93874-1

No. 33814-2-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DENNIS WALLACE PATTERSON,

Appellant.

On Appeal from the Stevens County Superior Court
Cause No. 15-1-00005-0
The Honorable Allen Nielson & Patrick Monasmith, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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I. SUPPLEMENTAL ISSUE

1. Should this Court deny any future request for appellate costs where Dennis Patterson does not have the ability to repay the costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances?

II. SUPPLEMENTAL STATEMENT OF THE CASE

Recently, in State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016), Division 1 held that "it is appropriate for [the Court of Appeals] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." On June 10, 2016, this Court issued a General Court Order directing that any "adult offender convicted of an offense who wishes this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal must make the request and provide argument in support of the request, together with citations to legal authority and references to relevant parts of the record, in the offender's opening brief or by motion as provided in Title 17 of the Rules on Appeal."

III. SUPPLEMENTAL ARGUMENT & AUTHORITIES

Under RCW 10.73.160, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. And RAP

14.2 provides that "[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the authority to award costs of appeal "is permissive," the Court held, so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Patterson's case, this Court should exercise its discretion and decline to award any

appellate costs that the State may request. First, Patterson owns limited property and assets, and has little income. (Sup. CP) His income has been below the federal taxable level since 2013. (Sup. CP) The trial court did not make a finding that Patterson has the ability to repay LFOs and ordered Patterson to pay only mandatory LFOs. (CP 282-83) Thus, there was no evidence below that Patterson has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Patterson is indigent and entitled to appellate review at public expense. (CP 309-10) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, the court declined to impose appellate costs on a defendant who had previously been found indigent,

noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Patterson's financial situation has improved or is likely to improve.[1] Patterson is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

IV. CONCLUSION

This Court should decline any future request to impose appellate costs.

DATED: June 29, 2016

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[1] Patterson will provide a Report as to Continued Indigency no later than 60 days following the filing of this brief, as required by the June 10, 2016 General Order.