NO. 47702-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRIS FORTH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine M. Stolz, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to consider Chris Allen Forth's request for remission of appellate costs.

2. The trial court erred when it refused to exercise discretion before adding $5,600.72 in appellate costs to Forth's judgment and sentence.

3. If maintained, the appellate costs at issue should be properly apportioned between county and state pursuant to RAP 14.2, RAP 15.6, and RCW 10.73.160.

Issues Pertaining to Assignments of Error

1. Did the trial court err when it refused to consider Forth's request for remission of appellate cost or to determine whether the appellate costs constituted a manifest hardship on Forth?

2. Did the trial court err when it refused to acknowledge, let alone exercise, any discretion to consider Forth's inability to pay $5,600.72 in appellate costs before imposing them?

3. The appellate costs at issue were awarded entirely to Pierce County in contravention of RAP 14.2 that requires apportionment of such costs between the county and the state in indigent cases. In the event the appellate costs endure this appeal, should they nonetheless be properly apportioned between Pierce County and the Office of Public Defense pursuant to RAP 14.2, RAP 15.2, and RCW 10.73.160?

B. STATEMENT OF THE CASE

On February 20, 2014, this court issued an unpublished opinion in Forth's previous consolidated appeals, Nos. 19429-5-II and 43041-0-II. CP 23-41. This court affirmed Forth's bail jumping and first degree child molestation convictions, but remanded for the trial court "to recalculate the credit for time served that Forth is entitled to under RCW 9.94A.505(6)." CP 40.

The mandate issued in these appeals on January 9, 2015. CP 42-43. The mandate awarded costs and attorney fees solely to Pierce County in the amount of $5,600.72, listing Forth as the judgment debtor. CP 42.

On remand, Forth's attorney and the State "c[a]me to an agreement as to what credit [Forth] should receive . . . towards his revoked SSOSA sentence . . . and the number of days, I think, adds -- I think it's [13] days." RP 4. The trial court accepted this 13 days' worth of credit and entered an agreed order correcting the order revoking sentence to authorize a total of 204 days of credit for time served. CP 51-52.

As to the issue of appellate costs, Forth's trial counsel stated,

> Technically, Your Honor, because it's a post-conviction matter, I'm -- he's not entitled to an attorney. I did -- because I think Mr. Forth probably just heard about it -- let him know a couple things he could raise with Your Honor, including State v. Blazina in terms of his financial ability to pay; but I think he can address those . . . .

RP 3. Forth addressed the court, stating, "I have no income at this point and have no way of paying [appellate costs]; and according to State vs. Blazina, I cannot afford the financial obligations at this point." RP 4-5. The trial court responded, "Well, the Court of Appeals has sent it back for the imposition of costs as you did not prevail on that appeal; and the Court is going to impose costs." RP 5. The trial court entered an order adding $5,600.72 in appellate costs to the judgment and sentence. CP 61-62.

Forth timely appeals. CP 53.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER FORTH'S REQUEST FOR REMISSION OF $5,600.72 IN APPELLATE COSTS

Forth stated at resentencing, "I have no income at this point and have no way of paying [appellate costs]; and according to State v. Blazina,[1] I cannot afford the financial obligations at this point." RP 4-5. This was plainly a request not to impose appellate costs due to an inability to pay. Rather than address Forth's claim, the trial court stated, "Well, the Court of Appeals has sent it back for the imposition of costs as you did not prevail on that appeal; and the Court is going to impose the costs." RP 5. The trial court erred by refusing to address Forth's request for remission.

[1] State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

RCW 10.73.160(1) provides that an appellate court "may require an adult offender convicted of an offense to pay appellate costs." If these costs are requested and imposed in accordance with title 14 RAP. "[a]n award of costs shall become part of the trial court judgment and sentence." RCW 10.73.160(3). These provisions automatically make appellate costs part of the judgment and sentence.

"A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court . . . for remission of the payment of costs or of any unpaid portion." RCW 10.73.160(4) (emphasis added). The trial court may remit all or part of the amount due in costs "[i]f it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediately family . . . ." Id.

The meaning of these provisions could not be clearer: when a defendant has been ordered to pay appellate costs, the defendant may move for remission of the costs at any time. On June 12, 2015, Forth requested complete remission of the appellate costs due to his inability to pay based on the concerns identified by our supreme court in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). RP 4-5. June 12, 2015 surely falls under RCW 10.73.160(4)'s "at any time" language.

In addition to allowing a motion for remission at any time, RCW 10.73.160(4) requires the trial court to engage in a manifest hardship inquiry. The second sentence of this subsection requires the trial court to determine whether payment of the appellate costs "will impose manifest hardship on the defendant or the defendant's immediate family." Despite Forth's remission request, the trial court made no manifest hardship determination. It did not consider how $5,600.72 in appellate costs potentially caused Forth manifest hardship, contrary to the procedure RCW 10.73.160(4) contemplates. The trial court failed to comply with the plain commands of RCW 10.73.160. This court should accordingly remand and instruct the trial court to properly consider Forth's motion for remission under RCW 10.73.160's procedure.

2. THIS COURT AND SUPERIOR COURTS HAVE AMPLE DISCRETION TO DENY APPELLATE COSTS IN INDIGENT CASES OR TO MEANINGFULLY ASSESS ABILITY TO PAY BEFORE IMPOSING SUCH COSTS

This court and the superior courts of this state have a choice to deny appellate costs in the cases of indigent appellants or to insist on an ability-to-pay determination before imposing them.[2] The trial court here stated it had no choice because "the Court of Appeals has sent it back for the imposition of costs as you did not prevail on that appeal; and the Court is going to

[2] Since Blazina, it appears that this court has so insisted, thoughtfully remanding appellate cost bills for ability-to-pay determinations.

impose the costs." RP 5. The refusal to exercise discretion perpetuates the numerous harms of "broken LFO systems," identified in Blazina, 182 Wn.2d at 835, and does so on a much larger monetary scale. This court should soundly exercise its discretion and deny these costs or remand for the trial court to soundly exercise its discretion.

a. The trial court erred by failing to acknowledge or exercise its own discretion

Rather than acknowledge or apply its discretion, the trial court indicated it had no discretion because "the Court of Appeals has sent it back for the imposition of costs as you did not prevail on that appeal; and the Court is going to impose the costs." RP 5. But this is not so. RCW 10.73.160(1) provides, "The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs." (Emphasis added.) Thus, contrary to the trial court's suggestion, it had discretion not to deny appellate costs or to consider whether Forth had the ability to pay appellate costs before adding them to the judgment and sentence.

The trial court's error in declining to acknowledge or exercise its discretion has arisen in the sentencing context. In State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005), the court considered whether "the trial judge abused his discretion by categorically refusing to consider a

DOSA sentence." The court indicated that "every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Id. at 342. Indeed, "[a] trial court abuses discretion when 'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.'" Id. (quoting State v. Garcia Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). Thus, the categorical refusal to consider a statutorily authorized alternative "is reversible error." Grayson, 154 Wn.2d at 342.

Grayson's reasoning applies here. The trial court acted as though it had no discretion to waive all or part of the appellate costs and categorically refused to consider this alternative to imposing the appellate costs listed in the mandate. But RCW 10.73.160(1) plainly supplies the trial court with such discretion and forth deserved to have his request actually considered. As in Grayson, the trial court erred in refusing to acknowledge or apply its own discretion.

For the reasons that follow, this court should exercise its own discretion to deny the appellate costs or remand with instructions for the trial court to exercise its discretion as it should have in the first instance.

b. The indigency order in Forth's appeal informed Forth that an attorney would be court-appointed to perfect his appeal due to his indigency, but this was untrue

Forth sought counsel for appeal due to his indigency and represented to the court under penalty of perjury, "I can provide nothing towards the cost of this appeal." CP 59. Based on this declaration and the declaration of counsel, the trial court found "that [Forth] is indigent and desires a court-appointed counsel to perfect his appeal" and appointed an attorney to represent Forth. CP 60. Any reasonable person reading Forth's declaration and the order appointing counsel on appeal would understand (1) Forth was entitled to counsel at public expense due to his indigency and (2) "court-appointed counsel to perfect his appeal" means Forth, due to his indigency, would pay nothing for his attorney or for the preparation of the appellate record, win or lose. The award of appellate costs against Forth in the amount of $5,600.72 converts the order appointing counsel for appeal into a falsehood. This alone is a sound reason for this court and the trial court to exercise discretion and deny appellate costs in this case.

c. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their cases undermines the attorney-client relationship and creates a perverse conflict of interest

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day in the Court

of Appeals, their clients will have to pay, at minimum, thousands of dollars in appellate costs. In this manner, appellate defenders must become more than just their clients' lawyers, but also their financial planners. Indeed, appellate defenders must hedge the strength of their arguments against the vast sums of money their clients will owe and advise their clients accordingly. This undermines attorneys' fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only to appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money.[3] Many clients immediately see the perverse incentive this creates: the Office of Public Defense, through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily seen as a conflict of interest and undermines the appearance of fairness of the appellate cost scheme. The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the

[3] In indigent cases, appellate costs are apportioned between the county and the State. RAP 14.2. The State's money is collected by superior court clerks and forwarded to the Office of Public Defense for the Indigent Appeal Allotment. RAP 15.6. As discussed in Part 3, infra, this court did not apportion the appellate costs pursuant to the rules of appellate procedure but instead awarded the full $5,600.72 to Pierce County. CP 42.

organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design. This court should exercise its discretion and deny costs or remand this matter to the trial court to exercise its discretion.

d. County prosecutors seek appellate costs to punish the exercise of constitutional rights

Because the county prosecutors typically only stand to recover a small amount for the cost of their briefing, they have no real interest at stake. The State's real purpose in seeking costs is to punish those who exercise their rights to counsel and to appeal under article I, section 22 of the state constitution.

"There can be no equal justice where the kind of appeal a [person] enjoys depends on the amount of money he [or she] has." Douglas v. California, 372 U.S. 353, 355, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). Likewise, there can be no equal justice when a person's decision to exercise his constitutional right to appeal depends on the amount of money he has. This court should do equal justice by exercising its discretion to deny the imposition of appellate costs. To do otherwise is to punish Forth for exercising his article I, section 22 rights.

In response, the State might argue that there is a difference between trial costs and appeal costs because appeals are initiated by the defendant and

trials are initiated by the prosecution. This court should reject any such argument. This appeal, just like the trial that came before it, results from a State-initiated prosecution—but for the prosecution, there would be no appeal. In our constitution, the right to appeal is enumerated alongside the right to confrontation, counsel, compulsory process, and a speedy and public trial. CONST. art. I, § 22. An appeal is merely the final chapter of the prosecution, and stands on equal footing with the other numerous rights our constitution guarantees to the accused. Any suggestion that an indigent person should bear the costs of exercising one particular constitutional right while remaining exempt from the costs of exercising others makes no sense and must be rejected.[4] This court should exercise its discretion on the issue of appellate costs or instruct the trial court to do so on remand.

e. Imposing costs on indigent persons who do not have the ability to pay does not rationally serve a legitimate state interest and accordingly violates substantive due process

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; CONST. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive

[4] Any such distinction between trial costs and appeal costs is further undermined by the fact that the State can and does seek costs against indigent respondents when it is the appealing party. See RCW 10.73.160(1) ("Appellate costs are limited to expense specifically incurred by the state in prosecuting or defending an appeal . . . ." (emphasis added)).

protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218-19. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process challenge depends on the nature of the right at issue. Johnson v. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, courts apply rational basis scrutiny. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id. Although this standard is deferential, it is not meaningless. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (cautioning rational basis standard "is not a toothless one").

As discussed, in a typical cost bill, the vast majority of the money award is earmarked for indigent defense funding. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs

on indigent litigants who cannot pay them does not rationally serve this interest.[5]

As the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. Imposing appellate costs under RCW 10.73.160 and RAP 14.2 on indigent persons without ascertaining whether they can pay them fails to further any state interest. There is no rational basis for Washington courts to impose this debt on those who lack the ability to pay.

Likely intending to avoid such a result, the legislature expressly granted discretion to deny a request to impose costs on indigent litigants: "The courts of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1) (emphasis added). "The authority is permissive as the statute specifically indicates." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). No rational legislation would expressly grant discretion to courts that fail or refuse to exercise it. Washington courts must, at minimum, require an ability-to-pay determination before imposing appellate costs to comport with the due process clauses.

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[5] It is by no means clear and Forth does not concede that the appellate cost system produces a net positive balance in the state's coffers. It is likely that enforcement efforts—if fairly quantified to include the time that trial and appellate lawyers, clerks, commissioners, and judges spend on these issues—would exceed the limited sums extracted from indigent litigants.

The state also has a substantial interest in reducing recidivism and promoting postconviction rehabilitation and reentry into society. Blazina, 182 Wn.2d at 836-37. Appellate costs immediately begin accruing interest at 12 percent, making this reentry unduly onerous, if not impossible, to achieve. See id.; RCW 10.82.090(1). This important state interest cuts directly against the discretionless imposition of appellate costs.

When applied to indigent persons who do not have the ability or likely future ability to pay, as here, the imposition of appellate costs does not rationally relate to the state's interest in funding indigent defense programs. Forth asks this court to conclude that any imposition of appellate costs without a preimposition determination of his ability to pay violates his substantive due process rights.

f. *Blazina* called for discretion and undermined the time-of-enforcement rationale, and it is by no means clear that Washington's remission and collections process, the proper functioning of which is the basis for the time-of-enforcement rationale, is constitutionally adequate

In Blazina, our supreme court recognized the "problematic consequences" legal financial obligations inflict on indigent criminal defendants. 182 Wn.2d at 836-37. LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the

LFOs were initially assessed." Id. at 836. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InFor_APenny_web.pdf; Katherine A. Beckett, Alexes M. Harris & Heather Evans, Wash. State Minority & Justice Comm'n, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASH. STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducing such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. As discussed, the appellate cost bill imposes a debt for not prevailing on appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent litigant after the State substantially prevails on appeal results in the same compounded interest and prolonged retention of court jurisdiction. Appellate costs negatively impact indigent persons in precisely the same ways the Blazina court identified.

Furthermore, the Blazina courts instructed *all* courts to "look to the comment in GR 34 for guidance." 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in 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. (emphasis added). The Blazina court also stated that "if someone does meet the GR 34[(a)(3)] standard[s] for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839. Blazina indicates that this court and the trial courts should be exercising discretion before imposing thousands of dollars on indigent appellants in appellate costs. Forth therefore asks this court to exercise discretion or remand this matter to the trial court with instructions to do so.

The State might respond by discussing State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). But while Blank upheld the constitutionality of RCW 10.73.160, it did not hold that appellate or trial courts lack discretion on the issue of appellate costs. Any reliance on Blank for the proposition that no discretion exists would be misplaced, especially in light of the serious concerns the Blazina court identified.

To be sure, Blank repeatedly approved of a time-of-enforcement rationale, indicating that the proper time to challenge LFOs was when the State attempted to collect the money. 131 Wn.2d at 244, 246, 252-53. It did so relying primarily on Fuller v. Oregon, 417 U.S. 40, 54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), which held it was constitutional to attempt to recoup court costs from an indigent person who later becomes able to pay. See Blank, 131 Wn.2d at 246. Thus, according to Blank, RCW 19.73.160 is constitutional because indigent persons can move for remission at any time and because their ability to pay must be taken into account before sanctions are imposed for nonpayment. Blank, 131 Wn.2d at 246-47.

However, Blank provides no guidance on whether courts should exercise discretion to avoid the problematic consequences associated with LFOs. Blank did not address the problem of compounding interest at the well-above-market rate of 12 percent. Blazina did. Under a time-of-enforcement rationale, the State can allow unpaid LFOs to accrue to

astronomical levels by delaying collection efforts months or years. High interest rates that exponentially increase the amount of LFOs were one of the many harms our supreme court identified in Blazina. See 182 Wn.2d at 836-37. If Forth serves even four more years in prison, he will owe at least $8,812.85, $3,212.13 more than the $5,600.72 initially imposed in appellate costs due to four years of compounding interest alone. Courts should exercise discretion not to perpetuate this type of barrier to reentry. See Blazina, 182 Wn.2d at 836-38.

Moreover, Blank's time-of-enforcement rationale could have disposed of Blazina's and Paige-Colter's claims in Blazina, but the Washington Supreme Court rejected it. In Blazina, the State argued that the LFO issue was not yet ripe and should not be reviewed because the proper time to challenge the imposition of LFOs is at the time of enforcement. 182 Wn.2d at 832 n.1. The Blazina court disagreed. Id. Because the Blazina court reached the merits of the LFO issue despite no attempt by the State to collect LFOs, this court should do the same or instruct the trial court to do the same. Forth finds himself in the same position as Blazina and Paige-Colter, and should receive the same consideration.

In addition, when read carefully and considered in light of the realities of Washington's LFO collection scheme, Blank actually supports Forth's position that an ability-to-pay inquiry should occur before imposition

of appellate costs. After Blazina's recognition that Washington State's LFO system is "broken," 182 Wn.2d at 835, Blank's time-of-enforcement rule must be revisited to place it in the context of the current broken system.

Washington law sets forth an elaborate and aggressive collections process including the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and often on their families as well. See Alexes Harris, et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. SOC. 1753 (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who lack the ability to pay).

Washington's legislatively sanctioned debt cycle does not conform to the constitutional safeguards established in Blank. In Blank, the court indicated that fundamental fairness concerns arise only if the government seeks to enforce collection of the assessment and the defendant is unable, through no fault of his own, to comply. 131 Wn.2d at 241. However, the court noted that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting a fair ability-to-pay inquiry at certain times, including "when sanctions are sought for nonpayment," "if the State

seeks to impose some additional penalty for failure to pay," and "before enforced collection or any sanction is imposed for nonpayment." Id. at 242. Thus, anytime additional penalties or sanctions are imposed, or the State enforces collection, there must be an ability-to-pay inquiry.

Unfortunately, however, Washington courts are not complying with Blank's directives. The time-of-enforcement rule is predicated on the remission and collections processes working properly. And these processes do not appear to be working at all.

First, as discussed, LFOs accrue interest at a compounding rate of 12 percent. This is an astounding level given the historically low interest rates of the last several years. Blazina, 182 Wn.2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of *Gideon* by Reducing the Burden, 11 SEATTLE J. SOC. JUST. 963, 967 (2013)). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. Appellate costs become part of this judgment automatically and begin accruing interest immediately. RCW 10.73.160(3). This sanction has been identified as particularly invidious because, as discussed, it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See Harris, supra, at 1776-77 (explaining "those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later"). Yet there

is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Second, Washington law also permits "payroll deductions" immediately upon sentencing. 3). In addition to deducting wages to cover outstanding LFOs, employers RCW 9.94A.760(are permitted to deduct other fees from employees' earnings. RCW 9.94A.7604(4). This is enforced collection with additional monetary sanction yet there is no provision requiring an ability-to-pay inquiry before this collection mechanism is used.

Third, Washington law permits garnishment of wages and wage assignments to pay outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; Harris, supra, at 1778 (providing examples of wage garnishment in Washington). Garnishment may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Employers are permitted to charge a "processing fee." RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct ability-to-pay determinations when this enforced collection mechanism is employed.

Fourth, Washington law also permits courts to use collection agencies or county collection services to collect unpaid LFOs. RCW 36.18.190. These agencies may assess additional penalties or fees. Id.

Nothing in the statute prohibits courts from using such collections services immediately after sentencing. But there is no requirement that an ability-to-pay inquiry occur before enforcing LFOs in this manner.

Fifth, many indigent persons in DOC custody are forced to forfeit wages to pay LFOs without any determination of their ability to pay. Division Three has held that "[m]andatory Department of Corrections' deductions from inmate wages for payment of LFOs are not collection actions 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). In its one sentence of analysis, the Crook court stated, "Statutory guidelines set forth specific formulas allowing for fluctuating amounts to be withheld, based on designated percentages and inmate account balances, assuring inmate accounts are not reduced below indigency levels. RCW 72.11.020; RCW 72.09.111(1); RCW 72.09.015(10)." Crook, 146 Wn. App. at 28.

Crook is incorrect for two main reasons. First, as a matter of common sense, a state agency's deduction of wages to pay LFOs is, under any stretch of the imagination, a collection action by the State. Just because the somewhat convoluted collections statutes contain fluctuating formulas does not exempt them from qualifying as enforced collections for Blank's purposes. See RCW 72.11.020 (DOC secretary custodian of convicted person's funds and may disburse money from personal account to satisfy

LFOs); RCW 72.09.110 (requiring inmates working in prison industries to "participate in the cost of corrections"); RCW 72.09.111 (enumerating the deduction schedules and formulas for varying classes of wages). Crook defies reason and reality. Second, Crook's assurance that "inmate accounts are not reduced below indigency levels" rings completely hollow given that the "indigency level" established under chapter 72.09 RCW means "an inmate who has less than a ten-dollar balance of disposable income in his or her institutional account on the day a request is made . . . ." RCW 72.09.015(15). It is absurd to place an "indigency level" at $10 and then assure litigants and the public that DOC "accounts are not reduced below indigency levels." Crook, 146 Wn. App. at 28. DOC's wage deductions plainly qualify enforced collections but there is no requirement to inquire into ability to pay. This violates Blank.

Sixth, this case itself demonstrates that the remissions process is not satisfactory. Forth requested remission of his LFOs but the trial court refused to address his request or engage in the statutorily required manifest hardship determination. See Part 1, supra. This court recently granted a motion for discretionary review under similar circumstances in State v. Shirts, No. 47740-8-II.

Finally, and more fundamentally, indigent persons enjoy the assistance of counsel at sentencing and on appeal when courts impose LFOs,

including appellate costs. They lack counsel during the remissions or collections process. Instead, they are required to appear pro se at payment review hearings before a trial court judge, even though the State is represented by a prosecutor and a county collections officer. See RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because order denying remission not appealable as a matter of right, "Mahone cannot receive counsel at public expense"). To ensure that appellate costs are not enforced despite an indigent person's inability to pay, this issue should be litigated, and an ability-to-pay determination made, when counsel is presently appointed to allow for meaningful advocacy on the indigent person's behalf.

In sum, Washington's LFO system is broken in part because the courts have not satisfied the constitutional requirement that LFOs be enforced only upon those who have the ability to pay. The current LFO scheme fails to comply with Blank's requirements in many respects, undermining any reliance on Blank's time-of-enforcement rationale. This court should exercise discretion and deny appellate costs without a fair determination of Forth's ability to pay.

3. ALTERNATIVELY, PIERCE COUNTY IS NOT ENTITLED TO THE FULL AMOUNT OF APPELLATE COSTS IMPOSED

According to the mandate from Forth's last appeal, the full $5,600.72 was awarded to Pierce County. CP 42. However, Forth was indigent. CP 60. Because of his indigency, this court erred by not apportioning the money between Pierce County and the State Office of Public Defense.

RAP 14.2 provides, in pertinent part, "In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the count and the State." This provision is likely intended to conform to RCW 10.73.160(2), which limits appellate costs "to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction."

Apportionment should have occurred in Forth's previous appeal (Nos. 19429-5-II & 43041-0-II). According to the cost bill, the $4,440.00 in "Attorney Fees" was not a cost incurred by Pierce County in defending against Forth's appeal. Appendix at 1.[6] Since Forth was the appellant, neither did Pierce County incur $1,056.10 for transcription or $71.50 for preparing the clerk's papers. Appendix at 1. The only charges reasonably incurred by Pierce County were $10.07 for the respondent's brief and

[6] On December 1, 2015, this court granted Forth's motion to transfer the cost bill from his previous appeals to this appeal. To facilitate this court's review, this brief appends the cost bill and cites the cost bill as Appendix.

perhaps the $23.05 cost of copying the appellant's brief, a total of $33.12. See Appendix at 1. Assuming for the sake of argument the costs are valid, because these costs were not incurred by Pierce County, these costs are payable not to the county but to the Office of Public Defense's Indigent Appeal Allotment. RAP 15.6. Short of exercising its discretion to deny appellate costs outright or remanding for the trial court to exercise its discretion, this court should exercise its discretion to ensure that the apportionment of appellate costs complies with the law.

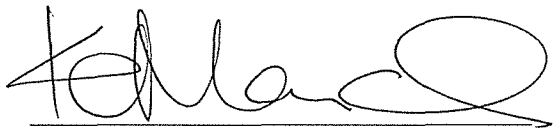
D. CONCLUSION

Blazina presents a watershed moment in Washington law. It calls for a reexamination of our broken LFO system, which necessarily includes appellate costs and proper remission procedures. This court should not perpetuate the harms identified in Blazina by maintaining the status quo. Instead, Forth asks that this court exercise its discretion to deny appellate costs altogether or to remand this matter to the trial court with instructions to exercise its own discretion and to consider Forth's request for remission.

DATED this 1st day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051
Attorneys for Appellant

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. CHRIS ALLEN FORTH, Appellant.	NO. 19429-5 COST BILL

The STATE OF WASHINGTON, Respondent, asks that the following costs be awarded:

1. Charges for reproduction of

Respondent's Brief:	$ 10.07
Attorney Fees	4,440.00
VRPS	1,056.10
Pro Se Fees	0.00
Clerk's Papers	71.50
Appellant's Brief copies	23.05
	$ 5,600.72

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

The above items are expenses allowed as costs by RAP 14.3, and RCW 10.73.160 (Laws 1995, Chapter 275), reasonable expenses actually incurred, and reasonably necessary for review. Appellant should pay the cost.

DATED: FEBRUARY 25, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail, e-file, or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/25/14
Date Signature

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE
Email: Michele.Young@opd.wa.gov PO Box 40957 Olympia WA 98504-0957 360-586-3164 x101

INDIGENT DEFENSE FUND
COST SUMMARY REQUEST

Request Date 02/24/14 **Date Cost Bill Due** 02/28/14

Case # 19429-5/43041-0 **Title** State v. Chris Allen Forth

County Pierce **Superior Court #** 93-1-02523-0

Person Requesting: Heather Johnson **County** Pierce

Email hjohns2@co.pierce.wa.us **Phone #** 253-798-7875

Items Requested:	19429-5	43041-0	
	10.07		10.07
Respondent Brief			
• Counsel Fee Paid to Date:	$2,125.00	$2,315.00	= 4,440.00
• Amount paid for VRP*:	$1,001.00	$55.10	- 1,056.10
			0
• Amount paid for ProSe:	-0-	-0-	
• Amount paid for Clerk's Papers:	$18.00	$ 53.50	71.50
• Amount paid for Brief copies:	$ 23.05	-0-	23.05

* For cases consolidated with one or more co-defendants, the amount provided here reflects an even distribution of the total VRP Costs.

☐ If this box is checked either no invoice or only a partial invoice has been received and additional expenses may be incurred

Completed by: _____ **Date:** 2/24/14

Please send Cost Summary Request Form via email: Michele.Young@opd.wa.gov

Form: 0075-2012_Cost_Summary_Request

PIERCE COUNTY PROSECUTOR

February 25, 2014 - 10:23 AM

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Case Name: State v. Chris Forth

Court of Appeals Case Number: 19429-5

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Motion: ____

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Brief: ____

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☒ Cost Bill

Objection to Cost Bill

Affidavit

Letter

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 47702-5-II
	)	
CHRIS FORTH,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF DECEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRIS FORTH
DOC NO. 728948
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 900
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF DECEMBER 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 01, 2015 - 12:43 PM

Transmittal Letter

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Case Name: Chris Forth
Court of Appeals Case Number: 47702-5

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Cost Bill

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Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

Other: _____

Comments:

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Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

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