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SEP 13, 2016

Court of Appeals
Division III
State of Washington

No. 33838-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

STEVEN RUIZ-SIBAJA,

Appellant

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

NO. 11-1-01312-3

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Julie E. Long, Deputy
Prosecuting Attorney
BAR NO. 28276
OFFICE ID 91004

Brittnie E. Roehm, Deputy
Prosecuting Attorney
BAR NO. 49588
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not err in revoking the SSOSA sentence.
- B. The trial court erred in using possession of pornography as a basis for revocation of the SSOSA sentence; however, the revocation was proper based on two admitted alcohol violations.

II. STATEMENT OF FACTS

The defendant, Steven Ruiz-Sibaja, pleaded guilty to one count of Rape of a Child in the First Degree in June 2012. CP 4-12. The defendant was sentenced under the Special Sex Offender Sentencing Alternative (hereinafter SSOSA) to a sentence of 93 months with all but 12 months suspended. CP 13-27, 75. As part of the SSOSA, the trial court imposed community custody conditions. CP 25-26. These conditions included not possessing or perusing pornographic materials and not consuming alcohol. CP 26.

On March 13, 2015, the Department of Corrections filed a special report to update the court of the defendant's progress. CP 67-68. The report indicated that on May 30, 2014, Kennewick Police arrested the defendant for false reporting. CP 67. Kennewick Police were notified the defendant was in a library, a location he was prohibited from entering. *Id.* Officers located the defendant outside of a local high school. *Id.* He lied about his identity to police and was subsequently arrested. *Id.* The special report also indicated that during his polygraph on September 17, 2014, the

defendant was shown to be deceptive when relating his sexual history with minor-aged males and animals. *Id.*

On June 23, 2015, the Department of Corrections filed a notice of violation with the court, alleging the defendant had committed two violations. CP 69-72. The first violation alleged that the defendant had possessed or consumed alcohol on or about December 25, 2014. CP 69. The second violation alleged that the defendant had possessed or perused pornography on or about April 30, 2015. *Id.*

The violation report stated that on June 12, 2015, prior to his polygraph examination, the defendant admitted he had consumed alcohol on one occasion. CP 70. He stated to his community corrections officer that a friend had offered him one shot of whiskey in celebration of Christmas. *Id.* During his polygraph examination, the defendant was found to be deceptive in his response to the question regarding deliberately viewing pornography. *Id.* When questioned about his response, the defendant stated that a female friend sends him nude photographs of herself on occasion. *Id.* He stated that the photographs were generally of the breast area and sometimes of her buttocks. *Id.* The defendant admitted that he used these images on occasion for masturbatory purposes. *Id.*

After being notified of the defendant's community custody violations, a revocation hearing was held to determine whether the

defendant's SSOSA would be revoked. RP at 2. Lucy Armijo, the defendant's community corrections officer, testified that in June 2015, she became aware of violations committed by the defendant. RP at 57. The violations included possessing and consuming alcohol in December 2014, and possessing or perusing pornography in April 2015. CP 69; RP at 57-58. Upon reviewing the polygraph results from June 12, 2015, the defendant admitted to consuming one glass of wine on Christmas Day, an admission inconsistent with the polygraph results. CP 70; RP at 58-59. Based upon the two violations, Ms. Armijo recommended revocation. CP 72; RP at 62.

At the revocation hearing, the State also presented testimony from the defendant's certified sex offender treatment providers, Julie Crest and Kristi Hunziker. RP at 2-53. Ms. Crest explained that she informed the defendant of all requirements and treatment expectations, including abstaining from the use of alcohol and abstaining from possession or use of sexually explicit or pornographic materials. RP at 5-6. Ms. Crest told the defendant that if he had pornographic material in his possession, he would need to tell her. RP at 6. The defendant did not reveal that he had received nude photographs from any females, nor did he disclose his use of alcohol until he was in the middle of a polygraph examination. RP at 8, 12-13. Once she became aware of the disclosure, Ms. Crest no longer

believed that the defendant was amenable to treatment to continue with the SSOSA program. RP at 14.

Ms. Hunziker testified that in April 2014, she discussed treatment expectations with the defendant, specifically that he was prohibited from viewing nude photographs and alcohol use. RP at 39-40. The defendant never revealed any alcohol use or possession of pornography. RP at 40-41. After it was revealed that the defendant had violated the terms and had failed to disclose this to his treatment team, Ms. Hunziker recommended revocation of his SSOSA sentence at the hearing. RP at 44. During cross-examination, the defendant admitted to consuming alcohol on two prior occasions and to viewing nude pictures on his cell phone sent by a female friend. RP at 99, 105.

The trial court revoked the defendant's SSOSA after determining that the defendant had failed to comply with the conditions of the Judgment and Sentence by consuming alcohol on two occasions in December 2014 and possessing and viewing pornographic images that he received on his cell phone while in the SSOSA program. CP 75-76; RP at 128.

III. ARGUMENT

The defendant contends that the trial court abused its discretion by revoking his SSOSA sentence because the term "pornography" was

unconstitutionally vague. Am. Br. Appellant at 5.

The court reviews the revocation of a SSOSA sentence for an abuse of discretion. *State v. Ramirez*, 140 Wn. App. 278, 290, 165 P.3d 61 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A court may revoke an offender's SSOSA at any time so long as a violation of a condition of a SSOSA sentence has been proved by verified facts. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

A. THE TERM "PORNOGRAPHY" WAS UNCONSTITUTIONALLY VAGUE.

The defendant contends that the community custody condition prohibiting him from possessing pornography is unconstitutionally vague. The State agrees. The condition should be amended to prohibit "sexually explicit conduct" as defined in RCW 9.68A.011.

The defendant challenges as unconstitutionally vague the provision of his supervised release prohibiting him from possessing or perusing "pornographic material." In *United States v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002), the Court held as impermissibly vague a similar supervised release term. Guagliardo was prohibited from possessing "any pornography," including legal adult pornography." *Id.* at 872. Because "a

probationer cannot reasonably understand what is encompassed by a blanket prohibition on ‘pornography,’” the court remanded for clarification. *Id.* The condition imposed on the defendant is indistinguishable from the one imposed on Guagliardo.

Thus, the condition prohibiting the defendant from perusing and possessing pornography cannot be the basis for the SSOSA revocation. The condition should be amended to prohibit “sexually explicit conduct” as defined in RCW 9.68A.011.

B. THE PROHIBITED ALCOHOL CONSUMPTION WAS A SUFFICIENT INDEPENDENT BASIS FOR REVOCATION.

The defendant does not address his two admitted alcohol consumption violations. While the pornography condition was unconstitutionally vague, the two prior incidents of alcohol consumption were a sufficient independent basis for revocation.

An offender’s SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment. RCW 9.94A.633(2)(a); RCW 9.94A.670(11); *State v. Badger*, 64 Wn. App. 904, 908-09, 827 P.2d 318 (1992). Once a SSOSA is revoked, the original sentence is reinstated. *Dahl*, 139 Wn.2d at 682. “Proof of violations need not be established beyond a reasonable doubt but only

must 'reasonably satisfy' the court the breach of condition occurred."

Badger, 64 Wn. App. at 908.

Here, the defendant's SSOSA was revoked for alcohol consumption and possession of pornography. These facts are supported by the record and undisputed by the defendant. The defendant admitted to consuming alcohol on two previous occasions, a condition which would have been a sufficient basis for revocation. *See* RCW 9.94A.670(10).

Ms. Crest testified to the importance of the alcohol condition, explaining that alcohol and drugs are disinhibitors in which good judgment can be lost and mistakes can be made. RP at 7. She also stated that while a shot of alcohol does not necessarily mean the defendant will reoffend, it does reflect an attitude of noncompliance. RP at 26. The defendant's dishonesty regarding the violations also called into question his amenability to treatment and continuation in the program.

Thus, because the defendant violated the conditions of community custody by consuming alcohol on two occasions, aside from any potential issues regarding the violation for possession of pornography, the court had a tenable basis to revoke the defendant's SSOSA sentence and did not abuse discretion.

C. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE REVOCATION.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the Court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court can decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976¹, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate or even “chill” the right to counsel. *Id.* at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful)

defendant to pay appellate costs. In *Blank*, the Supreme Court held this statute constitutional, affirming the court's holding in *State v. Blank*, 80 Wn. App. 638, 641-42, 910 P.2d 545 (1996). 131 Wn.2d at 239.

Nolan noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. *Nolan*, 141 Wn.2d at 623.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, 141 Wn.2d at 624-25, 628.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the

¹ Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, 63 Wn. App. at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-42; *see also State v. Wright*, 97 Wn. App. 382, 985 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See State v. Woodward*, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See Blank*, 131 Wn.2d at 236-37 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53-54, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts of late. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that “[t]he legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.* at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.* at 835-37. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.* at 838-39.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and RCW 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burdens of persons convicted of crimes, the Legislature has yet to show any shift toward eliminating the imposition of financial obligation on indigent defendants.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs

under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” RCW 10.73.160(3). Obviously, all these defendants have been found indigent by the court. Under the defendant’s argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant’s financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of “manifest hardship.” See RCW 10.73.160(4).

Certainly, in fairness, the appellate court should also take into account the defendant’s financial circumstances before exercising its discretion. Ideally, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determinations about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

The record reflects that after being granted the SSOSA sentence, the defendant had been gainfully employed part-time at McDonalds and full-time at Manufacturing Services Incorporated. RP at 96. The defendant also indicated that he was going out looking for employment. RP at 104. There is nothing in the record to support the assertion that the defendant will never be able to pay the appellate costs associated with this case.

In this case, the State submits that it has “substantially prevailed.” Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should exercise discretion to impose appellate costs.

IV. CONCLUSION

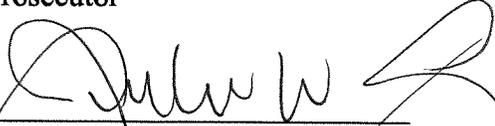
This Court should affirm the defendant’s SSOSA revocation because it was properly revoked and authorized by RCW 9.94A.670(10). Additionally, the Legislature has expressed its intent that criminal defendants contribute to the costs of the prosecution and appeal of their cases. Whether this is good or bad policy is a matter for the Legislature. The State respectfully requests that costs be taxed as requested by the State, should the State substantially prevail.

RESPECTFULLY SUBMITTED this 13th day of September,

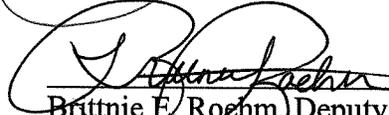
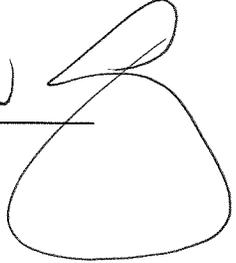
2016.

ANDY MILLER

Prosecutor



Julie E. Long, Deputy
Prosecuting Attorney
Bar No. 28276
OFC ID NO. 91004



Brittnie E. Roehm, Deputy
Prosecuting Attorney
Bar No. 49588
OFC ID NO. 91004

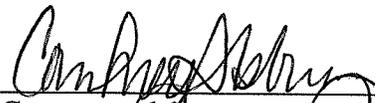
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

David Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

E-mail service by agreement
was made to the following
parties: gaschlaw@msn.com

Signed at Kennewick, Washington on September 13, 2016.


Courtney Alsbury
Appellate Secretary