

No. 45328-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeremy McCracken,

Appellant.

Grays Harbor County Superior Court Cause No. 13-1-00154-6

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. McCracken's conviction was entered in violation of his Fifth and Fourteenth Amendment privilege against self-incrimination.
2. Mr. McCracken's conviction was entered in violation of his Fourteenth Amendment right to due process.
3. The prosecutor unconstitutionally commented on Mr. McCracken's right to remain silent by eliciting testimony that he stopped answering questions during custodial interrogation.
4. Deputy Wilson unconstitutionally commented on Mr. McCracken's right to remain silent by testifying that he stopped answering questions during custodial interrogation.
5. The trial court erred by adopting Finding of Fact No. 5 (CrR 3.5).
6. The trial court erred by concluding that Mr. McCracken's "statements" "are admissible for use" at trial, to the extent the word "statements" encompasses Mr. McCracken's invocation of his right to remain silent.

ISSUE 1: An accused person may stop answering questions at any time during custodial interrogation, and the decision not to cooperate may not be used as evidence of guilt at trial. Here, the state introduced testimony that Mr. McCracken stopped answering questions during custodial interrogation following administration of *Miranda* warnings. Did the prosecutor infringe Mr. McCracken's Fifth and Fourteenth Amendment privilege against self incrimination?

7. Mr. McCracken was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Defense counsel provided ineffective assistance by failing to object to comments on Mr. McCracken's exercise of his right to remain silent.

ISSUE 2: An accused person is guaranteed the effective assistance of counsel. Here, defense counsel unreasonably failed to object to Deputy Wilson's comments on Mr. McCracken's decision to stop answering questions during custodial interrogation. Did counsel's deficient performance

prejudice Mr. McCracken in violation of his Sixth and Fourteenth Amendment right to counsel?

9. The trial court erred by imposing attorney fees.
10. The trial court's imposition of attorney's fees infringed Mr. McCracken's Sixth and Fourteenth Amendment right to counsel.
11. The court erred by ordering payment of attorney fees without finding that Mr. McCracken has the present or future ability to pay his legal financial obligations.
12. The trial court lacked statutory authority to impose attorney fees.

ISSUE 6: A trial court may only impose attorney fees after finding that the offender has the present or likely future ability to pay. Here, the court imposed \$500 in attorney fees but failed to conduct any inquiry into whether Mr. McCracken could afford to pay the amount. Did the trial court violate Mr. McCracken's Sixth and Fourteenth Amendment right to counsel?

ISSUE 7: A court exceeds its authority by ordering payment of legal financial obligations beyond what is permitted by statute. The court ordered Mr. McCracken to pay \$500 in attorney fees despite the absence of any statute authorizing imposition of such costs. Did the sentencing court exceed its authority?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Spring of 2013 was a very hard time for Jeremy McCracken. He became injured in a car accident, several people attacked him, and a car fell on his arm. RP¹ 86, 91.

To make matters worse, the state filed an action to place his daughter in foster care. RP 66. Mr. McCracken appeared in court with his arm in a brace and on pain medication. RP 33, 38, 63. Mr. McCracken became upset as the judge explained his ruling, which was that the child should be placed outside of the home. He spoke while the judge spoke, even after being admonished. RP 47, 66.

Judge Edwards told Mr. McCracken that he was being held in contempt, and the courtroom security officers moved to arrest him. RP 47, 60. Mr. McCracken got up, asked why no one was helping him -- including his parents who were in the courtroom, and walked toward the back of the courtroom. RP 48, 89, 92. Haller, the security officer by the door, moved to stop him from leaving the room. RP 48, 60.

What happened next was the subject of disagreement. Mr. McCracken said he turned and ran into the guard who he didn't see

¹ Most of the transcripts in this case are consecutively numbered and will be cited as RP. The only hearing that is not consecutively numbered is a pretrial hearing on July 30, 2013, and it is not cited in this brief.

coming. RP 89. Security guard Combs who was toward the front of the courtroom, said that it appeared to him that Mr. McCracken pushed Haller, though he did not see his hands. RP 49, 51-54. Haller said that Mr. McCracken “hauled off” and punched him with his fist. RP 61. Social worker Airhart said that Mr. McCracken had his good hand out to push people out of his way as he went to the door and Haller fell back. RP 68-69. Social worker Harris said that she saw Mr. McCracken push Haller, though she did not see his arm. RP 74. Court clerk O’Brien said that Mr. McCracken pushed the guard with two open hands. RP 82, 84.

Mr. McCracken was arrested.² The state charged him with third degree assault. CP 1.

The court held a CrR 3.5 hearing. Deputy Wilson said that he read Mr. McCracken his rights and spoke with him at the jail. RP 20-30. He testified that Mr. McCracken was calm and coherent, that he agreed to talk, and signed a written statement. RP 21-23, 25. The court ruled Mr. McCracken’s statement admissible. RP 40-42.

At trial, Mr. McCracken denied that he had any intent to assault the guard. RP 86-97, 113-117. Deputy Wilson was called to testify in the state’s rebuttal, after the defense had rested. He said that while they spoke

² It got worse in jail, where Mr. McCracken got beat up, urinated blood, couldn’t eat or get up for days, . According to Mr. McCracken, the jail did not give him appropriate medical care despite repeated requests. RP 6-7, 12, 17, 32-33, 87.

at the jail, Wilson asked Mr. McCracken if he had struck the officer. RP 103. Wilson said that Mr. McCracken responded “I don’t want to get into that.” RP 103.

The jury convicted Mr. McCracken as charged. RP 119.

At sentencing, the court imposed attorney fees of \$500. CP 17.

Mr. McCracken timely appealed. CP 21.

ARGUMENT

I. DEPUTY WILSON’S IMPROPER COMMENT ON MR. MCCRACKEN’S SILENCE INFRINGED HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

A. Standard of Review.

Improper comments on an accused’s post-arrest silence present a constitutional issue reviewed *de novo*. *State v. Silva*, 119 Wn. App. 422, 428, 81 P.3d 889 (2003). Such comments can constitute manifest error affecting a constitutional right, and thus may be raised for the first time on review. RAP 2.5(a)(3); *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004). Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

B. Deputy Wilson’s comment on Mr. McCracken’s post-arrest exercise of his privilege against self-incrimination violated due process.

Both the federal and state constitutions protect the accused’s right to silence. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. The privilege against self-incrimination is liberally construed. *Holmes*, 122 Wn. App. at 443.

The *Miranda*³ warnings carry an implicit assurance that the accused’s silence will not carry a penalty. *Silva*, 119 Wn. App. at 429. Thus, telling the jury that the accused remained silent after being informed of his/her rights “violates fundamental due process by undermining [that] implicit assurance.” *Id.*

Additionally, an accused’s exercise of his/her constitutional right to remain silence is not evidence of guilt. *Id.* at 428-29. The state may not invite the jury to infer that the accused is guilty based on his/her exercise of that right. *Id.* Such an inference “always adds weights to the prosecution’s case and is always, therefore, unfairly prejudicial.” *Id.* It is also highly prejudicial for the state to “suggest... that silence casts doubt on the defendant’s credibility.” *Holmes*, 122 Wn. App. at 443.

Because it presents a constitutional error, an improper comment on silence requires reversal unless the state can show that it was harmless

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

beyond a reasonable doubt. *Id.* at 446. Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person's substantial rights, and if it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

A direct comment on the accused's silence "is always constitutional error." *Holmes*, 122 Wn. App. at 445. If a law-enforcement statement at trial can reasonably be considered a purposeful comment on the accused's silence, reversal is required unless the error was harmless beyond a reasonable doubt. *Holmes*, 122 Wn. App. at 445-46. A comment on silence is purposeful if it is responsive to the state's questioning and carries "even slight inferable prejudice" to the accused.⁴ *Id.*

Deputy Wilson purposefully commented on Mr. McCracken's refusal to answer when asked if he'd struck Haller. The prosecutor intentionally elicited this testimony:

Q. Did you ask him if he struck the officer?
A. I did.
Q. What did he say?

⁴ A comment on silence from law enforcement that is nonresponsive to the state's questions requires review under the constitutional harmless error analysis if: (1) it was given for the purpose of prejudicing the accused, (2) resulted in the unintended effect of likely prejudice to the accused, or (3) was exploited by the state during the course of the trial in an attempt to prejudice the accused. *Id.*

A. He didn't want to get into that was his statement. I don't want to get into that, was I believe the statement made.
RP 103.

This exchange took place after Wilson had advised Mr. McCracken of his *Miranda* rights. RP 19-42, 97-103.

Deputy Wilson's testimony constituted a purposeful, direct comment on Mr. McCracken's exercise of the right to remain silent. *Holmes*, 122 Wn. App. at 445-46. The comment was a direct answer to the prosecutor's question.⁵ *Id.*

The violation of Mr. McCracken's right to remain silent and his right to due process requires reversal. *Holmes*, 122 Wn. App. at 445-46. The state cannot show that this comment was harmless beyond a reasonable doubt. *Id.*

The case hinged on the jury's assessment of Mr. McCracken's credibility. The various state witnesses described his contact with Haller in different ways. RP 49, 53-54, 61, 68-69, 82, 84. Mr. McCracken himself testified that Haller startled him and that any contact was accidental. RP 89-90, 92-95. Under these circumstances, Wilson's testimony that Mr. McCracken refused to talk about the alleged assault suggested that he had something to hide, and undermined his credibility.

⁵ Even if the comment had been unresponsive to the state's question, it had both the purpose and effect of prejudicing Mr. McCracken's defense. *Id.*

The comment encouraged the jury to infer Mr. McCracken's guilt from his exercise of his right to silence in violation of his due process rights. *Silva*, 119 Wn. App. at 428-29.

Wilson's comment on Mr. McCracken's post-arrest exercise of his constitutional right to silence violated due process and requires reversal of his conviction. *Silva*, 119 Wn. App. at 429.

II. THE COURT ERRED BY ORDERING MR. MCCRACKEN TO PAY LEGAL FINANCIAL OBLIGATIONS BEYOND WHAT IS PERMITTED BY THE CONSTITUTION AND BY STATUTE.

A. Standard of Review.

Reviewing courts assess constitutional issues and questions of law *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013); *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013).

B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).⁶ A court exceeds its

⁶ See also *State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).⁷

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d

⁷ *See also*, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining “sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional”); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has

1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* The cases do not govern Mr. McCracken’s claim that the court lacked constitutional and statutory authority.⁸

C. The court violated Mr. McCracken’s right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused’s exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person’s current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court’s authority to order an offender to pay the costs of prosecution:

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

“established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

⁸ The issue will likely be resolved when the Supreme Court issues its opinion in *Blazina*.

financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.⁹ *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the

⁹ In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

[Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the accused has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the

equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, the trial court did not find that Mr. McCracken had the present or likely future ability to pay. CP 12-20. Indeed, the record suggests that Mr. McCracken lacks the ability to pay the amount ordered.

The lower court found Mr. McCracken indigent at beginning and at the end of the proceedings. CP 22-23. His incarceration and felony conviction will also negatively impact his prospects for employment. At sentencing, defense counsel even asked the court to credit time spent in jail against Mr. McCracken's financial obligations. RP 126.

The lower court ordered Mr. McCracken to pay \$500 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. This violated his right to counsel. Under *Fuller*, the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. McCracken to pay \$500 in attorney fees must be vacated. *Id*

D. The court lacked the authority to order Mr. McCracken to pay the cost of court-appointed counsel.

A court's authority to impose costs derives from statute.

Hathaway, 161 Wn. App. at 651-653.¹⁰ No statute specifically authorizes a sentencing court to impose attorney fees upon conviction.¹¹

¹⁰ See also *Bunch*, 168 Wn. App. 631; *Moreno*, 173 Wn. App. at 499.

¹¹ RCW 9.94A.030(30) defines "legal financial obligation," which "may include...court-appointed attorneys' fees..." Although it mentions attorneys' fees, this definitional statute does not purport to authorize a court to impose attorneys' fees upon conviction. *Cf.* RCW 9.94A.7709 (allowing the prevailing party in an enforcement action to recover attorneys' fees). By contrast, other sums mentioned in the provision are specifically authorized by other statutes. See, e.g., RCW 9.94A.750 (restitution); RCW 9.94A.550 (fines).

The court may order an offender to pay “expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2).

The court may not order an offender to pay “expenses inherent in providing a constitutionally guaranteed jury trial.” RCW 10.01.160(2).¹²

The trial court exceeded its authority by requiring Mr. McCracken to pay \$500 for court appointed attorney fees. CP 17. As noted, no statute specifically authorizes the imposition of costs for counsel. The costs were not “expenses specially incurred by the state in prosecuting” Mr. McCracken. RCW 10.01.160(2). Furthermore, the cost of counsel inhered in the expense required to provide a constitutionally guaranteed jury trial. RCW 10.01.160(2).

For these reasons, the attorney fee assessment must be vacated, and the case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

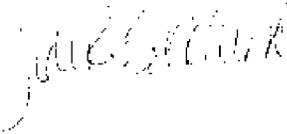
¹² Nor may the court order payment of “expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.” RCW 10.01.160. Here, the record does not indicate whether or not defense counsel belonged to a public defense agency funded in a manner unrelated to specific violations of law.

CONCLUSION

Mr. McCracken's conviction must be reversed and the case remanded for a new trial. In the alternative, the order imposing attorney fees must be vacated.

Respectfully submitted on April 15, 2014,

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jeremy McCracken
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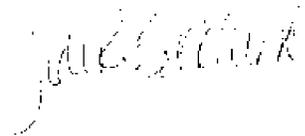
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 15, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

April 15, 2014 - 2:36 PM

Transmittal Letter

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Case Name: State v, Jeremy McCracken

Court of Appeals Case Number: 45328-2

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