

NO. 49183-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BRADY,

Appellant.

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

The Honorable Susan Serko, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in ruling that the community custody conditions imposed in the vacated sentence remained in effect.

2. The community custody condition prohibiting the possession of pornography is unconstitutionally vague and must be stricken.

3. To the extent the community custody condition authorizes plethysmograph testing as a monitoring tool it must be stricken.

4. This Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Appellant was originally sentenced in 2002. In 2005 this Court vacated appellant's sentence and remanded for resentencing. On remand the trial court held a full adversarial sentencing hearing. In Appellant subsequently filed a motion to clarify his judgment and sentence because DOC was relying on the community custody conditions imposed in 2002. Where the 2006 judgment and sentence sets forth community custody provisions without reference to the conditions imposed in 2002, did the court err in ruling that the 2002 conditions were still in effect?

2. The Washington Supreme Court has held that a community custody condition prohibiting possession of pornography is unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). Must the condition relating to pornography be stricken from appellant's sentence?

3. The Washington Supreme Court has held that plethysmograph testing does not serve a monitoring purpose and thus may only be imposed for use with sex offender treatment. State v. Riles, 135 Wn.2d 326, 345, 353, 957 P.2d 655 (1998), *abrogated on other grounds*, Valencia, 169 Wn.2d 782, 239 P.3d 1059. Where appellant has already completed sex offender treatment, must the condition ordering him to submit to plethysmograph testing at the direction of his community corrections officer be stricken or modified?

4. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

Appellant Michael Brady was convicted on multiple counts following a bench trial, and on November 22, 2002, the court imposed an exceptional sentence. CP 27-47. In addition, the court ordered 36 to 48

months community custody with mandatory conditions, setting forth additional conditions in Appendix H to the judgment and sentence. CP 41, 48-49. These conditions include the following:

11. Enter and complete a state approved sexual deviancy treatment program if not completed while incarcerated.

...

13. Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.

...

16. Inform your community corrections officer of any romantic relationships to verify there are no victim-aged children involved.

17. Submit to polygraph and plethysmograph testing upon direction of your community corrections officer or therapist at your expense.

...

20. Submit to DNA/HIV testing.

CP 49.

In October 2005, this Court granted Brady's personal restraint petition, holding that the exceptional sentence was invalid under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). CP 167-70. The order granting Brady's petition stated that "this petition is granted, petitioner's sentence is vacated, and this case is remanded for resentencing." CP 170.

On March 24, 2006, the Honorable Susan Serko conducted a sentencing hearing. The prosecutor argued that the court should sentence Brady to the high end of the standard range, referring to the facts of the

case and presenting information learned during seminars. RP 3-8. Defense counsel objected that information from the seminars was outside the record and should not be considered by the court. RP 5-6. The court overruled the objection, saying it would consider appropriate information and disregard the rest. RP 6. The State also asked the court to impose the same legal financial obligations imposed at the original sentencing hearing. The prosecutor noted that Brady would be on community custody once he was released from incarceration and asked the court to order HIV testing and that Brady have no contact with the victims for life. RP 8-9.

The defense challenged the State's calculation of the offender score, arguing that that the proper score was zero. RP 9-10. The defense asked for a sentence at the low end of the standard range. RP 11. Brady then gave allocution, informing the court he had completed sex offender treatment after the Washington State Department of Corrections transferred him to a prison in Nevada. RP 25.

The court accepted the State's offender score calculation and imposed a high-end standard range sentence of 318 months incarceration. RP 28-29. It imposed the same LFOs previously imposed and adopted the permanent no contact orders. The court noted that there would be community custody of 36-48 months and ordered HIV testing with that.

RP 30. No other community custody conditions were discussed. When filling out the judgment and sentence form, the prosecutor noted that he did not have new no contact orders for the court to sign, but he believed the previous orders remained in effect, and that was noted at the top of the judgment and sentence. RP 36; CP 70.

The judgment and sentence orders community custody on all counts for 36 to 48 months, with standard mandatory conditions. CP 76. It orders Brady to (1) report to and maintain contact with his community corrections officer, (2) work at DOC-approved education, employment, or community service, (3) not consume controlled substances unless prescribed, (4) not unlawfully possess controlled substances, (5) pay supervision fees, (6) perform affirmative acts to monitor compliance. CP 76. Appendix F to the judgment and sentence reiterates these conditions and provides that Brady's living arrangements are subject to prior approval of DOC. The form lists a number of additional conditions the court may order, but none is checked. CP 80. There is no indication in the judgment and sentence that the community custody conditions imposed in the prior judgment and sentence are being adopted or remain in effect. CP 68-81.

On March 29, 2016, Brady filed a motion for clarification of his sentence and/or modification of community custody conditions, indicating

that DOC seemed unclear on whether the 2006 judgment and sentence contained the complete community custody requirements or whether the 2002 Appendix H remained in effect. CP 94-132. In the event the court ruled that the 2002 conditions remained in effect, he asked the court to modify several of them, including the condition that he not unlawfully use or possess controlled substances, the requirement for sexual deviancy treatment, the ban on pornography, the requirement that he notify his CCO of romantic relationships, and the use of plethysmograph testing as a monitoring tool. CP 97-101.

The court ruled that “the conditions of community custody imposed at the original sentencing hearing in 2002 remain in effect to include Appendix H” and it denied Brady’s request to modify the conditions. CP 138. Brady filed this timely appeal. CP 274-76.

C. ARGUMENT

1. THE COURT ERRED IN RULING THAT THE COMMUNITY CUSTODY CONDITIONS IMPOSED AS PART OF THE 2002 SENTENCE REMAIN IN EFFECT.

In its order granting Brady’s personal restraint petition in 2005, this Court vacated Brady’s existing sentence and remanded for resentencing. CP 170. The appellate court’s mandate is binding on the superior court and must be strictly followed. In re Marriage of McCausland, 129 Wn.App. 390, 399, 118 P.3d 944 (2005), *reversed on*

other grounds, 159 Wn.2d 607, 152 P.3d 1013 (2007). While the trial court has no discretion to exceed any specific limitations set forth by the appellate court, an open ended mandate allows the trial court to revisit issues even if they were not the subject of the appeal resulting in remand. State v. Kilgore, 167 Wn.2d 28, 38, 42, 216 P.3d 393 (2009) (citing State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993); RAP 2.5(c)(1)); see also State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006) (where appellate court remands “for further proceedings” or instructs trial court to enter judgment “in any lawful manner” consistent with opinion, court has authority to decide any issue necessary to resolve case on remand), aff’d, 162 Wn.2d 664, 185 P.3d 1151 (2008).

Here, this Court specifically ordered that Brady’s 2002 sentence be vacated, and it remanded for resentencing. Remand was not limited to correction of any specific issue. In compliance with this mandate, the trial court held a full adversarial sentencing hearing. At the resentencing, the parties argued and the court ruled on the proper calculation of the offender score, the parties argued what they believed was the appropriate standard range sentence, and Brady was given his right of allocution. Included within its sentence request, the State asked the court to order LFOs, no contact orders, HIV testing, and community custody. Although the State did not discuss any specific community custody conditions, it had the

opportunity to do so. Notably, the State asked the court to impose the same LFOs previously ordered and included a notation on the judgment and sentence that previous protection orders remained in effect. There was no similar request or notation regarding the community custody conditions ordered in 2002. Instead, the body of the judgment and sentence and the Appendix F attached to it set forth the community custody conditions imposed as a part of Brady's sentence. The record does not support the court's ruling, in response to Brady's motion for clarification, that the community custody conditions ordered as part of the vacated 2002 sentence remain in effect.

2. IF THE COURT CORRECTLY RULED THAT THE 2002 COMMUNITY CUSTODY CONDITIONS REMAIN IN EFFECT, THE CONDITIONS REGARDING POSSESSION OF PORNOGRAPHY AND PLETHYSMOGRAPH TESTING MUST BE MODIFIED.

The appellate court reviews de novo whether the trial court had statutory authority to impose specific community custody conditions. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The condition prohibiting possession of pornography is unconstitutionally vague and must be stricken. In addition, to the extent the condition regarding plethysmograph testing permits it to be used as a monitoring tool, it is improper and must be stricken.

The due process provisions of the state and federal constitutions require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness that an ordinary person can understand what is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

The court below imposed the following condition: “Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.” CP 49. Our Supreme Court has already held that a community custody condition restricting access to or possession of pornography is unconstitutionally vague. Bahl, 163 Wn.2d at 758. The fact that such a condition relies on the CCO to define pornography “only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758. The community custody condition referring to pornography is unconstitutionally vague and must be stricken.

The court below also ordered Brady to “Submit to polygraph and plethysmograph testing upon direction of your community corrections

officer or therapist at your expense.” CP 49. While polygraph testing has been upheld as a monitoring tool, the Supreme Court has recognized that plethysmograph testing may be used only as a part of a treatment program for sex offenders. State v. Riles, 135 Wn.2d 326, 345, 957 P.2d 655 (1998), *abrogated on other grounds*, Valencia, 169 Wn.2d 782, 239 P.3d 1059. Thus, a condition which authorizes the community corrections officer to direct the use of plethysmograph testing as a monitoring tool rather than part of treatment is improper. Id. at 353; see also State v. Land, 172 Wn. App. 593, 605-06, 295 P.3d 782 (striking condition requiring defendant to submit to CCO-ordered plethysmograph testing without any accompanying treatment requirement), review denied, 177 Wn.2d 1016 (2013). Since Brady has already completed sex offender treatment, the condition authorizing plethysmograph testing should be stricken or modified to prohibit such testing at the direction of the CCO as a monitoring tool.

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

The trial court entered an order of indigency finding that Brady was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 280-81.

- a. **The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.**

Our supreme court in Blazina recognized the “problematic consequences” legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM’N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22,

43, 68 (2008), available _____ at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” 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.

The Blazina court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina’s reasoning not to require the same particularized inquiry before imposing costs on appeal.

Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Brady has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover,

indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” Blazina, 182 Wn.2d at 832, n.1. Blank’s questionable foundation has been thoroughly undermined by the Blazina court’s exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to “look to the comment in GR 34 for guidance.” Blazina, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The Blazina court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts

should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. 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). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Brady respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

- b. **Alternatively, this court should remand for superior court fact-finding to determine Brady's ability to pay.**

In the event this court is inclined to impose appellate costs on Brady should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Brady to assist him in developing a record and litigating his ability to pay.

If the State is able to overcome the presumption of continued indigence and support a finding that Brady has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's ruling on Brady's motion.

DATED December 1, 2016.

Respectfully submitted,



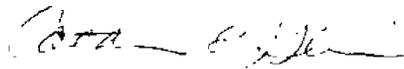
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
December 1, 2016

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