No. 33021-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CHRIS LITO,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Lito's motion for a new trial.

2. The record does not support the finding Mr. Lito has the current or future ability to pay the imposed legal financial obligations.

3. The trial court erred when it ordered Mr. Lito to pay a $100 DNA-collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Jury Instruction No. 12 violate due process because it shifted the burden to Mr. Lito to prove the alleged victim was capable of consent?

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into Mr. Lito 's current and future ability to pay before imposing LFOs?

3. Does the mandatory $100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?

C. STATEMENT OF THE CASE

Chris Lito was convicted by a jury of second degree rape where the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 17, 26. The jury was instructed in pertinent part:

> It is a defense to a charge of rape in the second degree that at the time of the acts the defendant reasonably believed that Hannah Hansen was not mentally incapacitated or physically helpless. The defendant has the burden of proving this defense by a preponderance of the evidence . . .

Jury Instruction No. 12, CP 20.

Following his conviction, Mr. Lito moved for a new trial based on the Washington Supreme Court's recent decision in *State v. W.R.*, which held due process prohibits shifting the burden to the defendant to prove consent by a preponderance of the evidence as a defense to a charge of rape by forcible compulsion.[1] CP 27-31; RP 272-76. W.R. was decided 41 days after Mr. Lito's conviction. CP 58, *State v. W.R.,* 181 Wn.2d 757, 336 P.3d 1134 (2014). The Court denied the motion. RP 280-82.

At sentencing the Court imposed mandatory costs of $800[2] and $552.86 restitution, for a total Legal Financial Obligation (LFO) of

[1] 181 Wn.2d 757, 768, 336 P.3d 1134 (2014)

[2] $500 Victim Assessment, $200 criminal filing and $100 DNA fee. CP 65.

$1352.86. CP 65. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760) The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 61-62.

The Court did not inquire into Mr. Lito's financial resources but did state, "[I]t doesn't appear in the future there will be the ability to pay." RP 292. Nevertheless, the Court ordered Mr. Lito to pay $25 per month commencing December 15, 2015. RP 293, CP 66.

This appeal followed. CP 74-75.

D. ARGUMENT

1. Jury Instruction No. 12 violated due process because it shifted the burden to Mr. Lito to prove the alleged victim was capable of consent.

The due process clause of the Fourteenth Amendment and Washington Constitutuion, Article 1, § 3 require the State to prove beyond a reasonable doubt every fact necessary to convict the defendant of the charged crime. *State v. W.R.*, 181 Wn.2d 757, 761–62, 336 P.3d 1134 (2014); *State v. Lozano*, No. 45242-1-II, 2015 WL 4540768, at *10 (July

28, 2015)[3]. "A corollary rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged." *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134. Whether due process prevents the legislature from allocating the burden of proof of a defense to the defendant depends on the relationship between the elements of the charged crime and the elements of the defense. *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134. A defense that merely excuses conduct that would otherwise be punishable is a true affirmative defense, and the burden of proving it may be allocated to the defendant. *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134; *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). But where a defense necessarily negates an element of the crime, the legislature may not allocate to the defendant the burden of proving the defense. *W.R.*, 181 Wn.2d at 762, 336 P.3d 1134.

"The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist." *W.R.*, 181 Wn.2d at 765, 336 P.3d 1134. In *W.R.*, the Washington Supreme Court held consent necessarily negates forcible compulsion; therefore, due process prohibits shifting the burden to the defendant to prove consent by

[3] Petition for review filed 8/27/15; scheduled for consideration 1/5/16.

a preponderance of the evidence as a defense to a charge of rape by forcible compulsion. 181 Wn.2d at 768, 336 P.3d 1134.

However, in *State v. Lozano,* Division II held an instruction in a rape case allocating to the defendant the burden of proving he reasonably believed the victim was capable of consent, did not violate due process because the instruction did not impose a burden on the defendant to prove any element of the charged crime. *Lozano,* 2015 WL 4540768, at *2. The Court further stated:

> Unlike in *W.R.*, Lozano's burden to prove his "reasonable belief" that the victim was not mentally incapacitated and physically helpless did not negate an element of the charged crime. Here, the State retained its burden to prove beyond a reasonable doubt that Lozano had sexual intercourse with A.B. when she could not consent by reason of being physically helpless or mentally incapacitated. The challenged instruction did not negate this element; *i.e.*, the instruction did not require Lozano to prove that the victim could actually consent. It merely placed the burden on Lozano to prove that he reasonably believed A.B. could consent, which is a statutory defense to the crime.
> The "reasonable belief" defense may coexist with the charged crime because the elements of the crime are based on the inability of the person to consent, whereas the defense is concerned with the reasonableness of the defendant's belief that the person was able to consent. The "reasonable belief" defense is merely an excuse for conduct that would otherwise be punishable. Therefore, the trial court's instruction did not violate due process.

Lozano, 2015 WL 4540768, at *2-3.

The Court's reasoning in *Lozano* is flawed and this Court should decline to follow it. First, the instruction does not qualify as an affirmative defense that does not violate due process, i.e. a defense that merely " 'excuses[s] conduct that would otherwise be punishable . . .' " *W.R.*, 181 Wn.2d at 762 (citing *Smith v. United States*, —— U.S. ——, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013) (quoting *Dixon v. United States*, 548 U.S. 1, 6, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006)). The conduct here would not otherwise be punishable, since consensual sexual intercourse is not a crime.

Second, the instruction does in fact negate the element that the victim was incapable of consent. The key word in the instruction is "reasonable." "Reasonable" means "thinking, speaking or acting according to the dictates of reason; not immoderate or excessive;" synonyms include "rational; just; honest; equitable; fair; suitable; moderate; tolerable." *Black's Law Dictionary* (Fifth Ed., 1979, West Publishing Company); *Cass v. State*, 124 Tex. Crim. 208, 216, 61 S.W.2d 500 (1933). Thus, if the defendant's belief that the victim was able to consent was "reasonable," the victim would have had to necessarily convey consent in some manner "according to the dictates of reason." If

the victim conveyed such consent, that act negated the element that she was incapable of consent.

Therefore, like *W.R.*, the "reasonable belief" instruction requires the defendant to prove the victim was capable of consent, which negates the element that she was incapable of consent, thus shifting the burden and violating due process.

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Lito 's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review*.

Mr. Lito did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, __Wn.2d__, 344 P.3d 680, 683 (March 12, 2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities

and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing

judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Lito's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.")(citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Lito respectfully submits that

in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Mr. Lito has the past, present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendnat had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id*. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id*.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id*. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id*. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a

needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id*.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[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." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement that the trial court has “considered” Mr. Lito’s past, present or future ability to pay legal financial obligations. CP 61-62. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59

(2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Lito's financial resources and the potential burden of imposing LFOs on him. RP 292. However, the Court did state, "[I]t doesn't appear in the future there will be the ability to pay." RP 292. Nevertheless, the Court ordered Mr. Lito to pay $25 per month commencing December 15, 2015. RP 293, CP 66.

The boilerplate finding that Mr. Lito has the past, present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Lito 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

2. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Id.* at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." *Nielsen v. Washington State Dep't of*

Licensing, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen,* 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.* Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test "is not a toothless one." *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." *DeYounq v. Providence Med. Ctr.,* 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA-

collection fee. RCW 43.43.7541[4]. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, ___ Wn.2d ___, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial

[4] RCW 43.43.7541 provides:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

courts impose this debt upon defendants who cannot pay.

In response, the State may argue the $100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the fee is paid only after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, *Blazina,* 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does

not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Lito's indigent status, the order to pay the $100 DNA collection fee should be vacated.

E. CONCLUSION

For the reasons stated, the case should be remanded for a new trial, or in the alternative, to make an individualized inquiry into Mr. Lito's current and future ability to pay before imposing LFOs. In addition, the order to pay the $100 DNA collection fee should be vacated.

Respectfully submitted September 16, 2015,

_____

s/David N. Gasch
Attorney for Appellant
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 16, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Chris Lito
#377672
1313 N. 13th Avenue
Walla Walla WA 99263

SCPAAppeals@spokanecounty.org
Brian O'Brian/Larry Steinmetz
Spokane County Prosecutor

_____

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com