

NO. 49071-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA RHOADES,

Appellant.

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

The Honorable James W. Lawler, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	4
1. THE SENTENCING COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO PROPERLY CONSIDER RHOADES'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.	4
2. APPEAL COSTS SHOULD NOT BE IMPOSED.	13
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Rights to Waters of Stranger Creek</u> 77 Wn.2d 649, 466 P.2d 508 (1970)	10
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000)	13
<u>State v. Bartholomew</u> 104 Wn.2d 844, 710 P.2d 196 (1985)	5
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015)	5, 6, 7, 8, 10, 13
<u>State v. Duncan</u> 185 Wn.2d 430, 374 P.3d 83 (2016)	11
<u>State v. Jacobs</u> 154 Wn.2d 596, 115 P.3d 281 (2005)	12
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 755 (2013)	4, 9, 11
<u>State v. Moon</u> 124 Wn. App. 190, 100 P.3d 357 (2004)	9
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016)	13
<u>State v. Thompson</u> 151 Wn.2d 793, 92 P.3d 228 (2004)	9
<u>Stoddard</u> 192 Wn. App. 222, 366 P.3d 474 (2016)	9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
<u>Blacks Law Dictionary</u> 915 (6th ed. 1990)	12
GR 34	6, 8
RAP 14	13
RCW 7.68.035	4
RCW 9.94A.760	4
RCW 10.01.160(3)	1, 4, 5, 6, 7, 12
RCW 10.73.160	13
RCW 10.82.090	11
RCW 36.18.020	9, 10, 11, 12
RCW 36.19.020	12
RCW 43.43.754	10
RCW 43.43.7541	4, 10, 11

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 the boilerplate finding of fact, found in section 2.5 of appellant's judgment and sentence, which indicates the court has properly considered appellant's current and future ability to pay LFOs.

Issues Pertaining to Assignments of Error

1. Did the sentencing 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. Is the boilerplate finding in section 2.5 of the judgment and sentence erroneous because it is not supported by evidence in the record?

3. Is the \$200 criminal filing fee imposed in this case a discretionary LFO?

B. STATEMENT OF THE CASE

In April 2013, a Lewis County jury convicted Joshua Rhoades of Assault in the Second Degree. CP 8. The sentencing judge imposed an exceptional 110-month sentence, and Rhoades appealed. CP 11, 18-19. Although his conviction was affirmed, this Court vacated his exceptional sentence because he had not received constitutionally adequate notice of the aggravating circumstance on which the State relied. CP 21, 25-30. The matter was remanded to the trial court for resentencing within the standard range. CP 21, 42.

At the resentencing hearing, it was apparent Rhoades had taken advantage of numerous therapeutic and educational programs available in prison, including programs aimed at self-improvement, better parenting, and preparation to become an upstanding citizen upon his release. RP 6-7. Because of these efforts, the Honorable James Lawler rejected the State's request for a high-end standard range sentence and instead sentenced Rhoades to 77 months. RP¹ 3, 10-11; CP 66.

The State also asked Judge Lawler to impose the same LFOs imposed at the original sentencing: \$500 for a victim penalty

¹ "RP" refers to the verbatim report of proceedings for May 3, 2016.

assessment; a \$200 filing fee; \$2,400 for attorney's fees; a \$100 DNA fee; and a jail recovery fee of \$1,000. RP 4; CP 13. The State encouraged Judge Lawler to assess Rhoades's current ability to pay these LFOs. RP 4.

In response to questions from Judge Lawler, Rhoades indicated he had spent \$1,450 on classes taken in prison, all of which was funded by family. RP 7, 13. And although he will be capable of working upon release, his ability to pay anything toward his LFOs is, and will continue to be, hampered by several factors: he has 9 Superior Court cases and even small payments in each case (for example, \$25/month) add up quickly when combined; he has four children to support,² and all of his legal debts are subject to an interest rate of 12%. RP 13-14. Judge Lawler decided to remove the \$1,000 jail fee but otherwise leave the LFOs intact, resulting in a total LFO debt of \$3,200, plus interest, with mandatory minimum monthly payments of \$25. RP 15; CP 68-69.

Rhoades was declared indigent and eligible to seek review at public expense. CP 80-81. He timely filed his Notice of Appeal. CP 75.

² Affidavits filed by Rhoades in connection with earlier efforts to reduce his LFO obligations reveal that his four children are quite young. See CP 82-84, 90-92.

C. ARGUMENT

1. THE SENTENCING COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO PROPERLY CONSIDER RHOADES'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 Lawler imposed two mandatory LFOs: the \$500 crime victim penalty assessment and the \$100 DNA collection fee. CP 68; 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 remaining \$2,600 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 Lawler’s efforts under Blazina and RCW 10.01.160 fell short. Despite being informed that Rhoades had 9 cases – the combination of which resulted in significant monthly LFO payments and growing interest – and had four children to support, Judge Lawler did not elicit any precise information regarding these financial

obligations. Judge Lawler failed to take account of Rhoades's financial resources, such as his other debts and the burden of incarceration. See Blazina, 182 Wn.2d at 838.

Judge Lawler also failed to 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" . . . "shall be determined to be indigent." GR 34(a)(3)(A)(iii). Moreover, 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). Judge Lawler inquired about none of this. Had Judge Lawler engaged in a GR 34 inquiry and "seriously question[ed]" Rhoades's ability to pay LFOs as Blazina instructed, he likely would not have imposed \$2,600 in discretionary LFOs. Judge Lawler failed to comply with RCW 10.01.160 or Blazina.

In light of these failures, the boilerplate assertion concerning LFOs, found in paragraph 2.5 of the judgment and sentence, is not supported by the facts. See CP 65 ("The court has considered the total amount owing, the defendant's 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.”).

One last issue on this subject. Rhoades asserts that the \$200 criminal filing fee is discretionary. The nature of this fee is a question of statutory interpretation, which this Court reviews de novo. State v. Moon, 124 Wn. App. 190, 193, 100 P.3d 357 (2004) (citing State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004)).

RCW 36.18.020 provides:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h) (emphasis added).

In State v. Lundy, 176 Wn. App. at 102-103, a panel of this Court found that criminal filing fees are mandatory, leaving sentencing courts without discretion to waive them based on a defendant's established poverty. But the Lundy court provided no rationale and no analysis of the language of RCW 36.18.020(2)(h). See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (without statutory analysis, Division Three merely cites Lundy for assertion filing fee must be imposed regardless of

indigency).

Lundy was wrongly decided and the pernicious effects of LFOs recognized in Blazina demonstrate the harmfulness of imposing discretionary LFOs without an adequate ability-to-pay inquiry. This Court should therefore overrule Lundy's determination that the filing fee is a mandatory LFO. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned").

The language of RCW 36.18.020(2)(h) is markedly different from that in statutes imposing mandatory fees. The victim's penalty assessment is recognized as a mandatory fee, with its authorizing statute providing: "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). The statute is unambiguous in its command that such a fee shall be imposed. Likewise, the mandatory nature of the DNA-collection fee statute is also unambiguous, stating: "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added).

In contrast, RCW 36.18.020(2)(h) does not directly set forth a mandatory fee, providing only that: “Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.” (Emphasis added). Despite the fact the Legislature clearly knows how to create an unambiguous mandatory fee, which absolutely must be included in a sentence, it did not do so in this statute. RCW 36.18.020(2)(h) does not say that every sentence must include the fee or that judges may not waive the fee.

Indeed, the Washington Supreme Court’s recent decision in State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016), acknowledges the different language found in RCW 36.18.020(2)(h). Discussing LFOs, the Duncan Court made the following observation:

We recognize that the legislature has designated some of these fees as mandatory. *E.g.*, RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals, State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020(2)(h) is mandatory and courts have no discretion to consider the offender’s ability to pay). . . .

Duncan, 185 Wn.2d at 436 n.3 (underlined emphasis added). That the Court would identify those fees designated as mandatory by the

Legislature, on the one hand, and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory, on the other, indicates an identified distinction.

By directing only that the defendant be “liable” for the criminal filing fee, the Legislature did not create a mandatory fee in RCW 36.18.020(2)(h). Blacks Law Dictionary recognizes the term “liable” encompasses a broad range of possibilities -- from making a person “obligated” in law to imposing on a person a “future possible or probable happening that may not occur.” Blacks Law Dictionary 915 (6th ed. 1990). Thus, “liable” can mean a situation from which a legal liability *might* arise. At best, RCW 36.19.020(2)(h) is ambiguous and, under the rule of lenity, its language must be interpreted in Rhoades’s favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281, 283 (2005).

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 Lawler failed to adequately do so regarding the \$2,600 in discretionary LFOs. This Court should remand for compliance with RCW 10.01.160.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

Judge Lawler found Rhoades to be indigent and entitled to appointment of our office's services at public expense. Moreover, Rhoades is serving a 77-month prison sentence and owes LFOs in many criminal cases. His prospects for paying appellate costs are dismal. Therefore, if he 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, Rhoades's ability to pay must be determined before discretionary costs are

imposed. Judge Lawler failed to make a proper and reliable determination below. Without a basis to determine that Rhoades has a present or future ability to pay, this Court should not assess discretionary appellate costs against him in the event he does not substantially prevail on appeal.

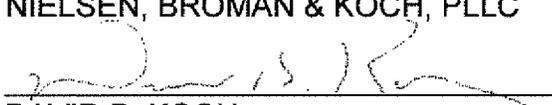
D. CONCLUSION

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

DATED this 12th day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC

October 12, 2016 - 1:11 PM

Transmittal Letter

Document Uploaded: 2-490714-Appellant's Brief.pdf

Case Name: Joshua Rhoades

Court of Appeals Case Number: 49071-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Copy sent to : Joshua Rhoades, 798276 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

Sara.Beigh@lewiscountywa.gov
appeals@lewiscountywa.gov
kochd@nwattorney.net