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No. 90812-5
COA No. 70002-2-I

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

FREDERICK E. HARDTKE, Petitioner

PETITIONER FREDERICK HARDTKE'S RESPONSE TO
SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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II. TABLE OF AUTHORITIES

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PET'S RESP. TO SUPPL. BR. OF RESP.,
iii.

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III. INTRODUCTION

In its supplemental brief to this Court, the State, for the first time since Mr. Hardtke filed his original appeal, has addressed the applicability and construction of RCW 10.01.160. *See* Suppl. Br. of Resp. at 9–12. It cites to *State v. Cawyer* to refute Mr. Hardtke’s argument that, because “pretrial supervision” is in the list of costs authorized by the statute, pretrial monitoring expense is not an expense “specially incurred by the State in prosecuting the defendant.” *See* Suppl. Br. of Resp. at 9–12 (discussing RCW 10.01.160(2) and *State v. Cawyer*, 182 Wn. App. 610, 330 P.3d 219 (2014)). However, the State and the *Cawyer* opinion ignore the legislature’s intent as demonstrated by the history of the statute.

IV. ARGUMENT

The State argues that the cost of pretrial monitoring by a transdermal alcohol detection (TAD) bracelet is an expense “specially incurred by the State in prosecuting the defendant” allowing the trial court to impose this expense in Mr. Hardtke’s sentence under RCW 10.01.160.¹ *See* Suppl. Br. of Resp. at 9–12. This appeal may turn on the proper scope of the word “prosecuting” in the statute.² Although not explicit, the State

¹ The State appears to concede that recovery of this TAD monitoring expense cannot be as restitution. *See State v. Cawyer*, 182 Wn. App. 610, 616–18, 330 P.3d 219 (2014) (holding extradition expense incurred by the State not recoverable as restitution).

² The TAD bracelet expense was “specially incurred by the State.”

seems to urge an interpretation of the word “prosecuting” to include anything related to the proceeding in which a defendant is charged, tried, and convicted. While some support for the State’s position exists in caselaw, the history of the statute suggests that the legislature intended a narrower meaning.

A court’s authority to impose costs and fees is statutory. *Cawyer*, 182 Wn. App. at 619. Statutes imposing court costs are in derogation of common law and so are strictly construed. *Id.*

The only Washington decision that attempts to define “prosecuting” as used in RCW 10.01.160(2) is *State v. Utter*, 140 Wn. App. 293, 165 P.3d. 399 (2007). The defendant in *Utter* was found incompetent to stand trial and was committed for rehabilitation for approximately a year. *Id.* at 297–98. The State sought reimbursement for the cost of rehabilitation pursuant to Chapter 10.77 RCW and related statutes. *Id.* The defendant argued, and the appellate court agreed, that these expenses were “specially incurred by the State in prosecuting the defendant,” and thus only RCW 10.01.160 applied. *Id.* at 298, 302. Because the defendant was not convicted, these costs could not be imposed under this statute. *Id.* at 312.

The *Utter* court relied on an Oregon case to define “prosecuting” to refer to “the portion of a criminal action that leads to a determination of

guilt or innocence of the crime charged.” *Id.* at 305 (quoting *Oregon v. Flajole*, 204 Or. App. 295, 129 P.3d 770, 772 (2006)). Given this definition, the State in *Utter* argued a narrow meaning of the word “prosecuting.” *Id.* at 306.

The trial court did not commit Mr. Utter to determine his guilt or innocence, or as a punishment or penalty for his alleged criminal behavior. Rather, the trial court sought to have the Department evaluate and treat Mr. Utter's mental illness.

Id. (quoting the State's brief). The Court of Appeals disagreed, noting that the competency evaluation and rehabilitative treatment was required to try the defendant under the federal and state constitutions and Washington statutes. *Id.* at 306–09. Consequently, *Utter* suggests that prosecution costs can include those specially incurred by the State to convict a defendant even though the costs do not directly relate to guilt or innocence.

The case discussed by the State, *State v. Cawyer*, also appears to employ a broad definition of the word “prosecuting” in RCW 10.01.160. *See* Suppl. Br. of Resp. at 10–12. The defendant's sentence in *Cawyer* included extradition costs as restitution to the State. *Cawyer*, 182 Wn. App. at 614–15. The appellate court held this cost to be properly denoted as a prosecution cost under RCW 10.01.160 rather than restitution. *Id.* at 623.

In reaching its holding regarding RCW 10.01.160, the *Cawyer* court rests primarily on Oregon caselaw.³ *See id.* at 622 (citing *Oregon v. Armstrong*, 44 Or. App. 219, 605 P.2d 736, 737–38 (1980)). *Armstrong* reaches its holding in a single sentence with no analysis. *Armstrong*, 605 P.2d at 737–38 (“The expense of transporting the defendant to Oregon was a cost specially incurred by the state in prosecuting him on that charge and was properly assessed as part of his sentence.”) However, it cites *Oregon v. Fuller*, which holds that the costs of providing indigent defense and a defense investigator are “costs specially incurred by the State in prosecuting the defendant.” 12 Or. App. 152, 504 P.2d 1393, 1396 (1974).

From *Fuller*, a 1974 case, it may be reasonable to assume that the Oregon legislature intended prosecution costs to include costs that the State must incur to convict a defendant whatever the reasons for those costs. RCW 10.01.160 was based on the 1971 version of the corresponding Oregon statute. *Utter*, 140 Wn. App. at 305. Thus, the Oregon legislature’s intentions in the 1970’s are arguably helpful in construing the current Washington version.

³ *Cawyer* also relies on a Washington case, which offers no analysis or case citation. *See State v. Lass*, 55 Wn. App. 300, 307–08, 777 P.2d 539 (1989) (“The witness fees and costs of extradition are also recoverable.”) (citing only RCW 10.01.160).

However, the Washington legislature has since manifested its intentions regarding RCW 10.01.160 in several amendments. One of the most recent was the legislative response to *Utter* (discussed *supra*). In 2008, the legislature amended RCW 10.01.160 to clarify that the cost of treatment designed to rehabilitate an incompetent defendant is not a cost of “prosecuting” that defendant. Laws of 2008, ch. 318, § 2 (adding subsection 5).⁴ In making this amendment, the legislature commented,

The legislature further finds that it intended that a court order staying criminal proceedings under RCW 10.77.084, and committing a defendant to the custody of the secretary of the department of social and health services for placement in an appropriate facility involve costs payable by the defendant, because the commitment primarily and directly benefits the defendant through treatment of their medical and mental health conditions. The legislature did not intend for medical and mental health services provided to a defendant in the custody of a governmental unit, and the associated costs, to be costs related to the prosecution of the defendant.

Id., § 1. Thus, even though the cost of rehabilitating an incompetent defendant must be incurred by the State to prosecute him, this cost is not a cost “specially incurred by the State to prosecuting the defendant” as used in RCW 10.01.160.

⁴ The first sentence of the additional subsection reads, “Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant’s competency to stand trial as provided in RCW 10.77.060, this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units.” RCW 10.01.160(5).

Legislative history also calls into question the holding in *Cawyer*. The defendant in *Cawyer* appears to have made an argument with regard to extradition costs similar to that which Mr. Hardtke advances with regard to the cost of pretrial TAD bracelet monitoring. *See Cawyer*, 182 Wn. App. at 623 (“Cawyer argues that the legislature intended to exclude extradition expenses from RCW 10.01.160 because RCW 10.01.160 includes clauses that authorize the imposition of a court cost for ‘[e]xpenses incurred for serving of warrants for failure to appear.’”) (edits in original). *Cawyer* appears to have argued that the legislature’s express inclusion of warrant costs in the statute indicates that it does not consider warrant costs as “costs specially incurred by the State in prosecuting the defendant.” *See State v. Pannell*, 173 Wn.2d 222, 230, 267 P.3d 349 (2011) (holding that a statute should be construed to avoid rendering superfluous or insignificant any word, clause, or sentence).⁵ And, if warrant costs are not prosecution costs, then arguably neither are extradition costs.

In rejecting *Cawyer*’s argument, the Court of Appeals notes that warrant costs may be imposed on non-convicted defendants unlike other

⁵ It is not clear that the *Cawyer* court applied this principle of statutory construction. It cites the similar but different principle that a statute’s expression of things or classes of things implies the exclusion of all else. *Cawyer*, 182 Wn. App. at 623.

prosecution costs. *Cawyer*, 182 Wn. App. at 624.⁶ Thus, the court reasons, the appearance of warrant costs in subsection 2 of the statute “reveals a legislative intent to limit a unique court cost that may be collected from a defendant who is not convicted, rather than an intent to limit which court costs constitute ‘expenses specially incurred by the state in prosecuting the defendant.’” *Id.*

This reason is flawed for several reasons. First, subsection 2 of the statute mentions the “costs of preparing and serving a warrant for failure to appear” in two separate, noncontiguous sentences. *See* RCW 10.01.160(2). Only the second of these two sentences places any limit on those costs, specifically to \$100. *Id.* The first simply states, “Expenses incurred for serving of warrants for failure to appear . . . may be included in costs the court may require a defendant to pay.” If these costs are included in those expenses “specially incurred by the State in prosecuting the defendant,” then the first sentence of subsection 2 authorizing the charging of warrant costs is superfluous.

Second, the legislature added the sentence authorizing the imposition of warrant costs in 1985, and with no limitation. Laws of

⁶ Oddly, the opinion cites RCW 10.01.160(2) for this proposition even though RCW 10.01.160(1) contains the list of expenses that may be imposed on a non-convicted defendant.

1985, ch. 389, § 1.⁷ If warrant costs are “expenses specially incurred by the State in prosecuting the defendant,” then this amendment was entirely superfluous.

Third, the Court of Appeals’ argument that the express inclusion of warrant expenses in subsection 2 only serves to limit “a unique court cost that may be collected from a defendant who is not convicted” does not recognize that the legislature added warrant expenses to subsection 2 nine years before it authorized any expenses to be collected from a non-convicted defendant. *Compare* Laws of 1994, ch. 247, § 1 (authorizing certain expenses to be imposed on non-convicted defendants) *with* Laws of 1985, ch. 389, § 1 (authorizing the imposition of warrant expense for failure to appear). This same amendment added the \$100 limit on warrant fees. Laws of 1994, ch. 247, § 1.

Thus, it is clear that “expenses incurred for serving of warrants for failure to appear” are not “expenses specially incurred by the State in prosecuting the defendant.” The *Cawyer* court then erred unless the scope

⁷ Prior to this amendment, RCW 10.01.160(2) read in its entirety,
Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.
The amendment added the sentence, “Expenses incurred for serving of warrants for failure to appear may be included in costs the court may require a defendant to pay.”
Laws of 1985, ch. 389, § 1.

of prosecution costs excludes warrant costs yet includes extradition costs. No principled distinction between these two costs exists.

Similarly, no principled distinction exists between the expenses imposed on Mr. Hardtke for pretrial monitoring of his alcohol consumption and “pretrial supervision,” which is listed separately in RCW 10.01.160.⁸ A sentence in subsection 2 of the statute limits pretrial supervision to \$150. RCW 10.01.160(2). Nevertheless, the legislature’s express listing of “pretrial supervision” in the first sentence of subsection 2 indicates that pretrial supervision is not an “expense specially incurred by the State in prosecuting the defendant.” Otherwise, this listing of pretrial supervision in the first sentence would be superfluous. The fact that the legislature more recently added “pretrial supervision” to the statute supports this conclusion. *See* Suppl. Br. of Pet. at 13–15 (discussing Laws of 2007, ch. 367, § 3).

The conclusion to be drawn from the history of RCW 10.01.160 is that the legislature considers the scope of expenses “specially incurred by the State in prosecuting the defendant” to be limited. It does not include

⁸ The State argues that Mr. Hardtke was not eligible for pretrial supervision. *See* Suppl. Br. of Resp. at 10. The State cites the “pretrial supervision program.” *See id.* (citing RCW 10.21.015). This program is currently limited to those charged with offenses that are neither violent nor sex offenses as defined in RCW 9.94A.030 unless the defendant’s release is secured by bail. RCW 10.21.015(2). Mr. Hardtke was not disqualified for this program for two reasons. First, Mr. Hardtke’s release was secured by bail. Second, the legislature created the limitation on qualification for the program after Mr. Hardtke’s conviction. *See* Laws of 2014, ch. 24, § 1.

the expense of rehabilitating an incompetent defendant, the cost of preparing and serving a warrant for failure to appear, or pretrial supervision. By analogy, it does not include extradition cost contrary to the holding in *Cawyer*. Therefore, as the State argued in *Utter*, it includes only those costs “to determine [the defendant’s] guilt or innocence, or as punishment or penalty for his alleged criminal behavior.” *See Utter*, 140 Wn. App. at 306 (quoting the State).

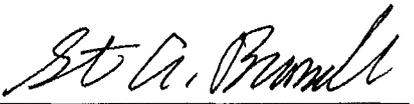
V. CONCLUSION

RCW 10.01.160 proscribes the imposition on a defendant of the cost of pretrial monitoring of the defendant’s alcohol consumption with a TAD bracelet. The trial court erred when it imposed this cost on Mr. Hardtke. The Court should remand with instructions to delete this cost from Mr. Hardtke’s sentence.

Respectfully submitted,

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Dated: March 16, 2015

By: 

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v.

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Petitioner.

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