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Court of Appeals
Division II
State of Washington
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NO. 52098-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH UELTZEN,

Appellant.

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

The Honorable Christopher Melly, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The \$100 Domestic Violence (DV) penalty assessment imposed by the trial court under RCW 10.99.080 should be stricken under the Supreme Court's recent decision in State v. Ramirez.¹

2. The \$200 "criminal filing fee" imposed by the trial court at sentencing should be stricken under Ramirez.

3. The \$500 "fees for appointed attorney" imposed by the trial court at sentencing should be stricken under Ramirez.

Issue Pertaining to Assignments of Error

Under the Supreme Court's decision in Ramirez, should the \$100 DV penalty assessment, \$200 criminal filing fee and \$500 fee for appointed counsel be stricken from appellant's judgment and sentence because he was indigent at the time of sentencing?

B. STATEMENT OF THE CASE

On June 27, 2018, appellant Joseph Ueltzen was convicted by a jury in Clallam County Superior Court of felony harassment, intimidating a witness and fourth degree assault. CP 28, 30-31. The jury also found the crimes were committed against a member of Ueltzen's family or

¹ State v. Ramirez, ___ Wn.2d, ___, 426 P.3d 714, 2018 WL 4499761 (Sept. 20, 2018).

household. CP 29. This was Ueltzen's first felony conviction. RP² 345-46.

Sentencing was held before the Honorable Judge Christopher Melly on July 5, 2018. The court imposed 15 months of incarceration, 12 months of community custody, and imposed \$1400 in Legal Financial Obligations (LFOs). CP 17-21; RP 351-53. The LFOs ordered by Judge Melly consist of a \$500 Victim Assessment, a \$100 Domestic Violence assessment, a \$200 Criminal filing fee, a \$100 DNA collection fee and \$500 in "Fees for court appointed attorney." CP 19-20.

Ueltzen appeals his judgment and sentence. CP 12. Ueltzen applied for and was granted an "Order of Indigency" by Judge Melly. CP 5-10. The Order of Indigency specifically states: "'THE COURT FINDS that the defendant lacks sufficient funds to prosecute an appeal and that applicable laws grant the defendant a right to review at public expense to the extent defined in this ORDER;". CP 5.

² There are two consecutively paginated volumes of verbatim report of proceedings referenced herein as "RP."

C. ARGUMENT

THE DISCRETIONARY LFOs IMPOSED BY THE TRIAL COURT SHOULD BE STRICKEN BECAUSE UELTZEN IS INDIGENT.

Ueltzen is indigent under the applicable statutory criteria. CP 5. Therefore, the \$100 Domestic Violence assessment, a \$200 Criminal filing fee, and \$500 in “Fees for court appointed attorney,” all of which are discretionary, should be stricken from Ueltzen’s judgment and sentence under the recent Ramirez decision.

In Ramirez, the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending on appeal. Ramirez, 426 P.3d at 718, 721-23.

HB 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, 426 P.3d at 721 (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 “also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17.” Ramirez, 426 P.3d at 722. Thus, HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. Accordingly, the Ramirez court struck the fee due to indigency. Ramirez, 426 P.3d at 723. Because Ueltzen is indigent, this Court should similarly strike the \$200 Criminal filing fee from his judgment and sentence.

HB 1783 also amends the RCW 9.94A.760, which now provides: “The court may not order an offender to pay costs as described in RCW 10.01.160 if the court finds that the offender at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” LAWS OF 2018, ch. 269, § 14. Ueltzen’s judgment and sentence states the \$500 in “Fees for court appointed attorney” was imposed under the authority of RCW 9.94A.760. CP 20. Because HB 1783 amended RCW 9.94A.760 to prohibit imposition of such costs and fees on indigent defendants, and Ueltzen is indigent, this Court should strike the fee from his judgment and sentence.

Although not explicitly addressed by Ramirez, RCW 10.99.080(1) provides,

All superior courts . . . may impose a penalty of one hundred dollars, plus an additional fifteen dollars on any person convicted of a crime involving domestic violence; in no case shall a penalty assessment exceed one hundred fifteen dollars on any person convicted of a crime involving domestic violence. The assessment shall be in addition to, and shall not supersede, any other penalty, restitution, fines, or costs provided by law.

(Emphasis added.)

“This [use of ‘may’ and ‘shall’ in a statute] indicates that the Legislature intended the two words to have different meanings: ‘may’ being directory while ‘shall’ being mandatory. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)) (modification of quote by Krall).

RCW 10.99.080(1) states a court “may” impose a DV penalty assessment and therefore constitutes a discretionary LFO. Id. HB 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. Laws of 2018, ch. 269, § 6(3). Because the DV penalty assessment is a discretionary LFO, and because Ueltzen is indigent, under Ramirez it too should be stricken from his judgment and sentence.

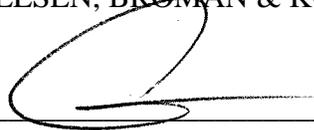
D. CONCLUSION

Remand in necessary to strike the discretionary LFOs imposed by the trial court in violation of HB 1783.

DATED this 14th day of December, 2018.

Respectfully submitted,

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