No. 47581-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WYATT SEWARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
The Honorable Anne Hirsch, Judge
Cause No. 13-1-01458-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUES.

This Court has directed the parties to file supplemental briefing addressing the applicability to this case of its recent decision in State v. Mathers, 193 Wn. App. 913, ___ P.3d ___ (2016). In his supplemental brief, Seward has raised two additional issues. This brief will address the following issues:

1. Whether Mathers has decided the same substantive due process claim raised by Seward.

2. Whether the criminal filing fee required by RCW 36.18.020(2)(h) is mandatory.

3. Whether, in the event the State substantially prevails on appeal, appellate costs should be imposed on Seward.

B. ARGUMENT.

1. The Mathers opinion did not address precisely the same substantive due process claim raised by Seward, but it is relevant to that claim.

The opinion in Mathers addressed the due process preclusion of incarcerating an offender for a non-willful failure to pay legal financial obligations (LFOs). Mathers, 193 Wn. App. at 927-28. Instead, Seward claims that making some costs or fees mandatory violates due process where the offender is indigent. He argues that trying to collect debt from those unable to pay is irrational. Appellant's Supplemental Brief at 3-4.

It is not irrational to impose costs, even on defendants who are indigent at the time of sentencing. Unless the defendant is permanently disabled and will never be able to work, or is not facing any incarceration, sentencing is not the optimum time to determine his or her ability to pay. Seward's argument assumes that every indigent defendant will remain so for life. That is no more realistic than assuming a defendant who is able to make payments at the time of sentencing will not suffer reversals that render him or her indigent at a later time. Nor does it seem good policy to convey to the defendant the not-so-subtle message that the court does not expect that the defendant will ever improve his or her financial situation. Defendants should be encouraged to better their lots in life.

The Mathers opinion recognizes that due process, even in a slightly different context, is satisfied when the defendant has the opportunity to assert a constitutional defense at the time the State attempts to collect the LFOs. Mathers, 193 Wn. App. at 927-28. The legitimate goals of the State, which Seward acknowledges, are not subverted by this process.

2. The $200 criminal filing fee is mandatory.

As Seward acknowledges, this court has held that the criminal filing fee is a mandatory LFO. Appellant's Supplemental Brief at 5; State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); State v. Bergen, 186 Wn. App. 21, 30, 344 P.3d 1251 (2015). He also cites to a footnote in State v. Duncan in which the Supreme Court referred to the filing fee as one that has "been treated as mandatory by the Court of Appeals." 185 Wn.2d 430, 436 fn. 3, ___ P.3d ___ (2015).

When interpreting a statute, the court must give effect to the plain meaning of the statutory language. In re Wissink, 118 Wn. App. 870, 874, 81 P.3d 865 (2003). A court may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a legislative, not judicial, function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court's goal in statutory interpretation is to identify and give effect to the legislature's intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (*citing* State v. Bright, 129 Wn.2d 257, 265, 916 P.2d

922 (1996)), *review denied*, 145 Wn.2d 1013 (2001), if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. Id. When the legislature omits language from a statute, intentionally or inadvertently, the court will not read into the statute the language it believes was omitted. State v. Moses, 145 Wn.2d 370, 374, 37 P.2d 1216 (2002). Under the rule of lenity, any ambiguity is interpreted to favor the defendant. Spandel, 107 Wn. App. at 358.

To construe a statute, courts examine the whole statute "and consider the entire sequence of all statutes relating to the same subject matter." State v.Morales, 173 Wn.2d 560, 567, 269 P.3d 263 (2012).

RCW 36.18.020(2)(a) provides that a party initiating a civil action "shall pay" a filing fee. RCW 36.18.020(2)(b), referring to appeals from a court of limited jurisdiction, provides that a party other than the defendant in a criminal case "shall pay" a $200 filing fee to initiate the action. RCW 36.18.020(h) makes only convicted defendants "liable for a fee of two hundred dollars." A defendant who is acquitted, or whose case is dismissed, will not "be liable" for the filing fee.

RCW 36.18.022 states:

> The court may waive the filing fees provided for under RCW 36.18.016(2)(b)[1] and 36.18.020(2)(a) and (b) upon affidavit that the party is unable to pay the fee due to financial hardship.

This statute does not allow for waiver of a fee for which a convicted defendant is "liable." One cannot read into the statute the implication that the court may waive the filing fee for convicted defendants.

In Wash. Pub. Ports Ass'n v. Dep't of Revenue, the Supreme Court also looked to Black's Law Dictionary to define "liable."

> *Black's* also defines "liable" as "bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution." . . . Therefore, under the common meaning of the terms "fully" and "liable" we find that the public lessor is entirely, i.e., fully, responsible for the collection and the remittance of the LET—even if the LET is uncollected.

Wash. Pub. Ports, 148 Wn.2d 637 (internal cite omitted). There are many words in Black's Law Dictionary that have more than one meaning, and the State acknowledges that the rule of lenity requires that the meaning most favorable to the defendant be selected where there is ambiguity. However, reading RCW 36.18.020(2) and RCW 36.18.022 together, there is no ambiguity.

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1 This statute address petitions for dissolutions.

The difference between "shall pay" and "liable for" reflects the fact that a convicted defendant reimburses the State for the filing fee, whereas any other party "shall pay" the fee up front.

The legislature intended that the filing fee be mandatory for defendants convicted of crimes.

3. The record provides no basis for this court to waive appellate costs should the State substantially prevail on appeal.

Seward asks this court to decline to award appellate costs to the State in the event the State substantially prevails on appeal, or in the alternative to remand to the trial court for an inquiry into his ability to pay. His only basis for that request is that he was found indigent for purposes of receiving publicly-funded counsel and the record on appeal. Appellant's Supplemental Brief at 9-10.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[2], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. Id., .160(2). In State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a

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2 Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. Id., at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997), the Supreme Court held this statute constitutional, affirming the Court of Appeals' holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

The defendant has the initial burden to show indigence. *See* State v. Lundy, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See* State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See* Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to

satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id., at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id., at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but

despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

Even though Seward has been found indigent in the trial court that is not a finding of indigency in the constitutional sense. Constitutional indigence is more than poverty but less than "absolute destitution." State v. Johnson, 179 Wn.2d 534, 553-54, 315 P.3d 1090, *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). Only the constitutionally indigent are protected from the requirement to pay. Id. at 555. Indigency, moreover, is a "relative term" that "must be considered and measured in each case by reference to the need or service to be furnished." State v. Rutherford, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964); Johnson, 179 Wn.2d at 555.

There is a significant difference between costs at trial and costs on appeal. Trial costs result from a proceeding initiated by the State. The appeal in this case, however, was initiated by the defendant. The costs of this decision are properly borne by the defendant, not the taxpayer. Non-indigent parties regularly make financial sacrifices in order to exercise their right to appeal. They must weigh these in deciding whether to exercise that right. There is no reason why indigent defendants should be entirely freed from any such sacrifices. To the extent that the defendant has ability to pay, he should do so. If the costs create financial hardship, he can seek remission under RCW 10.73.160(4).

As Blazina instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as pointed out in State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612 (2016), the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Seward's date of birth is September 24, 1978. CP 18. He will be 38 years old in September of 2016. He was sentenced on

May 1, 2015, to 120 months in prison. CP 22. The record does not reflect how much time he served before sentencing, but even if he serves every day of the 120 months beginning on the day of sentencing, he will still be fairly young when he is released. At his guilty plea hearing his counsel told the court he was employed. 03/06/15 RP at 11. At something less than 50 years old and with a work history, there is no apparent reason that Seward cannot pay both the LFOs imposed at sentencing and any appellate costs awarded by this court.

If the court finds that it does not have sufficient information upon which to determine Seward's present or future ability to pay his legal financial obligations, it should require his currently assigned counsel to assist him in providing a full accounting of all of his debts and assets. The court should then take that information into account, as well as the fact that he has been employed in the past.

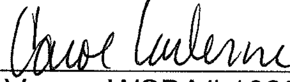
The burden of proving forever-indigency (or at least a significant likelihood that the defendant will remain indigent) or that repayment will work a manifest hardship on him should be placed on the defendant. A defendant's financial information is not within the control of the State; the defendant controls all of this

information. *See, e.g.* Cedar River Water and Sewer Dist. v. King Cty., 178 Wn.2d 763, 779, 315 P.3d 1065 (2013) (citing Jolliffe v. N. Pac. Ry., 52 Wash. 433, 436, 100 P. 977 (1909) ("When information necessary to proof 'is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof.'") As such, should the court need additional documentation regarding defendant's inability to pay, it should require the defendant, through his attorney, to provide it, in a form sworn under oath, such that there may be recourse for false statements or failure to disclose all assets or sources of income. Seward's appellate counsel is in the best position to facilitate presenting this information to the court; appellate counsel surely is in communication with his client and can readily obtain this information from him to present to the court.

C. CONCLUSION.

The decision in Mathers is helpful but not dispositive to the issue in this case. The $200 filing fee is mandatory. Seward has not offered any reason why appellate costs should not be imposed if the State substantially prevails on appeal.

Respectfully submitted this 2d day of August, 2016.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Supplemental Brief of Respondent on the date below as follows:

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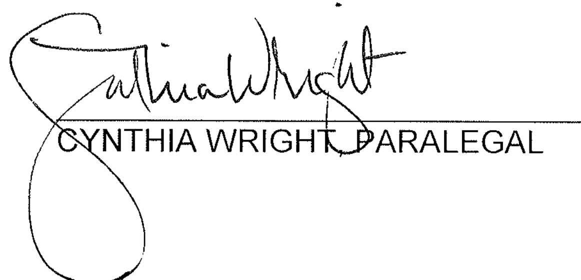

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