

31909-1-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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JAN 17, 2017  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

TASHIA STUART,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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RESPONDENT'S SUPPLEMENTAL BRIEF

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Respectfully submitted:  
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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

## **II. ISSUES**

1. Did the court abused its discretion in imposing LFO's where the record demonstrates an employable defendant with an ability to pay?
2. If the State substantially prevails on appeal, should the Defendant be assessed any appellate costs?

## **III. RELIEF REQUESTED**

Respondent asserts the superior court committed no error in finding an ability to pay and imposing sentence. Costs should be imposed if the State substantially prevails on appeal.

## **IV. STATEMENT OF THE CASE**

The Defendant Tashia Stuart has been convicted by jury of the attempted and actual first degree murder of her adoptive mother Judy Hebert with aggravating factors. CP 18-20, 200, 202-07, 1691-92. She has been sentenced to 540 months. Munoz RP (9/4/2013) at 77.

One judge was assigned to this case from beginning to end, ruling on innumerable motions from both sides and thereby becoming intimately familiar with Ms. Stuart's case, her drug seeking behavior, her false mental health claims (which were determined to be malingering), her intelligence, resilience, and resourcefulness. CP 535-41, 554-66, 1115-22, 1138-39.

The sentencing judge knew the Defendant had no mental disease or defect, nor any developmental or learning disability. CP 1115, 1117. He knew she had no criminal history, and therefore no LFO debt. CP 1116. He knew she had been employed fairly recently as a nursing assistant and that she had said there was no reason she could not have found her own residence when she moved to Pasco for college coursework. CP 1117, 1119-20. The judge was aware that despite Ms. Stuart's incarceration and the alienation of her family, whether through resourcefulness or access to funds, she was able to acquire a "massive amount of unauthorized items." CP 535-41. Ms. Stuart admitted at the sentencing hearing that she has no physical disabilities and that there was no reason why she would not be able to work upon release from incarceration. Munoz RP (9/4/2013) at 78.

The superior court found the Defendant is an adult and is not

disabled and therefore has the ability or likely future ability to pay LFO's. CP 21. Immediately after imposing the 540 month term, the court imposed both mandatory and discretionary costs. CP 28-30.

THE COURT: ... So, on Count I, the court is imposing a sentence of 240 months, plus the 120 months for the enhancements, for a minimum of 360 months, and in Count II, the attempted murder, the court is going to adopt the bottom of that standard range in that matter of 180 months. Those will run concurrently -- excuse me, consecutively, as I indicated, **for a total of 540 months.**

In addition, at this point, the court believes the no contact order is appropriate unless and until the counselor for Shaylynn indicates it would be in her best interests to have contact with her mother. If that is, in fact, the case, a petition can be brought to modify that no contact order based on the opinion of a trained professional that it would be in Shaylynn's best interests.

***Ms. Stuart, is there any reason that upon your release that you'll be unable to work?***

***THE DEFENDANT: No, sir.***

***THE COURT: You have no physical limitations at this point that would prevent you from working?***

***THE DEFENDANT: No, sir.***

THE COURT: In addition to the sentence the court has just indicated, you will be responsible for restitution in the amount of --

MR. CONNICK: There is no restitution.

THE COURT: Has restitution been addressed in this matter?

MR. CONNICK: No, it has not.

THE COURT: Restitution to be determined, if any. The judgment and sentence lists the amount for restitution, but I do not believe it's been argued and submitted to the court.

MR. CORKRUM: Is counsel objecting to the restitution amount?

MR. THOMPSON: We are.

THE COURT: That is my understanding.

MR. THOMPSON: We are, your Honor, and I think those were attributed to a burial cost.

MR. CORKRUM: Correct.

MR. THOMPSON: We believe there is an insurance policy that covered that. So, we would dispute that.

THE COURT: That remains to be determined. \$500.00 crime victim assessment. \$1,109.31 in court costs, \$700.00 --

MR. SANT: Your Honor, if I may, that should be stricken as that is included in the next line.

THE COURT: Thank you. Attorneys fees in the amount of \$180,434.19.

MR. SANT: Your Honor, the State has attached appendix 4.1A. That should be behind page five of ten of the judgment and sentence that breaks that down further.

THE COURT: Thank you. A \$500.00 fine; a \$100.00 felony DNA collection fee; \$100.00 domestic violence fine; for a total of \$181,825.50.

Munoz RP (9/4/2013) at 77-79 (emphasis added).

## **V. ARGUMENT**

### **A. THE SUPERIOR COURT PROPERLY IMPOSED LFO'S.**

At her sentencing hearing, Ms. Stuart objected to \$5353.07 in restitution for her mother's burial costs, but not to the finding of ability to pay or the assessment of \$180,434.19 in attorneys' and experts' fees. Munoz RP (9/4/2013) at 78-79. Accordingly, her claim of error is not preserved for review, and this Court is entitled to decline to review it. *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015).

Despite having advised the court at sentencing that she had the ability to work so as to pay off her LFO's, the Defendant claims that the court abused its discretion for believing her. She appears to argue that the court should instead have believed the story she told police. Appellant's Supplemental Brief at 2 (citing Exhibit 367 – Defendant's videotaped statement to police). It should be noted that in this same interview, the Defendant told police many things which, in coming to its

verdict, the jury did not find credible. Respondent's Brief and Cross Appeal (BOR) at 14-15.

In her interview with police, the Defendant made self-serving representations about her communications with her husband. She claimed that her mother was irrational and violent. She claimed that because of this bizarre behavior, Ms. Stuart offered her mother many appeasements and reached out to her husband for assistance. Even if we were to believe what the jury did not, these statements do not show a *future* inability to find work and pay LFO's, but an *immediate* inability to repay stolen funds or otherwise calm her sickly mother.

The Defendant told police that she came to live with her mother because the Defendant's *husband* had not paid the rent and they had been evicted. Exh. 20. Again, this does not demonstrate a future inability to find work and pay LFO's. In fact, the Defendant claimed precisely the opposite in her communications with her doctors. Pending trial, she informed her doctors that she had been employed fairly recently as a nursing assistant and that there was no reason she could not have found her own residence when she moved to Pasco for college coursework. CP 1117, 1119-20. In other words, she did not need to live with her mother – she chose to.

The *Blazina* court recommended that, when determining ability to pay under RCW 10.01.160(3), superior courts “should” consider factors like incarceration. *State v. Blazina*, 182 Wn.2d at 838-39. The Defendant appears to argue that the court failed to take into account what her age will be when she is released from incarceration. ASP at 2-3. Because the court’s assessment of her ability to pay and imposition of costs follows immediately upon the utterance of the term of confinement, this is not a tenable claim.

The *Blazina* court recommended that, when determining ability to pay under RCW 10.01.160(3), superior courts “should also look to the comment in court rule GR 34 for guidance.” *State v. Blazina*, 182 Wn.2d at 838-39. GR 34(a)(3)(A) finds that a person currently receiving assistance under a needs-based, means-tested assistance program would be indigent for purposes of the civil fee. Ms. Stuart does not demonstrate that she currently is, or even in the past was, receiving public assistance. GR 34(a)(3)(B) identifies a person with a household income at or below the federal poverty line as indigent for purposes of the civil filing fee. Ms. Stuart does not demonstrate what her household income was or will be. She only demonstrates that she is currently incarcerated. The fact of her temporary incarceration

alone cannot be the reason to deny any and all LFO's.

The Defendant appears to claim that her current indigency as an incarcerated person demonstrates a future inability to pay. ASP at 3. It does not. She informed the court that upon her release, she will be able to work.

Given the wealth of information which the sentencing judge had reviewed in the several years of proceedings in this case and given the Defendant's own responses to the court's inquiries, the court did not abuse its discretion in imposing LFO's.

**B. COSTS SHOULD BE IMPOSED IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL.**

The State objects to the Defendant's request to waive costs due to alleged future hardship.

RCW 10.73.160 is the relevant statute; and *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997) is the controlling case. [The opinion in *Blazina* interprets RCW 10.01.160(3), not RCW 10.73.160.] Unlike RCW 10.01.160(3), no section in RCW 10.73.160 requires an appellate court to consider financial resources and the nature of the burden before imposing costs.

[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay.

*State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213, 1220 (1997).

Appellate costs will include fees for court appointed counsel. RCW 10.73.160(3) (cost include recoupment of fees for court-appointed counsel). Counsel is only appointed to indigent criminal defendants. RCW 10.73.150. The Legislature has thus specifically provided for an award of costs against indigent defendants. The statute has been found constitutionally valid. *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). As a result, the fact of the Defendant's current indigency for purposes of appointment of counsel is insufficient reason to deny costs.

Criminal defendants are and will be motivated to file frivolous appeals at great expense to the public when there is neither cost nor risk of cost to them. Appropriately, the rules of appellate procedure discourage frivolous appeals by presuming costs will be paid to the substantially prevailing party. RAP 14.1(c) ("In all other

circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a)"); RAP 14.2 (court "will" award costs to substantially prevailing party).

In this case and in all challenges to costs premised on a criminal defendant's alleged inability to pay, this Court should consider the ABA Criminal Justice Standard 21-2.3. *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993). These black letter standards explain that the criminal justice system unacceptably induces an appeal when there is no risk of costs for frivolous appeals.

It is helpful to review cases in which costs have been denied. Costs have been denied when reversal results from an error caused by the successful appellant. *See, e.g., Water Dist. No. 111 v. Moore*, 65 Wn.2d 392, 393, 397 P.2d 845 (1964); *In re Dill*, 60 Wn.2d 148, 372 P.2d 541, 543 (1962); *Ramsdell v. Ramsdell*, 47 Wash. 444, 92 P. 278 (1907). They may be denied as a sanction for violations for appellate rules. *See, e.g., Tyree v. General Insurance Co.*, 64 Wn.2d 748, 753, 394 P.2d 222, 226 (1964). They may be denied when the determinative issue was raised by the court sua sponte and not by either party. *Hall v. American National Plastics. Inc.*, 73 Wn.2d 203,

205, 437 P.2d 693, 694 (1968). They may also be denied when the court decides the merits of a moot case. *National Electrical Contractors Assoc. v. Seattle School Dist. No. 1*, 66 Wn.2d 14, 23, 400 P.2d 778 (1965). A decision on a moot case is rendered in the public interest, not for the benefit of either party.

These examples share a fundamental feature. Costs are denied based on the issues raised and the manner in which they were argued, and not for financial hardship to a party. In fact, the Washington Supreme Court refused to recognize hardship as a reason for denying costs. *Association Collectors v. King County*, 194 Wash. 25, 44, 76 P.2d 998 (1938). (“[W]hile the court has some latitude in the matter of costs, we fear that to depart from the ordinary rule that costs on an appeal shall be awarded to the successful party for the purpose of relieving the hardship of one of the parties would result in hardship to others.”) This is consistent with the ABA Standards.

It is also consistent with the “American rule” under which each party bears its own attorney fees. *Rettkowski v. Dep’t of Ecology*, 128 Wn.2d 508, 514, 910 P.2d 462 (1996). Occasionally, the prevailing party can win its attorney fees against the opposing party. In criminal

cases, when the State wins, it not only pays its own attorney fees, the Defendant would have the State pay the loser's attorney fees as well.

It is not unreasonable for the Legislature to conclude that costs of an appeal should, at least to some extent, be paid by the guilty offender and not the innocent taxpayer.

The issue of appellate costs involves conflicting policy considerations. Within constitutional limitations, resolving those conflicts is a matter for the Legislature. And the Legislature has not been inactive in this regard. Laws of 2015, ch. 265, sec. 22 (amending RCW 10.73.160).

The Defendant provides two bases for her request. First, she is currently indigent. And second, she will be 65 when she is released from incarceration. Both have been addressed above. The Defendant does not demonstrate future indigency under GR 34 or an inability to pay after the age of 65. There is no reason to believe on this record that she will be unemployable then. If payment of costs does result in manifest hardship, she will have the ability to seek remission when those facts come into existence. RCW 10.73.160(4).

If the State substantially prevails, it is appropriate for this Court to impose costs against the Defendant.

**VI. CONCLUSION**

Based upon the forgoing, the State respectfully requests this Court affirm the sentence and, if the State substantially prevails, impose costs on the Defendant.

DATED: January 13, 2017.

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<p>Janet G. Gemberling &lt;jan@gemberlaw.com&gt; &lt;admin@gemberlaw.com&gt;</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 13, 2017, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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