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COA NO. 52323-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEONTE A. SMITH,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN FAILING TO FULLY AND MEANINGFULLY CONSIDER THE MITIGATING FACTOR OF YOUTH IN DECLINING TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD.

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). The State says the trial court "considered" all of the mitigation material submitted by Smith and therefore can be deemed to have fully and meaningfully considered Smith's request for an exceptional sentence downward based on youth. Brief of Respondent (BOR) at 15, 18-19. Smith disagrees.

Special protection applies when sentencing juveniles. It is not enough that the court recognize and exercise its discretion on whether to impose an exceptional mitigated sentence. In fully and meaningfully considering the request for an exceptional sentence downward based on youth, the court must consider certain factors. State v. Houston-Sconiers, 188 Wn.2d 1, 23, 391 P.3d 409 (2017). Consideration of those factors does not, as the State claims, amount to nothing more than a perfunctory acknowledgment that the court has considered the defense argument and supporting material. Rather, the court "must conduct a meaningful,

individualized inquiry" into whether the defendant's youth should mitigate the sentence. State v. Solis-Diaz, 194 Wn. App. 129, 132, 376 P.3d 458 (2016), rev'd on other grounds, 187 Wn.2d 535, 387 P.3d 703 (2017).

The court made no such inquiry at sentencing in this case. The court did not fully address Smith's "immaturity" in any meaningful sense, failing to incorporate the forensic psychologist's observations and conclusions about Smith's immaturity into its decision. Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller v. Alabama, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). The court completely failed to address "the nature of the juvenile's surrounding environment and family circumstances" and "the way familial and peer pressures may have affected him." Id. (quoting Miller, 567 U.S. at 477). The court also outright failed to address "any factors suggesting that the child might be successfully rehabilitated." Houston-Sconiers, 188 Wn.2d at 23. As set forth in the opening brief, there was plenty of relevant evidence on these factors to support the exceptional sentence request. See Brief of Appellant at 20-22.

In making its sentencing decision, the court must address the requisite factors involving youth. State v. Delbosque, 6 Wn. App. 2d 407, 421, 430 P.3d 1153 (2018), review granted, 193 Wn.2d 1008, 439 P.3d 661 (2019). This is not a passive exercise. The court must actively assess,

on the record, why the requisite factors for consideration do or do not support the exceptional sentence request. Anything less is an abuse of discretion. The court here failed to comply with the controlling standard for exercising its discretion by failing to fully and meaningfully consider the diminished culpability of youth and attendant prospects for rehabilitation.

2. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE DISCRETIONARY COSTS ON SMITH BECAUSE HE IS INDIGENT AND ALSO LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS.

a. The cost of community supervision is discretionary and therefore must be stricken from the judgment and sentence.

There is no dispute Smith is indigent. The State, however, contends the supervision fee is not a "cost" under RCW 10.01.160 and therefore can be imposed on indigent defendants. BOR at 25-27. The State's argument cannot be reconciled with the prohibition against imposing the DNA fee on those whose DNA sample is already on file. By the State's reasoning, the DNA fee is not a "cost" under RCW 10.01.160 because it is "not a cost incurred during the prosecution of the charge or a cost of pretrial supervision." BOR at 26. But in the wake of changes wrought by House Bill 1783, courts recognize imposition of a DNA fee on an indigent defendant must be stricken when that person's DNA has

already been collected pursuant to a prior conviction. State v. Catling, 193 Wn.2d 252, 259, 438 P.3d 1174 (2019); State v. Maling, 6 Wn. App. 2d 838, 844-45, 431 P.3d 499 (2018), review denied, 438 P.3d 118 (2019).

The DNA fee, like the cost of supervision, is discretionary. Compare RCW 43.43.7541 ("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.") with RCW 9.94A.703(2)(d) ("*Unless waived by the court*, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department."). There is no reason to treat the two differently. Both are legal financial obligations (LFOs).¹

"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." State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). "House Bill 1783 amends former RCW 10.01.160(3) by expressly prohibiting the imposition of

¹ See RCW 9.94A.030(31) (defining "legal financial obligation" as "a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.").

discretionary LFOs on defendants . . . who are indigent at the time of sentencing; the amendment conclusively establishes that courts do not have discretion to impose such LFOs." Id. at 749. The supervision fee is a discretionary LFO and therefore cannot be imposed on indigent defendants like Smith.

Courts have taken a broad approach to what costs, or LFOs, are proper in light of a defendant's indigency. State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) held "RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs." The requirement of inquiry into ability to pay LFOs, however, is not limited to costs under RCW 10.01.160. According to Ramirez, "the statute requires trial courts to conduct an individualized inquiry into the financial circumstances of each offender before levying *any discretionary LFOs.*" Ramirez, 191 Wn.2d at 739 (emphasis added).

In State v. Leonard, 184 Wn.2d 505, 507-08, 358 P.3d 1167 (2015), for example, the Supreme Court recognized the discretionary costs of incarceration under RCW 9.94A.760(2) and medical care under RCW 70.48.130 were not costs under RCW 10.01.160, but still held an individualized assessment of ability to pay them was mandated by the concerns animating Blazina. The trial court must therefore inquire into a

defendant's ability to pay all discretionary LFOs, regardless of whether they qualify as a "cost" under RCW 10.01.160. See also State v. Duncan, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016) (remanding for resentencing with proper consideration of ability to pay LFOs, which consisted of "costs, assessments, and fines; \$50 per day toward the cost of incarceration for the duration of his prison sentence; and the costs of his medical care"). At the very least, then, the trial court needed to inquire into Smith's ability to pay the cost of supervision prior to imposing it.

The State also relies on the distinction between mandatory, waivable and discretionary community custody conditions set forth in RCW 9.94A.703 to argue a waivable cost is not a discretionary cost. BOR at 27. The State's position does not hold up.

In the context of LFOs, the only relevant distinction is between mandatory LFOs and discretionary ones. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The court has no choice but to impose mandatory LFOs, regardless of ability to pay. Id. While the sentencing court must "make an individualized inquiry into the defendant's ability to pay discretionary legal financial obligations," no such inquiry is needed for mandatory obligations. State v. Shelton, 194 Wn. App. 660, 673-74, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017) (addressing former and since amended statutes regarding

imposition of filing fee and DNA fee). The court thus has no authority to waive mandatory LFOs.

Discretionary LFOs, on the other hand, can be waived and, if the defendant is indigent, must be waived. "Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations, such as court costs and fees, as a sentencing condition, it must consider the defendant's present or likely future ability to pay." Lundy, 176 Wn. App. at 103; accord Ramirez, 191 Wn.2d at 739.

Because the court has the authority to waive the supervision fee under RCW 9.94A.703(2)(d), the fee by definition is a discretionary LFO, not a mandatory one. As such, it triggers inquiry into ability to pay and, in the case of an indigent defendant like Smith, outright prohibition on the fee. House Bill 1783 "amends former RCW 10.01.160(3) to categorically prohibit the imposition of any discretionary costs on indigent defendants." Ramirez, 191 Wn.2d at 739.

This Court has noted the cost of community custody is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Although the State seeks to dismiss Lundstrom's observation as dicta (BOR at 26), this Court has subsequently cited Lundstrom as authority to strike the supervision fee imposed on an indigent defendant.

State v. Taylor, ___ Wn. App. 2d. ___, 2019 WL 2599184, at *4 (slip op. filed June 25, 2019) (unpublished).² Smith requests that this Court do the same.

b. Collection costs are discretionary and therefore must be stricken from the judgment and sentence.

The State claims financial collection costs are not discretionary costs and so the court did not err in imposing them. BOR at 27-28. Precedent recognizes collection costs are discretionary costs. State v. Clark, 191 Wn. App. 369, 374, 362 P.3d 309 (2015); see also In re Pers. Restraint of Cargill, 3 Wn. App. 2d 1040, 2018 WL 2021805 at *1-2 (2018) (unpublished) (where defendant indigent, vacating the portion of the judgment and sentence imposing collection costs).

c. Review is appropriate.

The State suggests this Court should not review the LFO issues because they were not raised below. BOR at 24-25. "In the wake of Blazina, appellate courts have heeded its message and regularly exercise their discretion to reach the merits of unpreserved LFO arguments." State v. Glover, 4 Wn. App. 2d 690, 693, 423 P.3d 290 (2018). There is no compelling reason to treat Smith differently.

² GR 14.1(a) permits citation to unpublished decisions as non-binding, persuasive authority.

B. CONCLUSION

For the reasons stated above and in the opening brief, Smith request reversal of the sentence and remand for resentencing before a different judge. Smith also requests correction of the judgment and sentence regarding the imposition of LFOs and the interest provision.

DATED this 24 day of July 2019

Respectfully Submitted,

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