COA No. 33326-4-III

NO. 93908-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD E. CORNWELL, JR.,

Petitioner.

PETITION FOR REVIEW

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the denial of the Appellant's motion to remit LFO's while he is still incarcerated with a projected release date of 11/30/2025 and is not subject to collections until 90 after his release and where he could not demonstrate that the future collections were currently resulting in manifest hardship.

III. ISSUE

Should this Court deny review of a motion to remit LFO's where the Superior Court correctly held that the incarcerated Defendant made no showing of manifest hardship where there will be no collection of his LFO's until 2026 (90 days after his release from incarceration) and where the Court of Appeals correctly decided that the Defendant has failed to demonstrate that he is an aggrieved party?

IV. STATEMENT OF THE CASE

The Defendant challenges the superior court's denial of his motion to remit LFO's.

In this single case, the Defendant Richard Cornwell is convicted of:

1. delivery of methamphetamine (school zone enhancement),
2. possession with intent to deliver heroin (school zone and firearm enhancements),
3. possession with intent to deliver methamphetamine (school zone and firearm enhancements),
4. possession with intent to deliver dihydrodeinone (school zone and firearm enhancements),
5. possession with intent to deliver methadone (school zone and firearm enhancements),
6. use of drug paraphernalia,
7. possessing stolen property in the second degree,
8. possessing a stolen firearm,
9. a second count of possessing a stolen firearm,
10. possessing an unlawful firearm,
11. and trafficking in stolen property in the first degree,

CP 44-45. The Honorable Judge Lohrman presided at pretrial, trial, and sentencing.

At the Defendant's first appearance, the judge entered an order of indigency and appointed counsel based on the following typical minimal inquiry:

THE COURT:	Mr. Cornwell, do you wish to be represented by an attorney?
THE DEFENDANT:	Yes, sir.

THE COURT:	Do you have the funds with which to hire one?
THE DEFENDANT:	No, I don't.
THE COURT:	Have you been working?
THE DEFENDANT:	No.
THE COURT:	I will appoint Mr. Richard Wernette as your attorney.

RP (12/13/2012) 6. By the date of arraignment, the Defendant had obtained his release with a bail bond in the amount of $100,000. RP (12/28/2012) 10. Despite this large bond amount and while detained on these charges, the Defendant attempted to escape and was convicted of escape. RP (6/24/13) 23-24.

At sentencing, the prosecutor and the judge observed that the Defendant's large scale trafficking business was at the "center of an operation that encouraged" crime and had a "devastating effect" on "a lot of people economically, privacy-wise, and health-wise as far as those that were trading stolen property for drugs to further their habit." RP (6/24/13) 29, 34.

Although the Defendant's Statement of the Case claims the court made no inquiry into his ability to pay (Petition at 2), the record is otherwise. At his sentencing, the 37-year-old Defendant, his attorney, and a friend informed the court that he had held the same job for 16 years, "a

long term of consecutive employment, no difficulties." RP (6/24/13) 25-26, 32. In response to the court's specific inquiry, the Defendant acknowledged that he was able-bodied, had found employment in the past, and was able to find employment. RP (6/24/13) 35.

On this record, the court found the Defendant was able to pay his legal financial obligations (LFO's). *Id.*; CP 9, 47. The sentencing court imposed legal financial obligations in the amount of $5946.22 to be paid at $100/mo "commencing 90 days after release" while authorizing the Department of Corrections to disburse money from the Defendant's personal account while in custody for LFO's pursuant to RCW 72.11.020. CP 50. The court found that the Defendant had the ability or likely future ability to pay the legal financial obligations. CP 47.

The court ordered 124 months of confinement with credit for 48 days served. CP 54. The Defendant's projected release date is November 30, 2025. CP 86. Collections on the LFO's will not begin until March 2026 at the earliest.

The Defendant appealed his convictions in Court of Appeals No. 31763-3, but did not challenge his LFO's in that appeal.

On April 1, 2015, almost two years after the judgment, the

Defendant filed in the superior court a Motion to Vacate Illegally Imposed Legal Financial Obligations. CP 82-84, 91. The motion relied upon RCW 10.01.160, RCW 10.73.100, and *State v. Blazina*. CP 82-83. The Defendant failed to provide the record relevant to his allegations. CP 86.

The State filed a response. CP 85-94. Having failed to provide the transcript of the sentencing hearings in his motion, the Defendant could not prove his allegation regarding the insufficiency of the court's inquiry. CP 87. The Defendant also had not demonstrated he lacked the future ability to pay, having failed to provide any information about his education or work history or dependents. CP 87, 91-92.

The State noted that the Defendant had previously been employed as a dry cleaner. CP 91. The Defendant had informed the court in his indigency screening form that he was earning above poverty level income of $1800/mo. CP 92.

On April 20, 2015, the superior court held a hearing and denied the motion, finding that the LFO's did not impose a manifest hardship on the defendant or his immediate family, that there were no grounds for granting relief under RCW 9.94A.7605, and that Defendant had not sustained his burden of proof. CP 95-96.

The Defendant appeals from the denial of his motion.

V. ARGUMENT

A. THE DEFENDANT'S CLAIM IS UNAPPEALABLE; AND THE DEFENDANT IS NOT AGGRIEVED.

Under RAP 2.2(a), denials of a defendant's motion to remit are not appealable; an appeal will be summarily denied. *State v. Smits*, 152 Wn. App. 514, 518, 523-24, 216 P.3d 1097 (2009). An order to pay LFO's is not final under RAP 2.2(a)(1), because a defendant may file motions to modify or waive LFO's at any time repeatedly. *State v. Smits*, 152 Wn. App. at 523. Nor is an order appealable under RAP 2.2(a)(9), because the order is conditional, such that when the time comes for collection, payment will not be required unless several conditions are met and because the amount is always subject to modification. *State v. Smits*, 152 Wn. App. at 524.

The Defendant claims that he is an aggrieved party under RAP 3.1. Petition at 13. To be aggrieved, a party must have a present interest, not merely an expectancy in the subject matter. *State v. Mahone*, 98 Wn. App. 342, 347, 989 P.2d 583 (1999). The *Smits* court found the defendant was not aggrieved, because he was not currently being collected upon and any

collections were only speculative. *State v. Smits*, 152 Wn. App. at 523-24, *citing State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991). A defendant is not an aggrieved party on this issue "until the State seeks to enforce payment and contemporaneously determines the ability to pay." *State v. Smits*, 152 Wn. App. at 582, (quoting *State v. Mahone*, 98 Wn. App. at 347-48).

The same is true for Defendant Cornwell. The judgment and sentence states that he shall not be required to pay until 90 days after his release. Collections on Cornwell's LFO's will not begin until March 2026 at the earliest, another ten years from now. *State v. Smits* is good law. By law, the Defendant is not an aggrieved party.

In a recent case, the court of appeals allowed that an inmate could be an aggrieved party where he provided evidence that, due to his outstanding LFOs, he is currently denied access to transitional classes and classification advances in DOC. *State v. Shirts*, 195 Wn. App. 849, 856, 381 P.3d 1223 (2016). Defendant Cornwell makes no such allegation. Therefore, the case has no application to his matter.

To the extent, the Defendant relies on State v. *Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), that case plainly does not interpret either

appealability under RAP 2.2(a) or standing under RAP 3.1. The *Blazina* court was not concerned with RAP 3.1, because Blazina, filing a direct appeal from his judgment and sentence, had a right of appeal under RAP 2.2(a)(1). The Defendant Cornwell, on the other hand, filed a motion under RCW 10.01.160 to terminate LFO's which is not appealable under RAP 2.2(a)(1).

The *Blazina* court acknowledged that a court of appeals had the discretion to deny review of an unpreserved error under RAP 2.5(a). *State v. Blazina*, 182 Wn.2d at 832-33. In *Smits* and *Mahone*, the question was not preservation of error in a direct appeal, but standing as an aggrieved party in a post-conviction motion. The cases are entirely distinct.

Under *State v. Smits*, the appeal must be dismissed.

B. THE SUPERIOR COURT HELD A HEARING ON THE DEFENDANT'S MOTION.

The Defendant argues that the failure to hold a RCW 10.01.160 hearing renders the decision "a nullity and violates due process." Petition at 4. The premise is flawed. <u>There plainly was a hearing</u>. The Defendant did not appear at the hearing. His presence was not required, nor does he argue that it was.

The Defendant argues that "[w]ithout some fact finding process, no

court could satisfy itself that payment will or will not impose a manifest hardship." Petition at 5. This argument fails. First, there was a fact finding process. The court reviewed the briefing from both sides and held a hearing.

Second, the Defendant did not demonstrate in his motion the bare requisite for a hearing, i.e. that an obligation that was not being collected upon was causing him any hardship where his room, board, and medical care are being provided to him. These are the conditions "as they exist when the request is made." *State v. Smits*, 152 Wn. App. at 524. And they will continue to be the conditions for another nine plus years.

Regardless of the outcome of the April 20, 2015 hearing, the Defendant may renew his motion under RCW 10.01.160(4) "at any time" and repeatedly. This is the conclusion in *Smits*.

His motion will continue to be denied while collections have not yet begun and where he does not demonstrate a hardship in his motion. The Defendant apparently intends that this Court should require the superior court to arrange for his transport around the State every time he renews this frivolous motion. He provides no authority that his presence was required at the hearing. The hearing was properly held.

C. THE TERM "MANIFEST HARDSHIP" DOES NOT REQUIRE CLARIFICATION.

It is apparent that the legislature intended that the superior courts have discretion in deciding motions under RCW 10.01.160.

> … If it appears ***to the satisfaction of the court*** that payment of the amount due will impose ***manifest hardship*** on the defendant or the defendant's immediate family, the court ***may*** remit ***all or part*** of the amount due in costs, ***or modify the method of payment*** under RCW 10.01.170.

RCW 10.01.160(4) (emphasis added).

However, the Defendant faults the legislature and urges this Court to remove this discretion by re-defining "manifest hardship" so as to be linked to the existence of an order of indigency. Petition at 18.

The *Blazina* court wrote "if someone does not meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFO's." *State v. Blazina*, 182 Wn.2d at 838. In other words, indigency standards ***can inform*** the court in its inquiry, but do not determine the outcome. However, the Defendant urges this Court to go further and to legislate that if there had been an order of indigency or if any of the GR 34 standards are present, then manifest hardship is necessarily met.

Because the Defendant has not demonstrated that he meets any of the GR 34 standards or that his order of indigency is based upon the GR 34 standard, he has no standing to make this argument. The argument is

irrelevant to his case.

And his case is typical of criminal orders of indigency. The orders in a particular case do not indicate the particular defendant meets any of the factors listed in GR 34. Nor does an order indicate that the court engaged in any analysis under this civil rule. Courts routinely enter orders of indigency in criminal cases without any analysis of the civil standard under GR 34.[1]

After appointment of counsel an as the case and record are developed, much more information about the defendant's financial circumstances will come to light. It is proper for the court to consider any relevant information that enters the record subsequent to the imposition of the order of indigency and prior to imposing a criminal sentence.

In this particular case, it is apparent that the superior court did not engage in any GR 34 analysis before entering the order of indigency. The court entered the order based only on the Defendant's statement that he was not currently working and did not have the funds to pay for an attorney. These turned out to be false statements. Very soon thereafter the Defendant

[1] Criminal courts are justified in asking fewer questions before entering orders of indigency. A civil filing fee is only $200. RCW 36.18.020(2)(a). The retainer for a criminal attorney is significantly more. And the right to counsel is constitutional.

came up with the premium on a bond of $100,000 which is usually a non-refundable 10% of the bond. It was a bond he was willing to risk as he fled from the courtroom following his conviction and was subsequently charged with and convicted of escape. This bond could have paid for a retainer on a private attorney. And, as it turned out, he was making $1800/mo and had been employed as a dry cleaner for 16 years.

A GR 34 analysis of what someone can pay in a lump sum at the time of a civil filing is not necessarily dispositive of what someone can pay after serving a sentence and in reasonable increments. While a criminal court can defer payment and modify the payment schedule to only a few dollars a month for LFO's, a civil filing fee is $200 up front and a criminal retainer is significantly (10-100x) more up front. A criminal defendant who cannot come up with a retainer for an attorney right away may still be capable of paying significantly smaller LFO's at a very affordable payment schedule.

In waiving civil filing fees, GR 34 directs the court to look at whether a person is on TANF (temporary assistance for needy families), GAU (general assistance for unemployable people), SSI (supplemental security income), poverty-related veteran's benefits, or food stamps. GR

34(a)(3)(A). This is appropriate when the question is whether a person can immediately produce a $200 filing fee … or a $5,000 retainer in a criminal matter. However, one's TANF status at the time of filing is not determinative of one's future ability to pay at the time of collection. TANF is by definition temporary. It is a program intended to get families back on their feet. The same is true for food stamps. Some assistance programs are available to people as they are transitioning into other employment, picking up new skills. These programs indicate a snapshot in time of one's earning ability. They do not speak to one's future ability to pay in reasonable increments.

In this particular case, there is no information to suggest that the Defendant, who was making $1800/mo[2] and had a long history of steady employment, was on any of these programs. Therefore, he lacks standing to make this argument.

A court's discretion in remitting LFO's (and a court's discretion in imposing LFO's) should not be tied to an order of indigency which is entered upon little information for the purpose of safeguarding the

[2] This is well above the $1238/mo (i.e. 125% of the federal poverty guidelines) that Washington State Courts find is sufficient to support oneself. https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=82

constitutional right to counsel. There is a significant difference between having the funds to pay a large lump sum retainer and having the funds to meet a reasonable and alterable LFO payment plan. This Court should not alter the clear legislative directive permitting superior courts to assess each motion on a case by case basis considering all relevant factors.

The legislative process requires public input and the lengthy consideration of all possible consequences and ripple effects. The Petition does not offer the Court the information necessary to change the law. Tying punishment (LFO's) to attorney appointment could result in superior courts entering fewer orders of indigency. It could also encourage courts to make more thorough on-the-record inquiries of a defendant's circumstances at the time of attorney appointment, which in turn could result in statements that could be used by the prosecutor against the defendant at trial.

The Defendant proposes switching the burden of proving manifest hardship to the state. Petition at 19 (advocating the creation of a "rebuttable presumption" of manifest hardship). A criminal prosecutor does not have information on a defendant's child support obligations, debts, incomes, inheritances, properties, or most current health circumstances. Unlike a child support prosecutor, a criminal prosecutor does not (and should not)

have access to confidential employment information through the Employment Security Division or confidential health information reflected in public disability payments. The best source for the most up-to-date information about an individual's income and expenses is the individual. Therefore, the legislature properly allotted the burden, and this Court should not alter this legislative decision.

Because the state met the burden of proving ability to pay at sentencing, and because a defendant may renew a motion interminably, it is improper to make the state bear the burden every time the defendant files a new motion to remit.

The Court should be aware that prosecutors are frequently absent on the LFO docket. This benefits defendants. But if the burden of proof were placed on the state as the Defendant urges, prosecutors would begin attending these hearings and the bar to remission would be raised on defendants.

The Defendant's proposals to this Court are poorly thought through. The Court should not exceed its authority on this invitation.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition.

DATED: December 19, 2016.

Respectfully submitted:

___electronically signed____
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Deputy Prosecuting Attorney

David Gasch gaschlaw@msn.com	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 22, 2016, Pasco, WA *__electronically signed___* **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**