

NO. 44739-8-II

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

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STATE OF WASHINGTON, Respondent

v.

ANDREW MICHAEL FLORES, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.00-1-01036-2

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MOTION ON THE MERITS

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A. IDENTITY OF MOVING PARTY

The Respondent, State of Washington, is the moving party.

B. RELIEF SOUGHT

Respondent asks this Court to dismiss this appeal because the denial of Mr. Flores's motion is not appealable as a matter of right under RAP 2.2.

C. STATEMENT OF THE CASE

The defendant filed a motion to terminate legal financial obligations pursuant to RCW 10.01.160 (4). CP 55-59. This motion did not seek to modify or attack the judgment and sentence. *Id.* It asked the trial court “to *wave* the following Court ordered Legal Financial Obligations imposed under respective cause number(s) 0-0-101036-2 (sic) & 9-0-1004070-4 (sic).” CP 55 (emphasis added). The defendant claimed he did not have the “present or future ability to pay the Legal Financial Obligations imposed by this court.” CP 55. The court denied the motion. CP 79. The defendant filed a direct appeal of the trial court's order denying that motion. CP 90.

D. ARGUMENT IN SUPPORT OF MOTION ON THE MERITS TO DISMISS THIS APPEAL

RAP 2.2 (a) (9) provides that direct appeal may be taken of an order granting or denying a motion for new trial or amendment of judgment. RAP 2.2 (a) (10) provides that direct appeal may be taken of an order granting or denying a motion to vacate a judgment. Finally, under RAP 2.2 (a) (11), direct appeal may be taken of an order on motion for arrest of judgment. Thus, under RAP 2.2 (a) (9), (10) and (11), direct appeal may be taken, for example, of the disposition on the merits of a motion under CrR 7.5 or CrR 7.8. See generally *State v. Larranaga*, 126 Wn.App. 505, 509, 108 P.3d 833 (2005).

Direct appeal, however, may *not* be taken of the denial of a motion to waive or terminate the duty to pay legal financial obligations. *State v. Smits*, 152 Wn.App. 514, 524-25, 216 P.3d 1097 (2009). The denial of a motion pursuant to RCW 10.01.160 (4) is not appealable as a matter of right under either RAP 2.2 (a) (1) or (9). The *Smits* Court held:

The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is clearly somewhat “speculative,” the time to examine a defendant’s ability to pay is when the government seeks to collect the obligation. *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991). Until then, the denial of a motion under RCW 10.01.160(4) does not preclude subsequent motions. Moreover, the

court can modify the LFOs at any time and there can be no adverse consequences from a failure to pay if the default was not attributable to an intentional refusal to obey the court order, a determination that can be made only when payment is required. Smits, therefore, does not have a right to appeal under RAP 2.2(a) (1).

The decision to deny a motion under RCW 10.01.160(4) is also not appealable under RAP 2.2(a) (9) as an order denying motion to amend the judgment. Smits argues that because a decision granting a motion to terminate his LFOs would have the effect of amending the judgment and sentence, a decision denying such a motion is appealable under RAP 2.2(a)(9). Smits's argument ignores the conditional nature of the order to pay LFOs. Under the plain language of the statute, the requirement to pay LFOs as part of a judgment and sentence is not mandatory unless several conditions are met and the amount imposed is always subject to modification. A decision to grant or deny a motion to remit LFOs is a determination of whether the defendant should be required to pay based on the conditions as they exist when the request is made. *It does not alter or amend the judgment but rather changes the requirement of payment based on a present showing that payment would impose manifest hardship.* The decision to deny a motion under RCW 10.01.160(4) is therefore not appealable under RAP 2.2(a) (9).

*Smits* at 523-24 (emphasis added).

Flores acknowledges in his brief that this appeal is premised upon the trial court's denial of his motion to terminate his obligation to pay LFOs under RCW 10.01.160 (4). See Brief of Appellant at 3, 6. The trial court's decision was not appealable as a matter of right under RAP 2.2. This Court should dismiss this appeal.

Should this Court elect to depart from *Smits* and permit this direct appeal, Flores's appeal is nevertheless meritless. Flores provided no

documentation with his motion showing that the Department of Corrections was currently requiring him to make payments on his LFOs, CP 55-62. His motion boiled down to this: I am serving life in prison, so I shouldn't have to pay LFOs. In other words, as the moving party he didn't meet his burden of showing he was entitled to relief.

Counsel for Flores complains that counsel for the State did not step in and provide representation for Flores, supplementing his motion and curing any deficiencies. Counsel for Respondent represents the State of Washington and is not permitted to represent or provide legal advice to pro se litigants. Moreover, counsel for Respondent had no obligation to join or supplement Flores's motion. Flores's claim that counsel for Respondent is "uniquely positioned" to know the status of Flores's prison account is absurd. It is *his* account. He can obtain that information at any time. If anyone was "uniquely positioned" to provide that information to the trial court, it was Flores. There is no excuse for his failure to do so. In any event, neither the trial court nor this Court can invent a record where none exists. As the moving party, it was incumbent on Flores to demonstrate the ripeness of his motion. He failed to do so. This case is clearly controlled by settled law and the issue on review is a matter of judicial discretion and the decision was clearly within the discretion of the

trial court. This motion should be granted pursuant to RAP 18.4 (e) (1) (a) and (c).

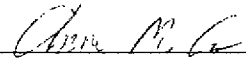
E. CONCLUSION

This appeal should be dismissed.

DATED this 17<sup>th</sup> day of October, 2013.

Respectfully submitted:

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# CLARK COUNTY PROSECUTOR

## October 17, 2013 - 3:16 PM

### Transmittal Letter

Document Uploaded: 447398-Motion on the Merits~2.pdf

Case Name: State v. Andrew Michael Flores

Court of Appeals Case Number: 44739-8

**Is this a Personal Restraint Petition?** Yes  No

#### The document being Filed is:

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Motion: Motion on the Merits

Answer/Reply to Motion: \_\_\_\_\_

Brief: \_\_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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#### Comments:

No Comments were entered.

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