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October 25, 2016
Court of Appeals
Division III
State of Washington

NO. 34006-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JAY TREVOR POWERS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 15-1-00296-5

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court imposed the special cost reimbursement during sentencing.
- B. The prosecuting attorney complied with RCW 36.27.020(7).

II. STATEMENT OF FACTS

On March 15, 2015, Matthew Mahan and his girlfriend, Alyssa Aitoro, had recently hit a rough patch in their relationship. 1RP¹ at 27. They were talking on Ms. Aitoro's front porch but decided to take a drive in Mr. Mahan's truck so they could talk about their relationship in private. 1RP at 28, 79. At approximately 8:00 p.m., Mr. Mahan began driving to Canon De Sol Winery, a place that held significance to them both. 1RP at 28-29, 71. Mr. Mahan and Ms. Aitoro had been there on a couple of occasions for celebrations, and Mr. Mahan's mother was an acquaintance of the owner, Victor Cruz. 1RP at 29, 70-71. There were no "no trespassing" signs visible at the front of the property, and seeing the gate propped open with a large stone, Mr. Mahan drove down the gravel road and parked. 1RP at 41. At some point into the conversation, Mr. Mahan and Ms. Aitoro moved from the front seat into the back seat and were

¹ There are three volumes Verbatim Report of Proceedings referenced as follows: 1RP – March 23, 2015, April 15, 2015, and December 7, 2015; 2RP – December 8, 2015, December 9, 2015, and December 14, 2015; 3RP – Excerpts of Jury Trial, Exhibits 60 and 61.

becoming intimate when they saw a vehicle coming down the road. 1RP at 31-32.

Once the couple saw the vehicle's blinker, indicating that it was turning onto the property, they moved back into the front seat. 1RP at 32. As the vehicle approached, Mr. Mahan rolled down his window. 1RP at 33. The vehicle stopped short of Mr. Mahan's truck, and then began to pull forward, stopping directly in front of the truck. 1RP at 34. Mr. Mahan turned on the headlights of his truck, which illuminated the vehicle and the driver. *Id.* Mr. Mahan did not recognize the driver of the vehicle, who was later identified as Brent Parrish. 1RP at 35; 2RP at 161, 163. After Mr. Mahan turn on his headlights, the vehicle moved approximately five (5) to ten (10) yards away and the defendant, Jay Powers, got out of the passenger's side. 1RP at 36, 44, 73. The defendant approached Mr. Mahan's truck with his left hand hidden behind his back and his right hand in the air. 1RP at 37. Concerned that the defendant may be carrying a weapon in his waistband, Mr. Mahan put his foot on the accelerator and steered right, away from the vehicle. 1RP at 38, 81.

It was at this point Mr. Mahan and Ms. Aitoro saw the defendant remove a pistol from behind his back and pull the hammer back on the gun. 1RP at 38, 74. Mr. Mahan initially heard one shot being fired at his truck, followed by multiple gunshots. 1RP at 38, 41. Fearing for his and

Ms. Aitoro's lives, he reached over to Ms. Aitoro, put his arm around her back, and pushed her down into her seat. 1RP at 39. Mr. Mahan sped back to Ms. Aitoro's house and upon inspection, noticed several bullet holes in his truck. 1RP at 42. The first bullet hole was located in the driver's side door, the second was behind the driver's side passenger door, and the third in the driver's side rear tire. 1RP at 47. There were other bullet holes discovered in the back of the vehicle. *Id.* Ms. Aitoro's father immediately called law enforcement. 1RP at 60, 75-76.

Corporal John Thompson with the Benton County Sheriff's Office immediately responded to Ms. Aitoro's residence. 1RP at 84-85. Corporal Thompson observed Mr. Mahan's truck and concluded that there were eleven (11) bullet holes in various locations. 1RP at 90-91. One bullet was recovered from the truck's bumper. 1RP at 91.

Deputy Mike McDermott with the Benton County Sheriff's Office was assigned to secure the area of the shooting. 1RP at 103. Deputy McDermott had also received a report from Mr. Parrish, who called in a suspicious vehicle at the winery. 1RP at 104. Detective Justin Gerry spoke with the defendant and Mr. Parrish on their front porch at the winery. 2RP at 140. Two days after the incident, Detective Gerry asked that the defendant come down to the station to speak with him. 2RP at 159. On March 18, 2015, Detective Gerry returned to the winery and noticed for

the first time that the gate was closed and a couple yellow “no trespassing” signs had been placed at the entrance. 2RP at 160.

When interviewed by the law enforcement officers, the defendant advised them that when he got out of the vehicle, Mr. Mahan turned the truck on and floored it in his direction. 3RP at 6-7. The defendant stated that he felt that he was in danger because the truck came close to him. 3RP at 5. He fired his pistol three times at the pickup’s engine block and emptied the clip into the vehicle as it drove away. 3RP at 10.

Mr. Parrish testified that on the day of the shooting he and the defendant were travelling back to their residence at the winery at approximately 9:00 or 10:00 at night when they noticed an unfamiliar truck on the premises. 2RP at 162-63. When Mr. Parrish pulled up next to the truck, the defendant pulled a gun out of his backpack and engaged the chamber before he got out of the vehicle. 2RP at 163-67. Mr. Parrish heard the truck peel out, saw it retreat from the area, and immediately after heard gun shots. 2RP at 164. Mr. Parrish and the defendant then called the owners of the winery to see if they knew anyone that would be out there, and the owners said that they did not. 2RP at 165.

The State agrees with the Statement of Facts included within the Brief of Appellant at pages 3-4.

III. ARGUMENT

A. The trial court imposed the special cost reimbursement during sentencing.

The defendant contends that the trial court failed to comply with its statutory obligation by delegating authority to the Court Clerk to impose additional costs not individually addressed at sentencing. The County Clerk did not impose costs on the defendant without authority from the court. During sentencing, the trial court specifically addressed the special cost reimbursement when it imposed court costs and included the special cost reimbursement when assessing the total amount to be imposed.

The court may require a defendant to pay costs. RCW 10.01.160(1). Costs are those expenses specially incurred by the State in prosecuting the defendant, or in administering the deferred prosecution program under chapter 10.06 RCW or pretrial supervision. RCW 10.01.160(2). The statute lists a series of “costs” that may be imposed, including: warrant service costs, jury fees, costs of administering deferred prosecution or pretrial supervision, and incarceration costs. *Id.*

RCW 9.94A.760(1) provides in part: “The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other

assessments required by law.”

Page four of the Judgment and Sentence states “[o]ther costs as assessed by the Clerk and set forth in the cost bill to be attached upon filing of this Judgment and Sentence” CP 100. The cost bill separately assessed a \$200 criminal filing fee, a \$60 sheriff’s service fee, a \$250 jury demand fee, a \$700 attorney fee, and \$2,742.50, the special cost reimbursement. CP 107. Following sentencing, the cost bill was attached to the Judgment and Sentence and filed with the court. *Id.* There is no requirement under RCW 9.94A.760(1) that the sentencing judge make an oral record regarding the individual assessments.

Page three of the Judgment and Sentence indicates that court costs are those authorized by RCW 9.94A.760, 9.94A.505, 10.01.160, and 10.46.190. CP 99. The \$2,742.50 special cost reimbursement is authorized by RCW 10.01.160 and was ordered by the trial court during sentencing. CP 107; 2RP at 244-45. The court specifically imposed court costs, attorney’s fees, and the jury fee, which totaled \$4,522.50, and restitution in the amount of \$8,520.90. CP 99-100, 107; 2RP at 244-45.

On May 8, 2015, Psychological Associates, P.S. filed a claim for compensation in the amount of \$2,000.00 to reimburse an expert regarding the defendant’s alleged diminished capacity. Uniform Claim for

Compensation filed 05/08/2016². The notation “DR \$2000” on the cost bill represents defense’s expert expenses. CP 107. On August 14, 2015, defense investigator Jeff Porteous filed a claim for compensation in the amount of \$742.50. Uniform Claim for Compensation filed 08/14/2015³. The notation “INV \$742.50” on the cost bill represents defense’s investigator fee. CP 107. Both claims for compensation were approved by the Benton & Franklin Office of Public Defense. These special reimbursement costs were expenses specially incurred by the State in prosecuting the defendant. The defendant argues that the cost bill contains unidentifiable notations; however, a quick review of the court file would have informed the defendant of the nature of these court costs. *See* Uniform Claims for Compensation, subnumbers 22 and 27.

Witness costs, costs of investigators, and the sheriff’s fee for service of process could be recouped from a convicted defendant as “costs specially incurred” if the sentencing court could find present or likely future ability to repay. *State v. Earls*, 51 Wn. App. 192, 752 P.2d 402 (1988). Defense’s expert witness and investigator fees were costs specially incurred in prosecuting the defendant. The defendant has not alleged that the sentencing judge failed to inquire into his ability to pay.

Here, the sentencing judge clearly segregated each assessment out

² Clerk’s subnumber 22, designated on 10/25/2016.

for the Clerk, arriving at a total of \$4,552.50, before restitution. The Clerk wrote down the costs and fines assessed during sentencing, and it was subsequently attached to the Judgment and Sentence. The Clerk did not impose additional costs not individually assessed at the sentencing hearing; rather the trial court imposed the special reimbursement costs during sentencing.

B. The prosecuting attorney complied with RCW 36.27.020(7).

The defendant argues that the prosecuting attorney failed to comply with the statutory duties under RCW 36.27.020(7) in taxing the cost bill. The deputy prosecutor complied with the statutory requirements in taxing the cost bill and ensuring that no useless witness fees were taxed and that the fees imposed did not exceed the statutory maximum amount authorized by the law.

RCW 36.27.020(7) states that the prosecuting attorney shall “[c]arefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by the law.”

Whenever a person is convicted in superior court, the court may order the payment of legal financial obligations (LFOs) as part of the

³ Clerk’s subnumber 27, designated on 10/25/2016.

sentence. RCW 9.94A.760. The \$500 victim assessment authorized by RCW 7.68.035, \$100 DNA collection fee authorized by RCW 43.43.7541, \$200 criminal filing fee authorized by RCW 36.18.020(2)(h), \$60 sheriff's service fee authorized by RCW 36.18.040, \$250 jury demand fee authorized by RCW 9.94A.760 and 10.01.160, \$700 court-appointed attorney fee authorized by RCW 9.94A.760, \$2,742.20 special cost reimbursement authorized by RCW 9.94A.760 and 10.01.160, and the \$8,520.90 restitution authorized by RCW 9.94A.753 did not exceed the maximum amount allowed by the law. The witness fees included in the special cost reimbursement were reasonably necessary in providing a defense.

The deputy prosecutor was aware of the costs and fees imposed on the defendant during sentencing and had no objection to the LFOs imposed by the court. The deputy prosecutor complied with the statutory duties under RCW 36.27.020(7) in taxing the cost bill.

C. Appellate costs are appropriate in this case if the Court affirms the conviction.

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 1976⁴, 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.

⁴ Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

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 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." 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, appellate courts 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.

During sentencing, the record reflects that the defendant had the present and future ability to pay. 2RP at 244-45. The court took notice the defendant had been employed at the time of the incident. 2RP at 244. The defendant was asked, "Is there any reason that you are not capable of working?" to which the defendant replied that there was not. 2RP at 244. At the time of sentencing, the defendant was thirty-one (31) years of age.

CP 1, 97-107; 2RP at 232. With a sentence of eighty-five (85) months, the defendant will likely be released from prison before he is forty (40) years old. This will give the defendant ample time and opportunity to find gainful employment following his release. 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

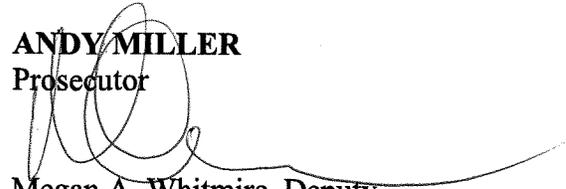
The court clerk did not impose costs on the defendant without authority from the court because the court imposed the special cost reimbursement during sentencing. The prosecutor complied with RCW 36.27.020(7) in taxing the cost bill. Thus, the \$2,742.50 imposed for the special cost reimbursement should not be waived. The State respectfully requests that costs be taxed as requested by the State.

RESPECTFULLY SUBMITTED this 25th day of October, 2016.



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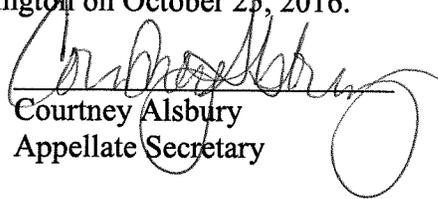
CERTIFICATE OF SERVICE

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:

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Signed at Kennewick, Washington on October 25, 2016.



Courtney Alsbury
Appellate Secretary