

FILED
Court of Appeals
Division II
State of Washington
2/28/2020 12:44 PM

NO. 53719-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN COLE MORGAN,

Appellant.

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

The Honorable Andrew Toynbee, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE TRIAL COURT ERRED WHEN IT MISTAKENLY INCLUDED A DISCRETIONARY LFO IN THE JUDGMENT AND SENTENCE AFTER INDICATING IT WOULD IMPOSE ONLY THE MANDATORY VPA DUE TO MR. MORGAN'S INDIGENCE.	3
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Blazina
182 Wn.2d 827, 344 P.3d 680 (2015) 3, 5

State v. Dillon
___ Wn. App. 2d ___, ___ P.3d ___, 2020 WL 525669..... 3

State v. Lundstrom
6 Wn. App. 2d 388 n.3, 429 P.3d 1116 (2018)
rev. denied, 193 Wn.2d 1007 (2019)..... 3, 5

State v. Makekau
194 Wn. App. 407, 378 P.3d 577 (2016)..... 5

State v. Stone
unpublished opinion, 2020 WL 824449 4

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.703 3

RCW 10.01.160..... 3, 4

A. ASSIGNMENT OF ERROR

The trial court erred when it erroneously included discretionary legal financial obligations (LFOs) in the judgment and sentence after it ruled appellant would pay only mandatory LFOs due to his indigence.

Issue Pertaining to Assignment of Error

Appellant was sentenced to 36 months of community custody as part of his sentence. Pre-printed as a condition thereof on appellant's judgment and sentence is the requirement that he pay supervision fees as determined by DOC.

Based on appellant's indigence, however, the prosecutor recommended the court impose only the \$500 victim penalty assessment (VPA). The court agreed stating it would impose only the \$500 VPA.

Yet the community custody supervision fee was not crossed out. Where the court clearly intended to waive all discretionary fees, is remand required for the trial court to correct this error?

B. STATEMENT OF THE CASE

On May 7, 2019, appellant Sean Morgan pled guilty to an amended information charging him with three counts of felony indecent exposure – two with sexual motivation – and one count of

third degree driving while license suspended. CP 9-12, 15-25. Based on the sexual motivation aggravator, the state requested the court impose consecutive sentences on the indecent exposure counts (I-III) consisting of: 12 months + 1 day; 364 days; and 364 days; followed by 36 months of community custody. RP 12, 16-17, 24.

Regarding legal financial obligations, the state recommended only the \$500 victim penalty assessment, based on Morgan's indigence. RP 16-17. Morgan receives social security disability income (SSDI). RP 16.

The court followed the state's recommendation and agreed it would only impose the \$500 VPA. RP 26. In the judgment and sentence, court further found that Morgan does not have the ability to pay LFOs. CP 50. The court also found Morgan indigent for purposes of this appeal. CP 81-82.

Yet, the judgment and sentence contains pre-printed form language indicating that as a condition of community custody, Morgan will "pay supervision fees as determined by DOC." CP 48.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT MISTAKENLY INCLUDED A DISCRETIONARY LFO IN THE JUDGMENT AND SENTENCE AFTER INDICATING IT WOULD IMPOSE ONLY THE MANDATORY VPA DUE TO MR. MORGAN'S INDIGENCE.

“Supervision fees” are a discretionary LFO. State v. Dillon, ___ Wn. App. 2d ___, ___ P.3d ___, 2020 WL 525669. Under RCW 9.94A.703(2), “unless waived by the court, as part of any term of community custody, the court shall order an offender to: (d) pay supervision fees as determined by the department.” Since the supervision fees are waivable by the trial court, they are discretionary LFOs. State v. Lundstrom, 6 Wn. App. 2d 388 n.3, 429 P.3d 1116 (2018), rev. denied, 193 Wn.2d 1007 (2019).

Before the trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160, the record must reflect the court considered the defendant's personal financial circumstances and made an individualized inquiry into his or her ability to pay. State v. Blazina, 182 Wn.2d 827, 837–38, 344 P.3d 680 (2015). The trial court “shall not” order a defendant to pay

discretionary LFOs unless it first finds the defendant is or will be able to pay these. Id.; RCW 10.01.160(3).¹

It is clear from the record here the court intended to waive all discretionary fines and fees. The prosecutor stated Morgan was indigent and asked the court to impose only the VPA because Morgan receives SSDI. The court stated it was only imposing the VPA. The court expressly found on the judgment and sentence that Morgan does not have the ability to pay LFOs. The court further found Morgan indigent for purposes of this appeal. There is nothing in the record indicating the trial court ever reconsidered this ruling before signing the judgment and sentence.

Unfortunately, however, the judgment and sentence still mistakenly included preprinted language requiring Morgan to pay supervision fees as determined by DOC. Since the trial court had already ruled it would impose only the VPA, the inclusion of this discretionary fee in the judgment and sentence was likely due to one of two circumstances: (1) the trial court failed to recognize the discretionary LFO as such, or (2) scrivener's error. Given the

¹ In an unpublished opinion, this Court held that "supervision fees" are a discretionary LFO but not a "cost" for purposes of RCW 10.01.160(2). State v. Stone, unpublished opinion, 2020 WL 824449. Accordingly, this Court held the lower court was not required to conduct a Blazina analysis before imposing it. Nonetheless, this Court encouraged the lower court to do so. Here, the lower

plethora of cases issued since Blazina, including Lundstrom, supra, discussing the distinction between discretionary and mandatory LFOs, it is highly unlikely the trial court did not understand which fees were mandatory and which were discretionary. Instead, it is likely that the inclusion of the discretionary LFOs in the written judgment was the result of scrivener's error.

The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. E.g., State v. Makekau, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). Consequently, this Court should remand for the trial court to correct the judgment and sentence.

court conducted an ability to pay analysis and expressed its intent to waive all discretionary LFOs.

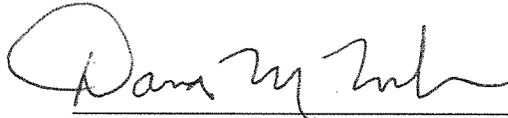
D. CONCLUSION

Because the trial court did not intend to impose discretionary LFOs, this Court should remand to allow the trial court to strike the supervision fees based on Morgan's indigency.

Dated this 27th day of February, 2020.

Respectfully submitted

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "Dana M. Nelson", written over a horizontal line.

DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

NIELSEN KOCH P.L.L.C.

February 28, 2020 - 12:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53719-2
Appellate Court Case Title: State of Washington, Respondent v Sean Cole Morgan, Appellant
Superior Court Case Number: 19-1-00237-3

The following documents have been uploaded:

- 537192_Briefs_20200228124252D2090421_6273.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 53719-2-II.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- sara.beigh@lewiscountywa.gov
- teri.bryant@lewiscountywa.gov

Comments:

Copy mailed to: Sean Morgan 333263 Washington Corrections Center PO Box 900 Shelton, WA 98584-

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20200228124252D2090421