

FILED
Court of Appeals
Division II
State of Washington
7/22/2019 3:53 PM
NO. 53051-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN SUMMERS, JR.,

Appellant.

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

The Honorable Michal Evans, Judge

BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ...	1
C. STATEMENT OF THE CASE	2
1. <u>PROCEDURAL FACTS AND TRIAL TESTIMONY</u>	2
2. <u>JURY VOIR DIRE</u>	7
<i>a. Juror venire 45</i>	7
<i>b. Verdict and sentencing:</i>	8
D. ARGUMENT	9
1. SUMMERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY	9
2. ALTERNATIVELY, COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE FOR FAILING TO INQUIRE OF THE JURORS WHO INDICATED THEY COULD NOT BE FAIR OR IN FAILING TO CHALLENGE THEM FOR CAUSE	13
3. THE COURT ERRED IN IMPOSING THE COMMUNITY SUPERVISION FEE	15
<i>a. Recent statutory amendments prohibit discretionary costs for indigent defendants</i>	15
<i>b. The court did not inquire into Mr. Summers' financial situation</i>	17
<i>c. Mr. Summers was indigent</i>	17

*d. The trial court erred by imposing discretionary
community supervision*18

E. CONCLUSION19

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Bartholomew</i> , 104 Wn.2d 844, 710 P.2d 196 (1985).....	17
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	17
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995) rev'd on other 10grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001)	10
<i>State v. Davis</i> , 175 Wn.2d 287, 290 P.3d 43 (2012).....	11,13
<i>State v. Depaz</i> , 165 Wn.2d 842, 204 P.3d 217 (2009).....	9
<i>State v. Elmore</i> , 155 Wn.2d 758, 123 P.3d 72 (2005).....	9
<i>State v. Estes</i> , 188 Wn.2d 450, 395 P.3d 1045 (2017).....	14
<i>State v. Fire</i> , 100 Wn.App. 722, 998 P.2d 362 (2000).....	10
<i>State v. Fire</i> , 145 Wn.2d 152, 34 P.3d 1218 (2001).....	10
<i>State v. Gonzalez</i> , 111 Wn. App 276, 45 P.3d 205 (2002).....	11,13
<i>State v. Grenning</i> , 142 Wn.App. 518, 174 P.3d 706 (2008).....	10
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	10
<i>State v. Irby</i> , 187 Wn. App. 183, 347 P.3d 1103 (2015).....	9,11,13,15
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	14
<i>State v. Lundstrom</i> , 6 Wn.App.2d 388, 429 P.3d 1116 (2018).....	18
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14
<i>State v. Parnell</i> , 77 Wn.2d 503, 463 P.2d 134 (1969).....	10
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	2,15,16
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210 (1987).....	10

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>United States v. Gonzalez</i> , 214 F.3d 1109 (9th Cir.2000).....	12
<i>Hughes v. United States</i> , 258 F.3d 453 (6th Cir. 2001).....	14,15
<i>United States v. Martinez Salazar</i> , 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).....	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	14,15

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 2.36.110	10
RCW 9A.36.031(1)(a)	5
RCW 9A.36.031(1)(g)	6
RCW 9.94A.703(2)(d).....	18

RCW 9.94A.760(1)	15
RCW 10.01.160(1)	15,16
RCW 10.01.160 (2)	15
RCW 10.101.010(3)(a).....	16,18
RCW 10.64.015	16
RCW 36.18.020(2)(h).....	15

RULES OF APPELLATE PROCEDURE **Page**

RAP 2.6(a)(3).....	9
--------------------	---

OTHER AUTHORITIES **Page**

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783).....	1,2,15
Laws of 2018, ch. 269, § 17	15

CONSTITUTIONAL PROVISIONS **Page**

U.S. Const. Amend VI	9
Wash. Const. art. I, § 22.....	13

COURT RULES **Page**

CrR 3.3(d)(3).....	5
CrR 6.4(c)(1).....	10

A. ASSIGNMENTS OF ERROR

1. The selection of jurors 18 and 35 to decide appellant John Summers' case violated his right to trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington Constitution.

2. Defense counsel rendered constitutionally ineffective assistance of counsel in failing to ensure Mr. Summers received a trial by a fair and impartial jury.

3. The sentencing court erred by imposing the legal financial obligations [LFOs] of Department of Corrections community supervision in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez* and after enactment of House Bill 1783.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Two seated jurors were biased against the appellant, and endorsed the statements of another juror that he would believe a police officer's version of events over that of non-police witnesses. Did inclusion of these individuals on appellant's jury deny him his constitutional right to a fair and impartial jury? Assignment of Error 1.

2. Did defense counsel render constitutionally ineffective assistance of counsel by failing to inquire of the jurors who expressed actual bias and in failing to move to excuse the jurors for cause? Assignment of

Error 2.

3. Under the Supreme Court's decision in *Ramirez*, and after enactment of House Bill 1783, should the community supervision fee be stricken? Assignment Error 3.

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS AND TRIAL TESTIMONY:

Mr. Summers was driving on Interstate 5 from Tacoma to visit friends in Portland when his car broke down near Woodland, Washington on the morning of August 2, 2018. 2Report of Proceedings (RP)¹ at 219.

Mr. Summers did not have a cell phone to summon help so he walked several miles to find an exit ramp in order to find a library with a phone so that he could call friends for help. 2RP at 219, 220.

Mr. Summers had driven to Portland on numerous occasions but was unfamiliar with Cowlitz County and was apprehensive about being in an unfamiliar area. 2RP at 220.

Washington State Patrol Trooper Jamie Gola was on duty and driving northbound on I-5 near Exit 22 in the Woodland area on August 2 when he saw Mr. Summers walking southbound in the northbound median. 2RP at 177, 223. Trooper Gola contacted Mr. Summers and told him that

¹The record of proceedings consists of the following transcribed proceedings: 1RP - August 3, 2018, August 14, 2018 (arraignment), October 1, 2018, November 8, 2018, November 14, 2018, November 27, 2018 (sentencing); and 2RP - November 16, 2018 (jury trial).

their contact was being reported and that he was being recorded. 2RP at 178. Mr. Summers said that he was walking to the next town. 2RP at 178. Trooper Gola noted that Mr. Summers was carrying a Bible, a pair of jeans and some pictures. 2RP at 81.

Trooper Gola told Mr. Summers that it was illegal to walk on the freeway and that it was not safe, and that he would give him a ride off the freeway. 2RP at 180.

Mr. Summers followed the Trooper to the back of his patrol car but would not get inside the vehicle. 2RP at 181. Trooper Gola called for another unit to respond and then explained to Mr. Summers that he needed to get in the car so he could safely get off the freeway. 2RP at 182. He also offered to slow down traffic so that Mr. Summers could walk across the Interstate to the shoulder and then safely walk to an exit, but he would not agree to do so. 2RP at 182.

Trooper Gola tried to physically put him into his vehicle, and as he grabbed his left arm Mr. Summers pulled his arm back and the Trooper felt Mr. Summers hit him on his jaw. 2RP at 183. Trooper Gola attempted to use his taser to subdue him, but Mr. Summers did not respond to the taser. 2RP at 184-85.

Trooper Phillip Berg responded to Trooper Gola's request for assistance, and as he approached the scene he saw Mr. Summers hit Trooper Gola in the face. 2RP at 194. Trooper Berg got out of his vehicle and

attempted to tackle Mr. Summers, but his body was supported by a cable barrier next to the Interstate and did not fall down. 2RP at 195. Trooper Berg used his elbow to hit Mr. Summers in the face and tried an arm bar takedown, but he was not able to get control of Mr. Summers' arm. 2RP at 195. Trooper Gola then tried to use his taser, but the taser was ineffective in stopping Mr. Summers. 2RP at 196-97. Trooper Berg approached Mr. Summers again, who hit him on the shoulder and neck. 2RP at 197. Trooper Berg used his asp baton, but Mr. Summers continued to resist. 2RP at 199.

As they repeatedly attempted to subdue him, both Troopers told Mr. Summers that he was under arrest. 2RP at 185. Trooper Berg stated that Mr. Summers lunged at Trooper Gola and he used his asp baton to hit Mr. Summers on the arm. 2RP at 200. Mr. Summers ran in front of Trooper Berg's car and then ran southward in the northbound lane, stopping traffic on the Interstate. 2RP at 185, 201. Mr. Summers ran between cars in the middle and left lanes, and Trooper Berg then used pepper spray on him, which seemed to have minimal effect. 2RP at 186.

Mr. Summers picked up a plastic stick he found on the side of the freeway, broke it in half and wielded both pieces in either hand. 2RP at 203. Trooper Gola told him: "don't do it," because "if he would come after us then I would be considering lethal force." 2RP at 186. Mr. Summers then dropped the sticks and ran onto the freeway surface again. 2RP at 187. Trooper Berg again deployed his taser, but it had no effect. 2RP at 202.

Trooper Berg signaled that Trooper Gola and a Woodland police officer who had arrived at the scene needed to subdue him at once because the tasers, pepper spray and asp batons were not working, but the Troopers were separated by traffic. 2RP at 203.

Trooper Berg was right behind Mr. Summers as he chased him through the stopped cars, and Mr. Summers ran on the northbound shoulder, and then went into the center lane and started sprinting between cars. 2RP at 203. A motorist in a stopped car opened his door, blocking Mr. Summers' path and Trooper Berg was then able to tackle him. 2RP at 187, 203. After he was tackled the motorist also jumped on Mr. Summers and helped hold him down while Trooper Gola and the Woodland police officer arrived to place Mr. Summers under arrest. 2RP at 204.

Mr. Summers was charged by information filed August 6, 2018, with two counts of third-degree assault under RCW 9A.36.031(1)(a), obstructing a law enforcement officer, and resisting arrest. Clerk's Papers (CP) 9-11. .

Defense counsel moved to withdraw a waiver of speedy trial on the basis that it was not knowingly and voluntarily made. 1RP at 36-37. The court granted the motion to withdraw the speedy trial waiver. 1RP at 38. Defense counsel moved to dismiss the case under CrR 3.3(d)(3) on this basis that speedy trial had expired. 1RP at 38-42. The court denied the motion to dismiss and granted the State's motion to continue the trial and set the matter for trial on November 16. 1RP at 46.

On November 14, 2018, the State filed an amended information, charging Mr. Summers in Counts I and II under RCW 9A.36.031(1)(g), which provides in pertinent part:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault[.]

CP 24-25.

The case came on for trial on November 16, 2018, the Honorable Michael Evans presiding. 2RP at 62-265.

Videos from Trooper Berg's and Trooper Gola's dashcams were played for the jury. 2RP at 190, 206-07. Exhibits 1 and 2.

Mr. Summers testified that he was compliant, cooperative and gave the Trooper Gola his information and told him to "pat him down." 2RP at 220. He stated that he asked Trooper Gola to call in his information and to tell dispatch that Trooper Gola was picking him up. 2RP at 221. He stated that he wanted the Trooper to call in that he was picking up Mr. Summers because "I didn't know who he was and I didn't know what his intentions were toward me, so I just asked that he called it in, then I would get inside his car." 2RP at 221. He stated that the Trooper was not willing to call in that he was picking up Mr. Summers. 2RP at 221.

Mr. Summers testified that he was backing up from Trooper Gola

and that Trooper Berg was running directly at him and he thought Trooper Gola was going to grab him and pull his arms behind his back, and he “instinctively just struck.” 2RP at 222. He said that he did not intend to harm either of the Troopers. 2RP at 222.

2. JURY VOIR DIRE

a. *Juror 45*

During voir dire, Juror 45 stated: “my brother is [indiscernable] is police officer and dispatcher; a lot of my friends are police officers.” 1RP 96. The court asked if those relationships would cause any problems in the case. Juror 45 stated: “a little bit” and when asked by the court to expand on that, he stated: “Well, I would side with the police more.” 1RP at 96.

Defense counsel asked Juror 45 the following:

Defense counsel: Is there anyone who, given the situation where a police officer is testifying about his or her recollection of how an event unfolded would give more deference to that police officer as an observer? And we’re not talking about telling the truth versus not telling the truth. We’re talking about their---their ability as an observer of an event to be accurate. Juror No. 45?

Juror: Absolutely.

Defense counsel: So your leaning would be toward giving a police officer---

Juror: [indiscernable].

Defense counsel: --the benefit of the doubt. And that makes sense, right?

Juror: Well, they take notes.

Defense counsel: They are trained observers.

Juror: Trained observers, and they also take notes and they write a report after it happens, so right when its fresh on their mind.

Defense counsel: And so, given all of that, would you tend to be more aligned with---

Juror: Police officers.

Defense counsel: --the police officer's ability to recollect an observation?

Juror: Yeah.

2RP at 148-49.

When asked who agreed with Juror 45's statement, Jurors 1, 2, 3, 7, 10, 18, 22, 23, 25, 26, 32, and 35 raised their cards.

Jurors 18 and 35 were selected for Mr. Summers' case, were not an alternate, and deliberated to reach a verdict. 2RP at 150.

b. Verdict and sentencing:

The jury found Mr. Summers guilty of two counts of third-degree assault, obstruction, and resisting arrest as charged. 2RP at 260-61; CP 90, 91, 92, 93.

Defense counsel requested the court to sentence Mr. Summers under

the first time offender waiver. The court imposed a standard range sentence of five months for Counts I and II, 364 days suspended for Counts III and IV, followed by twelve months of community custody. RP at 56-57; CP 97-108.

The court imposed a \$500.00 crime victim assessment and \$100.00 DNA collection fee. CP 103.

The judgment and sentence provides that the defendant shall “pay supervision fees as determined by” the Department of Corrections. CP 102.

Timely notice of appeal was filed December 12, 2018. CP 110. This appeal follows.

D. ARGUMENT

1. SUMMERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY

A trial court's decision whether to dismiss a juror is reviewed for an abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009); *State v. Elmore*, 155 Wn.2d 758, 778, 123 P.3d 72 (2005). However, seating a biased juror is by definition manifest error, and requires reversal. *State v. Irby*, 187 Wn. App. 183, 197, 347 P.3d 1103, 1110 (2015). A party may raise for the first time on appeal a “manifest error affecting a constitutional right.” RAP 2.6(a)(3).

Under the Sixth Amendment to the United States Constitution and

article I, section 22 (amend.10) of the Washington State Constitution, “a defendant is guaranteed the right to a fair and impartial jury.” *State v. Brett*, 126 Wash.2d 136, 157, 892 P.2d 29 (1995) rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001) (citing *State v. Rupe*, 108 Wash.2d 734, 748, 743 P.2d 210 (1987)); *State v. Fire*, 100 Wn.App. 722, 725–26, 998 P.2d 362 (2000) (citing *Brett*, 126 Wn.2d at 157). The failure to provide a defendant an impartial jury violates due process. *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds by *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001).

A juror may be excused for cause when his views “ ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’ ” *Brett*, 126 Wash.2d at 157, 892 P.2d 29 (quoting *State v. Hughes*, 106 Wash.2d 176, 181, 721 P.2d 902 (1986)). Where a defendant challenges a juror for cause, the trial court must excuse a juror for cause if actual bias is shown. *State v. Grenning*, 142 Wn.App. 518, 540, 174 P.3d 706 (2008).

According to RCW 2.36.110, “[i]t shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, [or] indifference...” Pursuant to CrR 6.4(c)(1), “[i]f the judge after examination of

any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.”

“This rule makes clear that a trial judge may excuse a potential juror where grounds for a challenge for cause exist, notwithstanding the fact that neither party to the case exercised such a challenge. In fact, the judge is obligated to do so.” *State v. Davis*, 175 Wn.2d 287, 316, 290 P.3d 43, 55 (2012), emphasis added.

In *State v. Gonzalez*, a juror declared during *voir dire* that she would be more likely to believe the testimony of a police officer than the testimony of any other witnesses who were not police officers. *State v. Gonzalez*, 111 Wn. App. 276, 278, 45 P.3d 205 (2002). No effort was made to elicit a curative statement or to rehabilitate the potential juror and the juror never expressed any confidence that she would be able to deliberate fairly and follow the instructions provided by the court. *Id.* at 281. The court held that the juror should have been excused, that the trial court erred in denying defense counsel's challenge for cause, and that the defendant was entitled to a new trial. *Id.* at 282.

In *State v. Irby*, a juror indicated in *voir dire* that she was “more inclined towards the prosecution I guess.” 187 Wn. App. at 191. When

asked if that would impact her ability to be fair, she responded, “I would like to say he's guilty.” *Id.* The court held in that case that the juror had demonstrated actual bias and consequently reversed the conviction. *Id.* at 198. The court stated that “[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice. *Id.* at 193 (citing *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir.2000)). Thus, if the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error.” *Id.* at 193. The court also held that a defendant’s “failure to challenge the two jurors for cause at trial does not preclude him from raising the issue of actual bias on appeal.” *Id.* at 193.

In this case, during *voir dire* defense counsel specifically asked jurors about the credibility of police officers and their ability to recall facts. Juror 45 repeatedly indicated an admitted a bias regarding a class of persons (here, a bias in favor of police witnesses). Jurors 18 and 35 endorsed Juror 45’s statement that police were more likely to be better observers. Jurors 18 and 35 was not rehabilitated. Indeed, here no rehabilitation was attempted.

There can be no question that the jurors’ endorsement of Juror 45’s statement, at the very least, should have raised alarm to the trial court and to both litigants in the absence of any curative statements. The trial court, therefore, had an independent obligation to ensure that the jurors were not

seated, whether or not defense counsel or the State challenged the jurors for cause. It could not have been the opinion of the trial court that the juror was not biased; the issue was never explored. While the trial court would have been within its discretion to question the juror further and, based upon those responses, determine that the juror would be able to set aside any bias and deliberate fairly, the trial court made no effort to do so. The trial court did not fulfill this obligation. The court denied the defendant his right to fair trial by an impartial and unbiased jury.

“When a defendant is denied his or her constitutional right to a fair and impartial jury, the remedy is reversal.” *State v. Gonzalez*, 111 Wn. App 276 at 282. This issue standing alone requires reversal.

1. ALTERNATIVELY, COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE FOR FAILING TO INQUIRE OF THE JURORS WHO INDICATED THEY COULD NOT BE FAIR OR IN FAILING TO CHALLENGE THEM FOR CAUSE

“A trial judge has an independent obligation to protect [the jury trial] right, regardless of inaction by counsel or the defendant.” *Irby*, 187 Wn. App. at 193 (citing *Davis*, 175 Wn.2d at 316). Nonetheless, this court may alternatively consider the jury bias issue as a denial of Mr. Summers’ right to effective assistance of counsel.

The Sixth Amendment and article I, section 22 guarantee effective

assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). “Washington has adopted *Strickland v. Washington's* two-pronged test for evaluating whether a defendant had constitutionally sufficient representation.” *Estes*, 188 Wn.2d at 457. “Under *Strickland*, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim.” *Id.* at 457-58.

“Performance is deficient if it falls ‘below an objective standard of reasonableness based on consideration of all the circumstances.’” *Id.* at 458 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). “Prejudice exists if there is a reasonable probability that ‘but for counsel's deficient performance, the outcome of the proceedings would have been different.’” *Id.* (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A “reasonable probability” is lower than the preponderance of the evidence standard; “it is a probability sufficient to undermine confidence in the outcome.” *Id.*

It could never be considered reasonable for defense counsel to waive his client's right to trial by a fair and impartial jury. As the *Hughes* court put it, “The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction.” 258 F.3d at 463 (citing *United States v. Martinez Salazar*, 528 U.S. 304, 316, 120 S. Ct. 774,

145 L. Ed. 2d 792 (2000)).

The prejudice prong is also satisfied, given that the presence of a biased juror cannot be considered harmless and requires a new trial without a showing of prejudice. *Irby*, 187 Wn. App. at 193; *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). “[G]iven that a biased juror was impaneled in this case, prejudice under Strickland is presumed, and a new trial is required.” *Hughes*, 258 F.3d at 463. *Strickland's* second prong is also satisfied, perfecting Summers’ ineffective assistance of counsel claim.

**3. THE COURT ERRED IN IMPOSING THE
COMMUNITY SUPERVISION FEE**

**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).

b. The court did not inquire into Mr. Summers’ financial situation

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 engage in a *Blazina* inquiry. 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. Mr. Summers was indigent

Mr. Summers was represented by court-appointed counsel, and shortly after sentencing the court found Mr. Summers indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely

at public expense. CP 124. Thus, the record indicates that Mr. Summers was indigent under RCW 10.101.010(3) at the time of sentencing.

d. The trial court erred by imposing discretionary community supervision

In the judgment and sentence, the court directed Mr. Summers to pay a community supervision fee to the Department of Corrections. CP 101. 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, 429 P.3d 1116 (2018). Because these costs are discretionary and prohibited by statutory amendments, this Court should remand to strike them.

//

//

E. CONCLUSION

The reasons stated, Mr. Summers respectfully asks the Court to reverse and dismiss the convictions with prejudice.

In the alternative, Mr. Summers respectfully requests this Court remand for resentencing with instructions to strike the community supervision fee.

DATED: July 22, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

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

PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com

CERTIFICATE OF SERVICE

The undersigned certifies that on July 22, 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 Aila Wallace, Cowlitz County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

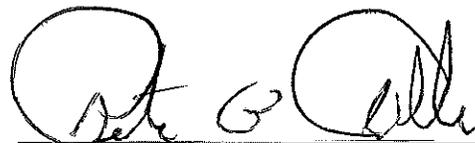
Aila Rose Wallace
Cowlitz County Prosecutor's Office
312 SW 1st Ave. Rm 105
Kelso, WA 98626-1799
WallaceA@co.cowlitz.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. John Summers Jr.
Inmate # 266161
Cowlitz County Jail
1935 First Avenue
Longview, WA 98632

LEGAL MAIL/SPECIAL MAIL

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 July 22, 2019.

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

PETER B. TILLER

THE TILLER LAW FIRM

July 22, 2019 - 3:53 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53051-1
Appellate Court Case Title: State of Washington, Respondent v. John Wesley Summers, Jr., Appellant
Superior Court Case Number: 18-1-01067-2

The following documents have been uploaded:

- 530511_Briefs_20190722155250D2123480_3339.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 20190722154811328.pdf

A copy of the uploaded files will be sent to:

- WallaceA@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com

Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20190722155250D2123480