

FILED  
JANUARY 17, 2017  
Court of Appeals  
Division III  
State of Washington

NO. 34108-9  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON

RESPONDENT

V.

DEMETRIO PAZ

APPELLANT,

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BRIEF OF RESPONDENT

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## **A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the trial court err when it ordered the defendant to serve 18 months of community custody for his violent offense as required by statute?
2. Did the trial court err by not entering written findings of fact and conclusions of law after a pre-trial CrR 3.5 hearing, but that have now been entered and designated as part of the appellate record?
3. Is the objection to imposition of appellate costs premature, where the appeal is pending and the State has not requested costs?

## **B. STATEMENT OF THE CASE**

### 1. Substantive Facts

On January 14, 2015, Corrections Officer Craig Caswell observed what appeared to be blood smears on the floor of the Okanogan County Jail's A module. RP 38, 54. Officer Caswell contacted inmate Tyson Heath, and observed visible injury to Mr. Heath's face. RP 40-41, 54-55. Mr. Heath identified the defendant as one of the other inmates who had assaulted him. RP 42, 148.

Officer Caswell transported Mr. Heath to Confluence Health and then to Mid-Valley Hospital. RP 47-48. Deputy Josh Brown contacted Mr. Heath at Mid-Valley Hospital and photographed his injuries. RP 64. Mr. Heath suffered multiple fractures to his face

requiring surgical repair with titanium plates and screws. RP 67-68, 73, 148-149.

Mr. Heath named the defendant as one of the inmates who attacked him after he asked the defendant about commissary items that had been stolen from Mr. Heath's cell. RP 65-67, 137-143. The defendant swung at Mr. Heath, striking him in the face; and then other inmates joined the defendant in the attack on Mr. Heath. RP 66-67, 74, 143-146, 157, 166.

The defendant admitted to police that he was contacted by Mr. Heath about the stolen commissary items, but he denied knowledge of any assault. RP 69. However, the defendant subsequently admitted to inmate Adam Stewart that he and fellow inmates assaulted Mr. Heath. RP 91-94. The defendant also talked to Mr. Stewart about a plan to have another inmate take the blame for the assault. RP 94-95.

The defendant was found guilty of assault in the second degree. CP 41. The defendant was sentenced to 70 months in prison based on an offender score of 8.5. CP 24-25. The defendant was ordered to serve 18 months on community custody based on the assault being classified as a violent offense. CP 25.

## 2. Procedural Facts

A CrR 3.5 hearing was held the first morning of trial, February 9, 2016. Deputy Josh Brown testified. RP 27-28. The Court made findings of fact and conclusions of law on the record. The Court found the defendant's statements were given after he was advised of his *Miranda* warnings and after he waived his right to remain silent. RP 32-33.

Jury selection and trial directly followed the CrR 3.5 hearing. Written findings of fact and conclusions of law were not completed at that time. The State filed the Court's written "3.5 Findings of Fact and Conclusions of Law" on January 13, 2017. CP 203-205.<sup>1</sup>

## C. ARGUMENT

### 1. The defendant was correctly ordered to serve 18 months of community custody for his violent offense.

The defendant was ordered to serve 18 months on community custody pursuant to RCW 9.94A.701, which states in part:

...(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

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<sup>1</sup> The State filed a "Designation of Clerk's Papers" on January 13, 2017, designating the Courts 3.5 Findings of Fact and Conclusions of Law.

- (a) A sex offense not sentenced under RCW 9.94A.507; or
- (b) A serious violent offense.

(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

(3) A court shall, in addition to other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

- (a) Any *crime against persons* under RCW 9.94A.411 (2)...

RCW 9.94A.701.

Assault in the second degree is a “violent offense”. See RCW 9.94A.030 (55)(a)(viii). Thus, it falls within RCW 9.94A.701 (2), which requires a community custody term of 18 months for a violent offense. But assault in the second degree is also a “crime against persons” under RCW 9.94A.411 (2). It therefore also falls within RCW 9.94A.701 (3)(a), which requires a community custody term of 12 months for a crime against persons.

The defendant argues that the legislature created an ambiguity by placing the crime of assault in the second degree in two different categories and that the ambiguity must be resolved by shortening his term of community custody to 12 months in accordance with the rule of lenity.

However, many, if not most, of the crimes on the “serious violent offense” and “violent offense” lists are also listed as “crimes against persons” under RCW 9.94A.411 (2).

The defendant’s argument is the same argument made to, and rejected by, the Court of Appeals in *State v. Hood*, 196 Wash. App. 127, 382 P.3d 710, 715 (2016).

Statutes must be interpreted and construed so that all language used is given effect, with no portion rendered meaningless or superfluous. *Hood*, 196 Wash. App. at 139–40 (citing *State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318 (2003)).

The *Hood* Court noted that if it adopted the defendant’s interpretation of the statute, that RCW 9.94A.701(1)(b) and (2) would be rendered largely superfluous because many “serious violent offenses” and “violent offenses” could only be punished with 12 months of community custody instead of the 3 years or 18 months the legislature prescribed in subsections (1)(b) and (2). *Hood*, 196 Wn.App.at 139-40.

The statute sets up a tiered step-down sentencing structure depending on the seriousness of the crime: 3 years of community custody is imposed for “serious violent offenses”; 18 months for “a violent offense that is not considered a serious violent offense”; and

12 months for crimes against persons. RCW 9.94A.701(1)(b), (2), (3)(a). *Id.*

The statutory scheme as a whole establishes that the legislature intended for individuals who commit violent offenses to receive a longer term of community custody than individuals who commit nonviolent crimes against persons. This is consistent with the legislature's purpose to "ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history". RCW 9.94A.010(1). *J.P.*, 149 Wash. 2d 444

For crimes that are listed as both serious violent offenses and violent offenses, the legislature eliminated the appearance of ambiguity by stating that the court shall sentence an offense to 18 months of community custody for a "violent offense that is not considered a serious violent offense." RCW 9.94A.701 (2). *Hood*, 196 Wash. App. at 140–41.

The clarifying language in subsection (2) is more accurately viewed as an expression of the legislature's intent to create a tiered step-down sentencing structure, as detailed above. To determine the plain meaning of subsection (3)(a), it should be interpreted in a way that is consistent with the overall statutory scheme. *Id.*

The *Hood* Court held that RCW 9.94A.701 is not ambiguous as to the length of the community custody term for a violent offense, and that the only reasonable reading of RCW 9.94A.701 is that it requires a term of 18 months of community custody for a violent offense that is not considered a serious violent offense, even if it is also a crime against persons. *Id.* The Court noted that because the potential ambiguity can be reconciled in a way that reflects the legislature's clear intent, the court does not apply the rule of lenity. *Id.* (citing *State v. Oakley*, 117 Wash. App. 730, 734, 72 P.3d 1114 (2003)).

The defendant was correctly ordered to serve 18 months of community custody for his second-degree assault conviction.

2. Remand is not warranted where the CrR 3.5 findings of fact and conclusions were clearly indicated on the record, and the written findings of fact have been entered.

The defendant argues that the court erred by not entering written findings of fact prior to his appeal, and that the court lacked authority to submit written findings of fact without the permission of the Court of Appeals under RAP 7.2(e).<sup>2</sup>

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<sup>2</sup>RAP 7.2 (e) states in part.

The defendant relies upon *State v. Friedlund*, 182 Wash. 2d 388, 341 P.3d 280 (2015). However, the same arguments were made to, and rejected by, the Court of Appeals in the unpublished case of *State v. Chesney*, 192 Wash. App. 1053, *review denied*, 186 Wash. 2d 1018, 383 P.3d 1013 (2016). Although the decision in *Chesney* is non-binding, its reasoning is persuasive

In *Friedlund*, the court held that the entry of written findings is essential when a court imposes an exceptional sentence and remanded for entry of written findings. *Friedlund*, 182 Wash. 2d at 393–94. The court denied pending motions to supplement the record with the trial court's belated findings, stating that because the trial court failed to obtain our permission prior to entering its written findings, entering the findings violated RAP 7.2(e).

*Friedlund*, 182 Wash. 2d at 396.

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The trial court has authority to hear and determine (1) post judgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The post judgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion. The decision granting or denying a postjudgment motion may be subject to review.

Unlike the present case, *Friedlund* addressed whether an on-the-record oral ruling may substitute for written findings when a trial court imposes an exceptional sentence ... outside the standard range for an offense. *Friedlund*, 182 Wash. 2d at 390.

The *Friedlund* court based its conclusion on the unique policy concerns underlying the Sentencing Reform Act (SRA). For example, the court stated that without written findings, the Sentencing Guidelines Commission and the public at large could not readily determine the reasons behind exceptional sentences, greatly hampering the public accountability that the SRA requires. *Friedlund*, 182 Wash. 2d at 395.

Further, the court noted that permitting the parties to supplement the record with late-filed findings would deprive the defendant his right to appeal an exceptional sentence under RCW 9.94A.585 (2). *Friedlund* is inapposite to the present case.

In this case, the defendant's appeal on the CrR 3.5 findings is arguably moot because remand would serve no purpose. See *Snohomish Cty. v. State*, 69 Wash. App. 655, 660, 850 P.2d 546 (1993) (An appeal is moot if the court can no longer provide effective relief).

The 3.5 hearing was a pre-trial motion, not a post judgment motion. The Trial Court's determination on this pre-trial motion was made on the record at the time of the hearing. The subsequent written findings of fact and conclusions of law memorialized the court's oral decision, and does not change a "decision" being reviewed by the appellate court.<sup>3</sup> The trial court is not prohibited by RAP 7.2 from entering the written findings and conclusions of its pre-trial decision.

Here, the State filed the Court's findings and conclusions under CrR 3.5, and properly supplemented the appellate record with those findings and conclusions. RAP 9.6(a) permits any party to supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief.

On remand, the trial court would enter the same findings and conclusions. Therefore, no effective relief is available to the defendant. *See also for non-binding authority, State v. Noble*, 116 Wash. App. 1043 (2003)(remand not necessary where a clear oral opinion permitted Court of Appeals to determine how factual issues

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<sup>3</sup> At trial or on appeal, defendant did not challenge the facts found by the court, nor the conclusions it reached. On appeal defendant only requests a remand to enter the written findings and conclusions that have now been entered.

were decided by the trial court, when findings and conclusions were entered after appeal was filed).

In the present case, the issue raised by defendant is moot. The CrR 3.5 findings have been entered, and no remedy is available to the defendant through a remand.

3. The objection to appeal costs is premature.

The defendant cites to *State v. Nolan*, 141 Wash. 2d 620, 8 P.3d 300 (2000) and *State v. Sinclair*, 192 Wash. App. 380, 367 P.3d 612, *review denied*, 185 Wash. 2d 1034, 377 P.3d 733 (2016), in support of his request that the Court not award costs in the event the State substantially prevails. The defendant's request is premature and should be denied. <sup>4</sup>

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wash. 2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wash. App. 342, 989 P.2d 583 (1999). The

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<sup>4</sup> In *Sinclair*, 192 Wash. App. at 389–390, the court used its discretion to deny appellate costs to the State when the defendant remained indigent and this court saw “no realistic possibility,” given that the defendant was 66 years old and received a 280-month prison sentence, that he would be able to pay appellate costs.

award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *Nolan*, 141 Wash. 2d 620.

In *Nolan*, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.* at 622. As suggested by the Supreme Court in *Blank*, 131 Wash. 2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *Sinclair*, 192 Wash. App. at 389–390, prematurely raises an issue that is not before the Court. *If* the defendant does not prevail, and *if* the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

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

The defendant argues that the Court should not impose costs on indigent defendants. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, 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. See RCW 10.01.160(2). In *State v. Barklind*, 87 Wash. 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*, 131 Wash. 2d 230, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wash. App. 638,

641–642, 910 P.2d 545 (1996), *aff'd*, 131 Wash. 2d 230, 930 P.2d 1213 (1997).

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 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In *State v. Blazina*, 182 Wash. 2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(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, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. 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).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW

10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, 131 Wash. 2d 230, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Id.* RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

(2) The court may, on motion by the offender, following the offender's *release from total confinement*, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090(emphasis added). The rest of the “relief” is equally limited and demonstrative of the Legislature’s intent and presumption that the debts be paid:

- (a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;
- (b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;
- (c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections*;
- (d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations*. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2)(emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate 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. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

The question for the Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did *not* do in *Blazina*. It is for the Legislature to change the statute if it so desires.

Moreover, *Sinclair* does not support the defendant's claim of future indigence. The defendant's young age and length of sentence distinguishes him from the defendant in *Sinclair*.

Here, the court should decline to address the issue of appellate costs. The issue is not properly before the court. The appeal has not concluded, and the State has not made any determination that it will seek costs if it prevails on appeal.

#### **D. CONCLUSION**

The Trial Court correctly imposed 18 months of community custody. RCW 9.94A.701 is not ambiguous as to the length of the community custody term for a violet offense.

The Trial Court has properly entered findings of fact and conclusions from its CrR 3.5 oral ruling. The issue raised on appeal is moot, and there is no available remedy through a remand.

The objection to appellate costs is premature where no costs have been requested.

Dated this 17 day of January 2017

Respectfully Submitted by:

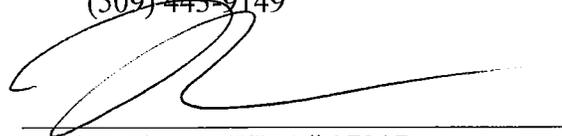


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I, Karl F. Sloan, do hereby certify under penalty of perjury that on January 17, 2017, I provided email service, a true and correct copy of **Brief of Respondent, to:**

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