

NO. 73306-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLE A. SAND,

Appellant.

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Court of Appeals
Division I
State of Washington

SUPPLEMENTAL
BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. SUPPLEMENTAL ISSUE

If the State prevails on this appeal, should costs be imposed against the defendant?

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Respondent.

III. ARGUMENT

NOTHING IN THIS CASE RENDERS IT INEQUITABLE FOR THE DEFENADNT TO PAY THE COSTS OF HIS UNSUCCESSFUL APPEAL.

In his reply brief, the defendant raised a new issue: that he should not be compelled to pay appellate costs. Ordinarily, new issues cannot be raised in a reply brief. State v. Peerson, 62 Wn. App. 755, 778, 816 P.2d 43 (1991), review denied, 118 Wn.2d 1012 (1992). The court has nonetheless denied the State's motion to strike this portion of the brief. Instead, the State has been given the opportunity to respond to this new argument.

Under RCW 10.73.160(1), this court "may require an adult offender convicted of an offense to pay appellate costs." As this court has recognized, the statute gives this court discretion concerning as to the award of costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The defendant claims that because the trial court

found him to be indigent, costs should presumptively be denied. This argument ignores both the language and the history of RCW 10.73.160.

To begin with, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is "An Act Relating to indigent persons." Laws of 1995, ch. 275. RCW 10.73.160(3) expressly provides for "recoupment of fees for court-appointed counsel." Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. "Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." "In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. See State v.

Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, the rule was that “[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs.” Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979). The appellate court nonetheless had discretion to deny costs.

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn. App. 392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case. It refused to award costs because “this appeal was retained and decided, not for any benefit which either of the parties would receive in consequence of the decision, but for the public interest involved.” NECA, 65 Wn.2d at 23.

In Moore, the plaintiffs brought suit to resolve issues arising from the anticipated dissolution of a water district. The trial court rendered judgment for the defendants. On appeal, the Supreme Court reversed that judgment because the action was brought prematurely. The court nonetheless refused to award costs: “While appellants prevail, in that the judgment appealed from is set aside,

they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal.” Moore, 66 Wn.2d at 393.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those connected with the issues raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis makes practical sense. The appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the court is poorly positioned to conduct. As the Supreme Court has recognized, “it is nearly impossible to predict ability to pay over a period of 10 years or longer.” State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of the appeal. This court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997,

the Supreme Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for juvenile offenders. See Laws of 2015, ch. 265, § 22 (eliminating statutory authority for imposition of appellate costs against juvenile offenders).

In the present case, this analysis should lead the court to impose costs. The case presents a routine issue of prosecutorial misconduct. The defendant litigated the case for his own benefit, not for any public interest. Indeed, the equities favor the State, since the defendant chose not to raise a timely objection that could have obviated appellate issues. 3/6 RP 44-45; see Brief of Respondent at 12-16. Nothing in this case supports permanently shifting the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

If this court focuses on the defendant's ability to pay, nothing in the record indicates that he is physically incapable of finding employment after his release. At sentencing, defense counsel suggested that payments on legal financial obligations be set at \$25 a month. Sent RP 68. This suggests that the defendant will have the ability to pay that amount.

This court should award costs. If it turns out that payment creates manifest hardship, the defendant can move for remission under RCW 10.73.160(4). If accrual of interest creates a hardship, the court can reduce or waive interest under RCW 10.82.090.

IV. CONCLUSION

For the reasons stated in the State's previous brief, the judgment and sentence should be affirmed. For the reasons stated in this brief, the State should be awarded appellate costs.

Respectfully submitted on May 3, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA 10937
Deputy Prosecuting Attorney
Attorney for Respondent

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 3rd day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mary Swift, Nielsen, Broman & Koch, swiftm@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of May, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office