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Court of Appeals
Division II
State of Washington
NO. 51901-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KALI ADELBAI ETPISON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01827-18

SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED May 30, 2019, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in assessing discretionary legal financial obligations (LFO) against an indigent defendant and in ordering the accrual of interest on non-restitution LFO? PARTIAL CONCESSION OF ERROR, the DNA collection fee should remain.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The facts and procedures in this case are well briefed by the parties in the initial briefing. Facts relevant to the supplemental issue are:

Etpison had appointed counsel below. CP 19. The trial court found him indigent and entered an order of indigency for appeal. CP 236-237.

The trial court assessed legal financial obligations (LFO) against Etpison that included a \$200 filing fee, a \$100 DNA collection fee, and a Department of Corrections (DOC) monthly supervision fee. CP 6-7. The trial court also ordered that all the LFO ordered were to bear interest at 12%. CP 7.

The judgment and sentence indicates that Etpison had no criminal history before these offenses. CP 206.

III. ARGUMENT

A. THE TRIAL COURT ERRONEOUSLY ASSESSED AN INDIGENT DEFENDANT A FILING FEE AND A DISCRETIONARY SUPERVISION FEE AND ERRONEOUSLY ORDERED INTEREST ON NON-RESTITUTION LFO AND THOSE THREE ERRORS SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE. THE DNA COLLECTION FEE WAS PROPERLY LEVIED AND SHOULD REMAIN.

Etpison argues that some of the discretionary LFO assessed against him should be stricken because he is indigent. He further claims that the imposition of interest was improper and that provision should also be stricken. Etpison is correct except with regard to the \$100 DNA collection fee.

First, the state has no information that would demonstrate that Etpison is not indigent. He had appointed counsel in the trial court and the trial court entered an order of indigency for the present appeal. RCW 10.01.160 directs that Etpison's indigency be determined "at the time of sentencing. . ." At sentencing, it appears that Etpison was indigent.

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 the 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 accrual of interest section of the judgment and sentence should be stricken.

But the \$100 DNA collection fee should remain. 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.”

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. Etpison has no prior felonies. He therefore has not previously had a DNA sample taken. He must pay for the one taken this time. The \$100 DNA collection fee should be included in Etpison's LFO.

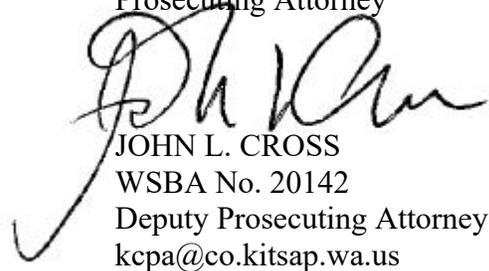
IV. CONCLUSION

For the foregoing reasons, Etpison's judgment and sentence should be amended to exclude the filing fee, the supervision fee, and the accrual of interest on non-restitution LFO. The DNA collection fee should be retained.

DATED May 30, 2019.

Respectfully submitted,

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