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Court of Appeals  
Division II  
State of Washington  
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NO. 52120-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOSEPH BRADY,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Michael Brady had over \$8,000 in discretionary legal financial obligations imposed for several appeals and personal restraint petitions he filed while he was incarcerated and indigent.

Mr. Brady filed a motion requesting the court remit these significant legal financial obligations because they constituted a manifest hardship. However, after he filed his motion to remit the Legislature changed the law on legal financial obligations. Where before Mr. Brady was entitled to seek remission at any time, the amended version of RCW 10.73.160(4) limited a person's ability to seek remission to after release from total confinement. The trial court applied the amended statute retroactively to Mr. Brady, denying him the right to seek relief from onerous legal financial obligations because he has not yet been released from total confinement.

Because an amended statute is presumed to apply prospectively, and retroactive application of this statute deprives Mr. Brady of his vested right to relief from legal financial obligations that pose a manifest hardship, he asks this Court to apply the law that was in effect at the time he filed for remittance and reverse the trial court order denying him relief.

B. ASSIGNMENT OF ERROR.

The trial court erred when it applied the amended statute retroactively to Mr. Brady's request for remission.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A statute is presumed to be applied prospectively and may not be applied retroactively when it deprives a defendant of a vested right. Const. art. I, §3; U.S. Const. amend. V, XIV. Mr. Brady was entitled to seek remittance from his legal financial obligations when he filed his motion to remit. Must the court interpret the subsequent amendment that prohibits him from obtaining this form of relief as applying only prospectively so as not to deprive Mr. Brady of his vested right to obtain remittance for his legal financial obligations that create a manifest hardship?

D. STATEMENT OF THE CASE.

Michael Brady has been incarcerated since 2002. CP 51, 80. At sentencing, the court found him indigent for the purposes of appeal. CP 51. In the years since, Mr. Brady has filed two direct appeals and many personal restraint petitions for which the Washington Supreme Court and the Court of Appeals imposed discretionary appellate costs against

him totaling over \$8,000.00. CP 50-78, 82. Although Mr. Brady's indigent status had been repeatedly affirmed throughout his sentence, the costs were added to Mr. Brady's judgment and sentence without an inquiry into his current or future ability to pay. CP 58-80.

Mr. Brady's earliest possible release date is June 2024. CP 54. He will have spent twenty-two years in prison. CP 54. Mr. Brady has no family financial support and no savings. CP 54. His programming while incarcerated affords him a small gratuity well below poverty wages,<sup>1</sup> and most of this gratuity is deducted to pay his LFOs. CP 87-112. Mr. Brady has made substantial progress in paying off both his mandatory and discretionary obligations. CP 87-112. Still, as of the date of his remittance motion, Mr. Brady still had \$1,672.94 of unpaid discretionary appellate costs. CP 83. He has also accrued \$241.12 in restitution interest, and regular interest of \$7,407.39. CP 83.

On May 29, 2018, Mr. Brady filed for remission of these appellate costs. CP 51. Each of his appeals and personal restraint

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<sup>1</sup> State of Washington Department of Corrections Offender Manual, Policy No. 700.100 (V)(C) (Jan.1, 2016) (Class III inmate earnings with overtime not to exceed \$55/mo. w/out express authorization.). WA Dep't of Corrections, Policy No. 710.400 (IV)(B) (Jan. 1, 2016) (Inmates employed in Correctional Industries earn between \$.065-\$2.70/hour).

petitions were complete, as demonstrated by the imposition of costs. CP 58-79. Under the version of RCW 10.73.160(4) then in effect, he was free to ask the court *at any time* to remit his remaining obligations if they posed a manifest hardship. Laws of 1995, Ch. 275 §3.

Nine days after Mr. Brady filed his motion, HB 1783 went into effect. Laws of 2018, Ch. 269. The bill amended RCW 10.73.160(4) to require a defendant wait until release before seeking remission of discretionary imposed appellate costs. RCW 10.73.160(4). On June 22, 2018, the superior court denied Mr. Brady's motion, applying the amended statute, which became effective *after* Mr. Brady petitioned the court, as the basis for denying him relief. CP 128.

E. ARGUMENT.

**The Superior Court's retroactive application of the amended version of RCW 10.73.160(4) deprived Mr. Brady of his due process right to obtain relief from burdensome legal financial obligations.**

The trial court's denial of Mr. Brady's motion to remit based on retroactive application of the amended version of RCW 10.73.160(4) deprived him of due process and his vested right to seek redress from discretionary appellate costs which pose a manifest hardship.

*a. Previously RCW 10.73.160(4) permitted defendants to seek remittance from court-imposed appellate costs at any time. That changed in June of 2018, when the legislature limited the right to seek remittance until after release from confinement.*

In response to increasing awareness of the substantial and inequitable burden that court-imposed fines, costs, fees and interest pose to indigent criminal defendants, the legislature passed HB 1783. Laws of 2018, ch. 269; *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (“House Bill 1783’s amendments modify Washington’s system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction”).

Among its many sweeping changes, the bill prohibits courts from imposing discretionary costs—such as costs on appeal—on indigent defendants. Today, a court could not impose any costs on Mr. Brady beyond the mandatory DNA collection, victim assessment, and restitution. Laws of 2018, ch. 269, §6(3) (The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent); *Ramirez*, 191 Wn.2d at 746 (Amended House Bill 1783 prohibits courts from imposing discretionary costs, including the criminal filing fee, on a defendant who is indigent at the time of sentencing). Further, interest cannot accrue for any costs other than unpaid restitution. Laws of 2018, ch. 269 §1.

The Legislature designated appellate costs as discretionary in 1995. Laws of 1995, Ch. 275 §3 (“[Courts] *may* require an adult or juvenile offender convicted of an offense [...] to pay appellate costs.” (emphasis added)). Like others across the country, the law did not require a court to conduct an inquiry into a defendant’s ability to pay before adding appellate costs to the judgment and sentence. Critically, these statutes allowed convicted persons like Mr. Brady, whose appellate costs were imposed without determining his ability to pay, to petition the court *at any time* for remission, or relief from the obligation to repay appellate costs. Laws of 1995, Ch. 275 §3(4); *see also Fuller v. Oregon*, 417 U.S. 40, 47, 94 S. Ct. 2116, 40 L. Ed. 642 (1974).

In Washington, former RCW 10.73.160(4) survived a due process challenge in large part because of the provision that allowed convicted defendants, even those presently confined, to seek remission at any time. *State v. Blank*, 131 Wn.2d 230, 245, 930 P.2d 1213 (1997). The *Blank* court compared this statute to that at issue in *Fuller*. 131 Wn.2d at 47. In *Fuller*, indigent defendants challenged a nearly identical Oregon statute which allowed courts to impose appellate costs on indigent defendants upon affirmation of a conviction. 417 U.S. at 43. However, those defendants could petition the sentencing court for

remission at any time. *Id.* at 43-46. The United States Supreme Court determined that because the law allowed any convicted person to petition the court for remission at any time, “the obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.* at 46.

Like the Oregon statute, RCW 10.73.160(4) allowed defendants to petition for relief from appellate costs at any time. *Blank*, 131 Wn.2d at 246. Thus, a confined person like Mr. Brady could seek remission. The *Blank* court determined this provision provided defendants the necessary “opportunity to be heard regarding ability to pay” before the state attempted collection. *Id.* at 245; *see also State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) (Noting the *Fuller* court implicitly held that several features of the Oregon statute were constitutionally required, including the ability to move to remit at any time; these protections are adequate and court need not make specific findings of fact on defendant’s ability to pay).

Now, courts cannot impose discretionary costs on indigent defendants like Mr. Brady. RCW 10.01.160(3). But the right to seek relief at any time from those previously imposed discretionary costs has been removed. RCW 10.73.160(4); Laws of 1995, Ch. 275 § 3. This

raises a significant due process problem for indigent convicted appellants who receive neither the benefit of the new law nor the protection of the former. In Mr. Brady's case, costs were imposed despite his poverty with the promise he could seek remission at any time. Now Mr. Brady must bear this onerous burden without the ability to retain relief.

*b. RCW 10.73.160(4) should be interpreted to apply prospectively where retroactive application is contrary to the statute's purpose and deprives Mr. Brady of a vested right.*

Retroactive application of RCW 10.73.160(4) is contrary to the purpose of HB 1783 and deprives Mr. Brady of his vested right to seek relief from legal financial obligations that create a manifest hardship.

i. RCW 10.73.160(4)'s amendment that limits when a person may seek remittance is presumed to apply prospectively.

Statutes are generally presumed to apply prospectively, unless there is some legislative indication to the contrary. *State v. Humphrey*, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999).

The current version of RCW 10.73.160(4) does not specify whether the amendment applies only to costs imposed for appeals filed after the statute's effective date of June 7, 2018, or if it also applies retroactively to all petitions for remission of costs imposed prior to the

amendment. RCW 10.73.160(4). Questions of statutory construction are reviewed de novo. *In re Estate of Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013).

The legislature intended prospective application of RCW 10.73.160(4). Under HB 1783, discretionary costs cannot be imposed on indigent defendants. RCW 10.01.160(3). The appellate costs imposed on Mr. Brady were discretionary. RCW 10.73.160(1), (2); *see e.g. State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016) (interpreting appellate costs as discretionary). When a statute is silent as to its prospective or retroactive application, courts turn to the subject matter of the statute to identify the “precipitating event” necessary to trigger its application. *State v. T.K.*, 139 Wn.2d 320, 330, 987 P.2d 63 (1999) (citing *In re Estate of Burns*, 131 Wn.2d 104, 112, 928 P.2d 1094 (1997)). A statute has retroactive effect when the precipitating event under the statute occurred before the statute’s enactment. *Haviland*, 177 Wn.2d 68 at 75.

The precipitating event for statutes concerning litigation costs is the termination of the appeal, which in Mr. Brady’s case, was governed by the former version of RCW 10.73.160(4). In *Blank*, the Washington Supreme Court explained that because costs could not be imposed on a

successful appellant, the former version of RCW 10.73.160(4) “did not apply unless and until a defendant’s conviction is upheld on appeal.” 131 Wn.2d at 249 (*citing Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wn.2d 222, 232, 833 9.2d 1370 (1994) (the right to attorney fees and determination of the awardable amount is governed by the statute in force at the termination of the action). Here, the termination of Mr. Brady’s various appeals and personal restraint petitions in which the court imposed costs were the precipitating events for application of the statute, which occurred well before the amendment to RCW 10.73.160(4). CP 58-78 (finality of appeals and imposition of costs all occurred well before enactment of HB 1783); *c.f. Ramirez*, 191 Wn.2d at 746 (Ramirez challenged the court’s imposition of costs while his case was pending on appeal, entitling him to prospective relief under the new statute).

The superior court erred when it applied RCW 10.73.160(4) retroactively because the precipitating event that triggered his right to relief under RCW 10.73.160(4) occurred prior to enactment of the amended version of the statute.

ii. Mr. Brady has a vested right to seek relief from discretionary LFOs which pose a manifest hardship.

RCW 10.73.160(4)'s amendment eliminating the right to seek remittance at any time is a deprivation of a substantive right, and thus must not be applied retroactively.

Vested rights are protected by both state and federal constitutional law. U.S. Const. amends. V, XIV; Const. art 1 § 3. “A retroactive law violates due process when it deprives an individual of a vested right.” *State v. Shultz*, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999).

Property interests may be created and their dimensions defined by state statutes or rules entitling the citizen to certain benefits. *Goss v. Lopez*, 419 U.S. 565, 572–73, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972)). A vested right includes a legal or equitable title “to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.” *In re. Carrier*, 173 Wn.2d 791, 811, 272 P.3d 209 (2012).

“Procedural guaranties may create protected property interests when they contain ‘substantive predicates’ to guide the discretion of decision makers” and specific direction that when a “substantive

predicate is present, a particular outcome must follow.” *Conrad v. University of WA*, 119 Wn.2d 519, 536, 834 P.2d 17 (1992) (citing *KY Dep’t of Corrections v. Thompson*, 490 U.S. 454, 662-63, 109 S. Ct 1904, 1910 104 L.Ed.2d 506 (1989)). In this way, a claimant “earns” the procedural right established by the statute when each condition required to assert the right is met. *T.K.*, 139 Wn.2d at 332.

“Amending a statute does not necessarily mean that the prior statute ceases to exist... a preamendment version of a statute will continue to govern in cases arising prior to the amendment, particularly where vested rights or contractual obligations are affected.” *T.K.*, 139 Wn.2d at 327.

Mr. Brady had a vested right to seek relief from legal financial obligations through remission. At the time he filed his motion, Washington law was clear: so long as his appeals were final and he was not in contumacious default, he could ask the court for relief at any time. Former RCW 10.73.160(4). As such, his interest in his ability to file a motion for remission was more than a “mere expectation” in the continued existence of the statute. *State v. Godfrey*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975). He and all other defendants with convictions affirmed on appeal prior to June 7, 2018 had a clear, statutory right to

ask the court to remit his remaining appellate financial obligations.

Former RCW 10.73.160(4).

In Washington, courts focus on when a defendant satisfied the statutory conditions that entitle him to a right to determine the right was vested. *See T.K.*, 139 Wn.2d at 334; *Carrier*, 173 Wn.2d at 811. In *T.K.*, a defendant had a vested right to seal his juvenile record because he satisfied each of the procedural conditions required by the former sealing statute while it was in effect. *T.K.*, 139 Wn.2d at 331. Although *T.K.* became eligible to seal *before* an amendment rendered him ineligible, he did not move to seal his record until *after* the amendments became effective. *Id.* However, the Washington Supreme Court held that *completing the statutory conditions*—for *T.K.* spending two years in the community crime free—triggered application of the statute. *Id.* at 334.

The Court compared *T.K.*'s interest in his procedural right conferred by the previous sealing statute to that granted by a statute of limitations: after the statutory period has “run,” “it is a defense, not of grace, but of right, not contingent, but absolute and vested,...*not to be taken away by legislative enactment.*” *T.K.*, 139 Wn.2d at 332 (internal citations omitted) (emphasis added). The language of the former

sealing statute provided similar constraints to decision makers: “once the conditions of the statute are met, the defendant has the right to relief and a court has the *nondiscretionary obligation* to seal records regardless of when the motion is made.” *Id.* at 331 (internal citations omitted) (emphasis added). Similarly, in *Carrier*, the defendant met all the conditions for vacating his conviction under the preamendment version of former RCW 9.95.240. 173 Wn.2d at 812. Because the vacated status of his conviction was not contingent on any future occurrence, and did not require he fulfill any additional conditions, the court had no discretion but to vacate his conviction and exclude it from his criminal history under the prior amendment. *Id.* at 812.

Just as in *T.K.* and *Carrier*, Mr. Brady has a protected interest in the ability to seek relief from discretionary appellate costs. Mr. Brady had no remaining conditions to satisfy in order to meet the requirements of former RCW 10.73.160(4) prior to its amendment. Under the former statute, the Superior Court had no discretion to refuse to consider Mr. Brady’s motion for remission, which he was entitled to submit for consideration at any time after sentencing so long as he was not in contumacious default. Indeed, when Mr. Brady filed the motion (May 29, 2018), the statute was still in effect.

RCW 10.73.160(4)'s amendment requiring release from total confinement before seeking remittance cannot apply to Mr. Brady. The triggering event for the application of the statute occurred well before the amendment. Application of the newly enacted statute deprives Mr. Brady of his vested right to seek relief from costs that impose a manifest hardship.

F. CONCLUSION.

Mr. Brady is entitled to seek remission based on the statute in place at the time he sought relief from court-imposed discretionary appellate costs. The Superior Court's dismissal of Mr. Brady's motion for remission should be reversed.

DATED this 24th day of January 2019.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 52120-2-II
	)	
MICHAEL BRADY,	)	
	)	
Appellant.	)	

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**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JANUARY, 2019.



X \_\_\_\_\_

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