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Court of Appeals  
Division II  
State of Washington  
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No. 51474-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SAGE CREE BEAR  
Appellant.

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

The Honorable John C. Skinder, Judge  
Cause No. 17-1-01469-34

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SUPPLEMENTAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 1

1. The State does not oppose an order striking the  
\$200 filing fee and \$100 DNA fee. .... 1

D. CONCLUSION..... 4

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

State v. Ramirez,  
191 Wn.2d 732, 426 P.3d 714, (2018) ..... 2, 3

**Decisions Of The Court Of Appeals**

State v. Lewis,  
194 Wn.App. 709, 379 P.3d 129,  
*review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016) ..... 3

State v. Thibodeaux,  
no. 76818-2-1, (Slip. Op.)(November 26, 2018) ..... 2, 3

State v. Thornton,  
188 Wn.App. 317, 372, 353 P.3d 642 (2015)..... 2, 3

**Statutes and Rules**

RCW 7.68.035..... 2

RCW 10.01.180(5) ..... 2

RCW 10.82.090..... 4

RCW 10.82.090(1) ..... 4

RCW 10.82.090(2)(a)..... 4

RCW 10.101.010(3)(a) through (c)..... 1

RCW 36.18.020(2)(h)..... 1

RCW 43.43.7541 ..... 1

**Other Authorities**

Laws of 2018, ch. 269, § 17 ..... 1

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

B. STATEMENT OF THE CASE.

For purposes of this supplemental response, the State relies on the statement of the case contained in the original brief of respondent, with the following additions:

At sentencing, the trial court imposed a \$200 filing fee and a \$100 DNA fee. CP 87. The Judgment and Sentence did not contain specific findings regarding indigence or whether Bear has previously provided a DNA sample. CP 82-91.

C. ARGUMENT.

1. The State does not oppose an order striking the \$200 filing fee and \$100 DNA fee.

Legislative amendments to RCW 43.43.7541 and RCW 36.18.020(2)(h), which took effect on June 7, 2018, require that costs as described in RCW 10.01.160, which include the \$200 filing fee, "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c), and that the \$100 DNA fee not be collected if the State has previously collected the offender's DNA as a result of a prior conviction. Laws of 2018, ch. 269, § 17.

The amendments apply prospectively to defendants whose appeals were pending when the amendment was enacted. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, (2018). However, the “crime victim penalty assessment under RCW 7.68.035 may not be reduced, revoked, or converted to community restitution hours.” RCW 10.01.180(5).

The trial court expressed its intention to impose only mandatory legal financial obligations. RP 398. Though the judgment and sentence does not include specific findings as to indigency, the State does not contest the assertion that Bear was indigent at the time of sentencing.

The record is silent in regard to whether or not Bear has previously submitted a sample of his DNA to the State crime lab. Bear argues that because he has prior felony convictions, the State clearly must have previously collected his DNA, however, defendants do not always submit to DNA collection despite being ordered to do so. Supplemental Brief of Appellant, at 3; State v. Thornton, 188 Wn.App. 317, 372, 353 P.3d 642 (2015). In State v. Thibodeaux, no. 76818-2-1, (Slip. Op.)(November 26, 2018), Division I of this Court rejected a similar argument as that made by Bear regarding the DNA fee, stating, “the existing record does not

establish that the State has already collected Thibodeaux's DNA." Id. at 7. The fact of a prior conviction alone is not enough to show actual submission of a DNA sample. State v. Lewis, 194 Wn.App. 709, 379 P.3d 129, *review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016).

Claims of error on direct appeal must be supported by the existing record on review. RAP 9.1. However, the State has checked its records and noticed that there is an indication that Bear has previously provided a DNA sample. While the State does not concede error based on the record, in the interest of expedient justice, the State does not oppose a remand for a ministerial order striking the \$100 DNA-collection fee.

In future cases, where the State's records show the appellant had not previously submitted a sample, the State reserves the ability to object pursuant to Thibodeaux, Thornton and Lewis.

It is clear that the trial court properly ordered the \$200 filing fee and the \$100 DNA fee prior to the legislative amendments which took effect in June of last year. Based on the holding in Ramirez that those amendments apply prospectively to cases which were on appeal at the time the amendments took effect, the

State does not oppose an order striking the \$200 filing fee and \$100 DNA fee.

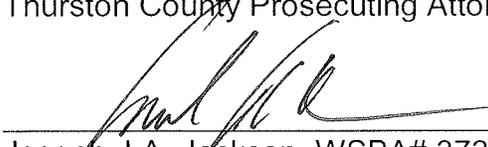
No specific action is necessary regarding interest. RCW 10.82.090(1) states, "as of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(2)(a) further states that the court "shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018." The specific reference to RCW 10.82.090 judgment and sentence should have the effect of removing any nonrestitution interest without further action.

D. CONCLUSION.

The State does not oppose an order striking the \$200 filing fee. Though the record appears silent as to whether Bear has actually provided a sample of his DNA, the State's records indicate that he has, therefore the State does not oppose an order striking the \$100 DNA fee that was imposed.

Respectfully submitted this 30 day of January, 2019.

JON TUNHEIM  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent on the date below as follows:

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

Dated this 30<sup>th</sup> day of January, 2019, at Olympia,  
Washington.

  
\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**January 30, 2019 - 2:41 PM**

**Transmittal Information**

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