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Court of Appeals
Division II
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NO. 53093-3-11

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

STATE OF WASHINGTON,

Respondent,

v.

LOUIS THIBODEAUX

Appellant.

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

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. 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. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

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

C. STATEMENT OF THE CASE

1. **Procedural facts:**

Louis Thibodeaux was charged in Cowlitz County Superior Court by information with one count of possession of methamphetamine. Clerk's Papers (CP) 10-11. RCW 69.50.4013(1). According to the probable cause statement, while on patrol in Longview, Washington on September 7, 2017, Longview police officer Brian Price saw Mr. Thibodeaux standing on the corner of 12th at Washington Way. CP 1. Mr. Thibodeaux, who was known to the officer, had a misdemeanor warrant for his arrest from Longview and another warrant from Vancouver, Washington CP 1. After confirming the warrants, Mr. Thibodeaux was placed under arrest, and while searching him incident to arrest, another officer found a container which held

suspected methamphetamine. CP 1-2.

During this period Mr. Thibodeaux also faced other charges, including three counts of delivery of methamphetamine in Cowlitz County cause no. 17-1-00825-08.¹ 1RP at 31. Due to unavailability of a witness for the State, the court found good cause to set cause no. 17-1-00825-08 for trial beyond the expiration of speedy trial for October 30, 2018, and set cause no. 17-1-01383-08 for the same date. 1Report of Proceedings (RP)² at 32. At a readiness hearing on October 25, the State told the court that there were unavailable witnesses in cause no. 17-1-1-00825-08 and the court again found good cause to continue the case to the week of November 6. 1RP at 34-35.

After the cases were reset, Mr. Thibodeaux announced that he had “fired” his attorney. 1RP at 35, 2RP at 69-70. The court did not engage in a colloquy with Mr. Thibodeaux at that time and Mr. Thibodeaux continued to be represented by counsel. Mr. Thibodeaux did not request to proceed pro se. 1RP at 35, 2RP at 57-58.

Mr. Thibodeaux proceeded to trial in cause no. 17-1-01383-08 on

¹Cause no. 53091-1-II. Undersigned counsel filed an appellate brief in that matter on July 29, 2019.

²The record of proceedings consists of the following transcribed hearings: 1RP – May 21, 2018, June 4, 2018, June 25, 2018, July 2, 2018, July 19, 2018, August 7, 2018, August 23, 2018, September 11, 2018, October 25, 2018, November 20, 2018, November 29, 2018, December 4, 2018, and December 18, 2018 (sentencing); 2RP – October 30, 2018 (CrR 3.5, jury trial, day 1), October 31, 2018 (jury trial, day 2).

October 30 and 31, 2018, the Honorable Michael Evans presiding. 2RP at 57-252. Mr. Thibodeaux told the court on October 30, 2018, that he had requested a different attorney, and asked the court to appoint new counsel. 2RP at 58-59. Mr. Thibodeaux stated that he had asked his attorney to file a motion to suppress evidence and that his attorney had not done so. 2RP at 62.

The court denied Mr. Thibodeaux's request for new counsel, stating the case was straightforward and not complex, and noted that Mr. Thibodeaux and his attorney are on speaking terms but disagreed on the approach to the case. 2RP at 68.

a. CrR 3.5 hearing

Prior to trial the court held a hearing pursuant to CrR 3.5. 2RP at 159-182. The following testimony was presented at the hearing:

Longview police officers Alec Langlois and Brian Price arrested Mr. Thibodeaux early on September 7, 2017 pursuant to two warrants for his arrest. 2RP at 162, 167. Officer Price stated that he contacted Mr. Thibodeaux because he knew Mr. Thibodeaux and believed that he had warrants for his arrest. 2RP at 167. After determining that he had two active warrants, he was handcuffed and placed under arrest by Officer Price, and Officer Langlois searched Mr. Thibodeaux and found suspected methamphetamine in a container in his right front pocket. 2RP at 162, 167,

168.

Officer Langlois advised Mr. Thibodeaux of his *Miranda* rights. 2RP at 163-64. Officer Price stated that Mr. Thibodeaux agreed to talk to him and took ownership of the suspected methamphetamine. 2RP at 169 - 70.

Mr. Thibodeaux testified at the hearing that he was contacted by police at 3:00 or 3:15 a.m. on September 7, while he was standing on the street, and was handcuffed and then searched. 2RP at 173. Mr. Thibodeaux denied that the officers read his *Miranda* rights to him and denied that he had a conversation with the officers. 2RP at 173-74. He stated that he told the police that he had an attorney and that he was supposed to bring a letter to court later that morning explaining why he missed court in order to have a warrant quashed. 2RP at 174. Mr. Thibodeaux denied that the officer found methamphetamine in his pocket during the search. 2RP at 174. He stated that he “guess[ed]” that he remembered telling the officers that he was working with the Longview Police Department Street Crimes Unit. 2RP at 174.

The trial court found that the State met its burden for admission of Mr. Thibodeaux’s statements to police, found that he was in custody when he spoke to the officers, that the officers had read Mr. Thibodeaux his constitutional warnings, and found that his statement was knowingly,

voluntarily and intelligently made. 2RP at 178-82.

b. Verdict and sentencing

Ms. Thibodeaux was found guilty as charged. 2RP at 246; CP 85.

Mr. Thibodeaux was also convicted of three counts of delivery of methamphetamine on November 9, 2018 in cause no. 17-1-00825-08, and both cases came on for sentencing on December 18, 2018. 1RP at 46-52.

Based on an offender score of 9 points, the standard range sentence was 12 + months to 24 months. 1RP at 46; CP 98. The State argued for 24 months and 12 months of community custody. 1RP at 47. Defense counsel requested an exceptional sentence downward based on the argument that Mr. Thibodeaux suffers from congestive heart failure. 1RP at 48.

The court sentenced Mr. Thibodeaux to a year and a day and 12 months of community custody in cause 17-1-01383-08, to be served concurrently with 84 months imposed in cause no. 17-1-00825-08. 1RP at 51; CP 99, 100.

The court imposed a \$500.00 victim assessment legal financial obligation. CP 101. The judgment and sentence also provides in Section 4.2 that the defendant shall “pay supervision fees as determined by” the Department of Corrections. CP 101.

Timely notice of appeal was filed January 2, 2019. CP 108. This

appeal follows.

2. Trial testimony:

Longview police officer Alec Langlois saw Mr. Thibodeaux while on patrol in Longview early on September 7, 2017. 2RP at 187. Officer Langlois contacted Mr. Thibodeaux, placed him under arrest and searched him incident arrest. 2RP at 187. While performing the search the officer found a small Tupperware container inside his right front pants pocket. 2RP at 189. Officer Langlois handed the container to Officer Brian Price, who opened the container and found two small plastic bags containing suspected methamphetamine. 2RP at 189, 195.

The substance was tested at the Washington State Patrol Crime Lab and determined to contain methamphetamine. 2RP at 214.

After being given his constitutional warnings, Mr. Thibodeaux agreed to talk to police. 2RP at 187. Mr. Thibodeaux said that the substance was methamphetamine and that it belonged to him. 2RP at 195.

The defense rested without calling witnesses. 2RP at 227, 231.

D. ARGUMENT

1. 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).”).

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. Thibodeaux’s 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. Thibodeaux was indigent

Mr. Thibodeaux was represented by court-appointed counsel, and shortly after sentencing the court found Mr. Thibodeaux indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 124-26. The defense also presented evidence that Mr. Thibodeaux suffers from congestive heart failure, presumably impacting his ability to work. 1RP at 48, 50. Thus, the record indicates that Mr. Thibodeaux was indigent under RCW 10.101.010(3) at the time of sentencing.

d. The trial court erred by imposing discretionary community supervision

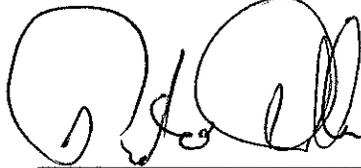
In the judgment and sentence, the court directed Mr. Thibodeaux to pay a community supervision fee to the Department of Corrections. CP 101. The community custody supervision fee is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). The trial court found Mr. Thibodeaux indigent at sentencing for purposes of appeal. Therefore, under RCW 10.01.160(3), this Court should remand to strike the community custody supervision fee.

E. CONCLUSION

Mr. Thibodeaux respectfully requests this Court to remand for resentencing with instructions to strike the community custody supervision fee.

DATED: August 5, 2019.

Respectfully submitted,
THE TILLER LAW FIRM

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

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CERTIFICATE OF SERVICE

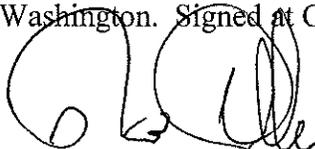
The undersigned certifies that on August 5, 2019, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Sean M. Brittain, Cowlitz County Prosecuting Attorney's Office 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 August 5, 2019.



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