102308-1

NO. 39175-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

KODY M. ELMER,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

Kody M. Elmer requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Elmer seeks review of an unpublished Opinion of Division III of the Court of Appeals dated July 11, 2023 (Appendix "A" 1-6) and the Order denying Motion for Reconsideration dated August 8, 2023 (Appendix "B")

3. ISSUE PRESENTED FOR REVIEW

Does a "fine" constitute a legal financial obligation (LFO) as defined in RCW 9.94A.030 (31), and, if so, is a sentencing court required to conduct a colloquy as to a convicted defendant's ability to pay a "fine" under RCW 10.01.160?

4. STATEMENT OF THE CASE

Mr. Elmer stands by his original argument as set out in his reply brief that *State v. Clark*, *191* Wn. App. 369, 362 P.3d 309 (2015), was wrongly decided.

The *Clark* case, as well as Mr. Elmer's case, involves the statutory construction of two related statutes.

The decision by the Court of Appeals is based on a misreading of the statutory authorities and the rules of statutory construction.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RCW 9.94A.030 (31) defines an LFO as

> …meaning a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, *court costs*, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, *fines*, and any other financial obligation that is assessed to the offender as a result of a felony conviction.

(Emphasis supplied.)

LFOs include both costs and fines. The Court of Appeals attempt to distinguish between the two ignores the plain language of the statute.

In addition, the decision in *State v. Clark* undercuts the reasoning set out in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Blazina dealt with discretionary LFOs and the need for a sentencing court to ascertain whether or not a convicted defendant is indigent. The legislature has classified fines as an LFOs. Fines have been so included since the adoption of Laws of 1989, Ch. 252, section 2 (10). Section 1 of that act states:

> The purpose of this act is to create a system that: (1) Assists the courts in sentencing felony offenders regarding the offenders' *legal financial obligations*; (2) holds offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior.

(Emphasis supplied.)

Mr. Elmer contends that a fine is a discretionary LFO. The language of RCW 9A.20.021, relating to fines, is consistent throughout that statute. Whether a felony or a misdemeanor the

subsections state, in part, that punishment may include: "or by a fine in an amount fixed by the court … or by both such confinement and fine."

The other statute requiring interpretation, in conjunction with the definitional statute involving LFOs, is RCW 10.01.160 (3) which provides, in part: "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent…"

As previously noted, the legislature has determined that costs are inclusive within LFOs. Similarly, fines are inclusive as LFOs.

The *Clark* decision fails to recognize that a fine constitutes an LFO. The *Clark* Court interprets a fine and a cost in a somewhat confusing way. It states at 375-76:

> The decision to impose a fine pursuant to RCW 9A.20.021 appears to be discretionary with the trial court. E.g., *State v. Young*, 83 Wash.2d 937, 941, 523 P.2d 934 (1974); *State v. Newton*, 29 Wash. 373, 382, 70 P. 31 (1902); 13 ROYCE A FERGUSON JR., Washington Practice, Criminal Practice and Procedure, § 4813 at 376 (3d ed. 2004). However, the fact that imposing

> a fine under this general statute is a discretionary act does not make the fine a discretionary "cost" within the meaning of RCW 10.01.160(3). The definition of "costs" in RCW 10.01.160(2) does not include "fines." Accordingly, we hold that a fine is not a court cost subject to the strictures of RCW 10.01.160(3) and the trial court is not required to conduct an inquiry into the defendant's ability to pay.

Mr. Elmer does not contend that a fine is a cost or vice versa. He contends that fines and costs are both LFOs. The *Blazina* case requires that a sentencing court consider whether or not a convicted defendant should be subject to the imposition of discretionary LFOs.

Even though the *Clark* decision attempts to distinguish between fines and costs, it hints that a sentencing court should still consider a convicted defendant's financial ability to make payment of fines and costs. The Court cautions at 376:

> Nonetheless, we strongly urge trial judges to consider the defendant's ability to pay before imposing fines. The barriers that LFOs impose on an offender's reintegration to society are well documented in *Blazina* and should not be imposed lightly merely

> because the legislature has not dictated that judges conduct the same inquiry required for discretionary costs. Moreover, conducting such an inquiry may protect a timely challenged decision to impose a fine by establishing a tenable basis for the fine.

RCW 10.01.160 was originally enacted by the Laws of Washington, 1975-76 2nd ex. Sess., Ch. 96.

Ch. 96 was based upon HB 1342. It is entitled **CRIMINAL PROCEDURE-CONVICTED DEFENDANTS-FINES AND COSTS, LIABILITY.**

Mr. Elmer contends that these two statutes relate to the same subject matter and must be read together. As set out in *Lenander v. Department of Retirement Systems*, 186 Wn.2d 393, 412, 377 P.3d 199 (2016):

> Statutes relating to the same subject are to be read together so as to constitute a unified whole. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n* , 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Where possible, we will read statutes as complementary, rather than in conflict with each other. *Id.* To the extent there are apparent conflicts between statutes, courts generally resolve such conflicts by giving " 'preference to the more specific and

> more recently enacted statute. ' " *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210, 118 P.3d 311 (2005) (quoting *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000)).

See also: *Southwick Inc v. Washington State Funeral and Cemetery Board*, 200 Wn. App. 890, 901, 403 P.3d 934 (2017) (dealing with the phrase "a place of internment" and directing reliance upon the specific statute for the disposal of human remains as opposed to the general statute.)

RCW 9.94A.030 (31) is a specific statute defining LFOs. Both fines and costs are included. The *Clark* Court's attempt to distinguish between the two creates an absurd result by failing to harmonize the plain language used by the Legislature. It creates an ambiguity where none exists.

> If the plain language of the statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. … We first attempt to resolve the ambiguity and determine the legislature's intent by resorting to other indicia of legislative intent, including principles of statutory construction, legislative history, and relevant case law. … If these indications of legislative intent are insufficient to resolve the ambiguity, under the rule of lenity

> we must interpret the ambiguous statute in favor of the defendant. … *We will construe an ambiguous criminal statute against the defendant only where the principles of statutory construction clearly establish that the legislature intended such an interpretation.*

State v. Reeves, 184 Wn. App. 154, 158-59, 336 P.3d 105 (2014) (Emphasis supplied).

"Statutes prescribing punishment must be construed together" (quoting *State v. McDougal*, 61 Wn. App. 847, 852, 812 P.2d 877 (1991)). 24 C.J.S. Criminal Law § 1461, at 9 (1989); *see also State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

6. CONCLUSION

The Court of Appeals incorrectly analyzes Mr. Elmer's argument. Its Order Denying the Motion for Reconsideration gives short shrift to the statutory analysis required to determine whether or not a "fine" is an "LFO."

Mr. Elmer respectfully requests that the Supreme Court accept review.

Certificate of Compliance: I hereby certify there are 1362 words contained in this Petition for Discretionary Review.

DATED this 25th day of August, 2023.

Respectfully submitted,

s/Dennis W. Morgan
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APPENDIX A

FILED
JULY 11, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 39175-2-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
KODY M. ELMER,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Kody Elmer appeals after pleading guilty to various felonies. He raises three sentencing issues, and we raised one issue sua sponte. We remand for the trial court to correct the community custody term for counts 4 and 5 and for it to strike the community custody supervision fee. We otherwise affirm.

FACTS

In August 2022, Mr. Elmer pleaded guilty to attempting to allude a pursuing police vehicle (count 1), identity theft in the first degree (count 2), identity theft in the second degree (count 3), and two counts of assault in the third degree (counts 4 and 5). The trial court imposed the following concurrent terms of incarceration: count 1—34 months, count 2—63 months, count 3—43 months, and counts 4 and 5—51 months. The court

imposed 12 months of community custody for counts 2, 3, 4, and 5, a $1,000 fine pursuant to RCW 9A.20.021, and community custody supervision fees. Mr. Elmer timely appealed.

ANALYSIS

Mr. Elmer asserts the trial court erred when it (1) imposed the $1,000 fine without inquiring into his indigency, (2) imposed community custody on counts 2 and 3, and (3) imposed 12 months of community custody on counts 4 and 5. We sua sponte raised the issue of whether the trial court erred when it imposed the community custody supervision fee. We address these issues in turn.

1. THE $1,000 FINE WAS PROPERLY IMPOSED

Mr. Elmer contends the sentencing court erred when it imposed the $1,000 fine without determining whether he could pay. We disagree.

Whenever a person is convicted, the trial court may order the payment of costs, often referred to as legal financial obligations (LFOs), as part of the sentence. RCW 10.01.160(1). By statute, the trial court is not authorized to order a defendant to pay LFOs if they are indigent. RCW 10.01.160(3). For this reason, the sentencing court "has a statutory obligation to make an individualized inquiry into a defendant's current

and future ability to pay before [it] imposes LFOs" under RCW 10.01.160(3). *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Here, however, the trial court imposed the $1,000 fine pursuant to RCW 9A.20.021, not RCW 10.01.160(3). As the State points out, we have previously held that a fine imposed pursuant to RCW 9A.20.021 is not a court cost subject to RCW 10.01.160(3), and the trial court is not required to conduct an inquiry as to the defendant's ability to pay when it imposes such a fine. *State v. Clark*, 191 Wn. App. 369, 375-76, 362 P.3d 309 (2015).

In his reply brief, Mr. Elmer argues the *Clark* court did not discuss RCW 9.94A.030(31), which includes "fines" in the definition of LFOs. Reply Br. at 2. We disagree. The *Clark* court did address the definition of LFOs, former RCW 9.94A.030(30) (2012), and specifically stated that the definition "distinguishes among different types of costs, other financial obligations, and fines." *Clark*, 191 Wn. App. at 375. The *Clark* court distinguished the definitions of costs and fines when reaching its holding that a sentencing court need not inquire about a defendant's ability to pay a fine. *Id.* at 375-76. Consistent with our precedent, we conclude that a fine imposed pursuant to RCW 9A.20.021 is not a cost under RCW 10.01.160(3), and the sentencing

court was not required to determine whether Mr. Elmer had the present or future ability to pay it.

2. COMMUNITY CUSTODY WAS PROPERLY IMPOSED FOR THE IDENTITY THEFT CONVICTIONS

In his opening brief, Mr. Elmer argued the sentencing court erred by imposing community custody on counts 2 and 3—his identity theft convictions. The State responded by citing RCW 9.94A.701(3)(a), which expressly requires that 12 months of community custody be imposed for any crime against persons under RCW 9.94A.411(2)(a), which includes RCW 9.35.020(2) (identify theft in the first degree) and RCW 9.35.020(3) (identity theft in the second degree). In his reply, Mr. Elmer properly concedes this issue.

3. THE COMMUNITY CUSTODY TERM MUST BE REDUCED FOR COUNTS 4 AND 5

Mr. Elmer argues his 12-month community custody term causes his sentence for counts 4 and 5 to exceed the statutory maximum. The State concedes this point but notes that correction of the sentence will not make any substantive difference. We agree.

Assault in the third degree (as well as identity theft in the second degree) is a class C felony, punishable by a maximum of 5 years of confinement (60 months). RCW 9A.36.031(2); RCW 9.35.020(3); RCW 9A.20.021(1)(c). If an offender's standard range term of confinement combined with the term of community custody exceeds the

statutory maximum for the crime, the sentencing court is required to reduce the term of community custody to be within the statutory maximum. Former RCW 9.94A.701(9) (2010).

Here, Mr. Elmer pleaded guilty to counts 4 and 5, both for assault in the third degree. The court imposed a 51-month term of confinement for those convictions and 12 months of community custody. The total sentence, including for counts 4 and 5, is therefore 63 months, which is 3 months too long.

That said, Mr. Elmer was sentenced to 12 months of community custody on count 2, identity theft in the first degree, which is a class B felony, punishable by up to 10 years of confinement. RCW 9.35.020(2); RCW 9A.20.021(1)(b). The error noted in the preceding paragraph therefore will have no effect on Mr. Elmer's actual community custody sentence. Nevertheless, we remand for the trial court to correct the community custody sentence on counts 4 and 5.

4. THE SUPERVISION FEE WAS IMPROPERLY IMPOSED

In our review of this appeal, we noted a likely unraised error. We asked the State to provide a short brief or letter addressing whether the trial court erred when it imposed the community custody supervision fee. The State responded by letter and acknowledged the supervision fee should not have been imposed. We agree.

Effective July 1, 2022, the legislature removed the subsection of the statute that allowed a trial court to impose community custody supervision fees as a condition of community custody. *See* former RCW 9.94A.703(2)(d) (2018); SECOND SUBSTITUTE H.B. 1818, 67th Leg., Reg. Sess. (Wash. 2022). Mr. Elmer was sentenced after this change took effect. Therefore, the sentencing court erred when it imposed the condition.

Affirm in part, reverse in part, and remand to make noted corrections.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

APPENDIX “B”

FILED
AUGUST 8, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 39175-2-III**
Respondent,	)	
v.	)	**ORDER DENYING MOTION FOR RECONSIDERATION**
KODY M. ELMER,	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated July 11, 2023, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Siddoway, Fearing

FOR THE COURT:

GEORGE FEARING
CHIEF JUDGE

NO. 39175-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	ASOTIN COUNTY
Plaintiff,	)	NO. 19 1 00048 02
	)	
v.	)	
	)	
KODY M. ELMER,	)	
	)	
Defendant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 25th day of August, 2023, I caused a true and correct copy of the *Petition for Discretionary Review* to be served on:

TRISTEN WORTHEN, CLERK
COURT OF APPEALS DIVISION III
500 N CEDAR ST
SPOKANE, WA 99201

E-FILE

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

August 25, 2023 - 12:04 PM

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