

No. 48406-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**PAUL SCOTT BICKLE,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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I. **ISSUES**

- A. Did the sentencing court abuse its discretion when it determined it did not have statutory authority to revisit Bickle's sentence and declined to modify his judgment and sentence?
- B. Should this Court decline to award appellate costs to the State if the State is the prevailing party due to Bickle's alleged indigence?

II. **STATEMENT OF THE CASE**

Bickle pleaded guilty and was sentenced in Lewis County Superior Court on February 11, 2011 to Counts I and III: Theft of a Motor Vehicle, Count II: Theft in the First Degree, Count IV: Burglary in the Second Degree and Count V: Theft in the Second Degree. CP 32. Bickle was sentenced to 68 months, to run consecutive to a Whitman County Superior Court case (10-1-170-5). CP 20-29, 35.

After Bickle was sentenced in his Lewis County case he pleaded guilty and was sentenced in Pierce County Superior Court on August 3, 2012. CP 46. In the Pierce County case, Bickle pleaded guilty to Count I: Attempted Burglary in the Second Degree, Count II and III: Attempted Theft of a Motor Vehicle, and Count IV: Theft of a Motor Vehicle. CP 46. Bickle was sentenced to 43 months to run consecutively to all other cause numbers and Department of Corrections (DOC) sentences. CP 50-51.

Bickle appealed his Lewis County plea and sentence. CP 3. The Lewis County case did not become final until the Mandate was issued on March 2, 2015. CP 3. On October 30, 2015 Bickle filed a CrR 7.8 motion to modify his judgment and sentence. CP 7-11. Bickle alleged his sentence was improper because it was being run consecutively with his Pierce County sentence. *Id.* Bickle requested the trial court resentence and run the Lewis County sentence concurrent with his Pierce County sentence. *Id.* The trial court declined Bickle's invitation to modify his judgment and sentence. See RP<sup>1</sup>; CP 61. Bickle timely appeals the trial court's denial of his motion. CP 68-74.

The State will supplement the facts as necessary in its argument section below.

### III. ARGUMENT

#### **A. THE SENTENCING COURT CORRECTLY DECLINED TO REVISIT BICKLE'S SENTENCE AS IT DID NOT HAVE STATUTORY AUTHORITY TO RUN THE LEWIS COUNTY SENTENCE CONCURRENT WITH THE PIERCE COUNTY SENTENCE.**

Bickle argues the sentencing court abused its discretion by stating it did not have discretion to run Bickle's Lewis County

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<sup>1</sup> The State will refer to the motion hearing that took place on 12/2/15 as RP.

sentence concurrent with his Pierce County sentence. The sentencing court did not abuse its discretion and this Court should affirm the sentencing court's denial of Bickle's CrR 7.8 motion.

### **1. Standard Of Review.**

Statutory interpretation is reviewed by this Court under a de novo standard. *In re Postsentence Review of Combs*, 176 Wn. App. 112, 116, 308 P.3d 763 (2013).

### **2. The Plain Language Of RCW 9.94A.589 Gives The Later Sentencing Court The Power To Determine Whether A Sentence Shall Run Consecutive Or Concurrent To A Sentence Already Imposed.**

The Sentencing Reform Act prescribes the authority sentencing courts are awarded in Washington State when sentencing persons convicted of felony offenses. *In re Combs*, 176 Wn. App. at 117. "The SRA limits the trial court's sentencing authority to that expressly found in the statutes." *Id.*

This Court gives the plain meaning of the statute the effect of an expression of the intent of the legislature when that meaning is plain on the statute's face. *Id.*

We determine the statute's plain meaning from the ordinary meaning of its language, as well as from the statute's general context, related provisions, and the statutory scheme as a whole. Absent specialized statutory definition, we give a term its plain and ordinary meaning ascertained from a standard dictionary. We interpret statutes to give effect to all

language in the statute and to render no portion meaningless or superfluous.

*Id.* (internal citations omitted). The statute in the SRA that governs concurrent and consecutive time is RCW 9.94A.589. The relevant portion of the statute is:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3).

Lewis County sentenced Bickle on February 16, 2011. CP 32. On that date the sentencing judge used his discretion, as expressly granted to him through RCW 9.94A.589(3), to run the Lewis County sentence consecutive to a Whitman County sentence which Bickle was already serving.<sup>2</sup> CP 20-30, 35. On August 3, 2012 a judge in Pierce County used her discretion, as provided by RCW 9.94A.589(3), to run Bickle's Pierce County sentence consecutive to all other cause numbers and DOC sentences. CP 51.

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<sup>2</sup> The Whitman County sentence was imposed on December 3, 2010. CP 20.

Bickle argued to the sentencing judge at his CrR 7.8 hearing that his sentences from Lewis County and Pierce County should run concurrently. RP 5. Bickle asked the Lewis County judge to modify Bickle's judgment and sentence to make the Lewis County and Pierce County sentences concurrent. RP 5. The sentencing judge explained that while he had the discretion when he sentenced Bickle to run his sentence concurrent with the Whitman County case, which he had declined to do, he did not have the discretion to undo Pierce County's consecutive sentence. RP 11-12.

Bickle now argues the SRA does not foreclose a sentencing court from coming back, after a later court hands down a consecutive sentence pursuant to the provisions of the SRA, and modify its judgment and sentence to make the sentences concurrent. Bickle argues the Lewis County sentencing judge abused his discretion by failing to exercise the discretion to revisit Bickle's sentence. The plain language of RCW 9.94A.589(3) makes it clear that the sentencing judge in Lewis County did not abuse his discretion because he did not have the authority to run the Pierce County sentence concurrent with the Lewis County sentence.

If this Court were to accept Bickle's argument, that a sentencing judge from an earlier case could revisit and change a

sentence, thereby rendering a later court's direct order that a sentence run consecutive moot, it would render RCW 9.94A.589(3) meaningless. This interpretation would strip away the direct authority the legislature invested in the later sentencing court. See RCW 9.94A.589(3). The authority is explicit in the statute. *Id.* If the later court expressly states the sentence shall run consecutively, the sentence is to run consecutively. *Id.* When this Court looks to statutes, it interprets them in a way that is to render no portion of the statute meaningless or superfluous. *In re Combs*, 176 Wn. App at 117. Bickle's argument renders RCW 9.94A.589(3) meaningless. This Court should reject Bickle's argument and affirm the sentencing court's ruling.

**B. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE  
IF THE COURT AFFIRMS THE JUDGMENT.**

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). As the Court pointed out in *State v. Sinclair*, the award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair*, 192 Wn. App. 380, 385, 367 P.3d 612 (2016); See also RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not:

can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976<sup>3</sup>, 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*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. 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).

*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

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<sup>3</sup> Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Keeney*, 112 Wn.2d 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. The Court also rejected the concept or belief, espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, at 624-625, 628.

In *Nolan*, as in most 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 *Sinclair*, prematurely raises an issue that is not before the Court. *Sinclair*, 192 Wn. App. at 390-91. 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.

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, 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 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 defendant has the initial burden to show indigence. See *State v. Lundy*, 176 Wn. App. 96, 104, n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. See *State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See *Blank* at 236-237, quoting *Fuller v. Oregon*, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), 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.

*Id.*, 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.

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).

As *Blazina* instructed, trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Division I pointed out in *State v. Sinclair*, the Legislature did not include such a provision in RCW 10.73.160. *Sinclair*, 192 Wn. App. at 389. 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).

Certainly, in fairness, appellate courts should also take into account the defendant’s financial circumstances before exercising its

discretion. Hopefully, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. It should be the burden upon the defendant to make this record that he or she is unable to pay, as he or she holds all the cards, so to speak. The State is unable to refute much of what a defendant asserts to the trial court regarding their ability to pay, unless information has come out during the trial or other hearings that contradicts the defendant's assertions. Without a factual record the State has nothing to respond to.

In this case the State has no information in regards to Bickle's alleged indigency. The original sentencing transcript is not before it for this appeal. Therefore, the State cannot even make a factual argument, as there is no record with the exception that Bickle has indigent counsel. This Court should award the State appellate costs as provided by court rule.

**IV. CONCLUSION**

The sentencing court properly denied Bickle's request to revisit and modify his judgment and sentence to run his Lewis County and Pierce County sentences concurrently. This Court should affirm the sentencing court's denial of the motion to modify. This Court should award the State appellate cost if it is the prevailing party

RESPECTFULLY submitted this 7<sup>th</sup> day of July, 2016.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



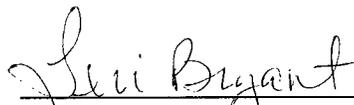
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  PAUL SCOTT BICKLE,  Appellant.	No. 48406-4-II  DECLARATION OF SERVICE
------------------------------------------------------------------------------------------------	----------------------------------------------

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 8, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi Backlund, attorney for appellant, at the following email address: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com).

DATED this 8<sup>th</sup> day of July, 2016, at Chehalis, Washington.

  
\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

# LEWIS COUNTY PROSECUTOR

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