

FILED
Court of Appeals
Division II
State of Washington
8/28/2020 9:35 AM

NO. 53843-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY LLOYD MENZIES, JR.,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 16-1-02309-8

BRIEF OF RESPONDENT

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I. INTRODUCTION

For the first time on appeal, Timothy Menzies Jr. challenges the trial court's imposition of a supervision fee and collection costs in his judgment and sentence. He has not preserved this issue for review and does not demonstrate a manifest constitutional error under RAP 2.5(a). Neither collection costs nor supervision fees are "costs" within the meaning of RCW 10.01.160. Both are authorized under the law regardless of a defendant's indigency. And Menzies may challenge any subsequent imposition of these costs at any time following his release from total confinement. The trial court did not abuse its discretion by imposing the supervision fee and collection costs, and nothing in the record indicates that they were inadvertently imposed. This Court should affirm the sentence.

II. RESTATEMENT OF THE ISSUES

- A. Should this Court decline to address Menzies' unpreserved claim that the trial court erred by imposing a supervision fee and collection costs where he failed to object below, where there is no manifest constitutional error, and where he has a remedy and may challenge the fees if they are ever imposed at any time following release from confinement?
- B. Did the court abuse its discretion by imposing a supervision fee and collection costs, which are explicitly authorized under RCW 9.94A.780 and RCW 36.18.190, and which are not "costs" under RCW 10.01.160?
- C. Does the record indicate that the court inadvertently imposed the supervision fee and collection costs where the court never indicated an intent to impose only mandatory legal financial obligations?

III. STATEMENT OF THE CASE

On June 8, 2016, the State charged Timothy Menzies Jr. with two counts of rape of a child in the first degree and two counts of child molestation in the first degree for sexually assaulting his daughter, K.M. CP 1-6. The State subsequently amended the charges and added three counts of rape of a child in the first degree and one count of rape of a child in the second degree for sexually assaulting his stepdaughter, K.E. CP 7-10. Based on plea negotiations, the State amended the charges to two counts of rape of child in the first degree, one count for each victim, and added the following three aggravating factors on each count: abuse of a position of trust, multiple victims, and multiple incidents/acts of penetration over a prolonged period of time. CP 11-12. Menzies pled guilty to the amended charges. CP 13-24.

On October 13, 2017, the court sentenced Menzies to an exceptional sentence above the standard range of 240 months to life. CP 28-45. The trial court found substantial and compelling reasons to impose the exceptional sentence because Menzies abused his position of trust as the father and stepfather of the victims and because he committed the crimes against multiple victims with multiple acts of sexual intercourse with each victim for years that occurred on at least a daily basis with threats of violence. CP 64-67. Menzies timely appealed the exceptional sentence. *See* CP 46.

In an unpublished opinion, this Court held that the trial court's reliance on the multiple incidents aggravating factor was not error but that the multiple victim aggravating factor was improper because the State charged Menzies with crimes against each victim. *State v. Menzies*, No. 51431-1-II, 2019 WL 2513803 at *1 (Wash. Ct. App. June 18, 2019). The Court remanded for resentencing because the record was not sufficiently clear to establish that the trial court would have imposed the same exceptional sentence without the multiple victim aggravating factor. *Id.* The Court also ruled that the trial court should address the legal financial obligations under the current law on remand. *Id.*

On September 13, 2019, the court resentenced Menzies and again found substantial and compelling reasons to impose an exceptional sentence of 240 months to life. CP 80-98; 9/13/19 RP 6-8. The State asked the court to impose the same legal financial obligations (LFOs) with the exception of the \$200 filing fee "because of Mr. Menzies' indigency." 9/13/19 RP 3. In its oral ruling, the court stated that it would change the LFOs based on the recent statutory change because Menzies is indigent and "will be for some time." *See* 9/13/19 RP 8. The court imposed the following LFOs: \$500 crime victim assessment, \$100 DNA database fee, and \$1,079.65 in restitution based on a prior restitution order. CP 87-88; 9/13/19 RP 8. These LFOs were reflected in the judgment and sentence. CP 87. The court also

imposed collection costs and a supervision fee as determined by the Department of Corrections (DOC). CP 44, 88-92, 97. Menzies timely appealed. *See* CP 101.

IV. ARGUMENT

A. Menzies raises an objection to the imposition of a supervision fee and collection costs for the first time on appeal and has not properly preserved the issue for review.

For the first time on appeal, Menzies raises an objection to the trial court's imposition of a supervision fee and collection costs at resentencing. This Court should decline to reach the merits of his claims because he did not challenge the imposition of these LFOs at resentencing. Thus, he has not preserved the issue for review.

It is well settled that an appellate court may refuse to review any claim of error that was not raised in the trial court. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015); RAP 2.5(a). Issue preservation helps promote judicial economy by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). Generally, appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a "manifest error affecting a constitutional right." *Id.*; RAP 2.5(a)(3). The defendant must identify a constitutional error and show how

the alleged error actually affected his rights. *Kirkman*, 159 Wn.2d at 926-27. Manifest constitutional errors are still subject to a harmless error analysis. *Id.* at 927.

Challenges to LFOs do not rise to the level of manifest constitutional error. *See Blazina*, 182 Wn.2d at 833-34 (unpreserved LFO errors do not command review as a matter of right). Here, Menzies does not argue that the imposition of a supervision fee and collection costs is a manifest constitutional error warranting an exception to the preservation rule under RAP 2.5(a). Rather, his challenge is a statutory one—not a constitutional one. And there is no manifest error where the judgment merely authorizes a cost or fee that the trial court has the authority to impose under RCW 9.94A.703(2) and RCW 36.18.190. These costs are within the province of the trial court, and Menzies may “at any time after release from total confinement” petition the trial court for remission of any costs. RCW 10.01.160(4).

A defendant who fails to object to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. *Blazina*, 182 Wn.2d at 832. But this Court does have the discretion to reach unpreserved claims of error. *Id.* at 830. In *Blazina*, the Supreme Court exercised its discretion to reach the merits of the defendant’s unpreserved LFO challenge. *Id.* But unlike the LFOs at issue in *Blazina*, the collection costs

may never be imposed and the supervision fee is a modest expense that can be waived by DOC if Menzies is unable to pay. *See State v. Kottenbrock*, No. 79009-9-I, 2020 WL 1911435 at *5 (Wash. Ct. App. April 20, 2020) (declining to exercise its discretion to consider defendant’s unpreserved claim that the court erred by imposing a supervision fee because he did not object below and noting that the fee is a “modest expense that can be waived by DOC”); *see also State v. Ganis*, No. 52849-5-II, 2020 WL 2044768 at *1 (Wash. Ct. App. April 28, 2020) (declining to address defendant’s unpreserved argument that the trial court improperly ordered him to pay the supervision fee because he failed to object below).¹

Menzies did not object to the imposition of the supervision fee or collection costs below and has not preserved the issue for appeal. Further, he may seek remission at any time upon his release from total confinement. RCW 10.01.160(4). This Court should decline to reach the merits of his claim for the first time on appeal.

B. The trial court did not abuse its discretion by imposing a supervision fee and collection costs.

If this Court reaches the merits of Menzies’ claims, it should conclude that the trial court did not abuse its discretion by imposing a

¹ *Kottenbrock* and *Ganis* are unpublished opinions that have no precedential value and are not binding on this Court. They are cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

supervision fee as determined by DOC and collection costs because they are not “costs” within the meaning of RCW 10.01.160 and may be imposed regardless of the defendant’s indigency and without an inquiry into the defendant’s ability to pay. A decision to impose LFOs is reviewed for an abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). An abuse of discretion occurs if the trial court’s decision is manifestly unreasonable or based on untenable grounds. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012).

1. The trial court properly imposed a supervision fee because it is not a “cost” under RCW 10.01.160 and may be imposed regardless of a defendant’s indigency.

The trial court did not abuse its discretion by imposing a supervision fee to be determined by DOC because it is not a “cost” under RCW 10.01.160 and may be imposed regardless of indigency and without conducting an inquiry into the defendant’s ability to pay.

The court shall order a defendant to pay supervision fees for community custody as determined by DOC unless the court waives this requirement. RCW 9.94A.703(2)(d). Here, the trial court did not waive the imposition of the supervision fee. *See* CP 44, 91-92, 97.

The law now prohibits the imposition of discretionary “costs” on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3). RCW 9.94A.760(1); RCW 10.01.160(3); *State v. Ramirez*,

191 Wn.2d 732, 746, 748, 426 P.3d 714 (2018). “Costs” are 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.” RCW 10.01.160(2). The term “costs” is generally defined in the first two sentences of RCW 10.01.160(2):

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. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

Clark, 191 Wn. App. at 375; RCW 10.01.160(2). The statute then lists a series of “costs” that may or may not be imposed, including warrant service costs, jury fees, costs of administering deferred prosecution or pretrial supervision, and incarceration costs. *Clark*, 191 Wn. App. at 375; RCW 10.01.160(2).

In *Clark*, the Court concluded that a “fine” is not a discretionary “cost” within the meaning of RCW 10.01.160(3) because the definition of “costs” in RCW 10.01.160(2) does not include “fines.” *Clark*, 191 Wn. App. at 375-76. Accordingly, the Court held that the trial court is not required to conduct an inquiry into the defendant’s ability to pay the fine. *Id.* at 376. Thus, not every LFO is a cost. *See id.* Costs do not include post-

conviction penalties such as the mandatory crime victim penalty assessment, restitution, the discretionary fine under RCW 9A.20.021, supervision fees, or collection costs.

In dicta, this Court noted that costs of community custody are discretionary LFOs. *See State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). But this Court subsequently explained in several unpublished decisions that the supervision fee is not a discretionary “cost” merely because it is a discretionary LFO. *State v. Estavillo*, No. 51629-2-II, 2019 WL 5188618 at *5 (Wash. Ct. App. Oct. 15, 2019); *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517 at *11 (Wash. Ct. App. Nov. 5, 2019); *State v. Chiechi*, No. 52405-8-II, 2020 WL 4194608 at *6 (Wash. Ct. App. July 21, 2020).² The supervision fee fails to meet the RCW 10.01.160(2) definition of a “cost” because it is not an expense specially incurred by the State to prosecute a defendant, to administer a deferred prosecution program, or to administer pretrial supervision. *Estavillo*, 2019 WL 5188618 at *5; *Abarca*, 2019 WL 5709517 at *11; *Chiechi*, 2020 WL 4194608 at *6.

Based on this reasoning, this Court has held in several unpublished decisions that the supervision fee was properly imposed because it is not a

² *Estavillo*, *Abarca*, and *Chiechi* are unpublished opinions that have no precedential value and are not binding on this Court. They are cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

“cost” under RCW 10.01.160 and that the trial court was not required to inquire into the defendant’s ability to pay before imposing the fee. *Estavillo*, 2019 WL 5188618 at *5-6; *Abarca*, 2019 WL 5709517 at *1, 10-11; *Chiechi*, 2020 WL 4194608 at *6 (statutes do not prohibit the court from imposing the supervision fee based on the court’s finding that the defendant is indigent).

In *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020), Division I remanded to strike the supervision fee after concluding that the trial court intended to impose only mandatory LFOs, but “inadvertently imposed supervision fees” because the requirement was “buried in a lengthy paragraph on community custody.” Division I relied on the trial court’s statement that it would waive the DNA fee, the filing fee, and “simply order \$500 victim penalty assessment, which is still truly mandatory, as well as restitution, if any.” *Id.*

Although the supervision fee in Menzies’ case is in a similar lengthy paragraph about community custody conditions, it is also separately included as one of the conditions listed in both Appendix F and Appendix H. *See* CP 44, 91-92, 97. Thus, it is included in three separate locations in the judgment. *See id.* Further, there is no indication that the trial court “inadvertently” imposed the fee in Menzies’ case as the court did not indicate an intent to only impose “truly mandatory” fees as the court did in

Dillon. See 9/13/19 RP 8-9. In its oral ruling, the court noted that it was changing the LFOs in Menzies' judgment only because of the statutory change:

Now, the thing that will be changed, and it's only because the statute changed, and that has to do with the...legal financial obligations, and only those obligations that are not -- you are indigent and you will be for some time, those, only those matters will be changed. Consequently, the \$200 filing fee will not be imposed. And the interest on non restitution matters will not be imposed either. I had forgotten on this particular case, there's \$100 DNA fee I noticed as well.

9/13/19 RP 8. The statutory change that the court was referring to eliminated interest accrual on the nonrestitution portion of LFOS, established that the DNA database fee is no longer mandatory if the defendant's DNA had previously been collected, prohibited imposition of the \$200 filing fee, and provided that a court may only sanction offenders for failing to pay LFOs if the failure to pay is willful. See *Ramirez*, 191 Wn.2d at 746-47. The Legislature also amended the discretionary LFO statute, RCW 10.01.160, to prohibit courts from imposing costs on defendants who are indigent at sentencing. *Ramirez*, 191 Wn.2d at 746-47. These are the costs that the trial court was indicating it would not impose based on the statutory change. See 9/13/19 RP 8.

The trial court did not indicate an intent to impose only mandatory LFOs. This is further supported by a provision that the trial court did not

impose in the judgment and sentence. The judgment includes a provision with a box to check if the court finds it applicable, which notes that the “following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:”. CP 87. The court did not impose this provision and did not list any circumstances indicating that payment of all nonmandatory LFOs is inappropriate. *See* CP 87.

Further, even after *Dillon*, this Court has continued to hold in unpublished decisions that trial courts properly imposed supervision fees regardless of indigency and that this is not a cost under RCW 10.01.160 where an inquiry into the defendant’s ability to pay is required. *See, e.g., State v. Aylward*, No. 52681-6-II, 2020 WL 2126522 at *7 (Wash. Ct. App. May 5, 2020); *State v. Summers*, No. 53051-1-II, 2020 WL 4470831 at *4 (Wash. Ct. App. Aug. 4, 2020) (trial court did not err by imposing supervision fee because DOC has the authority to impose or waive the fee).³

Menzies argues that the trial court did not intend to impose a supervision fee or collection costs because they were not included in the “total LFO calculation” in the judgment and sentence. Br. of Appellant at 16. This argument lacks merit. The supervision fee and collection costs were not included in the calculation because not only is the monetary amount

³ These unpublished opinions have no precedential value and are not binding on this Court but may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

unknown, but they may not be imposed at all. The restitution, crime victim assessment, and DNA database all have specific amounts that Menzies must pay. *See* CP 87. The amount of any potential supervision fee will be determined by DOC after Menzies' release—or not imposed at all. *See* RCW 9.94A.780(2); RCW 9.94A.703(2)(d). And collection costs will not be imposed if Menzies pays his LFOs—or the clerk's office may not send the case to collections. *See* RCW 36.18.190. These fees and costs simply could not be “calculated” at the time of sentencing.

Menzies misrepresents that there is authority concluding that the term “costs” encompasses supervision fees. *See* Br. of Appellant at 8 (citing *Dillon* and *State v. Reamer*, No. 78447-1-I, 2019 WL 3416868 (Wash. Ct. App. July 29, 2019) (unpublished)).⁴ Neither case makes such an assertion. In *Dillon*, the Court held that the trial court abused its discretion by imposing discretionary supervision fees where it indicated an intent to only impose mandatory fees. *Dillon*, 12 Wn. App. 2d at 152. In *Reamer*, the Court struck the supervision fee under the faulty analysis that the fee is discretionary without any consideration of whether it is a cost under RCW 10.01.160. *See Reamer*, 2019 WL 3416868 at *5.

⁴ Unpublished opinions have no precedential value and are not binding on this Court but may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

The proper inquiry is not whether the LFO is discretionary, but rather whether it is a “cost” under RCW 10.01.160(2). Menzies improperly relies on dicta in inapposite remission cases for his argument that this Court should reject the analysis in *Clark* and *Abarca*. See Br. of Appellant at 13 (citing *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019) and *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016)). This Court should continue to follow the reasoning in *Clark*, *Estavillo*, *Abarca*, *Chiechi*, *Aylward*, and *Summers* and hold that a supervision fee is not a cost under RCW 10.01.160. The trial court did not abuse its discretion by imposing a supervision fee in the judgment without regard to Menzies’ ability to pay because it is not a cost under RCW 10.01.160. When Menzies is released, DOC will determine whether to impose any supervision fee based on his ability to pay, and Menzies may seek remission at any time following his release from total confinement. This Court should affirm.

2. The trial court properly exercised its discretion to impose collection costs because they are not “costs” under RCW 10.01.160, and the clerk’s office has the statutory authority to seek collection costs.

The trial court did not abuse its discretion by imposing collection costs because they are not “costs” within the meaning of RCW 10.01.160, and the clerk’s office has the statutory authority to seek collection costs from the defendant if he does not pay his court-ordered LFOs.

“The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services.” RCW 36.18.190 (emphasis added). The word “may” indicates that the cost is discretionary. After a defendant is released from confinement, the county clerk assumes legal responsibility for collecting any remaining LFOs. RCW 9.94A.780(7). The county clerk may contract with collection agencies under chapter 19.16 RCW to collect unpaid court-ordered LFOs, and the costs shall be paid by the debtor. RCW 36.18.190. The Legislature has allocated the costs of collection to the debtor. *Id.*; RCW 19.16.500.

Here, the trial court included a provision in the judgment and sentence requiring Menzies to pay “the cost of services to collect unpaid legal financial obligations per contract or statute.” CP 88. This provision only gives notice of the county clerk’s discretion and statutory authority to send the case to collections if Menzies fails to pay his court-ordered LFOs.

Like supervision fees, collection costs are also not a “cost” under RCW 10.01.160(2), which limits costs 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.” RCW 10.01.160(2). Collection costs have no relation to the costs of prosecution and are not a “cost” within the meaning of RCW

10.01.160. Rather, they are simply a mechanism for enforcing the court's judgment when a defendant refuses to pay LFOs as ordered by the court. And the clerk may still consider a variety of extenuating circumstances in determining whether to exempt or defer payment of the LFOs. RCW 9.94A.780(7). The trial court did not abuse its discretion by including a collection cost provision in the judgment that merely outlines the applicable law. *See* CP 88.

Recent decisions from the Court of Appeals have remanded cases to strike LFOs from judgments on the theory that the absence of an oral record explicitly addressing provisions imposing fees and costs indicates that the imposition of such provisions was inadvertent. *See, e.g., Dillon*, 12 Wn. App. 2d at 152; *see also State v. Tucker*, No. 53014-7-II, 2020 WL 2857612 at *4 (Wash. Ct. App. June 2, 2020) (unpublished) (striking the “boilerplate language imposing nonmandatory collection costs” because it appears to be “inadvertently” imposed).

Here, the judgment and sentence is thirteen pages long and includes numerous provisions that Menzies must follow. *See* CP 85-98. The sentencing court did not discuss nearly any of these provisions in its oral ruling—but this does not mean that the provisions do not apply or were inadvertently imposed. The sentencing court did not discuss the payment plan, HIV testing, the exoneration of bond, the Domestic Violence No-

Contact Order, the return of property, sexual deviancy treatment, or any of the conditions of community custody that Menzies will be required to follow upon release. *See* 9/13/19 RP 6-11; *see also* CP 85-98. But the lack of an oral record does not affect the validity of these provisions.

“The written decision of a trial court is considered the court’s ‘ultimate understanding’ of the issue presented.” *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980). A trial court’s oral statements are “no more than a verbal expression of (its) informal opinion at that time...necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” *Id.* at 458. An oral decision has no binding or final effect unless it is formally incorporated into the judgment. *Id.* at 458-59; *State v. Sims*, 193 Wn.2d 86, 99, 441 P.3d 262 (2019) (a written order will control over an oral ruling). An appellate court may consider a trial court’s oral decision as long as it is not inconsistent with the trial court’s written order. *State v. Kull*, 155 Wn.2d 80, 88, 118 P.3d 307 (2005).

Here, the trial court’s oral ruling is not inconsistent with the judgment. It simply provides no guidance. The fact that the court waived certain costs based on statutory changes in the law does not mean that the court intended to waive all costs, which have separate purposes. The provisions imposed in a trial court’s written judgment and sentence are not presumed to be inadvertent merely because they were not repeated verbally

on the record. This Court should not speculate that the trial court inadvertently imposed a supervision fee and collection costs in a judgment that the court signed where nothing in the record indicates they were inadvertently imposed. The trial court did not abuse its discretion by imposing collection costs as a potential means of collecting unpaid court-ordered LFOs. This Court should affirm.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment and sentence.

RESPECTFULLY SUBMITTED this 28th day of August, 2020.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

8-28-20 s/Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

August 28, 2020 - 9:35 AM

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Appellate Court Case Title: State of Washington, Respondent v. Timothy Menzies, Jr., Appellant
Superior Court Case Number: 16-1-02309-8

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