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Court of Appeals  
Division II  
State of Washington  
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NO. 53247-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

HEATH MCMILLIAN,

Appellant.

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

The Honorable Erik D. Price, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

The State addresses several issues in its response brief. With respect to arguments regarding denial of the special sex offender sentencing alternative and the community custody conditions that the State concedes must be stricken, McMillian rests on his initial briefing. McMillian addresses the State's supervision costs argument below.

THE COURT ERRED IN IMPOSING THE DISCRETIONARY SUPERVISION FEE ON MCMILLIAN BECAUSE HE IS INDIGENT.

The trial court erred in imposing the discretionary supervision fee because McMillian is indigent.

The State claims the supervision fee is not a "cost" under RCW 10.01.160, and therefore it can be imposed on indigent defendants. Brief of Respondent (BOR) at 10. The State's argument cannot be reconciled with the cases prohibiting imposing the DNA fee on those whose DNA sample is already on file. By the State's reasoning, the DNA fee is not a "cost" under RCW 10.01.160 because it is not a cost incurred during the prosecution of the charge or a cost of pretrial supervision. BOR at 10. But in the wake of changes wrought by HB 1783, courts recognize imposition of a DNA fee on an indigent defendant must be stricken when that person's DNA has already collected pursuant to a prior conviction. State v. Catling, 193 Wn.2d 252, 259, 438 P.3d 1174 (2019); State v.

Maling, 6 Wn. App. 2d 838, 844-45, 431 P.3d 499 (2018), rev. denied, 438 P.3d 118 (2019).

The DNA fee, like the supervision fee, is discretionary. Compare RCW 43.43.7541 (“Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender’s DNA* as a result of a prior conviction.”) with RCW 9.94A.703(2)(d) (“*Unless waived by the court*, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department.”) (emphasis added in both).

There is no reason to treat the two differently. Both are legal financial obligations (LFOs). See RCW 9.94A.030(31) (defining “legal financial obligation” as “a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims’ compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys’ fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction”).

“House Bill 1783’s amendments modify 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). “House Bill 1783 amends former RCW 10.01.160 (3) by expressly prohibiting the imposition of discretionary LFOs on defendants . . . who are indigent at the time of sentencing; the amendment conclusively establishes that courts do not have discretion to impose such LFOs.” Ramirez, 191 Wn.2d at 749. The supervision fee is a discretionary LFO and therefore cannot be imposed on indigent defendants like McMillian.

The State also claims the sentencing court’s obligation to inquire into the defendant’s ability to pay is limited to the imposition of costs under RCW 10.01.160. BOR at 10. This is incorrect.

State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) held that “RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.” The requirement of inquiry into ability to pay LFOs, however, is not limited to costs under RCW 10.01.160. According to Ramirez, “the statute requires trial courts to conduct an individualized inquiry into the financial circumstances of each

offender before levying *any discretionary LFOs.*” Ramirez, 191 Wn.2d at 739 (emphasis added).<sup>1</sup>

In State v. Leonard, 184 Wn.2d 505, 507-08, 358 P.3d 1167 (2015), the Supreme Court recognized the discretionary costs of incarceration under RCW 9.94A.760(2) and medical care under RCW 70.48.130 were not costs under RCW 10.01.160, but still held an individualized assessment regarding ability to pay them was mandated by the concerns animating the Blazina decision.<sup>2</sup> The trial court must therefore inquire into a defendant’s ability to pay all discretionary LFOs, regardless of whether they qualify as a “cost” under RCW 10.01.160. See also State v. Duncan, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016) (remanding for resentencing with proper consideration of ability to pay LFOs, which consisted of “costs, assessments, and fines; \$50 per day toward the cost of incarceration for the duration of his prison sentence; and the costs of his medical care”).

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<sup>1</sup> LFOs imposed by the trial court in Ramirez included the DNA fee. Ramirez, 191 Wn.2d at 736.

<sup>2</sup> Citing these concerns, even in the unpublished cases cited by the State, the court “strongly urged” trial judges to carefully consider a defendant’s financial circumstances before imposing discretionary Department of Corrections supervision fees. State v. Abarca, \_\_\_ Wn. App. 2d \_\_\_, 2019 WL 5709517 at \*11 (no. 51673-0-II, filed Nov. 5, 2019); State v. Estavilla, \_\_\_ Wn. App. 2d \_\_\_, 2019 WL 5188618 (no. 51629-2-II, filed Oct. 15, 2019).

The State argues the Department of Corrections can waive the supervision fee if McMillian is unable to pay. BOR at 11. What the Department may decide to do in the future is not at issue. What is at issue is what the court has already done. McMillian appeals from the judgment and sentence, in which the trial court imposed the supervision fee. The statute is clear that the court may waive the cost of supervision. RCW 9.94A.703(2)(d). Because the fee can be waived, it is, by definition, discretionary. For the reasons discussed, the imposition of this discretionary fee on an indigent defendant is error.

As pointed out in the opening brief, the trial court here likely did not intend to impose the waivable cost of supervision because it waived all other non-mandatory costs and fees. CP 43. But the court also erred to the extent that it failed to engage any inquiry into ability to pay discretionary LFOs. 2RP 1-21. Such inquiry is required before discretionary LFOs may be imposed. Ramirez, 191 Wn.2d at 744-45.

Although McMillian did not specifically object, “[i]n the wake of Blazina, appellate courts have heeded its message and regularly exercise their discretion to reach the merits of unpreserved LFO arguments.” State v. Glover, 4 Wn. App. 2d 690, 693, 423 P.3d 290 (2018). There is no compelling reason to treat McMillian differently. Moreover, the State has

already conceded that limited remand is necessary to correct the judgment and sentence. BOR at 7-9.

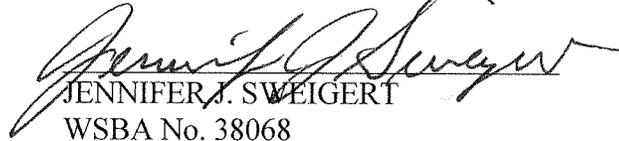
B. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opening brief of appellant, McMillian asks this Court to vacate his judgment and sentence and remand for resentencing. Alternatively, he asks this Court to strike the improper community custody conditions and legal financial obligations.

DATED this 10<sup>th</sup> day of January, 2020.

Respectfully submitted,

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