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Division II
State of Washington
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KURTIS WILLIAM MONSCHKE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth P. Martin

No. 03-1-01464-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the trial court failed to consider the motion for remission of appellate costs because the defendant remains incarcerated, whether this court should remand to the trial court or deny the claim based on the defendant's failure to demonstrate manifest hardship?

B. STATEMENT OF THE CASE.

The defendant was sentenced to life without parole after being convicted for aggravated first-degree murder. The Court of Appeals affirmed his conviction on direct review, *State v. Monschke*, 133 Wn. App 313, 135 P.3d 966 (2006), *review denied*, 159 Wn.2d 1010 (2007). The court added appellate costs of \$20,769.24 on June 8, 2007. CP 40 – 41. Defendant filed an unsuccessful personal restraint petition and the court ordered \$25,042.01 in costs on June 15, 2012. CP 46 – 47.

On June 12, 2018, defendant moved the court for a waiver of interest on his LFOs and remission of his appellate costs as well as the interest on those costs. CP 48 - 80. The court entered an order waiving interest on non-restitution LFOs including the interest accrued prior to June 7, 2018. CP 80 - 82. The court did not address the appellate costs or the accrued interest on the appellate costs and directed the matter to made by motion to the court of appeals. CP 80 - 82.

Defendant filed a motion to reconsider. CP 83 - 87. The court ordered the State to respond to the motion to reconsider. CP 107 – 108. The State filed a response asking the court to deny the defendant’s motion to reconsider as time barred. CP 109 – 144. Defendant filed a reply brief. CP 145 - 151. The court entered an order finding that the defendant has not been released from total confinement as required by the current version of RCW 10.82.090(2). CP 88 – 89. Defendant filed a notice of appeal. CP 90 – 95. The Court of Appeals accepted as a motion for discretionary review and granted review. CP 99 – 102.

C. ARGUMENT.

1. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT’S MOTION FOR REMISSION BASED ON HIS CUSTODY STATUS BUT THE DEFENDANT FAILS TO DEMONSTRATE MANIFEST HARDSHIP.

The State concedes that the trial court erred in concluding it lacked the authority to consider defendant’s request to waive appellate costs.

“The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1). Under current Washington authority, a defendant may object to appellate costs before the appellate court files its decision, after the State files its cost bill, or in a motion to modify the commissioner’s cost ruling. RAP 14.5; *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d

612, *review denied*, 185 Wn.2d 1034 (2016)); *State v. Grant*, 196 Wn. App. 644, 385 P.3d 184, 187 (2016).

However, once a commissioner of this court orders appellate costs, and there is no motion to modify the commissioner's cost ruling, "[a]n award of costs shall become part of the trial court judgment and sentence." RCW 10.73.160(3). "The general rule is that the word 'shall' is presumptively imperative and operates to create a duty rather than conferring discretion." *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985). "Moreover, a superior court is required to follow a mandate of this court." *State v. Wright*, 97 Wn. App. 382, 383, 985 P.2d 411 (1999). In *Wright*, we held that adding appellate costs to an offender's judgment and sentence, "was required by this court's mandate and by RCW 10.73.160." 97 Wn. App. at 384. Thus, the sentencing court had no discretion to decide whether to add the costs award to Monschke's judgment and sentence once this court ordered appellate costs.

Under former RCW 10.01.160(4) the defendant is allowed to file a motion to remit his discretionary LFOs at any time. *State v. Shirts*, 195 Wn. App. 849, 858-859, 381 P.3d 1223 (2016). Under former RCW 10.73.160(4), a defendant who is not in contumacious default may at any time petition the sentencing court for remission of the payment of costs. If the trial court is satisfied that payment of the amount due will impose

manifest hardship on the defendant or his or her family, the court may remit all or part of the amount due in costs. *See*, RCW 10.73.160(4). Mandatory deductions from an inmate's wages by the Department of Corrections is not considered a collection action. *State v. Crook*, 146 Wn. App. 24, 27-28, 189 P.3d 811 (2008).

If the offender has not contumaciously defaulted, the trial court must determine whether the court's imposition of financial obligations creates a "manifest hardship." RCW 10.01.160(4); *City of Richland v. Wakefield*, 186 Wn.2d 596, 605–06, 380 P.3d 459 (2016); *State v. Wilson*, 198 Wn. App. 632, 634–35, 393 P.3d 892 (2017). If payment will impose manifest hardship on the defendant or the defendant's immediate family, the court "may" remit all or part of the amount due or modify the method of payment under RCW 10.01.170. RCW 10.01.160(4); *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997). RCW 10.73.160(4) and RCW 10.01.160(4), the subsections on remission, are nearly identical in language and are identical in meaning. *State v. Shirts*, 195 Wn. App. 849, 854 n.4, 381 P.3d 1223 (2016), *State v. Sorrell*, 2 Wn. App. 2d 156, 408 P.3d 1100 (2018).

Therefore, the trial court erred when it denied defendant's motion to remit the appellate costs on the basis that the defendant remains incarcerated. This court should either remand for the trial court to make a

determination on whether the imposed appellate costs constitute a manifest hardship on the defendant or address the defendant's claims on the merits to further the ends of justice and conserve judicial resources. See RAP 1.2(c). "The appellate courts may waive or alter the provision of any of these rules in order to serve the ends of justice."

- a. The defendant must show manifest hardship to obtain relief not just indigency.

The term "manifest hardship" is undefined in RCW 10.01.160(4). *City of Richland v. Wakefield*, 186 Wn.2d at 606, 380 P.3d 459 (2016). One's present inability to provide for one's own basic needs, food, shelter, basic medical expenses, would meet that standard, however. *City of Richland v. Wakefield*, 186 Wn.2d at 606, 380 P.3d 459. Possessing some ability to pay does not necessarily preclude payment from creating a "manifest hardship." *City of Richland v. Wakefield*, 186 Wn.2d at 605-06, 380 P.3d 459. In determining manifest hardship, the trial court should use GR 34 as a guide. *City of Richland v. Wakefield*, 186 Wn.2d at 606, 380 P.3d 459. GR 34 is a court rule designed to simplify the process for determining whether a person is indigent for purposes of court and clerk's fees and charges in civil cases. *City of Richland v. Wakefield*, 186 W.2d at 606-07, 380 P.3d 459. Under GR 34, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *City of Richland v. Wakefield*, 186 Wn.2d at 607, 380

P.3d 459. If someone meets the GR 34 standard for indigency, courts should seriously question that person's ability to pay financial obligations. *State v. Blazina*, 182 Wn.2d at 839, 344 P.3d 680 (2015); *City of Richland v. Wakefield*, 186 Wn.2d at 607, 380 P.3d 459. *State v. Sorrell*, 2 Wn. App. 2d 156, 408 P.3d 1100 (2018).

In this case, this court should find that the defendant has not shown that the legal financial obligations would impose a manifest hardship on him or his immediate family. Economic considerations lack relevance when the State prison system provides one shelter and food.

In the defendant's pleadings to the court, he states:
"I have little or no funds to pay for basic needs or education needs, art supplies as positive and productive outlet, save money for emergencies e.g. losing my prison job, getting transferred and mailing out property, communicating with my family via email or phone and financially helping my family with visits or birthday cards or gifts. Everything costs money in prison, even paper towels. If my family or friends send money 45% of what they send is taken."

CP 48 - 80.

The Washington Supreme Court has stated the correct time to consider an individual's economic circumstances is when the State begins collecting LFOs. *State v. Blank*, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997); *State v. Wilson*, 198 Wn. App. 632, 635, 393 P.3d 892 (2017). Mandatory deductions by the DOC are not considered a collection action. *Wilson*, 198 Wn. App. at 635. Historically, remission petitions for LFOs

were not ripe for review until the inmate was out of custody and collection began; until then, the inmate is not an aggrieved party. *Id.*; see *State v. Mahone*, 98 Wn. App. 342, 348, 989 P.2d 583 (1999).

LFOs were examined extensively in *State v. Blazina*, (which applies prospectively) and the court recognized that LFOs could impose other hardships outside the financial realm. 182 Wn.2d 827, 837, 344 P.3d 680 (2015). This court considered *Blazina's* impact on remission petitions of LFOs by inmates. See *State v. Shirts*, 195 Wn. App. 849, 856-57, 381 P.3d 1223 (2016). The court in *Shirts* recognized that LFOs can have other collateral impacts on offenders that make them “aggrieved” even before collection begins. *Id.* (finding the defendant was aggrieved before release because he was “denied access to transitional classes and classification advances in DOC due to his outstanding LFOs”). *State v. Wilson*, 198 Wn App. 632, 393 P.3d 892 (2017). See also, *State v. Lopez*¹, 2 Wn. App.2d 1023 (2018). *In re Flippo*, 187 Wn.2d 106, 108, 385 P.3d 128 (2016) (asking the court to find that his petition to readdress the ability to pay finding in the judgment and sentence was not time barred). Such a challenge is subject to the time limits in RCW 10.73.090. *In re Flippo*, 187 Wn.2d at 114.

¹ This opinion has no precedential value. It is not binding on any court. It is cited only for such persuasive value as the court deems appropriated. GR 14.1. *Crosswhite v. DSHS*, 197 Wn. App. 539, 544, 389 P.3d 731, 733, review denied, 188 Wn.2d 1009, 394 P.3d 1016 (2017).

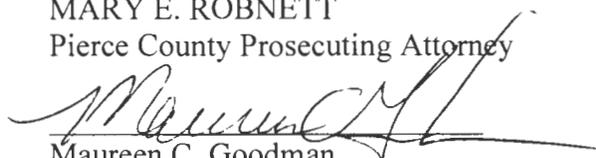
Similarly to the appellants in *Wilson* and *Lopez*, the defendant's statement of his financial situation lists no dependents and states that he is unemployed although he lists losing his prison job as a reason to save money for emergencies. It is unclear whether or not defendant has worked while incarcerated as he references a prison job but has not supplied any information as to what he does or the amount he is paid. There is no information regarding the financial status of his family. CP 48 – 80. This court should find that the defendant has failed to show that his financial obligations have created a manifest injustice.

D. CONCLUSION.

The State respectfully requests that that this court either remand the case to the trial court or deny the defendant's motion for remission of his appellate costs and interest on the merits.

DATED: June 26, 2019.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-26-19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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