33326-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD E. CORNWELL, JR.,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

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 2025 such that he is not subject to collections.

III. ISSUES

1. Should this Court summarily deny the appeal under *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) where a denial of a motion to remit is not a final judgment? Is the Defendant aggrieved under RAP 3.1 where he is not currently being collected upon and where he may renew his motion at any time?
2. Do the facts support the Defendant's claim that there was no hearing on his motion where the record is that the superior court scheduled and held a hearing on April 20, 2015?
3. Should this Court limit the legislatively given discretion of superior courts in determining the meaning of manifest hardship on a case by case basis?

4. Arising in the context of a frivolous motion in a non-collection case, should this Court decline the Appellant's invitation to create a right to counsel in collection cases?

IV. STATEMENT OF THE CASE

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 trial, the testimony was that police found the Defendant in possession of a large amount of cash and drugs and a houseful of stolen property. Respondent's Brief at 4-10, State v. Cornwell, (No. 31762-5/No. 31763-3). 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 Appellants' Statement of the Case claims the court made no inquiry into his ability to pay (BOA at 3), 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 which was consolidated with his appeal on another matter (31762-5), 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 did not note a hearing or make a motion to arrange for his transportation from prison. Although a transcript had been generated in his appeal, he did not provide the record for the court's review. 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. *But see* BOA at 3 (claiming there was no hearing). The Defendant did not appear. RP (4/20/15). The court 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. The superior court entered an order of indigency for the appeal.

V. ARGUMENT

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

The Defendant's arguments on appeal acknowledge that the Defendant's motion was made under RCW 10.01.160 only. Orders of such motions are not appealable and must be summarily denied. *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009).

In *State v. Smits*, the defendant appealed from superior court orders denying his motions to terminate LFO's. *State v. Smits*, 152 Wn. App. at 517. The commissioner of the court of appeals held that under RAP 2.2(a) the defendant had no right to appeal. *State v. Smits*, 152 Wn. App. at 518. And in the motion to modify, the court of appeals agreed with its

commissioner. *State v. Smits*, 152 Wn. App. at 523-24. An order to pay LFO's is not final under RAP 2.2(a)(1) but conditional, allowing a defendant to file a motion to modify or waive LFO's at any time. *State v. Smits*, 152 Wn. App. at 523. Nor is an order denying the motion to terminate LFO's equivalent to an order to amend the judgment under RAP 2.2(a)(9). Again, this is because the order is already 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 repeatedly cites to this opinion. He does not dispute that the order is not an appealable decision under RAP 2.2(a). Therefore, the appeal must be summarily denied.

The Defendant claims that he is an aggrieved party under RAP 3.1. BOA at 14. Even if this were true, it does not make the order appealable.

As he acknowledges, to be aggrieved, a party must have a present interest, not merely an expectancy in the subject matter. BOA at 14, *citing 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. The Defendant's complaints about interest (BOA at 18) are likewise speculative. *State v. Smits* is good law. By law, the Defendant is not an aggrieved party.

The Defendant argues that *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) overruled *Smits* and *Mahone* on this point, while at same time acknowledging that *Blazina* did not address in any way "appellate standing under RAP 3.1." BOA at 16-17. *Blazina* plainly does not interpret either appealability under RAP 2.2(a) or standing under RAP 3.1.

As the Defendant acknowledges, he "is in a different procedural posture." BOA at 17. The *Blazina* court was not concerned with RAP 3.1, because Blazina had a right of appeal. Blazina filed a direct appeal from his sentencing hearing claiming error at the imposition of sentencing condition. Blazina had a right to appeal from a judgment 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." BOA at 4. The premise is flawed. There plainly was a hearing. The Defendant did not appear at the hearing. His presence was not required, nor does he argue that it was.

The Defendant argues that "without some fact finding process, no court could satisfy itself that payment will or will not impose a manifest hardship." BOA at 5. This argument fails. First, there was a fact finding process. The court reviewed the briefing from both sides. The court

scheduled a hearing. The Defendant failed to appear at his own motion, failed to request to be transported, and failed to request a continuance for his appearance. This hearing took place regardless of the Defendant's failures. And his presence was not required.

Second, there is nothing the Defendant ***could*** show to demonstrate that an obligation that was not being collected upon was causing him any hardship where his room, board, and medical 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 approximately ten 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*. However, his motion will continue to be denied while collections have not yet begun. While he is incarcerated and being cared for by the State, he will never be able to demonstrate that non-existent collections impose a manifest hardship on him.

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. BOA at 19.

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 827, 838, 344 P.3d 680 (2015). In other words, indigency standards can inform the court in its inquiry. 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, much more information about the defendant's financial circumstances will come to light in the development of the case and record. There is no reason the court should be prevented from considering any relevant information in imposing a criminal sentence.

In this particular case, it is apparent that the superior court did not engage in any GR 34 analysis. The court entered an order of indigency in Mr. Cornwell's case based only on his 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 came up with the premium on a bond of $100,000 which is usually a non-refundable 10% of the bond. This premium could have paid for a retainer on a private attorney. And, as it turned out, he was making $1800/mo and

[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.

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 relevant to 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 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 come up with a $200 filing fee today ... 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 snap shot 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 entered upon little information and to safeguard the 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 Appellant's Brief does not offer the Court the information necessary to

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[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

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. BOA at 22. A criminal prosecutor does not (and should not) have access to the confidential employment information that a child support prosecutor does through the Employment Security Division. And even if she did, this information will not reflect recent changes in employment, such as loss of employment or injury. A criminal prosecutor does not have information on a person's child support obligations or health situation. The best source for the most up-to-date information about an individual's income and expenses is the individual.

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. (In Cornwell's case, however, the State amply demonstrated there was no hardship on the Defendant because there is no

ongoing collection and the Defendant will have the ability to pay upon release.)

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, to avoid automatic dismissal of all LFO collections, 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.

D. THIS NON-COLLECTION CASE IS NOT THE VEHICLE FOR DECIDING RIGHT TO COUNSEL IN ALL COLLECTION MATTERS.

The Defendant invites this Court to engage in constitutional reform and determine that the State should appoint counsel every time a person wants to make a motion to remit LFO's, no matter how facially frivolous. He admits that his request is contrary to the legislative directive in RCW 10.73.150 and the Washington Supreme Court in *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999).

This case of all cases is a poor test case. The Defendant has admitted the ability to pay. And the Defendant is not subject to collections. He will not be subject to collections for another ten years.

He argues that "many" public defenders do not object to the imposition of "considerable" LFO's. BOA at 23. He offers no proof for this generalization. Here the defense and Defendant tactically used his employment history and employability in order to support their request for a reduced sentence. RP (6/24/2013) 25-28 (arguing that, given his history of long term consecutive employment, Defendant's crimes were an anomaly and that he was deserving of a minimal term of incarceration). *See also State v. Duncan*, 180 Wn. App. 245, 247, 251, 327 P.3d 699 (2014) (a sentencing court will seldom find that there is no likelihood that an offender will ever be able to pay, therefore, "given the more important issues at stake in a sentencing hearing," it makes good strategic sense not to present oneself as "perpetually unemployed and indigent"). The sentencing court did not impose "considerable" LFO's. The LFO's are appropriate to the facts of this particular case which caused enormous harm and made the Defendant significant profit.

He argues that "most" courts enter "boilerplate findings" without consideration of the ability to pay. BOA at 23. Again there is no offer of proof for the generalization. It is certainly not true here. The sentencing court in this case had more than enough information, even before making additional inquiries, with which to support its specific finding.

He argues that it is unclear what standard he must meet. BOA at 24. The standard is manifest hardship, i.e. a hardship that is readily apparent or easily recognized. *State v. McNearney*, 32667-5-III, 2016 WL 1273028, at *8 (Wash. Ct. App. Mar. 31, 2016) (Fearing, J., concurring).

In his case, he has not begun to meet any standard because there is no collection and because he is incarcerated with all his needs cared for, so as to be at no risk of hardship.

He argues that appointed counsel is necessary, because the law is unclear. But the standard (show a hardship on you or your family) is not unclear. It is broad. Broad is good. It gives courts discretion and flexibility to fashion the proper remedy on a case by case basis.

Pro se litigants access the courts on a daily basis in civil matters. They get protection orders, child support orders, property division orders, and deeds of trust. People change their names, they petition to regain their gun rights, and they respond to others' legal process – all without appointed counsel.

Criminal defendants have significant advantages over these pro se litigants. They had counsel at trial and on appeal. Surely trial and appellate counsel advise their clients that the remission procedure exists. Later on, they have appointed counsel when courts are considering

whether they are in contumacious default. Surely those attorneys discuss remission with them. During the collection process, defendants meet regularly to negotiate with court clerks who are able to provide them information and forms[3] which the courts have created for them to use for this purpose. They just have to fill them out. Court facilitators can assist the public in filling out forms. And legal aid groups have created forms of their own.

A pro se defendant who wishes to seek remission should have no difficulty in communicating this request to the court. And because there are no difficult-to-find or specific standards, any pro se litigant can demonstrate to a judge when collections are a hardship in that defendant's own unique circumstances.

While the Defendant urges this Court to change the law, he offers no persuasive facts on which to do so. It appears the goal of the Defendant's appeal is to make the costs to the State of imposing and collecting fines (through appointment of counsel and the transporting of incarcerated defendants on facially frivolous motions) greater than the fines themselves. However, it is both the legislative will and the sentencing court's determination that fines should be imposed as

[3] Forms CR 08.0800 and CR 08.0810 are available at the clerk's office or online.

punishment for the commission of crimes.

This Court should follow the established law and dismiss the appeal.

VI. CONCLUSION

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

DATED: April 7, 2016.

Respectfully submitted:

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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 April 7, 2016, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**