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COA NO. 51629-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN ESTAVILLO,

Appellant.

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

The Honorable William C. Houser, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The court erred in imposing discretionary costs on an indigent defendant, including a \$200 criminal filing fee, \$100 DNA fee, supervision costs and collection costs.

2. The interest notation in the judgment and sentence is unauthorized by statute.

Issues Pertaining to Supplemental Assignments of Error

1. Where the new statute prohibiting imposition of discretionary costs against indigent defendants applies prospectively to cases pending on direct appeal, whether the \$200 criminal filing fee, \$100 DNA fee, supervision fee, and collection fee must be vacated because appellant is indigent?

2. Whether the notation in the judgment and sentence directing accrual of interest on all legal financial obligations must be amended to state that no interest shall accrue on non-restitution obligations, as mandated by the controlling statute?

B. STATEMENT OF THE CASE

As part of the judgment and sentence, the court ordered Ryan Estavillo to pay a \$200 criminal filing fee and a \$100 DNA fee. CP 227. The court also ordered Estavillo to "Pay DOC monthly supervision assessment." CP 226. It further ordered "Defendant shall pay the costs of

services to collect unpaid legal financial obligations." CP 227. The judgment and sentence provides "12% INTEREST FOR LEGAL FINANCIAL OBLIGATIONS/ADDITIONAL COSTS — Financial obligations in this judgment shall bear interest from the date of judgment until paid in full at a rate applicable to civil judgments." CP 227.

At the sentencing hearing, defense counsel informed the court that, "as indicated in his request for services, has already been found indigent. He was not employed at the time. There is no income. His family was actually sending him some money while he was out. So there's no present or future ability to pay fines. So we'd ask the court to consider reducing or waiving whatever fines it can." RP 3/23/18 at 5. The declaration attached to the motion for appeal at public expense shows Estavillo was unemployed and had no income and no money in the bank. CP 236-37. He had no assets, except for a Nissan pickup valued at \$2,500. CP 236.

The court remarked that even "if I had felt that you had money in the bank, I would still have only imposed the mandatory minimums on the financials on this. But I do find you are indigent in this matter." RP 3/23/18 at 13. The court entered an order of indigency for appeal. CP 239-40.

C. ARGUMENT

1. **THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE DISCRETIONARY COSTS ON ESTAVILLO DUE TO INDIGENCY AND ALSO LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS.**

The recently amended statute on legal financial obligations (LFOs) prohibits the imposition of discretionary costs on indigent defendants. Here, the court imposed a \$200 criminal filing fee, \$100 DNA fee, collection costs and the cost of supervision. Because Estavillo is indigent, these discretionary costs must be stricken. The law on interest has changed as well, no longer applying to non-restitution costs. The interest provision in the judgment and sentence must be corrected.

a. **The \$200 criminal filing fee is discretionary and therefore must be stricken from the judgment and sentence.**

Estavillo was sentenced on March 23, 2018. CP 221. The current, amended version of RCW 36.18.020(2)(h), effective June 7, 2018, states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an

annual income after taxes of 125 percent or less of the current federal poverty level.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), of which the filing fee provision is a part, applies prospectively to cases currently pending on direct appeal. State v. Ramirez, 191 Wn.2d 732, 747-49, 426 P.3d 714 (2018). The amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Id. at 749. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. at 749-50.

Estavillo's indigency at the time of sentencing is established in the record. According to the declaration in support of his indigency motion, Estavillo was unemployed, had no income, and had no money in the bank. CP 236-37; see Ramirez, 191 Wn.2d at 747 (relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing). The court found Estavillo indigent at sentencing. RP 3/23/18 at 13. Estavillo does not have an income at or above 125 percent of the federal poverty level (125 percent of the current federal guideline of \$12,490).¹ He is therefore indigent under RCW 10.101.010(3)(c). The criminal filing

¹ See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, Poverty Guidelines (2018), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited Feb. 16, 2019).

fee must be stricken because Estavillo is indigent. Ramirez, 191 Wn.2d at 749-50.

b. The DNA fee is discretionary and therefore must be stricken from the judgment and sentence.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court "*may* require the defendant to pay costs." RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute via HB 1783 prohibit the imposition of costs on indigent defendants. "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3). This language became effective on June 7, 2018. Laws of 2018, ch. 269 § 6.

Under RCW 43.43.754(1)(a), a biological sample must be collected for purposes of DNA identification analysis from every adult convicted of a felony. Estavillo has four prior felony convictions. CP 221-22. He would necessarily have had his DNA sample collected pursuant to RCW 43.43.754(1)(a). See State v. Maling, ___ Wn. App. 2d ___, 431 P.3d 499, 501 (2018) (striking DNA fee where appellant's "lengthy felony record indicates a DNA fee has previously been collected.").

RCW 43.43.7541, meanwhile, was amended by HB 1783 to read, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*" Laws of 2018, ch. 269, § 18 (emphasis added). Again, HB 1783 applies to all cases pending on appeal. Ramirez, 191 Wn.2d 732, 747-49. HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Id. at 747.

Because Estavillo's DNA sample was previously collected based on other felony convictions, the DNA fee in the present case is not mandatory under RCW 43.43.7541. The fee is discretionary. RCW 10.01.160 addresses discretionary costs. HB 1783 amended RCW 10.01.160(3), which now prohibits imposition of costs on those who are indigent.

As argued, Estavillo meets the indigency standard under RCW 10.101.010(3)(c). And he has previously had his DNA sample collected. Reading the current, applicable version of RCW 43.43.7541 in conjunction with RCW 10.01.160(3), the court lacked authority to impose the \$100 DNA fee because Estavillo is indigent. The criminal filing fee and DNA fee must therefore be stricken from the judgment and sentence.

- c. **The cost of community supervision is discretionary and therefore must be stricken from the judgment and sentence.**

The court imposed 18 months of community custody. CP 224. The judgment and sentence orders Estavillo to "Pay DOC monthly supervision assessment." CP 226.

RCW 9.94A.703(2)(d) states "*Unless waived by the court, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department.*" RCW 9.94A.703(2) (emphasis added). Given the language authorizing the court to waive the cost, this Court recently noted the cost of community custody is discretionary. State v. Lundstrom, ___ Wn. App. 2d ___, 429 P.3d 1116, 1121 n.3 (2018).

The cost of supervision must be stricken from the judgment and sentence because it is discretionary and Estavillo is indigent. RCW 10.01.160(3). In light of the court's remarks at sentencing about imposing only the mandatory minimum costs, it probably did not intend to impose the community supervision cost. RP 3/23/18 at 13. This provision is buried in the boilerplate language of the judgment and sentence. CP 224. "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376, 381, 415 P.3d 1261 (2018). Intentional or not, the inclusion

of this cost in the judgment and sentence is unauthorized and must be stricken.

d. Collection costs are discretionary and therefore must be stricken from the judgment and sentence.

The judgment and sentence states "Defendant shall pay the costs of services to collect unpaid legal financial obligations," citing RCW 36.18.190. CP 227.

RCW 36.18.190 states "The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services." RCW 36.18.190 (emphasis added). Use of the word "may" shows the cost is discretionary. State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 691, 370 P.3d 989 (2016). The court's general authority to impose costs, and the specific authority cited by the written order, provide discretionary authority to impose collection costs. Discretionary costs imposed on indigent defendants are prohibited by RCW 10.01.160(3). The remedy is to strike this cost provision from the judgment and sentence. Ramirez, 191 Wn.2d at 749-50.

e. The notation in the judgment and sentence regarding interest on costs is unauthorized by statute.

The judgment and sentence also provides "12% INTEREST FOR LEGAL FINANCIAL OBLIGATIONS/ADDITIONAL COSTS —

Financial obligations in this judgment shall bear interest from the date of judgment until paid in full at a rate applicable to civil judgments." CP 227. This is an inaccurate statement of the applicable law. The judgment and sentence must be amended to state that non-restitution legal financial obligations will not accrue interest from June 7, 2018.

The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that "restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." This statute was amended as part of HB 1783's overhaul of the legal financial obligation system. Laws of 2018, ch. 269 § 1. Again, HB 1783 applies prospectively to cases pending on appeal. Ramirez, 191 Wn.2d 732, 747-49. The judgment and sentence, then, must be modified to reflect that no interest shall accrue on non-restitution LFOs as of June 7, 2018 in accordance with the current version of RCW 10.82.090(1).

D. CONCLUSION

For the reasons stated, Estavillo requests that this Court strike the challenged costs from the judgment and sentence and correction of the interest provision.

DATED this 19th day of February 2019

Respectfully Submitted,

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