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Division II
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NO. 52681-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIELLE AYLWARD,

Appellant.

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

The Honorable Stephen Brown, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The sentencing court erred by imposing legal financial obligations (LFOs) including attorney fees, interest accrual provision and monthly Department of Corrections (DOC) community supervision fee in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez*¹ and after enactment of House Bill 1783. Clerk's Papers (CP) 46-47.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

1. Following the Supreme Court's decision in *Ramirez* recent statutory amendments affecting legal financial obligations (LFOs), should the case be remanded to strike the imposition of attorney fees, interest accrual on non-restitution LFOs, and the imposition of DOC community supervision fees from the judgment and sentence?

2. Is the imposition of discretionary LFOs clearly erroneous when the court conducts an inadequate *Blazina*² inquiry and evidence shows that the appellant is indigent?

C. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural facts:

Appellant Danielle Aylward was sentenced on August 23, 2018.

¹ 191 Wn.2d 732, 426 P.3d 714 (2018).

² *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The court imposed a \$500.00 crime victim assessment, \$250.00 attorney fees, \$100 DNA collection fee, and waived other LFOs. CP 46-47.

The judgment and sentence states:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

CP 48.

The judgment and sentence also provides that Ms. Aylward shall serve twelve months of community custody and that while on community custody, the defendant shall “pay supervision fees as determined by the department[.]” CP 53.

Appellant’s opening brief was filed March 7, 2018, counsel was granted leave to file a supplemental brief addressing LFOs.

D. ARGUMENT

1. THE COURT ERRED IN IMPOSING ATTORNEY FEES, INTEREST ACCRUAL AND COMMUNITY SUPERVISION FEES

a. Recent statutory amendments prohibit discretionary costs for indigent defendants.

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute*

House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

House Bill 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*, 191 Wn.2d at 746 (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 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. The Supreme Court in *Ramirez* concluded the trial court impermissibly imposed discretionary LFOs and a \$200 criminal filing fee and remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. *Ramirez*, 191 Wn.2d at 750.

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

At sentencing on August 23, 2018, the court imposed a \$500 crime victim fund assessment, which HB 1783 retains as a mandatory LFO. RCW 7.68.035(1)(a). *State v. Catling*, No. 95794-1, filed April 18, 2019, 438 P.3d 1174, 2019 WL 1745697 at *3.

Ms. Aylward, however, is entitled to relief from the statutory changes of the Bill regarding other LFOs. As was the case in *Ramirez*, her case is still on direct appeal.

b. The court did not adequately inquire into Ms. Aylward's ability to pay LFOs

The record indicates that Ms. Aylward is indigent and that she qualified for appellate counsel. CP 61-62. Ms. Aylward was ordered to

pay discretionary costs including attorney fees, interest accrual, and supervision fees.

The sentencing court must conduct on the record an individualized inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when determining his ability to pay. *Id.*

At sentencing, counsel told the court that Ms. Aylward is working as a housekeeper for vacation rentals and hotels, but that the work would slow down in September and October. RP at 86. The court did not question Ms. Aylward about her income, her assets and other financial resources, and did not inquire about her monthly expenses, health care costs, or education loans, debts, and present and future ability to pay LFOs. RP at 88-89.

This Court recently found a similar LFO inquiry inadequate, reversing imposition of the LFOs, including attorney fees, and remanding for a new sentencing hearing. *State v. Glover*, 4 Wash.App.2d 690, 423 P.3d 290 (2018). In *Glover*, this Court found the inquiry inadequate where the court “asked only about Glover's work history and whether there was

any reason she could not work.” *Id.* This Court noted the sentencing court “failed to inquire at all about other debts,” “failed to examine her financial situation, such as the extent of her assets,” and the general failure to consider other important factors *Id.* Finally, this Court specifically noted that the later finding of indigency, presumably for purposes of the appeal, “call[ed] into question [the defendant’s] ability to pay.” *Id.*

RCW 10.01.160 is mandatory: “it creates a duty rather than confers discretion.” *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking ... the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Id.* “Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant’s other debts ... when determining a defendant’s ability to pay.” *Id.*

c. Ms. Aylward was indigent

Ms. Aylward was represented by court-appointed counsel. Shortly after sentencing the court found Ms. Aylward was unable to contribute to the costs of this appeal while ordering the appeal to proceed solely at public expense. CP 61-62. Thus, the record indicates that Ms. Aylward was

indigent under RCW 10.101.010(3) at the time of sentencing.

d. The trial court erred by imposing discretionary costs including attorney fees, community supervision and interest accrual LFOs

In the judgment and sentence the court directed Ms. Aylward to pay a community supervision assessment to the Department of Corrections. CP 53. Although the judgment and sentence cites no authority for these costs, a statute allows them as a discretionary community custody condition. RCW 9.94A.703(2)(d).

This Court recently made it clear these costs are discretionary. *State v. Lundstrom*, 6 Wn.App.2d 388, 398 n. 3, 429 P.3d 1116, 1121 (2018). Because these costs are discretionary and prohibited by statutory amendments, this Court should remand to strike them.

Ms. Aylward also challenges the interest accrual on non-restitution LFOs assessed in the judgment and sentence. CP 48. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 48. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090

now provides:

(1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See Laws of 2018, ch. 269.

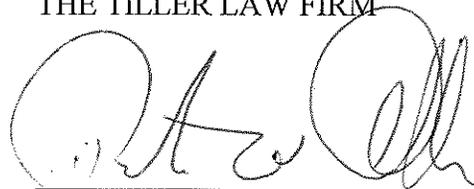
The interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs should be stricken.

E. CONCLUSION

For the reasons stated above, Ms. Aylward respectfully requests this Court remand for resentencing with instructions to strike the attorney fees, DOC community supervision fee, and the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: May 24, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line.

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CERTIFICATE OF SERVICE

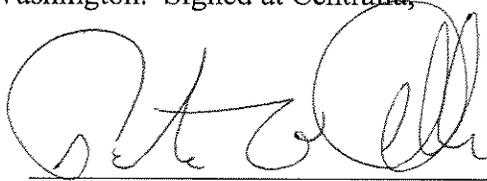
The undersigned certifies that on May 24, 2019, that this Supplemental Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Randall Sutton, Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 24, 2019.



PETER B. TILLER

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Transmittal Information

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