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Division II
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NO. 52964-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

COLLEEN KALAMA

Appellant.

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

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing a $200 criminal filing fee and an interest accrual provision on Colleen Kalama following the Supreme Court's decision in ***State v. Ramirez***[1] and after enactment of House Bill 1783.

2. The sentencing court erred by imposing the discretionary cost of Department of Corrections (DOC) community supervision on Ms. Kalama. Clerk's Papers (CP) 73, (Judgment and Sentence, Appendix A, item 4.a).

3. To the extent the sentencing court found Ms. Kalama was not indigent and that she was able to pay discretionary legal financial obligations (LFOs), its finding was error.

4. The sentencing court failed to make an adequate inquiry into Ms. Kalama's financial resources and ability to pay before imposing discretionary LFOs.

5. The sentencing court erred in making the following finding of fact:

> The defendant is not "indigent" as defined in RCW 10.101.010(3)(3)(a)-(c) and therefore the court has considered the defendant's financial resources, and the nature of the burden that payment of costs will impose in determining the amount and method of payment for costs imposed by this judgment.

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[1] 191 Wn.2d 732, 426 P.3d 714 (2018).

CP 69.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Supreme Court's decision in ***Ramirez***, should the $200.00 criminal filing fee be stricken from appellant's judgment and sentence? Assignments Error 1, 3, 4, and 5.

2. Do recent statutory amendments affecting LFOs require remand to strike the imposition of interest accrual on non-restitution LFOs? Assignments of Error 1, 3, 4, and 5.

3. Do recent statutory amendments affecting discretionary LFOs require remand to strike the imposition of those costs where the trial court imposed the costs of community supervision? Assignment of Error 2, 3, 4, and 5.

4. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without making adequate inquiry into Ms. Kalama's financial resources and ability to pay? Assignments of Error 3, 4, and 5.

C. STATEMENT OF THE CASE

1. Procedural facts:

Colleen Kalama was charged by information filed on November 14, 2017 in Clark County Superior Court with two counts of first degree burglary, two counts of first degree custodial interference, and two counts of

second degree assault. CP 7.

The case came on for change of plea to an amended information before the Honorable Robert Lewis on November 13, 2018. Report of Proceedings[2] (RP) at 1-14; CP 55. Ms. Kalama entered a plea pursuant to ***Alford/Newton***[3] to fourth degree assault. RP at 1-5; CP 56. The State's sentencing recommendation was for 364 days with 326 days suspended, an anger management evaluation, and legal financial obligations. RP at 6-7. Defense counsel argued that Ms. Kalama was indigent. RP at 8-9, 15. The court sentenced Ms. Kalama to 364 days with all suspended except for 18 days previously served, followed by twelve months of Department of Corrections supervision. CP 70, 73. The court found that Ms. Kalama "may have some ability to pay but you need to focus on things such as anger management . . ." and imposed the "mandatory minimums." RP at 10.

When asked by defense counsel about a finding of indigency, Judge Lewis stated that he found Ms. Kalama is indigent, but found her not to be indigent pursuant to RCW 10.101.010[4] as contained in the judgment and

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[2]The record of proceedings consists of the following transcribed hearings: RP – November 13, 2018 (change of plea and sentencing), and December 14, 2018 (sentencing).

[3]***N. Carolina v. Alford***, 400 U.S. 25, 36, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), adopted in ***State v. Newton***, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

[4] RCW 10.101.010(3) provides:
"Indigent" means a person who, at any stage of a court proceeding, is:
(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance

sentence RP at 11. Referring to the language contained in the judgment and sentence, Judge Lewis stated:

> I'm making a finding that she's indigent in the sense that on here. I'm not making a finding that she's indigent up here. I don't find any of the three things that are listed up there.
>
> However by finding that she's currently indigent she doesn't have the ability to pay but she might have the ability in the future. So, I took that into account.

RP at 11-12.

Defense counsel responded that the statute changed and that the section indicating the future ability to pay is no longer a consideration for the court. RP at 12.

The exchange continued:

> [THE COURT]: This form has three ways you can be indigent under [RCW 10.]101.010(3)(a)-(c) – I don't find that she's indigent under any of those three things. So I have no reason to check that box.
>
> [DEFENSE COUNSEL]: But the forms may be old. I –
>
> [THE COURT]: Actually it's brand new. September of 2018. So I don't find that she's indigent in any one of those three things. But I took her financial resources into account and determined that she'd only pay mandatory minimum so- we'll just have to live with that finding.

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benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, Medicaid, or supplemental security income; or
(b) Involuntarily committed to a public mental health facility; or
(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or
(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

RP at 12.

After addressing other matters, the court returned to the question of indigency. Defense counsel referred to RCW 10.101.010(3) (d), stating that "[s]ubsection (d) indicates that if a Defendant is unable to pay for the costs of their attorney then they are to be considered indigent." RP at 13.

The court continued the LFO matter to December 6, 2018. RP at 13, 15-16. Defense counsel noted that Ms. Kalama was found indigent at the first appearance and he was appointed as counsel, that her financial situation has not changed during the case, that she has been staying at friends' houses, and that she has not been able to support herself. RP at 15.

The court imposed a $500.00 crime victim assessment, $200.00 criminal filing fee, and reserved restitution. RP at 16; CP 70, 71.

The judgment and sentence states "[t]he 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." CP 71.

The judgment and sentence also states "the defendant shall pay a monthly community supervision fee to the Department of Corrections." CP 71.

Timely notice of appeal was filed December 7, 2018. CP 79. This appeal follows.

D. ARGUMENT

1. THE COURT ERRED IN IMPOSING $200.00 FILING FEE, INTEREST ACCRUAL AND COMMUNITY SUPERVISION FEES DESPITE MS. KALAMA'S INDIGENCE

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.

In this case, 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, ___ P.3d ___, 2019 WL 1745697 at *3. The court, however, also imposed the $200.00 criminal filing fee against Ms. Kalama. RP at 16; CP 71. 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).

b. The court's inquiry into Ms. Kalama's financial situation was wholly inadequate to satisfy RCW 10.01.160.

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.*

Here, the court did not question Ms. Kalama directly and made no inquiry of her counsel regarding her ability to pay LFOs. 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.* The ***Blazina*** court also instructed courts engaged in this inquiry to "look to the comment in court rule GR 34 for guidance." *Id.* The court explained that, "under the rule, courts must find a person indigent if the person establishes that he or she receives assistance form a needs-based, means-tested assistance program, such as Social Security or food stamps." *Id.* Under GR 34, courts must also "find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline." *Id.* at 838-39. "[I]f someone does meet the GR 34 standard for indigency courts should seriously question that person's ability to pay LFOs." *Id.* at 839.

c. Ms. Kalama was and remains indigent

Before imposing LFOs, the court had just heard from cousnl that Ms. Kalama was unable to find work during the previous year, was homeless and staying at friends' houses, was unable to support herself, and had to rely on friends and family for financial support. RP at 15. The trial court did not comply with RCW 10.01.160(3) in that it made no inquiry regarding Ms. Kalama's lack of account of financial resources and made no inquiry regarding her debts. See ***Blazina***, 182 Wn.2d at 838. To comply with the statutory requirements the trial court was required to

consider Ms. Kalama's homelessness, long term lack of employment, and the fact that she likely owed a significant amount of LFOs from other matters, including a strike offense for third degree robbery in Oregon, a second strike offense for first degree burglary in Oregon, and unlawful use of a motor vehicle. RP at 7.

Moreover, the court did not follow ***Blazina***'s instruction to look to GR 34 for guidance. 182 Wn.2d at 838-39. GR 34 provides in part that a person whose household income is at or below 125 percent of the federal poverty level also "shall be determined to be indigent." GR 34(a)(3)(B). The record indicates that Ms. Kalama had no household or any income from any source other than what she received from friends or her family. RP 15. Had the court engaged in a GR 34 inquiry and "'seriously question [ed]" Ms. Kalama's ability to pay LFOs as ***Blazina*** instructs, the trial court would not have imposed discretionary LFOs.

In addition, Ms. Kalama was represented by court-appointed counsel, and shortly after sentencing the court found Ms. Kalama indigent and unable to contribute to the costs of her appeal while ordering the appeal to proceed solely at public expense. CP 83. Her attorney argued to the court that Ms. Kalama had been trying to find work while the case was pending had been able to find "anything steady," and that she was indigent.

RP at 8-9. During the continued sentencing hearing on December 6, defense counsel argued that Ms. Kalama's circumstances had not changed since he was appointed and that she has been staying at friends' houses and receives support from her friends and family. RP at 15.

Thus, the record indicates that Ms. Kalama was indigent under RCW 10.101.010(3) at the time of sentencing.

d. In addition to the $200.00 filing fee, the trial court erred by imposing discretionary community supervision and interest accrual LFOs

In Section 4 of the judgment and sentence, the court also directed Ms. Kalama to "[p]ay a monthly community supervision fee to the Department of Corrections" for twelve months of community supervision." CP 71. See also, CP 73 (Appendix A, item 4.a.) 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***, __ Wn.App. 2d __, 429 P.3d 1116, 1121 n.3 (2018). Because these costs are discretionary and prohibited by statutory amendments, this Court should remand to strike them.

Ms. Kalama also challenges the interest accrual on non-restitution LFOs assessed in Section 3 of the judgment and sentence. CP 71. 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 71. 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.

Here, the judgment and sentence was filed December 6, 2018. CP 68. Accordingly, the interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs should be stricken.

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E. CONCLUSION

For the reasons stated above, Ms. Kalama respectfully requests that this Court remand for resentencing with instructions to strike the discretionary costs of the criminal filing fee, community supervision and the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: April 25, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on April 25, 2019, that this 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 Rachael Rogers Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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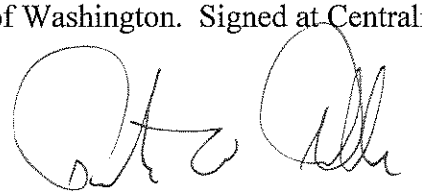
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 25, 2019.



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