

NO. 33032-0-III

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

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

ERNEST SORRELL,

Appellant.

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

The Honorable John Hotchkiss, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to consider Ernest James Sorrell's plain request for remission of legal financial obligations (LFOs).

2. The trial court erred in finding Sorrell's nonpayment of LFOs was willful rather than a result of his indigency.

3. The trial court erred in placing burden of proof on Sorrell to prove the absence of willful nonpayment is inconsistent with United States Supreme Court precedent and violates the Fourteenth Amendment's due process and equal protection clauses.

4. RCW 9.94B.040 is unconstitutional because it lacks any guidance for equitably determining whether nonpayment is the result of willfulness or the result of indigency.

Issues Pertaining to Assignments of Error

1. From the first payment review hearing, Sorrell plainly requested remission of his outstanding LFOs. The trial court ignored his request and instead held payment review hearings for more than 18 months without ever considering whether remission was appropriate. In light of recent Washington Supreme Court precedent, did the trial court's refusal to consider remission constitute reversible error?

2a. Despite Sorrell's presentation of evidence that he had no money to pay any monthly amount in LFOs and had made bona fide

efforts to pay LFOs, the trial court determined Sorrell's nonpayment was willful and imposed incarceration as punishment. Did the trial court violate Sorrell's due process rights?

2b. Did the trial court err in refusing to consider lesser alternatives to incarceration, such as community restitution?

3. RCW 9.94B.040 places the burden on Sorrell to demonstrate that nonpayment of LFOs was not willful. Consistent with United States Supreme Court precedent, should the burden of showing willfulness be placed on the State?

4a. Because RCW 9.94B.040 provides no standard governing the determination of whether nonpayment of LFOs is willful, does the statute violate due process?

4b. Should GR 34, which the Washington Supreme Court has adopted as the appropriate standard for determining ability to pay when imposing and enforcing LFOs, be adopted as the standard for determining whether the nonpayment of LFOs is willful?

B. STATEMENT OF THE CASE

1. Charges and imposition of legal financial obligations

The State charged Sorrell with two counts of child molestation in the third degree. CP 1-2. The State amended the information to allege aggravating factors under RCW 9.94A.535(3). CP 3-5.

After a jury trial resulting in guilty verdicts for both counts, the trial court sentenced Sorrell 60 months of confinement, the statutory maximum for third degree child molestation. CP 6, 8, 11.

As part of the sentence, the trial court imposed a significant amount of LFOs, \$3,747.25. CP 9. These LFOs included the \$500 victim assessment, \$100 DNA collection fee, a \$500 fine, \$1,000 for court-appointed counsel, \$200 for the filing fee, \$747.25 in witness costs, \$250 for the jury demand, and \$450 for transcription. CP 9.

Sorrell challenged his judgment and sentence on appeal, resulting in reversal and dismissal of one of the child molestation convictions on double jeopardy grounds and remand for resentencing. CP 31, 39.

On remand, the court imposed an exceptional sentence of 60 months for the remaining third degree child molestation conviction. CP 64, 67. The LFOs remained the same. CP 65.

Sorrell appealed again, challenging the 60-month exceptional sentence, but this court granted the State's motion to dismiss his appeal as moot because Sorrell finished serving the 60-month sentence while the appeal was pending. CP 74-75, 93-96. Although his appeal was dismissed as moot rather than considered on its merits, this court assessed \$2,169.35 in appellate costs. CP 93.

2. Payment review hearings

The Department of Corrections filed a closure report on December 18, 2012. CP 88-91. The report correctly stated that the amount of LFOs imposed was \$3,747.25. CP 89. Sorrell owed a total of \$5,046.88 in LFOs given that \$1,388.73 in had accrued in interest and Sorrell had paid only \$89.10. CP 89. On December 24, 2012, the trial court transferred supervision of Sorrell's LFO collection from the Department of Corrections to the Douglas County Superior Court. CP 92. The order transferring supervision imposed an additional \$100 collection fee.

On May 21, 2013, Tristen Worthen, the financial collections officer for Douglas County, issued notice of a financial review hearing on June 3, 2013. CP 112. A prosecutor and financial officer Worthen were present, but Sorrell was not provided counsel. CP 113; 1RP¹ 3-6. Sorrell appeared on June 3, 2013 and requested that the court dismiss all financial responsibility. CP 113. Sorrell "move[d] the Court to dismiss the fines because I . . . The way things are standing, I don't see any future ability to pay." 1RP 4 (alteration in original). The court refused to consider Sorrell's request for remission by ignoring it, and instead continued the matter for three months

¹ Sorrell's briefing will refer to the verbatim reports of proceedings as follows: 1RP—June 3, 2013, September 9, 2013, January 6, 2014, and October 13, 2014; 2RP—December 8, 2014.

and required Sorrell to report to Worthen monthly about his job search. CP 113; 1RP 4-5.

On September 9, 2013, Sorrell appeared again for financial review. CP 114; 1RP 7-13. A prosecutor and Worthen were present but Sorrell remained without counsel. CP 114. Sorrell indicated he was employed in Toppenish cleaning toilets and septic system, noting “it’s the only work I could find.: CP 114; 1RP 7-8. Sorrell also stated, “After child support takes half my wages it leaves me a couple hundred dollars a month to pay my rent, my utilities[;] I had to borrow money just to get here today from Toppenish.” 1RP 8. Sorrell said he could not pay even \$10 per month, noting “I have to eat; I have to be able to go to work . . . I’m going under as it is.” 1RP 9. In response, Worthen stated, “His balance is \$7,706.00” and incorrectly noted, “I’m sure some of that is restitution.”² 1RP 9. Sorrell explained he was left with only \$650 per month to pay auto insurance, food, \$475 in rent. 1RP 9, 11. The court continued the matter to January 2014 to monitor the progress of his payments. CP 114.

On January 6, 2014, Sorrell appeared at yet another financial review hearing. CP 115; 1RP 14-19. Sorrell did not have counsel but a prosecutor and court clerk were present. CP 115. Sorrell again indicated he was

² Sorrell was not ordered to pay restitution. CP 65. The LFOs imposed against Sorrell are merely the result of Sorrell exercising his constitutional rights to trial, appeal, and counsel.

working in Toppenish but had not made any payments to date because of limited work hours. CP 115; 1RP 14-15. Sorrell brought a paystub with him to the hearing which showed he took home \$4,582.63 since July 2013, a span of five months (thus averaging about \$917 per month), more than half of which went to pay rent. 1RP 16-17. Sorrell indicated he might be able to pay LFOS “in two or three years maybe paying off child support to the point where . . . I’m not relying on my mother to come buy groceries for me.” 1RP 17-18. Sorrell also said he was trying to avoid going on welfare: “if I’m forced to . . . pay Courts, then I’ll be forced to go on State assistance” 1RP 19. The court continued the hearing to April 7, 2014. CP 116; 1RP 19.

On April 7, 2014, Sorrell appeared a fourth time for financial review, again without counsel despite the presence of a prosecutor. CP 117. Sorrell indicated he could not pay due to limited work hours. CP 117. The court wanted documentation from a doctor’s office “that indicates Mr. Sorrell can’t work due to illness.” CP 117. The trial court continued the hearing until July 7, 2014. CP 117.

On July 7, 2014, for the fifth time, Sorrell appeared for financial review, again without an attorney. CP 118. No payments had been received given that “Mr. Sorrell indicates he only works very limited number of hours.” CP 118 (capitalization omitted). Worthen stated the payments were

set at \$25 per month and the State indicated it “will be filing violation in due court, if payment(s) are not being made.” CP 118 (capitalization omitted).

On August 7, 2014, Sorrell wrote an e-mail to Worthen, stating

My name is Ernest Sorrell, I have appeared in court on several occasions, The most recent on July 7, 2014.

I make the same amount now that I did at the previous 5 hearings. With no change in income, and continually rising cost of living (fuel, health, food) and Child Support Enforcement garnishing my wages, I am left in debt frequently, and forced to rely on “help” with food. I qualify for food stamps, but I feel that putting an additional burden on the State to support me is not in anybody’s best interest. I have always appeared in court when requested. I hope it won[']t be necessary to waste more fuel and more money to drive to Waterville to tell you there has been no change, when my circumstances improve the Douglas County Superior Court will be the first to know.

CP 97. Worthen replied on August 8, 2014, stating, “Please provide me with a financial statement of exactly what is received and paid out on a monthly basis. This statement needs to arrive prior to 8/15/14.” CP 97.

On August 20, 2014, Sorrell wrote back to Worthen, noting “RCW 9.94A.760(13) gives county clerks access to Employment Security records for the purpose of wage and employment information. No where in the RCW you stated (9.94A.760) does it require me to give evidence against myself. (5th amendment).” CP 98. Sorrell also stated,

There is no willful failure to pay on my part, only an inability. [A]t previous hearings the court has inquired as to my income and monthly living expenses. These are part of the record. There has not been a “willful violation”

previously, and my circumstances have not changed. Because the court has not previously found a willful violation and there is no change in circumstance it would be inconsistent for the court to rule a willful violation occurred now. I feel that another summons to appear will gain nothing but to waste the court[']s time and my fuel. Having me arrested for being unable to pay will surely cost me my job, and my future ability to gain employment will be almost non-existent.

The information you seek I have already provided in open court (without the required assistance of counsel). If you failed to document the information it is not my fault and I should not be forced to appear to answer the same questions with the same answers over and over again because you weren't paying attention.

I have an Attorney Of Record in this case, and feel that the state is attempting to get me to give evidence against myself with the intentional absence of counsel. The State and the Court agreed that I have a right to counsel, Have you contacted counsel to obtain the information, or would you rather question me further in the absence of counsel?

CP 98.

3. Violation hearing and appeal

On September 11, 2014, the State filed a motion for an order requiring Sorrell to show cause regarding noncompliance with his judgment and sentence. CP 99. In the notice of violation, Worthen stated Sorrell's LFO balance was \$8,406.07 and that his payments were currently set at \$25 per month. CP 101. Worthen also stated "he is considered \$525.00 past due since released from prison in 2012," even though Worthen had been present at all of the financial review hearings at which Sorrell indicated he could not

pay due to indigency. CP 101. Worthen also submitted a declaration that stated Sorrell had been employed for four consecutive quarters “with the most recent earnings on average about \$1,390.191 per month.” CP 102.

The trial court appointed counsel how entered a denial of any violation. 1RP 20. The trial court scheduled a contested hearing. 1RP 20-21.

Sorrell testified at the contested hearing. He stated he had applied for several jobs aside from his toilet-cleaning job, including in fast food and landscaping. 2RP 10. He described difficulty obtaining employment given his “convicted sex offender” status. 2RP 10-11. At his job cleaning out portable toilets, Sorrell explained he averaged 20 to 30 hours per week throughout the year, working less due to lack of demand in the winter months. 2RP 11-12. He earned \$13 per hour before taxes, averaging take-home pay of about \$10 per hour. 2RP 14. He also said he “g[o]t right around \$1,000.00 a month.” 2RP 15. Sorrell stated child support was deducted from this amount and that he was in arrears about \$14,000 in child support payments. 2RP 16. His rent was \$475 per month for an apartment of “a couple hundred square feet.” 2RP 16. Utilities cost “anywhere from 50 to 150 a month depending on the season.” 2RP 16. From the roughly \$1,000 per month, he also paid food, gas, car insurance, and all other expenses of daily living. 2RP 17-18. Sorrell also had significant medical

bills and no medical insurance given that he suffered from Crohn's disease.

2RP 18, 25-26. He said he could not currently pay any amount toward his LFOs and had not paid anything to date "Because I don't have it to pay."

2RP 19. He again explained he was trying to stay off State assistance:

if I were to pay anything to the Court, it would force me on to State assistance. And if I am forced on to State assistance, it . . . defeats the entire purpose of me trying to work for a living and support myself, and for me to go on State assistance just to pay the Court so that in a roundabout kind of way the taxpayers can pay my debt or the debt that's owed to the Court just seems a little bit ridiculous to me.

2RP 19. Sorrell also described the conundrum of choosing between eating and saving gas money so he could make it to his review hearings and avoid jail. 2RP 19-20. He also said, "Every time I come up here to appear I collect cans on the side of the highway to gather up enough gas money to get here." 2RP 23. Finally, Sorrell indicated he would be willing to do community service in lieu of paying LFOs. 2RP 27.

The State requested that the trial court impose 10 days of jail time for nonpayment and \$50 in attorney fees. 2RP 28-29. The State argued, "He describes how much money he has and it's hard to believe that he can't even scrape up a few dollars a month to send to this Court." 2RP 28. The State also asserted that collecting cans on the side of the road should not just be limited to saving gas money for court dates, but that it was "something he

could've done to begin with and it's something he can continue to do, so he does have the wherewithal to pay something to the Court." 2RP 28-29.

The trial court followed the State's recommendation, ordering 10 days in jail and \$50 in attorney fees. CP 103-06; 2RP 31-32. The court

recognize[d] that he has some difficulties, but . . . Douglas County has 400 people that pay on a monthly basis, and I agree that those 400 people don't have the same kind of criminal conviction that Mr. Sorrell does, but . . . Douglas County does have people that have those kind of criminal convictions and they pay.

2RP 31. The trial court also suggested that Sorrell could get another job, musing "I don't know that orchardists really care whether you're thinning apples or picking apples or, or pruning trees, *etcetera*, and I just think that Mr. Sorrell has the ability to pay something; I think he chooses not to." 2RP 31. The trial court held the jail time in abeyance until a review hearing in March 2015, stating, "hopefully Mr. Sorrell has paid something in that time period. If not, then the Court will impose the 10 days." CP 106; 2RP 32.

Sorrell timely appeals. CP 107.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER SORRELL'S REQUEST FOR REMISSION

At the first payment review hearing, Sorrell moved for remission of his LFOs. 1RP 4. He stated, "I'd move the Court to dismiss the fines because I . . . The way things are standing, I don't see any future ability to

pay.” 1RP 4 (alteration in original). The court did not consider this plain request but instead continued the matter and directed Sorrell to keep the clerk apprised of his job search. 1RP 5. As Sorrell repeatedly came to court to discuss his nonpayment, the trial court persisted in its refusal to consider Sorrell’s remission motion pursuant to RCW 10.01.160(4) and/or RCW 10.73.160(4). These errors require reversal.

RCW 10.01.160(4) provides,

A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant’s immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.^{3, 41}

Under this statute, if a defendant has been ordered to pay costs and if the defendant is not in contumacious default, a defendant may petition to remit costs at any time. State v. Shirts, 195 Wn. App. 849, 858-59, 381 P.3d 1223 (2016).

³ RCW 10.01.170 permits the trial court to specify installments and periods of time for payments of fines or costs. Since the trial court did not consider any aspect of Sorrell’s remission request, RCW 10.01.170 has no application to this case.

⁴ RCW 10.73.160(4) pertains to appellate costs and permits remission under virtually identical circumstances. See State v. Shirts, 195 Wn. App. 849, 854 n.4, 381 P.3d 1223 (2016) (discussing minor textual differences between RCW 10.01.160(4) and RCW 10.73.160 (4)). Both trial court and appellate costs were imposed here, CP 9, 93; thus, Sorrell’s arguments pertain to both statutes.

Sorrell was ordered to pay costs. CP 9. At the time he requested remission, he was not in default. June 3, 2013 falls under the “at any time” language in the remission statutes. Thus, under the statute’s plain language, the trial court erred in refusing to consider Sorrell’s motion for remission.

The Washington Supreme Court recently clarified that trial courts must consider and apply “the ‘manifest hardship’ standard expressly adopted by the legislature in RCW 10.01.160(4).” City of Richland v. Wakefield, 186 Wn.2d 596, 605, 380 P.3d 459 (2016). In Wakefield, the district court found Wakefield was able to pay \$15 per month but did not consider whether paying this amount would cause her and her family manifest hardship. Id. at 605-06. “By failing to recognize or apply the correct standard, the district court committed reversible error.” Id. at 606. “In the typical case,” the remedy for the error was “remand for the district court to apply the proper standard.” Id.

The Wakefield court also provided important and needed guidance on the meaning of “manifest hardship.” See id. at 605 (recognizing “little case law on this statutory provision”). First, the court determined “it was legal error to disregard whether Wakefield could currently meet her own basic needs when evaluating her ability to pay. Such information is crucial to determine whether paying LFOs would create a ‘manifest hardship’ for

Wakefield.” Id. at 606. A present inability to meet basic needs “is not only relevant, but crucial to determining whether paying LFOs would create a manifest hardship.” Id.

Second, the court reiterated that the standards provided in GR 34 apply at the time of enforcement and requested remission of LFOs. “As we have previously held, and as we again hold today: “[I]f someone does meet the GR 34 standard[s] for indigency, courts should seriously question that person’s ability to pay LFOs.’ This is true for both the imposition and enforcement of LFOs.” Wakefield, 186 Wn.2d at 606 (emphasis added) (alteration in original) (citation omitted) (quoting State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015)).

Third, the Wakefield court stated that trial courts “should be cautious of imposing such low payment amounts in the long term for impoverished people. For individuals like Wakefield, who show no prospects of any change in their ability to pay, it is unjustly punitive to impose payments that will only cause their LFO amount to increase.” 186 Wn.2d at 607. The court emphasized that low payments should be ordered only in short-term situations: “If a person has no present or future ability to pay amounts that will actually pay off their LFOs, remission in accordance with RCW 10.01.160(4) is a more appropriate and just option.” Id.

Remand is necessary in this case for the trial court to apply the correct remission standards to Sorrell. From the first moment he appeared in court for payment review, he requested remission because “[t]he way things are standing, I don’t see any future ability to pay.” 1RP 4. He had been out of prison for six months at that point and had not found work. 1RP 4-5. When he did find work, he initially netted \$650 per month after child support enforcement took a substantial portion of his earnings. 1RP 7-8, 10-11. This money went to rent, food, auto insurance, and other expenses, and Sorrell stated he did not have even \$10 per month to pay towards LFOs. 1RP 9, 11. Sorrell also expressed fear of losing his job based on public disclosure of his sex offender status. 1RP 15.

As he continued to work for a portable toilet company, which was spotty in terms of earnings because of its seasonality, Sorrell’s net total income in five months was \$4,582.63, or about \$917 in take-home pay per month on average. 1RP 16-17. After paying his monthly expenses, such as rent, food, transportation costs, and the like, Sorrell had no money to pay anything toward LFOs, stating, “I’m at the point where I’m trying not to go on welfare.” 1RP 19. He said he was “relying on other people before I get on the State assistance, and if I’m forced to pay the Courts, then I’ll be forced to go on State assistance., which seems kind of a (inaudible over Court) circle.” 1RP 19.

As quarterly payment review hearings drew on despite Sorrell's repeated statements about inability to pay and despite the trial court never having considered Sorrell's circumstances under any discernible standard, more information came to light. For instance, at the April 7, 2014 review hearing, Sorrell stated that limited work hours prevented him from paying; he also referred to a medical condition that may have limited his work hours. CP 117. Sorrell described limited work hours again as a basis for not being able to pay \$25 per month at the July 7, 2014 review hearing at the same time the State began to threaten him with "filing violation in due course." CP 118 (capitalization omitted).⁵

Douglas County's payment review process does not comport with Wakefield's requirements. Sorrell repeatedly stated throughout the payment review hearings that he was struggling to provide for his basic needs. This was "crucial to determining whether paying LFOs would create a manifest hardship," Wakefield, 186 Wn.2d at 606, yet the trial court ignored these issues in persisting to deny Sorrell remission. The trial court applied no standard for determining Sorrell's ability to pay costs, even though Sorrell was below 125 percent of the federal poverty guideline and repeatedly stated

⁵ From these hearings, the only information available to Sorrell is contained in the clerk's minute entries. Sorrell attempted to obtain additional information by moving for remand to reconstruct the record given that Douglas County deleted audio recordings from these review hearings. However, this court and the Washington Supreme Court refused Sorrell this reasonable request. Sorrell is therefore not to blame for any deficiencies in the record perceived by the courts.

he qualified for state cash assistance programs. Sorrell's indigency under GR 34 standards, including eligibility for public assistance programs should have been regarded "as strong evidence of indigency." Wakefield, 186 Wn.2d at 606-07. And, there were no prospects for a change in Sorrell's ability to pay during the 18 months the trial court haled Sorrell to court for review hearings, yet and all the while interest was accruing. See IRP 11 (prosecutor stating, "The problem for Mr. Sorrell, is of course, interest is accruing"). Requiring low payments, such as \$25 per month, was unjust in the circumstances because it "will only cause the[] LFO amount to increase" Wakefield, 186 Wn.2d at 607. Where a person lacks a present or future ability "to pay amounts that will actually pay off their LFOs, remission . . . is a more appropriate and just option." Id.

The trial court's unreasonable actions affront the important remission and enforcement standards adopted in Wakefield. Sorrell asks this court to reverse and remand for the trial court to consider his timely and appropriate motion for remission pursuant to GR 34 and the Wakefield decision.

2. BECAUSE SORRELL DEMONSTRATED HE COULD NOT PAY LEGAL FINANCIAL OBLIGATIONS BECAUSE OF INDIGENCE, HIS NONPAYMENT WAS NOT WILLFUL AND CANNOT SERVE AS A BASIS FOR IMPRISONMENT

"The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence

and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or 9.94A.740.”⁶ RCW 9.94A.760(10). RCW 9.94B.040(1) provides, “If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.” “The state has the burden of showing noncompliance [with a condition or requirement of a sentence] by a preponderance of the evidence.” RCW 9.94B.040(3)(c).

RCW 9.94A.760 and RCW 9.94B.040 together govern violation proceedings for the nonpayment of LFOs. State v. Nason, 168 Wn.2d 936, 947, 233 P.3d 848 (2010). To incarcerate an offender for the nonpayment of LFOs, due process requires the trial court to determine the offender is able to pay and that the offender’s nonpayment is willful:

Due process precludes the jailing of an offender for failure to pay a fine if the offender’s failure to pay was due to his or her indigence. However, if an offender is capable of paying but willfully refuses to pay, or if an offender does not “make sufficient bona fide efforts to seek employment or borrow money in order to pay,” the State may imprison the offender for failing to pay his or her LFO. The burden is on the offender to show that his nonpayment is not willful. Although the offender carries the burden, due process still imposes a duty on the court to inquire into the offender’s ability to pay.

⁶ RCW 9.94A.737 and RCW 9.94A.740 pertain to violations of community custody conditions or requirements. Because Sorrell served the statutory maximum sentence of 60 months for his crime, no community custody was ordered. CP 11. RCW 9.94A.737 and RCW 9.94A.740 are thus inapposite here.

Id. at 945 (citations omitted) (quoting Bearden v. Georgia, 461 U.S. 660, 668, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)). Moreover, if an offender “has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to [impose imprisonment] without considering whether adequate alternative methods of punishing the defendant are available.” Bearden, 461 U.S. at 668-69.

Sorrell’s nonpayment of LFOs was not willful because he (1) is not capable of paying his LFOs due to indigency and (2) has made and continues to make sufficient bona fide efforts to attempt to pay them. The trial court erred by imposing incarceration based on the willfulness of Sorrell’s nonpayment. In addition, the trial court was presented with the adequate alternative of ordering Sorrell to complete community service rather than incarcerating him, yet failed to consider that alternative on the record as Bearden requires. The trial court’s errors require reversal.

a. Sorrell is unable to pay any amount toward his LFOs because he is indigent

Sorrell, who brings home approximately \$1000 per month, is not capable of paying any amount toward his LFOs. 2RP 15. Sorrell’s rent of a modest apartment is \$475. 2RP 16. Out of the remaining \$525, Sorrell pays “anywhere from 50 to 150 a month” in utilities “depending on the season.” 2RP 16. From the \$375 to \$475 left over, Sorrell pays an additional \$50 for

car insurance. 2RP 18. This leaves between \$325 and \$425 per month to pay an unspecified amount in child support, food, toiletries, transportation, healthcare, clothing, and a whole host of other incidentals of daily living. RP 16-18. Sorrell testified he did not even have five dollars to send in, noting, “Every time I come up here to appear [in court] I collect cans on the side of the highway to gather up enough gas money to get here.” RP 23. Based on his financial circumstances, Sorrell testified he has not tried to pay anything to the court “[b]ecause I don’t have it to pay.” RP 19. Sorrell also stated he suffered from Crohn’s disease, which was frequently debilitating; Sorrell asserted he was eligible to go onto disability (ostensibly through the Social Security Administration), but was attempting to support himself:

If I . . . were to pay anything to the Court, it would force me on to State assistance. And if I am forced on to State assistance, it, it defeats the entire purpose of me trying to work for a living and support myself, and for me to go on State assistance just to pay the Court so that in a roundabout kind of way the taxpayers can pay my debt or the debt that’s owed to the Court just seems a little bit ridiculous to me.

2RP 19. This record plainly shows Sorrell has not paid his LFOs because he is financially unable to do so.

There can be no dispute Sorrell is indigent. Indeed, he qualified for a public defender at trial and continued to qualify for court-appointed counsel in his appeals, including this one. His monthly earnings of approximately \$1000 place him below 125 percent of the annual federal poverty level: that

poverty guideline is \$11,770, 125 percent of which is \$14,712.50.⁷ Because he qualifies as indigent, the trial court should have “seriously question[ed]” Sorrell’s ability to pay even a small amount in LFOs before imposing them. Wakefield, 186 Wn.2d at 607 (quoting Blazina, 182 Wn.2d at 839).

As discussed, in Blazina, the Washington Supreme Court identified several of the numerous “problematic consequences” of Washington’s LFO system. 182 Wn.2d at 835-37. The court discussed how criminal debt, which compounds at a 12-percent interest rate, has “serious negative consequences on employment, housing, and on finances,” and “impacts credit ratings.” Id. at 836-37 (citing KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM’N, The Assessment and Consequences of Legal Financial Obligations in Washington State, at 43 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf). “All of these reentry difficulties increase the chances of recidivism.” Id. at 837.

The Blazina court acknowledged that “the state cannot collect from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” Id. To determine whether a person is able to pay, our supreme court directed courts to “look to the comment in court rule GR 34

⁷ The federal 2015 poverty guidelines are published on the Internet by the United States Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation. They are available at aspe.hhs.gov/2015-poverty-guidelines (last visited March 27, 2017).

for guidance.” Id. at 838. “[U]nder the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program” or “if his or her household income falls below 125 percent of the federal poverty guideline.” Id. at 838-39. Because Sorrell meets this standard, “courts should seriously question [his] ability to pay LFOs.” Id. at 839.

As discussed above, the Washington Supreme Court augmented Blazina’s requirements more recently in Wakefield. The Wakefield court confirmed that the GR 34 standard adopted in Blazina applies to the enforcement of LFOs just as much as to their imposition. 186 Wn.2d at 607.

Rather than seriously question his ability to pay, however, the trial court determined “Mr. Sorrell’s position of not paying is a little bit more defiant than inability” and “Mr. Sorrell has the ability to pay something; I think he chooses not to.” RP 31. Aside from these conclusory statements, the trial court gave no further explanation for finding willful nonpayment and “defiance.” This determination of Sorrell’s ability to pay is not supportable based on the evidence of Sorrell’s financial circumstances provided at the hearing, which demonstrated Sorrell’s indigence and inability to pay. Nor could the trial court’s determination withstand scrutiny under the GR 34 standards the Washington Supreme Court has directed courts to employ when assessing ability to pay at the time of enforcement. Sorrell’s

nonpayment was not willful but a result of indigency. Because the trial court's contrary decision defies both law and common sense, this court should reverse.

b. Sorrell has made genuine, bona fide efforts to attempt to pay his LFOs

When an offender has made reasonable efforts to pay LFOs, it is fundamentally unfair to send him or her to jail for failure to pay them. Bearden, 461 U.S. at 668-69. The fundamental unfairness is palpable in this case given Sorrell's considerable efforts to pay his LFOs.

Since being released from prison in November 2012, Sorrell has appeared at several payment review hearings. At these hearings, Sorrell described his efforts in looking for work after release from prison, finding a job at his uncle's portable toilet business, which was the only work he could find. 1RP 4-8. He described limited hours because business is diminished during winter months. 2RP 14-15. He also expressed fear over losing his job if the public learned where he, a sex offender, was employed. 2RP 15.

In five months of work, his take-home pay was \$4,582.63, less than \$1,000 per month. Yet he paid \$475 in rent, utilities, transportation costs, and had to borrow money to pay medical bills given that he could not afford health insurance. 2RP 16-18. He owed about \$14,000 in back child support and other LFOs to Grant County, which he explained was not collecting

LFOs based on his indigency. 2RP 15-16. He collected cans on highway to pay for gas money to get himself to court, expressing that he was forced to choose between going to jail and feeding himself.⁸ 2RP 19-20, 23. Sorrell said nothing had changed in his financial circumstances and expressed confusion over why “all of the sudden . . . since the cost of living’s increased and my wages haven’t, I’m expected to pay now when I couldn’t then.” 2RP 21.

Sorrell described preferring to work over going on state or federal assistance programs, despite qualifying for such programs. 2RP 22-23. He stated his low wages were the result of “blow[ing] shit out of toilets for a living,” but said he was “proud to be gainfully employed.” 2RP 24-25. He also explained he was living with Crohn’s disease, which was debilitating and occasionally stopped him from working. 2RP 25-26. Yet he acknowledged he did not want to go onto public assistance for his disability because it made no sense to ask the taxpayers to pay his criminal debt for him.⁹ 2RP 19.

⁸ The prosecutor suggested Sorrell should just collect more cans to pay LFOs, as though his lack of can-collecting efforts demonstrated willful nonpayment. 2RP 23-24, 28-29.

⁹ Of course, if Sorrell went on disability, Douglas County would not be lawfully permitted to collect any amount from him given the anti-attachment provisions that pertain to the receipt and payment of public assistance benefits. See Wakefield, 186 Wn.2d at 607-09 (explaining anti-attachment provisions); Anthi

Sorrell initially looked for work, found a job, and has been working steadily since July 2013, even though he makes a low wage and has serious medical difficulties. He realistically acknowledged limitations in finding perhaps more lucrative work in the fast food or landscaping industries because of being a convicted sex offender, stating “I have been denied at every opportunity.” 2RP 10-11.

Sorrell has made genuine efforts to pay his LFOs. He simply cannot pay LFOs based on the little amount of money he makes, which already fall short of covering his basic needs. The trial court failed to recognize Sorrell’s reasonable efforts to pay LFOs and instead chose to punish Sorrell with 10 days in jail and \$50 in attorney fees for his poverty.¹⁰ The trial court’s ruling is constitutionally repugnant under Bearden and must be reversed.

- c. The trial court failed to consider whether the alternative of community service was an adequate alternative to imprisonment

Furthermore, even if Sorrell had willfully refused to pay, there were alternatives to incarceration that were adequate to punish Sorrell, such as

v. Copland, 173 Wn.2d 752, 760-64, 270 P.3d 574 (2012) (discussing Washington’s anti attachment provisions for certain exempt benefits).

¹⁰ The trial court’s ruling is also quite ironic, given that it fails to recognize that just about every employer in the United States will terminate employees for suddenly missing 10 days of work due to incarceration. Sorrell expressly stated that being arrested for failing to appear or pay LFOs would “surely cost me my job, and my future ability to gain employment will be almost non-existent.” CP 98. The state actors of Douglas County miss this basic point.

community service. The trial court, however, failed to consider whether this alternative was sufficient. This error also requires reversal.

RCW 9.94B.040(3)(a)(i) and (c) permit the trial court to convert monetary obligations (except restitution¹¹ and the victim penalty assessment) “to community restitution hours at the rate of the state minimum wage as established in RCW 49.46.020 for each hour of community restitution.” Sorrell stated he was willing to perform community service if ordered by the court. 2RP 27. Defense counsel asked the court to order community service in lieu of jail time. 2RP 32. This alternative would have allowed Sorrell to keep his employment but provide some punishment for nonpayment. As the High Court in Bearden held, “it is fundamentally unfair” to incarcerate the defendant “without considering whether adequate alternative methods of punishment are available. 461 U.S. at 668-69. At minimum, this court should remand for the trial court to consider whether community restitution was a reasonable alternative to imprisonment.

In sum, Sorrell did not willfully refuse to pay his LFOs. He made several bona fide efforts to obtain the money to pay them but has been unable to do so for various reasons apparent from the record. The trial court’s imposition of 10 days of imprisonment and an additional \$50 in attorney fees violates due process because it punishes Sorrell for being

¹¹ Sorrell was not ordered to pay any restitution in this case. CP 65-66.

unable to pay his ever-increasing amount of LFOs and because the trial court failed to consider available alternatives to imprisonment. Sorrell asks this court to reverse the trial court's order and remand for a fair hearing on Sorrell's ability to pay.

3. BY PLACING THE BURDEN ON SORRELL TO PROVE THE ABSENCE OF WILLFULNESS, RCW 9.94B.040 CONFLICTS WITH BEARDEN AND THEREFORE VIOLATES DUE PROCESS AND EQUAL PROTECTION

The Court in Bearden addressed “whether a sentencing court can revoke a defendant’s probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate.” 461 U.S. at 665 (emphasis added). The Court answered no to this question, expressly requiring the sentencing court to inquire into the reasons for the failure to pay because to “do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.” Id. at 672-73. Under Bearden, there must be both an inquiry into a defendant’s ability to pay and a determination of willful nonpayment.

The Bearden Court also appeared to place the burden of showing willfulness on the State: “If the probationer has willfully refused to pay the

fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.” Id. at 668. From this statement it follows that when the State seeks to incarcerate someone for his or her failure to pay, it must introduce evidence on the ability to pay issue that would support a finding of willfulness.

But RCW 9.94B.040 does not require this from the State. Rather, all the State needs to show is nonpayment: “The State has the burden of showing noncompliance by a preponderance of the evidence.” RCW 9.94B.040(3)(c). Then the court “shall require the offender to show cause why the offender should not be punished for noncompliance.” RCW 9.94B.040(3)(b). The burden of proof is on the defense to prove inability to pay rather than willfulness and, if the defense fails, then nonpayment is automatically deemed willful. This burden-shifting is contrary to Bearden, which explicitly requires both an inquiry into ability to pay and a finding of willfulness before incarceration. Under RCW 9.94B.040(3)(b), even where a defendant is not capable of paying anything due to indigency, he or she can be jailed for not keeping detailed financial records, for not being articulate enough to persuade the court, or for simply remaining silent. These results are contrary to Bearden and the Fourteenth Amendment.

The burden-shifting infirmity stems from the fact that in the context of LFOs, nonpayment is statutorily deemed the equivalent of

“noncompliance.” RCW 9.94B.040(3)(c). But nonpayment of LFOs may be willful or nonpayment of LFOs may be due to indigency. For a defendant to be considered noncompliant, the courts should require the State to show more than just simple nonpayment. Consistent with Bearden, noncompliance under RCW 9.94B.040 should be construed to mean nonpayment despite the ability to pay, i.e., willfulness. Absent this interpretation of “noncompliance” in RCW 9.94B.040, the statute permits the State to seek to jail someone even though the nonpayment is the result of a continued inability to pay.

The Florida Supreme Court recently reached this conclusion in construing a similar statute in Del Valle v. State, 80 So.3d 999 (Fla. 2011). The State required probationers who asserted inability to pay restitution or the cost of supervision to prove they did not have the present financial resources. Id. at 1011-12 (discussing FL. STAT. § 948.06(5)). As RCW 9.94B.040, the Florida statute “require[d] the State to establish failure to pay before the burden of proof shifts to the defendant to prove inability to pay.” Id. at 1012. The court stated, “The absence of any recognition or mention of the element of willfulness as a first step in section 948.06(5) could alone render the statute unconstitutional.” Id. To reconcile the statute with Bearden’s requirements, the court read the statute in pari materia with another statute that required the trial court’s inquiry into financial

circumstances and willfulness of failure to pay when revoking probation. Id.
at 1013. Thus, the court held that

before the burden shifts to the defendant to prove inability to pay, the State must provide sufficient evidence that would support a trial court's finding that the probationer willfully failed to pay a monetary obligation, which would include whether the probationer has, or has had, the ability to pay the obligation.

Id. De Valle provides persuasive authority for the proposition that RCW 9.94B.040 is unconstitutional under Bearden unless the State bears the burden of showing willful nonpayment.

The facts of this case demonstrate how placing the burden of proving a negative—proving a lack of willfulness—is fundamentally unfair. For some 18 months, the State required Sorrell to appear pro se at quarterly payment review hearings where he, the county collections officer, the prosecutor, and a judge discussed why he was not paying. Sorrell repeatedly stated he could not pay because he had no money. He detailed his efforts to obtain employment and, after getting a job, explained that his earnings still failed to meet the necessities of life. Then, suddenly, after several such hearings, the State decided that it would seek to incarcerate Sorrell for nonpayment. The State put forth no information indicating that Sorrell had the ability to pay. The State had no such information, as there was no change in circumstances that would support the conclusion that Sorrell

suddenly had the ability to pay.¹² It appears the State just arbitrarily decided it was time to send Sorrell to jail for nonpayment even though it could point to nothing to support its decision.

To give the prosecution this power is fundamentally unfair. If the State can point to information that shows nonpayment is willful and not the result of inability, so be it. But the State should not be permitted to seek incarceration for nonpayment of LFOs when the State has no indication that nonpayment is willful. This is particularly true where the defendant lacks the benefit of counsel for several months leading up to the State's incarceration request, as counsel could certainly assist in developing a record that nonpayment is the result of financial inability rather than a result of willful noncompliance. Because RCW 9.94B.040 conflates mere nonpayment with willful noncompliance, thereby permitting incarceration without a specific finding of willfulness, it is unconstitutional.

Sorrell recognizes that Division One came to a contrary result 25 years ago in State v. Bower, 64 Wn. App. 227, 823 P.2d 1171 (1992). Bower's decision to place the burden of proof on the defense to show a lack of willfulness is, as discussed, inconsistent with Bearden, and is therefore

¹² Sorrell aptly pointed this out: "There has not been a 'willful violation' previously, and my circumstances have not changed. Because the court has not previously found a willful violation and there is no change in circumstance it would be inconsistent for the court to rule a willful violation occurred now." CP 98.

incorrect. And Bower provided no analysis of where the burden of proof for nonpayment of LFOs should be placed because Bower did not make any claim regarding the burden of proof. Bower, 64 Wn. App. at 234 (“Bower has not challenged the constitutionality of the statute in this appeal). Bower did not claim “he did not have the burden of proof, but rather that he met his burden of proof by showing that he was only sometimes employed and that he had difficulty paying his rent.”). Because Bower did not address the arguments Sorrell advances, Bower does not foreclose them.

This court should interpret RCW 9.94B.040 so that it is constitutional and consistent with Bearden. The State’s burden of showing noncompliance should be more than showing simple nonpayment. To avoid creating a debtor’s prison in Washington, if the State wishes to incarcerate someone for nonpayment of LFOs, it should be prepared to point to evidence that nonpayment is the result of willfulness rather than indigency.¹³ Because the State did not and could not do so here, Sorrell asks that this court reverse.

¹³ As discussed above, the best willfulness argument the State could come up with below was that because Sorrell collected cans to pay for gas money so he could drive to his review hearings, collecting cans was “something he could’ve done to begin with and it’s something he can continue to do, so he does have the wherewithal to pay something to the Court.” 2RP 28-29. If the burden of proof had been properly placed on the prosecution, the prosecution would have failed to carry its burden with this argument.

4. RCW 9.94B.040, IN THE CONTEXT OF LFOs,
VIOLATES DUE PROCESS BECAUSE IT LACKS
NECESSARY GUIDANCE FOR EQUITABLY
ASSESSING WHETHER NONPAYMENT IS THE
RESULT OF WILLFULNESS

There are no ascertainable standards to determine whether a person's nonpayment of LFOs is a result of willfulness or a result of indigency. This court should accordingly hold that, as applied to the issue of nonpayment of LFOs, RCW 9.94B.040 violates due process. The Washington courts should also adopt the GR 34 standard for assessing the willfulness of nonpayment.

Due process requires that statutes provide explicit standards to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Where a statute affords discretion to a judge, the discretion must be suitably directed so that decisions are neither arbitrary nor influenced by the personal views of the judge. Gregg v. Georgia, 428 U.S. 153, 188-89, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

RCW 9.94B.040(1) permits trial courts to modify its judgment and sentence and impose further punishment. "If an offender fails to comply with any of the requirements or conditions of a sentence . . . the court, upon the motion of the state, or upon its own motion, shall require the offender to show cause why the offender should not be punished for noncompliance."

RCW 9.94B.040(3)(b). “The state has the burden of showing noncompliance by a preponderance of the evidence.” RCW 9.94B.040(3)(c). “If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations” RCW 9.94B.040(3)(d).

RCW 9.94B.040 suffers from unconstitutional arbitrariness because it provides no guidance for determining whether the nonpayment of LFOs is the result of willfulness or the result of indigency. The statute operates by presuming the nonpayment of LFOs is willful: the State must show by a preponderance of the evidence only that a person has not paid LFOs for the burden to shift to the “offender to show cause why the offender should not be punished for the noncompliance.” RCW 9.94B.040(b)–(c). But the statute thereafter provides no standard for determining when and whether punishment is appropriate for nonpayment. Nothing in the statute differentiates willful nonpayment from indigent nonpayment. This lack of any discernible standard renders the application of RCW 9.94B.040 completely arbitrary. In this context, the statute violates due process.

Nor does case law applying RCW 9.94B.040 resolve the problem. For instance, in State v. Stone, 165 Wn. App. 796, 817, 268 P.3d 226 (2012), the trial court imposed 45 days in jail despite “Stone’s testimony about his homelessness, the injury to his dominant hand, the fact that DSHS was

paying his medical bills, and that his only money came from GAU payments in the amount of \$339 a month.” The trial court determined the nonpayment was willful because Stone ““could have made a phone call, sent a letter, [or] made some attempt to contact’ the trial court.” Id. at 817-18 (alteration in original) (quoting report of proceedings). The Court of Appeals disagreed and determined the trial court based its determination of willfulness on Stone’s failure to contact the court rather than an assessment of his financial circumstances. Id. at 818. However, the dissenting judge argued that based on the record, “the trial court was free to find that Stone had failed to meet his burden to show that he was unable to make any payment.” Id. at 819 (Penoyar, J., dissenting). The conflicting views of the majority and dissent in Stone themselves illustrate RCW 9.94B.040’s arbitrariness: reasonable minds clearly differ as to what qualifies as willful nonpayment.

In Bower, supra, Division One upheld the trial court’s willfulness determination, noting that while “Bower claimed that he had no steady employment and that he had difficulty paying his rent, he made no showing of bona fide efforts to obtain steady employment. He was evasive in his response to the court’s specific inquiry as to his actual income while he was out of jail.” 64 Wn. App. at 231. The court stressed that a

defendant who claims indigency must do more than simply plead poverty in general terms as Bower did in this instance. He should be prepared to show the court his actual income,

his reasonable living expenses, his efforts, if any, to find steady employment, his efforts, if any, to acquire resources from which to pay his court-ordered obligations

Id. at 233. This reasoning suggests that if a defendant does make a sufficient showing of his income and his efforts to pay LFOs, his or her nonpayment will not be considered willful. The court gave no hint about where the line should be drawn, however.

In State v. Woodward, 116 Wn. App. 697, 700, 67 P.3d 530 (2003), Woodward received \$340 per month in government assistance and paid approximately \$250 in monthly expenses. Woodward also claimed he could not work because of emphysema. Id. at 701. The trial court determined “Woodward ‘can probably afford to pay something a month, even if it’s five bucks a month,’ and that he was not ‘even making an effort to pay five dollars a month,’” and imposed 60 days’ imprisonment for willful nonpayment. Id. (quoting report of proceedings). This court affirmed: “Although Mr. Woodward lamented generally that he did not have enough to live on, his own testimony indicates he had approximately \$90 a month remaining after expenses, including food. That testimony supports the trial court’s assessment that Mr. Woodward could afford monthly payments of at least \$5.” Id. at 705. This reasoning amounts to a virtual presumption of willfulness for nonpayment of LFOs whenever a person has any money left after paying basic expenses at the end of any given month.

In contrast, in Wakefield and Blazina, the Washington Supreme Court indicated that those who meet indigency standards should not be considered able to pay LFOs. Wakefield, 186 Wn.2d at 607; Blazina, 182 Wn.2d at 838-39. Thus, nonpayment of LFOs by an indigent person—defined under GR 34 as qualifying for a needs-based program or falling under 125 percent of the federal poverty level—should not be considered willful. In this respect, Wakefield and Blazina seem to supersede the reasoning in Woodward, Bower, and the Stone dissent.

The various cases and various results demonstrate there is no perceptible or differentiating standard for determining whether the nonpayment of LFOs is due to willfulness or due to an actual inability to pay. Without such a standard, the issue of willfulness appears to be resolved “on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Grayned, 408 U.S. at 108-09. Because it is not capable of being applied in a consistent manner when it comes to assessing the willfulness of LFO nonpayment, RCW 9.94B.040 is unconstitutional.

To provide a needed standard, Sorrell advocates for the GR 34 standard in assessing willfulness. As discussed, this standard applies at the time of imposing many LFOs and likewise applies at the time of enforcing them. Wakefield, 186 Wn.2d at 607. There is no good reason it should not

also apply to determine whether a defendant is acting willfully or not. Couched in Wakefield's and Blazina's terms, if a defendant meets the GR 34 standards, courts should seriously question whether the defendant's nonpayment is a result of willful noncompliance with the judgment and sentence. Sorrell asks this court to adopt GR 34 as the standard to guide determinations of willfulness under RCW 9.94B.040.

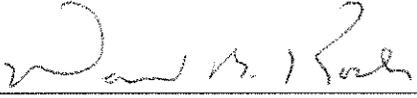
D. CONCLUSION

Sorrell is indigent and unable to pay LFOs. The trial court's order jailing Sorrell for nonpayment is a result of Douglas County's grossly inadequate procedures for determining a person's ability to pay which conflict with recent Washington Supreme Court precedent. Sorrell asks this court to reverse and remand for proceedings at which the trial court can fairly apply the appropriate legal standards.

DATED this 30th day of March, 2017.

Respectfully submitted,

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