

NO. 35209-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

BRETT EAGLE TRACY,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
07 MAR -7 AM 11:22
STATE OF WASHINGTON
BY [Signature]

BRIEF OF RESPONDENT

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 ORIGINAL

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STATEMENT OF THE CASE

Respondent accepts appellant's statement of the case.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE RAP 2.2(b) DOES NOT GRANT THE STATE THE RIGHT TO SEEK REVIEW OF A SENTENCE IMPOSED WITHIN THE STANDARD RANGE.

Rule 2.2(b) of the Rules of Appellate Procedure sets out those instances in which the state has an appeal as of right in a criminal case.

This rule states:

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) Final Decision, Except Not Guilty. A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

(4) New Trial. An order granting a new trial.

(5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding which is below the standard range of disposition for the offense or which the state or local government believes involves a miscalculation of the standard range.

(6) Sentence in Criminal Case. A sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the

standard range.

RAP 2.2(b).

As the introductory section in part (b) indicates, in criminal cases the state may “only” appeal under one of the six listed circumstances. For example, in *State v. Williams*, 112 Wn.App. 171, 48 P.3d 354 (2002), the state appealed from the trial court’s decision to grant the defendant a DOSA sentence arguing that the defendant did not qualify under the applicable statute, thus making the case appealable under RAP 2.2(b)(6). The defense moved to dismiss, arguing that DOSA sentences are imposed within the standard range, thus precluding the state from seeking appellate review of the sentence. The court of appeals agreed, noting as follows:

RAP 2.2(b) limits the State’s criminal appeal rights to specified circumstances. Regarding sentencing, the State may appeal: “A sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the standard range.” RAP 2.2(b)(6). Under RCW 9.94A.660, a DOSA sentence is split evenly between incarceration and community custody based upon the mid-point of the total standard range. Here, the trial court adopted the standard range proposed by the State. Under these circumstances, the State cannot rely on RAP 2.2(b) to support a direct appeal. As discussed, a DOSA sentence is always within the standard range because it is always based upon the mid-point of the standard range.

State v. Williams, 112 Wn.App. at 176-177.

While the court refused to hear the case under RCW 2.2(b), the court did agree to hear the case as a discretionary appeal. The court stated:

BRIEF OF RESPONDENT - 3

Given the above, we hold for the first time that a dispute regarding a defendant's eligibility for DOSA is not properly reviewed under RAP 2.2(b)(6). "Although the State does not have the right to appeal the order dismissing its petition, its notice of appeal may be given the same effect as a notice for discretionary review." *In re Welfare of Watson*, 23 Wn.App. 21, 23, 594 P.2d 947 (1979) (citing RAP 5.1(c)). Accordingly, we may consider this matter solely under the discretionary standards found in RAP 2.3.

State v. Williams, 112 Wn.App. at 177.

The sixth basis under RAP 2.2(b) for allowing the state to appeal in a criminal case provides as follows:

(6) Sentence in Criminal Case. A sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the standard range.

RAP 2.2(b)(6).

This is the only section under RAP 2.2(b) in which the state may appeal from a sentence imposed by the trial court. Since RAP 2.2(b) sets out the exclusive bases for allowing the state to appeal, the state's only right to appeal from a sentence in a criminal case comes from this subsection. Thus, unless RAP 2.2(6) allows the state to appeal from the assessment of costs or fees or the failure to assess costs or fees then no such appeal is allowed.

Turning to the text of RAP 2.2(b)(6), the only type of sentence in a criminal case that the state may appeal is a sentence "outside the standard range" or one in which the state argues that the trial court miscalculated

the standard range. In the case at bar, the trial court imposed a sentence of three months in jail upon a standard range of three to eight months. The state did not argue that this was a sentence outside the standard range and the state did not argue that the trial court miscalculated the standard range. Thus, under RAP 2.2(b)(6) the state does not have review as of right and this court should dismiss the instant appeal.

II. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO IMPOSE A CRIME-VICTIM ASSESSMENT AGAINST A PERSON WITH NO PRESENT OR FUTURE ABILITY TO PAY.

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court 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).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations, and any punishment

for failure to pay, must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

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 defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v.*

Oregon, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar, the record reveals that the trial court was convinced that the defendant has no present or future ability to pay his legal-financial

obligations, including a crime-victim's compensation fund assessment.

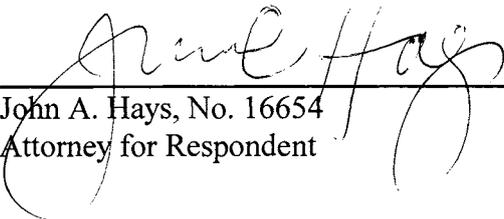
With such a factual finding both RCW 10.01.160 and the equal protection provisions in Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment give the court authority to not impose the crime victim compensation fund assessment. As a result, the trial court in this case did not err when it decided to refrain from imposing the crime victim assessment. Even were the record insufficient to allow this court to infer the trial court's factual finding that the defendant did not have either the present or future ability to pay, the fact is that such a finding would be sufficient to legally justify the trial court's actions. In this alternative, the defendant argues that this court should remand for entry of findings by the trial court on this issue.

CONCLUSION

The instant appeal should be dismissed because RAP 2.2(b) does not grant the state an appeal as of right. In the alternative, the court should either affirm the decision of the trial court or remand the case for entry of findings in support of the decision of the trial court to refrain from imposing the crime victim's assessment.

DATED this 5th day of March, 2007.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 12**

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 10.68.035

(1)(a) When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. 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 and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

(b) When any juvenile is adjudicated of any offense in any juvenile offense disposition under Title 13 RCW, except as provided in subsection (2) of this section, there shall be imposed upon the juvenile offender a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be one hundred dollars for each case or cause of action that includes one or more adjudications for a felony or gross misdemeanor and seventy-five dollars for each case or cause of action that includes adjudications of only one or more misdemeanors.

(2) The assessment imposed by subsection (1) of this section shall not apply to motor vehicle crimes defined in Title 46 RCW except those defined in the following sections: RCW 46.61.520, 46.61.522, 46.61.024, 46.52.090, 46.70.140, 46.61.502, 46.61.504, 46.52.101, 46.20.410, 46.52.020, 46.10.130, 46.09.130, 46.61.5249, 46.61.525, 46.61.685, 46.61.530, 46.61.500, 46.61.015, 46.52.010, 46.44.180, 46.10.090(2), and 46.09.120(2).

(3) When any person accused of having committed a crime posts bail in superior court pursuant to the provisions of chapter 10.19 RCW and such bail is forfeited, there shall be deducted from the proceeds of such forfeited bail a penalty assessment, in addition to any other penalty or fine imposed by law, equal to the assessment which would be applicable under subsection (1) of this section if the person had been convicted of the crime.

(4) Such penalty assessments shall be paid by the clerk of the superior court to the county treasurer who shall monthly transmit the money as provided in RCW 10.82.070. Each county shall deposit fifty percent of the money it receives per case or cause of action under subsection (1) of this section and retains under RCW 10.82.070, not less than one and seventy-five one-hundredths percent of the remaining money it retains under RCW

10.82.070 and the money it retains under chapter 3.62 RCW, and all money it receives under subsection (7) of this section into a fund maintained exclusively for the support of comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes. A program shall be considered "comprehensive" only after approval of the department upon application by the county prosecuting attorney. The department shall approve as comprehensive only programs which:

(a) Provide comprehensive services to victims and witnesses of all types of crime with particular emphasis on serious crimes against persons and property. It is the intent of the legislature to make funds available only to programs which do not restrict services to victims or witnesses of a particular type or types of crime and that such funds supplement, not supplant, existing local funding levels;

(b) Are administered by the county prosecuting attorney either directly through the prosecuting attorney's office or by contract between the county and agencies providing services to victims of crime;

(c) Make a reasonable effort to inform the known victim or his surviving dependents of the existence of this chapter and the procedure for making application for benefits;

(d) Assist victims in the restitution and adjudication process; and

(e) Assist victims of violent crimes in the preparation and presentation of their claims to the department of labor and industries under this chapter.

Before a program in any county west of the Cascade mountains is submitted to the department for approval, it shall be submitted for review and comment to each city within the county with a population of more than one hundred fifty thousand. The department will consider if the county's proposed comprehensive plan meets the needs of crime victims in cases adjudicated in municipal, district or superior courts and of crime victims located within the city and county.

(5) Upon submission to the department of a letter of intent to adopt a comprehensive program, the prosecuting attorney shall retain the money deposited by the county under subsection (4) of this section until such time as the county prosecuting attorney has obtained approval of a program from the department. Approval of the comprehensive plan by the department must

be obtained within one year of the date of the letter of intent to adopt a comprehensive program. The county prosecuting attorney shall not make any expenditures from the money deposited under subsection (4) of this section until approval of a comprehensive plan by the department. If a county prosecuting attorney has failed to obtain approval of a program from the department under subsection (4) of this section or failed to obtain approval of a comprehensive program within one year after submission of a letter of intent under this section, the county treasurer shall monthly transmit one hundred percent of the money deposited by the county under subsection (4) of this section to the state treasurer for deposit in the public safety and education account established under RCW 43.08.250.

(6) County prosecuting attorneys are responsible to make every reasonable effort to insure that the penalty assessments of this chapter are imposed and collected.

(7) Every city and town shall transmit monthly one and seventy-five one-hundredths percent of all money, other than money received for parking infractions, retained under RCW 3.46.120, 3.50.100, and 35.20.220 to the county treasurer for deposit as provided in subsection (4) of this section.

RCW 10.01.160

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of

incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RAP 2.2(b)

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) Final Decision, Except Not Guilty. A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside,

quashing, or dismissing an indictment or information.

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(c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo and the final judgment is not a finding that a traffic infraction has been committed.

(d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment which does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

07 MAR -7 AM 11: 22

STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,)

Appellant ,)

vs.)

BRETT E. TRACY,
Respondent.)

NO. 06-1-00623-0
COURT OF APPEALS NO:
35209-5-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

COUNTY OF COWLITZ)

ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 5TH day of MARCH, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTORNEY
312 S.W. 1ST STREET
KELSO, WA 98626

BRETT E. TRACY
C/O BARBARA TRACY
4001 JAMES DRIVE
ANCHORAGE, AK 99504

and that said envelope contained the following:

- 1. BRIEF OF RESPONDENT
- 2. AFFIDAVIT OF MAILING

DATED this 5TH day of MARCH, 2007.

[Signature]
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 5th day of MARCH, 2007.



[Signature]
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09

AFFIDAVIT OF MAILING - 1

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