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Court of Appeals
Division II
State of Washington
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NO. 53109-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC GILLEN,

Appellant.

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

The Honorable Erik D. Price, Judge
The Honorable James Dixon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing interest on legal financial obligations (LFOs) other than restitution. CP 90.

2. The requirement that the appellant pay supervision fees is also unauthorized by statute. CP 88.

Issues Pertaining to Assignments of Error

1. The judgment and sentence contains a provision requiring the appellant to pay interest on all LFOs. Given recent statutory amendments, must the provision imposing interest be stricken?

2. The appellant is indigent. Must the requirement that he pay supervision fees, a discretionary LFO, be stricken as well?

B. STATEMENT OF THE CASE¹

The State charged appellant Eric Gillen with possession of methamphetamine with intent to deliver and three counts of bail jumping.² CP 47-49 (fifth amended information). The trial court denied Gillen's

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 12/17/18 (suppression hearing); 2RP – 1/7/19; 3RP – 1/15/19; 4RP – 1/15 and 1/16/19; 5RP – 1/16 and 1/23/19; 6RP – 1/23/19; and 7RP – 3/13/19 (sentencing). Volumes 2 through 6, as identified in this brief, are consecutively paginated.

² RCW 69.50.401(1), (2)(b); RCW 9A.76.170(1), (3)(c).

motions to suppress statements and evidence. CP 36-46; 1RP 120-34. A jury convicted him as charged. CP 73-76.³

At the March 2019 sentencing hearing, the trial court sentenced Gillen to 90 months of incarceration on the methamphetamine charge and 60 months on each bail jumping charge, to run concurrently, reflecting a standard range sentence. CP 87-88. The court also sentenced Gillen to 12 months of community custody. CP 88.

Among LFOs, the court imposed only the mandatory \$500 victim penalty assessment,⁴ waiving all others, with one exception. CP 89. As a condition of community custody, the court also ordered that “[w]hile on community custody” Gillen must pay “supervision fees as determined by [the Department of Corrections (DOC)].” CP 88.

The judgment and sentence also requires that Gillen pay interest on all LFOs. CP 90. Specifically, the judgment and sentence states

The 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. RCW 10.82.090.

CP 90.

³ The trial court dismissed additional charges on the State’s motion, although the record contains no written order to that effect. 5RP 538.

⁴ RCW 7.68.035.

The court did not inquire into Gillen’s ability to pay LFOs. But it found Gillen indigent based on a declaration filed at sentencing. CP 79-83. Specifically, the declaration indicates that Gillen, who will likely be incarcerated for several years, does not anticipate that his financial condition will “improv[e] in the foreseeable future through inheritance, sale of land, or similar.” CP 80.

Gillen timely appeals. CP 78.

C. ARGUMENT

1. THE PROVISION IMPOSING INTEREST ON ALL LEGAL FINANCIAL OBLIGATIONS MUST BE STRICKEN FROM GILLEN’S JUDGMENT AND SENTENCE.

The provision of the judgment and sentence imposing interest on LFOs is contrary to recent statutory amendments and must be stricken.

Sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018, modified Washington’s system of LFOs, addressing “some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.” State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

Among other changes, HB 1783 eliminates interest accrual on the nonrestitution portions of LFOs.⁵ Laws of 2018, ch. 269, § 1 (amending RCW 10.82.090). See Ramirez, 191 Wn.2d at 747.

Thus, RCW 10.82.090 requires the sentencing court to impose interest on restitution. RCW 10.82.090(1). But, after the changes made by HB 1783, the statute now provides that “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1).

The provision of Gillen’s judgment and sentence requiring payment of interest, entered after June 7, 2018, violates this provision of the amended statute. This Court should remand with instructions to modify the judgment and sentence to strike the provision imposing interest on LFOs.

2. COMMUNITY CUSTODY SUPERVISION FEES ARE DISCRETIONARY LFOs AND MUST BE STRICKEN BECAUSE GILLEN IS INDIGENT.

The trial court imposed 12 months of community custody as part of the sentence in this case. CP 88. The judgment and sentence states: “[w]hile on community custody, the [Gillen] shall: . . . (7) pay supervision fees as determined by DOC.” CP 88. But such fees are considered

⁵ No restitution was imposed in this case.

discretionary LFOs, and Gillen is indigent. Thus, the order that Gillen pay such fees should be stricken.

“Conditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement.” State v. Wallmuller, ___ Wn.2d ___, ___ P.3d ___, 2019 WL 4682099, at *2 (Sept. 26, 2019) (citing State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018)).

RCW 9.94A.703(2)(d) states, “[u]nless waived by the court, . . . the court shall order an offender to: . . . [p]ay supervision fees as determined by [DOC]” (emphasis added).

Based on the language authorizing courts to waive the fees, this Court has found them to be discretionary LFOs. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007 (2019); see also State v. Reamer, noted at ___ Wn. App. 2d ___, 2019 WL 3416868, at *5 (July 29, 2019) (recent unpublished Division One decision finding Lundstrom persuasive and striking condition requiring defendant to pay supervision fees).

Recent amendments to the LFO statute prohibit the imposition of certain LFOs on indigent defendants. “The 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).

RCW 10.101.010(3) defines “indigent” as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125 per cent or less than the federally established poverty guidelines,⁶ 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). Moreover

[i]n determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

The trial court did not inquire into Gillen’s ability to pay discretionary LFOs. 7RP 12-13. This is required before discretionary LFOs may be imposed. Ramirez, 191 Wn.2d at 744-45.

But, in any event, the record establishes Gillen’s indigency at the time of sentencing. Other than supervision fees, the trial court imposed only the mandatory \$500 victim penalty assessment. CP 89. The court found Gillen indigent and allowed this appeal wholly at public expense. CP 82-83. Gillen, an Iraq veteran who struggles with addiction, was sentenced to

⁶ The current federal poverty guideline is \$12,490. See U.S. Dep’t Of Health & Human Servs., Office Of The Asst. Sec’y For Planning & Evaluation, Poverty Guidelines (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited October 3, 2019).

90 months of incarceration, which will prevent him from earning any substantial wages in the foreseeable future. 7RP 8-10. He does not have other financial resources. CP 80; see Ramirez, 191 Wn.2d at 747 (relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing).

In summary, the requirement that Gillen pay for supervision should be stricken from the judgment and sentence because he is indigent.

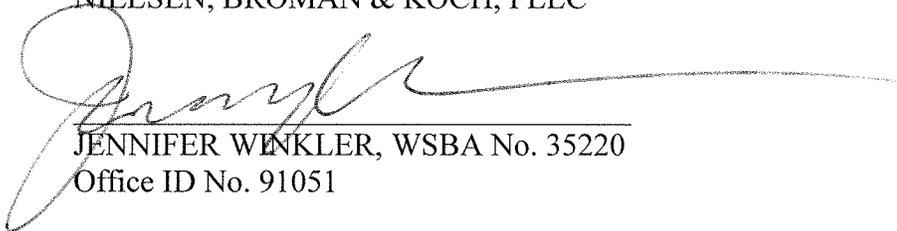
D. CONCLUSION

Recent amendments to the LFO statutes require that the provision imposing interest on non-restitution LFOs be stricken from Gillen's judgment and sentence. Similarly, the requirement that Gillen pay supervision fees must be stricken from the judgment and sentence because such fees are considered discretionary LFOs, and the record demonstrates Gillen is indigent.

DATED this 15th day of October, 2019.

Respectfully submitted,

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