

FILED  
Court of Appeals  
Division II  
State of Washington

NO. 51673-0-II  
5/30/2019 3:53 PM  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

v.

PETER \* ABARCA,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-01045-4

---

BRIEF OF RESPONDENT

---

CHAD M. ENRIGHT  
Prosecuting Attorney

JOHN L. CROSS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 328-1577

**SERVICE**

Peter B. Tiller  
P.O. Box 58  
Centralia, Wa 98531-0058  
Email: ptiller@tillerlaw.com

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED May 30, 2019, Port Orchard, WA *Elizabeth Allen*  
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**  
Office ID #91103 kcpa@co.kitsap.wa.us

**TABLE OF CONTENTS**

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

    A. FACTUAL AND PROCEDURAL HISTORY .....1

III. ARGUMENT.....2

    A. THE TRIAL COURT ERRED IN IMPOSING A  
        FILING FEE, SUPERVISION FEES, AND  
        INTEREST ON NON-RESTITUTION LFO BUT  
        DID NOT ERR IN ASSESSING THE DNA  
        COLLECTION FEE. ....2

IV. CONCLUSION.....5

**TABLE OF AUTHORITIES**

**CASES**

*State v. Lundstrom*,  
6 Wn. App.2d 388, 396 note 3, 429 P.3d 1116 (2018) ..... 3

*State v. Phillips*,  
6 Wn. App.2d 651, 431 P.3d 1056 (2018) ..... 4

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

**STATUTORY AUTHORITIES**

RCW 10.01.160 ..... 2

RCW 10.82.090(1) ..... 3

RCW 43.43.754 ..... 3

RCW 43.43.7532 ..... 3

RCW 43.43.7541 ..... 3, 4

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred in assessing Abarca a \$200 filing fee, a \$100 DNA collection fee, a discretionary supervision fee, and interest accrual on non-restitution legal financial obligations? (PARTIAL CONCESSION OF ERROR, the DNA collection fee should remain).

## **II. STATEMENT OF THE CASE**

### **A. FACTUAL AND PROCEDURAL HISTORY**

The facts and procedures in the case are well briefed in the initial briefing of the parties.

For the present issue, Abarca had appointed counsel in the trial court based on the trial court's finding that he was financially unable to obtain a lawyer. CP 22. Court staff reported that Abarca was unemployed. CP 20. The trial court entered an order of indigency for appeal. CP 114.

Although the trial court waived most of the discretionary legal financial obligations (LFO), it did impose a \$200 filing fee and a \$100 DNA collection fee. CP 86. The judgment and sentence indicates that Abarca's prior criminal history was two juvenile offenses out of California. CP 80.

### III. ARGUMENT

#### A. THE TRIAL COURT ERRED IN IMPOSING A FILING FEE, SUPERVISION FEES, AND INTEREST ON NON-RESTITUTION LFO BUT DID NOT ERR IN ASSESSING THE DNA COLLECTION FEE.

Abarca argues that the trial court erred in assessing the \$200 filing fee, the discretionary supervision fee and in ordering the accrual of interest on non-restitution LFO. This claim is correct. These discretionary LFO should be stricken from the judgment and sentence. However, Abarca does not demonstrate the \$100 DNA collection fee should be stricken

First, the state has no argument that Abarca is not indigent. He was screened as unemployed and, as a result of his indigency, he was provided with appointed counsel in the trial court and on appeal. Significantly, the amended statute, RCW 10.01.160, directs a measuring of a defendant's financial circumstances "at the time of sentencing. . ."

Next, Abarca accurately advances the changes in the law of LFO. The amended statute disallows the imposition of discretionary costs on a defendant who is indigent at the time of sentencing. The Washington Supreme Court has left no doubt that the \$200 filing fee is just such a discretionary LFO. *See State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018). Thus, the \$200 filing fee must be stricken from the judgment and sentence.

Further, the state agrees that the imposition of supervision fees is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App.2d 388, 396 note 3, 429 P.3d 1116 (2018) (Noting that the language “Unless waived by the court” in RCW 9.94A.703(2)(d) makes this provision discretionary). Thus, by way of the *Ramirez* decision, this fee should not be imposed. And, the inclusion of interest in the judgment and sentence is clearly in error because the statute expressly disallows interest on anything except restitution. RCW 10.82.090(1) (“no interest shall accrue on non-restitution legal financial obligations.”). The supervision fee and the accrual of interest section of the judgment and sentence should be stricken.

As to the \$100 DNA collection fee, the state disagrees with Abarca’s argument that the statute is satisfied by the collection of his DNA pursuant to California statute following his California convictions. RCW 43.43.7541 provides that “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.” (emphasis added). The statutory reference to the “the state” is a clearly a reference to the State of Washington, not California. Moreover, the statute is clear that the distribution of these funds is intended to fund this state’s DNA database and to reimburse the state agencies that are directed to collect the samples. *See also* RCW

43.43.7532 (providing for the creation of the “DNA database account” where the receipts of the subsection 7541 fees are to be deposited).

The collection of DNA in California does not serve the collection purposes of the State of Washington. Moreover, Abarca provides no proof or argument that California would share the DNA sample with Washington. The record is clear that the State of Washington has never collected Abarca’s DNA.

The DNA fee was considered to be mandatory, but the new legislation added the “unless the state has previously collected” language. RCW 43.43.7541; Second Substitute H.B. 1783, § 18, 65th Leg., Reg. Sess. (Wash. 2018); *State v. Phillips*, 6 Wn. App.2d 651, 677, 431 P.3d 1056 (2018) *review denied* 438 P.3d 116 (2019). By this new provision, a subsequent DNA collection fee is not allowed if the defendant’s DNA “is on file with the Washington State Patrol Crime Lab.” *Phillips*, 6 Wn. App.23d at 651. Since Abarca has never had DNA collected in Washington state, his sample is not on record with the state patrol. This cost should remain.

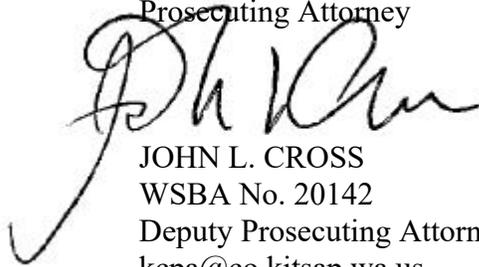
**IV. CONCLUSION**

For the foregoing reasons, the matter should be remanded with order to amend the judgment and sentence to exclude the \$200 filing fee, the discretionary supervision fee, and the accrual of interest on non-restitution LFO.

DATED May 30, 2019.

Respectfully submitted,

CHAD M. ENRIGHT  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney.

JOHN L. CROSS  
WSBA No. 20142  
Deputy Prosecuting Attorney  
kcpa@co.kitsap.wa.us

**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

**May 30, 2019 - 3:53 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51673-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Peter Abarca, Appellant  
**Superior Court Case Number:** 17-1-01045-4

**The following documents have been uploaded:**

- 516730\_Briefs\_20190530155246D2256839\_4555.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Abarca Peter 20190530 coa ramirez response.pdf*

**A copy of the uploaded files will be sent to:**

- KCPA@co.kitsap.wa.us
- bleigh@tillerlaw.com
- ptiller@tillerlaw.com
- rsutton@co.kitsap.wa.us

**Comments:**

---

Sender Name: Elizabeth Allen - Email: erallen@co.kitsap.wa.us

**Filing on Behalf of:** John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email: )

Address:  
614 Division Street, MS-35  
Port Orchard, WA, 98366  
Phone: (360) 337-7171

**Note: The Filing Id is 20190530155246D2256839**