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NO. 51929-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DEVIN JOHN KONECNY,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing an exceptional sentence that was “clearly excessive.”

2. The sentencing court erred by imposing the costs of collections and community custody, and imposing interest on legal financial obligations (LFOs) other than restitution.

3. The sentencing court erred by failing to conduct an adequate inquiry into the defendant’s ability to pay before imposing discretionary LFOs.

Issues Pertaining to Assignments of Error.

1. Appellant Devin Konecny was diagnosed with multiple sclerosis. The sentencing court acknowledged a lengthy term of incarceration may be equivalent to a life sentence. The record shows Konecny did not intend harm; rather his actions displayed reckless immaturity born out of a lifetime of neglect, abuse, and drug exposure since infancy. Given the above, was the court’s imposition of an exceptional sentence of 348 months “clearly excessive”?

2. The sentencing court found Konecny indigent, and orally waived all fees and costs excepting the mandatory victim penalty assessment and restitution. However, the court’s judgment and sentence imposes costs of collection and community custody, and interest on all

LFOs. Must these costs and fees be stricken in light of State v. Ramirez¹ and recent statutory amendments?

3. The sentencing court failed to inquire into Konecny's ability to pay during the sentencing hearing before imposing discretionary costs. Did the court fail to conduct an adequate inquiry as required by State v. Blazina²?

B. STATEMENT OF FACTS

1. History of Abuse, Neglect, Drug Use & Medical Condition.

From infancy, Konecny was exposed to hard drugs, abuse and neglect. Konecny was born to a 15-year-old cocaine user. CP 122. His father, a drug user himself, abandoned Konecny's mother when he learned of her pregnancy. CP 122. When Konecny was 10 years old he met his father, but shortly thereafter, his father was murdered, apparently in connection with his drug use. CP 123. Konecny also lost his step-father—his only stable male role model—at around age five when his mother relapsed and divorced. CP 122-23. Konecny was then neglected by his mother and physically and sexually abused by her boyfriends. CP 123, 186. When his mother was jailed on domestic violence charges, Konecny went to live with his grandfather, also a methamphetamine addict. CP 123. His grandfather permitted him to skip school regularly,

¹ State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

² State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

kept drugs in the home, and allowed Konecny to associate with other drug users. CP 123.

As a result of this environment, Konecny began using hard drugs at an incredibly early age, including cocaine and methamphetamines by approximately the fifth grade. CP 123; RP 43. He was incarcerated for a felony at age 12 for leaving an inappropriate note on the school bus, and convicted again and labeled a sex offender at age 18 for consensual sex with a 13-year-old. CP 123-25.

He dropped out of school in eighth grade. CP 182. His educational history showed he required additional assistance in school because he “didn’t catch onto stuff like other kids,” but he had “no record of special education accommodation” in the year he dropped out. CP 182-83. He began drinking heavily at age 10, used methamphetamines, inhalants, mushrooms, cigarettes dipped in formaldehyde, and ultimately heroin. CP 183.

As a result of his background, Konecny was diagnosed with post-traumatic stress disorder and severe stimulant use disorder. CP 187. In 2008, while in custody, Konecny was also diagnosed with multiple sclerosis (M.S.). RP 44; CP 183. Incarceration records showed he had experienced pain and weakness in his legs, a slow loss of vision, declining function of his bladder, neuropathic pain, and grand mal seizures. CP 183.

He also had a serious head injury after an altercation with another inmate. CP 183-84.

Konecny underwent a competency evaluation. CP 47. An initial evaluation noted concerns that Konecny's M.S., as complicated by the recent head injury, had contributed to cognitive decline and recent self-reported confusion. CP 42-43. However, the final evaluation resulted in a diagnosis of "[m]alingerin[ing]." CP 47.

2. Charges & Plea

In 2016, Konecny had an outstanding warrant for his arrest. CP 4. Acting on a tip, a team of police officers approached the apartment building where Konecny was staying. CP 4. Rather than submitting to arrest, Konecny panicked, fired shots into the wall toward the officers, and declared he would rather die than go back to prison. CP 4-5. He eventually submitted after officers pumped tear gas into the apartment unit. CP5. The Pierce County Prosecutor's Office charged Konecny with ten counts of first-degree assault, one count of first-degree unlawful firearm possession, and two counts of intimidating a public servant. CP 7-15.

Konecny pled guilty to the amended charges of ten second-degree assaults, five counts of which included firearm enhancements. CP 91, 99

(plea), 84-90 (Second Amended Information). The parties stipulated to his criminal history and agreed to an offender score of 33. CP 215-16; RP 38.

The standard range on each of the ten assaults was 63-84 months, plus 180 additional months of “flat time” for the five firearm enhancements. CP 216; RP 37-38. In sum, this amounted to a standard range of 248-264 months.

3. Sentence & Appeal

The State asked the court to impose the high end of the standard range for nine of the ten counts, and to run one count consecutive to the rest, resulting in an exceptional sentence of 348 months. RP 348.

The defense conceded Konecny’s high offender score gave the court authority to impose an exceptional sentence, but requested the high end of the standard range. RP 42. Defense counsel emphasized that Konecny’s history of trauma and abuse left him suffering from post-traumatic stress disorder (PTSD), borderline personality disorder, and stimulant use disorder, all of which had limited his emotional maturity. RP 44. Counsel argued his level of maturity was more similar to a 6-8 year old than an adult. RP 44.

Konecny expressed remorse for his actions. RP 46. He apologized to the officers and their family members, stating he was thankful none of the officers had been injured but recognized he had still caused them

harm. RP 45-46. He acknowledged that his lifetime of family problems and substance abuse had contributed to his circumstances, but did not want to make excuses and accepted full responsibility for his conduct. RP 45-46.

At the time of sentencing, the trajectory of Konecny's multiple sclerosis was unknown. RP 44. He was still able to walk, but his mobility was decreased while in custody. RP 44. Even with the sentence recommended by the defense, it was unlikely Konecny would be able to walk out of prison upon his release. RP 44. Given his illness and other trauma-related issues, Konecny also would likely not be able to work upon release. RP 45. His grandfather, and primary source of support, was also unlikely to be able to support or assist him by the date of his release. RP 45.

The sentencing court adopted the State's recommendation. RP 49. The court found Konecny did not get "a very fair shake in life," given his history of abuse, neglect, and exposure to hard drugs at an early age. RP 47. The court reasoned that background provided authority to impose an exceptional sentence downward. RP 48. The court also expressed "very real concerns" that even the defense recommendation would ultimately "end up being the equivalent [to] a life sentence," and stated, "I don't do that lightly, of course." RP 48. However, the court considered that

Konecny's conduct put people's lives at risk, and concluded imposition of the State's recommendation of 348 months was most appropriate. RP 48.

The court found Konecny indigent, and orally stated it would waive all fees and fines excepting the victim penalty assessment (VPA) and restitution. RP 49. In the written order, the court waived the DNA and criminal filing fee, and imposed the VPA and Restitution. CP 224. Spaces for attorney fees, fine, other costs, and costs of incarceration were left blank. CP 224-25. Through its written order, the court also imposed collection costs and interest on the financial obligations. CP 225. The court also imposed 18 months of community custody as well as payment of "supervision fees" and "community placement fees" as conditions of community custody. CP 228, 232.

Konecny timely appeals. CP 188.

C. ARGUMENT

1. THE TRIAL COURT'S EXCEPTIONAL SENTENCE IS "CLEARLY EXCESSIVE."

An exceptional sentence may be reversed as an abuse of discretion where the sentence is clearly excessive. RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).³ A trial court abuses its discretion

³ An excessive sentence may also be reversed under a clearly erroneous standard where there is insufficient evidence to support the reasons for imposing the sentence, or under a de novo standard where the sentencing court's reasons do not justify a departure from the standard range. RCW 9.94A.585(4); Law, 154 Wn.2d at 93. However,

when its decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Where “in light of the record” the sentence length “shocks the conscience of the reviewing court,” it must be reversed under this standard. State v. Ross, 71 Wn. App. 556, 571, 861 P.2d 473 (1993). Here, the exceptional sentence was manifestly unreasonable and clearly excessive where (i) several factors warranted an exceptional sentence below, not above the standard range, (ii) operation of the multiple offense policy in this context was contrary to general purposes of the SRA, and (iii) Konecny’s multiple sclerosis diagnosis meant the sentence imposed was *de facto* life imprisonment, and as such, is disproportionate to sentences imposed on other defendants for similar crimes. This Court should reverse and remand for resentencing.

i. Several factors warranted an exceptional sentence downward.

As detailed above, Konecny has a childhood history characterized by abuse, neglect, and exposure to hard drugs. See RP 42-44, 47; CP 122-23, 182-84, 186-87. Defense counsel explained his actions resulting in the present convictions were the result of recklessness, immaturity, and PTSD arising out of this history. RP 44. Apart from himself, no one was

Konecny does not dispute that there is a legally adequate basis to impose an exceptional sentence under the free crimes aggravator. RCW 9.94A.535(2)(c).

injured. RP 45-46. Still Konecny expressed remorse at sentencing, acknowledged the risk and harm caused, and accepted full responsibility for his actions. RP 44-46.

The SRA permits downward departures from the standard range for mitigating circumstances. RCW 9.94A.535(1). The statute provides an illustrative and non-exclusive list. Relevant items include considerations of the defendant's experience of a pattern of abuse and violence by the victim, "duress" or "threat" that may be an incomplete defense but that "significantly affected his ... conduct." RCW 9.94A.535(1)(h) (abuse by victim), (j) (same), (c) (duress, threat or coercion). The list also encourages courts to consider whether "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e).

These examples show the Legislature intended circumstances of abuse, trauma, and related capacity could be considered by sentencing courts and justify an exceptional sentence below the standard range. Here, the record shows Konecny's history of childhood abuse and trauma impaired his emotional maturity and consequently his ability to defer gratification or conform his conduct to the requirements of the law. RP

44. Given the non-exclusive list of related factors, Konecny's history should be considered significant mitigating factors.

The court chose to impose an exceptional sentence upward, citing the risk Konecny's actions posed to others' lives. RP 48. However, before doing so, and in keeping with the analysis above, the court acknowledged several factors, including the history of abuse and neglect, were mitigating and weighed in favor of an exceptional sentence downward. RP 47-48.

Where several factors weighed in favor of an exceptional sentence downward, even if one factor—protecting the community against risk of future harm—weighed in favor of an exceptional sentence upward, a sentence within the standard range was appropriate. An exceptional sentence above the standard range was clearly excessive.

ii. Operation of the multiple offense policy contradicts the purposes of the SRA.

The SRA also permits an exceptional sentence below the standard range where “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g). Here, the multiple offense policy applies to Konecny's case and results in a sentence that contradicts the purposes of the SRA. This

is an additional mitigating factor that warrants an exceptional sentence down, and makes the court's exceptional upward sentence clearly excessive.

Under the multiple offense policy, for each of Konecny's ten assaults, the nine other presently charged assaults were to be treated as prior assaults for purposes of his offender score. RCW 9.94A.589(1)(a). Crimes determined to be the "[s]ame criminal conduct" are treated as one crime for purposes of the offender score. *Id.* However "[s]ame criminal conduct" is defined to require the "same victim." RCW 9.94A.589. Thus, Konecny's action of discharging a firearm constitutes ten separate assaults, rather than one, because ten officers were present and each individual officer constitutes a separate count. As calculated, each additional charge increased Konecny's offender score by two points. Thus, operation of the multiple offense policy under this statute meant that his current actions increased his offender score by eighteen points. *Id.*

Konecny's already high offender score meant that operation of this rule did not affect his standard range calculation. *See* CP 215-16; RP 38 (fourteen points before current convictions). However, the rule drastically increased his offender score, and made the court much more receptive to the State's free crimes argument for an exceptional sentence above the standard range. The resulting sentence was clearly excessive in light of the purposes of the SRA.

The SRA states its general purpose “is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences.” RCW 9.94A.010. The Act also lists the following specific purposes:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state’s and local governments’ resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010 (emphasis added).

Here, the court acknowledged the sentence it had chosen to impose was greater than the defense request, and the defense request had the potential to be a life sentence. RP 48. Where the sentence had a strong potential to be greater than a life sentence, Konecny was not afforded any opportunity to improve himself, contrary to the purpose stated in part (e). RCW 9.94A.010(e).

This factor is particularly compelling in light of Konecny’s record. The court acknowledged Konecny did not get “a very fair shake in life,”

given his history of childhood abuse, neglect, and drug exposure. RP 47. This underscores that Konecny may have not had previous opportunities to improve himself. Such a conclusion is reinforced where, as defense counsel pointed out, during Konecny's early interactions with the juvenile and criminal justice system, opportunities to access diversionary and rehabilitative programs were glaringly absent. CP 122, 125. Thus, a juvenile prank on a school bus driver, and teenaged consensual sexual activity both resulted in early and lengthy incarceration, rather than genuine rehabilitation opportunities. CP 122, 125.

Where operation of the multiple offense policy drastically increased his offender score, and the resulting sentence was clearly excessive given the rehabilitative goal of the SRA, another mitigating factor is present. Given this, and other mitigating factors discussed above, an exceptional sentence above the standard range was clearly excessive.

iii. The de facto life sentence imposed was clearly excessive, particularly in light of sentences imposed for similar crimes.

Jurisprudence supports the conclusion that Konecny's sentence is clearly excessive.

Konecny's case stands in stark contrast to the exceptional sentence upheld in State Kolesnik, a case with similar facts but involving

considerably more violence and injury. 146 Wn. App. 790, 806, 192 P.3d 937 (2008).

In Kolensnik, the Court upheld an exceptional sentence of 240 months, approximately twice the standard range, for first degree assault. Id. Kolesnik stabbed a police officer multiple times in the head with a screwdriver. Id. The court found he “knowingly and violently assaulted” the officer, resulting in “life threatening” and “permanent” injuries. Id. Thus, Kolesnik’s case involved a clear intent to injure and a result of serious permanent injury. By contrast, Konecny’s actions involved the discharge of his firearm with intent to dissuade officers from entering. CP 99, 118. This involved recklessness, rather than intent to injure. RP 46; CP 99, 118. And no officer suffered injury. RP 46; CP 118.

The Kolesnik Court’s reasoning is mirrored in the unpublished, but similarly persuasive, opinion of State v. Ferrer, 195 Wn. App. 1044 (2016) (unpublished).⁴ Ferrer was convicted of second degree assault and felony harassment of his wife after he hid in her bedroom closet, pinned her to the bed, punched her in the head and face repeatedly, and threatened to kill her, all while her two young daughters were also on the bed, screaming and crying, and her older daughter was on the phone calling 911. Id. at 1.

⁴ Unpublished Court of Appeals opinions, filed after March 1, 2013, may be cited as nonbinding authorities and “may be accorded such persuasive value as the court deems appropriate.” GR 14.1(a).

The standard sentence ranges were 12-14 months for the second degree assault, and 4-12 months for the felony harassment. Id. at 2. The jury found additional aggravating factors: three minors had been present during a domestic violence assault. Id. at 2. The sentencing court imposed the top of the standard range for the assault, plus 12 additional months for each minor present, all to run concurrent to one another, and consecutive to 12 months imposed for the felony harassment. Id. at 3.

The Court of Appeals upheld this 50 month exceptional sentence, 36 months above the standard range, finding it was not “clearly excessive.” Id. at 4. Division Two reasoned the sentence did not “shock the conscience” where Kolesnik parked his car down the street, waited and hid in his wife’s closet, and violently assaulted her despite being aware that three minor children were present and observing. Id. at 5.

In contrast, Konecny’s case involved no minor children, no violent injuries, and recklessness. His sentence also involved more than twice as much time added on by means of the exceptional sentence; 84 additional months, rather than 36 months. Thus, Konecny’s case, particularly in light of the lack of any injuries, is distinguishable from another assault conviction where the court upheld the imposition of exceptional sentences.

This conclusion is particularly true where the trial court imposed a *de facto* life sentence. At the time of sentencing, Konecny had been

diagnosed with multiple sclerosis. RP 44. The trajectory of his disease was unknown. RP 44. However, it was known that his mobility was limited while he was incarcerated. RP 44. By the date of release, even as requested by the defense, it was unlikely he would be able to walk or work. RP 44-45. And it was also unlikely his grandfather, and only means of support, would be available to assist him. RP 45. In light of these facts, the court noted its “very real concerns” that even the term of imprisonment requested by the defense could be “equivalent” to a life sentence. See RP 48. Despite this, the court imposed the higher exceptional sentence requested by the State. RP 48.

Case law shows that a life sentence may be clearly excessive even in a murder case involving less than the most egregious facts, and would be clearly excessive as applied to Konecny’s assaults given the reckless intent and lack of resulting injury.

In State v. Ronquillo, the defendant was convicted of murder and other assault charges. 190 Wn. App. 765, 768, 361 P.3d 779 (2015). At age 16, Ronquillo rode in a car with other gang members and fired six shots into a group of students standing in front of Ballard High School, resulting in the death of one bystander and injury to another student. Id. at 769. The sentencing court initially imposed a 621 month sentence, and revised it to correct an error to result in 615.75 months. Id. at 769, 774.

The sentencing court concluded that the prohibition on life imprisonment for juveniles did not apply. Id. at 773.

However, on appeal, Division One reasoned “Ronquillo’s sentence contemplates that he will remain in prison until the age of 68. This is a de facto life sentence. It assesses Ronquillo as virtually irredeemable. This is inconsistent with the teachings of Miller and its predecessors.” Id. at 775 (emphasis added) (citing Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)). In reaching this decision, the Ronquillo Court found a decision of the Idaho Supreme Court was persuasive where it determined it was appropriate for a sentencing court to consider that a lengthy prison term would result in “the prospect of geriatric release.” Id. at 775 (quoting State v. Null, 836 N.W.2d 41, 71 (Iowa 2013)).

In dicta, the Ronquillo Court suggested the sentence may also be “clearly excessive” in light of the purposes of the SRA, and directed the sentencing court to consider the seven statutory purposes of the SRA as well as recent case law discussing the reduced culpability of youthful offenders. Id. at 784-85 (citing RCW 9.94A.010; RCW 9.94A.535(1)(g); Miller, 567 U.S. 460; State v. O’Dell, 183 Wn.2d 680, 358 P.3d 359 (2015)).

Here, the court imposed a sentence that it knew and acknowledged to be greater than a sentence that could be equivalent to life imprisonment.

This was where Konecny's shots were fired into a wall, in the general direction of offices, and resulted in no injuries, not fired into a crowd of students resulting in death and injury from bullet shrapnel. Although Konecny was in his late twenties at the time of the offense, his emotional maturity had been limited by his traumatic background. CP 122, 187. Given Konecny's multiple sclerosis diagnosis, his health, family support, and employment circumstances upon release are equivalent to a geriatric release. In these circumstances, and given the sentencing court's own concerns regarding the length of the sentence, this Court should find Konecny's sentence was a clearly excessive *de facto* life sentence. This Court should remand for resentencing.

2. THE COURT MAY NOT IMPOSE DISCRETIONARY COSTS OR INTEREST ON NON-RESTITUTION LFOs BECAUSE KONECNY WAS INDIGENT.

The recently amended statute on LFOs prohibits the imposition of non-restitution interest and of discretionary costs on indigent defendants. Here, the court imposed multiple discretionary LFOs, including collection costs and community custody supervision costs, and imposed interest on all LFOs. CP 225, 228, 232. Because Konecny is indigent, the discretionary LFOs must be stricken and the interest must be modified to exclude non-restitution LFOs.

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 prohibit the imposition of discretionary 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, one week before Konecny was sentenced. Ramirez, 191 Wn.2d at 738; RP 36 (sentenced on June 14, 2018).

The statute defines “indigent” as a person (a) who 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). This definition is contrasted with “[i]ndigent and able to contribute” under subsection (4), defined as a person who “at any stage of the proceeding” has available funds sufficient to contribute to some but not all of the anticipated costs of counsel. RCW 10.101.010(4).

i. Konecny was indigent at the time of sentencing.

Here, the record established that Konecny was indigent at the time of sentencing. The sentencing court expressly found Konecny was indigent. RP 49. Konecny moved for an order of indigency to proceed with his appeal “wholly at public expense.” CP 241. In an attached certificate, Konecny asserted he had completed ninth grade, did not have a current job, had one dependent, and had M.S., PTSD, and anxiety impacting his ability to work. CP 242. He and his attorney anticipated his financial circumstances would not improve in the foreseeable future. CP 241, 243. In response, the court granted an “Order of Indigency” finding Konecny authorized to appeal at public expense. CP 244-45. Thus, Konecny meets the statutory definition of “indigent” under RCW 10.101.010(3) because he lacked the funds to pay for his own defense at trial or on appeal.

Despite finding Konecny indigent, and orally waiving all costs excepting the VPA and restitution, the sentencing court imposed discretionary costs in its written order, including collection costs and supervision fees. RP 49; CP 224-25, 228, 232. The court also imposed interest on all LFOs. CP 225. These costs must be stricken because they violate recent statutory amendments limiting discretionary fees and

interest. RCW 10.82.090(1) (interest); RCW 10.101.010(3) (discretionary fees); Ramirez, 191 Wn.2d at 750 (remedy is remand to strike fees).

ii. Non-restitution interest is prohibited.

The court’s written order imposed interest on Konecny as follows: “INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 225 (citing RCW 10.82.090). This language imposes interest on all LFOs imposed by the judgment and sentence.

RCW 10.82.090 requires the court to impose interest on restitution costs. RCW 10.82.090(1). However, the statute also states, “As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). The non-restitution portion of the court’s written order violates this provision of the statute. This Court should remand with instructions to modify the judgment and sentence to impose interest only on restitution.

iii. Collection costs are discretionary, and therefore prohibited.

The court imposed collection costs, requiring Konecny to “pay the costs of services to collect unpaid legal financial obligations per contract or statute.” CP 225 (citing RCW 36.18.190; RCW 9.94A.780; RCW

19.16.500). As discussed below, each of the three statutory sources of authority cited by the sentencing court provide, at best, discretionary authority.

First, RCW 36.18.190 provides only discretionary authority for the superior court to impose collection costs. “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).

Second, RCW 9.94A.780 also provides only discretionary authority to the Department of Corrections to assess a community corrections intake fee, and for the Department and county clerk to assess associated collection costs. However, as discussed below, none of this authority is expressly granted to the court and all of the costs are discretionary.

Subsection (1) of the statute states an offender who is sentenced to community supervision “shall pay to the department of corrections the supervision intake fee... which shall be considered as payment or part of payment of the costs of establishing supervision to the offender.” RCW 9.94A.780(1). However, the statute also provides, “The department may exempt or defer a person from the payment of all or any part of the intake fee based upon any of the following factors:” including (a) inability to

obtain sufficient employment income, (b) student status, (c) employment handicap, (d) age, (e) existence of dependents makes payment an “undue hardship”, or (f) “Other extenuating circumstances as determined by the department.” RCW 9.94A.780(1) (emphasis added). The statute further provides that “[t]he department of corrections shall adopt a rule prescribing the amount of the assessment.” RCW 9.94A.780(2).

Thus, this section addresses the authority of the Department of Corrections to impose, waive or defer community custody intake fees; the section does not grant any authority to the court to impose these fees at the time of sentencing. Even if it were interpreted to provide court authority, the fees are discretionary because the statute allows for the fees to be waived or deferred on the basis of factors affecting inability to pay. RCW 9.94A.780(1).

Subsection (7) of the statute further states that if a county clerk assumes responsibility for community custody fees assessed by the Department of Correction, “the clerk may impose a monthly or annual assessment for the cost of collections.” (Emphasis added). Again, this subsection provides authority to another party, here a county clerk, to assess collection costs. Nothing in this section addresses authority of the court. Regardless, the authority is discretionary because the statute uses the word “may.” RCW 9.94A.780(7).

The third statute cited by the sentencing court's order, RCW 19.16.500(1), provides general authority to government entities, including counties, to retain private collection agencies. RCW 19.16.500(1)(a). Under the statute, government entities "may add a reasonable fee" for collections. RCW 19.16.500(1)(b) (emphasis added). Thus, this statute also provides only discretionary authority to impose collection costs.

The court's general authority to impose costs, and the specific authority cited by the written order, all provide, at best, discretionary authority to impose collection costs. RCW 9.94A.780(1), (2), (7); RCW 10.01.160(1); RCW 19.16.500; RCW 36.18.190. This court should find the costs of collection are discretionary, and are therefore prohibited by RCW 10.01.160(3).

iv. Community placement fees are discretionary, and therefore prohibited.

The court required Konecny to pay "community placement fees as determined by DOC" and "supervision fees as determined by DOC" as a condition of "community placement or community custody." CP 228, 232.

The judgment and sentence does not cite to any legal authority for the imposition of this "community placement fees" or "supervision fees," which seem to be two names for the same cost. See CP 232. The cost

appears to be authorized by the statute discussing allowable community custody conditions. RCW 9.94A.703(2)(d).

Examination of the statutory language, and recent case law, establishes that these costs are discretionary. Subsection .703(2) 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 this language authorizing the court to waive the cost, Division Two recently noted the cost is discretionary. State v. Lundstrom, ___ Wn. App. ___, 429 P.3d 1116, 1121 n.3 (2018) (quoting RCW 9.94A.703(2)(d)). This Court should find the cost is discretionary and thus prohibited.

v. *The record suggests the discretionary costs may have been imposed as an oversight.*

In Lundstrom, the Court also recognized that while the sentencing court there had intended to impose only mandatory fees, it had also imposed this discretionary community custody fee. Id. This is likely what occurred in Konecny’s case as well.

In Konecny’s case, the court stated “I am finding [Konecny] indigent, and I believe can waive all of the fines and costs except for the crime victim penalty assessment and the restitution, if there is any.” RP 49. Consistent with this stated intent, in the written order the court waived

the DNA and criminal filing fee, and imposed the VPA and Restitution. CP 224. Spaces for attorney fees, a fine, other costs, and costs of incarceration were left blank. CP 224-25.

Yet the court's written order contains pre-printed text imposing the additional discretionary LFOs discussed above. For example, the court imposed the community custody costs as the seventh of ten pre-printed community custody conditions, and imposed this cost again in pre-printed text in Appendix F. CP 228, 232. Similarly, collection costs and interest were imposed via pre-printed text, not in handwriting or a space requiring an affirmative mark. CP 225. This strongly suggests the imposition of these discretionary LFOs and interest may have been mere oversight, similar to the issue in Lundstrom.

vi. The proper remedy is to remand to strike the prohibited costs.

As discussed above, the imposition of discretionary LFOs and of interest on non-restitution LFOs violates the amended LFO statute. The Washington Supreme Court recently concluded that where LFOs violate the recently amended statute, the appropriate remedy is to remand to the sentencing court to strike the unauthorized fees. Ramirez, 191 Wn.2d at 750. Resentencing is unnecessary. Id. Accordingly, this Court should

remand to strike the community custody and collection costs, and strike the interest for all non-restitution LFOs.

3. THE SENTENCING COURT FAILED TO CONDUCT AN ADEQUATE BLAZINA INQUIRY.

The discretionary fees imposed on Konecny are also unauthorized for a second, independent reason. The sentencing court failed to conduct an adequate inquiry into Konecny's ability to pay before imposing these costs.

Both before and after statutory amendments to the LFO statute, sentencing courts were required to conduct an individualized inquiry into a defendant's ability to pay before imposing discretionary costs. Ramirez, 191 Wn.2d at 742; Blazina, 182 Wn.2d at 839; compare Former RCW 10.01.160(3) (2015) with Current RCW 10.01.160(3). The Ramirez Court observed despite these requirements, "costs are often imposed with very little discussion." Ramirez, 191 Wn.2d at 739.

As a result, the Ramirez Court took the opportunity to clarify the requirements of an adequate Blazina inquiry. First, the sentencing court must conduct an inquiry "on the record," and "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. at 742 (quoting Blazina, 182 Wn.2d at 838). Second, this inquiry must include five broad categories: (1)

“employment history,” including “present employment and past work experience,” (2) “income,” (3) “assets and other financial resources,” (4) “monthly living expenses,” and (5) “other debts,” “including other LFOs, health care costs, or education loans,” “restitution,” and other general costs associated with “incarceration.” Ramirez, 191 Wn.2d at 735, 744; Blazina, 182 Wn.2d at 838.

The adequacy of a sentencing court’s Blazina inquiry is a question of law reviewed *de novo*. Ramirez, 191 Wn.2d at 740-41. In Ramirez, the court directed only two questions to the State regarding the defendant’s ability to pay. Id. at 736-37. Although the defendant had offered some financial information during his allocution, this was not sufficient to satisfy Blazina. Ramirez, 191 Wn.2d at 744-46. The court also reiterated that boilerplate language in the written order could not substitute for the required on-the-record inquiry. Ramirez, 191 Wn.2d at 742 (quoting Blazina, 182 Wn.2d at 838).

Here, the sentencing court did not inquire into the five required categories during the sentencing hearing. This inadequacy cannot be remedied by other financial information supplied by the defendant elsewhere in the record. Ramirez, 191 Wn.2d at 742, 744-46.

The remedy for a failure to conduct an adequate Blazina inquiry is to remand for resentencing. Ramirez, 191 Wn.2d at 746. However,

where, as here, the costs also violated recent statutory amendments, the court need not reach the Blazina issue, and instead should remand to strike the unauthorized fees. Ramirez, 191 Wn.2d at 746. In Konecny's case, remand for resentencing is particularly unnecessary where the sentencing court already made clear its intention to waive all fines and costs excepting the VPA and restitution. RP 49.

D. CONCLUSION

As discussed above, Konecny's sentence is clearly excessive where the court imposed a sentence it acknowledged to be a *de facto* life sentence, the record provides several mitigating factors, and a *de facto* life sentence is disproportionate considering other offenders' sentences for more serious crimes. Moreover, the court erred by imposing discretionary costs and interest on non-restitution LFOs.

Konecny respectfully requests that this Court vacate the exceptional sentence, and remand for resentencing with instructions to strike discretionary LFOs and non-restitution interest.

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DATED this 21st day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, reading "E. Rania Rampersad". The signature is written in black ink and is positioned above the printed name.

E. RANIA RAMPERSAD

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