

FILED

August 8, 2016
Court of Appeals
Division I
State of Washington

NO. 74567-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN P. BLACKMON,

Appellant.

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
206-623-2373

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A. ASSIGNMENTS OF ERROR

1. The sentencing court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant's current and future ability to pay.

2. The sentencing court erred when it entered boilerplate findings of fact, found in section 2.5 of appellant's judgment and sentence, which indicate the court has considered appellant's ability to pay LFOs, appellant is not disabled, and appellant has the future ability to pay discretionary LFOs.

Issues Pertaining to Assignments of Error

1. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first properly considering appellant's current and future ability to pay?

2. Are the boilerplate findings in section 2.5 of the judgment and sentence erroneous because they are not supported by evidence in the record?

B. STATEMENT OF THE CASE

In July 2013, a Snohomish County jury convicted John Blackmon of two counts of Child Molestation in the Second Degree, one count of Rape of a Child in the Third Degree, and two counts of

Child Molestation in the Third Degree. CP 193. Although the State merely requested a standard range sentence on all counts, the Honorable Michael T. Downes found that – because Blackmon’s offender score on each of his current offenses was 12 – an exceptional sentence was warranted under RCW 9.94A.535(2)(c)¹ and ran one of the sentences for molestation consecutively with the other sentences for a total sentence of 176 months. CP 46-48, 195-197, 207.

Blackmon appealed and raised a number of challenges to his convictions and sentence. CP 30. In December 2014, this Court filed an opinion in Blackmon’s case in which it rejected all of his arguments save one. See CP 30-53. This Court agreed that the combination of prison time and 36 months community custody exceeded the authorized statutory maximum sentence for each of Blackmon’s convictions. CP 51-52. Accordingly, under State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012), Blackmon’s case was remanded for resentencing. CP 52-53.

At the resentencing hearing, Blackmon moved for Judge Downes’ recusal, arguing that his decision at the original sentencing

¹ RCW 9.94A.535(2)(c) authorizes a sentencing court to impose an exceptional sentence above the standard range where “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.”

to impose an exceptionally high sentence, sua sponte, demonstrated his lack of impartiality in the matter. Supp. CP ____ (sub no. 248, Motion for Recusal); 1RP² 3. Judge Downes declined to remove himself from the resentencing. 2RP 14-16.

The State asked Judge Downes to impose the same prison terms imposed at the original sentencing, resulting in an exceptional sentence of 176 months, and reduce the community custody term for each count to ensure compliance with the statutory maximum terms. 2RP 17-22, 26-32. The defense asked Judge Downes to reconsider the exceptional sentence and instead impose standard range statutory maximum sentences (including the maximum 36-month community custody period) on each count. Alternatively, if Judge Downes again imposed an exceptional sentence, the defense asked him to reduce the total amount of time to be served by reducing the sentences on the two most serious offenses (the two counts of Child Molestation in the Second Degree). 2RP 24-26, 32-33; Supp. CP ____ (sub no. 248, Defendant's Re-Sentencing Memorandum).

Judge Downes imposed the same prison terms originally imposed, once again resulting in an exceptional sentence of 176 months. 2RP 36-37, 42; CP 13-15. He then reduced or eliminated

² This brief refers to the verbatim report of proceedings as follows: 1RP – December 16, 2015; 2RP – January 6, 2016.

the period of community custody on each count to avoid exceeding the statutory maximum sentences. 2RP 37; CP 16.

Judge Downes also addressed the matter of LFOs. At the original sentencing, he obligated Blackmon to pay \$2,393.82. CP 199. In addition to mandatory LFOs for a crime victim assessment (\$500) and a biological sample fee (\$100), Judge Downes had imposed \$1,793.82 in discretionary "court costs." CP 199. The State asked Judge Downes to impose these LFOs again. 2RP 20. The defense asked him to waive the discretionary obligations, pointing out that Blackmon had not worked for 11 or 12 years prior to his arrest, he is partially disabled, and he is not able to work. 2RP 26. The State did not contest these assertions or otherwise respond to the defense request. 2RP 33.

Judge Downes found that he had no information "in a usable form" demonstrating Blackmon was indigent and recalled from the trial years earlier that Blackmon previously had a home, there was a divorce, and "there was something to do with insurance proceeds." 2RP 42. Because Blackmon had never previously been found to be indigent and Judge Downes believed he still "very well may and likely does have access to some significant resources," Judge Downes imposed the same LFOs again. 2RP 42-43. Judge Downes added

that he had no idea what happened to Blackmon's assets in the divorce and noted that Blackmon could "try to have another hearing" on the issue if appropriate. 2RP 43.

The amended judgment contains the following preprinted, boilerplate language:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court finds that the defendant is an adult and is not disabled and therefore the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 13. Judge Downes ordered Blackmon to pay a minimum of \$60.00 per month on his LFOs upon release, plus all interest, which began accruing immediately. CP 18-19. Blackmon timely filed his Notice of Appeal. CP 9-10.

In a subsequent Motion for Order of Indigency, Blackmon swore under penalty of perjury that he owned no real property, owned no personal property, that he received no money the past year (other than apparently social security disability payments that went to his children), that he has approximately \$5,000.00 in debts, and that he can contribute nothing toward the expense of review in his case.

Supp. CP ____ (sub no. 233, Motion for Order of Indigency). Judge Downes declared Blackmon indigent and authorized his appeal at public expense. CP 7-8.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO PROPERLY CONSIDER BLACKMON'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

Judge Downes imposed two mandatory LFOs: a \$500 crime victim penalty assessment and a \$100 biological sample fee. CP 18; RCW 7.68.035(1)(a) (penalty assessment "shall be imposed"); RCW 43.43.7541 (every sentence "must include a fee of one hundred dollars" for collection of biological samples); State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) (identifying these LFOs as mandatory). These two LFOs are not at issue. But the \$1,793.82 for

uncategorized “court costs” should not have been imposed in the absence of compliance with RCW 10.01.160.

RCW 10.01.160 (3) provides,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

This statute is mandatory: “it creates a duty rather than confers discretion.” State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (citing State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking . . . the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. (emphasis added). “Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts . . . when determining a defendant’s ability to pay.” Id. (emphasis added).

The Blazina court also instructed courts engaged in this inquiry to “look to the comment in court rule GR 34 for guidance.” Id. The court explained that, “under the rule, courts must find a person

indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps.” Id. Under GR 34, courts must also “find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline.” Id. at 838-39. “[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” Id. at 839 (emphasis added).

The catalyst for clarifying and emphasizing the mandates of RCW 10.01.160(3) was the Blazina court’s recognition that our “broken” LFO system creates a permanent underclass of Washington citizens. 182 Wn.2d at 835-37. This underclass is created in large part because of the outrageously high, compounding interest rate of 12 percent. Id. at 836.

Many defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month. But on average, a person who pays \$25 per month toward their LFOs will owe the state more after 10 years conviction than they did when the LFOs were initially assessed. Consequently, indigent offenders owe high LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe. The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they

completely satisfy their LFOs. The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.

Id. at 836-37 (citations omitted).

And, in spite of the imposition of LFOs, the government does not collect much: "for three quarters of the cases sentenced in the first two months of 2004, less than 20 percent of LFOs had been paid three years after sentencing." Id. at 837. In addition, there are "[s]ignificant disparities" in the administration of LFOs: "drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties." Id. It was in light of these problematic consequences – the very real creation of a permanent underclass – that prompted our supreme court to require meaningful, on-the-record compliance with RCW 10.01.160 (3)'s language.

Judge Downes' efforts under Blazina and RCW 10.01.160 fell short. Despite being informed that Blackmon suffered from a disability and had not worked for 11 or 12 years prior to his arrest in

this matter, and despite the court's duty to assess a defendant's *current* and future ability to pay LFOs, Judge Downes relied on what he could recall of Blackmon's finances from trial years earlier (that Blackmon once had a home and "there was something to do with insurance proceeds."). 2RP 42. But Judge Downes conceded he had "no idea what happened" to these resources in the years since trial and in light of Blackmon's divorce. 2RP 43

Judge Downes failed to take account of Blackmon's financial resources, such as his other debts and the burden of incarceration. See Blazina, 182 Wn.2d at 838. Nor did Judge Downes follow Blazina's instruction to look to GR 34 for guidance. 182 Wn.2d at 838-39. GR 34 specifies that persons who receive "assistance under a needs-based, means-tested assistance program such as" Social Security "shall be determined to be indigent." GR 34(a)(3)(A)(iii). A person whose household income is at or below 125 percent of the federal poverty level also "shall be determined to be indigent." GR 34(a)(3)(B). Blackmon is partially disabled, unable to work, and apparently receives social security disability benefits. Moreover, he has no income and no real or personal property. Had Judge Downes engaged in a GR 34 inquiry and "seriously question[ed]" Blackmon's ability to pay LFOs as Blazina instructed, he likely would not have

imposed \$1,793.82 in discretionary LFOs. Judge Downes failed to comply with RCW 10.01.160 or Blazina.

Finally, the boilerplate assertions regarding Blackmon's ability to pay LFOs, found in paragraph 2.5 of the judgment and sentence, are not supported by any facts. See CP 13. It is not true that Judge Downes adequately considered Blackmon's present and future ability to pay, including his current financial resources and the likelihood this might change. It also is not true that Blackmon "is not disabled" and "therefore has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 13.

It is the legislature's clear mandate that the trial court "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160. Here, Judge Downes failed to do so. This Court should remand for compliance with RCW 10.01.160.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Blackmon to be indigent and entitled to appointment of our office's services at public expense. Moreover, Blackmon is serving a 176-month prison sentence. CP 15. His prospects for paying appellate costs are dismal. Therefore, if Blackmon does not prevail on appeal, he asks that no costs of appeal

be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160 (1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

As discussed above, trial courts must make individualized findings of current and future ability to pay before they impose LFOs. Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Blackmon’s ability to pay must be determined before discretionary costs are imposed. Judge Downes failed to make a proper and reliable determination below. Without a basis to determine that Blackmon has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

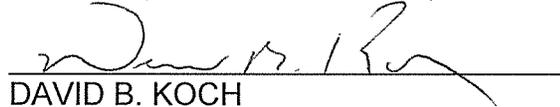
D. CONCLUSION

This Court should vacate the discretionary LFOs in the absence of any showing under the relevant criteria that Blackmon has the ability to pay.

DATED this 8th day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH

WSBA No. 23789

Office ID No. 91051

Attorney for Appellant