

NO. 48203-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD LANE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth P. Martin

No. 09-1-01198-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it revoked the defendant's SSOSA on the grounds that defendant had violated the conditions of his SSOSA for the third time, was deceptive to his CCO regarding violating the conditions of his SSOSA, was deceptive on polygraph examinations on multiple occasions, and had previously received multiple warnings and admonishments from the court? (Appellant's Assignment of Error No. 1)

2. Should this Court make a determination as to whether appellate costs are appropriate before the State seeks enforcement of costs if the State is to prevail on appeal? (Appellant's Assignment of Error No. 2)

B. STATEMENT OF THE CASE.

On December 17, 2009, Richard Lane, hereinafter "defendant" pleaded guilty to one count of first degree child molestation and two counts of witness tampering. CP 4-18. On February 12, 2010, the defendant was sentenced under the special sex offender sentencing alternative (SSOSA) to a sentence of 82 months to life on the child molestation count, concurrent with two six month sentences on witness

tampering counts. CP 24. He was ordered to serve six months in confinement with the rest of the sentence suspended under SSOSA. *Id.*

Over a three year period the defendant was found to have violated the conditions of his suspended sentence multiple times. CP 109-110, 111, 112. The first instance was in March 2012, when he admitted having contact with a minor and lying about such contact. CP 111. Defendant stipulated that he did have contact with a minor, he was deceptive on a polygraph regarding such, and that he was not honest with his Community Corrections Officer (CCO) or treatment provider regarding the contact with a minor. *Id.* He was then jailed for 105 days for the violation. CP 109-110. In February 2015, the defendant again violated his SSOSA conditions when he tested positive for methamphetamines and he again lied about such when he was deceptive on a polygraph. CP 112. At that time the defendant was jailed for 120 days. The court also directed his CCO to administer frequent urinalysis tests (UAs) and specifically noted that “there is absolutely zero margin for error” by the defendant regarding future violations. *Id.*

In August 2015, defendant’s CCO, Gregory Devorss, learned that the defendant had been seen at the Red Wind Casino in Thurston County

near Yelm. 2RP¹ 7-8. Defendant did not have permission at that time to leave the county. *Id.* When Devross asked the defendant whether he had left the county the defendant denied having done so. 2RP 8-9. However, the following day when the defendant took another polygraph exam he admitted that he had been to the casino and had left the county without permission, illustrating that he had again been deceptive to his CCO. 2RP 11. Further, the defendant had been deceptive on a question regarding whether he had used illegal drugs when he answered such in the negative according to the polygraph examiner. *Id.* Defendant claimed that these two answers were the result of him forgetting that he had gone to the casino. The defendant also attributed a deceptive finding regarding illegal drug use due to drug dealers having called him and having offered to sell him drugs. 2RP 11-12.

Defendant took a subsequent polygraph exam, which showed that the defendant was being deceptive regarding his use. 2RP 20-21. The second polygraph was intentionally administered by a different examiner than the first polygraph exam in order to help prevent a bad exam and determine if there was an issue with the first exam. 2RP 22. Devross stated that there was consistency in both polygraph exams as given by two

¹ The Verbatim Report of Proceeds is contained in two volumes, designated by both parties as follows: 1RP- 9/11/15; 2RP- 10/22/15

separate examiners, and therefore, showed that there was validity between the two exams regarding the defendant's deception. 2RP 22-23. The conclusion was drawn that the defendant did in fact use illegal drugs. *Id.*

Following the discovery that the defendant had left the county without permission, Devross visited the home that the defendant lived in with his mother and stepfather. 2RP 15. Devross discovered that the stepfather's minor grandson had visited the house and was babysat by Devross's mother and stepfather one or twice a week. 2RP 15-16. A minor child in the house had not previously been disclosed to Devross. *Id.*

Based upon the repeated violations of his SSOSA conditions, the State again sought to revoke the suspended sentence alleging that the defendant had (1) left Pierce County without permission and (2) failed to make satisfactory progress in sexual deviancy treatment. CP 37-55. At the hearing on the State's petition, the defendant stipulated that he had left Pierce County without permission, a violation of his SSOSA conditions. 2RP 3-4. The defendant did not stipulate that he made unsatisfactory progress in treatment. 2RP 4.

During the period of community custody, the defendant was engaged in sexual deviancy treatment with Paula van Pul beginning in February 2010. 2RP 55. Van Pul testified that while the defendant was consistent in attending his group therapy sessions, he was not up to date on

his payments, though he had made arrangements to make payments. 2RP 48, 50.

Van Pul stated that it was critical that one be open, honest, and transparent in order to complete a relapse program and that it is critical that one is open and transparent in determining if, in the future, one was going to succeed in the community without further treatment. 2RP 55. It was a concern to van Pul that the defendant was not transparent with his CCO. 2RP 61. The need to be open, honest, and transparent was something that was consistently addressed in the group sessions that the defendant attended. 2RP 53-54. Defendant's lack of transparency was a problem that needed to be addressed, even though he was making good progress in treatment. 2RP 79.

The court granted the State's motion to revoke the defendant's suspended sentence. It found that the defendant had left Pierce County without permission and that he had failed to make satisfactory progress in sexual deviancy treatment. CP 101-103. The court stated that it was revoking the suspended sentence due to the defendant's ongoing history of being dishonest with his CCO, in addition to the other two violations. *Id.* The court specifically noted that the decision to revoke the suspended sentence was due to the defendant's pattern of deception and that the court

had previously considered, and come close to, revoking the suspended sentence due to the same deception concerns. 2RP 104-106, CP 109-110.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REVOKING DEFENDANT'S SSOSA BECAUSE HE VIOLATED THE CONDITIONS OF HIS SSOSA AND WAS CONTINUALLY DECEPTIVE REGARDING HIS SSOSA VIOLATIONS.

SSOSA allows for a sentencing court to suspend the sentence of a first time sexual offender provided that the offender is shown to be amenable to treatment. *State v. Dahl*, 139 Wn.2d 678, 682, 990 P.2d 396 (1999). An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or fails to make satisfactory progress in treatment. *Id.* "Under the Sentencing Reform Act...the trial court may revoke a SSOSA sentence whenever the defendant violates the conditions of the suspended sentence or the court finds the defendant is failing to make satisfactory progress in treatment." *State v. McCormick*, 166 Wn.2d 689, 698, 213 P.3d 32 (2009). Division I has also previously found that a trial court does not abuse its discretion when, even if the testimony and evidence show that a defendant has completed treatment, a defendant has gone a long

time without violations, and is a low to medium risk to reoffend. *State v. Miller* 159 Wn. App. 911, 922, 247 P.3d 457 (2011).

RCW 9.94A.670(10) states:

The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if:

- (a) the offender violates the conditions of the suspended sentence, or
- (b) the court finds that the offender is failing to make satisfactory progress in treatment.

In the current instance, even though van Pul's testimony may have shown that he was on the path to completing his treatment, the defendant could not even go four to five months without violating his SSOSA by having the violation for drugs and leaving the county both occurring within that period. 2RP 106. Under both *McCormick* and *Miller*, a violation of a SSOSA condition is, by itself, enough for the suspended sentence to be revoked. Because an offender violates the conditions of their suspended sentence when they violate a condition of the suspended sentence *or* the court finds that the offender is not making satisfactory progress in their treatment, this Court only needs to find that one of the two rationales provided by the trial court were valid in order to affirm the revocation of SSOSA. *McCormick* at 698, RCW 9.94A.670(10).

- a. Defendant leaving the county without the permission of his CCO is a valid ground for revoking the SSOSA.

In the present case, the defendant's suspended sentence was revoked when he violated the conditions of his SSOSA. 2RP 106. Appendix "H" of defendant's Judgment and Sentence outlines the conditions of the SSOSA he was to follow, which, inter alia, include:

(a)(9): Remain in the geographic boundary, as set forth in writing by the Community Corrections Officer;

(b)(21): Submit to polygraph and/or plethysmograph testing as deemed appropriate upon direction of your Community Corrections Officer...

CP 34-36. In order to continue to have his sentence suspended per SSOSA, the defendant agreed to abide by all of these conditions. When a court finds that a violation of the conditions occurred, it is within its discretion to suspend the sentence. *McCormick, supra* at 698, *see also* RCW 9.94A.670(10).

The court properly exercised its discretion when it revoked the defendant's SSOSA because its decision was directly based upon the evidence presented before the court. The evidence presented at the revocation hearing showed that the defendant had failed to follow the above requirements. Devross testified that the defendant had left the county without his permission and then had subsequently lied to Devross

about such. 2RP 9. Leaving the county without permission is, by itself, a violation of the conditions of the defendant's SSOSA in which he was explicitly ordered to stay within the geographical boundaries set by his CCO. CP 34-36. In this case, Devross set the geographical boundaries as within the county limits. 2RP 7, 9. Further, the court noted, that, among the considerations for the revocation was that the "...defendant is not deemed amenable to treatment due to his ongoing history on being dishonest with his CCO." CP 101-103. In this instance, the defendant was deceptive about leaving the county to his CCO. 2RP 8-9.

Based upon the evidence presented and the rationale of *McCormick*, the trial court properly exercised its discretion in revoking the defendant's SSOSA.

- b. The court properly exercised its discretion in finding that the defendant failed to make satisfactory progress in his sexual deviancy treatment.

Among the conditions of the defendant's SSOSA outlined in Appendix H to Judgment and Sentence included:

- (a)(3): Do not consume alcohol and/or controlled substances except pursuant to lawfully issued prescriptions;
- (b)(22): Follow all conditions imposed by your Sexual Deviancy Treatment Provider [van Pul];

CP 34-36. In this instance, the defendant did not follow either of those two criteria and thus did not make satisfactory progress in his sexual deviancy treatment. Van Pul informed that court that condition 13² of the defendant's treatment contract (CP (Ex. 5)) stated that the defendant was not to use drugs or alcohol. 2RP 59-61. Defendant did indeed use drugs, methamphetamines, and was deceptive about it to his CCO. CP 112. The trial court had previously found that the defendant had used drugs. *Id.* This is a violation of both conditions (a)(3) and (b)(22) of the defendant's SSOSA because (a)(3) prohibited the use of narcotics, which the defendant violated by using methamphetamines, and of (b)(22) because van Pul had a condition of no use of drugs as well, which the defendant also violated via the use of methamphetamines. By violating his Sexual Deviancy Treatment Provider's policies and conditions, the evidence presented at trial shows that the defendant did not make satisfactory progress in his treatment and committed another error.

Additionally, on May 8, 2015, the trial court specifically noted the defendant's deceptive behavior regarding the use of drugs, which by itself was a violation of condition (a)(3). *Id.* At the hearing, the court exercised its discretion and denied the State's motion for revocation. CP 112.

² Condition 13 refers to a condition of the defendant's participation in sexual deviancy treatment with van Pul, not a condition of SSOSA. (See Exhibit 5).

However, the court stated and wrote on the Order Continuing SSOSA Treatment that “there is absolutely zero margin for error” on the part of the defendant. *Id.* The defendant signed the order acknowledging such and thus stated that he understood that he had zero margin for error.

- c. The court’s revocation is supported by the defendant’s history of deception towards his CCO.

The revocation was further justified by the defendant’s dubious history of deceptions towards his CCO. Division I has previously found that when a trial court finds, inter alia, that a defendant who has been deceptive multiple times towards his CCO can have their SSOSA be revoked based upon such deception. *State v. Miller* 159 Wn. App. 911, 920, 247 P.3d 457 (2011).

There were at least five different instances where the defendant had an opportunity to tell the truth, yet was deceptive towards either his CCO or on polygraphs that he was assigned to take by his CCO. CP 111 (where the defendant was deceptive about having contact with a minor); CP 112 (deceptive about taking methamphetamines); 2RP 9 (deceptive about leaving the county when asked by his CCO); 2RP 11 (deceptive on a polygraph assigned by his CCO when asked about using illegal drugs); 2RP 20-22 (deceptive on a follow-up polygraph assigned by his CCO

when asked again about using illegal drugs). All of the matters that the defendant was deceptive about were by themselves violations of the conditions for his SSOSA. CP 34-36. This history of deception did not escape the notice of the court. Rather, the court stated that "...it's the pattern of deception...that I think makes him inappropriate to continue in a SSOSA." 2RP 106. Again, the court was concerned that due to the repeated pattern of lying and deception, that SSOSA was no longer appropriate for the defendant. There was a pattern with the defendant about not only being deceptive about being in contact with minors, but also not being open and honest about the physical presence of a minor on a regular basis at his residence. 2RP 41, 15-16.

Defendant's reliance on the testimony of van Pul to illustrate that the defendant's making satisfactory progress in his treatment ignores the substantive link between the defendant's deceptive behavior, the court's warnings, and the risk factors associated with the defendant's propensity to reoffend. The court noted that it was very concerned about the use of methamphetamines by the defendant. 2RP 106. The court was thus concerned by the fact that the defendant was using illegal drugs, which by itself may be a factor that would lead to a propensity to reoffend, but also that the defendant was again deceptive of such use of drugs. This

deception made the court concerned that it could not trust the defendant.

Id.

During testimony van Pul stated that the defendant not being open, honest and transparent was a concern for her as his treatment provider. 2RP 52, 61. While the defendant may have been making progress with his treatment, the fact that he was still deceptive and therefore, not open, honest, and transparent about his behavior is an area of concern and therefore, can be seen as something that could lead the defendant to reoffend. Further, van Pul stated that if one is not transparent, then treatment providers cannot know what an individual is thinking and therefore, would be unable to address any problems that arise. 2RP 53. If it is not possible to determine how an individual needs to be treated, then it is impossible to treat them and hence, they are not making satisfactory progress towards their sexual deviancy treatment, which as previously discussed, is a violation of SSOSA.

2. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

RCW 10.73.160(2) states “the court of appeals...may require an adult offender convicted of an offense to pay appellate costs.” Courts have

constantly affirmed such and have noted time and again that an appellate court may provide for the recoupment of costs from a defendant that does not prevail on appeal. See *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). As the Court of Appeals for Division I stated in *State v. Sinclair*, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016); the award of appellate costs to a prevailing party is within the discretion of the appellate court. See also, RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). Thus, the issue is not whether the Court can order appellate costs, but when, and how the Court may order such costs.

The idea that those convicted should be required to pay for the costs of their appeal, including the cost of their appellate attorney, is historical in nature. In 1976³, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, 160(2). In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute towards paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

³ Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96

Nolan, 141 Wn.2d 620, noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Keeney*, at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. Additionally, the Court noted that RCW 10.73.160 was specifically enacted by the legislature in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs for the expenses specifically incurred by the state in prosecuting or defending an appeal from a criminal conviction. *Nolan* at 623. In *Blank, supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

In *Nolan*, as in the majority of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State’s cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wn. App. 380, 367 P.2d 612 (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court’s exercise of discretion in an objection to the cost bill, if he does not

prevail, and if the State files a cost bill. However, in this matter the State has yet to file a cost bill. Until the State does so, the issue is premature and not ripe for this Court to determine whether the defendant is excused from paying appellate costs that do not yet exist.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. See *Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 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 determining if a defendant is indigent "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). Further, *Blank* at 253 noted that "there is no reason [at the time of the decision] to deny the State's cost request based upon speculation about future circumstances." Further while *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) rejected the argument that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect," it also noted that one of the requirements for judicial determination was if

there were no further factual developments that were required and that a challenge to the trial court's entry of such met the requirements. *Blazina* 182 Wn.2d at 832, n.1. Because a trial court should determine whether defendant is still indigent at the time that a cost bill is submitted, as required under *Blank*, there is still further factual information that needs to be developed. Additionally, unlike in *Blazina*, there are currently no LFOs that are being challenged by defendant. Rather, he is looking to challenge potential future costs which by nature, are purely speculative.

The imposition of LFOs has been much discussed in the appellate courts lately. In *Blazina*, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

182 Wn.2d at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

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 and the court should give deference to the Legislature and allow such costs to be determined.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. RCW 10.73.160(3) specifically includes “recoupment of fees for court-appointed counsel.” Those defendants with a court-appointed counsel have already been found to be indigent by the court. The statute would be redundant if it was not enacted specifically for the purpose of noting that indigent defendants may be responsible for paying for their court-appointed counsel. Further, defense counsel noted in their Brief of Petitioner that the appellate costs for losing an appeal are part of the trial judgment and record. Under that logic, RCW 10.73.160(3) would be nullified by excusing all indigent defendants from payment of costs without such a finding of fact at the time that the cost bill is submitted to the court.

As *Blazina* requires, trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. However, as *Sinclair* points out at 385, 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).

While RCW 10.73.160(4) does not explicitly provide that a defendant is entitled to the appointment of counsel at the time the state seeks to collect costs, a lack of appointment of counsel would run contrary to the Rules of Superior Court. Criminal Rule 3.1(b)(2) states that a lawyer shall be provided *at every stage of the proceedings*. CrR 3.1 (emphasis added). Because all defendants are entitled to counsel at all stages of proceedings, including post-conviction review, indigent defendants would still have a right to counsel during proceedings regarding cost bills and would have counsel to help them in their proceedings against the state. Even if CrR 3.1 does not apply to proceedings regarding cost bills, GR 34(3) provides multiple other conditions that would qualify an individual as indigent even without an attorney present, and in fact creates an automatic finding of indigency if one does not have an attorney or other qualified legal services provider and meets one of the enumerated conditions. A court can even determine that a defendant is indigent simply by finding that there are compelling circumstances that demonstrate that a defendant is unable to pay for such fees. GR 34(3)(D).

The State concedes that the trial court below entered an Order of Indigency. CP 105-06. In this case, however, the State has yet to “substantially prevail.” It has also not submitted a cost bill. This court should wait until the cost issue is ripe before exploring such legally and substantively. Any ruling regarding such costs at this time would be merely speculative regarding the defendant’s future ability to pay for

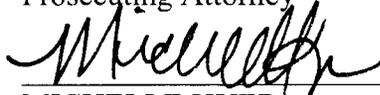
appellate costs at the time that a cost bill is submitted, if one even is submitted.

D. CONCLUSION.

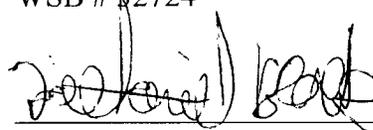
The court below properly exercised its discretion in revoking the defendant's SSOSA as he (a) did not follow the conditions of his SSOSA by leaving the county without permission; (b) has not made satisfactory progress on completing his sexual deviancy treatment; and (c) has a history of deception. Additionally, the Court should address the issue of appellate costs only if the State prevails and seeks enforcement.

DATED: JULY 20, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney



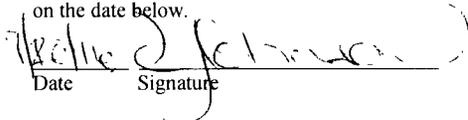
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724



Nathaniel Block
Appellate Intern

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