

NO. 47671-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RUBEY,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

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A. ARGUMENT.

**The trial court erroneously concluded Mr. Rubey was statutorily ineligible for a DOSA.**

The trial court found Mr. Rubey was ineligible for a DOSA because the court mistakenly believed any offense involving a firearm is ineligible under the statute. RP 422. Quoted below is the sum of the trial court's ruling on Mr. Rubey's request for a DOSA.

First, the Court hears your request that you be granted a drug offender sentencing alternative. You are not eligible for a DOSA sentence, Mr. Rubey, and the first requirement is the current offense is nonviolent, nonsex offense and does not involve a firearm or deadly weapon enhancement. These two charges, these two felonies are weapons, Unlawful Possession of a Firearm Second Degree involves a weapon. You are not eligible. Even if I went through the rest of the eligibility requirements, you don't get past the first condition, and that is these involved a weapon. And you may have a drug addiction, I don't know that, and there are programs at the Department of Corrections that you can take advantage of if you are serious about doing something about this addiction. But the Court is not imposing a DOSA. You are not eligible for such a sentence as deemed by the legislature.

As is clear, the court's ruling begins and ends with the conclusion that Mr. Rubey is statutorily ineligible. The State agrees that conclusion is erroneous. Brief of Respondent at 5. But the State imagines that the trial court actually considered other factors in denying

Mr. Rubey's request. Brief of Respondent a 4-5. Thus, the State contends the trial court considered Mr. Rubey's community custody status, his criminal history, and potential danger. *Id.* at 4. Even the most cursory reading of the trial court's ruling reveals the court never mentioned any of those factors I its ruling.

Instead, the portions of the record the State cites to pertain to other aspects of the sentencing hearing, **after** the court had denied the DOSA request. Thus, the State's entire response rest upon its gross misstatement of the record.

It is clear, the trial court denied the DOSA based solely upon a misreading of the statue. Because the trial court failed to properly apply the statute, Mr. Rubey is entitled to a new sentencing hearing at which a court gives proper consideration to his eligibility for a DOSA sentence.

If the court disagrees and affirms the trial court's decision, the Court should exercise its discretion and deny any claim for costs. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, 618 (2016). In *Sinclair*, this Court noted RAP 15.2 creates a presumption of continuing indigency for any person found unable to pay the costs of appeal or counsel. *Id.* at 367. In the absence of any effort by the State to offer evidence to overcome that presumption the court found there was no

reason to believe an individual serving a 20 year sentence would have the ability to a cost award of nearly \$7,000. *Id.*

Here, Mr. Rubey has been indigent throughout these proceedings. At sentencing, after considering Mr. Rubey's work history, the trial court concluded he could not pay \$1500 in recoupment and determined Mr. Rubey only had the future ability to pay only \$500. 3RP 524. The State has offered nothing to even suggest his ability to pay more than that has changed. Thus the State has failed to overcome the presumption that Mr. Rubey is unable to pay.

B. CONCLUSION.

For the foregoing reasons, Mr. Rubey respectfully requests this Court remand his case for a new sentencing hearing.

Respectfully submitted this 15<sup>th</sup> day of April 2016.

*s/ Gregory C. Link*  
GREGORY C. LINK – 25228  
Washington Appellate Project  
Attorneys for Appellant

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Respondent,	)	
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	)	
MICHAEL RUBEY,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF APRIL, 2016.



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# WASHINGTON APPELLATE PROJECT

**April 15, 2016 - 4:27 PM**

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Court of Appeals Case Number: 47671-1

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