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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
Cause No. 17-1-00431-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The State concedes that the outdated boilerplate language requiring interest on non-restitution legal financial obligations should be modified to reflect the current language in RCW 10.82.090.

2. Whether community custody supervision assessments are costs under the definition of RCW 10.01.160(2), where the definition specifically refers to pretrial supervision.

B. STATEMENT OF THE CASE.

The State generally accepts that the statement of facts in the Brief of Appellant are adequate to address the issues raised on appeal. Additional facts will be included in the argument section below as necessary.

C. ARGUMENT.

1. The State concedes that the boilerplate language regarding interest on legal financial obligations should be modified.

Effective June 7, 2018, “no interest shall accrue on non-restitution legal financial obligations.” RCW 10.82.090(1). The statute also now states “The court shall waive all interest on the portions of legal financial obligations that are not restitution that accrued prior to June 7, 2018.” RCW 10.82.090(2)(a). While the

boilerplate language included in Gillen's judgment and sentence refers to the correct RCW, the language included reflects the law as it existed prior to June 7, 2018.

Given the current form of RCW 10.82.090, it is clear that Gillen is not required to pay interest on non-restitution legal financial obligations as he was sentenced after June 7, 2018. CP 84. The Administrative Office of the Courts provided a modified form for a felony prison judgment and sentence that reflects the change in the law on its website in July of 2019.¹ To reflect the current state of the law, the language should read:

The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until paid in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

The State does not oppose remand for entry of an order substituting that language for the erroneously included language.

2. Community custody supervision fees are not costs pursuant to RCW 10.01.160, therefore the trial court did not err in ordering that Gillen pay community custody supervision fees.

¹ See, www.courts.wa.gov/forms/?fa=forms.contribute&formID=18, at form WPF CR 84.0400 P; 07/2019.

RCW 10.01.160 states that the trial court shall not order a defendant to pay costs if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 9.94A.760(1) states that the trial court cannot order costs as described in RCW 10.01.160 if the defendant is indigent. This Court has found that community supervision fees are discretionary legal financial obligations (LFOs). State v. Lundstrom, 6 Wn. App.2d 388, 396 n. 3, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019). However, that fact does not make community supervision assessments “costs.”

The community custody supervision assessment is imposed under RCW 9.94A.703(2)(d), which states, “Unless waived by the court, as part of any term of community custody, the court shall order an offender to pay supervision fees as determined by the DOC.” RCW 10.01.160(2) states “Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” A community custody supervision assessment is not included in the definition of costs. A trial court is not required to conduct an inquiry into the ability to pay prior to assessing the community custody supervision assessment because it is not a cost pursuant to RCW 10.01.160(2).

State v. Abarca, 2019 Wn. App. LEXIS 2890, at 28,² *citing*, State v. Clark, 191 Wn. App. 369, 374-75, 362 P.3d 309 (2015).

In Abarca, this Court declined to accept a concession from the State to strike a community custody supervision assessment. Id. at 28. This Court reached a similar conclusion in the unpublished decision of State v. Estravillo, 2019 Wn. App. LEXIS 2617, at 11-14.³ Division I seems to have taken a different approach in its unpublished decisions on this issue. See, State v. Reamer, 2019 Wn. App. LEXIS 2008, at 13; State v. Lilly, 2019 Wn. App. LEXIS 2907, at 2.⁴ Given that the community supervision assessment is clearly not contemplated by the definition of costs in RCW 10.01.160(2), this Court's approach is correct and should be followed.

The State further notes that the inclusion of the community supervision assessment in the judgment and sentence does not mean that an offender's financial status will not be taken into account. RCW 9.94A.780(1) allows the Department of Corrections

² This is an unpublished decision, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

³ This is an unpublished decision, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

⁴ These are also unpublished decisions, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

to exempt or defer a person from offender supervision intake fees for several reasons including inability to obtain employment and undue hardship. State statutes take indigency into account when it comes to community supervision fees. The trial court did not err by including the provision that Gillen shall pay supervision fees as determined by DOC.

D. CONCLUSION.

The State concedes that the judgment and sentence should be modified to reflect the current language of RCW 10.82.090. Community supervision fees are not “costs” pursuant to RCW 10.01.160(2), and as such, the trial court was not required to inquire into Gillen’s ability to pay prior to ordering that he pay supervision fees as determined by DOC. The State respectfully requests that this Court affirm Gillen’s judgment and sentence in all aspects, with the exception of remanding to correct the language based on RCW 10.82.090. Gillen raised no issues other than LFOs.

Respectfully submitted this 26th day of November, 2019.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 26, 2019

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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