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Court of Appeals
Division II
State of Washington
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NO. 52964-5-II

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

STATE OF WASHINGTON, Respondent

v.

COLLEEN MARILYN KALAMA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02426-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly imposed the \$200 criminal filing fee since the fee was mandatory pursuant to RCW 36.18.020(2)(h) as a result of Kalama’s failure to provide sufficient evidence of indigence under RCW 10.101.010(3)(a)-(c).**
- II. **This Court should remand to the trial court to strike the discretionary supervision costs and the imposition of interest accrual on non-restitution legal financial obligations.**

STATEMENT OF THE CASE

Colleen Marilyn Kalama was originally charged by information with a number of serious crimes arising out of an incident on November 10, 2017. CP 4-5, 7-9. But by November of 2018, Kalama was pleading guilty before the Honorable Robert Lewis to an amended information charging one count of Assault in the Fourth Degree, a gross misdemeanor. RP 1-6; CP 55-62.

The trial court sentenced Kalama to 364 days “with all of that time suspended except for the credit that you have for time served” and the “mandatory minimum” legal financial obligations, which included a \$200 criminal filing fee. RP 10-11; CP 68-72. After the conclusion of the sentencing hearing, Kalama’s trial counsel twice sought to, and did in fact, readdress the trial court regarding the court’s findings on Kalama’s indigence. RP 11-14. Because the issue was not resolved, however, a

hearing was set to discuss Kalama's indigence and the imposition of the criminal filing fee. RP 14-16. After a very brief discussion, Kalama's sentence remained the same, including the imposition of the criminal filing fee. RP 14-16; CP 67, 69-71. Kalama filed a timely notice of appeal. CP 79.

ARGUMENT

I. The trial court properly imposed the \$200 criminal filing fee since the fee was mandatory pursuant to RCW 36.18.020(2)(h) as a result of Kalama's failure to provide sufficient evidence of indigence under RCW 10.101.010(3)(a)-(c).

Pursuant to RCW 10.01.160(3) "[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)." *See also* RCW 9.94A.760(1). In turn, RCW 10.101.010(3)(a)-(c) defines indigent as "a person who, at any stage of a court proceeding, is "(a) [r]eceiving . . . public assistance . . . or (b) [i]nvoluntarily committed to a public mental health facility; or (c) [r]eceiving an annual income . . . of one hundred twenty-five percent . . . of the current federally established poverty level." Subsection (3)(d) of RCW 10.101.010, which is not referenced by RCW 10.01.160(3), includes in the definition of indigent those "[u]nable to pay the anticipated cost of counsel . . . or his or her funds are insufficient to

pay any amount for the retention of counsel.” Thus, as far as the relevant statutes are concerned, indigent for the purposes of assigning counsel does not necessarily mean indigent when assessing costs. *See State v. Bitner*, --- Wn.App.2d ----; 2019 WL 2598731, 7 (2019).¹

Similarly, under RCW 36.18.020(2)(h), the criminal filing fee statute, “[u]pon conviction or plea of guilty . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).” Accordingly, the criminal filing fee is mandatory unless the court makes a particular indigence finding. In other words, RCW 36.18.020(2)(h) requires the imposition of the criminal filing fee if the defendant is indigent under only RCW 10.101.010(3)(d), (unable to pay the costs of counsel). *Bitner*, 2019 WL 2598731 at 7.

Here, the trial court refused to make a finding that Kalama was indigent as defined by RCW 10.101.010(3)(a) through (c), i.e., that Kalama was “(a) [r]eceiving . . . public assistance . . . or (b) [i]nvoluntarily committed to a public mental health facility; or (c) [r]eceiving an annual income . . . of one hundred twenty-five percent . . . of the current federally

¹ This Court’s opinion in *Bitner* is unpublished. GR 14.1 states that unpublished opinions “may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

established poverty level,” for the purpose of imposing the \$200 criminal filing fee. RP 11-12, 15-16; CP 69, 71. This was not error.

At the first sentencing hearing, Kalama’s counsel informed the trial court that she “is currently indigent” though counsel’s explanation of Kalama’s indigence consisted solely of explaining to the court that “[s]he’s been trying to find work while this case has been pending . . . and hasn’t been able to get anything steady yet.” RP 8-9. Counsel asked the trial court to “waive the mandatory funds [sic] and fines.” RP 9. Kalama herself did not weigh in. RP 9.

Based upon those representations and presumably the court file² the trial court sentenced Kalama and stated that “I find that you may have some ability to pay . . . [s]o I’ll impose [the] mandatory minimum[]” legal financial obligations (“LFOs”). RP 10. The trial court included the \$500 crime victim’s assessment and the \$200 criminal filing fee as the mandatory LFOs and struck a number of discretionary fees, fines, and costs. CP 71.

Unsatisfied with this result, Kalama’s counsel requested to readdress the court on the LFOs issue. RP 11-12. The court and counsel then discussed the court’s findings in the judgment and sentence wherein the Court explained:

² Kalama was able to post a \$30,000 bail to remain out of custody while her case was pending. CP 13-14.

[t]his form has three ways you can be indigent under 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. . . . So I don't find 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.

RP 11-12. With that, the trial court moved onto other matters. RP 12.

But Kalama's counsel sought once again to readdress the trial court about its findings regarding the LFOs. RP 12-13. Kalama's counsel then seemingly asserted that judgment and sentence form that was used was incorrect because it did not include an option for the trial court to find Kalama indigent under RCW 10.101.010(3)(d) (indigent defined as inability to pay the costs of counsel) for the purposes of assessing costs or fees. RP 13.³ Because the issue could not be resolved, the trial court set over Kalama's sentencing *just* to address the LFOs issue. RP 13-14.

At the next hearing, Kalama's counsel informed the court that "the only issue is regarding the two hundred dollar criminal filing fee." RP 15. Then counsel, for whatever reason, did not address RCW 36.18.020(2)(h), RCW 10.101.010(3)(d), RCW 10.01.160(3), or what he had previously claimed was an inaccurate judgment and sentence form. RP 15. Nor did he

³ Whether Kalama is still advancing this argument is unclear, but as shown above, RCW 10.01.160(3) and RCW 36.18.020(2)(h) explicitly exclude the definition of indigent found in subsection (3)(d) of RCW 10.101.010 when determining whether a defendant is indigent for the purpose of assessing certain costs and fees to include the criminal filing fee. Brief of Appellant at 6-8.

explain how Kalama was indigent under RCW 10.101.010(3)(a) through (c)—a finding the court would have had to make in order to not impose the criminal filing fee. RP 15. Instead, he basically reiterated his previous comments stating:

She hasn't been able to find work since this case has been pending. She's been staying at friends' houses. She's not able to support herself just through family and friends. So she needs indigent defense.

RP 15. Once again, Kalama herself chose not to address the court on the issue. RP 15-16. Consequently, the trial court did not change its mind and stated “I found previously that although she doesn't meet one of three categories up in [] number four, that [] she was in fact not indigent as defined in those three categories, that I took her financial resources and the nature of the burden into effect and only imposed the mandatory minimum sentence.” RP 16.

The trial court did not err when it found these representations insufficient to find Kalama indigent under RCW 10.101.010(3)(a) through (c). The trial court gave Kalama and her counsel multiple opportunities to address the issue of LFOs and whether or not she was indeed indigent for the purposes of assessing the criminal filing fee, but they continuously failed to provide information that would allow the trial court to find her indigent because she was “(a) [r]eceiving . . . public assistance . . . or (b)

[i]nvoluntarily committed to a public mental health facility; or (c) [r]eceiving an annual income . . . of one hundred twenty-five percent . . . of the current federally established poverty level.” RCW 10.010.101(3)(a)-(c). And the claim of lacking of a steady job or the inability to afford counsel plainly does not equate to indigent under RCW 10.010.101(3)(a) through (c). Furthermore, where the trial court sets a hearing date specifically for the purpose of allowing a defendant to address whether he or she is indigent for the purpose of imposing the criminal filing fee the court has conducted an adequate inquiry.⁴ *See generally State v. Clark*, 191 Wn.App. 369, 372-77, 362 P.3d 309 (2015). Consequently, the trial court properly imposed the \$200 criminal filing fee.

II. Because the clear intent of the trial court was to only impose mandatory legal financial obligations, this Court should remand this case to strike the discretionary supervision costs and the imposition of interest accrual on non-restitution legal financial obligations.

On multiple occasions the trial court commented that it intended to only impose the “mandatory minimum” LFOs and that it was finding Kalama indigent in general even if it was not willing to find her indigent under RCW 10.101.010(3)(a) through (c). RP 10, 12, 14, 16. Nonetheless,

⁴ The “individualized inquiry” discussed in *Blazina* and *Ramirez* pertains to discretionary LFOs. 182 Wn.2d 827, 344 P.3d 680 (2015); 191 Wn.2d 732, 740-751, 426 P.3d 714 (2018). The current criminal filing fee statute creates a mandatory LFO unless the trial court makes a *particular* indigence finding, *supra. Ramirez*, 191 Wn.2d at 748-750 (remanding to “strike the \$2,100 *discretionary* LFOs and the \$200 filing fee”) (emphasis added).

the judgement and sentence included two LFOs that did not belong; a supervision fee and an allowance for interest accrual on LFOs. CP 71.

RCW 9.94A.703(2)(d)⁵ makes supervision fees discretionary and RCW 10.82.090(1) prohibits interest accrual on “nonrestitution legal financial obligations.” *State v. Lundstrom*, 6 Wn.App. 2d 388, 396 n. 3, 429 P.3d 1116 (2018). Because the trial court sought to strike or waive all discretionary LFOs and was not permitted to allow for interest accrual on nonrestitution LFOs, this Court should remand the matter to the trial court to strike the supervision fee and the interest accrual provision in the judgment and sentence.

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⁵ “**Waivable Conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . [p]ay supervision fees. . . .” (emphasis in original).

CONCLUSION

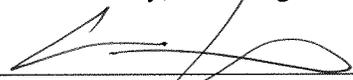
For the reasons argued above, this Court should affirm the imposition of the \$200 criminal filing fee, but remand to the trial court to strike the supervision fee and the provision allowing for interest accrual on nonrestitution LFOs.

DATED this 12th day of July, 2019.

Respectfully submitted:

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