

FILED
June 21, 2016
Court of Appeals
Division I
State of Washington

No. 74467-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON ELI MARTIN,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing legal financial obligations (LFOs) on Jason Martin without inquiring into his ability to pay them, and in light of his demonstrated indigency and mental health problems.

2. If the State substantially prevails, this Court should decline to award appellate costs due to Mr. Martin's inability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court recently 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. Martin was impoverished and mentally ill but nonetheless imposed LFOs. Should this Court remand with instructions to strike LFOs?

2. Where Mr. Martin is indigent and mentally ill and unlikely ever to be able to pay appellate costs, should this Court deny appellate costs if the State substantially prevails?

D. STATEMENT OF THE CASE

Mr. Martin was charged with one count of taking a motor vehicle without permission, a felony, and one count of third degree theft, a gross misdemeanor. CP 6. The charges arose out of an incident in which Mr. Martin rode in a stolen Puget Sound Blood Center van that someone else was driving. CP 1. A sheriff deputy detained Mr. Martin as he sat outside a convenience store next to the parked van. CP 1. Mr. Martin was eating food that employees in the convenience store said he had stolen from the store. CP 1.

Mr. Martin pled guilty to the charges. CP 41-50.

Mr. Martin is mentally ill. RP 37-39. Before pleading guilty, he was a candidate for mental health court and observed several sessions of mental health court over a period of weeks. RP 3-4, 11, 16. Mr. Martin was unable to comply with the conditions of mental health court, however, and he was ultimately declined. RP 25.

At sentencing, defense counsel argued Mr. Martin did not have the ability to pay legal financial obligations because he is mentally ill, homeless, and indigent. RP 35.

Notwithstanding Mr. Martin's mental illness and indigency, the court imposed LFOs. RP 47. The court imposed a \$500 victim

assessment, a \$200 criminal filing fee, and a \$100 DNA collection fee, for a total of \$800 in LFOs. CP 11.

E. ARGUMENT

1. The court should not have imposed legal financial obligations due to Mr. Martin's inability to pay and his mental illness.

a. The imposition of LFOs on an impoverished defendant is improper under the relevant statutes and court rules, and violates constitutional principles of due process and equal protection.

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 recently 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).

There is good reason for this requirement. Imposing 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.

Generally, 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. Id.

The State may argue that the court properly imposed these costs without regard to Mr. Martin’s poverty because the statutes in question use the word “shall” or “must.” See RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 43.43.7541 (“Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.”); State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes 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 10.01.160(3); Blazina, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of LFOs upon those who can pay, and require that they not be ordered for indigent defendants.

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 an 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 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.

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 LFOs Mr. Martin challenges here: the Victim Penalty Assessment. 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 a limitation clear.

GR 34, which was adopted at the end of 2010, also supports Mr. Martin’s position. That rule provides, “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 that others endure. See Blazina, 182 Wn.2d at 837.

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.

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 arbitrary 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 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 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 has not borne out. As indicated in significant studies post-dating Blank, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. See 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).¹ 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 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that

¹ Available at:
https://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

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. Martin concedes the government has a legitimate interest in collecting the costs at issue. But imposing costs and fees on impoverished people like Mr. Martin 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 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.

b. This Court should remand with instructions to strike LFOs.

Because Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record

demonstrates Mr. Martin's indigence and mental illness, this Court should remand with instructions to strike LFOs.

2. Any request that costs be imposed on Mr. Martin for this appeal should be denied because he does not have the present or likely future ability to pay them.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016); RCW 10.73.160(1). An offender's inability to pay is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 192 Wn. App. at 389.

Mr. Martin does not have a realistic ability to pay appellate costs. At sentencing, the court imposed only those LFOs it deemed mandatory. RP 47; CP 11.

The court also entered an order authorizing Mr. Martin to seek review at public expense and appointing public counsel on appeal. CP 38. As the Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition. Sinclair, 192 Wn. App. at 393. Otherwise, the indigent party is entitled

to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f). There is no trial court record showing Mr. Martin's financial condition has improved.

Nor is Mr. Martin's financial situation likely to improve to the point where he will be able to pay appellate costs. Mr. Martin is mentally ill and unable to work. RP 37-39. He is homeless and "basically penniless." RP 35. He had applied for social security disability benefits but the lengthy approval process was not yet complete by the time he was sentenced on this matter. RP 35.

Due to these circumstances, "[t]here is no realistic possibility" that Mr. Martin will "find gainful employment that will allow him to pay appellate costs." Sinclair, 192 Wn. App. at 393.

Imposing appellate costs on Mr. Martin would significantly reduce any possibility of his integrating into society successfully. Id. at 391; see also State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Because Mr. Martin is indigent and unlikely ever to be able to pay appellate costs, this Court should exercise its discretion and decline to award costs if the State substantially prevails on appeal.

F. CONCLUSION

Due to Mr. Martin's inability to pay and mental illness, this Court should remand with instructions to strike LFOs.

Respectfully submitted this 21st day of June, 2016.

/s/ Maureen M. Cyr

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 74467-4-I
)	
JASON MARTIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JUNE, 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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| <p>[X] JASON MARTIN
(NO CURRENT ADDRESS)
C/O COUNSEL FOR APPELLANT
WASHINGTON APPELLATE PROJECT</p> | <p>() U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JUNE, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711