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THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

STATE V. CHAD EDWARD DUNCAN,
Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT
BY YAKIMA COUNTY

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A. INTRODUCTION

Petitioner, Chad Edward Duncan, was charged by information and subsequently convicted of seven counts: six counts of first degree assault and one count of first degree unlawful possession of a firearm in the Superior Court for Yakima County. CP 178-9. He was sentenced to a total term of about 96 years. CP 179. He appealed the conviction and sentence. CP 186.

Division Three of the Court of Appeals upheld the conviction in an opinion that was published in part. Duncan petitioned this court for review, presenting to this court two of the issues raised in the Court of Appeals: 1) the challenge of his legal financial obligations (LFOs) for the first time on appeal, and 2) the protective sweep of his vehicle.

B. ISSUES PRESENTED BY PETITION

- 1) Did the Court of Appeals correctly refuse to entertain the issue of LFOs when raised for the first time on appeal?
- 2) Did the Court of Appeals correctly decide that the gun, having been in plain view in the course of a protective sweep, was permissibly seized by the officers?
- 3) Assuming *arguendo* that the gun was admitted in error, was such error clearly harmless given the overwhelming evidence presented at trial?

ANSWERS TO ISSUES PRESENTED BY PETITION

- 1) The Court of Appeals correctly refused to entertain the issue of LFOs when raised for the first time on appeal.

- 2) The Court of Appeals correctly decided that the gun, having been in plain view in the course of a protective sweep, was permissibly seized by the officers.
- 3) Assuming *arguendo* that the gun was admitted in error, such error was clearly harmless given the overwhelming evidence presented at trial.

C. STATEMENT OF THE CASE

The petitioner, Chad Edward Duncan, was charged by information and subsequently convicted of seven counts: six counts of first degree assault and one count of first degree unlawful possession of a firearm in the Superior Court for Yakima County. CP 178-9. The charges were based on the following facts:

A shooter opened fire into a home located at 316 Cherry Avenue in a Sureño neighborhood. RP 481-4, 657. There were numerous individuals in the home, including Kyle Mullins. RP 480-3, 509-12. Kyle was shot in the head during the shooting. RP 439, 451-2, 525, 531-2. Someone called 911 and officers responded very quickly. RP 68, 70, 484. Officer Ely was at the police station when he got the calls of “shots fired.” RP 358. While in route, in less than a minute, Officer Ely came across Duncan, an admitted Norteño gang member, driving a white car with two females inside. RP 362-68, 391. All three were detained. RP 369.

A Hi-Point .380 automatic gun was found in the car and tested for DNA. RP 463, 466-7, 470. The DNA matched two major profiles, and showed that Duncan was the major contributor. RP 605-6. At trial, Duncan admitted that the gun was his. RP 835. Six spent shell casings were found and it was determined that they all came from the same gun found in the car. RP 614-21.

In a jail phone call that was played for the jury, Duncan told his mother, “[a]nd I actually shot him in the head.” RP 567. At trial, Duncan explained that someone asked, “oh, you killed that homey?” and that he responded, “no, I actually shot him in the head.” RP 840.

Prior to trial, Duncan made a motion to suppress the evidence under CrR 3.6. CP 6-15. Duncan argued that the stop of the vehicle went beyond a Terry stop and that the officers lacked probable cause to stop the vehicle. CP 14. The court denied the suppression motion. RP 115-124. Findings of fact and conclusions of law were filed. CP 202-8.

At trial, Duncan was convicted and sentenced to a total term of about 96 years. CP 179. The following costs were imposed:

| | |
|------------|-------------------------------------|
| \$1,235.54 | Restitution |
| \$500 | Crime Penalty Assessment |
| \$200 | Criminal filing fee |
| \$600 | Court appointed attorney recoupment |
| \$100 | DNA collection fee |
| \$20 | Sheriff service fee |
| \$250 | Jury fee |

At sentencing, Duncan did not raise the issue of his ability to pay the legal financial obligations. RP 978-994. He did not object to the costs imposed or to the court's findings. Id.

Duncan appealed the judgment and sentence. CP 186. Division Three of the Court of Appeals upheld his conviction. Duncan filed a petition for review, which this Court granted.

D. ARGUMENT

The State hereby incorporates the arguments made in the “Amended Brief of Respondent” filed on December 2, 2012 in Division Three of the Court of Appeals. In addition, the State make the following arguments:

1. The Court of Appeals correctly refused to entertain the issue of LFOs when raised for the first time on appeal.

In State v. Blazina, this Court held that ability to pay costs was not an issue that can automatically be raised for the first time on appeal. 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Instead, the Court chose to consider the issue as a matter of discretion, stating, “the appellate courts retain discretion whether or not to consider the issue initially on appeal.” Id. Here, Division Three exercised that discretion and declined to address the issue for the first time on appeal.

Furthermore, some of the costs imposed upon Duncan are

mandatory costs, such as the victim penalty assessment. This assessment is required by RCW 7.68.035. This assessment requires no consideration of a defendant's ability to pay. State v. Williams, 65 Wn. App. 456, 460-61, 828 P.2d 1158 (1992).

Evidence of ability to pay is unnecessary to support mandatory financial obligations imposed by the court. In State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), the court noted that for these costs, "the legislature has directed expressly that a defendant's ability to pay should not be taken into account." The court explained that:

As a preliminary matter, we note that Lundy does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. See, e.g., State v. Kuster, No. 30548-1-III, 2013 WL 3498241 (2013). And our courts have held that these mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants." State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

...

Additionally, a \$500 victim assessment is required by RCW 7.68.035(1)(a), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. See State v. Curry, 62 Wn.App. 676, 680-81, 814 P.2d 1252 (1991), aff'd, 118 Wash.2d 911, 829 P.2d 166; State v. Thompson, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's "finding" of a defendant's current or likely future ability to pay them is surplusage.

176 Wn. App. at 102-3 (footnote omitted, emphasis in original).

The State would urge this Court to continue to exercise the right to deny these challenges of costs when they have not been raised in the trial court pursuant to RAP 2.5. The decision rendered below was appropriate. As stated in Blazina, RAP 2.5(a) provides appellate courts with discretion whether to review a defendant's LFO challenge raised for the first time on appeal. 182 Wn.2d at 830.

Prior to the supreme court's ruling in Blazina, all three divisions of this Court had held that a defendant's failure to raise this issue or to object to the imposition of these costs in the trial court was a failure to preserve the issue. See, eg., State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), rev'd, 182 Wn.2d 827 (2015); State v. Calvin, 176 Wn. App. 1,

316 P.3d 496, 507-8 (2013), remanded for review, 183 Wn.2d 1013 (2015); State v. Duncan, 180 Wn. App. 245, 253, 327 P.3d 699 (2014).

The decision in Blazina did not change that reasoning.

2. The Court of Appeals correctly decided that the gun, having been in plain view in the course of a protective sweep, was permissibly seized by the officers.

Duncan takes issue with the officers clearing the vehicle for additional suspects. Petition at 14. Duncan argues that because this was not a large passenger van, there was nothing to suggest that officer safety was at issue. Petition at 14. The State would point out that this was a “call out” where each passenger was called out of the vehicle after reports of shots fired. RP 72. The fact that the officers saw three people exit the car at the time of the stop certainly did not mean that there weren’t other individuals hiding in the vehicle who could possibly ambush the officers.

There was nothing wrong in conducting a quick protective sweep of the vehicle for the mere purpose of making sure that no one could ambush the officers. See Maryland v. Buie, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990); State v. Kennedy, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). The scope of such a sweep is limited to a cursory visual inspection of places where a person may be hiding. Id. at 334.

Under the Fourth Amendment to the United States Constitution, and article 1, section 7 of the Washington State Constitution, warrantless

searches and seizures are per se unreasonable, with few exceptions. However, the search in this case is essentially identical to an inventory search conducted for community caretaking reasons.

One primary purpose of an inventory search is to protect the police from potential danger. State v. Houser, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980); State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998). An inventory search is essential to ensuring “the safety of law enforcement officers and others from dangerous items located in vehicles.” State v. Tyler, 177 Wn.2d 690, 709, 302 P.3d 165 (2013). The exception furthers officer and public safety. Id. at 710. It includes assisting law enforcement officers to identify and avert any danger posed by firearms and other dangerous items left unsecured in an uninventoried vehicle where they might be accessed. Id. (citing Colorado v. Bertine, 479 U.S. 367, 373, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987)).

The inventory search is limited in scope and not a general exploratory search for the purpose of finding evidence of a crime. State v. Montague, 173 Wn.2d 381, 385, 438 P.2d 571 (1968). It is permitted only to the extent necessary to achieve its purposes. Tyler, 177 Wn.2d at 708 (citing Houser, 95 Wn.2d at 155). Thus, private interests are protected because of the limited scope of the search. Id.

In State v. Ferguson, officers believed that a car possibly had a meth lab in the trunk that could pose a “risk to the police, the public, and the tow truck driver.” 131 Wn. App. 694, 703, 129 P.3d 1271 (2006). The Court of Appeals upheld the limited search of the trunk to “remove or insure the safeness of the suspected hazardous materials before towing.” Id. at 704. Similarly, officers in this case conducted a very limited search to remove a suspected hazard, a potentially loaded firearm, from a vehicle that was soon going to be loaded up on a tow truck and in motion. This is just as valid of a safety concern as the one present in Ferguson.

This ability to conduct an inventory search stems from the community caretaking function of the police and is wholly separate from the criminal investigation. South Dakota v. Opperman, 428 U.S. 364, 368, 96 S. Ct. 3092, 49 L. Ed 2d 1000 (1976). An officer may be derelict in his duty if he does not examine a vehicle before rendering it to the tow truck driver. See State v. Patterson, 8 Wn. App. 177, 504 P.2d 1197 (1973). In Tyler, this Court noted that the Washington State Patrol was required to take appropriate steps to ready a vehicle for towing once impoundment is the only reasonable course left. See Tyler, 177 Wn.2d at 709 (“Impounding the vehicle without inventorying its contents could expose the property within to danger or theft...”).

Here, while clearing the vehicle for other suspects, Officer Ely saw both shell casings and a handgun in the suspect vehicle. RP 71-2, 93. He did not seize the shell casings, but did seize the handgun before the car was towed. RP 74. He testified that this was done to make sure they were not transporting a car with a handgun inside that could possibly discharge. RP 72. He said they did a frisk of the vehicle's interior only to locate the handgun between the door and front passenger seat. RP 72. The car was then towed to a secure annex. RP 74. He got a warrant that night, and served it the next day. RP 75. The shell casings, along with some gang-related items, were recovered during the execution of the warrant. RP 75.

In this case, the search was initiated because of the impoundment and was not performed to detect a crime, but rather to protect the police and public from potential danger. These are legitimate governmental interests that outweigh an individual's privacy interests. Furthermore, there has been no showing or argument that the police acted in bad faith in this case or seized the gun for the sole purpose of a criminal investigation. In fact, officers left all the shell casings in the car and got a warrant that night. The only thing seized prior to the warrant's execution was the dangerous instrumentality, the firearm. The officers here were indisputably engaged in a community caretaking search of a lawfully seized automobile that was about to be towed.

3. **Assuming *arguendo* that the gun was admitted in error, such error was clearly harmless given the other evidence presented at trial.**

As explained in State v. Banks:

The test to determine whether an error is harmless is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Brown, 147 Wn.2d at 341 (quoting Neder, 527 U.S. at 15). Stated another way, “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred A reasonable probability exists when confidence in the outcome of the trial is undermined.” State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

149 Wn.2d 38, 44, 149 Wn.2d 38 (2003).

Here, Duncan testified that he was a Norteño with the nickname “hit man” and that he had an “ene” tattoo, meaning “every Norteno’s equal.” RP 831, 833. He also admitted that he was driving the car when Officer Ely pulled him over. RP 829. The car, in fact, was his. RP 378-9. Duncan testified that he came to Yakima with a .380 Hi-Point gun in his car, but denied shooting the victims’ house. RP 834-6. Duncan did admit to making the statement, “...I actually shot him in the head,” in a jail phone call to his mother. RP 840. The recorded phone call was played for the jury as well.

Passenger Jaimee Butler also testified at trial. RP 625. She identified Duncan as someone she was hanging out with on the evening of the shooting. RP 627-9. She testified that she was the front seat passenger in Duncan's white four-door car. RP 631-2. She testified that she heard a gun start to go off so she covered her head and put her head down. RP 634, 645. She said the gunfire was really loud. RP 635. She said that they drove off after the gunshots. RP 635. She testified that about a minute or two later the police stopped them. RP 638. She testified that no one got out of the car between the time the gunshots went off and when they got stopped. RP 655. She testified that when they got stopped, she saw Duncan with a gun and saw him throw the gun on the floorboard next to her. RP 634, 638. She testified that Duncan wanted her to get off and run with the gun but that she refused to do so. RP 639-40.

Alexis Brock-Sturtevant, the backseat passenger, also testified. RP 751-2. She indicated that she wrote out a statement for police about the incident. RP 753. In that statement, she wrote "I didn't know that—that he was going to shoot that house" and that when they got pulled over, "the gun was put on the passenger floor (inaudible) by the driver." RP 751-2. She indicated that the statement she wrote was accurate. RP 753.

Officer Scherzinger corroborated the testimony of the two passengers. After Duncan's car was stopped, Officer Scherzinger saw

Duncan lean over towards the passenger side, in an area consistent with where the gun was located. RP 421, 426, 429, 433.

Given the testimony of Jaimee and Alexis, as well as Duncan's testimony admitting that the gun was his and his statement in the jail phone call that he "shot him in the head," there was overwhelming evidence for the jury to convict him, regardless of the admission of the firearm. Had the State not admitted the firearm, the outcome of the trial would not have been different. As such, assuming arguendo that there was any error in admitting the firearm, such error was harmless.

E. CONCLUSION

The Court of Appeals decision should be affirmed. Division Three acted within its discretion in denying to hear the issue of LFOs for the first time on appeal. Furthermore, the Court correctly ruled that the firearm was permissibly seized by the officers. For sake of argument, if there was any error in admitting the firearm it was clearly harmless given the overwhelming evidence.

Respectfully submitted this 28th day of September, 2015.


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Good afternoon,

Attached for filing is the Supplemental Brief of Respondent in the case of State v. Chad Edward Duncan, No. 90188-1

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