FILED
Court of Appeals
Division II
State of Washington
3/29/2019 8:00 AM

NO. 50592-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

LEVAR COUCH,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR……1

1. The sentencing court failed to engage Mr. Couch in a meaningful colloquy, per RCW 10.10.160(3) and *State v. Blazina*, prior to imposing discretionary legal financial obligations (LFOs)……...1

2. The trial court erred in imposing a $200 criminal filing fee……1

3. The trial court erred in ordering interest to accrue on Mr. Couch's non-restitution LFOs……1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR……...1

1. Whether the sentencing court's failure to engage Mr. Couch in a meaningful indigency colloquy prior to imposing $ 3,719.54 in discretionary legal financial obligations requires remand for a hearing to determine Couch's ability to pay as required by both RCW 10.10.160(3) and *State v. Blazina*?.....1

2. Whether the trial court erred in requiring indigent Mr. Couch to pay a $200 criminal filing fee when the record failed to establish he was other than indigent and had the ability to pay the fee?.....1

3. Whether Mr. Couch, as an indigent person, is entitled to have his obligation to pay non-restitution interest accrual stricken from his judgment and sentence?.....1

C. STATEMENT OF THE CASE……...2

D. ARGUMENT……...4

Issue 1: **Whether the trial court adequately engaged with Mr. Couch about his ability to pay discretionary LFOs before imposing them? The trial court erred in imposing $3719.54 of discretionary legal financial obligations because the court failed to engage in an adequate *Blazina* colloquy……..…4**

a. The trial court is required to inquire into an indigent defendant's ability to pay discretionary LFOs……..…4

b. The trial court made an inadequate inquiry……6

Issue 2: **An indigent Mr. Couch is not required to pay a $200 filing fee or to have accruing interest on unpaid LFOs……..10**

E. CONCLUSION…….11

CERTIFICATE OF SERVICE…….12

TABLE OF AUTHORITIES

Page

Washington Supreme Court Cases

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016) 8
State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) 1, 4, 5, 6, 7, 8, 9
State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).....3, 5, 8, 9, 10, 11

Washington Court of Appeals Cases

State v. Mathers, 193 Wn. App. 913, 376 P.3d 1163 (2016) 10

Federal Cases

Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) .. 3

Statutes

RCW 10.01.160 .....4, 5, 6, 9, 10
RCW 10.10.160 1
RCW 36.18.020 10
RCW 9.94A.760 6

Other Authorities

GR 34.....4, 8, 9
House Bill 1783 ..... 10, 11
Laws of 2018 10

A. ASSIGNMENTS OF ERROR

1. The sentencing court failed to engage Mr. Couch in a meaningful colloquy, per RCW 10.10.160(3) and *State v. Blazina*, prior to imposing discretionary legal financial obligations (LFOs).

2. The trial court erred in imposing a $200 criminal filing fee.

3. The trial court erred in ordering interest to accrue on Mr. Couch's non-restitution LFOs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the sentencing court's failure to engage Mr. Couch in a meaningful indigency colloquy prior to imposing $ 3,719.54 in discretionary legal financial obligations requires remand for a hearing to determine Couch's ability to pay as required by both RCW 10.10.160(3) and *State v. Blazina*?

2. Whether the trial court erred in requiring indigent Mr. Couch to pay a $200 criminal filing fee when the record failed to establish he was other than indigent and had the ability to pay the fee?

3. Whether Mr. Couch, as an indigent person, is entitled to have his obligation to pay non-restitution interest accrual stricken from his judgment and sentence?

C. STATEMENT OF THE CASE

Levar Couch pleaded guilty to attempting to elude a pursuing police vehicle, driving while under the influence of alcohol, and driving on a suspended license in the second degree. RP 6/13/17 at 3-15; CP 1-3, 4-19. The date of all charges was April 1, 2017. CP 1. Attached to the plea form was a Washington Courts "Court - DUI Sentencing Grid." A footnote on the attached grid notes, "Mandatory Minimum fines may be reduced, waived, or suspended if defendant is indigent, as provided by law." CP 14. Mr. Couch pled guilty with the court's understanding he had two prior DUI offenses and had a BAC result greater than .15.

Before imposing discretionary legal financial obligations (LFOs), the court talked to Mr. Couch about his work history and his education. RP 6/15/17 at 6. At the time of his offense in April 2017, Mr. Couch worked for Nordstrom in the women's shoe department. Although Mr. Couch had "gone" to 12th grade, the record did not establish he graduated from high school or had obtained any equivalency certificate. RP 6/15/17 at 6.

Based on this limited information, the court found Mr. Couch had the present and future ability to pay discretionary LFOs. RP 6/15/17 at 7. The court then imposed the following discretionary LFOs: $500 court

appointed attorney fee, $200 criminal filing fee, $2895.50 fine, and $124.04 emergency response cost to the Washington State Patrol. CP 27, 36; RP 6/15/17 at 7.

The court noted:

> At this time, since you're not doing a lot of time and since you do have work history and since you can make this up, I'm going to impose $200 court costs, $500 dollar crime victim assessment, the DNA sample, $500 to DAC, the $2895.50 assessment, and the $124 for DUI recovery.

RP 7.

Mr. Couch made a timely appeal of all portions of his judgment and sentence. CP 43.

Initially, counsel filed a brief per *Anders*. *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Subsequent to filing the brief, the Supreme Court issued its opinion in *State v. Ramirez*, 191 Wn.2d 732, 740, 426 P.3d 714 (2018).

Counsel filed a supplemental brief asking that certain discretionary LFOs be stricken per *Ramirez*.

The court rejected the *Anders* brief and ordered counsel to file a brief.

D. ARGUMENT

Issue 1: **Whether the trial court adequately engaged with Mr. Couch about his ability to pay discretionary LFOs before imposing them? The trial court erred in imposing $3719.54 of discretionary legal financial obligations because the court failed to engage in an adequate *Blazina* colloquy.**

a. The trial court is required to inquire into an indigent defendant's ability to pay discretionary LFOs.

The trial court ordered Mr. Couch to pay $3719.54 in discretionary LFOs without first engaging him in an adequate *Blazina* colloquy to determine his ability to pay the discretionary costs. Mr. Couch's case must be remanded to the trial court for an adequate *Blazina* hearing or to otherwise strike all discretionary LFOs.

The Washington legislature mandated, "A court 'shall not order a defendant to pay costs unless the defendant is or will be able to pay them.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)). This imperative language prohibits a trial court from ordering discretionary LFOs absent an individualized inquiry into the person's current and future ability to pay them. *Id*. The *Blazina* court suggested that an indigent person likely could never pay LFOs. Id. ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

In *Ramirez*, our Supreme Court reiterated the trial court's obligation to perform an adequate inquiry into a defendant's ability to pay discretionary LFOs. *Ramirez*, 191 Wn.2d at 740. Courts are required to consider both a defendant's financial resources and the nature of the burden brought on by imposing mandatory and discretionary LFOs. *Id*. at 739.

On review, whether a trial court adequately inquired into a defendant's ability to pay discretionary LFOs involves both a factual and a legal component. *Ramirez*, 191 Wn. 2d at 740.

On the factual side, the reviewing court determines what evidence the trial court actually considered in making the *Blazina* inquiry. The factual determination is as simple as reviewing the record for supporting evidence. *Id*.

On the legal side, the reviewing court decides whether the trial court's inquiry complied with *Blazina* under a de novo review standard. *Id*.

The trial court's authority to impose discretionary LFOs is discretionary. *Id*. at 740. But the discretion is necessarily abused when it is manifestly unreasonable or based on untenable grounds or reasons. *Id*. at 741. If the trial court fails to conduct an individualized inquiry into the defendant's financial circumstances, as RCW 10.01.160(3) requires, and

nonetheless imposes discretionary LFOs on the defendant, the trial court has per se abused its discretionary power. Stated differently, the court's exercise of discretion is unreasonable when premised on a legal error.

Trial courts must impose mandatory LFOs, and may impose discretionary costs. RCW 9.94A.760; RCW 10.01.160(1). The statute uses mandatory "shall" language that reads:

> 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.

RCW 10.01.160(3). *Blazina* interprets this to impose a duty on the trial court judge to conduct an on the record, individualized inquiry of the defendant's present and future ability to pay before imposing discretionary fees, not just using boilerplate standard language on the judgment and sentence. *Blazina*, 182 Wn.2d at 838.

b. <u>The trial court made an inadequate inquiry</u>.

Here, the trial court abused its discretion in failing to conduct a reasonable individualized inquiry into Mr. Couch's financial circumstances. All the court learned from its abbreviated inquiry is Mr. Couch worked part time at Nordstrom for an unspecified amount of time, he made an

unspecified amount of money, and that he had "gone to 12th grade." RP 1/11/17 at 50.

The trial court failed to consider other "important factors" relating to Mr. Couch's current and future ability to pay discretionary LFOs, such as his actual income, his assets, and other financial resources, his monthly living expenses, and his employment history. *Blazina*, 182 Wn.2d at 838.

In *Blazina*, the court held that "[t]he record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay," which requires the court to consider "important factors," in addition to the mandatory factors discussed above. *Id*. The only information in the record about Mr. Couch's financial situation was he worked at Nordstrom in the women's shoe department and he had gone to 12th grade.

The court did not inquire into how much money Mr. Couch actually made or how far that money stretched in terms of living expenses (e.g., rent or mortgage, utilities, food, car insurance, child care or child support, if any). The court never inquired how paying discretionary court fees would fit into his budget or what basic human needs he would have to sacrifice to pay fees otherwise discretionary for the court to impose. *Ramirez*, 191

Wn. 2d at 741. The court did not inquire into what a felony conviction would do to Mr. Couch's ability to retain or find employment.

Mr. Couch pled guilty to driving on a suspended license. Without a driver's license, how would Mr. Couch get to a job? What was the cost and availability of public transportation? Would family or friends be able to transport Mr. Couch to his job? Mr. Couch mentioned having two daughters and a mother. RP 50. Did Mr. Couch have childcare or eldercare obligations? With a conviction and a jail sentence, would Mr. Couch even be able to keep his job?

The record does not reflect that the trial court inquired into whether Mr. Couch met the GR 34 standard for indigency. Had the court looked to GR 34 for guidance, as required under *Blazina*, it very likely would have confirmed that Mr. Couch was indigent at the time of sentencing meaning his income fell below 125 percent of the federal poverty guideline. As the court explained in *Blazina*, "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839; *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016). The court could not make that assessment because the court made virtually no inquiry into what it had to know before committing Mr. Couch to pay $3719.54 in LFOs.

Consistent with *Blazina's* instruction that courts use GR 34 as a guide for determining whether someone has an ability to pay discretionary costs, the trial court could have simply used a standard motion for indigency form as a reliable framework for inquiring as to Mr. Couch's financial status per the *Blazina* and RCW 10.01.160(3) requirements.

In determining a defendant's indigency status, the financial statement section of a standard motion for indigency asks the defendant to answer questions relating to five broad categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. These categories are equally relevant to determining a defendant's ability to pay discretionary LFOs. *Ramirez*, 191 Wn. 2d. at 743-44.

The court should ask questions about the defendant's monthly expenses, and as identified in *Blazina*, the court must ask about the defendant's other debts, including other LFOs, health care costs, or education loans. To satisfy *Blazina* and RCW 10.01.160(3)'s mandate that the state cannot collect costs from defendants unable to pay, the record must reflect that the trial court inquired into all five categories before imposing discretionary costs. *Ramirez*, 191 Wn. 2d at 743–44.

All the costs imposed, except the $100 felony DNA collection fee and the $500 victim assessment, are discretionary. *State v. Mathers*, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016).

Issue 2: An indigent Mr. Couch is not required to pay a $200 filing fee or to have accruing interest on unpaid LFOs.

At the time of sentencing, the $200 filing fee was statutorily mandated. Under former RCW 36.18.020(2)(h), upon conviction, an adult criminal defendant was liable for a filing fee of $200. House Bill 1783 modified Washington's system of legal financial obligations. *Ramirez*, 426 P.3d at 716. It amended former RCW 10.01.160(3) to expressly prohibit a court from imposing discretionary costs on indigent defendants. Laws of 2018 ch. 269 §6(3). The formerly mandatory criminal filing fee became a discretionary cost. LAWS of 2018 269 § 17(2)(h).

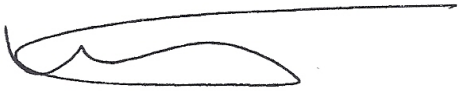
Our Supreme Court held that individuals whose case was not final at the statute's effective date were entitled to the benefit of the amended criminal filing fee statute. *Ramirez,* 426 P.3d 714. As Mr. Couch's case is on direct appeal, it is not final. He is entitled to the benefit of the amended statute, and the $200 criminal filing fee should be stricken as a discretionary cost.

Also, no non-restitution interest on unpaid costs should accrue against Mr. Couch. CP 28. Under the rules, interest only accrues on unpaid restitution. *Ramirez*, 191 Wn. 2d at 747 (House Bill 1783 eliminates interest accrual on the non-restitution portions of the LFOs).

E. CONCLUSION

Mr. Couch's case must be remanded to the trial court for an adequate colloquy on his financial means and ability to pay discretionary LFOs. The court must also strike the $200 criminal filing fee and any accrued interest obligation based on unpaid LFOs.

Respectfully submitted March 28, 2019.



LISA E. TABBUT/WSBA 21344
Attorney for Levar Couch

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Pierce County Prosecutor's Office, at pcpatcecf@co.pierce.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Levar Couch, 3202 S. Mason Avenue, No. F204, Tacoma, WA 98409.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 28, 2019, in Winthrop, Washington.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Levar Couch, Appellant

LAW OFFICE OF LISA E TABBUT

March 28, 2019 - 5:25 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50592-4
Appellate Court Case Title:	State of Washington, Respondent v Levar Demetrius Couch, Appellant
Superior Court Case Number:	17-1-01312-1

The following documents have been uploaded:

- 505924_Briefs_20190328172506D2129268_4100.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Couch Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: Lisa Tabbut - Email: ltabbutlaw@gmail.com
Address:
PO BOX 1319
WINTHROP, WA, 98862-3004
Phone: 877-856-9903

Note: The Filing Id is 20190328172506D2129268