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NO. 52636-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KURTIS WILLIAM MONSCHKE,

Appellant.

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

The Honorable Elizabeth P. Martin, Judge

REPLY BRIEF OF APPELLANT

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INTRODUCTION

As set out below, this Court should accept the Pierce County Prosecutor Office's¹ concessions of law, that Mr. Monschke is entitled to seek remission of his appellate legal financial obligations even though he is still in custody and that, given his continuing indigency, his ability to pay the obligations should, at the least, be seriously questioned. This Court should *not* accept any of its attempts to undercut those concessions which rely on cases – to the extent that they rely on any authority -- which are no longer good law and are against the weight of well-established authority.

In particular, while it is clear that the Prosecutor personally believes that a prisoner cannot suffer manifest financial hardship because the Department of Corrections must provide him enough food and shelter to survive – even though he can be charged for these costs of incarceration and has to buy his own soap and toothbrush and make co-payments for his health care² – *no authority* is cited to support this belief.

A. RESTATEMENT OF UNDISPUTED FACTS

Kurtis Monschke is serving a sentence of life without the possibility of parole and has been in custody since he was nineteen years

¹ Hereafter the “State.”

² As undersigned counsel understands it, inmates have to buy their own coffee as commissary.

old. State v. Monschke, 133 Wn. App. 313, 135 P.3d 966 (2006), review denied, 159 Wn.2d 1010 (2007). He has been indigent throughout this time -- the courts found him indigent at trial, on appeal and on collateral review when counsel was appointed to represent him. CP 24-25, 103. His continuing indigency is now presumed. State v. Sinclair, 192 Wn. App. 380, 392-293, 367 P.3d 612 (2016); State v. Hart, 195 Wn. App. 449, 463, 381 P.3d 142 (2016).

Over the fourteen years since his conviction, whenever family or friends sent Mr. Monschke money, or when he was able to earn a “gratuity” by working, the Department of Corrections deducted 20% of the money, before depositing it in his prison account, to pay legal financial obligations (LFOs).³ RCW 72.09.480 (2) (c).

At this time only appellate costs remain; the trial court waived all other discretionary LFOs and interest, but believed the appellate costs could not be remitted as long as Mr. Monschke remained in custody. CP 81-82, 88-89. Unless the appellate costs are remitted, however, he will likely continue to have to pay 20% of any money sent to him for the rest of his life – without significantly reducing the debt.

³ The Department of Corrections transferred Mr. Monschke to the federal system during part of his sentence and undersigned counsel is not aware if money for his Washington LFOs was collected during this time.

When money is sent to him or he is able to work, another 25% is deducted by the Department of Corrections and applied to the cost of incarceration and victim compensation; the remaining 55% is also reduced by the cost of hygiene products, over-the-counter medicine, exercise privileges in the gym, and health care co-payments which may be outstanding. Little, if anything, is left for classes, other positive programming, art supplies or commissary.

B. STATE’S CONCESSIONS ON APPEAL

-- “The trial court erred in concluding it lacked the authority to consider defendant’s request to waive 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.” (citing State v. Shirts, 195 Wn. App 849, 858-859, 381 P.3d 1223 (2016)). Brief of Respondent (BOR) 2.

-- “If the trial court is satisfied that payment of the amount due will impose a manifest hardship on the defendant or his or her family the court may remit all or part of the amount due in costs.” BOR 2-3.

-- Because of the trial court’s error in denying Mr. Monschke’s motion to remit appellate costs, this Court should “either remand for the trial court to make a determination on whether the imposed appellate costs constitute a manifest hardship. . . or address the defendant’s claims on the

merits to further the ends of justice and conserve judicial resources. “

BOR 4-5.

-- “Manifest hardship” includes present inability to provide for one’s basic needs and the GR 34 standard of having a household income below 125 percent of the federal poverty guide. BOR 5 (citing City of Wakefield, 186 Wn.2d 596, 605-607, 380 P.3d 459 (2016), and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015))

--“If someone meets the GR 34 standard for indigency, courts should seriously question that person’s ability to pay financial obligations.” BOR 6.

C. THE STATE’S ARGUMENTS ATTEMPTING TO UNDERCUT OR CONTRADICT ITS CONCESSIONS

1. Erroneous and contradictory argument that economic considerations are not relevant in determining “manifest hardship” for those in custody

After conceding (a) that the trial court was wrong to deny consideration of Mr. Monschke’s motion to remit appellate costs, (b) that he had the right to seek remission even though he was still in custody, (c) that GR 34 standard should guide the indigency determination and (d) that if a person is indigent their ability to pay LFOs should be seriously questioned, the State argues – without any citation to legal authority – that “economic considerations lack relevance when the State prison provides

one shelter and food.” BOR 6. Moreover, factually, inmates *are required* to pay for the cost of their incarceration – at the rate of 20% of funds available to them – and to pay for basic necessities such as hygiene items and healthcare. The debt incurred for necessities remains even after release from prison. See RCW 72.09.015; RCW 72.09.450 (1) and (2).

2. Erroneous and contradictory arguments that mandatory deductions to pay LFOs do not trigger consideration of remission of LFOs

The State contradicts its concession that remission may be sought at any time, even while in prison, by arguing that “mandatory deductions by the DOC are not considered a collection action” and that “the correct time to consider an individual’s economic circumstances is when the State begins collecting LFOs.” (citing State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997); State v. Wilson, 198 Wn. App. 632, 393 P.3d 892 (2017); State v. Mahone, 98 Wn. App. 342, 989 P.2d 583 (1999)); BOR at 6.

To the contrary, this Court in State v. Shirts, 195 Wn. App. 849, 857, 861, 381 P.3d 1223 (2016), rejected the holdings by Division Three, in Wilson, that consideration of a motion for remission was improper because the State had not attempted to collect the LFOs and that deductions from wages are not collection actions necessary to trigger the right to seek remission. The Shirts Court held that the plain language of

the statute required consideration of the motion to remit whenever the following conditions are met: (a) legal financial obligations had been imposed, (b) the defendant was not in contumacious default, and (c) it appeared to the court that payment would create a manifest hardship.⁴ Shirts, 195 Wn. App. at 858-859. Nothing further is required. Id.

Moreover, the State's assertions that the DOC may impose mandatory deductions without giving rise to a right to seek remission are contradicted by the clear holding in Blank that "before enforced payment or sanctions for nonpayment [of LFOs] may be imposed, there . . . [must be] an opportunity to be heard regarding ability to pay.

Moreover, because we hold that ability to pay (and other financial considerations) must be inquired into before enforced payment or imposition of sanctions for nonpayment, sufficient guidelines are in place. Also, the statute allows a defendant to seek remission at any time. It is not unconstitutional to recoup court costs (including costs of appointed counsel) from an indigent who later becomes able to pay.

Blank, 131 Wn.2d at 245-246. The Department of Corrections enforced payment of the appellate LFOs by taking money sent to Mr. Monschke by family and friends, without his consent, to pay his LFO's.

⁴ Shirts also held that Mahone was no longer good law. Shirts, at 856-857.

D. THE STATE PROPERLY CONCEDED THAT THIS COURT SHOULD GRANT MR. MONSCHKE REMISSION OF HIS APPELLATE COSTS OR REMAND TO THE TRIAL COURT; THIS COURT SHOULD ACCEPT THIS CONCESSION AND GRANT REMISSION OF APPELLATE COSTS.

The trial court waived Mr. Monschke's discretionary legal financial obligations and interest except for appellate costs. The trial court inferentially would have remitted the appellate costs as well but for the mistaken understanding that Mr. Monschke could not seek remission while in custody. Judicial economy would be served by this Court's granting his motion in this appeal without a remand.

There is extensive authority supporting the granting of the motion by this Court.

In State v. Young, 198 Wn. App. 797, 396 P.3d 386 (2017), the Court noted that under the amended Rules of Appellate Procedure, a party is presumed still indigent if an order of indigency has been granted for the appeal, and that the Commissioner has discretion to determine current or likely future ability to pay costs. In State v. Cardenas-Flores, 194 Wn. App. 496, 374 P.3d 1217, aff'd, 189 Wn.2d 243, 401 P.3d 19 (2017), the Court also remanded to the Commissioner for determination of ability to pay legal financial obligations.

But in most instances the appellate courts have made the decision on whether to impose appellate costs rather than remanding the cases to the Commissioner or trial court. In State v. Sinclair, 192 Wn. App. 380, 392-293, 367 P.3d 612 (2016), the Court exercised discretion to deny appellate costs because there was no reason to believe Sinclair, who was sixty-six years old and serving a twenty-year sentence, was or ever would be able to pay. In State v. Hart, 195 Wn. App. 449, 463, 381 P.3d 142 (2016), the Court similarly held that continuing indigency is presumed and that, therefore, it should exercise discretion to waive appellate costs. In State v. Grant, 196 Wn. App. 644, 385 P.3d 184 (2016), the Court declined to impose appellate costs, noting that imposing cost on indigent defendants raises “well-documented” problems such as “increased difficulty reentering society, the doubtful recoupment of money by the government, and inequities in administration.” Grant, at 652 (citing Sinclair, 192 Wn App. at 391, quoting State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)). See also State v. Burch, 197 Wn. App. 382, 407, 389 P.3d 685 (2016) (if the defendant meets the GR 34 standard of indigency, the court should seriously question ability to pay costs; not an abuse of discretion to deny costs in the case); State v. Bajardi, 3 Wn. App.2d 726, 468 P.3d 164 (2018) (award of costs inappropriate where defendant presumed indigent); State v. Blockman, 198 Wn.App. 34, 392 P.3d 1094 (2017) (no evidence

finances improved; costs not imposed); State v. Bigsby, 196 Wn. App. 803, 384 P.3d 668 (2016) (decline to impose as there is no evidence not indigent); State v. Velezmoro, 196 Wn. App. 552, 384 P.3d 613 (2016) (indigency not rebutted); State v. Hood, 196 Wn. App. 127, 382 P.3d 170 (2016) (same).

Under this authority, the Court should also hold that the imposition of appellate costs on Mr. Monschke constitutes a manifest hardship and remission of costs should be granted. His indigency is presumed and unrebutted. The record shows that he will not likely ever be able to pay.

E. THE 2018 AMENDMENTS SHOULD APPLY RETROACTIVELY TO THE EXTENT THAT MR. MONSCHKE’S INDIGENCY ALONE SHOULD BE SUFFICIENT TO ESTABLISH MANIFEST HARDSHIP.

As set out in Mr. Monschke’s Opening Brief of Appellant, pages 14-16, the remedial 2018 amendment to the legal financial obligations statute which equates indigency with manifest hardship should apply retroactively to him. This amendment – along with the amendment which exempts indigent defendants from discretionary costs of their prosecution – indicate a legislative determination that imposing trial and appellate costs on indigent defendants creates an unacceptable and manifest hardship on them.

F. CONCLUSION

This court should grant remission of the appellate costs imposed on Mr. Monschke. At the least the case should be remanded for the trial court or a commissioner of this Court to consider whether the payment of appellate costs constitute a manifest hardship on Mr. Monschke.

DATED this 3rd day of July, 2019

Respectfully submitted,

Rita J. Griffith

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Certificate of Service

I certify that on the 3rd day of July, 2019, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following by e-mail

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