SUPREME COURT NO. 97796-8

NO. 36271-0-III & 36272-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HUGHES,

Petitioner.

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

The Honorable M. Scott Wolfram, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Brian Hughes asks this Court to grant review of the court of appeals' unpublished decision in State v. Hughes, No. 36271-0-III (consolidated with No. 36272-8-III), filed October 15, 2019 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

1. Should this Court remand for the $200 criminal filing fee to be stricken from Hughes's judgment and sentence under State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)?

C. STATEMENT OF THE CASE

Hughes pleaded guilty in two Walla Walla County cause numbers to two counts of possession of methamphetamine and one count of first degree identity theft. 1CP 16-26; 2CP 18-29. At sentencing, the trial court ordered Hughes to pay the previously mandatory $200 criminal filing fee in both causes, though waived all other nonmandatory legal financial obligations (LFOs). 1CP 44; 2CP 37; RP 23. Hughes was represented by appointed counsel at the time of sentencing and was subsequently found indigent for purposes of the appeal. 1CP 57-58; 2CP 57-58. The drug offender sentencing alternative (DOSA) report likewise stated Hughes was unemployed and periodically homeless. 1CP 32.

In a consolidated appeal, Hughes argued the court should remand for the $200 criminal filing fee to be stricken from both of Hughes's judgments and sentences, based on his indigency. Br. of Appellant, 20-22. The court of appeals "decline[d] to reach the filing fee issue because it was not preserved" under RAP 2.5(a), where Hughes's counsel did not object at sentencing. Opinion, 5. The court also believed "[t]he record on appeal does not clarify whether Mr. Hughes was indigent at the time of sentencing as defined by RCW 10.101.010(3)(c)." Opinion, 5. The court did, however, remand for the nonrestitution LFO interest provision to be stricken. Opinion, 6.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD GRANT REVIEW AND REMAND FOR THE $200 CRIMINAL FILING FEE TO BE STRICKEN UNDER RAMIREZ.

In State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015), this Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. The Blazina court determined that—although ripe for review—a challenge to discretionary LFOs may not may be raised for the first time on appeal as a matter of right in the same manner as challenges to sentences under State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), and similar cases. Blazina, 182 Wn.2d at 832 n.1, 832-33. This is because, unlike in those cases, uniformity is not the goal. Rather, the goal is a fair and individualized determination of ability to pay. Id. at 834.

As this Court observed, however, RAP 2.5(a) gives appellate courts discretion to accept review of certain errors not appealed as a matter of right. Id. at 835. Although "[e]ach appellate court must make its own decision to accept discretionary review," the broken LFO system demanded that this Court reach the merits of the underlying appeals. Id.

Following Blazina, this Court discussed and applied House Bill (HB) 1783, which took effect on June 7, 2018 and applies prospectively to cases on direct appeal. Ramirez, 191 Wn.2d at 738, 747. HB 1783 amended RCW 10.01.160(3) to mandate: "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 6. The bill also amended RCW 36.18.020(2)(h) to prohibit imposing the $200 criminal filing fee on indigent defendants. Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(c), a person is "indigent" if he or she receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment "conclusively establishes that courts do not have discretion to impose such LFOs" on individuals "who are indigent at the time of sentencing." Ramirez, 191 Wn.2d at 749. In Ramirez, the court struck discretionary LFOs and the $200 criminal filing fee because Ramirez was indigent at the time of sentencing, i.e., his income fell below 125 percent of the federal poverty guideline. Id. at 749-50.

Hughes asks this Court to exercise its discretion under RAP 2.5(a) and remand for the $200 criminal filing fee to be stricken from both judgments and sentences. HB 1783 applies prospectively to Hughes because his direct appeal is still pending. Given that Hughes had appointed counsel below; the trial court waived all other nonmandatory LFOs; and Hughes was found indigent for purposes of appeal, the record is sufficient to establish Hughes was indigent at the time of sentencing.

As such, the sentencing court improperly imposed the $200 criminal filing fee in both causes, which may not be imposed on indigent defendants. At the very least, remand for a hearing to determine whether Hughes was indigent at the time of sentencing is appropriate. See State v. Catling, 193 Wn.2d 252, 438 P.3d 1174 (2019) (remanding for the trial court "to determine whether Catling has previously had a DNA sample collected and, if the court so finds, to strike the $ 100 DNA collection fee"). Notably, the court of appeals has already remanded for the nonrestitution interest provision to be stricken.

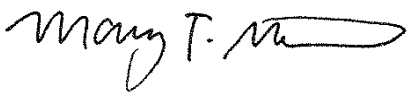
E. CONCLUSION

This Court should grant review and remand for the trial court to strike the $200 criminal filing fee from both judgments and sentences.

DATED this 23rd day of October, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

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CASE # 362710
State of Washington v. Brian Charles Hughes
WALLA WALLA CO SUPERIOR COURT No. 181000235

Consolidated with
CASE # 362728
State of Washington v. Brian Charles Hughes
WALLA WALLA CO SUPERIOR COURT No. 181001118

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 Washington 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 that 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. RAP 12.4(b). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. 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 the opinion (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is 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: Brian Charles Hughes
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OCTOBER 15, 2019
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. BRIAN CHARLES HUGHES, Appellant.	)	No. 36271-0-III (consolidated with No. 36272-8-III) UNPUBLISHED OPINION

PENNELL, J. — Brian Hughes appeals his sentences for two counts of unlawful possession of a controlled substance and one count of identity theft. He makes two assignments of error: First, Mr. Hughes claims the trial court erroneously imposed de facto consecutive sentences; second, he asserts the trial court's legal financial obligation (LFO) orders fail to comport with recent statutory changes. The first issue is moot and therefore not amenable to an appellate remedy. With respect to the second issue, we remand with instructions to strike only the nonrestitution interest provisions from each judgment and sentence under review in this consolidated appeal.

BACKGROUND

In two separate proceedings, Brian Hughes pleaded guilty to two counts of possession of a controlled substance (methamphetamine) and one count of first degree identity theft. His pleas were pursuant to a plea agreement, whereby the State agreed to dismiss several additional counts and recommend a residential drug offender sentencing alternative (DOSA).

The trial court accepted Mr. Hughes's guilty pleas and ordered the Department of Corrections (DOC) to screen Mr. Hughes for a residential DOSA. The DOC determined Mr. Hughes would be a good candidate for a residential DOSA. However, because the standard ranges for Mr. Hughes's methamphetamine convictions did not exceed one year, the DOC claimed Mr. Hughes was only eligible for a DOSA with respect to his identity theft conviction, which carried a standard range of 15-20 months.

At sentencing, Mr. Hughes requested an exceptional sentence downward such that he would be given credit for time served on the methamphetamine convictions and begin serving his residential DOSA immediately. The State disagreed with this approach. It claimed time served for a residential DOSA did not qualify for credit or constitute incarceration or confinement. The State recommended the court impose six-month concurrent sentences, with credit for time served, for the methamphetamine convictions

and then the residential DOSA sentence for the identity theft conviction. The trial court accepted the State's recommendation. It also imposed a $200 criminal filing fee in each of Mr. Hughes's cases.

The net effect of the trial court's sentencing decision was that Mr. Hughes spent approximately 70 days in custody on the methamphetamine convictions before being released into inpatient treatment for his residential DOSA sentence.

Mr. Hughes filed timely notices of appeal of his sentences. Since the time of sentencing, Mr. Hughes finished both his jail time and residential treatment. He is now serving a 24-month term of community custody.

ANALYSIS

De facto consecutive sentences

As the parties agree, Mr. Hughes's sentences were implemented in an illegal manner. Mr. Hughes was sentenced for multiple felony counts during the same proceeding. Under the circumstances of his case, the trial court was required to impose concurrent sentences. RCW 9.94A.589(1)(a). Because time spent on a residential DOSA is equivalent to jail or prison time, *see* RCW 9.94A.030(53) and *In re Postsentence Review of Bercier*, 178 Wn. App. 148, 150-51, 313 P.3d 491 (2013), imposition of current sentences meant Mr. Hughes should have been released to treatment immediately

following sentencing. By delaying release into treatment until after expiration of the non-DOSA-eligible counts, the trial court subjected Mr. Hughes to impermissible de facto consecutive terms. *See State v. Smith*, 142 Wn. App. 122, 127-29, 173 P.3d 973 (2007).[1]

While the parties agree Mr. Hughes's sentences were implemented in an illegal manner, they disagree as to whether he is eligible for relief on appeal. The State claims that because Mr. Hughes has finished his jail time and successfully completed residential treatment, we cannot provide effective relief on appeal and the trial court's error is moot. Mr. Hughes counters the issue is not moot because he may be at risk of not receiving credit for time served if his DOSA is revoked in the future. He further argues there is a continuing and substantial public interest in resolving the merits of appeal.

We would be sympathetic to Mr. Hughes's position if there were something in the written record that required correction. But Mr. Hughes's judgments and warrants of commitment state the sentences for all three counts of conviction are to run concurrently. There is, therefore, nothing we can order on remand. While it is possible the issue of credit could arise in the future, the current record is already sufficient to permit Mr.

[1] In addition, the trial court's disposition was inconsistent with our recent decision in *In re Postsentence Review of Hardy*, 9 Wn. App. 2d 44, 442 P.3d 14 (2019). Because Mr. Hughes was eligible for a DOSA sentence, his sentence should not have been divided up according to DOSA-eligible and DOSA-ineligible counts. Instead, he should have received one sentence and custody credit for residential treatment time.

Hughes to accurately seek credit for time served. Finally, our decisions in *Bercier* and *Hardy* adequately address any public interest in the merits of Mr. Hughes's DOSA arguments.

LFOs

Citing 2018 amendments to Washington's LFO laws[2] and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), Mr. Hughes argues the trial court improperly imposed the $200 criminal filing fees based on his indigence. *See* RCW 36.18.020(2)(h). Under the terms of the LFO amendments, a $200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." *Id.*

We decline to reach the filing fee issue because it was not preserved. RAP 2.5(a). Mr. Hughes was sentenced over a month after the effective date of the 2018 LFO amendments. Yet he did not object to the trial court's imposition of the filing fees. The record on appeal does not clarify whether Mr. Hughes was indigent at the time of sentencing as defined by RCW 10.101.010(3)(c). This issue was not adequately preserved for review.[3]

[2] LAWS OF 2018, ch. 269.

[3] Because Mr. Hughes has not established discretionary LFOs should be waived on the basis of indigence, we do not address his claim that the court cannot assess collection costs under RCW 36.18.190. We note this statute was not included in the 2018 LFO amendments.

Mr. Hughes also objects to language in each judgment and sentence requiring collection of interest on LFOs. Washington's new LFO law provides that, as of June 7, 2018, interest shall not accrue on nonrestitution LFOs. RCW 10.82.090. Given this new provision, it is unclear whether the trial court's judgments actually require collection of interest in Mr. Hughes's cases. Nevertheless, to eliminate the possibility of confusion, we remand for the limited purpose of striking the provisions in Mr. Hughes's judgments imposing interest on nonrestitution LFOs.

CONCLUSION

We remand with instructions to strike the provisions in each judgment and sentence imposing interest on nonrestitution LFOs. Having determined Mr. Hughes's challenge to imposition of his sentences is moot, the matter is otherwise affirmed.

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:

Lawrence-Berrey, C.J.

Fearing, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

October 23, 2019 - 12:57 PM

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