

No. 47573-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RONALD GLENN DAUGHERTY,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-05005-8
The Honorable John Hickman, Judge

REPLY BRIEF OF APPELLANT

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I. ARGUMENT & AUTHORITIES

Recently, in State v. Sinclair, Division 1 concluded “that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Daugherty is including an argument regarding appellate costs in this reply brief in the event that this Court agrees with Division 1’s interpretation of RAP 14.2.

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal.

RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Daugherty's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Daugherty owns no real property, has no job, no assets, and no income. (CP 224-26) Daugherty will be incarcerated for the remainder of his life. (CP 191) And the trial court made no inquiry or finding relating to Daugherty's ability to pay LFOs. (RP 2216-17) Thus, there was no evidence below, and no evidence on appeal, that Daugherty has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Daugherty is indigent and entitled to appellate review at public expense. (CP 217-19) This Court should therefore presume that he remains indigent because

the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. at 393; see also State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) ("if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Daugherty's financial situation

has improved or is likely to improve. Daugherty is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

II. CONCLUSION

This court should decline any future request to impose appellate costs.

DATED: June 21, 2016



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CERTIFICATE OF MAILING

I certify that on 06/21/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald Glenn Daugherty, DOC# 757311, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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