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COURT OF APPEALS  
DIVISION TWO

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STATE OF WASHINGTON

No. 40763-9-II

BY Cm  
COURT REPORTER

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WAYNE BROOKS,

Appellant.

---

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

The Honorable James Warme

---

BRIEF OF APPELLANT

---

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COURT REPORTER

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 2

D. ARGUMENT ..... 4

    1.    THERE WAS INSUFFICIENT EVIDENCE  
          PRESENTED THAT MR. BROOKS ENTERED  
          A “DWELLING” ..... 4

        a.    The State bears the burden of proving each of the  
              essential elements of the charged offense beyond a  
              reasonable doubt. .... 4

        b.    The building was not a “dwelling” as that term is  
              defined by statute..... 5

        c.    This Court must reverse and remand with  
              instructions to dismiss the convictions. .... 7

    2.    DEFENSE COUNSEL RENDERED  
          CONSTITUTIONALLY DEFECTIVE  
          REPRESENTATION WHEN HE FAILED TO  
          SEEK A LESSER DEGREE INSTRUCTION  
          FOR SECOND DEGREE BURGLARY ..... 7

        a.    Mr. Brooks had the right to the effective assistance  
              of counsel..... 7

        b.    Mr. Brook’s trial counsel rendered ineffective  
              assistance of counsel by failing to seek a lesser  
              degree instruction for second degree burglary..... 9

        c.    Mr. Brooks suffered prejudice from counsel’s  
              failure to seek a lesser degree instruction..... 10

3. THE TRIAL COURT EXCEEDED ITS  
STAUTORY AUTHORITY AND VIOLATED  
MR. BROOKS' RIGHT TO EQUAL  
PROTECTION IN IMPOSING COURT COSTS  
AND ATTORNEY'S FEES IN LIGHT OF HIS  
INABILITY TO PAY ..... 12

a. The court may impose court costs and fees only  
after a finding of an ability to pay. .... 12

b. The court's "finding" that Mr. Brooks had the ability  
to pay was clearly erroneous in light of evidence he  
completely lacked any ability to repay ..... 14

c. Imposition of the costs was not mandatory and  
was subject to suspension due to indigency. .... 15

d. The imposition of recoupment for attorney's fees  
was erroneous because Mr. Brooks did not have a  
present ability to pay nor was there any indication his  
indigency would end. .... 16

E. CONCLUSION ..... 18

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV ..... 4

U.S. Const. amend. VI..... 7, 8

FEDERAL CASES

*Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63  
S.Ct. 236, 87 L.Ed.2d 268 (1942) ..... 8

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147  
L.Ed.2d 435 (2000) ..... 4

*Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530  
(1972) ..... 8

*Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1  
(1978) ..... 7

*Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642  
(1974) ..... 17

*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799  
(1963) ..... 7

*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368  
(1970) ..... 4

*Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560  
(1979) ..... 4

*McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d  
763 (1970) ..... 8

*Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158  
(1932) ..... 7

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80  
L.Ed.2d 674 (1984) ..... 8, 11

WASHINGTON CASES

*Brunson v. Pierce County*, 149 Wn.App. 855, 205 P.3d 963  
(2009) ..... 16

*State v. Baldwin*, 63 Wn.App. 303, 818 P.2d 1116 (1991) ..... 14

*State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1977) ..... 17

*State v. Bergeson*, 64 Wn.App. 366, 824 P.2d 515 (1992), *review denied*, 128 Wn.2d 1009 (1996) ..... 10

*State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996)..... 7

*State v. Curry*, 62 Wn.App. 676, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992)..... 13

*State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150  
(2000) ..... 10

*State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979) ..... 9

*State v. Ieremia*, 78 Wn.App. 746, 899 P.2d 16 (1995) ..... 10

*State v. J.P.*, 130 Wn.App. 887, 125 P.3d 215 (2005)..... 5

*State v. McDonald*, 123 Wn.App. 85, 96 P.3d 468 (2004)..... 5, 6, 9

*State v. Nolan*, 98 Wn.App. 75, 988 P.2d 473 (1999)..... 12

*State v. Pettitt*, 93 Wn.2d 288, 609 P.2d 1364 (1980) ..... 16

*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992)..... 5

*State v. Stinton*, 121 Wn.App. 569, 89 P.3d 717 (2004)..... 5

*State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998)..... 9

*State v. Thompson*, 153 Wn.App. 325, 223 P.3d 1165 (2009) ..... 13

OTHER STATE CASES

*Hargett v. State*, 534 S.W.2d 909 (Tex.Crim.App.1976)..... 5

*Rash v. Commonwealth*, 9 Va.App. 22, 383 S.E.2d 749, 751-52  
(1989) ..... 6

*State v. Black*, 627 So.2d 741 (La.App.1993)..... 5

STATUTES

RCW 10.01.160..... 12, 13

RCW 9.94A.753 ..... 14

RCW 9.94A.760 ..... 15

RCW 9A.04.110 ..... 5

RCW 9A.52.010 ..... 5

RCW 9A.52.025 ..... 5, 11

RCW 9A.52.030 ..... 11

OTHER AUTHORITIES

13 Am.Jur. Burglary..... 6

20 A.L.R.4th 349 (1983)..... 6

A. ASSIGNMENTS OF ERROR

1. The State failed to prove the house Mr. Brooks entered was a dwelling.

2. Mr. Brooks was denied his constitutionally protected right to the effective assistance of counsel.

3. The trial court's decision imposing recoupment of attorney's fees and other non-mandatory fees violated Mr. Brooks' right to equal protection as there was no evidence that he had the present ability to pay and there was no evidence this inability to pay would end.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove each essential element of the charged offense beyond a reasonable doubt. Whether the building was a dwelling is an element of residential burglary. Where the house had not been lived in by anyone in over three years and was not occupied at the time Mr. Brooks entered it, did the State fail to prove the house was a dwelling, thus entitling Mr. Brooks to reversal of his conviction and dismissal?

2. A defendant has a constitutionally protected right under the United States and Washington Constitutions to counsel and to the effective representation of counsel. A defendant is entitled to a

new trial where he can establish his attorney performed deficiently and that he was prejudiced by the ineffective representation. Here, where Mr. Brooks was charged with residential burglary, counsel failed to seek a jury instruction for the lesser degree offense of second degree burglary despite the fact there was evidence the house Mr. Brooks was charged with entering was not a dwelling. Is Mr. Brooks entitled to reversal and remand for a new trial?

3. A trial court violates a defendant's constitutionally protected right to equal protection when it imposes recoupment for costs of court appointed counsel where it fails to determine the ability of the defendant to pay and whether any claim of indigency will be remedied in the near future. The court here imposed recoupment despite a lack of evidence of Mr. Brooks' ability to pay. The court also ignored evidence that Mr. Brooks' indigency would not end soon. Did the trial court violate Mr. Brooks' right to equal protection when it imposed substantial costs?

#### C. STATEMENT OF THE CASE

Dennis Wayne Brooks was charged with residential burglary. CP 5-6. Regarding the state of the house Mr. Brooks entered, Cowlitz County Deputy Cory Robinson's testimony established:

The house seemed to have been left in the state it was for a while. There were overgrown plants and things. There was maybe bats or something or some feces on the wall and some food that was kind of rotten. But, it seemed like the house there, there hadn't been someone living there for some amount of time.

...

The front door of the house was – it was pretty overgrown at the very front. You actually had to go through brush to get to the front door. The front door was locked and there was cobwebs on the door so it looked like it hadn't been accessed for quite a while.

RP 79-80.

The last resident of the house, Elaine Shepard, testified she lived in the house until 2007, two years before Mr. Brooks entered the house and three years before trial. RP 119. No one had lived in the house after Ms. Shepard left. Nevertheless, following a jury trial, Mr. Brooks was convicted as charged.

Mr. Brooks testified at trial that at the time of his arrest, his driver's license was suspended because he had failed to pay fines imposed for a felony conviction by the Clark County Superior Court. RP 144, 155. At sentencing, the trial court checked the box on the preprinted form indicating it found Mr. Brooks had the present or future ability to pay any legal financial obligations. CP 38. The court went on to impose \$1800 for recoupment of attorney's fees, \$1000 VUCSA fine, \$500 drug fund contribution, \$100 DNA

collection fee, \$200 filing fee, \$500 crime victim fee, \$104 Sheriff service fee, and \$100 lab fee. CP 41; RP 161. The court set Mr. Brooks' minimum payment when he was released from prison at \$25 a month. CP 42; RP 161-62.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE PRESENTED THAT MR. BROOKS ENTERED A "DWELLING"

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. Due process requires the State prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can

be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In order to establish that Mr. Brooks committed residential burglary, the State had to prove: (1) that he entered or remained unlawfully in a dwelling, and (2) that he intended to commit a crime against a person or property therein. RCW 9A.52.025; *State v. Stinton*, 121 Wn.App. 569, 573, 89 P.3d 717 (2004). A person enters or remains unlawfully if he does so without license, invitation, or privilege. RCW 9A.52.010(3); *State v. J.P.*, 130 Wn.App. 887, 892, 125 P.3d 215 (2005).

b. The building was not a “dwelling” as that term is defined by statute. RCW 9A.04.110(7) defines a “dwelling” as “any building or structure . . . which is used or ordinarily used by a person for lodging.” *State v. McDonald*, 123 Wn.App. 85, 90, 96 P.3d 468 (2004). In determining whether a building is a dwelling, the *McDonald* court adopted factors found important by other courts:

*State v. Black*, 627 So.2d 741, 745 (La.App.1993) (“To determine whether the house was ‘lived in’ ... it is proper to consider whether the occupant deemed the house to be her place of abode and whether she treated it as such.”); *Hargett v. State*, 534 S.W.2d 909, 911 (Tex.Crim.App.1976) (where building was furnished and rented out periodically, it was

inhabited); *Rash v. Commonwealth*, 9 Va.App. 22, 383 S.E.2d 749, 751-52 (1989) (occupant's intent to return is a factor in determining if building is a dwelling); see also *Occupant's absence from residential structure as affecting nature of offense as burglary or breaking and entering*, 20 A.L.R.4th 349, § 11 (1983); 13 Am.Jur. Burglary § 6 ("In determining whether a structure is a dwelling, the courts consider numerous factors such as ... whether the structure is 'usually occupied' by a person lodging there at night ... whether it is 'maintained' as a dwelling ... [and] how long it was vacant.") (citations omitted).

*McDonald*, 123 Wn.App. at 91, fn. 18.

Considering these factors, the building here was not a dwelling.

The house may have been a dwelling at one time, but was no longer a dwelling and was merely a building when Mr. Brooks and Mr. Petersen entered. The testimony of Deputy Robinson and Ms. Shepard established the house had not been lived in for several years and had not been maintained in the interim. RP 79-80, 119. The plants had overgrown the house and cobwebs had gathered across the front door. *Id.* The State failed to prove the house was a dwelling, thus failing to prove that Mr. Brooks was guilty of residential burglary.

c. This Court must reverse and remand with instructions to dismiss the convictions. Since there was insufficient evidence to support Mr. Brooks' conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

2. DEFENSE COUNSEL RENDERED  
CONSTITUTIONALLY DEFECTIVE  
REPRESENTATION WHEN HE FAILED TO  
SEEK A LESSER DEGREE INSTRUCTION  
FOR SECOND DEGREE BURGLARY

a. Mr. Brooks had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment right to counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the

prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687.

b. Mr. Brook's trial counsel rendered ineffective assistance of counsel by failing to seek a lesser degree instruction for second degree burglary. Defense counsel here failed in his constitutional duty to Mr. Brooks when he failed to seek a lesser degree instruction for second degree burglary in light of the fact the evidence established both the legal and factual requirements for a lesser degree instruction.

To obtain a lesser degree instruction, the proponent of an instruction must satisfy both a legal requirement and a factual requirement. *State v. Tamalini*, 134 Wn.2d 725, 728, 732, 953 P.2d 450 (1998). To satisfy the legal requirement, it must be shown that the proposed instruction describes an offense that is an inferior degree of the charged offense. *Tamalini*, 134 Wn.2d at 732; *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979). Second degree burglary is an inferior degree of residential burglary. *McDonald*, 123 Wn.App. at 90. Thus, the legal requirement was satisfied here.

To satisfy the factual requirement, the defendant must show that when the evidence is viewed in the light most favorable to him, the jury could find that even though he is not guilty of the charged offense, he is guilty of the inferior or lesser offense embodied in the

proposed instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (“When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.”); *State v. Ieremia*, 78 Wn.App. 746, 755, 899 P.2d 16 (1995) (evidence must support inference that defendant committed the lesser offense “instead of” the charged offense), *citing State v. Bergeson*, 64 Wn.App. 366, 369, 824 P.2d 515 (1992), *review denied*, 128 Wn.2d 1009 (1996).

Taking the evidence in the light most favorable to Mr. Brooks, the jury could have found that no one was living in Mr. Huber’s house from 2007, until May 2010, and thus that the house was not being “used or ordinarily used by a person for lodging” on July 1 through 5, 2009. Mr. Brooks satisfied the factual requirement as well the legal one. Mr. Brooks’ attorney rendered constitutionally deficient representation.

c. Mr. Brooks suffered prejudice from counsel’s failure to seek a lesser degree instruction. In order to establish prejudice, Mr. Brooks “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of

the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* The defendant is not required to establish his innocence or even demonstrate “that counsel's deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. In order to establish prejudice, Mr. Brooks need only show that had defense counsel sought a lesser degree instruction for second degree burglary discussed above, there is a reasonable probability that the jury's verdict would have been different. *Id.* at 694.

Had the jury been instructed, the jury could have rendered a verdict that Mr. Brooks was only guilty of second degree burglary, which is not only a lesser degree of residential burglary but a less serious offense. *Compare* RCW 9A.52.025(2) and RCW 9A.52.030(2) (while both offenses are class B offenses, “[i]n establishing sentencing guidelines and disposition standards, the sentencing guidelines commission and the juvenile disposition standards commission shall consider residential burglary as a more serious offense than second degree burglary.”).

Further, the sentencing consequences to Mr. Brooks were substantial. His standard range for residential burglary was 63 to

84 months. The court sentenced Mr. Brooks to low end of 63 months. The standard range for second degree burglary was 51 to 68 months, thus had the court followed through and sentenced Mr. Brooks at the low end of the standard range, Mr. Brooks would have saved a full year.

Mr. Brooks received ineffective assistance of counsel which prejudiced him. Mr. Brooks is entitled to reversal of his conviction and remand for a new trial.

3. THE TRIAL COURT EXCEEDED ITS  
STATUTORY AUTHORITY AND VIOLATED  
MR. BROOKS' RIGHT TO EQUAL  
PROTECTION IN IMPOSING COURT COSTS  
AND ATTORNEY'S FEES IN LIGHT OF HIS  
INABILITY TO PAY

a. The court may impose court costs and fees only after a finding of an ability to pay. The allowance and recovery of costs is entirely statutory. *State v. Nolan*, 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160 (1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160 (3) states that the sentencing court cannot order a defendant to pay court costs “unless the defendant is or will be able to pay them.” In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs. RCW 10.01.160(3) provides:

The court shall not order 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.

While neither the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs, *State v. Curry*, 62 Wn.App. 676, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992), the trial court here purported to make a finding of an ability to pay.

Only the victim assessment and DNA collection fee were mandatory fees that could not be waived. *Curry*, 118 Wn.2d at 917 (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

b. The court's "finding" that Mr. Brooks had the ability to pay was clearly erroneous in light of evidence he completely lacked any ability to repay. The court here imposed both costs and recoupment for attorney's fees following a "finding" that Mr. Brooks had the ability to pay. In fact, the evidence before the court showed the exact opposite; Mr. Brooks had no ability to pay.

The 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. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991). While the trial court is not required to make express findings as to the ability to pay, the court here did. The court checked the box next to the portion speaking to the defendant's ability to pay. CP 38. As a result, the court here found:

The court has considered the total amount owing, the defendant's past, present, and future ability to pay financial legal obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 38. While the court was not *required* to make an on-the-record finding of an ability to pay, since the court *did* make an express

finding, that finding is before this Court, and is reviewed as to whether that finding was clearly erroneous.

At the time of his arraignment, it was determined Mr. Brooks was indigent, unable to contribute to his defense, and as a result, was appointed an attorney to represent him. Nevertheless, at sentencing, contrary to the evidence before it regarding Mr. Brooks' indigency, the court imposed costs and fees totaling \$4334, and ordered him to make minimum payments of \$25 per month to begin upon his completion of his 63 month sentence. But, in light of the evidence that Mr. Brooks had no ability to pay these costs nor would he have the ability to pay in the future, the court's "finding" was clearly erroneous.

c. Imposition of the costs was not mandatory and was subject to suspension due to indigency. Only the victim penalty assessment and DNA fee were mandatory; all other costs were discretionary based upon the defendant's indigency. See RCW 9.94A.760(1) ("the court *may* order the payment of legal financial obligation . . ."); RCW 43.43.690(1) ("the court *may* suspend payment of all or part of the [crime laboratory] fee) (emphasis added).

Under the plain language of these statutes, the court possessed the discretion to waive the \$1830 recoupment fee for court appointed counsel; the \$1000 fine, the \$500 drug enforcement fund fee, and the \$100 crime lab fee. Yet, the court appeared to treat these costs and fees as mandatory.

The “[f]ailure to exercise discretion is an abuse of discretion.” *Brunson v. Pierce County*, 149 Wn.App. 855, 861, 205 P.3d 963 (2009), *citing State v. Pettitt*, 93 Wn.2d 288, 295-96, 609 P.2d 1364 (1980). The trial court here failed to exercise its discretion and waive these burdensome fees and costs.

d. The imposition of recoupment for attorney’s fees was erroneous because Mr. Brooks did not have a present ability to pay nor was there any indication his indigency would end. The court ordered Mr. Brooks to pay \$1830 for “[f]ees for court appointed attorney.” CP 41. Imposition of this fee where the evidence before the court showed Mr. Brooks lacked the ability to pay and there were no indicators showing this inability would end in the near future violated Mr. Brooks’ right to equal protection.

When imposing recoupment for attorney’s fees, certain factors must be considered or imposition of recoupment violates equal protection, including whether defendant “is or Will be able to

pay.” *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1977),  
citing *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642  
(1974). The court must also take into account the financial  
resources of the defendant and the nature of the burden that  
payment of costs will impose, and the court cannot require  
repayment if it appears that there is no likelihood that defendant's  
indigency will end. *Id.*

The court’s “finding” here ignored that there was no evidence  
presented that Mr. Brooks had any ability to pay the costs. Further,  
by requiring him to pay \$25 per month, the debt created by  
imposition of these costs, the court guaranteed that Mr. Brooks will  
never pay off the debt entirely. In addition, while Mr. Brooks had no  
ability to pay before being convicted, his ability to earn money  
would be further diminished by the felony conviction which  
stigmatizes him in the job market and quashes any ability he had to  
remedy his present indigency. Thus, the evidence failed to  
establish that Mr. Brooks had the ability to pay, and there was a  
complete lack of evidence that he would have an ability to pay  
anywhere in the near future. The court’s imposition of the  
attorney’s fees recoupment violated Mr. Brooks’ right to equal  
protection.

E. CONCLUSION

For the reasons stated, Mr. Brooks submits this Court must reverse his conviction with instructions to dismiss or remand for a new trial. Mr. Brooks also requests this Court reverse the trial court's imposition of costs and fees and remand for a determination of the trial court to waive the costs and fees in light of his inability to pay.

DATED this 13th day of October 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)  
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Washington Appellate Project – 91052  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
Respondent,	)	COA NO. 40763-9-II
	)	
v.	)	
	)	
DENNIS BROOKS,	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

1. THAT ON THE 13TH DAY OF OCTOBER, 2010, A COPY OF **BRIEF OF APPELLANT** WAS SERVED ON THE PARTIES BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

Susan Irene Baur  
Cowlitz Co. Prosecutor's Office  
312 SW 1st Ave  
Kelso WA 98626-1799

Dennis Brooks  
799413  
Airway Heights Correction Center  
P.O. Box 2049  
Airway Heights, WA 99001-2049

FILED  
COURT OF APPEALS  
DIVISION II  
10 OCT 15 PM 12:57  
STATE OF WASHINGTON  
BY Ann Joyce  
DEPUTY

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF OCTOBER, 2010

X. Ann Joyce