

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

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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

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A. ARGUMENT IN REPLY

1. THE SENTENCING COURT FAILED TO PROPERLY CONSIDER RHOADES'S CURRENT AND FUTURE ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS

Judge Lawler failed to comply with his obligations under RCW 10.01.160(3) and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), when he failed to adequately consider all relevant circumstances concerning Rhoades's current and future ability to pay. Judge Lawlor failed to elicit precise information about Rhoades's other debts – including the financial demands resulting from four children and 9 cases – and failed to inquire under GR 34 whether Rhoades receives needs-based assistance or determine just how far below the poverty level his income places him. See Brief of Appellant, at 7-8.

In response, the State notes that Rhoades challenged his LFOs in a prior appeal – as part of an ineffective assistance of counsel claim – following his 2013 sentencing, and that this Court rejected the claim his attorney should have argued his inability to pay LFOs. Brief of Respondent, at 1-2, 4-5. But that decision was filed in February 2015, prior to the Supreme Court's seminal decision in Blazina setting out in detail the circumstances to be

considered in assessing ability to pay. Compare CP 21 (State v. Joshua Rhoades, No. 45083-6-II, filed February 3, 2015) with Blazina, 182 Wn.2d at 827 (filed March 12, 2015). Neither Judge Lawler nor this Court had the benefit of Blazina for the original sentencing and appeal.

In any event, Rhoades's sentence was reversed on appeal and the case remanded for a new sentencing hearing. CP 21, 25-30, 42. Under RCW 10.01.160(3), that new sentencing hearing required Judge Lawler to assess Rhoades' *then*-current and future ability to pay. And, for the first time, Blazina was available for guidance.

Not only does the State improperly rely on Rhoades's pre-Blazina appeal, it also argues, "The Division Two Court of Appeals had a second opportunity to look at Mr. Rhoades's claim that he couldn't pay his LFOs on February 3, 2016, when he filed his Personal Restraint Petition (Court of Appeals NO. 48667-9-II)." Brief of Respondent, at 2. The State then notes that the Acting Chief Judge refused to reexamine the LFO issue in the PRP because it had already been addressed in the 2015 appeal. Id.

The PRP is irrelevant to whether Judge Lawler failed to adequately consider Rhoades's financial circumstances at the May

2016 resentencing. The LFO challenge in the PRP was simply a rehash of the issue raised in the earlier appeal and, therefore, subject to rejection on procedural grounds. See In re PRP of Davis, 152 Wn.2d 647, 670-671, 101 P.3d 1 (2004) (“The petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of the issue.”). The Chief Judge’s decision that the PRP challenge was procedurally barred has no bearing whatsoever on the current claim and the current record before this Court.

In his opening brief, Rhoades argued at length that the \$200 criminal filing fee is discretionary. See Brief of Appellant, at 9-12. The State does not address, much less dispute, this position.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

Effective January 31, 2017, RAP 14.2 provides, in pertinent part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review . . . unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a

preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. The commissioner of clerk may consider any evidence offered to determine the individual's current or future ability to pay. . . .

Under RAP 14.2, short of the new evidence described, Rhoades is presumed indigent and – assuming he does not prevail on appeal – should not be made to pay the costs of appeal.

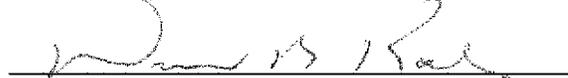
B. CONCLUSION

For the reasons discussed in the opening brief and here, this Court should vacate the discretionary LFOs imposed at resentencing.

DATED this 13th day of February, 2017.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

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