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Court of Appeals
Division II
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NO. 53917-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ONEAL,

Appellant.

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

The Honorable M.H. Evans & S.M. Warning, Judges

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
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>Issues Pertianing to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
THE DOMESTIC VIOLENCE ASSESSMENT AND CRIMINAL FILING FEE MUST BE STRICKEN BECAUSE ONEAL IS INDIGENT.	2
(a) <u>Oneal is indigent.</u>	2
(b) <u>Imposition of discretionary LFOs against the indigent is prohibited.</u>	3
(c) <u>The Criminal filing fee should be struck</u>	4
(d) <u>The \$100 DV penalty assessment should be struck</u>	5
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Bartholomew</u> 104 Wn.2d 844, 710 P.2d 196 (1985).....	5
<u>State v. Krall</u> 125 Wn.2d 146, 881 P.2d 1040 (1994).....	5
<u>State v. Ramirez</u> 191 Wn.2d 732, 426 P.3d 714 (2018).....	3, 4
<u>State v. Ueltzen</u> No. 52098-2-II, 2020 WL 200856 (Wash. Ct. App. Jan. 13, 2020)	3
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Former RCW 36.18.020.....	4
House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783)	3, 4
LAWS OF 2018, ch. 269, § 6.....	4
LAWS OF 2018, ch. 269, § 17.....	4
RCW 10.01.160	2, 3, 4, 6
RCW 10.99.080	5
RCW 10.101.010	1, 4

A. ASSIGNMENT OF ERROR

The trial court erred when it imposed a \$100 Domestic violence assessment and a \$200 Criminal filing fee as part of Appellant's judgment and sentence. CP 65.

Issues Pertaining to Assignment of Error

The \$100 Domestic violence assessment and \$200 Criminal filing fee are discretionary Legal Financial Obligations (LFOs). Appellant was represented by appointed counsel at trial and was found indigent for purposes of appeal after sentencing.

(1) Under these circumstances should this Court strike the LFOs imposed for the Domestic violence assessment and Criminal filing fee?

(2) In the alternative, is remand necessary to determine if Appellant "at the time of sentencing [was] indigent as defined in RCW 10.101.010(3)(a) through (c)," and if not, for the court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" before ordering any discretionary LFOs?

B. STATEMENT OF THE CASE

In July 2019, Appellant Joseph Oneal was convicted in Cowlitz County Superior Court of second degree assault by strangulation, domestic violence. CP 56-57. Sentencing was held July 30, 2019, before the

Honorable S.M. Warning, Judge. RP 354-60.¹ The court sentenced Oneal to 17 months of incarceration and 18 months of community custody. CP 59-70; RP 359.

Although not discussed on the record, Oneal's judgement and sentence includes a \$200 Criminal filing fee, and a \$100 Domestic Violence assessment. CP 65. Oneal timely appeals. CP 71-83. The trial court found Oneal indigent for purposes of appeal. CP 85-86.

C. ARGUMENT

THE DOMESTIC VIOLENCE ASSESSMENT AND CRIMINAL FILING FEE MUST BE STRICKEN BECAUSE ONEAL IS INDIGENT.

RCW 10.01.160(3) prohibits the imposition of discretionary costs on indigent defendants. Oneal is indigent. The \$100 DV penalty assessment and \$200 Criminal filing fee are discretionary costs and are statutorily prohibited here. They must be stricken.

(a) Oneal is indigent.

The trial court found Oneal was indigent for purposes of appeal based on an affidavit by trial counsel noting Oneal was found indigent for purposes of trial and that there is no basis to find his financial circumstances

¹ There are two consecutively paginated volumes of verbatim report of proceedings for the dates of June 17, 2019, July 1, 2, 10, 11, 23, & 30, 2019, referenced herein as "RP."

had improved since. CP 84-86. On the basis of this affidavit, the sentencing court found Oneal indigent and waived all expenses of the appeal. CP 85-86.

Oneal has been incarcerated since being found guilty on July 11, 2019. RP 349. It is therefore unlikely his financial circumstances have improved. This Court should find the record supports finding Oneal was indigent at the time of sentencing, and that the trial court was aware of this fact and made a finding of indigency.

In the alternative, this Court should remand for determination of whether Oneal meets the indigency requirements set forth under RCW 10.01.160(3). See State v. Ueltzen, No. 52098-2-II, 2020 WL 200856 (Wash. Ct. App. Jan. 13, 2020) (unpublished opinion remanding for determination of the “category of Ueltzen’s indigency” for purposes of applying RCW 10.01.160).

(b) Imposition of discretionary LFOs against the indigent is prohibited.

In Ramirez,² the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending on appeal. Ramirez, 191 Wn.2d at 749.

² State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

HB 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 191 Wn.2d at 746 (citing LAWS OF 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

HB 1783 “also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17.” Ramirez, 191 Wn.2d at 748. Thus, HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. Accordingly, the Ramirez court struck the fee due to indigency. Id.

(c) The Criminal filing fee should be struck

Because Oneal is indigent, this Court should strike the \$200 Criminal filing fee from his judgment and sentence. HB 1783 and Ramirez prohibit it in this instance.

(d) The \$100 DV Penalty assessment should be struck.

The trial court imposed a \$100 DV Penalty Assessment, citing RCW 10.99.080. CP 65. This LFO is discretionary and must be stricken from Oneal's judgment and sentence.

RCW 10.99.080(1) provides,

All superior courts . . . may impose a penalty of one hundred dollars, plus an additional fifteen dollars on any person convicted of a crime involving domestic violence; in no case shall a penalty assessment exceed one hundred fifteen dollars on any person convicted of a crime involving domestic violence. The assessment shall be in addition to, and shall not supersede, any other penalty, restitution, fines, or costs provided by law.

(Emphasis added.)

“This [use of ‘may’ and ‘shall’ in a statute] indicates that the Legislature intended the two words to have different meanings: ‘may’ being directory while ‘shall’ being mandatory. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)) (modification of quote by Krall). RCW 10.99.080(1) states a court “may” impose a DV penalty assessment and therefore constitutes a discretionary LFO.

In addition, RCW 10.99.080(5) provides:

When determining whether to impose a penalty assessment under this section, judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty,

including information regarding current financial obligations, family circumstances, and ongoing restitution.

(Emphasis added.) The underlined language further supports the conclusion that courts have the option to impose the penalty assessment or not, and this LFO is discretionary.

RCW 10.01.160(3) prohibits the courts from imposing discretionary LFOs on a defendant who is indigent at the time of sentencing. Because the DV Penalty Assessment is discretionary, and Oneal was (and remains) indigent, the trial court imposed this LFO in violation of RCW 10.01.160(3).

D. CONCLUSION

Remand in necessary to strike the discretionary LFOs erroneously imposed by the trial court in light of Oneal's indigency.

DATED this 26th day of March, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorney for Appellant

NIELSEN KOCH P.L.L.C.

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

Filing on Behalf of: Christopher Gibson - Email: gibsonc@nwattorney.net (Alternate Email:)

Address:
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