

NO. 74195-1-I

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

In re Personal Restraint
Petition of

JESSE M. WHITE,

Petitioner.

FILED
Aug 12, 2016
Court of Appeals
Division I
State of Washington

BRIEF OF RESPONDENT

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I. ISSUES

(1) The petitioner filed a motion claiming that the sentencing court improperly imposed financial obligations without making a determination of his ability to pay. Did the court properly treat this motion as a motion to vacate the judgment?

(2) The Brief of Petitioner contains no argument in support of the personal restraint petition. Should this court assume that the petition is unsupported by legal authority?

(3) If this court considers the merits of the petition, is the petition exempt from the statutory time bar on the basis that the Supreme Court's opinion in Blazina constitutes a "significant change in the law" within the meaning of RCW 10.73.100(6)?¹

(4) If the petition is considered timely, can the imposition of a victim penalty assessment, DNA fee, or costs on appeal be challenged collaterally on the basis that the court did not consider the defendant's ability to pay?

II. STATEMENT OF THE CASE

The petitioner, Jesse White, was found guilty by a jury of two counts of second degree assault, felony harassment, second

¹ A similar issue is currently pending in the Supreme Court in In re Flippo, no. 92616-6.

degree unlawful possession of a firearm, and reckless endangerment. App. at 5. The court sentenced him to a total of 98 months' confinement. App. 9.² The court also imposed legal financial obligations (LFOs) totaling \$600, consisting of a \$500 victim assessment and a \$100 biological sample fee. All other costs were waived. App.11.

The petitioner appealed these convictions. This court affirmed, and the Supreme Court denied review. The mandate was issued on May 13, 2013. It awarded appellate costs in the amount of \$12,249.38.³ App. 17-18.

On September 1, 2015, the petitioner filed in the sentencing court a "Motion to Terminate Legal Financial Obligations." The motion cited RCW 10.01.160(3) and State v. Blazina, 183 Wn.2d 827, 344 P.3d 680 (2015). It asked for termination of legal financial obligations and reimbursement for money that was already paid. App. 19. The court treated this as a motion for relief from judgment.

² Citations to "App." refer to the Appendix to the Brief of Petitioner.

³ The appendices to the petitioner's brief include a cost bill filed by the State in a personal restraint petition proceeding, cause no. 71886-0-I. App. 25-26. That case is still ongoing, so no costs have been awarded.

Pursuant to CrR 7.8(c)(2), it transferred the matter to this court, for consideration as a personal restraint petition. App. 46-47.

The Acting Chief Judge determined that the petition was not frivolous. He referred it to a panel of judges and appointed counsel to represent petitioner. See RAP 16.11(b); RCW 10.73.150(4).

III. ARGUMENT

A. SINCE THE PETITIONER'S MOTION CHALLENGED THE ORIGINAL IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS, THE SUPERIOR COURT PROPERLY TREATED IT AS A MOTION FOR RELIEF FROM JUDGMENT.

The Superior Court characterized the petitioner's motion as a motion for relief from judgment under CrR 7.8(b). It therefore transferred the motion to this court for consideration as a personal restraint petition, as authorized by CrR 7.8(c)(2). The petitioner now contends that this characterization was improper. Instead, he claims that his motion should have been treated as a motion to remit costs per RCW 10.73.160(4) and RCW 10.01.160(4) – statutes that were not even mentioned in his motion. This court is therefore called on to determine the proper characterization of the motion. To do so requires an examination of CrR 7.8, RCW 10.73.160, and RCW 10.01.160.

CrR 7.8(b) sets out circumstances under which a court may grant relief from a judgment:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

Subdivision (5) allows relief based on extraordinary circumstances that did not exist at the time the judgment was entered. State v. Smith, 159 Wn. App. 694, 700 ¶ 12, 247 P.3d 775 (2011) (judgment could be modified under CrR 7.8(b)(5) when defendant was sentenced to program that was abolished after sentence was imposed). Apart from that provision, the rule envisions modification of judgments based on circumstances that rendered them void or improper at the time they were imposed.

In contrast, RCW 10.73.160 deals specifically with imposition of appellate costs. Subsection (4) authorizes trial courts to remit such costs:

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 that sentenced the defendant ... for remission of the payment of costs or of any unpaid portion. If 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 immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Similarly, RCW 10.01.160 deals with imposition of costs in the trial court. Subsection (4) of that statute contains a similar provision for remission of costs:

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.

(As discussed in more detail below, the legal financial obligations in this case were not imposed under RCW 10.01.160, so this remission provision is irrelevant.)

When the rule and statutes are compared, it is clear that they address different issues. Under CrR 7.8(b), the key question is usually whether the judgment was void or irregular at the time when it was imposed. In contrast, RCW 10.73.160(4) and 10.01.160(4)

assume that costs were validly imposed. Under those statutes, the key question is whether subsequent enforcement of the judgment would result in manifest hardship.

In the present case, the petitioner's motion clearly attacked the original validity of the LFOs. He cited RCW 10.01.160(3): "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." App. 20. He also cited Blazina as requiring the sentencing court to "do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." App. 21. The motion did not even mention RCW 10.73.160(4) and 10.01.160(4). Nor did the motion contain any reference to any alleged "hardship" resulting from payment.⁴

If there were any doubt about the nature of the petitioner's motion, it would be eliminated by the relief he sought. He did not merely seek termination of his legal financial obligations. Rather, he asked the court to "[r]eimburse the defendant for the money taken for the cost of Legal Financial Obligations and Interest Fees." App. 19. Such relief might be available if the judgment imposing legal

⁴ In a reply, the petitioner did cite to RCW 10.01.160(4). App. 40. That reply, however, did not abandon the arguments raised and relief sought in the original motion.

financial obligations were void. See In re Marriage of Hardt, 39 Wn. App. 493, 499, 693 P.3d 1386 (1985). The remission statutes, however, contain no provision for reimbursing prior payments.

The petitioner correctly points out that he is entitled to file a motion for remission. It is highly unlikely that such a motion would be successful. Mandatory deductions of inmate wages do not, by themselves, warrant remission. See State v. Crook, 146 Wn. App. 24, 189 P.3d 811 (2008), review denied, 165 Wn.2d 1044 (2009). (upholding refusal of sentencing court to hold hearing on defendant's motion for remission). The defendant is nonetheless free to file such a motion if he wishes to do so.⁵ No action by this court is necessary.

The motion filed by petitioner was not, however, a motion for remission. It was a motion challenging the validity of the provisions of the judgment that imposed legal financial obligations. The Superior Court properly treated it as a motion to vacate judgment under CrR 7.8(b).

⁵ In filing such a motion, the petitioner would be pro se unless he obtained counsel at private expense. The statute authorizing post-conviction counsel at public expense applies to non-frivolous personal restraint petitions, but not to motions for remission. RCW 10.73.150.

B. SINCE BLAZINA OVERRULES NOTHING AND REFLECTS ARGUMENTS THAT WERE AVAILABLE UNDER A PRE-EXISTING STATUTE, IT IS NOT A “SIGNIFICANT CHANGE IN THE LAW” THAT PREVENTS THIS PETITION FROM BEING TIME BARRED.

This conclusion places this court in an anomalous situation. The petitioner’s motion is before the court for consideration as a personal restraint petition. CrR 7.8(c)(2). In accordance with RCW 10.73.160(4), the court has appointed counsel to represent the petitioner. Counsel has, however, failed to carry out her duty of briefing the issues raised in the personal restraint petition. Instead, counsel, has provided briefing relating to a non-existent remission motion.⁶

Notwithstanding the lack of briefing from petitioner, counsel for the State feels bound to assist the court in resolving the issues raised by the personal restraint petition. The State will therefore address those issues.

The first issue is whether this petition is time barred. RCW 10.73.090 sets a time limit on motions to vacate judgment and

⁶ If the court believes that it needs additional briefing relating to the personal restraint petition, it should direct counsel for petitioner to submit a supplemental brief. The State should then be permitted to file a response. The court should not allow the petitioner to file its opening brief under the guise of a “Reply.” Doing so would effectively block the State from responding to any specific arguments that the petitioner may raise relating to this case.

other forms of “collateral attack.” Such motions must be filed within one year after the judgment becomes final. Under the circumstances of this case, the judgment became “final” on the date that this court issued its mandate resolving the direct appeal. RCW 10.73.090(3)(b). That mandate was issued on May 3, 2013. App. 17. The Motion to Terminate Legal Financial Obligations was filed with the Superior Court Clerk on September 1, 2015. That date is over a year past the time limit.

The petitioner claims that his petitioner falls within the exception set out in RCW 10.73.090(6):

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

...

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal ... proceeding ..., and ... a court ... determines that sufficient reasons exist to require retroactive application of the changed legal standard.

The petitioner has provided no briefing on why this exception is applicable. Brief of Petitioner at 12. This court will not consider points that are unsupported by argument or legal authority. “Where no authorities are cited, the court may assume that counsel, after diligent search, has found none.” Grant County v. Bohne, 89 Wn.2d

953, 958, 577 P.2d 138 (1978). This problem is not corrected by a footnote referring to a brief in another case. See State v. Kalakosky, 121 Wn.2d 525, 540 n. 18, 852 P.2d 1064 (1993) (refusing to consider arguments raised by reference to trial memorandum). Absent any explanation of why the exception applies, this court should dismiss the petition as time barred.

If this court nonetheless examines case law interpreting RCW 10.73.100(6), the cases do not support application of the exception in this case.

We have consistently recognized that the “significant change in the law” exemption in RCW 10.73.100(6) applies when an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue. Conversely, an intervening appellate decision that settles a point of law without overturning prior precedent or simply applies settled law to new facts does not constitute a significant change in the law. One test to determine whether an intervening case represents a significant change in the law is whether the defendant could have argued this issue before publication of the decision.

State v. Miller, 185 Wn.2d 111, 115 ¶ 6, 371 P.3d 528 (2016) (citations omitted).

The petitioner claims that a “significant change in the law” resulted from Blazina. That case overruled nothing. It simply applied the requirement of RCW 10.01.160(3): “The court shall not

order a defendant to pay costs unless the defendant is or will be able to pay them." Blazina, 182 Wn.2d at 837-38 ¶¶ 17-19. Ever since RCW 10.01.160 was enacted, defendants have been able to argue that costs should not be imposed because they lacked the ability to pay. Because an argument based on inability to pay was available prior to Blazina, that case does not constitute a "significant change in the law." Since the petition is untimely and does not fall within any exception to the time limit, it should not be considered.

C. IF THE PETITION IS CONSIDERED ON THE MERITS, THE PETITIONER HAS NOT ESTABLISHED GROUNDS FOR RELIEF, BECAUSE NONE OF THE LEGAL FINANCIAL OBLIGATIONS IMPOSED IN THIS CASE REQUIRE A PRIOR SHOWING OF ABILITY TO PAY.

Even if the petition is considered timely, that would not resolve the case. The petitioner would still have to establish valid grounds for relief. The Brief of Petitioner completely ignores this aspect of the case. As discussed above, in the absence of any argument addressing the merits of the petition, this court should assume that it is meritless.

Such an assumption would be correct. Although the petitioner repeatedly cites to RCW 10.01.160, that statute has nothing to do with the LFOS that were imposed in this case. RCW

10.01.160(1) allows a sentencing court to impose “costs.” “Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(2). In the present case, the sentencing court did not impose any costs – probably because it believed that the defendant lacked the ability to pay them. App. 11.

Rather, the court imposed two types of LFOs: the \$500 victim assessment, and a \$100 biological sample fee. App. 11. Both of these fees are mandatory, regardless of the defendant’s ability to pay. State v. Shelton, ___ Wn. App. ___, ___ P.3d ___ (no. 72848-2-I) (June 20, 2016); State v. Stoddard, 192 Wn. App. 222, 225 ¶ 5, 366 P.3d 474 (2016); State v. Lundy, 176 Wn. App. 96, 102 ¶¶ 8-9, 308 P.3d 755 (2013). The sentencing court did not err in imposing these mandatory fees.

By far the largest portion of the petitioner’s LFOs were not, however, imposed by the sentencing court. Rather, this court imposed \$12,249.38 as appellate costs. App. 18. Of these costs, the overwhelming majority (\$12,153.26) were costs expanded on the petitioner’s own behalf – his attorney fees and costs of preparing the record. RCW 10.73.160 authorizes an appellate court

to order recoupment of such costs. Assessment of these costs does not require any determination of ability to pay. State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

This court does have discretion to decline to impose appellate costs. In exercising that discretion, the court will consider ability to pay, along with other factors. State v. Sinclair, 192 Wn. App. 380, 389 ¶¶ 24-25, 367 P.3d 612, review denied, 185 Wash. 2d 1034 (2016). Absent a specific decision by the court to deny costs, they will be imposed by the commissioner or clerk when the State substantially prevails. Id. at 385-86 ¶ 13. Here, the appellate opinion contains no provision denying costs, so they were properly awarded.

Even if this case involved imposition of costs under RCW 10.01.160, collateral relief would not be justified. In Blazina, the court held that this issue cannot automatically be raised for the first time on appeal. Blazina, 182 Wn.2d at 832-33 ¶ 7. Instead, the court chose to consider the issue as a matter of discretion. Id. at 834-35 ¶ 11. The court specifically said “this error will not taint sentencing for similar crimes in the future.” Id. at 834 ¶ 10. It is thus clear that any error under Blazina would not provide grounds for vacating a sentence on collateral attack.

Here, however, there was no error under Blazina. The LFOs imposed by both the trial court and this court did not require prior findings of ability to pay. Even if the petition is not time barred, it should be dismissed on the merits.

D. THE STATE DOES NOT INTEND TO SEEK APPELLATE COSTS IN THIS PROCEEDING.

The petitioner asks this court to refrain from awarding appellate costs in this proceeding. As already mentioned, this court has discretion to impose costs or refrain from doing so. Sinclair, 192 Wn. App. at 389 ¶ 24.

The petitioner's prior appeal of his conviction required the State – meaning the taxpayers – to expend over \$12,000 on his behalf. He does not want to make even small payments towards that sum. His efforts to avoid responsibility have now cost the taxpayers thousands more.

Nonetheless, the State must accept reality. It is unlikely that the petitioner will ultimately pay even the principal of the amount he already owes. Imposition of further costs would likely be meaningless. Consequently, the State does not intend to seek costs with respect to this petition.

IV. CONCLUSION

The defendant's motion should be treated as a personal restraint petition. It is untimely and fails to establish any valid basis for relief. It should therefore be dismissed. That disposition will leave the petitioner free to file a motion for remission of appellate costs per RCW 10.73.160(4).

Respectfully submitted on August 11, 2016.

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

In re Personal Restraint Petition of

No. 74195-1-I

JESSE M. WHITE,

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

Petitioner.

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 12th day of August, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

RESPONSE TO PERSONAL RESTRAINT PETITION

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Kevin March, Nielsen, Broman & Koch, marchk@nwattorney.net; 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 12th day of August, 2016, at the Snohomish County Office.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit