

No. 74208-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD L. DANIELS, JR.,

Appellant.

FILED
May 31, 2016

Court of Appeals
Division I
State of Washington

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

The Honorable David Needy

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The imposition of the \$100 DNA collection fee was improper because Mr. Daniels lacked the ability to pay.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court has emphasized that “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Here, the trial court recognized that Mr. Daniels was impoverished, but refused to waive the \$100 DNA collection fee because it was a “mandatory fee.” Should this Court remand with instructions to strike the DNA collection fee?

C. STATEMENT OF THE CASE

Richard Daniels, Jr. pleaded guilty to one count of attempted residential burglary. CP 39. At sentencing, Mr. Daniels questioned whether the \$100 DNA collection fee applied to him in light of the statute.¹ RP 5-7. Mr. Daniels noted that as he had already been

¹ RCW 43.43.754(1) states in relevant part:

convicted of a felony and a biological sample of his DNA had already been submitted, the \$100 fee for DNA collection should not be imposed. RP 6-8. The trial court refused to waive the \$100 fee, concluding it was a mandatory fee and the court lacked the power to waive it. RP 7-9. The court imposed the \$100 fee. CP 20; RP 9.

(1) A biological sample must be *collected* for purposes of DNA identification analysis from:

...

(2) If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent *submission* is not required to be submitted.

(emphasis added).

D. ARGUMENT

1. **The trial court in refusing to waive the \$100 DNA Collection Fee based upon Mr. Daniels' indigency.**

a. *The imposition of the \$100 fee on an impoverished defendant was improper under the relevant statutes and court rules, and violated principles of due process and equal protection.*

i. RCW 10.01.160 requires a finding of an ability to pay before imposing LFOs.

The legislature has mandated that a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). The Supreme Court has emphasized that “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” *Blazina*, 182 Wn.2d at 830.

There is good reason for this requirement. Imposing Legal Financial Obligations (LFOs) on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes

background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” *Id.* at 837. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act (SRA), which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Mr. Daniels’ poverty, because the statute in question use the word “shall” or “must.” *See* RCW 43.43.7541 (every felony sentence “must include” a DNA fee); *State v. Lundy*, 176 Wn.App. 96, 102-03, 308 P.3d 755 (2013). But this statute must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

- ii. Statutory language in RCW 10.01.060 presumptively requires an assessment of an ability to pay.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution “shall be ordered” for injury or damage absent extraordinary circumstances, but also states that “the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 712-13, 355 P.3d 1093(2015) (the legislature’s choice of different language in different provisions indicates a different legislative intent).²

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant’s inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent

² The legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

defendants alike: “The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants.” *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

iii. Blazina supersedes the decision in Curry to the extent that Curry does not require an assessment of an ability to pay.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to “LFOs,” not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 (“we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.”); *id.* at 839 (“We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.”). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited one of the same LFOs Mr. Daniels challenges here: the DNA fee. *Id.* at 831 (discussing defendant *Blazina*); *id.* at 832

(discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition costs). *See id.* If the court were limiting its holding to a minority of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee is exempt from the ability-to pay inquiry. And although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn.App. at 102-03 *with Blazina*, 182 Wn.2d at 830-39. This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 183 Wn.2d at 712 (“we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor”). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because “the error, if permitted to stand, would create inconsistent sentences for the same crime”); *see also id.* at 837 (discussing the “[s]ignificant

disparities” in the administration of LFOs among different counties); *and see* RCW 9.94A.010 (3) (stating that a sentence should “[b]e commensurate with the punishment imposed on others committing similar offenses”).

iv. GR 34 also requires a trial court make a finding of ability to pay.

GR 34, which was adopted at the end of 2010, also supports Mr. Daniels’ position. That rule provides in part, “Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant’s ability to secure access to judicial relief from a judicial officer in the applicable court.” GR 34(a). The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay \$50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs “shall” be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading “would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees.” *Id.* at 529. Given Jafar’s indigence, the Court said, “We fail to understand how, as a practical matter, Jafar could make the \$50 payment now, within 90 days, or ever.” *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

- v. Imposing LFOs without an assessment of an ability to pay would violate the United States and Washington Constitutions.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the “criminal filing fee” across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that “principles of due process or equal protection” guided the court’s analysis and recognizing that failure to require waiver of fees for indigent litigants “could lead to inconsistent results and disparate

treatment of similarly situated individuals”). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time

appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. Unfortunately, this assumption was not borne out. As indicated in the record in Mr. Daniels’ case, as well as significant studies post-dating *Blank*, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm’n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).³ In other words, the risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar’s civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar’s claim was ripe for review even though trial court had given her 90 days to pay \$50

³ Available at:
http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn.App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Daniels concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Mr. Daniels is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature’s stated goals of encouraging rehabilitation and preventing recidivism. *See RCW 9.94A.010; Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.⁴

⁴ *But see State v. Mathers*, ___ Wn.App. ___, ___ P.3d ___, 2016 WL 2865576 (Div II, May 10, 2016) (imposition of mandatory fees does not violate Washington or United States Constitutions or Washington court rules).

b. *This Court should reverse and remand with instructions to strike the \$100 DNA collection fee.*

Arguably, Mr. Daniels waived a challenge to the DNA fee when his attorney told the trial court that she was not asking for the court to waive the fee. RP 7. But, the trial court had already told Mr. Daniels that it would not waive any mandatory fees, thus any objection regarding the imposition of the fee would have been futile. *See State v. Moen*, 129 Wn.2d 535, 547, 919 P.2d 69 (1996) (where no corrective purpose would be served by raising a proper objection at trial, the lack of objection should not preclude appellate review).

Further, the parties and the court were confused about when the fee must be imposed given the wording of the statute. RCW 43.43.754(1) requires that “[a] biological sample must be collected.” Later in the statute, it notes that if the Washington state crime laboratory already has a sample from the defendant, “a subsequent submission is not required to be submitted.” RCW 43.43.754(2). Mr. Daniels had previously been convicted of a felony and a biological sample from him had also already been submitted. RP 8. Based upon this language, the parties were uncertain whether the DNA collection fee applied. Regardless, the trial court refused to waive the fee because it was “mandatory:”

I'm telling you the law tells me I must impose it. I don't know why, and I don't know whether the sample is going anywhere.

RP 7-8.

But, because *Blazina* clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record demonstrates Mr. Daniels' indigence, this Court should remand with instructions to strike the \$100 fee.

2. This Court should order that no costs be awarded on appeal.

- a. *Mr. Daniels may seek an order from the Court in his Brief of Appellant ordering that no costs be awarded.*

Should this Court reject Mr. Daniels' argument on appeal, he asks that this Court to refuse to impose costs on appeal due to his continued indigency. Such a request by a defendant is authorized under this Court's decision in *State v. Sinclair*, 192 Wn.App. 380, 367 P.3d 612 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 386, quoting *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d

300 (2000). This discretion is not limited to “compelling circumstances.” *Sinclair*, 192 Wn.App. at 388, quoting *Nolan*, 141 Wn.2d at 628.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390. This Court must then engage in an “individualized inquiry.” *Id.* at 391, citing *Blazina*, 182 Wn.2d at 838.

One factor this Court found persuasive in making its determination regarding costs on appeal in *Sinclair* were the trial court’s findings supporting its order of indigency for the purposes of the appeal pursuant to RAP 15.2. *Sinclair*, 192 Wn.App. at 393. Here, the trial court entered the order of indigency and findings supporting its order. As in *Sinclair*, there is no evidence that Mr. Daniels’ financial situation will improve. *Id.*

Mr. Daniels was sentenced to 24.75 months in custody. CP 18. Mr. Daniels was unemployed and had several thousand dollars of outstanding debt. CP Supp ____, Sub. No. 42. In light of the decision in *Sinclair*, and given Mr. Daniels’ continued indigency, “[t]here is no

realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs.”

192 Wn.App. at 393.

Because of his current and continued indigency, Mr. Daniels asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Id.*

- b. *Alternatively, this Court must remand to the trial court for a hearing where the court must determine whether Mr. Daniels has the current or future ability to pay.*

Should this Court determine that it cannot make a finding regarding ability to pay because the record is not complete, due process requires this Court to remand to the trial court for a hearing to determine Mr. Daniels’ present or future ability to pay these costs.

Any award of costs becomes part of the Judgment and Sentence, thus amending that document. RCW 10.73.160 (3) states that: “An award of costs shall become part of the trial court judgment and sentence.” A defendant has due process rights where the State seeks to modify or amend a Judgment and Sentence, including:

- (a) written notice
- (b) disclosure of evidence against him or her;
- (c) an opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the court specifically finds good cause for not allowing confrontation);
- (e) a “neutral and detached”

hearing body; and (f) a written statement by the court as to the evidence relied on and reasons for the modification.

State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005),
citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33
L.Ed.2d 484 (1972).

Since adding any costs that might be requested by the State to Mr. Daniels' Judgment and Sentence necessarily amends the judgment, due process requires that there be a hearing which complies with the dictates of *Abd-Rahmann* regarding his present or future ability to pay. As such, Mr. Daniels requests that, in the absence of a finding by this Court regarding his ability to pay, this Court remand to the trial court for a hearing on his ability to pay.

E. CONCLUSION

For the reasons stated, Mr. Daniels asks this Court to strike the \$100 DNA collection fee and/or remand to the trial court to correct the scrivener's error. Further, Mr. Daniels asks this Court to rule that no costs be awarded on appeal because of his continued inability to pay.

DATED this 31st day of May 2016.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74208-6-I
v.)	
)	
RICHARD DANIELS, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MAY, 2016.

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