Supreme Court No. 93908-0
Court of Appeals No. 33326-4-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD E. CORNWELL, JR.,

Defendant/Petitioner.

PETITION FOR REVIEW

DAVID N. GASCH
WSBA No. 18270
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Defendant/Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Court Rules

I. IDENTITY OF PETITIONER.

Petitioner asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed October 4, 2016, affirming his conviction and sentence. A copy of the Court's unpublished opinion is attached as Appendix A. A copy of the Court's Order Denying Motion for Reconsideration is attached as Appendix B. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

1. RCW 10.01.160(4) explicitly permits Cornwell to move for remission of LFOs at any time for manifest hardship. Does the failure to hold a fact hearing on whether there is manifest hardship render RCW 10.01.160(4)'s remissions process a nullity and violate due process?

2. Is Cornwell aggrieved under RAP 3.1 by the complete denial of consideration of his LFO remission motion on its merits?

3. What superior court procedures or standards should be established to ensure LFOs are remitted when they impose manifest hardship?

IV. STATEMENT OF THE CASE.

In June 2013, Cornwell was sentenced to numerous offenses involving drugs and stolen property. CP 6-7. At sentencing the Court imposed discretionary costs of $5346.22 and mandatory costs of $600[1], for a total Legal Financial Obligation (LFO) of $5946.22. CP 11-12.

The Judgment and Sentence contained the following language:

> ¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP 9.

The Court did not inquire into Cornwell's financial resources or consider the burden payment of LFOs would impose on him. 6/24/13 RP 35-36. The Court ordered Cornwell to begin making payments of $100 per month 90 days after his release from custody. CP 12.

On April 1, 2015, Cornwell filed a motion to vacate his LFO's. CP 82-84. The superior court ruled on the merits and summarily denied the motion without a hearing and with only the prosecutor present in the

[1] $500 Victim Assessment, $100 DNA fee. CP 11-12. The $200 in court costs imposed herein was not labeled as the criminal filing fee by the trial court, and therefore, it cannot

courtroom. 4/20/15 RP 1-2; CP 95-96. The Court found in its written order "that requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family, that none of the grounds for granting relief in RCW 9.94A.7605 or otherwise apply in this case, and the defendant has failed to meet his burden of proof in this matter." CP 95. Cornwell appealed. CP 101-03.

The Court of Appeals dismissed Cornwell's appeal holding he is not yet an aggrieved party because he is still in custody and no effort has been made to enforce payment of his LFOs. Slip Op p. 2 (*citing State v. Mahone*, 98 Wn. App. 342, 348, 989 P.2d 583 (1999).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RCW 10.01.160(4) explicitly permits Cornwell to move for remission of LFOs at any time for manifest hardship. The failure to hold a

---

be considered as mandatory. *See State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013).

fact hearing on whether there is manifest hardship renders RCW 10.01.160(4)'s remissions process a nullity and violates due process.

RCW 10.01.160(4) provides the LFO remission procedure in Washington:

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. 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.[2]

This statute's meaning is clear: if LFOs are imposed on a defendant, that defendant "may at any time petition the sentencing court for remission." RCW 10.01.160(4); *State v. Bertand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011) ("The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*" (alteration in original) (quoting *State v. Baldwin*, 63 Wn. App. 303, 310–11, 818 P.2d 1116, 837 P.2d 646 (1991)), *review denied*, 175 Wn.2d 1014 (2012)).

Because defendants may move for remission at any time, it follows that they must be given some process on the subject of remission when they so move. The second sentence of RCW 10.01.160(4) reads, "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 . . . ." Without some fact finding process, no court could satisfy itself that payment will or will not impose a manifest hardship. That is, no manifest hardship determination can be made unless and until the moving party is able to present evidence and arguments to the trial court demonstrating why the LFOs cause manifest hardship. A commonsense reading of RCW 10.01.160(4) requires a hearing on the issue of manifest hardship.

Washington courts interpreting the remissions statute have recognized that the actual merits of a remission petition must be considered. In *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), *as amended* (Dec. 14, 2009), Division One rejected the appealability of an order denying a RCW 10.01.160 (4) remission motion because, in its view, orders denying remission are neither final judgments nor amendments to judgments under RAP 2.2 (a)(1) or (9). This was so,

---

[2] RCW 10.01.170 allows the court to set a time period or specify installments for

according to the court, because the plain language of the statute makes the "amount imposed [in LFOs] . . . always subject to modification." *Smits*, 152 Wn. App. at 524. The court explained,

> 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.

Id. (emphasis added) (footnote omitted). *Smits* supports the conclusion that trial courts must actually consider the issue of manifest hardship based on the defendant's present circumstances. Indeed, that is precisely what the trial court did in *Smits*: "The court held a hearing and entered separate orders denying the 'Defendant's Motion to terminate Legal Financial Obligations.'" *Id.* at 518. Cornwell, like *Smits*, needs a factual hearing on his motions to remit LFOs based on the consideration of his current circumstances.

The consideration of presently available facts is especially warranted in indigent cases. Whether a motion to remit requires a hearing was decided by Division Three in *State v. Crook*, 146 Wn. App. 24, 28, 189 P.3d 811 (2008), which concluded that the defendant failed to show

---

LFO payments.

that the superior court "erred in denying his motion without a facts hearing." Prior to *Crook*, Division Two noted that "additional fact finding from the bench is probably warranted in low income cases." *State v. Campbell*, 84 Wn. App. 596, 600, 929 P.2d 1175 (1997). The *Campbell* court, somewhat incredulous toward the trial court for determining Campbell could pay LFOs, stated, "Although it is difficult to comprehend how a person supporting himself and a child on $700 per month would have *any* disposable income, Campbell indicated that he did, so we uphold the trial court's finding." *Campbell*, 84 Wn. App. at 600. Therefore, "under these facts," "the trial court did not abuse its discretion by denying" Campbell's motion. *Id.* at 600-01. *Campbell*'s marked reservations in the context of low income cases, however, foreshadowed the need for enhanced judicial scrutiny of an indigent person's actual, present ability to pay LFOs when the indigent person moves for remission based on manifest hardship.

Furthermore, although *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), concerned former RCW 10.01.160(3),[3] the Court emphasized

[3] Subsection 3 states:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payments of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Former RCW 10.01.160(3).

that a superior court, in assessing a defendant's ability to pay LFOs, must conduct an individualized inquiry and consider factors "such as incarceration and a defendant's other debts, including restitution." 182 Wn.2d at 838.

Moreover, an adequate remissions process—one where a defendant's financial circumstances are actually considered—is necessary to the constitutionality of the LFO system as a whole. In *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), the United States Supreme Court rejected Fuller's equal protection challenge because Oregon's statute, like Washington's, provided a remissions process. "The convicted person from whom recoupment is sought thus retains all the exemptions accorded to other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs of his legal defense will impose 'manifest hardship[.]'" *Id.* at 47. The Court concluded "The legislation before us, therefore, is wholly free of the kind of discrimination that was held [previously] . . .to violate the Equal Protection Clause." *Id.* at 47-48.

Other federal courts have interpreted *Fuller* as requiring examination of a defendant's financial circumstances whenever the issue of hardship arises. *See Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir.

1984) (holding that, under *Fuller*, courts must give a defendant notice and opportunity to be heard on the issue of repayment of counsel fees and "the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required"); *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979) (construing *Fuller*'s constitutional requirements to mean that a person against whom LFOs were imposed "ought at any time to be able to petition the sentencing court for remission of the payment of costs or any unpaid portion thereof. The court should have the power to issue remittitur if payment will impose manifest hardship on the defendant or his immediate family").

Washington courts have also recognized that a robust remissions process is constitutionally required. This recognition began in *State v. Barklind*, 87 Wn.2d 814, 817, 577 P.2d 314 (1977), where the Washington Supreme Court recited what is constitutionally required under *Fuller*:

> [A] convicted person under obligation to repay may petition the court for remission of the payment of costs or of any unpaid portion thereof. The trial court order specifically allows the defendant to petition the court to adjust the amount of any installment or the total amount due to fit his changing financial situation.

Likewise, in *State v. Curry*, 118 Wn.2d 911, 915, 829 P.2d 166 (1992), the Court listed one of the seven requirements that "must be met" for Washington's LFO scheme to be constitutional: "The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion." RCW 10.01.160 was constitutional, in part, because the "court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." *Curry*, 118 Wn.2d at 916.

In *State v. Blank*, 131 Wn.2d 230, 244, 930 P.2d 1213 (1997), the Washington Supreme Court upheld the constitutionality of the appellate cost scheme under RCW 10.73.160, because it "allows for a defendant to petition for remission at any time." The court noted that an obligation to pay "without opportunity for a hearing in which the defendant may dispute the amount assessed or the ability to repay, and which lacks any procedure to request a court for remission of payment violates due process." *Blank*, 131 Wn.2d at 244. More recently, in *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 303–04, 165 P.3d 399 (2007), the Court "delineated the salient features of a constitutionally permissible costs and fees structure" to include a requirement that the "convicted person must be

permitted to petition the court for remission of the payment of costs or any unpaid portion . . . ."

The constitutional lesson of all these cases and the plain language of RCW 10.01.160(4) is that defendants must be given a fair hearing of the subject of their LFO remission motions so that trial courts can make a manifest hardship determination based on the facts. A statute allowing a party to move for a remission at any time based on manifest hardship while at the same time disallowing that party to present evidence and arguments germane to the manifest hardship determination makes no sense. Indeed, such a restricted reading renders RCW 10.01.160(4) meaningless and thereby impermissibly undercuts the constitutionality of Washington's overall LFO scheme.

Here, when Cornwell was sentenced in June 2013, the Court found, via the boilerplate language of paragraph 2.5 in the judgment and sentence, that Cornwell "has the ability or likely future ability to pay the legal financial obligations ordered herein." CP 9. However, the Court did not inquire into Cornwell's financial resources or consider the burden payment of LFOs would impose on him. 6/24/13 RP 35-36.

After Cornwell filed his motion to vacate his LFO's, the trial court again made no inquiry and held no hearing. Yet the Court found "that

requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family, that none of the grounds for granting relief in RCW 9.94A.7605 or otherwise apply in this case, and the defendant has failed to meet his burden of proof in this matter." CP 95. However, a finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, there is no evidence to support the Court's finding that requiring the payment of LFO's will not impose a manifest hardship on Cornwell or his immediate family, since the Court has never inquired into Cornwell's financial resources or consider the burden payment of LFOs would impose on him. 6/24/13 RP 35-36. Second, the Court's reliance on RCW 9.94A.7605 is incorrect. That statute addresses payroll deductions[4],

[4] RCW 9.94A.7605 is titled "Motion to quash, modify, or terminate payroll deduction--Grounds for relief" and provides in pertinent part: "(1) The offender subject to a payroll deduction under this chapter, may file a motion in superior court to quash, modify, or terminate the payroll deduction. The court may grant relief if:
(a) It is demonstrated that the payroll deduction causes extreme hardship or substantial injustice; or
(b) In cases where the court did not immediately order the issuance of a notice of payroll deduction at sentencing, that a court-ordered legal financial obligation payment was not more than thirty days past due in an amount equal to or greater than the amount payable for one month . . ."

which could not have occurred in this case, since Cornwell's first payment was not due until 90 days after his release. RCW 10.01.160(4) is instead the applicable statute here. Finally, the Court's finding that Cornwell failed to meet his burden of proof is disingenuous at best, since he was not afforded the opportunity to do so at a hearing.

As a matter of constitutional and statutory law, Cornwell was entitled to a hearing, at which the trial court actually considered whether the amount owed in LFOs caused a manifest hardship to Cornwell and to his family. The Court's findings are not based on substantial evidence. The Court afforded Cornwell no process whatsoever. By refusing to meaningfully consider Cornwell's motions for remission, the trial court failed to comply with the plain commands of RCW 10.01.160(4) and thereby failed to provide the minimum process due under the constitution. This court should therefore reverse and give Cornwell a fair hearing.

2. Cornwell is aggrieved under RAP 3.1 by the complete denial of consideration of his LFO remission motion on its merits.

RAP 3.1 provides, "Only an aggrieved party may seek review by the appellate court." "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695 (1989). To

be aggrieved, a party must have a present and substantial interest, rather than a mere expectancy or contingent interest in the subject matter. *State v. Mahone*, 98 Wn. App. 342, 347, 989 P.2d 583 (1999). For the purposes of determining whether a party has standing to appeal the superior court order as an aggrieved party, "aggrieved" has been defined to mean denial of some personal or proprietary right, legal or equitable, or the imposition upon a party of a burden or obligation. *Mestrovac v. Department of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P. 3d 536 (2008), *as amended on denial of reconsideration*, (Feb 29, 2008), *aff'd on other grounds sub nom. Kustura v. Dep' t of Labor& Indus.*, 169 Wn.2d 81, 233 P. 3d 853 (2010). The complete denial of any process to Cornwell regarding his remission motions qualifies him as an aggrieved party.

The Court of Appeals, herein, dismissed Cornwell's appeal holding he is not yet an aggrieved party because he is still in custody and no effort has been made to enforce payment of his LFOs. Slip Op p. 2 (*citing State v. Mahone*, 98 Wn. App. 342, 348, 989 P.2d 583 (1999). The Court further held, "The Supreme Court's decision in *Blazina* does not undermine the reasoning in decisions such as *Mahone*, *Smits*, and *Crook*." Slip Op p. 2.

However, Division Two reached the opposite conclusion in a recent case with similar facts. In *State v. Shirts*, No. 47740-8 (August 30. 2016), the Court of Appeals held Shirts *is* an aggrieved party despite the fact there was no showing the State had tried to collect on the LFOs. *Shirts*, Slip Op p. 1.

The *Shirts* Court found that *Blazina* calls into question the continued precedential value of *Mahone*, a case it authored. *Shirts*, Slip Op p. 6. The Court further stated:

> *Blazina*'s recognition of the impacts LFOs have on offenders contradicts *Mahone*'s reasoning that any determination of whether payment will create a hardship would be mere speculation if no enforcement is sought. In light of *Blazina*, and contrary to the court's conclusion in *Mahone*, an offender can be "aggrieved" even if the State does not attempt to enforce payment. Therefore, given the recognized and real impacts LFOs have on offenders, we decline to follow *Mahone's* requirement that the State must attempt to collect LFOs from an offender before the offender can be considered "aggrieved."

Shirts, Slip Op p. 7. The Court also noted the continued precedential value of *Mahone* is further called into question by its decision in *State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011). *Shirts*, Slip Op p. 7 fn 6.

In light of the holding in *Shirts*, this Court should find Cornwell is an aggrieved party.

3. The evidentiary hearing must employ some standard to meaningfully assess whether LFOs impost a "manifest hardship," and consistent with *Blazina*, GR 34 provides an appropriate standard.

When faced with motions for remission, trial courts must determine whether "it appears to the[ir] satisfaction . . . that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family," and, if so, decide whether to "remit all or part of the amount due in costs." RCW 10.01.160(4). This is a subjective and vague standard. "Manifest hardship" is not defined in Title 10 RCW. Nor does the case law interpreting RCW 10.01.160(4) say what "manifest hardship" means. In order to provide needed guidance, this court should instruct trial courts on how to assess manifest hardship when reviewing indigent parties' motions to remit LFOs.

Blazina provides helpful direction on how best to do so. The *Blazina* court stressed the need for an "individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." 182 Wn.2d at 838. To assist the courts in making this determination, *Blazina* instructed that "[c]ourts should also

look to the comment in court rule GR 34 for guidance." 182 Wn.2d at 838.

> This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a need-based, means-tested assistance program, such as Social Security or food stamps. In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Id. at 838-39 (emphasis added) (citations omitted).

Under GR 34, a person is considered indigent when he or she receives assistance through a governmental needs-based, means-tested program such as TANF, Supplemental Security Income, poverty-related veteran's benefits, state-provided general assistance for unemployable individuals, or food stamps. GR 34(a)(3)(A). Indigency is presumed when a person's household income is below 125 percent of the federal poverty guideline or when a person, despite being above the 125-percent threshold, has recurring living expenses that render him or her unable to pay fees and surcharges. GR 34(a)(3)(B)–(C). Courts may also determine a person is indigent based on "other compelling circumstances" "that

demonstrate an applicant's inability to pay fees and/or surcharges." GR 34(a)(3)(D).

In addition, the Washington Supreme Court promulgated GR 34 based on "the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. The goal is to "ensure[] that meaningful access to judicial review is available to the poor as well as to those who can afford to pay." *Id.* GR 34 is particularly useful because it provides needed uniformity when it comes to determining ability to pay. *See Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013) ("GR 34 provides a uniform standard for determining whether an individual is indigent and further requires the court to waive all fees and costs for individuals who meet this standard.").

Although the *Blazina* court proposed GR 34 as an appropriate standard to assess whether to impose LFOs at sentencing, there is no reason it is not also an appropriate standard to assess whether the payment of the outstanding balance of already assessed LFOs present a manifest hardship under RCW 10.01.160(4). If courts should "seriously question" a person's ability to pay LFOs if he or she meets the GR 34 standard, why

should they not also "seriously question" whether continuing to carry an outstanding criminal debt causes manifest hardship?

GR 34, in the remissions context, would best be employed as a rebuttable presumption, much like the *Blazina* court suggested. If a person meets the GR 34 indigency standard, courts should presume "that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family." RCW 10.01.160(4). Then the State may attempt to rebut this presumption by presenting evidence that the payment of the outstanding balance of LFOs will not impose a manifest hardship because of the person's current or likely future ability to pay. Employing the GR 34 standard in this manner would allow trial courts to make meaningful manifest hardship assessments under the remission statute. This court should use this case as a vehicle to adopt GR 34 as a meaningful standard and procedure for assessing manifest hardship under RCW 10.01.160(4).

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals, find that Cornwell is an aggrieved party, and remand for Cornwell's motion for remission of LFOs to receive fair and just consideration.

Respectfully submitted November 22, 2016,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 22, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

Richard Eugene Cornwell, Jr.
#367292
1313 N. 13th Ave
Walla Walla, WA 99362

E-mail: tchen@co.franklin.wa.us
Teresa Chen
Special Deputy Prosecuting Attorney

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

October 4, 2016

E-mail
Teresa Jeanne Chen
Attorney at Law
PO Box 5889
Pasco, WA 99302-5801

E-mail
David N. Gasch
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005

E-mail
James Lyle Nagle
Office of the Pros Attorney
240 W Alder St Ste 201
Walla Walla, WA 99362-2807

CASE # 333264
State of Washington v. Richard Eugene Cornwell, Jr.
WALLA WALLA CO SUPERIOR COURT No. 121004304

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: **E-mail** Honorable M. Scott Wolfram
c: Richard Eugene Cornwell, Jr. #367292
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

FILED
OCTOBER 4, 2016
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. 33326-4-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
RICHARD EUGENE CORNWELL, JR.,	)	
	)	
Appellant.	)	

PENNELL, J. — Richard Cornwell appeals a superior court order denying his motion to vacate legal financial obligations (LFOs). Because the State has not yet attempted to enforce the LFO order, Mr. Cornwell is not an aggrieved party. His appeal is therefore dismissed.

BACKGROUND

While serving a lengthy prison sentence, Mr. Cornwell filed a motion in Walla Walla County Superior Court to vacate LFOs. Mr. Cornwell owes over $5,000 in LFOs, but payments are not scheduled to begin until after his release from prison, which is projected to occur in 2025. The basis of Mr. Cornwell's motion to vacate was there had not been a sufficient finding of ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The superior court denied Mr. Cornwell's motion after holding a brief hearing. Mr. Cornwell appeals.

ANALYSIS

Under RAP 3.1, "[o]nly an aggrieved party may seek review by the appellate court." Mr. Cornwell is not yet an aggrieved party as he is still in custody and no effort has been made to enforce payment of his LFOs. *State v. Mahone*, 98 Wn. App. 342, 348, 989 P.2d 583 (1999). Although the trial court denied Mr. Cornwell's motion to vacate costs, "he suffers no concrete injury until the State seeks to enforce payment and contemporaneously determines his ability to pay." *Id.*; *State v. Smits*, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009). While Mr. Cornwell's judgment and sentence authorized the Department of Corrections to deduct inmate wages for purposes of repayment of LFOs under RCW 72.11.20, this authorization does not constitute a collection action by the State "requiring inquiry into a defendant's financial status." *State v. Crook*, 146 Wn. App. 24, 27-28, 189 P.3d 811 (2008).

The Supreme Court's decision in *Blazina* does not undermine the reasoning in decisions such as *Mahone*, *Smits*, and *Crook*. *Blazina* addressed the requirements for a superior court's factual findings regarding ability to pay court costs. A defendant dissatisfied with the findings set forth in his or her judgment and sentence can bring up

this issue in a direct appeal. *See State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011) (reversing for insufficient findings pre-*Blazina*). But *Blazina* did not create a mechanism for reopening a final judgment in cases like Mr. Cornwell's where no objections were made during the direct appeal process.

Importantly, *Blazina* did not reverse *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), which held the constitutional right to contest imposition of fines on the basis of indigence is not ripe until enforcement. *Mahone*, *Smits* and *Crook* are all premised on *Blank*. They are not undermined by *Blazina*.

CONCLUSION

Mr. Cornwell's LFO claims are denied as they are not ripe for review. The appeal is dismissed.

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.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

October 27, 2016

E-mail
Teresa Jeanne Chen
Attorney at Law
PO Box 5889
Pasco, WA 99302-5801

E-mail
David N. Gasch
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005

E-mail
James Lyle Nagle
Office of the Pros Attorney
240 W Alder St Ste 201
Walla Walla, WA 99362-2807

CASE # 333264
State of Washington v. Richard Eugene Cornwell, Jr.
WALLA WALLA CO SUPERIOR COURT No. 121004304

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration of the court's October 4, 2016, opinion.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file an original and one copy (unless filed electronically) of a Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed. RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

FILED
OCTOBER 27, 2016
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, Respondent, v. RICHARD EUGENE CORNWELL, JR., Appellant.	)	No. 33326-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant Richard Eugene Cornwell, Jr.'s motion for reconsideration of our October 4, 2016, opinion and the record and file herein;

IT IS ORDERED, with one judge dissenting, that the appellant's motion for reconsideration is denied.

PANEL: Judges Fearing, Korsmo and Pennell

BY A MAJORITY:

GEORGE FEARING
Chief Judge