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Division II
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NO. 54191-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

HOMER CONNELL TAYLOR, III,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONSE TO ASSIGNMENTS OF ERROR 1

RESPONDENT’S COUNTER STATEMENT OF THE CASE..... 1

ARGUMENT 2

**1. The Judgment & Sentence lawfully gives the Department of
 Corrections authority to impose a non-cost legal financial
 obligation. 2**

**a. The community custody supervision assessment is not a
 cost that must be waived..... 2**

b. No fee is actually assessed by the judgment..... 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

State v. Abarca, No. 51673-0-II, 2019 WL 5709517 (2019)..... 3, 4, 5, 6
State v. Clark, 191 Wn. App. 369, 362 P.3d 309, 312 (2015) passim
State v. Lundstrom, 6 Wn. App. 2d 388, 429 P.3d 1116 (2018)..... 4
State v. Taylor, 9 Wn. App. 2d 1042 (2019)..... 5

Statutes

Laws of 2018, ch. 269, § 6..... 3
RCW 10.01.160 passim
RCW 7.68.035 1
RCW 9.94A.703..... 4

RESPONSE TO ASSIGNMENTS OF ERROR

The Judgment and Sentence does not assess a cost for community supervision, but instead gives the Department of Corrections discretion to assess a fee for community custody, or not. This fee is not a “cost” as defined by RCW 10.01.160, and may legally be assessed on indigent defendants.

RESPONDENT’S COUNTER STATEMENT OF THE CASE

The Appellant was convicted at a bench trial of Failure to Register as a Sex Offender. CP 26-30. The Honorable David L. Edwards sentenced the Appellant to 57 months of total confinement, followed by 36 months Community Custody. CP 35-36.

Judge Edwards found the Appellant to be indigent and imposed no costs or fees. CP 34 and 37-38. In fact, the trial court failed to impose the \$500 crime victim assessment despite this cost being mandatory, per RCW 7.68.035.

As one of the conditions of the Appellants community custody, the Court ordered the Appellant to pay any supervision fees the DOC might assess. CP 36, Section 4.2(B)(7).

ARGUMENT

1. The Judgment & Sentence lawfully gives the Department of Corrections authority to impose a non-cost legal financial obligation.

RCW 10.01.160 defines certain legal financial obligations as “costs,” and forbids a trial court from imposing them on indigent criminal defendants. However, the community supervision fee that the Department of Corrections imposes on some defendants is not a “cost” as defined by that statute.

a. The community custody supervision assessment is not a cost that must be waived.

Judges may not impose discretionary costs on indigent defendants. RCW 10.01.160(3). But a community custody supervision assessment is not a “cost.”

RCW 10.01.160(2) defines “costs” as “expenses especially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” In *State v. Clark*, Division III of this Court found that a \$500 *fine* was not a “cost,” and so upheld its imposition upon an indigent defendant. *State v. Clark*, 191 Wn. App. 369, 375, 362 P.3d 309, 312 (2015). Because the fine was not an expense incurred by the State in

prosecuting the defendant, no inquiry into the defendant's ability to pay was necessary. *Id* at 376.

The legislature amended RCW 10.01.160(3) in 2018, establishing a bright-line rule that discretionary costs shall not be imposed on indigent defendants as defined by the statute. *Compare* RCW 10.01.160(3) (2015) *with* RCW 10.01.160(3) (2019). This was after the *Clark* decision, but the definition of "cost" did not change with the amendment. *See* Laws of 2018, ch. 269, § 6. So the reasoning of *Clark* remains; the fact that a legal financial obligation is discretionary does not make that obligation a discretionary cost under the definition in RCW 10.01.160(2). *Clark*, 191 Wn. App. at 376. Just as inquiry on a defendant's ability to pay was not be required for non-cost LFOs before the amendment, a finding of indigency does not prohibit non-cost LFOs now.

Recently, this Court used the *Clark* framework to address the exact same issue raised here, and found that "a community custody supervision assessment clearly does not meet the definition of a cost under RCW 10.01.160(2)." *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517, *11 (November 5, 2019) (unpublished)¹.

¹ Pursuant to GR 14.1(a) this case is presented as persuasive authority and the Court may accord it such value as it deems appropriate.

The Appellant correctly states that the supervision assessment is a discretionary legal financial obligation under RCW 9.94A.703. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116, 1121 n.3 (2018). This interesting fact was also acknowledged in *Clark* regarding the \$500 fine: “the fact that imposing a fine under this general statute is a discretionary act does not make the fine a discretionary ‘cost’ within the meaning of RCW 10.01.160(3).” *Clark*, 191 Wn. App at 376. Indeed, in *Abarca* the court cited *Lundstrom* for the same proposition: “[t]he community custody supervision assessment is a discretionary LFO,” *Abarca*, WL 5709517 at *11. Neither decision stands for the proposition that discretionary legal financial obligations must be treated as costs under the statute, and waived for all indigent defendants. That this Court in *Lundstrom* was merely bringing the LFOs discretionary nature to the attention of the lower court—not forbidding it—comports with the policy of considering a defendant’s ability to pay, even for LFOs that are not costs, encouraged in both *Clark* and *Abarca*. *See Abarca*, WL 5709517 at *11.²

² “Although the court is not required to reevaluate imposing the community custody supervision assessment . . . the trial court is encouraged to do so”

The Appellant argues that, because the trial court waived the discretionary costs, it must have meant to waive the community supervision fee, and that the Judgment & Sentence is in error. The Appellant’s error in reasoning demonstrates the same fallacy that underpins the Appellant’s whole argument: that the community supervision fee is a cost that must be treated as a cost, simply because it is discretionary. The Appellant is mistaken, and his factual assertion is speculative.

To justify his reasoning, the Appellant cites to an earlier unpublished opinion, *State v. Taylor*, 9 Wn. App. 2d 1042, at *4 (June 25, 2019) (unpublished)³. *Taylor* does not take into account the difference between costs and non-cost legal financial obligations pointed out in *Clark*. Rather, *Taylor* equates discretionary legal financial obligations as fees that may not be imposed on indigent defendants. However, RCW 10.01.160 draws a distinction between cost and non-cost legal financial obligations, as *Clark* points out.

Indeed, in *Abarca* this Court affirmed the supervision assessment despite the parties’ agreement it should be struck, “declin[ing] to accept

³ Pursuant to GR 14.1(a) this case is presented as persuasive authority and the Court may accord it such value as it deems appropriate.

the State's concession as to the community custody supervision assessment." *Id.*

This Court should follow *Clark's* reasoning here, as it did in *Abarca*, and rule that the analysis should focus on whether a legal financial obligation is a cost or not, rather than whether it is discretionary, and uphold the judgment.

b. No fee is actually assessed by the judgment.

To any extent that the community supervision fee is a cost under RCW 10.01.160(3) that must be waived, there is no indication in the record that the Department of Corrections has imposed this fee on the Defendant. In the absence of any such proof, this Court should decline to reach the issue.

There was no cost or fee actually assessed in the judgment. Regarding the community custody supervision fee, the judgment merely leaves the Department of Corrections with discretion to assess a fee at some point in the future. It does not assess anything itself.

Because there is no indication in the record that the Department of Corrections has decided to assess a fee upon the Defendant, there is no controversy, and this Court should decline to consider this issue.

CONCLUSION

To any extent that the issue of a community supervision fee may be reached, it is not a cost that is governed by RCW 10.01.160. It is a fee. Fees may be imposed upon indigent defendants. This Court should affirm the Judgment & Sentence.

DATED this _____ day of September, 2020.

Respectfully Submitted,

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KLS /

GRAYS HARBOR CO PROS OFC

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