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4-25-16
Court of Appeals
Division I
State of Washington

NO. 74325-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

WENDELL LYNN SEPEDA,

Appellant.

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

The Honorable Samuel Chung, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY BY IMPOSING A CRIME LAB FEE WHERE NO CRIME LAB ANALYSIS WAS PERFORMED. 3

2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER SEPEDA'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS 5

3. SEPEDA'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF THE ERRONEOUS LAB FEE AND DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS 9

4. APPEAL COSTS SHOULD NOT BE IMPOSED. 12

D. CONCLUSION 14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Staats v. Brown
139 Wn.2d 757, 991 P.2d 615 (2000) 12

State v. Adamy
151 Wn. App. 583, 213 P.3d 627 (2009) 10

State v. Blazina
182 Wn.2d 827, 344 P.3d 680 (2015). 6, 7, 8, 10, 11, 13

State v. Diaz-Farias
191 Wn. App. 512, 362 P.3d 322 (2015) 5

State v. Gray
174 Wn.2d 920, 280 P.3d 1110 (2012) 4

State v. Kyllo
166 Wn.2d 856, 215 P.3d 177 (2009) 10

State v. Mahone
98 Wn. App. 342, 989 P.2d 583 (1999) 11

State v. Moon
124 Wn. App. 190, 100 P.3d 357 (2004) 4, 5

State v. Shaver
116 Wn. App. 375, 65 P.3d 688 (2003). 9

State v. Sinclair
192 Wn. App. 380, 367 P.3d 612 (2016) 12

State v. Smits
152 Wn. App. 514, 216 P.3d 1097 (2009) 6

TABLE OF AUTHORITIES

Page

State v. Stenson
132 Wn.2d 668, 940 P.2d 1239 (1997) 9

State v. Thomas
109 Wn.2d 222, 229, 743 P.2d 816 (1987 9

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 9

RULES, STATUTES AND OTHER AUTHORITIES

RAP 2.5 9

RAP 14 12

RAP 15.2 13

RCW 7.68.035 6

RCW 9.94A.760 ..... 5, 6

RCW 10.01.160 ..... 1, 5, 6, 7, 10, 11, 13

RCW 10.73.160 12

RCW 16.52.207 2

RCW 43.43.690 ..... 1, 4, 5, 6, 10, 13

RCW 43.43.754 3

RCW 43.43.7541 3

U.S. Const. Amend. VI 9

Const. art. I, § 22 9

A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority when it imposed a lab fee but no crime lab analysis was performed.

2. The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant's current and future ability to pay.

3. Defense counsel was ineffective for failing to object to the trial court's imposition of the erroneous lab fee and discretionary LFOs.

Issues Pertaining to Assignments of Error

1. Did the trial court exceed its statutory authority under RCW 43.43.690(1) when it imposed a lab fee, but no crime lab analysis was ever performed?

2. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering appellant's current and future ability to pay?

3. Was appellant's trial counsel ineffective for failing to object to the imposition of the erroneous lab fee and discretionary LFOs?

B. STATEMENT OF THE CASE

On February 19, 2015, the State charged Wendell Lynn Sepeda with one count of first degree animal cruelty. CP 1-5. The State alleged that on October 30, 2014, Sepeda intentionally and unlawfully inflicted substantial

pain or caused physical injury to Chilly the dog, by means causing undue suffering to the animal. CP 1.

Sepeda waived his right to a jury trial and proceeded to a bench trial on October 19, 2015. RP 6-8. Trial testimony established Sepeda lived with his then-girlfriend, Gina Mastandrea, and her two elderly Chihuahuas, Chico and Chilly. RP 31-34. On the evening of October 30, while Mastandrea was at work, Chilly defecated inside the house. RP 49, 290-93. Afraid of punishment, Chilly hid under the bed. RP 294-96. Sepeda reached for Chilly to comfort him and Chilly snapped at him. RP 296-98. Startled, Sepeda swatted Chilly with the back of his hand.[1] RP 296-300. Chilly suffered a spinal injury that left his legs partially paralyzed. RP 160-62. Chilly underwent surgery and is regaining mobility in his legs. RP 164-67. Sepeda admitted he hit Chilly, but he never intended to injure the dog and felt horrible about what happened. RP 300, 346-47.

The trial court concluded the State failed to establish beyond a reasonable doubt that Sepeda intentionally inflicted pain or injury on Chilly, and therefore failed to prove first degree animal cruelty. CP 28. However, the court found Sepeda guilty of second degree animal cruelty, a gross misdemeanor. CP 30-31; RCW 16.52.207(3). The court concluded Sepeda

[1] The type and force of this striking was in significant dispute at trial.

recklessly inflicted unnecessary suffering and pain upon Chilly after becoming angry with him for causing a mess inside the house. CP 30.

The trial court sentenced Sepeda to 364 days of imprisonment, suspended on the condition that he serve 45 days of work release and 12 months of unsupervised probation. CP 32-33. The court ordered Sepeda to pay a $500 victim assessment, $254 in court costs, and a $100 Washington State "lab fee," for a total of $854 in legal financial obligations (LFOs). CP 33; RP 458. The court also ordered Sepeda to pay restitution for Chilly's vet bills and ongoing treatment, in an amount to be determined at a later hearing. CP 33; RP 458. The court did not consider Sepeda's ability to pay discretionary LFOs at the sentencing hearing or enter any pertinent written findings. See RP 458; CP 32-34.

Sepeda filed a timely notice of appeal. CP 38.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY BY IMPOSING A CRIME LAB FEE WHERE NO CRIME LAB ANALYSIS WAS PERFORMED.

RCW 43.43.7541 mandates a $100 DNA collection fee for all felony offenses and certain misdemeanors: "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." Second degree animal cruelty is not one of the specified misdemeanors. See

RCW 43.43.754. The trial court correctly did not order the $100 DNA collection fee. CP 33-34.

However, the trial court did order a $100 Washington State "lab fee." CP 33; RP 458. RCW 43.43.690(1) mandates a $100 crime laboratory analysis fee "[w]hen an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory." (Emphasis added.) This statutory language is plain: a lab fee is allowed only when a crime lab analysis was performed in the case. State v. Gray, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012) ("If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end."); see also State v. Moon, 124 Wn. App. 190, 195, 100 P.3d 357 (2004) ("[S]tatutes authorizing costs are in derogation of common law and should be strictly construed.").

There was no crime lab analysis in this case—no DNA typing, fingerprint matching, or evidence of any other type of analysis performed by the Washington State Patrol Crime Laboratory. Sepeda admitted he struck Chilly and Chilly was injured as a result. RP 350-51. The only witnesses who testified for the State were Mastandrea, several private veterinarians, and Seattle Animal Control Officer Matthew Belue, who only observed Chilly and took a statement from Mastandrea. RP 31-34 (Mastandrea), 56-

57 (veterinarian Heather Hughes), 158 (veterinarian Sean Sanders), 199 (veterinarian Tabitha Fletcher), 222-26 (Officer Belue).

The trial court exceeded its statutory authority under RCW 43.43.690(1) by imposing a $100 lab fee where no crime lab analysis was performed. This Court should remand for the trial court to strike the erroneous $100 lab fee. See State v. Diaz-Farias, 191 Wn. App. 512, 528 & n.6, 362 P.3d 322 (2015) (remanding for the trial court to reconsider assessment of a crime lab fee where the State failed to present any evidence that a lab analysis was ever performed); cf. Moon, 124 Wn. App. at 195 (reversing imposition of crime lab fee where lab fee was associated only with a charge for which Moon was acquitted).

2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER SEPEDA'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The trial court imposed $254 in discretionary court costs.[2] CP 33; RCW 10.01.160(1), (2); RCW 9.94A.760; State v. Smits, 152 Wn. App. 514, 521-22, 216 P.3d 1097 (2009) (recognizing courts costs are discretionary). The trial court failed to make an individualized inquiry into Sepeda's present and future ability to pay before it imposed these discretionary LFOs. See CP 33; RP 456-59. In doing so, the court exceeded its statutory authority, and the discretionary LFO order should be vacated.

The Washington Supreme Court recently recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. at 837.

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[2] The court also imposed a mandatory $500 victim assessment, as well as the erroneous $100 lab fee. CP 33; RCW 7.68.035(1)(a) (mandating a $500 victim assessment in all felony and gross misdemeanor convictions); see also RCW 43.43.690(1) (allowing the court to suspend all or part of the crime lab fee "if it finds that the person does not have the ability to pay the fee").

The Blazina court thus held that RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. Blazina, 182 Wn.2d at 837-39. This requirement "means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. at 838. Instead, the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court further directed courts to look to GR 34 for guidance. Id. at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then "courts should seriously question that person's ability to pay LFOs." Id. at 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

At sentencing, the trial court failed to make an individualized inquiry into Sepeda's current or future ability to pay $254 in discretionary LFOs. The court said only, "I'm also ordering, um, the court costs, a victim's

penalty assessment, um, and the Washington State, uh, lab fee of $100." RP 458. The court did not even enter the written boilerplate finding of ability to pay. CP 33.

While the court suspended Sepeda's sentence and ordered him to serve 45 days on work release, the court did not determine how much income Sepeda's employment provided. See RP 458; CP 32-34. In fact, the court recognized Sepeda had been fired from his position in his band as a result of the conviction. RP 452-53, 458. Defense counsel also noted "work release is a huge financial burden for someone who does not make a lot of money. Um, it's very likely [Sepeda] would probably lose his apartment . . . because of the costs associated with that." RP 454.

The court also ordered Sepeda to pay restitution for Chilly's vet bills and ongoing treatment, "which is going to be significant." RP 458. Mastandrea told the court at sentencing that Chilly "needs special care every day. Um, the costs of the vet bills keep rising." RP 446. The court failed to consider the burden of this additional debt in ordering Sepeda to pay discretionary court costs. This Court should accordingly vacate the LFO order and remand for resentencing. Blazina, 182 Wn.2d at 838.

The State may ask this Court to decline review of the erroneous LFO order. The Blazina court held that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). 182 Wn.2d at 834. The

court nevertheless concluded that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Id. Asking this Court to decline review would essentially ask this Court to ignore the serious consequences of LFOs. This Court should instead confront the issue head on by vacating Sepeda's discretionary LFOs and remanding for resentencing.

3. SEPEDA'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF THE ERRONEOUS LAB FEE AND DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable

probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to the erroneous lab fee and the discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court comply with the requirements of RCW 10.01.160(3) and RCW 43.43.690(1). See, e.g., State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law).

Sepeda was sentenced on November 24, 2015, over eight months after the supreme court's decision in Blazina. Defense counsel was accordingly on notice that the trial court was required to consider Sepeda's ability to pay discretionary LFOs. Defense counsel was also on notice that Blazina gives appellate courts discretion to decline to consider imposition of discretionary LFOs where defense counsel fails to object at sentencing. Likewise, RCW 43.43.690(1) plainly allows for a $100 lab fee only in cases where a crime lab analysis was performed, and none was performed here. Given the clear case law and statutory mandates, counsel's failure to object constitutes deficient performance.

Counsel's failure to object to the erroneous lab fee and discretionary LFOs was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in a remission hearing to set aside LFOs, Sepeda will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160(4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Sepeda incurs no possible benefit from LFOs. Given Sepeda's indigency and significant restitution debt, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Sepeda's current and future ability to pay. CP 36-37 (order of indigency). And the trial court certainly would have not imposed the crime lab fee had defense counsel objected, because it was not authorized by statute in this case.

Sepeda's constitutional right to effective assistance of counsel was violated. This Court should also vacate the LFO order and remand for resentencing on this alternative basis.

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Sepeda does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. See State v. Sinclair, 192 Wn. App. 380, 387-94, 367 P.3d 612 (2016) (exercising discretion and denying State's request for appellate costs).

As discussed above, Sepeda's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. The trial court did, however, enter an order of indigency, finding Sepeda was "entitled to counsel for appellate review wholly at the public's expense" because he "lacks the sufficient funds necessary to prosecute an appeal." CP 36. Sepeda reported zero real or personal property. Supp. CP__ (Sub. No. 54, Motion for Order of Indigency). He earns only $875 a month after taxes from employment, disability payments, social security, or other income sources. Supp. CP__ (Sub. No. 54). This small amount of income is no doubt consumed by Sepeda's housing and sustenance needs, along with the significant restitution he will have to pay in this case.

Imposition of appellate costs is particularly inappropriate in this case because Sepeda has raised meritorious issues on appeal: the trial court did not comply with the plain language of RCW 43.43.690(1) before imposing the lab fee or the mandate of RCW 10.01.160(3) before imposing discretionary LFOs. Whether Sepeda substantially prevails on appeal, though, depends on this Court's exercise of its discretion under Blazina, 182 Wn.2d at 834-35. This Court should therefore not impose appellate costs even if it declines review of the LFO order.

Finally, there has been no order finding Sepeda's financial condition has improved or is likely to improve. Indeed, it will likely only worsen once the restitution order is entered. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must presume Sepeda remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For all these reasons, this Court should not assess appellate costs against Sepeda in the event he does not substantially prevail on appeal.

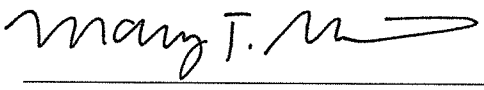
D. CONCLUSION

This Court should vacate the LFO order and remand for resentencing.

DATED this 25th day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 74325-2-I
	)	
WENDELL SEPEDA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF APRIL, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WENDELL SEPEDA
9632 AURORA AVENUE N. #33
SEATTLE, WA 98103

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF APRIL, 2016.

x Patrick Mayovsky