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Division II
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NO. 52849-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON GANIS,

Appellant.

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

The Honorable Michael H. Evans, Judge
The Honorable Stephen M. Warning, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE SENTENCING COURT ERRED WHEN IT REQUIRED PAYMENT OF COMMUNITY CUSTODY SUPERVISION FEES.

Citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the State argues that defense counsel's failure to object below has waived the issue. BOR, at 2-3. But Blazina makes it clear that appellate courts may exercise discretion to review these issues for the first time on appeal. Blazina, 182 Wn.2d at 832. "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 Ganis differently.

There is no dispute Ganis 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 3-5. 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 by the State during the prosecution of the charge or a cost of pretrial

supervision." BOR at 4. 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

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'

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 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 Ganis.

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 at 839, 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).

fees, and costs of defense, fines, and any other financial obligation that is

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 Ganis's ability to pay the cost of supervision prior to imposing it.

Because the court has the authority to waive the supervision fees 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

assessed to the offender as a result of a felony conviction.").

Ganis, 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). And, more recently, this Court has cited Lundstrom as authority to strike the supervision fees imposed on an indigent defendant. State v. Taylor, ___ Wn. App. 2d. ___, 2019 WL 2599184, at *4 (slip op. filed June 25, 2019) (unpublished).² Division One has done the same. State v. Reamer, ___ Wn. App. 2d ___, 2019 WL 3416868, at *5 (slip op. filed July 29, 2019) (unpublished). Ganis requests the same relief from his financial burden.

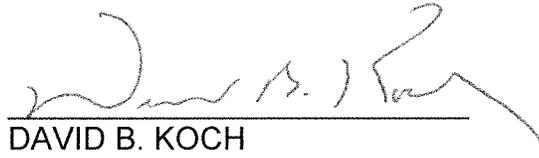
B. CONCLUSION

This Court should remand so that the sentencing court can amend the judgment and sentence by striking the improper imposition of supervision fees.

DATED this 23rd day of August, 2019.

Respectfully submitted,

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

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