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Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

RAYLYN K. NELSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 17-1-00781-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR

- I. **The matter should be remanded in light of *Ramirez* for the trial court to determine whether Nelson is “indigent” pursuant to RCW 10.101.010(3)(a)-(c) and whether Nelson has previously had DNA collected pursuant to a prior conviction.**

SUPPLEMENTAL STATEMENT OF THE CASE

In imposing its sentence, the trial court ordered Nelson to pay a \$200 criminal filing fee and a \$100 DNA fee. CP 35-36. The trial court found Nelson was indigent and not anticipated to be able to pay financial obligations in the future. CP 33.

ARGUMENT

- I. **The matter should be remanded for the trial court to make the appropriate factual determinations required under the amendments to the LFO statutes.**

Nelson argues that this Court should order the \$200 filing fee and \$100 DNA fee be stricken from the judgment and sentence due to indigency. The trial court has not previously entered a finding that Nelson is “indigent” as defined by RCW 10.101.010(3)(a)-(c), which it must do prior to striking the \$200 filing fee. Furthermore, the trial court is not permitted to strike the DNA fee due to indigency, but may only strike the fee if it finds Nelson has previously had a DNA sample obtained pursuant to a prior conviction. Accordingly, the fees assessed should not be stricken as Nelson asks, but the matter should be remanded for the trial court to make the necessary factual determinations.

Nelson's contention that *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714 (Sept. 20, 2018), requires that both the \$200 criminal filing fee and the \$100 DNA fee assessed in his case be stricken, without remand to the superior court for additional consideration is incorrect. Subsequent to the entry of the judgment and sentence in Nelson's case, the Legislature amended several statutes relating to LFOs imposed on criminal defendants via House Bill 1783. These changes went into effect in June 2018, after Nelson was sentenced. The Supreme Court recently held the amendment to these statutes (by House Bill 1783), that went into effect in June 2018, should apply prospectively to any cases that were still pending on appeal when the costs statutes were amended. *Ramirez*, 426 P.3d at 722 (discussing LAWS OF 2018, ch. 269). The amendments to the costs statutes went into effect on while Nelson's case was still pending on appeal. Accordingly, under *Ramirez's* holding, the now current version of the costs statutes should apply to Nelson. However, Nelson's assertion on the proper remedy is incorrect. While the State agrees with Nelson that she should get the benefit in the amendments brought forth to the LFO statutes by House Bill 1783 as required by *Ramirez, supra*, the State disagrees with Nelson's assessment that both the DNA fee and the filing fee are now subject to an indigency determination, and with her contention that both fees should be stricken without remand for further proceedings in superior court.

Prior to June 2018, the determination of indigency and ability to pay was not subject to the same restrictions it is now subject to. RCW 10.101.010(3) defines "indigent." This definition includes four different

ways that a person may be found to be “indigent.” However, the legislature’s amendment of the costs statutes only prohibits collection of costs against those who meet three of those definitions, and not all four. *See e.g.*, RCW 10.01.160(3). When the trial court entered its findings regarding Nelson’s indigency, it did not indicate under what definition of indigency it found Nelson to so be. CP 32. Therefore, we do not know if the trial court based its determination of indigency off of one of the three definitions which prohibits collection of costs, or on the one that does not prohibit collection of costs. Accordingly, this clarification is necessary to determine if the trial court has the discretion to impose costs. This factual decision must be made by the trial court.

House Bill 1783 worked to amend multiple statutes which now prohibit imposition of discretionary costs on an indigent defendant, prohibit imposition of the criminal filing fee on an indigent defendant, and provide that the DNA fee is no longer mandatory if the offender’s DNA has been collected pursuant to a prior conviction. LAWS OF 2018, ch. 269, §§ 6(3), 17, 18. The main effect of House Bill 1783 was the amendment to RCW 10.01.160(3), which changed the standard of imposing costs on a criminal defendant from only imposing them if a defendant had an ability to pay now or in the future, to prohibiting imposition of costs if the defendant meets the definition of “indigent” set forth in RCW 10.101.010(3)(a)-(c).¹ The only costs that RCW 10.01.160

¹ “Indigent” is defined in RCW 10.101.010(3)(a)-(c) as:

(3) “Indigent” means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance:
Temporary assistance for needy families, aged, blind, or disabled

applies to are those specially incurred by the state in prosecuting the defendant or in administering a deferred prosecution or for pretrial supervision. RCW 10.01.160(2). This statute also specifically includes costs imposed under RCW 10.46.190 within its application, but does not include fees for DNA, the criminal filing fee, the crime laboratory fee, the drug fund fee, or the victim assessment fee.

While House Bill 1783 did amend RCW 43.43.7541, which governs imposition of a DNA fee, the bill did not amend the statute to make the imposition of the fee contingent upon non-indigency or a finding of ability to pay. Instead, the current version of RCW 43.43.7541 indicates that a sentence for certain crimes must include a \$100 fee, unless the State has previously collected the offender's DNA as a result of a prior conviction. RCW 43.43.7541. The DNA fee is not waivable due to indigency pursuant to RCW 43.43.7541, and the *Ramirez* holding does not change this. This fee is not mandatory if the offender has previously had DNA collected pursuant to a prior conviction. While Nelson claims her DNA has previously been collected as she has a prior felony, that does not comply with the requirements of the statute. The statute requires a finding by the court that the defendant has actually had his or her DNA collected. While a prior conviction for a qualifying offense means a defendant

assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, Medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;....

should have had his or her DNA collected, it does not mean it was actually collected. This is a factual finding that must be made by the trial court. Therefore, the DNA fee should not be stricken, but rather the matter should be remanded so the trial court may make the appropriate factual determinations.

Additionally, the DNA fee is not a “cost” that is covered by the provisions of RCW 10.01.160. This fee does not fall under the definition of “cost” found in RCW 10.01.160 as it is not an expense specially incurred in prosecuting Nelson. *See State v. Sorrell*, 2 Wn.App.2d 156, 179-80, 408 P.3d 1100 (2018). Thus Nelson’s claim that the trial court could not impose the DNA fee if she is indigent (and her DNA has previously been collected) due to the amendments to RCW 10.01.160 is incorrect. RCW 10.01.160’s prohibition against imposing costs on defendants who are “indigent” as defined in RCW 10.101.010(3)(a)-(c) does not apply to the DNA fee authorized by RCW 43.43.7541. The prohibition against imposing costs on certain defendants set forth in RCW 10.01.160(3) applies only to “costs” as defined in RCW 10.01.160(2). While other statutes may also prohibit collection of other fees if a defendant is indigent, the provisions of RCW 10.01.160(3) do not apply to every LFO that may be imposed in a criminal case. The DNA fee is one such fee that does not fall under the purview of RCW 10.01.160(3).

The criminal filing fee is also a fee that is not covered by RCW 10.01.160(3)’s prohibition against collecting “costs” from indigent defendants, however, the statute authorizing assessment of the criminal filing fee prohibits its collection from defendants who are indigent under

the definition found in RCW 10.101.010(3)(a)-(c), thus the effect is similar to that of costs that fall under RCW 10.01.160(3). House Bill 1783 also amended RCW 36.18.020(2)(h), changing the criminal filing fee from a mandatory fee to a fee which shall be assessed unless the defendant is “indigent” as defined in RCW 10.101.010(3)(a)-(c). Therefore, when the superior court now sentences a defendant, the court shall impose the filing fee unless the defendant is “indigent” as defined in RCW 10.101.010(3)(a)-(c). With *Ramirez*’s holding that the changes included in House Bill 1783 shall apply prospectively, Nelson should have the benefit of this statutory amendment. However, the trial court has never considered whether Nelson meets the definition of “indigent” under RCW 10.101.010(3)(a)-(c), or whether he meets the fourth, not included, definition of “indigent” found at RCW 10.101.010(3)(d). Therefore, the criminal filing fee should not be stricken, but rather the matter should be remanded for consideration of imposition of the filing fee pursuant to Current RCW 36.18.020(2)(h).

Nelson’s argument that the criminal filing fee should be stricken because of the Supreme Court’s holding in *Ramirez* is incorrect. While the Court in *Ramirez* did strike the fees it found had been affected by House Bill 1783, that was only because the defendant had already been found to meet the definition of “indigent” pursuant to RCW 10.101.010(3)(a)-(c). *Ramirez*, 426 P.3d at 722 (stating “in this case, there is no question that Ramirez satisfied the indigency requirements of RCW 10.101.010(3)(c).”). Therefore Ramirez was “indigent” under one of the applicable definitions, and the statutory amendment would prohibit the

trial court from imposing the criminal filing fee or any other fee imposed under RCW 10.01.160, thus remand for resentencing was unnecessary. The same is not true for Nelson. There has been no factual determination that he qualifies as “indigent” pursuant to the definition found I RCW 10.101.010(3)(a)-(c). That factual question is for the trial court to determine; therefore remand for resentencing on the criminal filing fee is necessary and appropriate. It would be improper to strike the filing fee in its entirety prior to a factual finding that Nelson meets the required definition of “indigent.” Therefore this matter should be remanded for consideration of imposition of the filing fee under the current version of RCW 36.18.020(2)(h).

CONCLUSION

Nelson’s argument that *Ramirez, supra* changes the ability of a court to impose the criminal filing fee and DNA fee in his case is potentially incorrect. That determination requires a factual finding that has yet to be made. *Ramirez* provides that Nelson should have the benefit of the changes to certain statutes under House Bill 1873; this bill did not amend all statutes governing all fees and costs allowed to be imposed by a sentencing court. In Nelson’s case, as discussed above, the *Ramirez* decision only allows her to seek relief regarding the criminal filing fee due to potential indigency, and the DNA fee if she has previously had DNA collected pursuant to a prior conviction. For that reason, this Court should not strike the criminal filing fee and DNA fee imposed in this case, but rather should remand for reconsideration of the criminal filing fee

pursuant to the amendment of RCW 10.01.160(3) and of the DNA fee
pursuant to the amendment of RCW 43.43.7541.

DATED this 7th day of November, 2018.

Respectfully submitted:

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