

FILED
Court of Appeals
Division III
State of Washington
5/15/2019 2:58 PM
36367-8-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT PESONEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENT OF ERROR..... 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 3

 A. DEFENDANT’S CLAIM IS BARRED UNDER RAP 2.5
 BECAUSE DEFENDANT FAILED TO PRESERVE
 ANY LEGAL FINANCIAL OBLIGATION (LFO)
 ISSUE FOR APPEAL. 3

 B. IF THIS COURT EXERCISES ITS DISCRETION TO
 REVIEW THE DEFENDANT’S CLAIM, THE \$200
 FILING FEE SHOULD BE STRICKEN. 5

V. CONCLUSION 6

TABLE OF AUTHORITIES

Washington Cases

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 1

State v. Ramos, 171 Wn.2d 46, 246 P.3d 811 (2011) 6

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988) 4

State v. Stoddard, 192 Wn. App. 222, 366 P.3d 474 (2016)..... 4, 5

State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013)..... 3, 4

Statutes

Laws of 2018, ch. 269, § 17 5

Laws of 2018, pg. ii 5

RCW 36.18.020 1, 3, 5, 6

Rules

RAP 2.5..... 3, 4, 5

I. APPELLANT'S ASSIGNMENT OF ERROR

Under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), and RCW 36.18.020(2)(h), the trial court erred in imposing a \$200 criminal filing fee without inquiring into Pesonen's ability to pay it.

II. ISSUES PRESENTED

1. Is the defendant barred from raising an unpreserved claim under RAP 2.5?
2. Can the \$200 filing fee be imposed on defendants if they are found to be indigent at the time of sentencing, even if found to have the future ability to pay?

III. STATEMENT OF THE CASE

The defendant was charged and found guilty of first degree burglary after a bench trial on August 27, 2018. CP 189, 221-31. The court imposed the \$200 filing fee with a notation that the fee could be readdressed upon the defendant's release. CP 197; RP 360. The defendant did not object. RP 360-362. In considering the imposition of the filing fee, the court reasoned:

THE COURT: Based upon what I heard at trial, I cannot waive that because you were employed at the time this occurred and it appears to this Court you potentially could be employed, especially based upon the letter that I received

from your employer... So I can't make a finding of indigency at this point in time and I will impose the \$200....

RP 360.

After sentencing, but before leaving the courtroom, the defendant presented an Order of Indigency for appellate review. At that point, the following exchange occurred:

MR. WALL: And, your Honor, if I may, I would like to hand up, ... a Certificate of Indigency as I completed for Mr. Pesonen and an Order of Indigency allowing him to appeal at public expense because I'm going to be gone for a couple of weeks and I want him to be able to initiate his appeal if he chooses to do that without being held up because of my absence.

THE COURT: All right. So while what may be being handed up to me is an affidavit of indigency, and I will look at that to determine whether or not I need to change my mind on his indigency for purposes of paying the \$200 filing fee which is -- there's been a couple of different cases with regards to that. That is not the same standard for the appeal.

MR. WALL: Correct. This is for his appeal.

THE COURT: For his appeal.

RP 361-62.

The \$200 filing fee was ordered and the Order of Indigency was filed on September 13, 2018. CP 187-88, 189-203.

IV. ARGUMENT

A. DEFENDANT’S CLAIM IS BARRED UNDER RAP 2.5 BECAUSE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL.

In this case, the new statute limiting the levying of the \$200 filing fee on those who are indigent (RCW 36.18.020(2)(h)) was already in effect at the time of the defendant’s sentencing.

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle, as embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5, is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in

good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Additionally, this Court should not accept review of this claim based upon an undeveloped record. As in *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016), the issue now raised by Defendant was not preserved, or developed in the trial court with supporting facts that would enable this Court to properly review the claim. In *Stoddard*, this Court stated:

We consider whether the record on appeal is sufficient to review Gary Stoddard’s constitutional arguments. Stoddard’s contentions assume his poverty. Nevertheless, the record contains no information, other than Stoddard’s statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a

criminal charge's defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard's due process argument.

Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the \$100 DNA collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

Id. at 228-29.

Therefore, policy and RAP 2.5 do not favor consideration of the belatedly-raised legal financial obligations issue.

B. IF THIS COURT EXERCISES ITS DISCRETION TO REVIEW THE DEFENDANT'S CLAIM, THE \$200 FILING FEE SHOULD BE STRICKEN.

In 2018, House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit courts from imposing the \$200 filing fee on indigent defendants. Laws of 2018, ch. 269, § 17(2)(h). As of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee on defendants who are indigent. Laws of 2018, ch. 269, § 17; Laws of 2018, pg. ii, "Effective Date of Laws"; RCW 36.18.020.

In the present case, the defendant was sentenced, then an order of indigency was entered on September 13, 2018, CP 187-88, 201. Because the defendant was indigent at the time of sentencing for purposes of affording the cost of an appeal, the defendant's past and future ability to pay

apparently has no bearing on whether this fee could be imposed.
RCW 36.18.020.¹

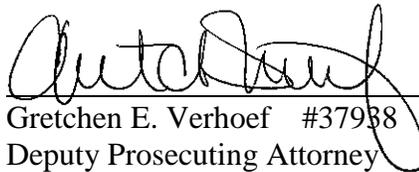
Therefore, this Court should order that the \$200 court cost be stricken from judgment and sentence. This may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (a ministerial correction does not require a defendant's presence).

V. CONCLUSION

Should this Court review the issue, it should remand the case for the ministerial correction to strike the \$200 filing fee.

Dated this 15 day of May, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

¹ The statute is very temporal and mandatory in its application. Here, the court found the defendant was able to afford to pay this fee before he was charged, and that he would be employed afterward and would be able to pay the fee. These “findings” were not objected to at sentencing, and are not assigned error on appeal.

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT PESONEN,

Appellant.

NO. 36367-8-III

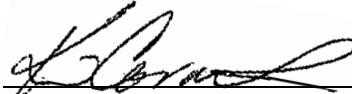
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 15, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

5/15/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

May 15, 2019 - 2:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36367-8
Appellate Court Case Title: State of Washington v. Scott Thomas Pesonen
Superior Court Case Number: 17-1-00658-1

The following documents have been uploaded:

- 363678_Briefs_20190515145648D3294888_7425.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Pesonen Scott - 363678 - Resp Br - kc-gev.pdf

A copy of the uploaded files will be sent to:

- Andrea@2arrows.net
- bobrien@spokanecounty.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Gretchen Eileen Verhoef - Email: gverhoef@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20190515145648D3294888