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No. 50871-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

FRANK A. WALLMULLER, Appellant.

Appeal from the Trial Court of Mason County
The Honorable Daniel L. Goodell
The Honorable Amber L. Finlay
No. 08-1-00305-1

**BRIEF OF APPELLANT
FRANK WALLMULLER**

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR1

III. STATEMENT OF THE CASE1

IV. ARGUMENT.....3

 A. The Trial Court Abused Its Discretion by Failing to Rule
 On or Transfer the Motion to Vacate.....3

 1. Standard of Review.....3

 2. The Trial Court Failed To Rule On or Transfer the Motion
 to Vacate, As Required by Statute.....4

 B. The Trial Court Erred In Imposing A \$250.00 Recoupment
 For Appointed Counsel Because Mr. Wallmuller Is
 Indigent And The Court Did Not Make A Finding He Had
 The Ability To Pay This Discretionary Fee.....6

 1. Practical Application of Blazina to Common Costs8

 2. Appointed Counsel Fee.....9

V. CONCLUSION11

TABLE OF AUTHORITIES

Washington Cases

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....6,7,8
State v. Brazzel, 154 Wn.App. 1023 (2010).4,5
State v. Robinson, 193 Wn.App. 215, 374 P.3d 175 (2016).....4,5,6
State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).....3
State v. Shirts, 195 Wn.App 849, 381 P.3d 1223 (2016) 6,7
State v. Smith, 144 Wn.App. 860, 864, 184 P.3d 666 (2008).....3,4,5
State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992).....7
State v. Zavala-Reynoso, 127 Wn.App. 119, 122, 110 P.3d 827 (2005).3

Federal Cases

Fuller v. Oregon, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).....9

Rules

RCW 7.68.0358
RCW 9.94A.0308
RCW 10.01.1609
RCW 10.73.0902,4
RCW 38.52.4308
RCW 46.61.5228
RCW 46.61.5208
RAP 2.410

CrR 7.81,2,3,4,5,11

Court Documents

Mason County Superior Court Order Granting in Part and Denying in Part

Defendant's Motion to Terminate Legal Financial Obligations Aug. 1,

2017 .. 3,10

I. ASSIGNMENTS OF ERROR

1. The Trial Court Abused Its Discretion by Failing to Rule on or Transfer Mr. Wallmuller's Motion to Vacate.
2. The Trial Court Erred in Imposing a \$250.00 Recoupment Fee For Appointed Counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can the trial court dispose of Mr. Wallmuller's motion to vacate and its requirements, to both rule on and hold a hearing or transfer it to appellate court, by referring to a previous appellate court's decision?
2. Can the trial court impose a \$250.00 discretionary fee for appointed counsel without making an assessment as to whether Mr. Wallmuller has the ability to pay?

III. STATEMENT OF THE CASE

On March 3, 2017, Mr. Wallmuller filed a motion to vacate his Mason County Superior Court Cause No. 08-1-00305-1 convictions with the trial court. CrR 7.8(b)(4), CP 31-157. The motion alleges that the court convicted him under invalid statutes. On April 10, 2017, the court held a brief telephonic

conference and stated it would take the issue under advisement. RP 9. The State did not file any briefing but argued that the motion had previously been presented to the court and had been rejected. RP 3-4. Mr. Wallmuller attempted to point the court to his extensive briefing supporting his request however, the court did not allow him to address the substance of his argument. RP pg. 4, ln 13-22, pg. 5 ln 16.

On April, 24, 2017, the court issued a memorandum of opinion rejecting this argument stating:

In the normal course, this matter would be considered a motion under CrR 7.8(b) and, upon the proper advisement of future collateral consequences, be transferred to the Court of Appeals under CrR7.8(c)(2) as it would be barred as a collateral attack under RCW 10.73.090. However, at the time of the initial hearing on this matter, the State brought to the court's attention that the argument set forth in the Defendant's initial appeal of the underlying judgment and sentence. Upon review, the court found that a portion of the unpublished Court of Appeals Opinion filed in this matter on November 15, 2011, did address this issue. The Appellant court rejected the defendant's argument, and affirmed the judgment and sentence. Since this issue has already been decided by the court of Appeals, this Court denies the Defendant's motion.¹

Mr. Wallmuller timely filed his notice of appeal on May 22, 2017. CP. 17.

On March 7, 2017, Mr. Wallmuller secured a remand from this court in Court of Appeals Case No. 48209-6-II, directing the trial court to address his

¹ CP 21. The order refers to Court of Appeals Division II Case No. 40186-0-II, issued on Nov. 15, 2011.

request that the trial court terminate his legal financial obligations due to his inability to pay. During the April 10, 2017 telephone conference, the trial court did not gather any information regarding his ability to pay his LFOs. RP 5. Mr. Wallmuller is indigent and the trial court entered a current order of indigency regarding his financial status. CP 5-6. The trial court did not enter its order granting in part and denying in part his motion to terminate his legal financial obligations until August 1, 2017. (Attachment A).

IV. ARGUMENT

A. **THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RULE ON OR TRANSFER THE MOTION TO VACATE A VOID JUDGMENT**

1. Standard of Review

The standard of review for a trial court's ruling on a CrR 7.8 motion is abuse of discretion. *State v. Zavala-Reynoso*, 127 Wn.App. 119, 110 P.3d 827 (2005). Under this standard, the trial court's decision will not be reversed unless it was manifestly unreasonable or based on untenable reasons. *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995). A trial court abuses its discretion when it fails to follow mandatory procedures. See *State v. Smith*, 144 Wn.App. 860, 184 P.3d 666 (2008).²

2. The Trial Court Failed To Rule On Or Transfer The Motion To Vacate, As Required by Statute.

² See also *State v. Mendoza*, 165 Wn.2d 913, 921, 205 P.3d 113 (2009) (court rules are interpreted as though they were drafted by the legislature).

Under CrR 7.8(c)(2) the court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing. CrR 7.8(c)(3) states, if the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted. “If the motion is timely and appears to have merit or requires fact finding the trial court [must] retain and hear it; in all other cases, the motion is transferred to the Appellate court.” *Smith*, 144 Wn.App. at 863.

In *State v. Robinson*, 193 Wn.App. 215, 374 P.3d 175 (2016), Robinson pleaded guilty to delivery of methamphetamine and unlawful possession of a firearm in the first degree. Robinson later filed a motion for relief. The trial court subsequently denied the motion after holding a hearing without Robinson, his counsel, or DOC. This Court reversed stating, “The trial court did not address the merits of that motion or hold a fact finding hearing.”

In *State v. Brazzel*, 154 Wn.App. 1023 (2010), Brazzel was convicted of first and second degree assault, with deadly weapon enhancements. After several appeals, Brazzel filed a motion to vacate judgment and sentence under CrR 7.8(b). The trial court subsequently denied Brazzel's motion without a ruling on the merits or holding a hearing. This Court reversed and remanded,

stating that, “[The] trial court abused its discretion when it failed to employ the procedures and criteria required by CrR 7.8(c)(2) and (3).” *Id.*³

Currently, Mr. Wallmuller has alleged that the trial court lacked subject matter jurisdiction over his case. Even though this Court previously ruled on this issue, the trial court failed to follow the requirements set forth in the CrR 7.8(c)(3). By statute the trial court was obligated to either hold a hearing and issue a formal opinion or transfer the issue back to this Court. Instead, the trial court issued a memorandum of opinion rejecting Mr. Wallmuller’s argument, by stating this Court previously ruled. Since the trial court failed to follow the mandatory procedures outlined in the statute it abused its discretion. CP 21.

Like *Brazzel* and *Robinson*, the trial court in Mr. Wallmuller’s case had an affirmative duty to rule on the issue in a manner outlined in the statute. They did not. The trial court did not hold a substantive hearing, issue a summons, or transfer the motion to this Court.

At the hearing the court simply inquired whether the issue had previously been raised and did not permit Mr. Wallmuller to argue his position. The trial judge said, “I want to focus right now, and that focus is on, has this argument been presented to the court previous to this? I don’t care if there has been different case law or different facts or anything. Have you presented this argument to the court before?” RP 5, ln 24-25. RP 6 ln 1-3.

³ Citing *State v. Smith*, 144 Wn.App. 864, 184 P.3d 666 (2008)).

The trial court further did not issue a substantive opinion, but instead punted on issue. As in *Robinson*, by holding the motion, and not transferring it, the trial court needed to hold a hearing and rule on his motion, as outlined in the statute. As such, the trial court failed to employ the procedures and criteria required. This Court, has been very clear on the standards set forth by the statute and the trial court failed to meet this standard.

B. THE TRIAL COURT ERRED IN IMPOSING A \$250.00 RECOUPMENT FOR APPOINTED COUNSEL BECAUSE MR. WALLMULLER IS INDIGENT AND THE COURT DID NOT MAKE A FINDING HE HAD THE ABILITY TO PAY THIS DISCRETIONARY FEE.

In 2015, the State Supreme Court dramatically altered the landscape of legal financial obligations (LFOs) in the case *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). In *Blazina* and companion case *State v. Paige-Colter*, the sentencing courts had required that each defendant both serve prison time and pay various LFOs. Neither defendant had objected to the LFOs at the time of sentencing and the court of appeals declined to address the issue on appeal. Citing a national and local cry for reform of broken LFO systems, the state Supreme Court took discretionary review of the issue. *Blazina*, 182 Wn.2d at 834. The ability of a defendant to raise the issue was clarified in *State v. Shirts*, 195 Wn. App. 849, 381 P.3d 1223 (2016). In *Shirts* the court held that the indigent defendant did not need to wait until the State sought to collect the LFOs before the trial court considered a motion to remit on the merits, also, the

superior court is not required to hold an evidentiary hearing on the motions.

State v. Shirts, 195 Wn. App. at 861–62.

In the published *Blazina* opinion, the Washington Supreme Court references studies from the American Civil Liberties Union (ACLU), the Brennan Center for Justice at New York University School of Law, and the Washington State Minority and Justice Commission. Each study cites systemic problems caused by the imposition of fines including “increased difficulty in reentering society,” “doubtful recoupment” of the money by the government, and “inequities in administration.” *Blazina*, 182 Wn.2d at 835. The decision also cites an academic article detailing additional “problematic consequences” of Washington’s LFO system, including high interest rates and collection fees that leave many defendants owing “more 10 years after conviction than they did when the LFOs were initially assessed.” *Blazina*, 182 Wn.2d at 836.⁴

Upon review of the real impacts caused by burdensome fines, the *Blazina* opinion ultimately holds that “the sentencing judge must make an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.” *Blazina*, 182 Wn.2d at 839. Boilerplate language in the judgment and sentence is not sufficient. *Id.* And “if someone does meet the GR 34 standard for indigency, courts should seriously question

⁴ Citing Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013) available at <http://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/6>).

that person's ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. This inquiry also requires the court to consider factors such as incarceration and a defendant’s other debts when determining a defendant’s ability to pay. *Id.*

1. Practical Application of *Blazina* to Common Costs

While the *Blazina* opinion clarified that lower courts *must* make a specific finding in regards to a defendant’s ability to pay discretionary legal financial obligations, the court did not conduct an independent review of each possible type of legal financial obligation. Under RCW 9.94A.030(31) "Legal financial obligation" means:

a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.” Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

The *Blazina* court recognized that the kind of legal financial obligations to be considered in each case could vary depending on circumstances. 182 Wn.2d at 834.

2. Appointed Counsel Fee

Under RCW 10.01.160, the legislature has authorized individual counties to seek reasonable reimbursement fees from defendants that use county indigent defense services. In *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974), the U.S. Supreme Court upheld the Oregon statute upon which our statute is based. The Court implicitly held that several features of the Oregon statute were constitutionally required. The court applied *Fuller* in *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976). There, the court delineated the salient features of a constitutionally permissible costs and fees structure. The following requirements must be met:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

The considerations from *Barklind* make it clear that the appointed counsel recoupment is a discretionary LFO. Imposition of a legal financial obligation

to reimburse for appointment of counsel may only be imposed if a specific finding as to the defendant's ability to pay was entered, which is consistent with the *Blazina* opinion. The Order granting in part and denying in part the defendant's motion to terminate legal financial obligations entered on August 1, 2017, imposed "\$250.00 for court-appointed attorney". SCP filed 12/11/17 (and attached as Exhibit 1). The order fails to make a finding regarding Mr. Wallmuller's ability to pay this fee and give due consideration to Mr. Wallmuller's on-going indigency. CP 5-6. This court should reverse the court's imposition of \$250.00 for attorney's fees.

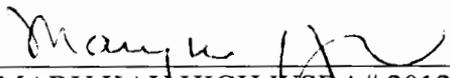
RAP 2.4(b) addresses when the trial court will address an order ruling not designated in the Notice of Appeal. Mr. Wallmuller, acting pro se, timely filed his notice of appeal concerning his motion to dismiss for lack of jurisdiction on May 22, 2017. The Court did not rule on this court's remand regarding Mr. Wallmuller's motion to terminate his legal financial obligations until August 1, 2017. This court accepted review and issued a perfection letter on August 22, 2017. Thus, while the legal financial obligations issue was not specifically included in the notice of appeal, the order imposing LFOs for appointed counsel prejudices Mr. Wallmuller and is contrary to the Washington State Court's ruling in *Blazina*. As a matter of judicial economy, and RAP 2.4(b), this court can address this error and correct the court's erroneous imposition of the discretionary attorney's fees.

3. **CONCLUSION**

In conclusion, Mr. Wallmuller was denied his right to a full hearing that complies with CrR 7.8 on his motion to vacate and the court further erred in imposing discretionary attorney's fees. The cumulative effect of these errors have prejudiced Mr. Wallmuller to an appreciable degree and he respectfully requests this trial court orders be reversed and remanded for additional proceedings.

Dated this 11th day of December, 2017.

Respectfully Submitted,



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Attorneys for Appellant, Frank Wallmuller

ATTACHMENT A

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) NO. 50871-1-II
 vs.)
) CERTIFICATE OF SERVICE
 FRANK WALLMULLER,)
)
 Appellant.)

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.


Signed December 11, 2017 at Tacoma, Washington.

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