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Division II
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NO. 51673-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PETER ABARCA,

Appellant.

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

The Honorable Kevin D. Hull, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing legal financial obligations (LFOs) including a \$200.00 filing fee, \$100.00 DNA collection fee, and interest accrual provision in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez*¹ and after enactment of House Bill 1783. Clerk's Papers (CP) 86.

2. The sentencing court erred by imposing the discretionary cost of a monthly Department of Corrections (DOC) community supervision fee in the judgment and sentence. CP 85.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Under the Supreme Court's decision in *Ramirez*, should the case be remanded and the \$200.00 criminal filing fee and \$100.00 DNA collection fee be stricken from appellant Peter Abarca's judgment and sentence? Assignment of Error 1.

2. Do recent statutory amendments affecting legal financial obligations (LFOs) require remand to strike the imposition of interest accrual on non-restitution LFOs? Assignment of Error 1.

3. Do recent statutory amendments affecting discretionary LFOs require remand to strike the imposition of a monthly DOC community supervision fee? Assignment of Error 2.

¹ 191 Wn.2d 732, 426 P.3d 714 (2018).

C. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural facts:

At sentencing on February 26, 2018, the court imposed a \$500.00 crime victim assessment, \$200.00 criminal filing fee, and \$100.00 DNA collection fee. CP 86. The court sentenced Mr. Abarca to 120 months followed by twelve months of community custody. CP 81, 82.

The judgment and sentence states:

12% INTEREST FOR LEGAL FINANCIAL OBLIGATIONS/ADDITIONAL COSTS--Financial obligations in this judgment shall bear interest from the date of the judgment until paid in full at the rate applicable to civil judgments.

CP 86.

The judgment and sentence also provides that the defendant shall “pay DOC monthly supervision assessment.” CP 85.

Appellant’s opening brief was filed September 13, 2018 and the appellant’s reply brief was filed February 6, 2019. Counsel was granted leave to file a supplemental brief on May.7, 2019.

D. ARGUMENT

1. THE COURT ERRED IN IMPOSING THE \$200.00 FILING FEE, \$100.00 DNA COLLECTION FEE, INTEREST ACCRUAL AND COMMUNITY SUPERVISION FEES

a. Recent statutory amendments prohibit discretionary costs for indigent defendants.

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.* (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

House Bill 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing *Laws of 2018*, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”). *HB 1783* establishes that the \$200

criminal filing fee is no longer mandatory if the defendant is indigent. The Supreme Court in *Ramirez* concluded the trial court impermissibly imposed discretionary LFOs and a \$200 criminal filing fee and remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. *Ramirez*, 191 Wn.2d at 750.

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he 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). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

The record indicates that Mr. Abarca is indigent and that he qualified for court appointed trial and appellate counsel. CP 22, 26, 114-15.

At sentencing on February 26, 2018, the court imposed a \$500 crime victim fund assessment, which HB 1783 retains as a mandatory LFO. RCW 7.68.035(1)(a). *State v. Catling*, No. 95794-1, filed April 18, 2019,

438 P.3d 1174, 2019 WL 1745697 at *3. Mr. Abarca, however, is entitled to relief from the statutory changes of the Bill. As was the case in *Ramirez*, his case is still on direct appeal. Mr. Abarca was subjected to the \$200 filing fee, \$100 DNA fee, and ordered to pay interest, which is no longer authorized under the Bill (*Laws of 2018*, ch. 269, § 1).

The trial court imposed a \$100.00 DNA collection fee. CP 86. The legislature recently amended RCW 43.43.7541 to direct the DNA fee not be imposed upon an individual who had previously provided a DNA sample.

Mr. Abarca has juvenile felony convictions from California from January 2016 for burglary. CP 80. *California Penal Code* § 296² provides that “[a]ny person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense” must provide “buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis[.]” Thus, his DNA

² Cal.Penal Code § 296 provides in relevant part: Offenders subject to collection of specimens, samples and print impressions:

(a) The following persons shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis:

(1) Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony

would previously have been collected in California in 2016.

b. The court did not adequately inquire into Mr. Abarca's ability to pay LFOs

The sentencing court must conduct on the record an individualized inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when determining his ability to pay. *Id.*

Here, the court did not question Mr. Abarca about his income, the defendant's assets and other financial resources, and did not inquire about the defendant's monthly expenses, debts including other LFOs, health care costs, or education loans, debts, and present and future ability to pay LFOs. RP (2/26/18) at 121-22. The court waived all non-mandatory LFOs. RP (2/26/18) at 122.

RCW 10.01.160 is mandatory: "it creates a duty rather than confers discretion." *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). "Practically speaking ... the court must do more than sign a judgment and sentence with boilerplate language

offense.

stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.” *Id.* “Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant's other debts ... when determining a defendant's ability to pay.” *Id.*

c. Mr. Abarca was and remains indigent

Mr. Abarca was represented by court-appointed counsel. CP 22, 26. The court waived all non-mandatory LFOs. RP (2/26/18) at 122. Shortly after sentencing the court found Mr. Abarca was unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 114-15. Thus, the record indicates that Mr. Abarca was indigent under RCW 10.101.010(3) at the time of sentencing.

d. The trial court erred by imposing discretionary community supervision and interest accrual LFOs

In the judgment and sentence the court directed Mr. Abarca to pay a monthly community supervision assessment to the Department of Corrections. CP 85. Although the judgment and sentence cites no authority for these costs, a statute allows them as a discretionary community custody condition. RCW 9.94A.703(2)(d).

This Court recently made it clear these costs are discretionary.

State v. Lundstrom, 6 Wn.App.2d 388, 429 P.3d 1116, 1121 n.3 (2018).

Because these costs are discretionary and prohibited by statutory amendments, this Court should remand to strike them.

Mr. Abarca also challenges the interest accrual on non-restitution LFOs assessed in the judgment and sentence. CP 86. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 86. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

(1) Except as provided in subsection (2) of this section, 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 the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See Laws of 2018, ch. 269.

The interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs should be stricken.

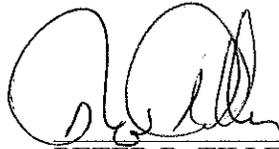
E. CONCLUSION

For the reasons stated above, Mr. Abarca respectfully requests this

Court remand for resentencing with instructions to strike the discretionary costs of the criminal filing fee, \$100.00 DNA collection fee, monthly community supervision fee, and the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: May 22, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 21, 2019, that this Supplemental Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Randall Sutton, Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, 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 at Centralia, Washington on May 21, 2019.



PETER B. TILLER

THE TILLER LAW FIRM

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