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

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

FREDERICK E. HARDTKE, Petitioner

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SUPPLEMENTAL BRIEF OF PETITIONER  
FREDERICK HARDTKE

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ORIGINAL

**I. TABLE OF CONTENTS**

I. TABLE OF CONTENTS..... ii

II. TABLE OF AUTHORITIES ..... iii

III. INTRODUCTION .....1

IV. ASSIGNMENTS OF ERROR .....2

V. STATEMENT OF THE CASE.....3

VI. ARGUMENT.....5

    A. The legislature has limited the pretrial costs that a court may impose on a defendant. The rental of a TAD bracelet is not among the allowed costs.....5

        1. RCW 10.01.160 precludes a court from ordering a defendant to pay the rental cost of electronic monitoring equipment. ....5

        2. A defendant does not agree to pay the costs of pretrial electronic monitoring when his only other choice is to post a larger performance bond. ....7

        3. The legitimate collateral costs associated with pretrial conditions, cited by the Court of Appeals and the State as analogous, do not fall under RCW 10.01.160.....8

    B. The trial court erred when it imposed the costs of pretrial electronic monitoring in Mr. Hardtke’s sentence.....10

        1. Pretrial electronic monitoring expense is not an expense recoverable as restitution. ....10

        2. The expense of pretrial electronic monitoring is not recoverable as a “cost” in a sentence. ....11

    C. The appropriate remedy is remand only for the purposes of removing the cost of electronic monitoring.....15

VII. CONCLUSION.....15

**II. TABLE OF AUTHORITIES**

Cases

Biggs v. Vail, 119 Wn.2d 129, 830 P.2d 350 (1992)..... 12

Gorman v. Garlock, Inc., 155 Wn.2d 198, 118 P.3d 311 (2005)..... 6, 9

Oregon v. Flajole, 204 Or. App. 295, 129 P.3d 770 (2006) ..... 13

Personal Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)..... 15

State v. Earls, 51 Wn. App. 192, 752 P.2d 402 (1988)..... 13

State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980) ..... 15

State v. Gray, 174 Wn.2d 920, 280 P.3d 1110 (2012)..... 5

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) ..... 12

State v. Kingen, 34 Wn. App. 124, 692 P.2d 215 (1984) ..... 12

State v. McEnroe, 174 Wn.2d 795, 279 P.3d 861 (2012)..... 5

State v. Pappas, 176 Wn.2d 188, 289 P.3d 634 (2012)..... 10

State, Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43  
P.3d 4 (2002)..... 12

Utter v. State, DSHS, 140 Wn. App. 293, 165 P.3d 399 (2007)..... 13

Statutes

Or. Rev. Stat. § 161.665..... 14

RCW 10.01.160 ..... 2, 3, 5, 6, 11, 12, 14

RCW 10.21.055 ..... 8

RCW 36.28A.300..... 9

RCW 36.28A.350..... 9

RCW 36.28A.360..... 6

RCW 9.94A.760..... 2

Rules

CrR 3.2..... 1, 5, 7, 8, 14

Other Authorities

Final Bill Rpt. SSB 6100 (2007)..... 15

Laws of 2005, ch. 263..... 15

Laws of 2007, ch. 367..... 15, 16

### III. INTRODUCTION

To be released, the Superior Court gave criminal defendant Frederick Hardtke a choice: post cash of \$15,000 as a “performance bond,”<sup>1</sup> or post only \$3000 cash and pay the rental cost of an ankle bracelet that would monitor the alcohol content of his blood. At the release hearing, the trial court ordered Mr. Hardtke to pay this rental cost. It later sentenced Mr. Hardtke to pay this rental cost as “restitution” to San Juan County. The total rental cost of the ankle bracelet was \$3972.

This case highlights a growing tension between the responsibility courts have to protect the public from violent offenders awaiting trial and the rights of those offenders to pretrial release. Sophisticated new technology, which allows courts to impose less restrictive release conditions while protecting the public, provides solutions to this tension.

However, this new technology is expensive, adding a new dimension to the public protection/freedom tradeoff. Should defendants have to buy their freedom when this new technology is available? Requiring defendants to pay is seductive to courts cognizant of budget pressure.

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<sup>1</sup> Performance bonds assure compliance with all conditions of release. *See* CrR 3.2(d)(6). The trial court acknowledged that the bonding companies approved by the court do not write performance bonds.

However, the legislature has expressly limited the costs that a defendant must pay both pretrial and in a sentence. *See* RCW 10.01.160. Perhaps the legislature should reconsider who should pay for this expensive, new technology. Until then, courts cannot impose the costs of this technology, used solely to monitor compliance with release conditions, on defendants.

#### IV. ASSIGNMENTS OF ERROR

The trial court erred as follows:

1. The trial court erred when it ordered Mr. Hardtke to pay the costs of pretrial electronic monitoring of his blood alcohol level in pretrial orders entered on July 11, 2012, July 20, 2012, and August 9, 2012. These orders violated the cost statute limiting the imposition of pretrial costs. *See* RCW 10.01.160(1).
2. The trial court erred when it imposed the expenses of pretrial electronic monitoring as restitution in Mr. Hardtke's sentence. The restitution statute does not authorize pretrial monitoring expenses as restitution. *See* RCW 9.94A.760(1). Further, reclassification of this expense as a "cost" would violate the cost statute limiting costs imposed upon conviction. *See* RCW 10.01.160(2).

## V. STATEMENT OF THE CASE

A more thorough statement of the case may be found in the Brief of Appellant filed in the Court of Appeals on or about July 31, 2014. For convenience, the most important facts follow:

On June 26 and 27, 2012, Petitioner Frederick Hardtke assaulted his girlfriend while blacked out from alcohol abuse. CP 87.

On July 11, 2012, on Mr. Hardtke's motion, the trial court reviewed the conditions of release it had initially imposed. AR 4. The court had previously found that a substantial danger exists that Mr. Hardtke would commit a violent crime. AR 3; CP 1. It modified the conditions of release to include a performance bond requirement of \$15,000 or, at Mr. Hardtke's option, a performance bond requirement of \$3000 coupled with the condition that Mr. Hardtke wear an ankle bracelet that would measure his blood-alcohol level, called a Transdermal Alcohol Detection (TAD) bracelet.<sup>2</sup> AR 4. Important to this appeal, the court ordered Mr. Hardtke, over his objection, to pay the cost of the TAD bracelet. AR 4-5; CP 7-8.<sup>3</sup>

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<sup>2</sup> The bracelet did not monitor any geographic restrictions.

<sup>3</sup> The trial court affirmed its decision to require Mr. Hardtke to pay these costs at a hearing on July 20, 2012. CP 9-10. On August 9, 2012, following Mr. Hardtke's violation of the release condition that he not consume alcohol, the trial court forfeited the \$3000 cash that Mr. Hardtke had posted and imposed an additional \$10,000 performance

On February 15, 2013, the trial court sentenced Mr. Hardtke. AR 7. In the sentence, the trial court imposed \$3,972 as “restitution” to San Juan County for the cost of the TAD bracelet, again over Mr. Hardtke’s objection. *Id.*; CP 33.

On appeal, the Court of Appeals did not adequately address Mr. Hardtke’s argument that RCW 10.01.160 governs the imposition of pretrial costs on a defendant and that, under this statute, the trial court could not impose the cost of monitoring using the TAD bracelet either as a pretrial cost or upon conviction. *State v. Hardtke*, No. 70002-2-I slip op. (Ct. App. Div. I July 21, 2014) [hereinafter the “COA Opinion”]. The court summarily denied Mr. Hardtke’s motion for reconsideration in which Mr. Hardtke specifically pointed out this oversight. Order Denying Motion for Reconsideration, *State v. Hardtke*, No. 70002-2-I (Ct. App. Div. I August 13, 2014).

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bond. AR 6; CP 22–24. The new order maintained all other conditions including that Mr. Hardtke wear the TAD bracelet and that he pay the costs of that bracelet. AR 6; CP 24–25. The Agreed Report of Proceedings reports that this hearing occurred on August 8, 2012. This appears to be an error in the report.

## VI. ARGUMENT

- A. The legislature has limited the pretrial costs that a court may impose on a defendant. The rental of a TAD bracelet is not among the allowed costs.**

Given the trial court's finding that there existed a substantial danger that Mr. Hardtke would commit a violent crime, the court was within its discretion to order Mr. Hardtke to not consume alcohol and to submit to electronic monitoring of compliance with this condition. *See* CrR 3.2(d)(9), (10). However, the trial court had no authority to order Mr. Hardtke to pay the cost of the electronic monitoring.

The interpretation of court rules is a question of law reviewed de novo. *State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012). The meaning of a statute is a question of law also reviewed de novo. *State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012)

- 1. RCW 10.01.160 precludes a court from ordering a defendant to pay the rental cost of electronic monitoring equipment.**

RCW 10.01.160 governs the costs that a court may impose in a criminal case. This statute is a statute of limitation, limiting costs to those

enumerated in the statute. *See* RCW 10.01.160(2) (“Costs shall be limited to . . .”).<sup>4</sup>

This statute limits costs that may be imposed on a defendant in a pretrial order to those related to a deferred prosecution program, a warrant, and “pretrial supervision.” RCW 10.01.160(1). Mr. Hardtke did not enter into a deferred prosecution program and was never ordered to pay the costs of a warrant. A pretrial supervision fee is expressly limited to \$150. RCW 10.01.160(2).

The TAD bracelet rental expense is not a cost of “pretrial supervision.” The word “supervision” refers to the services typically offered by a probation department. Given the costs of electronic monitoring—\$3972 in Mr. Hardtke’s case—the legislature could not have intended electronic monitoring to be a form of “pretrial supervision” since it limited that cost to \$150. *See* RCW 10.01.160(2). The \$150 limit is consistent with the cost of probation-style supervision. *See* CrR 3.2(d)(4) (authorizing as a release condition the requirement that the defendant

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<sup>4</sup> The legislature has authorized the imposition of certain costs not found in RCW 10.01.160 on defendants. *See, e.g.*, RCW 36.28A.360 (authorizing courts to impose the costs of a 24/7 sobriety program on defendants). These statutes override the limitations set forth in RCW 10.01.160. *See Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210–11, 118 P.3d 311 (2005) (giving preference to more specific and more recently enacted statute). However, no statute authorizes courts to impose the TAD bracelet cost at issue here.

report regularly to and remain under the supervision of an officer of the court or other person or agency).

**2. A defendant does not agree to pay the costs of pretrial electronic monitoring when his only other choice is to post a larger performance bond.**

The fact that Mr. Hardtke could have opted to pay the \$15,000 performance bond or simply sit in jail rather than wear, and pay for, the TAD bracelet does not change this result. It is within a court's discretion to require a defendant to post a performance bond as a condition of release. CrR 3.2(d)(6). However, the court may require a performance bond "only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community." *Id.*

Mr. Hardtke's objections at every turn should be evidence enough that he did not agree to pay this cost. More importantly, the trial court's alternative imposition of a \$15,000 performance bond was not authorized by the court rule. By offering electronic monitoring as an alternative, the trial court manifested its finding that this electronic monitoring, combined with the other release conditions such as the no-contact order, the alcohol-related prohibitions, and the lower \$3000 performance bond, was sufficient to protect the community. With this finding, the trial court could not impose the higher performance bond. *See* CrR 3.2(d)(6).

Requiring payment of the cost of monitoring cannot be justified by offering an alternative that could not be imposed in any event.

The trial court's order that Mr. Hardtke pay the cost of pretrial electronic monitoring was not legal. The trial court erred by imposing this cost on Mr. Hardtke as a condition of his release.

**3. The legitimate collateral costs associated with pretrial conditions, cited by the Court of Appeals and the State as analogous, do not fall under RCW 10.01.160.**

Persons defending criminal charges can incur legitimate expense complying with pretrial release conditions. However, unlike pretrial monitoring costs incurred by the government, RCW 10.01.160 does not address these expenses.

In its opinion, the Court of Appeals mentions two expenses that a defendant may incur: the cost of obtaining a surety bond guaranteeing the defendant's appearance and the cost of vacating a residence as the result of a pretrial no-contact order. *See* COA Opinion at 7. The State also mentions the cost of a pretrial ignition interlock device and the cost of a pretrial 24/7 sobriety monitoring program. *See* Br. of Resp. at 7 (referencing RCW 10.21.055(1)). Both reason that, since the pretrial release conditions giving rise to these costs are allowed, a court can impose monitoring expenses on a defendant.

However, with the exception of the 24/7 sobriety program, a trial court does not order payment of expenses associated with the release conditions cited by the Court of Appeals and the State. These costs are collateral consequences of the release conditions. It may be possible to obtain a bond, or obtain an ignition interlock device, or move from a residence, free of charge. Any charge is between the provider of the service (e.g. the bondsman or the moving company) and the defendant and may involve a variety of factors (e.g. the availability of collateral for a bond or friends to help move or a favor owed). Because a court does not impose these costs, RCW 10.01.160 does not address them.

The 24/7 sobriety program referenced by the State is run by the government. RCW 36.28A.300. The legislature has specifically authorized courts to condition release on participation in a 24/7 sobriety program, and to charge defendants with the associated expenses. RCW 36.28A.350. This authorization overrides the limitations set forth in RCW 10.01.160. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210–11, 118 P.3d 311 (2005) (giving preference to more specific and more recently enacted statute).

Further, the fact that a defendant may legitimately incur expense complying with pretrial release conditions does not void the legislative intent behind RCW 10.01.160. The legislature would not have expressly

authorized “pretrial supervision” as an expense for which a defendant may be charged if it intended to allow courts to charge defendants directly for any pretrial expense related to release conditions. While the analogy with incidental costs incurred as a result of pretrial release conditions is attractive, it cannot eviscerate the limitations imposed by the legislature.

**B. The trial court erred when it imposed the costs of pretrial electronic monitoring in Mr. Hardtke’s sentence.**

Mr. Hardtke’s ultimate conviction does not change the result in this case. The trial court erred by imposing the expense of pretrial electronic monitoring on Mr. Hardtke as restitution. In addition, this error cannot be corrected by reclassifying this expense as a “cost” on Mr. Hardtke’s sentence. Appellate courts review the legal sufficiency of a sentence de novo. *State v. Pappas*, 176 Wn.2d 188, 192, 289 P.3d 634 (2012).

**1. Pretrial electronic monitoring expense is not an expense recoverable as restitution.**

Before the Court of Appeals, Mr. Hardtke argued that the TAD bracelet expense was not recoverable as restitution in his sentence. *See* Br. of App. at 10–13. Neither the State nor the Court of Appeals addressed this argument. The argument will not be repeated here.

**2. The expense of pretrial electronic monitoring is not recoverable as a “cost” in a sentence.**

In a footnote, the Court of Appeals noted that Mr. Hardtke did not pay the rental costs of the TAD bracelet prior to sentencing. *See* COA Opinion at 7 n.2. From this observation, the court reasoned without citation to authority that there was no violation of RCW 10.01.160. *Id.*

The Court of Appeals’ reasoning does not recognize that RCW 10.01.160 limits the costs that may be imposed on a convicted defendant. These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(2). There was no deferred prosecution in this case. So, any costs charged to Mr. Hardtke must be expenses “specially incurred by the state in prosecuting the defendant” or expenses arising out of “pretrial supervision.”

This memorandum discusses “pretrial supervision” *supra*. Even if pretrial electronic monitoring is “pretrial supervision,” the total cost of that supervision is limited to \$150. *See* RCW 10.01.160(2). Consequently, justification of a nearly \$4000 cost for pretrial electronic monitoring requires classification of this monitoring as an expense “specially incurred by the state in prosecuting the defendant.” *See id.*

The interpretation of a statute is an issue of law that appellate courts review de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The objective is to ascertain and carry out the legislature’s intent. *Id.* If the “plain meaning” of the statute can be discerned from its language as well as the context of the statute, related provisions, and the statutory scheme as a whole, then no further inquiry is required. *Id.* When determining a statute’s plain meaning, it should be construed so that no word, clause, or sentence is superfluous or insignificant. *State v. Pannell*, 173 Wn.2d 222, 230, 267 P.3d 349 (2011).

However, if a statutory provision is subject to more than one interpretation, then the rule of lenity requires interpretation of that provision in the defendant’s favor absent legislative intent to the contrary. *Jacobs*, 154 Wn.2d at 600–01. In such circumstances, legislative intent may be determined through extrinsic aids such as legislative history. *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11–12, 43 P.3d 4 (2002). This legislative history may include amendments to the statute, *State v. Kingen*, 34 Wn. App. 124, 128, 692 P.2d 215 (1984), and final legislative reports, *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992).

The term “prosecuting” in RCW 10.01.160(1) and (2) “refers to the portion of a criminal action that leads to a determination of guilt or

innocence.” *Utter v. State, DSHS*, 140 Wn. App. 293, 305, 165 P.3d 399 (2007) (quoting *Oregon v. Flajole*, 204 Or. App. 295, 129 P.3d 770, 772 (2006)).<sup>5</sup> Under this definition, costs of pretrial release conditions are not included because they are not directly related to the determination of guilt or innocence.

Studying the statute as a whole supports this conclusion. Any logic that would label the cost of pretrial electronic monitoring as a prosecution cost would also label pretrial supervision as such a cost. Pretrial supervision is a condition imposed to protect the community. *See* CrR 3.2(d)(4). So is electronic monitoring. *See* CrR 3.2(d)(9). The expenses for both of these conditions are incurred pretrial solely to protect the public. So, if electronic monitoring expense is a prosecution cost, so is pretrial supervision expense, rendering superfluous the statute’s separate listing of pretrial supervision as a cost for which a defendant may be charged. *See* RCW 10.01.160(2); *Pannell*, 173 Wn.2d at 230 (regarding superfluous terms). Therefore, the cost of neither pretrial supervision nor pretrial electronic monitoring is a prosecution cost.

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<sup>5</sup> The legislature based the original version of RCW 10.01.160 upon the equivalent Oregon statute. *Utter*, 140 Wn. App. at 305. Consequently, Washington courts turn to Oregon cases interpreting the statute. *Id.* (citing *State v. Earls*, 51 Wn. App. 192, 197, 752 P.2d 402 (1988)). It should be noted that Oregon’s version of the statute has never referenced “pretrial supervision.” *See* Or. Rev. Stat. § 161.665.

The statute's history is evidence that the legislature did not intend pretrial costs that were incurred to ensure compliance with release conditions to be costs "incurred by the state in prosecuting the defendant." As of 2005, the statute limited costs only to "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW" with no mention of "pretrial supervision." Laws of 2005, ch. 263, § 2. In 2007, the legislature became concerned with reports that prosecutors were dismissing or reducing charges in exchange for contributions to charitable organizations. Final Bill Rpt. SSB 6100 (2007). The legislature passed a bill expressly forbidding this practice. Laws of 2007, ch. 367, §§ 1–2. However, the legislature wished to avoid prohibiting "[t]he collection of costs associated with actual supervision," *id.*, including pretrial supervision, *see* Final Bill Rpt. SSB 6100 (2007) ("Payment of costs of pretrial supervision are not prohibited.").

Consequently, in that same bill, the legislature added "pretrial supervision" to the list of costs that could be imposed upon a defendant, and limited that cost to \$150. Laws of 2007, ch. 367, § 3 (amending RCW 10.01.160). The legislature would not have added "pretrial supervision" to the list of recoverable costs if it considered pretrial supervision already to be recoverable as a cost "specially incurred by the state in prosecuting

the defendant.” To repeat, there is no difference between the purpose of pretrial electronic monitoring and the purpose of pretrial supervision that would allow a classification of electronic monitoring as a prosecution cost when pretrial supervision cannot be so classified.

The legislature intended neither prosecution costs nor pretrial supervision to include the cost of pretrial electronic monitoring. Therefore, the trial court’s error in ordering restitution to recover the expense of this monitoring cannot be cured by reclassifying this expense as a “cost” in Mr. Hardtke’s sentence.

**C. The appropriate remedy is remand only for the purposes of removing the cost of electronic monitoring.**

Since the sentence imposed by the trial court contains error, the sentence should be reversed. However, only the erroneous portion of the sentence should be reversed. *State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980); *Personal Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980).

## VII. CONCLUSION

As times change, our laws should be updated to change with them. Improving technology that allows criminal defendants to be supervised more effectively pretrial is attractive. But it raises the difficult question of who should pay for this new technology. This is a question for the legislature.

At least for now, the legislature has spoken on the issue. RCW 10.01.160 limits the costs for which a defendant may be charged. The cost of “pretrial supervision” is allowed, but limited to \$150. The costs of electronic monitoring are not on the list and so are prohibited.

The trial court erred when it imposed on Mr. Hardtke this cost. This court should reverse Mr. Hardtke’s sentence and remand with instructions to remove the requirement to pay restitution to San Juan County for the cost of pretrial electronic monitoring.

Respectfully submitted,

BRANDLI LAW PLLC

Dated: March 1, 2015

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FREDERICK E. HARDTKE,  
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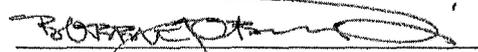
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Thank you,

Steve