

NO. 48178-2-II

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

STATE OF WASHINGTON, Respondent

v.

ISAIAH CEE WHITE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01731-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. The Trial Court Properly Found White Has the Ability to Pay
 LFOs..... 1

 II. This Court Should Decline to Consider Appellate Costs Prior to
 the State’s Submission of a Cost Bill. 1

STATEMENT OF THE CASE 1

ARGUMENT 2

 I. The Trial Court Properly Found White Has the Ability to Pay
 LFOs..... 2

 II. This Court Should Decline to Consider Appellate Costs Prior to
 the State’s Submission of a Cost Bill. 5

CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

<i>Schryvers v. Coulee Cmty. Hosp.</i> , 138 Wn.App. 648, 158 P.3d 113 (2007)	3
<i>State v. Baldwin</i> , 63 Wn.App. 303, 818 P.2d 1116 (1991)	3, 6
<i>State v. Bertrand</i> , 165 Wn.App. 393, 267 P.3d 511 (2011)	3
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997)	5, 6
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)	2, 4, 7
<i>State v. Crook</i> , 146 Wn.App. 24, 189 P.3d 811 (2008)	6
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992)	3
<i>State v. Lundy</i> , 176 Wn.App. 96, 308 P.3d 755 (2013)	3
<i>State v. Mahone</i> , 98 Wn.App. 342, 989 P.2d 583 (1999)	5
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000)	5
<i>State v. Sinclair</i> , 192 Wn.App. 380, 367 P.3d 612 (2016)	5, 6, 7
<i>State v. Smits</i> , 152 Wn.App. 514, 216 P.3d 1097 (2009)	6
<i>State v. Wright</i> , 97 Wn. App. 382, 965 P.2d 411 (1999)	6

Statutes

RCW 9.94A.760(1)	2
RCW 10.01.160	6
RCW 10.01.160(1)	2
RCW 10.01.160(3)	2, 4
RCW 10.73.160	5, 6
RCW 10.73.160(3)	7
RCW 10.73.160(4)	7

Rules

RAP 14.2	5
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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Trial Court Properly Found White Has the Ability to Pay LFOs.**
- II. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.**

STATEMENT OF THE CASE

Isaiah White (hereafter 'White') entered a guilty plea on October 16, 2015 in Clark County Superior Court to one count of possession of heroin with intent to deliver and admitted that crime occurred within 1,000 feet of a school bus route stop. CP 39, 40, 44-45. White was sentenced to a standard range sentence. CP 60. During the sentencing hearing, White's defense counsel asked the trial court to consider reducing some of the costs typically imposed because White has prior convictions which have LFOs still owing, physical injuries, and no significant skills as a laborer. RP 11-12. The trial court engaged in a colloquy with White, inquiring as to his education level, whether he was a heroin user himself, what his prior employment situation was, and whether his injuries would prevent him from engaging in that type of employment in the future. RP 13-15. Based on that colloquy, the trial court did not waive any of the legal financial

obligations and found that White had an ability to pay. RP 15; CP 59.

White thereafter appealed. CP 72.

ARGUMENT

I. The Trial Court Properly Found White Has the Ability to Pay LFOs.

White argues the trial court failed to properly consider his ability to pay prior to imposing LFOs. However, the trial court clearly went into a detailed inquiry into his ability to pay and found that prior to his incarceration White held a job that his now-claimed physical difficulties (hurt shoulder) would not prevent him from doing. The trial court did not err in finding White had an ability to pay his LFOs.

After a defendant has been convicted, the trial court “may order payment of a legal financial obligation” as part of the sentence. RCW 9.94A.760(1); *accord* RCW 10.01.160(1). The trial court may only order such costs if it finds the defendant is or will be able to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This requires an individualized inquiry into the defendant’s current and future ability to pay discretionary LFOs. *Blazina*, 182 Wn.2d at 838. The trial court must “do more than sign a judgment and sentence with boilerplate language....” *Id.* It is clear the trial court must conduct an individualized inquiry into a defendant’s ability to pay, but no statute or

case law, nor the Constitution “requires a trial court to enter formal, specific findings regarding a defendant’s ability to pay [discretionary] court costs.” *State v. Lundy*, 176 Wn.App. 96, 105, 308 P.3d 755 (2013) (alteration in original) (quoting *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)).

A trial court’s determination as to a defendant’s “ability to pay is essentially a factual determination and it should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn.App. 393, 404 n. 13, 267 P.3d 511 (2011) (quoting *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991)). A finding is clearly erroneous only when “review of all the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Lundy*, 176 Wn.App. at 105 (quoting *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn.App. 648, 654, 158 P.3d 113 (2007)).

The record of the sentencing hearing clearly reveals the trial court’s consideration of White’s ability to pay financial obligations. White is 28 years old. RP 13. He indicated to the court he obtained his GED at the age of 17. RP 14. Despite having a shoulder injury and a hernia, he had gainful employment earlier that same year where he was working 30 hours a week as a telemarketer. RP 15. White agreed there was no physical reason he would not be able to continue that type of work. RP 15. The trial court clearly took his injuries into consideration, and whether he was

recently employed, gainfully, and asked White whether his physical injuries would prevent him from conducting that same type of work in the future. RP 13-15. The record shows the trial court did conduct the type of individualized inquiry that is required by law. White simply disagrees with the trial court's conclusion. Such a conclusion can only be overturned if it was clearly erroneous, if it is obvious the trial court made a mistake. Simply because the trial court was unpersuaded by White's arguments that he had so many other financial obligations from prior cases, and physical injuries, does not mean the court's decision was not reasonable and lawful. The trial court also clearly considered that this was not a situation where White was receiving a prison sentence because of a drug addiction. In fact, White indicated he did not use drugs. RP 14. Instead, White had 25 bindles of heroin in his control, and was convicted of possession with intent to deliver within one thousand feet of a school bus route stop. CP 39, 57. White was clearly selling heroin to make money. He is a 28 year old man, with a GED, and work history. He has the ability to pay. The trial court properly inquired into his ability, discussed his physical injuries, and his most recent work history along with his education. The trial court properly made an individualized inquiry into White's ability to pay and complied with *Blazina, supra* and RCW 10.01.160(3). The trial court's finding of ability to pay was not clearly erroneous and should be affirmed.

II. This Court Should Decline to Consider Appellate Costs Prior to the State's Submission of a Cost Bill.

White argues that this court should not adopt the reasoning under *State v. Sinclair*, 192 Wn.App. 380, 367 P.3d 612 (2016) and that this Court should disavow *Sinclair*, and should wait to consider the award of appellate costs until it has the information available to make a proper decision on that question. The State agrees and asks this Court decline to impose appellate costs at this time as the matter is not ripe and may be moot if the State does not substantially prevail or if the State does not request a cost bill. White further argues that if this Court does follow *Sinclair*, that it should find White is indigent and has no ability to pay appellate costs. At this time, the State respectfully requests this Court refrain from ruling on the cost issue until it is ripe.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *Sinclair*, 192 Wn.App. at 389-90; see RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the

costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.*

Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-242. *See also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair*, 192 Wn.App. at 390-91, prematurely raises an issue that is not yet before the Court. White could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial

burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” Obviously, all these defendants have been found indigent by the court. Under the defendant’s argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina, supra*, the Court indicated that trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, *Sinclair*, 192 Wn.App. at 389, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

In this case, the State has yet to “substantially prevail” and has not submitted a cost bill. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

CONCLUSION

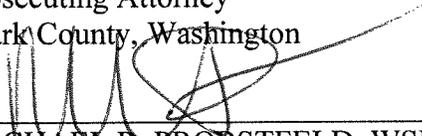
For the reasons discussed above, the trial court should be affirmed.

DATED this 12th day of July 2016.

Respectfully submitted:

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