance. RCW 9.94A.760(10) (effective until August 2009). Such jail time would have interrupted the wash-out period. *State v. Schwartz*, 6 Wn.App.2d 151, 429 P.3d 1080 (2018).

At the time of the sentencing hearing, the trial court did not have the benefit of the November 2018 ruling in *Schwartz*. In *Schwartz*, this Court reasoned there was a difference between financial and nonfinancial conditions of community custody. *Id.* at 159. Nonfinancial conditions do not extend beyond the statutory maximum for the crime. Financial obligations endure unless the offender has completely satisfied the debt. Not until 2018 was a

¹ For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime.

trial court prevented from sanctioning an offender for failure to pay LFOs unless the failure to pay was willful. RCW 10.01.180; *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

The Court distinguished its opinion from *State v. Mehrabian*, 175 Wn.App. 678, 308 P.3d 660 (2013), which held that confinement for a failure to pay LFOs reset the wash-out clock. The Court correctly noted that *Mehrabian* and previous cases did not consider the substantial differences between financial and nonfinancial conditions, which required a critical consideration of legislative intent outlined in RCW 9.94A.525(2)(b)-(d). The Court insightfully stated:

This stinginess when it comes to washing out crimes for offenders who fail to pay LFOs makes no sense in light of the second difference between financial and nonfinancial conditions of community custody: financial conditions have no relation to the important sentencing purposes of protecting the public offering the offender an opportunity to improve him or herself, or reducing the risk of reoffending... We recognize that a court must find a willful failure to pay LFOs before modifying a sentence to impose an additional period of confinement. But even so, we cannot conceive of a legislative purpose for the wash-out provisions under which it is logical to deny wash out to an offender who has lived crime-free in the community for the required period but failed to make a payment toward an LFO.

Schwartz, 6 Wn.App.2d at 160. The Court held the language of RCW 9.94A.525(2)(b)-(d) “the last date of release from confinement .. pursuant to a felony conviction” did not include confinement that was imposed for failing to make a payment toward an LFO.

Schwartz, 6 Wn.App.2d at 160. The Court held that Schwartz’s earlier conviction washed out because he had lived in the community crime free for over five years. *Id.*

Relying on a score of ‘7’, the trial court sentenced Ms. Thornton to 38 months of incarceration. It can be reasonably assumed that her probation violation two years after the statutory maximum was the result of failure to pay legal financial obligations. If the washout rules apply to her case, her score should have been a ‘1’, and the standard range sentence of between 3 and 8 months.

This matter should be remanded for a reference hearing with instructions to the trial court to resentence Ms. Thornton if the washout of convictions was the result of the jail time due to failure to pay legal financial obligations.

B. The DNA Collection Fee Must Be Stricken From The
Judgment and Sentence

Under the LAWS of 2018 ch. 269 §18, establishes that the DNA database collection fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction. *Ramirez*, 191 Wn.2d at 747. Here, it is uncontested that Ms. Thornton has a Washington State conviction from 2007. Washington has required a defendant with a felony conviction to provide a DNA sample since 1990. LAWS of 1989, ch. 350 § 4; RCW 43.43.754. It should be presumed that a DNA sample was collected from her in 2007, as it would have been ordered in that judgment and sentence.

Ms. Thornton respectfully asks the Court to direct the trial court to strike the DNA collection fee.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Thornton asks this Court to remand to the trial court for a hearing to determine if the 2014 probation violation was for nonpayment of legal financial obligations and if so, the trial court should recalculate Ms. Thornton's offender score and resentence accordingly. She

also asks the Court to direct the trial court to strike the DNA
collection fee.

Respectfully submitted this 7th day of May 2019.

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on May 7, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Klickitat County Prosecuting Attorney at davidq@klickitatcounty.org and to Brenda Thornton/DOC#894847, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332.

Marie Trombley

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

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