

NO. 47487-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHARLENE JEANETTE ALLEN,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court exceeded its authority when it imposed legal-financial obligations the legislature did not authorize.

2. The trial court abused its discretion when it found that a drug-addicted, single mother with no income, assets, employment or skills had the capacity to pay discretionary legal financial obligations.

Issues Pertaining to Assignment of Error

1. Does a trial court exceed its authority if it imposes legal-financial obligations the legislature did not authorize?

2. Does a trial court abuse its discretion if it finds that a drug-addicted, single mother with no income, assets, employment or skills has the capacity to pay discretionary legal financial obligations?

STATEMENT OF THE CASE

On February 13, 2015, two Sequim Police Officers were dispatched to the local safeway where a shoplifter later identified as the defendant Charlene Allen had just fled from Loss Prevention to a local apartment. CP 58. Once the officers obtained this information they responded to the local apartment, found the defendant and arrested her for third degree theft. CP 58-59. During a search of the defendant's purse and person incident to arrest the officers found syringes, methamphetamine, heroin, marijuana and various pieces of drug paraphernalia. *Id.* When the officers found these items, the defendant admitted to them that she injects methamphetamine, smokes or injects heroin and smokes marijuana on essentially a daily basis. *Id.* The defendant is a 27-year-old mother of at least two children who did not graduate from High School but did obtain and GED. CP 29; RP 22. She has no job, no skills and made minimum wage the last time she was employed, which was part-time. RP 22.

By information filed February 17, 2015, the Clallam County Prosecutor charged the defendant with one count of possession of methamphetamine, one count of possession of heroin and one count of third degree theft. CP 53-54. At her first appearance that same day the court asked whether or not she had a job and whether or not she had any resources with which to pay for an attorney. RP 1-11. She responded that about two months

previous she had worked part-time at minimum wage and had not worked since. RP 6-7. The court responded by appointing an attorney to represent her upon its finding that she did not “have the financial resources to hire an attorney.” RP 7.

The prosecutor later offered to dismiss the possession of heroin count if the defendant would plead to the possession of methamphetamine charge as well as the theft charge. CP 40-42. The plea offer did not require that the defendant agree to any part of the prosecutor’s recommendation to the court with one exception. *Id.* Page 2 of the written offer sheet included the following mandatory language:

NOTE: THIS OFFER IS ONLY EFFECTIVE IF THERE IS AGREEMENT BY THE DEFENSE THAT THE COURT MAY IMPOSE RESTITUTION FOR ALL VICTIMS AND CRIMES WHETHER CHARGED OR NOT.

CP 41 (bold and capitalization in original).

On April 21, 2015, the defendant and her appointed attorney appeared before the court and the defendant plead guilty to Counts I and III of the information pursuant to the state’s offer and the state moved to dismiss Count II, which motion the court granted. RP 11-27; CP 29-38. The written statement of defendant on plea of guilty also set out the state’s offer, which was written as follows:

The prosecuting attorney will make the following recommendation to the judge: On both counts, a sentence under the First Time Offender

Waiver consisting of 30 days, converted to 240 hours of community service work. In addition, obtain a chemical dependency evaluation and follow all recommendations. Be supervised by the Department of Corrections with standard crime related prohibitions. Pay legal financial obligations of \$500 victim's assessment; \$100 DNA fee; \$200 court costs; \$500 attorney's fee; \$1000 drug fine split between drug court and OPNET.

This resolves all charges against me from this investigation. Count 2 is to be dismissed with prejudice as part of this resolution.

CP 32.

After accepting the defendant's plea, the court proceeded to sentencing, and imposed 30 days on a first offender option converted to 240 hours community service, and 12 months of community custody. CP 18-19. As part of this process the court specifically found that "[t]he defendant has a **chemical dependency** that has contributed to the offense[s]." CP 16 (emphasis in original). Based upon this finding the court ordered the defendant to obtain a chemical dependency evaluation and successfully "undergo available outpatient treatment for a period not to exceed two years, or inpatient treatment not to exceed the standard range of this offense." CP 19.

The court also imposed the following legal financial obligations:

500.00	Victim Assessment
200.00	Criminal Filing Fee
500.00	Court Appointed Attorney Fees
500.00	OPNET (Olympic Pen. Narcotic Enforcement Team)
100.00	DNA collection fee
<u>500.00</u>	<u>Payable to Drug Court</u>
2,300.00	Total

CP 21-22.

At sentencing the defense generally objected to the imposition of discretionary legal financial obligations on the basis that the defendant did not have the present or future capacity to pay. CP 20-21. The defense also specifically objected that the court did not have authority to impose either the OPNET or the Drug Court assessment since neither the Olympic Peninsula Narcotic Enforcement Team nor the Drug Court had any involvement in the case. RP 20-21, 26-27.

When determining whether or not to impose discretionary legal-financial obligations the court asked the defendant if she had “Any special skills.” RP 22. The defendant responded “just being a mom.” *Id.* The court then noted that “unfortunately I don’t think they pay you for that.” RP 23. When asked what type of employment she had in the past, the defendant responded: “Um, just like random stuff. I’ve done waitressing (sic), care giving – well, I can’t do care giving anymore.” *Id.* The court then asked “do you have anything prohibiting you from having full time employment, any disabilities or anything.” RP 23. The defendant responded: “No, just these new charges.” *Id.* Based upon these answers the court found the defendant capable of paying her legal-financial obligations, stating as follows:

And I will note for the record that if this were a child support matter the Court would, um, presume that you’re capable of minimum wage full time, I’m not really sure why there should be a difference

in a criminal context versus a child support context, but given the fact that you are young, you have no disabilities, I think you're going to have the capacity to have some earnings and I will impose the requested financial obligations by the State.

RP 23.

Following imposition of sentence the defendant filed timely notice of appeal, noting that she wished to contest the trial court's imposition of non-discretionary legal financial obligations. RP 9-11, 11. The court then found the defendant indigent for the purposes of appeal. CP 7-8.

ARGUMENT

I. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED LEGAL-FINANCIAL OBLIGATIONS THE LEGISLATURE DID NOT AUTHORIZE.

Under Washington Constitution, Article 2, the legislature is granted the sole authority to define crimes and determine appropriate punishments. *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980). Thus, the trial court's discretion to impose sentences in criminal cases is limited to that discretion the legislature grants, and the court has no inherent power to develop a procedure for imposing a sentence or to impose a sentence which the legislature has not authorized. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986).

For example, in *State v. Ammons, supra*, the court upheld the Sentencing Reform Act (SRA) against a challenge that it violated the separation of powers and infringed upon judicial discretion in sentencing. In upholding the SRA, the *Ammons* court relied on the long-standing authority that recognizes that (1) the legislature has the sole authority to set the terms under which the trial court can impose punishment for crimes, and (2) that the trial court has no independent inherent authority to punish for crimes. *See also State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). Thus, the legislature's power to fix punishment for crimes is subject only to the limitation that the exercise of this authority must stay within the bounds set

in our state and federal constitutions. *State v. Mulcare*, 189 Wn. 625, 66 P.2d 360 (1937).

Under RCW 9.94A.760(1) the Legislature has generally authorized the courts to impose “legal financial obligations” as part of a felony sentence.

This provision states:

(1) Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. On the same order, the court is also to set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation. If the court fails to set the offender monthly payment amount, the department shall set the amount if the department has active supervision of the offender, otherwise the county clerk shall set the amount. Upon receipt of an offender's monthly payment, restitution shall be paid prior to any payments of other monetary obligations. After restitution is satisfied, the county clerk shall distribute the payment proportionally among all other fines, costs, and assessments imposed, unless otherwise ordered by the court.

RCW 9.94A.760(1).

The term “legal financial obligation” as it is used in this statute is a term of art and is specifically defined in RCW 9.94A.030(31) as follows:

(31) “Legal financial obligation” means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims’ compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys’ fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a

result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

RCW 9.94A.030(31).

In the case at bar the court imposed \$500.00 payable to the drug court and \$500.00 payable to the interlocal drug team. Under RCW 9.94A.030(31) there is no authorization for the imposition of a fine or assessment to be paid to the local drug court. Thus, the trial court exceeded its authority when it imposed this financial obligation.

While it is true that there is authorization for the imposition of fines or assessments payable to interlocal drug funds, any contribution to a drug fund must meet a two part test: (1) the defendant must have been convicted of a “drug-related crime,” and (2) the costs imposed must be commensurate with or related to the costs of the investigation. *State v. Hunter*, 102 Wn.App. 630, 640, 9 P.3d 872 (2000). In this case the defendant was convicted of a “drug-related crime.” However, there is no evidence in the record that the costs imposed were commensurate with or related to the costs of investigation. Rather, as is conclusively shown in the probable cause statement, two uniformed police officers on routine patrol arrested the defendant for shoplifting and happened to find drugs on her person and in her

purpose. Thus, in this case the trial court erred when it imposed an assessment to be generally paid to the Olympic Peninsula Narcotic Enforcement Team, which had no involvement in the case whatsoever.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT A DRUG-ADDICTED, SINGLE MOTHER WITH NO INCOME, ASSETS, EMPLOYMENT OR SKILLS HAD THE CAPACITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

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 willful 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).

Appellate courts review a trial court's decision to impose legal financial obligations, as well as the amount imposed, under an abuse of discretion standard. *State v. Williams*, 65 Wn.App. 456, 840 P.2d 902

(1992). An abuse of discretion occurs “when the trial court’s decision is arbitrary or rests on untenable grounds or untenable reasons.” *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

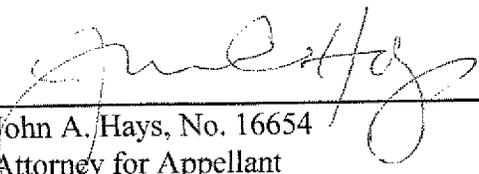
In the case at bar the trial court’s finding that the defendant had the capacity to pay based upon that fact that she did not have “a disability” and could theoretically work full time at a minimum wage job was arbitrary and did rest upon untenable grounds or untenable reasons because in so holding the court ignored all of the evidence before it. This evidence was as follows: (1) the defendant is addicted to methamphetamine and heroin and uses both on a daily basis, (2) the trial court entered an order requiring that the defendant complete up to 6 months in-patient treatment or 24 months out-patient treatment, (3) the defendant has no job skills or training at all, although she did at one point work as a waitress for minimum wage, (4) the defendant has children under her care, requiring both her time and what few monetary resources she does have, and (5) her only employment as been at minimum wage, part-time jobs. This woman cannot support herself in any meaningful way let alone support her children, even were she free to work a full time, minimum wage job. Nothing in the record suggests that the defendant has any assets, external sources of income, or help from anyone. Based upon this record, the trial court’s decision to force this woman to pay legal-financial obligation was arbitrary and should be reversed by this court.

CONCLUSION

The trial court erred when it imposed discretionary legal-financial obligations that the Legislature did not authorize. The court further erred when it imposed discretionary legal-financial obligations upon a woman who has no current or future ability to pay.

DATED this 19th day of August, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

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.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

NO. 47487-5-II

vs.

**AFFIRMATION
OF SERVICE**

**CHARLENE J. ALLEN,
Appellant.**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Lewis Schrawyer
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lschrawyer@co.clallam.wa.us
2. Charlene Jeanette Allen
P.O. Box 2121
Sequim, WA 98382

Dated this 19th day of August, 2015, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

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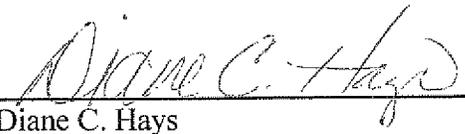
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2. Charlene Jeanette Allen
P.O. Box 2121
Sequim, WA 98382

Dated this 19th day of August, 2015, at Longview, WA.


Diane C. Hays

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