

COA No. 33830-4-III

FILED
Jun 23, 2016
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONYA LEIGH KIEHN,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

1. The court erred by denying Tonya Kiehn's motion for remission of payment of legal financial obligations (LFOs).

Issue Pertaining to Assignment of Error

A. Did the court abuse its discretion by denying the motion for remission of payment of LFOs when Ms. Kiehn was unable to work because of her mental health condition and physical issues so that payment imposed a manifest hardship on her? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Ms. Kiehn was originally charged with first degree theft. (CP 1). Pursuant to a plea bargain, she was charged by amended information with third degree theft, to which she would plead guilty. (CP 3, 5). In her statement of defendant on plea of guilty, she understood that the State would recommend a sentence of 365 days with 358 suspended, credit for time served, and partial confinement or community restitution authorized for the balance of the sentence, standard fine, court costs, and assessment. (CP 6).

The court sentenced Ms. Kiehn in accordance with the plea agreement and also imposed LFOs of \$200 for filing fee, \$500 victim assessment, \$30 sheriff's fee, \$350 recoupment for attorney

fees, and \$500 fine. (CP 10). Restitution of \$3000 had already been paid. (*Id.*). In imposing LFOs, the court inquired about Ms. Kiehn's source of income, ability to pay, and what she herself indicated she could pay:

[DEFENSE COUNSEL]: . . . She has three children at home and the only income she's got is through her child support which is about \$600.00 a month. Other than that, Your Honor, we'd ask you to follow the agreement. . .

THE COURT: . . . The Court has found that you are guilty and the sentence will be as follows:

Financial obligations are a \$200.00 filing fee; \$500.00 victim assessment; \$30.00 in sheriff's fees; \$350.00 for your court-appointed attorney; \$500.00 fine and \$3000.00 restitution, which I have indicated is already paid.

There'll be – you'll be required to make these payments within the next twenty-three months. How much can you make a month, payment?

MS. KIEHN: I don't know what the minimum is. I can pay minimum I guess.

THE COURT: Well, give me a figure.

MS. KIEHN: \$25.00

THE COURT: Okay. (11/10/08 RP 7).

Payments were to commence December 15, 2008. (*Id.* at 9).

Through the years, Ms. Kiehn wrote the court asking the court for more time to pay the LFOs because she was homeless

and suffered mental and physical problems. (CP 16, 18, 19). She failed to appear at a financial review hearing on March 27, 2014, so a bench warrant was issued for her arrest with bail at \$500. (CP 30). An amended bench warrant was later issued stating that if the \$500 bail was posted, it would be applied to existing LFOs and was nonrefundable. (CP 32). An attorney was appointed for Ms. Kiehn. (CP 34, 37, 40). She posted the \$500 bail, which was applied to the LFOs. (CP 36).

A fact-finding hearing was held on September 28, 2015. (9/28/15 RP 13). At a contempt hearing held one week earlier, the State put on evidence that Ms. Kiehn had paid \$986 toward LFOs, starting in April 2009. (9/21/15 RP 9). \$500 bail that had been posted was applied to the LFOs. (*Id.*). There had been sporadic payments over the years, with the last \$25 payment being made on March 13, 2012. (*Id.*). The outstanding balance on LFOs was \$1603.73, with \$1009.73 being interest. (*Id.*).

At the subsequent fact-finding hearing, the defense made its argument that, assuming no inquiry was made by the sentencing judge as to Ms. Kiehn's ability to pay, *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), supported her belated challenge to the imposition of LFOs in the first instance. (9/28/15 RP 16-17).

Stating *Blazina* did not apply retroactively, the court did not consider the issue. (*Id.* at 18).

It did, however, “hear whatever evidence you have with regard to Ms. Kiehn’s inability to make the payments.” (9/28/15 RP 18). She testified she was 44 and lived with her daughter. (*Id.* at 19). Her income was \$197/month ABD and another \$175 in food stamps. (*Id.* at 19-20). Ms. Kiehn had no other income as she had not worked cleaning houses on the side in months. (*Id.* at 20). She testified she could not remember anything so it was very hard to get a job and she filed DSHS records showing she suffered from mental and physical issues affecting her ability to work in any event. (*Id.* at 21; CP 43-48). She had expenses of \$80/month for car insurance, \$40/month phone bill, and gas for the car. (9/28/15 RP 21-22). Her only asset was her car, a 2005 Chevrolet Malibu. (*Id.* at 22).

The judge and counsel assumed the original sentencing judge did not ask Ms. Klehn whether she had the ability to pay. (9/28/15 RP 17). She did not recall. (*Id.* at 24). Although pre-dating *Blazina*, the record shows the judge in 2008 did inquire of her regarding her ability to pay and what she could afford. (11/10/08 RP 7).

The court found Ms. Kiehn did not willfully fail to pay her LFOs and thus was not in contempt. (9/28/15 RP 27). But it did not relieve her of the LFOs imposed in the judgment and sentence and settled on her making payments of \$5/month. (*Id.* at 27-28). The court wanted her to recognize she had an obligation and needed to pay it. (*Id.*). Ms. Kiehn's motion for remission of LFOs was denied. (*Id.* at 28; CP 41). This appeal follows.

III. ARGUMENT

A. The court abused its discretion by denying the motion for remission of payment of LFOs.

Blazina requires the trial court to make meaningful inquiry into the defendant's ability to pay:

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. 182 Wn.2d at 838.

Contrary to the assumptions of the court and counsel, the original sentencing judge here did make an individualized inquiry into Ms. Kiehn's ability to pay and she indicated what she could pay.

Ms. Kiehn also filed a motion for remission of payment of LFOs. She was unable to work because of her documented mental health condition and physical issues that made payment a manifest hardship on her. 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 a 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.

Ms. Kiehn filed DSHS records documenting her mental health and physical issues that made employment extremely difficult, if not impossible. (CP 43-48). Indeed, trial counsel was appointed due to her indigency. (CP 34, 37, 40).

Although Ms. Kiehn had \$600 monthly child support as her sole source of income in 2008, her income at the time of the fact-finding hearing in 2015 had dropped to \$197 ABD and \$175 food stamps. (11/10/08 RP 7; 9/28/15 RP 19-20). Her monthly expenses were at least \$120. (9/2815 RP 21-22). Furthermore, she did not have the present ability to pay LFOs because of her lack of education, dyslexia, depression, other mental health issues,

head injury, and inability to remember. (CP 43-48). These conditions were unlikely to resolve so she would have the ability to work in the future. (*Id.*). The State cannot collect money from defendants who cannot pay. *Blazina*, 182 Wn.2d at 837. Ms. Kiehn cannot pay and was aware of her responsibility for LFOs as reflected in her letters to the court asking for more time since she was homeless and unable to pay. (CP 16, 18, 19).

The *Blazina* court's observations of the predicament the imposition and payment of LFOs poses for defendants unable to pay are particularly appropriate:

. . . Washington's LFO system carries problematic consequences. To begin with, LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time. . . Many defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month. . . But on average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed. . . 182 Wn.2d at 836.

This is Ms. Kiehn's situation exactly and she owes more than she did when the LFOs were assessed in 2008 – despite paying almost \$1000 on LFOs. The 2015 court directed her to pay when she cannot pay. This is contrary to law, a manifest hardship on Ms. Kiehn, and an abuse of discretion. See *Blazina*, 182 Wn.2d at 837;

State v. Campbell, 84 Wn. App. 596, 600-01, 929 P.2d 1175 (1997).

An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). An incorrect legal analysis or error of law can constitute an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

Here, the court refused to remit the LFOs because it wanted Ms. Kiehn to know she had an obligation and needed to pay. (9/28/15 RP 17). But the record shows she knew she had to pay LFOs imposed in 2008 as reflected in the letters she wrote informing the court she was homeless and could not pay. (CP 16, 18, 19). The reason given by the court was made for untenable reasons. *Junker, supra*.

Furthermore, Ms. Kiehn was unable to work because of her mental health and physical issues. (CP 16, 18, 19, 43-48). With her only cash income of \$197/month ABD and expenses of at least \$120/month, she simply could not pay even \$5/month without suffering a manifest hardship. RCW 10.01.160(4). The record shows Ms. Kiehn was unable to pay. By refusing to remit her

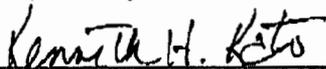
LFOs, the court abused its discretion by making an error of law because the State cannot collect when the defendant cannot pay. *Blazina*, 182 Wn.2d at 837. The court erred.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Kiehn respectfully urges this Court to reverse the trial court's order denying the motion for remission of payment of LFOs.

DATED this 23rd day of June, 2016.

Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on June 23, 2016, I served a copy of the Brief of Appellant by USPS on Tonya Kiehn at her last known address: 6123 Greenwood Blvd., Spokane, WA 99205; and by email, as agreed, on Randy Flyckt at randyf@co.adams.wa.us.

