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COA No. 35004-5-III

No. 95828-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH MANSON,

Petitioner/Defendant.

PETITION FOR REVIEW

STATE'S ANSWER

Respectfully submitted:

by: Teresa Chen, WSBA 31762
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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 denial of the Motion on Appellate Costs (requesting Division Three withdraw its General Order of 2016).

III. ISSUES

1. Where the Defendant's argument relies upon the false premise that indigency for the purpose of appointment of counsel is equivalent to inability to pay LFO's, has the Defendant shown a conflict with any court rule?
2. Has the Defendant demonstrated that imposing appellate costs on him presents an issue of substantial public interest where:
   - the Defendant relies on hypothetical situations not representative of his particular circumstance;
   - the Defendant did not appeal from either the finding of

ability to pay or the LFO's imposed; and

- the Legislature has provided a mechanism for remission or waiver of costs and interest with a showing of hardship?

IV. STATEMENT OF THE CASE

The Defendant Elijah Manson appealed from his jury conviction for possessing heroin. CP 59-60; 73-74.

The sentencing court found the Defendant had the ability to pay LFO's and imposed $2712. CP 61-62. This includes discretionary LFO's of sheriff service fees, a jury demand fee, a crime lab fee, a $500 fine toward the City's drug enforcement fund, and a $1000 fine under RCW 9A.20.021. CP 62. The Defendant did not challenge this on appeal.

The Defendant filed a Motion on Appellate Costs asking that Division Three's General Order of June 2016 be withdrawn. In his Continued Indigency Report appended to his motion, the Defendant Manson acknowledged an ability to pay, albeit in small payments. In this petition for review, the Defendant renews this challenge to the General Order only.

V. ARGUMENT

A. DIVISION THREE'S GENERAL ORDER DOES NOT CONFLICT WITH RAP 14.2 OR RAP 15.2.

The Defendant alleges a conflict between Division Three's General Order of July 2016 and the Rules of Appellate Procedure 14.2 and 15.2. RAP 13.4(b)(1) permits this Court to accept review if a decision of the Court of Appeals is in conflict with a decision of the Supreme Court. Because there is no conflict, review must be denied.

The Defendant notes that the courts will not revisit an order of indigency without a change of circumstances. He then argues that because an order of indigency was entered in his case to permit the appointment of counsel at public expense, he necessarily lacks the ability to pay LFO's. This is the alleged conflict. It is an illogical argument. Immediate inability to come up with a significant retainer necessary to safeguard the constitutional rights to counsel and appeal is not equivalent to future inability to make small payments toward LFO's.

The Defendant's argument begins and ends with this false premise. He equates indigency (for purposes of appointment of

counsel) with inability to pay LFO's. These are not equivalent. No authority, including RAP 14.2 and RAP 15.2, supports such a claim. Under RAP 14.2, where the losing party is a criminal defendant, the standard for awarding costs is "ability to pay," not indigency for purposes of appointment of counsel.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the comment in court rule GR 34 was offered "for guidance." The rule and its comment direct that a person on public assistance is indigent for the purpose of waiving *civil* filing fees and surcharges. *Blazina* noted that if a criminal defendant meets this standard (i.e. is on public assistance), while a finding is not prohibited, a court "should seriously question that person's ability to pay LFOs." *State v. Blazina*, 182 Wn.2d at 839. In other words, *public assistance* is heavily weighted, but it is not determinative.

The appointment of counsel is a very different matter. We can infer very little from an order of indigency for purposes of appointment of counsel. When a *criminal* court makes a finding of indigency, such decisions are, and should be, made profligately. Every defendant who receives appointed counsel is not necessarily

a recipient of public assistance. It is enough that the person lacks savings. The courts should appoint counsel when a person cannot come up with the thousands of dollars needed for a retainer to hire an attorney. The court should err on the side of appointment, because there is a constitutional right to counsel.

But there is no constitutional right to be free from punishment (fines) or reparation (restitution). Indigent criminal defendants may also be made to pay the costs of prosecution. *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). In order that the exercise of the right to counsel is not chilled, there must be the possibility of remission of the costs of prosecution (which include appellate costs) when repayment becomes a hardship. *Id.* This mechanism is present in RCW 10.01.160(4); RCW 10.73.160(4).

The General Order requests an appropriate record, not limited to the Order of Indigency, in order to make a meaningful decision on appellate costs. This does not conflict with the court rules. A person has the ability to pay LFO's if they can pay off a debt in reasonable increments over time.

B. THE DEFENDANT HAS NOT DEMONSTRATED AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Defendant is able to pay his LFO's including appellate costs. When Mr. Manson was arrested, he was in possession of $720 worth of heroin and $600 in cash. RP 146, 340-42. He was able to post a $5000 bond in this case. RP 80. He has a full time job available to him at his family's landscaping business. RP 81. He was represented by a private attorney at trial, and only made a motion for order of indigency based on his incarceration. RP 520, ll. 13-18. The sentencing court found him able to pay and imposed significant discretionary LFO's which Mr. Manson did not see fit to challenge his LFO's on appeal. CP 61-62. In his Continued Indigency Report, he has acknowledged an ability to make payments.

The Defendant argues that review is permitted under RAP 13.4(b)(4) (issue of substantial public interest). Petition at 8. Because legislative safeguards are in place and increasingly coming into place, this is not a matter of public interest. Appellate costs can be remitted in whole or in part with a showing of manifest hardship. RCW 10.01.160(4). The Defendant can seek remission at any time

and repeatedly.

The Defendant argues that some indigent offenders may be unable to fill out a financial declaration due to illiteracy or inability to speak English. Petition at 9. The Defendant speaks English. There is no record to suggest the Defendant is illiterate. Moreover, criminal defendants have attorneys who can assist them with the forms. The Defendant argues that it can be hard to reach offenders if they change addresses. There is no record to suggest that this has been the case here. On the contrary, the record suggests that the Defendant will be reachable at least through his family's business where he works. Insofar as these arguments do not pertain to the instant case, there is no case in controversy before the court. *See Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994) (stating that Washington courts do not issue advisory opinions).

The Defendant continues to argue that he will be saddled with interest. Petition at 8, n. 6 (arguing small payments will only cause his LFO amount to increase). This is false. The prosecutor has explained that the Walla Walla County Clerk does not collect interest. Respondent's Brief at 21, *State v. Manson*, 2 Wn. App.2d 1047 (Wn.

App.) (No. 35004-5-III). And defendants in every county can seek relief from interest under RCW 10.82.090 with a showing of hardship.

The United States Supreme Court has upheld awards of attorney and investigator fees against indigent criminal defendants. *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under a scheme where there is no risk of costs on appeal, criminal defendants have no incentive not to file frivolous appeals. This is exactly the concern that the ABA considered in coming up with its standard. ABA Criminal Justice Standard 21-2.3, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993).

> **Standard 21-2.3. Unacceptable inducements and deterrents to taking appeals**
>
> (a) Administration of a system of elective appeals presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons.
>
> (b) Examples of unacceptable inducements for defendants to appeal are:
>
> (i) absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal;
>
> ...

There is a significant public interest *for* imposing appellate costs which serve to deter wasteful and unmeritorious appeals which are a great cost to the public. Mr. Manson was arrested on a warrant while he was in possession of heroin, a very dangerous drug. Rather than accept responsibility, he went to trial and then appealed. He has a right to go to trial and to appeal. He does not have a right to be free from the reasonable costs of prosecution after conviction unless he can demonstrate that costs impose a manifest hardship.

Notwithstanding the unchallenged finding of his ability to pay, the Defendant has demanded that:

- the court of appeals not impose costs;
- the court of appeals not ask him to demonstrate that costs would be a hardship;
- the State demonstrate a change in the Defendant's financial circumstances.

None of this is reasonable. There is a finding of ability to pay. It is a recent finding. The State is not required to prove it anew. It is the State's burden to prove guilt. After a sentence is imposed which includes a finding of ability to pay, it is not the State's burden to

continue to prove ability to pay by continuing to seek out an offender's highly sensitive health information, work history, income, or finances. The court of appeals Order properly requests criminal defendants who would oppose the imposition of appellate costs to provide and/or supplement the record as to any change of circumstances following the lower court's finding of ability to pay.

This procedure is reasonable. It is not offensive. No public interest cries out for a review of this procedure.

VI. CONCLUSION

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

DATED: May 30, 2018.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Kevin March <MarchK@nwattorney.net>	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 May 30, 2018, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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