No. 46633-3-II
(CONSOLIDATED CASE)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

NATHANIEL WESLEY MILES,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-01704-2
The Honorable Bryan Chushcoff, Judge

SUPPLEMENTAL BRIEF OF APPELLANT NATHANIEL MILES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. SUPPLEMENTAL ISSUES

1. Should this Court require criminal appellants to preemptively object to the imposition of costs in the opening briefing even though neither party has substantially prevailed and even though the State has not requested costs?

2. Should this Court deny any future request for appellate costs where Nathaniel Miles does not have the ability to repay the costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances?

II. SUPPLEMENTAL STATEMENT OF THE CASE

Recently, in State v. Sinclair, 2016 WL 393719, ---P.3d --- (2016). Division 1 held that "it is appropriate for [the Court of Appeals] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief."

III. SUPPLEMENTAL ARGUMENT & AUTHORITIES

A. THIS COURT SHOULD NOT INTERPRET RAP TITLE 14 AND RCW 10.73.160 TO REQUIRE A CRIMINAL APPELLANT TO PREEMPTIVELY OBJECT TO THE IMPOSITION OF COSTS IN OPENING BRIEFING.

Under RCW 10.73.160, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. That statute

reads, in relevant part:

> (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.
> …
> (3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure…. An award of costs shall become part of the trial court judgment and sentence.

RCW 10.73.160. RAP 14.2 provides that "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review."

Recently, Division 1 analyzed RCW 10.73.160, and noted that it "vests the appellate court with discretion to deny or approve a request for an award of costs." State v. Sinclair, 2016 WL 393719 at *4, --- P.3d --- (2016). Division 1 went on to hold that, under RAP Title 14, "it is appropriate for [the Court of Appeals] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." Sinclair, 2016 WL 393719 at *5.

First, it should be noted that Division 1 did not hold that the issue can **only** be raised in the appellant's brief. In fact, the court specifically states, "we do not decide whether the appellate court

has discretion to deny or substantially reduce an award of costs when asked to do so by a motion to modify a commissioner's award of costs under RAP 14.2." Sinclair, 2016 WL 393719 at *8 fn. 2. But even if Sinclair did so hold, such an interpretation can and should be rejected by this Court.[1]

First, both the language of the RAP and prior case law support the conclusion that an objection to the imposition of criminal appeal costs can still be raised by through a post-opinion motion. RAP 14.6(b) specifically states that "[a] party may only object to the [commissioner's] ruling on costs by motion to the appellate court in the same manner and within the same time as provided for objections to any other rulings of a commissioner or clerk[.]" And in State v. Nolan, 98 Wn. App. 75, 83, 988 P.2d 473, 478 (1999) aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000), the court noted that "the commissioner 'will' award costs to the prevailing party unless the court 'direct otherwise' in the opinion terminating review (or by way of modification of the commissioner's ruling)" pursuant to RAP 14.6. Thus, RAP Title 14 simply does not require

[1] This Court is not bound by the Sinclair decision. Because Sinclair is a Division 1 case, it is merely persuasive authority and is not binding on this court. *See* Joyce v. State, Dept. of Corrections, 116 Wn. App. 569, 591 n.9, 75 P.3d 548 (2003).

a criminal appellant to preemptively object in its opening brief to the possibility that the State will request costs.

Division 1 found support for the idea that the issue of costs should be included in the opening briefing by looking to RAP 18.1(d), which states that the party seeking reimbursement of costs "must devote a section of its opening brief to the request for the fees or expenses." *See* Sinclair, 2016 WL 393719 at *5. But RAP 18.1(d) does not require a party to preemptively object to costs that may or may not be requested at a later date. And furthermore, "[t]he provisions of RAP 18.1 do not apply to costs recoverable under RCW 10.73.160." Nolan, 98 Wn. App. at 79 (citing State v. Blank, 131 Wn.2d 230, 251, 930 P.2d 1213 (1997)); *see also* Sinclair, 2016 WL 393719 at *8 ("the costs the State is entitled to request are awardable under RAP Title 14, not under RAP 18.1").

Division 1's reasoning in Sinclair is deeply flawed and should not be adopted by this Court. Instead, this Court should continue to allow criminal appellants to object to the imposition of costs only if the State requests costs, and by motion directed to the Commissioner.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.[2]

As noted above, RAP 14.2 provides that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review[.]" But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the authority to award costs of appeal "is permissive," the Court held, so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the

[2] Miles is including an argument regarding appellate costs in this brief in the event that this Court agrees with the Sinclair court's interpretation of RAP 14.2 and RCW 10.73.160.

party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Miles' case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Miles owns no property or assets, and has no job and no income. (CP 889-93) Miles will be incarcerated for the next 27 years, and owes at least $2,800 in previously ordered LFOs. (CP 770, 772) There was no evidence below, and no evidence on appeal, that Miles has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Miles is indigent and entitled to appellate review at public expense. (CP 805-07) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

2016 WL 393719 at *7. Similarly, there has been no evidence presented to this court, and no finding by the trial court, that Miles' financial situation has improved or is likely to improve. Miles is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

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IV. CONCLUSION

This Court should decline to adopt the Sinclair court's determination that an objection to appeal costs can or should be included in a criminal appellant's opening briefing. Alternatively, this Court should decline any future request to impose appellate costs.

DATED: March 14, 2016

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Attorney for Nathaniel Wesley Miles

CERTIFICATE OF MAILING

I certify that on 03/14/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Nathaniel W. Miles, DOC# 961489, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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