

FILED

NOV 05 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 303781-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

PATRICK GALE WILSON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-01031-9

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

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ISSUES

1. Was the defendant's constitutional right to a jury trial violated by the standard "to convict" instructions, published in the Washington Pattern Jury Instructions?
2. Was the court's finding that the defendant had the current or future ability to pay Legal Financial Obligations supported by the record?
3. Was the sentencing condition prohibiting possessing or viewing "any pornographic materials, including those found on the internet" unconstitutionally vague?
4. Was the defendant's due process rights violated when the sentencing court imposed certain conditions of community custody that were not crime-related?

STATEMENT OF THE CASE

On September 6, 2011, a jury convicted the defendant of Rape of a Child in the First Degree. CP 307. At trial the court gave the standard 'to convict' instruction. CP 299; WPIC 44.11. Defense counsel objected to the standard instruction and proposed an alternate 'to convict' instruction, which eliminated the 'duty to return a verdict of guilty' and proposed

language contained in the WPIC 160.00. RP Vol I PG 19-20; CP 283; WPIC 160.00 .

On November 4, 2011, the defendant was sentenced to a minimum of 136 months to LIFE. CP 327. This is an indeterminate sentence. CP 322-335. He was ordered to pay legal financial obligations. CP 325. RP Vol V 751. In addition the court ordered lifetime community custody and to comply with the conditions in Appendix F should he ever be released into society. RP Vol V 751-752; CP 333-334. Some of those conditions pertain to pornographic materials and alcohol. CP 333-334.

ARGUMENT

I. THE COURT'S "TO CONVICT" INSTRUCTION DID NOT MISSTATE THE LAW, NOR VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

A. Jury Nullification is a Breach of a Juror's Oath to the Court, and Contrary to Both State and Federal Law.

The defendant argues that the court's 'to convict' instruction created a duty to convict when there was none; and that it "affirmatively

misled the jury" about its power to exercise jury nullification. However, as argued by the State below, jury nullification is not sanctioned by law.

Jury nullification is defined as "a juror's knowing and deliberate rejection of the evidence or *refusal to apply the law* ... because the result *dictated by law* is contrary to the [juror's] sense of justice, morality, or fairness." *State v. Elmore*, 155 Wn.2d 758, 761 (2005) (citing *Black's Law Dictionary* 875 (8th ed. 2004)). The defendant's position supports the notion that a jury may lawfully ignore the instructions of the court, and in so doing, disregard the law.

This issue has been raised before in Washington State, and the defendant now asks the court to overrule those previous cases. In *State v. Meggyesy* and *State v. Bonissisio*, the court has confronted the issues and arguments raised by the defense. 90 Wn.App. 693 (1998); 92 Wn.App.

783 (1998). The defendant admits that he asks this court to disagree with those cases. However, the defendant does not acknowledge the heightened standard of review that this requires. In Washington State, the Court of Appeals is a single unified body, and each division speaks for the Court as a whole. Wn.Const. Art. IV; RCW 2.06.010; DeForrest, Mark Edward, *Stare Decisis and Conflicts between the Divisions of the Washington State Court of Appeals: Resolving a Problem at the Trial Court Level* (August 16, 2011). As such: "The Court of Appeals can overrule a previous decision if it is "demonstrably 'incorrect or harmful.'" *Intl. Assn. of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 36 (2002). The defendant has failed to demonstrate that *Meggyesy* was incorrectly decided, or that it is harmful in any manner. The *Meggyesy* court performed a straightforward and thorough *Gunwall* analysis, and nothing the Defendant argues demonstrates that it was

"demonstrably 'incorrect or harmful.'" *Intl. Assn. of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 36 (2002)

The defendant cites several cases to support his argument that jury nullification is part of a defendant's constitutional right to trial. However, defendant's understanding is based on a fundamental misconception of those cases. The defendant mistakes the power of the jury to judge the facts of the case entirely according to its view, for the power to ignore the law and the facts, and in that way render a verdict based upon moral or ethical rules. *State v. Elmore*, 155 Wn.2d 758, 761 (2005) (citing *Black's Law Dictionary* 875 (8th ed. 2004)).

The defendant cites *State v. Salazar* as an example of a court's recognition of the jury's "constitutional prerogative to acquit." However, the defendant's reliance on *State v. Salazar*, is misguided. 59 Wn.App. 202 (1990). Although the *Salazar* court acknowledges the jury's power to

nullify the verdict, it in no way condones the jury's exercise of that power.

In *Salazar*, over the objection of defense, the trial court allowed the State to introduce evidence that the search performed on defendant Salazar's automobile was based upon a warrant. *Id.* at 210. Under the circumstances of that case, the court allowed the testimony to avoid an assumption, on the part of the jury, that the defendant's vehicle was searched unlawfully. *Id.* The trial court was concerned that had the lawfulness of the search not been addressed, the jury's verdict may have been tainted by jurors' sympathy for the defendant. *Id.* at 210-211. Acknowledging the legitimacy of the trial court's concern, the *Salazar* court approved of the action taken by the trial court to avoid the risk of jury nullification. *Id.* at 211. As such, the *Salazar* court did not recognize jury nullification as a protected right; to the contrary, the court recognized it as something

courts have a duty to discourage. *Merced v. Mcgrath*, 426 F.3d 1076, 1079 (9thCir. 2005).

In fact, other cases have discussed the obligation of a court to investigate potential juror nullification. *State v. Elmore*, 155 Wn.2d 758, 761 (2005). Moreover, if it is revealed that a juror has engaged in nullification, the court has the power to dismiss that juror, even during deliberations. *Id.*

Federal case law also views jury nullification as a power and not a right. *Merced v. Mcgrath* (cited below) notes,

[i]nasmuch as no juror has a right to engage in nullification - and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court - trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition or, where it does not interfere with guaranteed rights or the need to protect the secrecy of jury deliberations, ... by dismissal of an offending juror from the venire or the jury.

Merced v. Mcgrath, 426 F.3d 1076, 1079 (9thCir. 2005) (citing *United States v. Thomas*, 116 F.3d 606, 615 (2nd.Circuit 1997.)

In sum, based upon the above cited case law, there is no justification in the common law of Washington or of our nation to view jury nullification as a right, or within the jury's rightful authority. *State v. Meggyesy*, 90 Wn.App. 693 (1998); *Merced v. Mcgrath*, 426 F.3d 1076, 1079 (9th Cir. 2005). Rather, it is a power that arises out of the confluence of several rules that are inherent in a defendant's constitutional right to a fair trial. *State v. Elmore*, 155 Wn.2d 758, 761 (2005). The defendant's right to have his guilt determined by a jury of his peers, the right of the jury to adjudge the facts as they will, to make their decision uncoerced, and have their deliberations be secret. That these rights exist does not mean the court must give the constitutional protection to jury nullification. Rather, it is a power which arises out of them, the use of which threatens anarchy within the court system, and one whose exercise the Court has the duty to stop if it may, by any

means that do not impede either party's exercise of those rights. *Sparf v. United States*. 156 U.S. 51, 101-103 (1895).

II. THE COURT'S FINDING THAT THE DEFENDANT HAD THE CURRENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS WAS SUPPORTED BY THE RECORD.

A. The defendant is likely to have the capacity to repay his Legal Financial Obligations

The defendant is indigent at the moment. This does not preclude the assessment of costs under RCW 9.94A.753 or RCW 10.01.160. Both RCW 10.01.160 and RCW 9.94A.753 ask the court to look to the defendant's current and future ability to pay. The court did exactly that in Finding 2.5:

"The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein."
CP at 325

The defendant may not be able to pay at the current point in time. But the court had confidence that the defendant would be able to.

This court review's a trial court's determination regarding a defendant's resources and ability to pay under the clearly erroneous standard. *State v. Betrand*, 165 Wn.App. 393, 403-04 n. 13, 267 P.3d 511 (2011) (citing *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.' *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn.App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). The burden to show that the trial court had insufficient facts before it to make a finding lies entirely on the defendant. *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d

935, 939-940 (1993). Mr. Wilson claims that the court had no evidence whatsoever before it demonstrating the possibility of a future ability to pay. Here, the defendant did not object when the court listed what he was obligated to pay. RP 11/4/2011 PG 751.

While in jail, the defendant will earn such money as he may. During his stay in jail, he will be provided with food and lodging, and various methods of earning money. RCW 72.09.015 provides an express definition of indigency in this circumstance: "[I]ndigency' mean[s] an inmate who has less than a ten-dollar balance of disposable income in his or her institutional account on the day a request is made to utilize funds and during the thirty days previous to the request." The deductions in prison are statutorily barred from reducing the inmate below the level of indigency, under the scheme constructed for such in RCW 72.09.111. If, upon being released, the continuing burden of Legal Financial Obligations

should prove too much for the defendant's earning potential, then he may petition the court to alleviate or do away with them, at that time. At the very least, for the period of time when the state has the obligation to prevent Mr. Wilson of falling beneath indigent status, any excess funds should be capable of flowing to the state to recoup the costs of trying the defendant.

The court had sufficient evidence before it to make Finding 2.5. The defendant failed to object at sentencing, as such, he has failed to meet his burden.

B. The defendant waived his right to appeal the cost bill.

In order to raise an issue on appeal, the general rule is that an individual must have allowed the trial court a chance to correct that error, whether through an objection at the time, or a motion for a new trial. *State v. Wicke*, 91 Wash.2d 638, 642 (1979). The reason for this rule is to prevent a defendant from going before a finder of fact in circumstances he finds

acceptable, receiving a verdict he does not approve of, and then attack the trial court's judgment for an error it could have corrected. *Id.* RAP 2.5 lays out when an appellate court must ignore this rule, due to the grave concerns underlying each: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5 (a). No allegation has been made court lacked jurisdiction, or that there were insufficient facts to justify the conviction of the defendant. The defendant alleges no Constitutional violations.

His brief does mention that seeking to collect funds from indigent defendants is a violation of the Equal Protection Clause. The state agrees with this conclusion, believing it well documented in the case law. *E.g. State v. Zeigenfuss* 118 Wash.App. 110, 112 (2003) However, the State is not currently attempting to collect

any funds from the defendant. He is not at risk of any penalty or sanction. As such, there is no constitutional violation at the moment. The case law is quite clear that it is not the assessment of the Legal Financial Obligations against an indigent defendant that is the constitutional violation, but the levying of sanctions, whether in the form of additional fines or jail time, as a result of his not paying.

The defendant did not object to the order for restitution or costs at sentencing. He cannot claim that he was unaware of the restitution or costs bill, nor that he was given no chance to object. Mr. Wilson has waived his objections, and under RAP 2.5, this court should dismiss his appeal.

C. Mr. Wilson's argument about the award of costs is not ripe.

Any argument about the defendant's indigent status cannot be considered ripe. The defendant is not facing the attempts of Benton County to collect at the current time. He suffers no injury

from the imposition of costs and fees until he leaves the penitentiary, and the state begins attempting to collect from him. As such, only then would the defendant be entitled to a protest about his indigent status. The court has stated as such: "If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault of his own, to repay, the statute allows for remission of the costs award." *State v. Blanks*, 131 Wash.App. 230, 253 (1997).

State v. Zeigenfuss is illustrative. 118 Wash.App. 110, 113 (2003). In *State v. Zeigenfuss*, an inmate protested the Department of Corrections procedure for imposing sanctions upon those who fail to pay their Legal Financial Obligations. 118 Wash.App. 110, 112 (2003). The court stated, in answer to her claims: "Zeigenfuss has not failed to pay the VPA, nor has she been incarcerated or otherwise sanctioned for violating the terms of her community custody.

As yet, therefore, she has suffered no harm, and her challenge to the constitutionality of the process in DOC community custody violation hearings is premature." *Id.* The defendant has suffered no harm as a result of the imposition of costs or restitution. When the state attempts to collect such from him, he will be given a chance to be heard, and make arguments about his ability to pay. The court has made it clear: "There is no reason at this time to deny the State's cost request based upon speculation about future circumstances." *State v. Blanks*, 131 Wash.App. 230, 253 (1997) Finding 2.5 simply indicates that the court believes that the defendant may be able to pay his Legal Financial Obligations. When the State attempts to collect, then let him claim indigence. The court will be able to make a determination based upon the best possible evidence.

Another illustrative case is *State v. Crook*. 146 Wn.App. 24, (Div.3 2008). There, Mr. Crook

appealed an order denying his motion to alleviate him of his financial obligations. *Id.* at 26. The courts response was: "Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs." *Id.*

Finally, *State v. Wimbs* clearly shows what consideration, if any, is necessary before the imposition of costs. 68 Wn.App. 673, (Div.3 1993). In *Wimbs*, the only funds of the defendant considered consist of \$108 held by the Yakima police department, all of which was dispersed to the state, in order to pay Mr. Wimbs cost bill, which left \$575.50 of the original \$683.50 cost bill. *Id.* at 680-681 In the courts words: "The court's order also finds that Mr. Wimbs has the ability to pay. The record contains no evidence of Mr. Wimbs' ability to pay the remaining \$575.50." *Id.* The court upheld the imposition of

finest and costs, agreeing with the lower court.

Id.

III. THE SENTENCING CONDITION PROHIBITING POSSESSION OR VIEWING "ANY PORNOGRAPHIC MATERIALS, INCLUDING THOSE FOUND ON THE INTERNET" HAS BEEN HELD TO BE UNCONSTITUTIONALLY VAGUE

The State concedes this point.

IV. THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE SENTENCING COURT IMPOSED A COMMUNITY CUSTODY CONDITION TO REFRAIN FROM CONSUMING ALCOHOL.

Under RCW 9.94A.703, some community custody conditions are mandatory, while others are subject to the court's discretions. Relevant to this case, the court may, in its discretion, order an offender to "refrain from consuming alcohol" under subsection 3(e) or to comply with any crime-related prohibitions" under subsection 3(f). This prohibits an offender from consuming alcohol, not possessing alcohol. The State will concede that at the trial there was no evidence presented that alcohol played a role in Mr. Wilson's offenses. Therefore, any prohibitions that are crime related are not

proper. However, the court did have the authority to order the prohibition on alcohol consumption, which is specifically permitted by RCW 9.94A.703(3)(3) regardless of whether alcohol was involved in the offense. *State v. Jones*, 118 Wn.App. 199, 206-07, 76 P.3d 258 (2003).

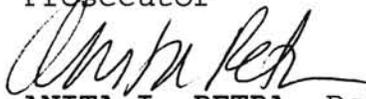
CONCLUSION

The "to convict" instruction located in the WPICs and given to the Jurors was an accurate summary of the law, and their duty to the court. In addition, the finding that regarding the defendant's current and future ability to pay was sufficient. The State concedes that conditions regarding pornography and alcohol possession related conditions be stricken.

RESPECTFULLY SUBMITTED this 1st day of
November, 2012.

ANDY MILLER

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

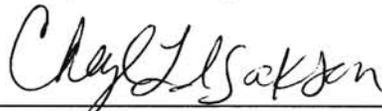
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