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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

FRANK, A. WALLMULLER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 08-1-00305-1

BRIEF OF RESPONDENT

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- a) The State contends that this issue is not reviewable as a matter of right under RAP 2.2 and that this Court should deny discretionary review of this issue because Wallmuller has not shown that review is appropriate under RAP 2.3(b).....5

- b) The trial court issued the order at issue here in response to this Court’s remand order from a prior appeal, and it is an RCW 10.01.160(4) remittance order rather than an order initially imposing LFOs under RCW 10.01.160(3). Therefore, the trial court was not required to engage in the analysis required by RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) when pursuant to RCW 10.01.106(4) it reduced the previously imposed attorney fees from \$7,365.90 to only \$250.00 and eliminated all other previously imposed discretionary LFOs.....7

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Wallmuller's CrR 7.8 motion that is at issue in this appeal alleges that the trial court lacked subject matter jurisdiction over his crimes. Wallmuller has filed this motion repetitively in the trial court and has pursued the issue on direct appeal and once again in a personal restraint petition. The State contends that because Wallmuller's CrR 7.8 motion is a regeneration of his prior motions that raise the same issue, the trial court was required by *State v. Brand*, 120 Wn.2d 365, 842 P.2d 470 (1992), to dismiss his repetitive motion, and the trial court, therefore, did not err by dismissing his motion without transferring it to the Court of Appeals for consideration as a personal restraint petition.
- 2) This Court should not grant discretionary review of the trial court's RCW 10.01.160(4) order reducing Wallmuller's previously imposed discretionary LFOs because Wallmuller has not shown that review is merited under RAP 2.3(b), and even if this Court were to accept review, Wallmuller's appeal on this issue should be denied because the trial court's order was appropriate under both RCW 10.01.160(4) and this Court's remand order from Wallmuller's prior appeal, and because the trial court was not obliged to follow the inapplicable requirements of RCW 10.01.160(3) when entering an order under RCW 10.01.160(4).

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Wallmuller's statement of facts, except where the State provides additional or contrary facts as needed to develop the State's arguments below. RAP 10.3(b).

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C. ARGUMENT

- 1) Wallmuller's CrR 7.8 motion that is at issue in this appeal alleges that the trial court lacked subject matter jurisdiction over his crimes. Wallmuller has filed this motion repetitively in the trial court and has pursued the issue on direct appeal and once again in a personal restraint petition. The State contends that because Wallmuller's CrR 7.8 motion is a regeneration of his prior motions that raise the same issue, the trial court was required by *State v. Brand*, 120 Wn.2d 365, 842 P.2d 470 (1992), to dismiss his repetitive motion, and the trial court, therefore, did not err by dismissing his motion without transferring it to the Court of Appeals for consideration as a personal restraint petition.

Wallmuller filed a direct appeal of his convictions in this case. CP 219-30. In a statement of additional grounds to his direct appeal, Wallmuller asserted the same claim as in the CrR 7.8 motion that gives rise to the instant appeal. *State v. Wallmuller*, 164 Wn. App. 890, 265 P.3d 940 (2011) (No. 40186-0-II, unpublished portion of opinion, at para. 25-26). On August 9, 2010, Wallmuller filed in the trial court a motion to dismiss, which was based on exactly the same claim as he had made in his statement of additional grounds. CP 184-215. On October 25, 2012, Wallmuller filed in the trial court yet another motion, which was based on the same claim as his previous motion and appeal. CP 231-264. Meanwhile, Wallmuller asserted the same claim in a personal restraint petition that he filed directly in the Supreme Court, and the Supreme Court ruled on the issue, rejected Wallmuller's claim, and dismissed the petition.

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Appendix A (Ruling Dismissing Personal Restraint Petition, Washington Supreme Court No. 88728-4, Nov. 27, 2013).

Thereafter, on March 13, 2017, Wallmuller raised the same issue in the trial court yet again, in a pleading entitled “Motion to Vacate a Void Judgment.” CP 31-157. Noting that a motion raising the same issue had already been decided on the merits and rejected by the Court of Appeals, the trial court summarily denied Wallmuller’s latest attempt to raise the same motion again. CP 21.

The State contends that the trial court’s denial of Wallmuller’s repetitious motion was authorized and required by the Supreme Court case of *State v. Brand*, 120 Wn.2d 365, 842 P.2d 470 (1992). The Court noted as follows:

A motion under CrR 7.8(b) is expressly subject to RCW 10.73.140, which provides:

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition....

RCW 10.73.140, however, governs only personal restraint petitions before the Court of Appeals. See *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 134, 814 P.2d 629 (1991) (“[W]hen a statute specifies the class of things upon which it operates, it can be inferred that the Legislature intended to exclude any omitted class.”). Thus, the reference in CrR 7.8(b) to RCW 10.73.140 is

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ambiguous. Nevertheless, we must attempt to give meaning to the reference. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (“[n]o part should be deemed inoperative or superfluous”). We therefore conclude the drafters of CrR 7.8(b) intended RCW 10.73.140 to apply by analogy. To hold otherwise would thwart the legislative purpose by allowing repetitious collateral attacks in the trial courts in contravention of the policy limiting collateral review. See [*Matter of*] *Taylor*, 105 Wn.2d [683,] at 688, 717 P.2d 755 (courts should discourage “review upon review in forum after forum ad infinitum”); *In re R.*, 97 Wn.2d 182, 187, 641 P.2d 704 (1982) (adopt an interpretation that “best advances the legislative purpose”); cf. RCW 10.73.090(2) (collateral attack means “any form of postconviction relief other than a direct appeal”).

Id. at 369-70. Thus, the *Brand* Court cited RCW 10.73.140 and held that “a court may not consider a CrR 7.8(b) motion if the movant has previously brought a collateral attack on similar grounds.” *Brand* at 370.

In summary, the State contends that on the facts of the instant case, the trial court did not err by denying Wallmuller’s repetitious collateral attack.

- 2) This Court should not grant discretionary review of the trial court’s RCW 10.01.160(4) order reducing Wallmuller’s previously imposed discretionary LFOs because Wallmuller has not shown that review is merited under RAP 2.3(b), and even if this Court were to accept review, Wallmuller’s appeal on this issue should be denied because the trial court’s order was appropriate under both RCW 10.01.160(4) and this Court’s remand order from Wallmuller’s prior appeal, and because the trial court was not obliged to follow the inapplicable requirements of RCW 10.01.160(3) when entering an order under RCW 10.01.160(4).

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At the time of sentencing in this case, the trial court ordered Wallmuller to pay a total of \$10,061.68 in mandatory and discretionary costs and fees. CP 172-73. These costs included a \$500.00 victim assessment, \$200.00 filing fee, \$1,227.50 sheriff's service fees, \$250.00 jury demand fee, \$31.28 for clothing, \$387.00 transcript costs, \$7,365.90 court-appointed attorney fee, and a \$100.00 DNA fee. *Id.* Wallmuller later filed a motion to terminate his legal financial obligations under RCW 10.01.160(4); the trial court denied the motion; and Wallmuller appealed the trial court's denial of his motion. CP 25-27. In an unpublished opinion, the Court of Appeals "reverse[d] the trial court's order denying Wallmuller's motion to terminate LFOs, and remand[ed] to the trial court to consider Wallmuller's motion to terminate LFOs." CP 27.

In obedience to the remand order, the trial court terminated all LFOs except for the \$500.00 crime victims fund, \$200.00 filing fee, and \$250.00 court-appointed attorney fee, thereby reducing Wallmuller's total LFOs from \$10,061.68 to only \$950.00. CP 167. Only the \$250.00 court-appointed attorney fee is at issue in this appeal. Br. of Appellant at 9-10.

- a) The State contends that this issue is not reviewable as a matter of right under RAP 2.2 and that this Court should deny discretionary review of this issue because Wallmuller has not shown that review is appropriate under RAP 2.3(b).

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The cost order at issue in this appeal was issued by the trial court in response to this Court's unpublished opinion that remanded this case to the trial court for consideration of Wallmuller's RCW 10.01.160(4) motion to remit the costs that the trial court had imposed more than one year earlier in the judgment and sentence. CP 25-27. In its prior, unpublished opinion in this case, this Court noted as follows:

Appeals of motions to terminate LFOs are post-judgment motions that should be treated as motions for discretionary review. *State v. Shirts*, 195 Wn. App. 849, 853, 381 P.3d 1223 (2016). Under RAP 2.3(b)(1), we grant discretionary review if the superior court has committed an obvious error that renders further proceedings useless, and under RAP 2.3(b)(2), we grant discretionary review if the superior court has committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act. Under RAP 5.1(c), "[a] notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review." In light of the State's proper concession, we grant discretionary review of Wallmuller's motion to terminate LFOs.

State v. Wallmuller, 198 Wn. App. 1007 (unpublished) (48209-6-II, n.3, 2017). The State's concession was based only on its agreement that "RCW 10.01.160(4) allows a defendant to move to terminate LFOs at any time and, therefore, the trial court erred by denying his motion as untimely." *Id.* at 1. On remand, the trial court has, in obedience to this Court's remand, considered Wallmuller's RCW 10.01.160(4) motion for remission of LFOs and has granted him relief. CP 167. The State

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contends that this Court should deny discretionary review of the trial court order because Wallmuller has not made the required showing under RAP 2.3(b).

- b) The trial court issued the order at issue here in response to this Court's remand order from a prior appeal, and it is an RCW 10.01.160(4) remittance order rather than an order initially imposing LFOs under RCW 10.01.160(3). Therefore, the trial court was not required to engage in the analysis required by RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) when pursuant to RCW 10.01.106(4) it reduced the previously imposed attorney fees from \$7,365.90 to only \$250.00 and eliminated all other previously imposed discretionary LFOs.

The State contends that by referring generally to RCW 10.01.160 without regard for the language of the specific subsections, Wallmuller conflates the requirements of RCW 10.01.160(3) with the permissive terms of RCW 10.01.160(4). *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), addressed the imposition of LFOs at sentencing and held "that RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs." *Id.* at 839. However, RCW 10.01.160(4) has no such requirement, and it only becomes applicable after the defendant "has been ordered to pay costs" and only if the defendant "is not in contumacious default," in which case the statute

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allows that the defendant “may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof.”

Id.

The trial court entered the order at issue in the instant case under RCW 10.01.160(4) rather than RCW 10.01.160(3). The trial court entered judgement and sentence in this case, to include the original LFOs of \$10,061.68 imposed pursuant to RCW 10.01.160(3), on December 29, 2009. CP 167-83. Therefore, under RAP 5.2, the last day to appeal the original order was January 28, 2010.

Wallmuller now seeks discretionary review of the trial court’s October 1, 2017, order entered pursuant to RCW 10.01.160(4). A motion to remit LFOs under RCW 10.01.160(4) permits, but does not require, the trial court to remit defendant’s LFOs. *State v. Shirts*, 195 Wn. App. 849, 860–61, 381 P.3d 1223 (2016). A hearing is not required, and the trial court may base its decision on the written pleadings. *Id.* “If the superior court becomes satisfied that the offender shows ‘manifest hardship,’ the court holds discretion to ‘remit all or part of the amount due in costs.’” *State v. Sorrell*, ___ Wn. App. ___, 408 P.3d 1100, 1114 (2018) (quoting *State v. Shirts*, 195 Wn. App. at 859-60, 381 P.3d 1223). Here, it is implicit in the trial court’s order that the trial court considered

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Wallmuller's ability to pay and whether payment worked a manifest hardship, because the trial court order eliminated all discretionary LFO's other than attorney fees and reduced the attorney fees from \$7,365.90 to \$250.00. CP 167-83; CP 265-66.

D. CONCLUSION

Wallmuller's CrR 7.8 motion is repetitive. Therefore, under *State v. Brand*, 120 Wn.2d 365, 842 P.2d 470 (1992), the trial court did not err when it dismissed Wallmuller's latest attempt to raise the same repetitive motion again.

Finally, this Court should not grant discretionary review of Wallmuller's claim regarding remittance of LFOs, but even if this court grants review, the trial court did not err when, pursuant to RCW 10.01.160(4), it reduced Wallmuller's attorney fees from \$7,365.90 to only \$250.00 and eliminated all other discretionary LFOs.

DATED: February 22, 2018.

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