

No. 34577-7-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

**FILED**  
Jan 06, 2017  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

LONNIE D. GLEIM, JR.,  
Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT  
Honorable m. Scott Wolfram, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The State breached the plea agreement at resentencing.
2. The resentencing court erred in denying the motion to withdraw guilty plea.
3. The resentencing court erred in finding the clerk's filing fee was a mandatory legal financial obligation.
4. The resentencing court abused its discretion in imposing legal financial obligations.

*Issues Pertaining to Assignments of Error*

1. Whether the State breached the plea agreement in a criminal resentencing proceeding by misrepresenting scope of court's discretion in resentencing upon remand, refusing defense requests to explain why the promised sentencing recommendation was being made and otherwise acting to undercut the terms of the agreement.
2. Whether the court abused its discretion at resentencing by failing to recognize a non-mandatory legal financial obligation.

**B. STATEMENT OF THE CASE**

On July 3, 2014, Lonnie Gleim, Jr. was charged by information with 12 counts of possession of depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.020(1)(a) and (b). CP 5–8. Mr. Gleim

pleaded guilty to four counts of possession of depictions of minors.

12/10/14 RP<sup>1</sup> 1-4. The standard range for each count was 77 to 102 months, based on an offender score of 9. CP 11. The statement of defendant on plea of guilty indicates pursuant to negotiation, the prosecuting attorney agreed to dismiss eight counts and recommend “36 months. Operation of multiple offense results in a presumptive sentence that can be clearly excessive.” CP 14.

At sentencing in March 2015 the State and Mr. Gleim both requested an exceptional sentence downward of 36 months confinement followed by 36 months community custody. CP 94 and *State v. Gleim*, No. 33209-8-III, 93 Wn. App. 1046, noted at \*1 2016 WL 2343168 (Wash. Ct. App. May 3, 2016). The trial court sentenced Mr. Gleim to 102 months on each count, all to run concurrently, with credit for 143 days served. *Id.* The court imposed legal financial obligations including discretionary costs of \$1,039.10. *Id.* The court also sentenced Mr. Gleim to “community custody for 36 months of for the period of earned ... early release awarded pursuant to RCW 9.94A.728, whichever is longer. *Id.*

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<sup>1</sup> The current appeal arises from proceedings after remand for resentencing. The report of proceedings from the prior direct appeal, *State v. Gleim* (COA No. 33209-8-III), was transferred into the current appeal by notation ruling dated August 31, 2016. All hearings will be cited to by date, e.g. “12/10/14 RP \_\_\_.”

Mr. Gleim appealed. CP 39–40; *see* Court of Appeals No. 33209-8-III. He argued the trial court erred by (1) failing to conduct an individualized inquiry into his financial resources consistent with *State v. Blazina*<sup>2</sup> and (2) giving him a sentence that exceeded the statutory maximum of 120 months. CP 95–102 and *Gleim*, \*2–4 2016 WL 2343168. This Court agreed. It remanded for an inquiry consistent with *Blazina* and to “either amend the community custody term or to sentence Mr. Gleim consistent with [RCW 9.94A.701(9)],” citing *In re Pers. Restraint of McWilliams*, 182 Wn.2d 213, 217, 340 P.3d 223 (2014) (holding when the trial court imposes a standard range sentence in violation of RCW 9.94A.701(9), the remedy is remand to the trial court to either amend the community custody term or to exercise its discretion to resentence consistent with the statute.) CP 97–98, 102 and *Gleim*, \*3, 5 2016 WL 2343168.

The court emphasized the trial court upon remand had many resentencing options subject only to the statutory constraints of RCW 9.94A.701(9) and the Sentencing Reform Act (SRA), including discretion to determine the length of the new sentence:

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<sup>2</sup> *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

On remand, the trial court may decide to keep the 102-month term of confinement and impose ‘community custody for a period of at least 18 months, plus all accrued earned early release time at the time of release, and this sentence would not be impermissibly indeterminate. See [*State v.*] *Bruch*, 182 Wn.2d [854,] 862–65[, 346 P.3d 724 (2015)]. However, this is one of many resentencing options the trial court has available, and neither the judgment and sentence nor the transcript of the sentencing hearing definitively indicates how the trial court would resentence Mr. Gleim. The trial court should be permitted to exercise its sentencing discretion on remand, subject to the foregoing statutory constraints.

CP 98 and *Gleim*, \*3 2016 WL 2343168.

The mandate was filed on July 12, 2016. CP 91. The current appeal arises from proceedings after remand for resentencing. The resentencing hearings took place June 13 and 27, 2016. With minimal discussion on the record the court deleted all but \$200 of the discretionary legal financial obligation (LFO) costs previously imposed. CP 59; see CP 102 fn 4; 6/27/16 RP 8–9, 12.

At the June 13 hearing, the prosecutor told the court the order of the Court of Appeals on remand “require[ed] the court to amend the community custody term to comply with RCW 9.94A.701(9).” 6/13/16 RP 1. The court inquired,

THE COURT: Community custody would be 18 months?

MR. NAGLE [PROSECUTOR]: Yes ... [a]nd I have prepared a proposed order amending that.

6/13/16 RP 2. Defense counsel protested categorization of the appellate directive as simply to amend the judgment and sentence, noting the Court of Appeals ordered a new sentencing. The trial court granted a continuance for defense counsel to consult with his client and prepare his sentencing arguments. 6/13/16 RP 2.

At the June 27 hearing the prosecutor again advised the trial court the appellate order “require[ed] the court to resentence the Defendant to amend the community custody term.” 6/27/16 RP 3. The prosecutor continued, “I went ahead and prepared an amended judgment and sentence. So I have in my hands for the Court’s discretion either an ... order amending the previous judgment and sentence or an amended judgment and sentence that goes through everything,”

So the only difference between this and the original judgment and sentence is that it specifies that the term of community custody is 18 months.

6/27/16 RP 4. The State had typed into the proposed Amended Judgment and Sentence, which was later signed by the judge, the previously imposed “102” months of total confinement on each of counts 1 through 4 and an amended term community custody of “18” months. *See* 6/28/16 RP 19; *compare* CP 60 (amended judgment and sentence) with CP 30 (original judgment and sentence). “And then we would anticipate that your Honor

would go through and decide which of the discretionary legal financial obligations are appropriate.” 6/27/16 RP 4. The prosecutor handed the proposed documents to the court. *Id.*

Defense counsel repeated his position the Court of Appeals ruling authorized a full resentencing at which the trial court could make a new determination of what length of sentence and term of community custody would be appropriate, rather than simply adjusting the existing term of community custody as the State advised the court. He noted Mr. Gleim had no countable criminal history (because it was too old) and the plea agreement with the prosecutor for an exceptional sentence downward was based on pleading guilty to four counts of possessing child pornography thereby yielding an offender score of 9. Defense counsel disputed the presentence report’s conclusion that Mr. Gleim was a repeat offender based simply on his out of-state plea of guilty to a misdemeanor after spending over a year in jail on an unproven greater charge. Arguing nothing in Mr. Gleim’s background or conduct warranted imposition of a high end sentence and one that exceeded a likely sentence had he actually molested a child, defense counsel asked the court to go along with the plea agreement and not impose the high end of the standard range. 6/27/16 RP 4–8.

In response to the court's inquiry about LFOs, defense counsel stated Mr. Gleim had no money and qualifies for 100 percent total disability payments from the Veteran's Administration once he is released from confinement. 6/27/16 RP 9.

The prosecutor stated he had nothing further to add. 6/27/16 RP 9.

Defense counsel moved to withdraw the guilty plea because the State failed to make the recommendation contemplated in the plea agreement, failed despite defense request to articulate why the State had agreed to make the recommendation, and undercut the agreement by misrepresenting verbally and through pre-prepared documents the Court of Appeals directive. 6/27/16 RP 9–11; 6/28/16 RP 19–22. The State responded,

PROSECUTOR: The State hasn't changed its recommendation. It is stated in what the plea of guilty says, your Honor. So, I guess, if that is a fundamental technicality, we reiterate what the plea agreement said, we reiterate our recommendation.

THE COURT: I have the recommendation from both parties on that, counsel.

MR. MAKUS [DEFENSE COUNSEL]: If his recommendation is forcing us to go ahead and recommend it, your Honor, we will. It is not a fulfilment of the plea agreement. When you make a plea agreement, the prosecutor is supposed to make the recommendation with some degree of advocacy. He has not done so in this case. ... I want to withdraw the guilty plea because the

prosecutor has not fulfilled their agreement ... [c]learly has not fulfilled it. ...

If the Court wants to deny the motion, I will prepare the appropriate papers and you can sign the appropriate papers saying our motion is denied for whatever the reason the Court wishes to give.

6/27/16 RP 10–11.

The court ruled, “The motion is denied.” 6/27/16 RP 11.

DEFENSE COUNSEL: Does the Court wish to give a reason?

THE COURT: The plea agreement is stated in the file and it has the recommendation from both parties. I know what the plea agreement is and what the recommendation is and it has not been changed.

DEFENSE COUNSEL: The recommendation has not been changed, but why the recommendation was made has not been articulated.

THE COURT: You can do that if you would like.

DEFENSE COUNSEL: I'm asking the prosecutor to do it. He's the one who made the agreement that he would recommend it.

6/27/16 RP 11.

The court proceeded to re-sentence Mr. Gleim. Without discussion the court struck several pre-printed discretionary costs from the form provided by the State and set the LFOs at \$800, stating “[t]hat [amount] is after taking off those that are voluntary fines.” 6/27/16 RP 12. The \$800 amount includes \$200 as “clerk’s filing fee (9.94A.030 & .760, 10.01.160,

10.46.190).” CP 59. The court made a finding the \$200 fee was a non-discretionary LFO. CP 75–76.

The trial court sentenced Mr. Gleim to 102 months concurrent on all four counts, with credit for 613 days served. 6/27/16 RP 12.

When again asked about the length of the community custody term to be used, the state responded,

PROSECUTOR: According to the Court of Appeals ... that is supposed to be 18 months, not 36.

THE COURT: It is 18 months. I didn’t see it on the form. Community custody is 18 months. I’m signing the amended judgment and sentence. ...

6/27/16 RP 12–13.

Defense counsel thereafter submitted a proposed order denying Mr. Gleim’s motion to withdraw the guilty plea. CP 68–69. At presentation of the order, the prosecutor remarked:

PROSECUTOR: I wish to point out for the record that if it is deemed that this is a completely new sentencing and if it is deemed that [defense counsel] does have a valid argument that there has to be a complete reiteration of all the plea agreement, the State did reiterate the plea agreement before your Honor actually did pronounce the amended sentence.

And again, this is all assuming that the Court was to do anything more than what the appellate court required it to do. ...

6/28/16 RP 17.

After further discussion, the court asked the prosecutor to also prepare a proposed order denying motion. 6/28/16 RP 23. Two weeks later, the court signed and filed the order submitted by the prosecutor. CP 70–71.

Mr. Gleim timely filed a Notice of Appeal. CP 72–73.

### C. ARGUMENT

**1. The court erred in denying Mr. Gleim’s motion to withdraw his guilty plea because the state breached the plea agreement at resentencing by acting explicitly and through conduct to undercut the terms of the agreement.**

A plea bargain is a binding agreement between the defendant and the state which is subject to the approval of the court. *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). Because such agreements are contractual in nature, the law imposes an implied promise by the state to act in good faith. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Because plea agreements concern fundamental rights of the accused, they also implicate due process considerations that require a prosecutor to adhere to the terms of the agreement. *Id.* (citing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)); U.S. Const. amend 14.

“When a plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled.” *Santobello*, 404 U.S. at 262. When a prosecutor breaks the agreement, “he undercuts the basis for the waiver of constitutional rights implicit in the plea.” *Santobello*, 404 U.S. at 268 (Marshall, J., concurring in part, dissenting in part); *Tourtellotte*, 88 Wn.2d at 584. No matter how ill-considered the agreement may appear, neither exigencies of the moment nor public pressure justify breach. *Id.*

In return for the defendant’s guilty plea, the state must make the promised recommendation. *Sledge*, 133 Wn.2d at 840. While prosecutors are not required to make the recommendation enthusiastically, the state has a corollary duty “not to undercut the terms of the agreement explicitly or by conduct evidencing intent to circumvent the terms of the plea agreement.” *Sledge*, 133 Wn.2d at 840–41; *State v. Talley*, 134 Wn.2d 176, 187, 949 P.2d 358 (1998) (discussing the limits of prosecutorial conduct at a court-ordered evidentiary hearing on an exceptional sentence); *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781, *rev. denied*, 138 Wn.2d 1002 (1999).

“The State’s duty under the plea bargain extends to resentencing, at which it must make the same recommendation before the new sentencing

[court].” *State v. Arko*, 52 Wn. App. 130, 132, 758 P.2d 522 (1988). At the same time, a prosecutor owes duties as an officer of the court to participate in the sentencing proceedings, to answer the court’s questions candidly in accordance with the duty of candor toward the tribunal and, consistent with RCW 9.94A.460, not to hold back relevant information regarding the plea agreement. *Sledge*, 133 Wn.2d at 840; *see also* RPC 3.3(a) (“A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal ...”).

The test to determine breach of a plea agreement is whether the words and actions of the State, when viewed objectively, contradict a promise. *Sledge*, 133 Wn.2d at 840. Appellate courts apply an objective standard to determine whether the state has breached a plea agreement irrespective of the prosecutors’ motivations or justifications for the failure to perform. *Jerde*, 93 Wn. App. at 780 (citations omitted).

**a. The State breached the plea agreement in several ways.**

The words and action of the State at resentencing, when viewed objectively, contradict its promise to recommend an exceptional downward sentence of 36 months followed by 36 months community custody. CP 14, 94.

From the outset the State repeatedly misrepresented that on remand the appellate directive limited the trial court's authority to changing the 36 month term of community custody to 18 months in order to avoid the problem of exceeding the statutory maximum of 120 months when combined with the previously imposed 102-month term of confinement. 6/13/16 RP 1; 6/13/16 RP 1-2, 6/27/16 RP 3-4, 12-13; 6/28/16 RP 17 ("And again, this is all assuming that the Court was to do anything more than what the appellate court required it to do. ...").

The State had sought this precise limited remedy in the prior appeal and the Court of Appeals rejected it. CP 97-98. The State's affirmative distortion of the appellate court directive not only directly undercut the recommendation promised in the plea agreement but was also a false statement of fact to the trial court in violation of RPC 3.3(a).

Instead, the appellate directive unambiguously held the proper remedy for violating RCW 9.94A.701(9)<sup>3</sup> is remand to the trial court to either amend the community custody term or to resentence consistent with the statute. CP 97-98, citing *In re Pers. Restraint of Mc Williams*, 182

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<sup>3</sup> RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Wn.2d at 217; *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012); *State v. Winborne*, 167 Wn. App. 320, 330, 273 P.3d 454 (2012). The court elaborated that the trial court had many resentencing options available and “should be permitted to exercise its sentencing discretion on remand,” subject only to the statutory constraints of the Sentencing Reform Act. CP 97–98.

The State additionally bolstered its misrepresentation and undercut the promised recommendation by submitting the proposed Amended Judgment and Sentence document, on which it had pre-typed the previously imposed “102” months of total confinement on each of counts 1 through 4 and an amended community custody term of “18” months. CP 60; 6/13/16 RP 2 (“... [a]nd I have prepared a proposed order amending [the term of community custody to 18 months]”); 6/27/16 RP 4 (“So the only difference between this and the original judgment and sentence is that it specifies that the term of community custody is 18 months.”); 6/28/16 RP 19.

The State further failed to fulfill the promise of its plea agreement by refusing defense counsel’s request to articulate even minimal reasons it entered into the agreement. *See* RCW 9.94A.431(1) (requiring the prosecutor and defendant to state to the court “on the record, the nature of

the agreement and the reasons for the agreement.”); *see also Arko*, 52 Wn. App. at 132 (“The prosecutor is obliged to give full and wholehearted compliance with the plea bargain, (citation omitted) although he need not elaborate on the recommendation unless the defendant so requests, *State v. James*, 35 Wn. App. 351, 356–57, 666 P.2d 943 (1983) ...”).

A prosecutor is obliged to fulfill the State’s duty under the plea agreement by making the promised sentencing recommendation. *Sledge*, 133 Wn.2d at 840. The prosecutor here did not utter the words of the actual sentencing recommendation, instead choosing to say four times the State “reiterated” what the plea agreement said. 6/27/16 RP 10; 6/28/16 RP 17, 18. This rendition of “making” the recommendation is arguably consistent with case authority saying the recommendation need not be made “enthusiastically.” *Sledge*, 133 Wn.2d at 840; *Talley*, 134 Wn.2d at 183; *State v. Coppin*, 57 Wn. App. 866, 874, 791 P.2d 228, *rev. denied*, 115 Wn.2d 1011, 797 P.2d 512 (1990). However the State’s words and actions, viewed objectively, violate its concomitant duty “not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement.” *Sledge*, 133 Wn.2d at 840.

**b. The motion to withdraw guilty plea should have been granted because the prosecution’s breach of the plea agreement amounted to manifest injustice.**

A trial court “shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). Our courts “have recognized the following circumstances as amounting to manifest injustice: the denial of effective assistance of counsel, the defendant’s failure to ratify the plea, an involuntary plea, and the prosecution’s breach of the plea agreement.” *State v. Mendoza*, 157 Wn.2d 582, 586, 141 P.3d 49 (2006) (citation omitted). If an accused can show that the prosecutor has breached the plea agreement, he has demonstrated actual and substantial prejudice from the prosecutor’s violation of his constitutional due process rights. *In re Lord*, 152 Wn.2d 182, 189, 94 P.3d 352 (2004).

In this case, the State breached the plea agreement. The actual effect of the prosecutor’s arguments on the court is irrelevant. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 88, 143 P.3d 343 (2006). The prosecutor is required to act in good faith and advocate for the agreed sentence regardless of whether the court imposes that sentence. *Id.*; see also *Santobello*, 404 U.S. at 262–263 (remand is necessary even if the court did not base its exceptional sentence on those complaints or allegations). No harmless error test applies. *Carreno-Maldonado*, 135 Wn. App. at 88. Thus it is irrelevant whether the trial court would have

imposed the same sentence regardless of the state's breach of the plea agreement. *See, e.g.* 6/28/16 RP 23.

Fundamental fairness requires that, in a prosecution initiated in a state court, the terms of a plea agreement be enforced against the State. *Santobello*, 404 U.S. at 262, 30 L.Ed. 427, 92 S.Ct. 495 (fact that second prosecutor who made a specific recommendation was unaware of first prosecutor's agreement to stand silent on sentencing, did not excuse the breach). Thus it is immaterial that the elected prosecutor as representative of the State at resentencing was not the deputy prosecutor who entered into the plea agreement. *Cf.* CP 19, 62.

The remedy for a breach is either a new sentencing hearing before a different judge, where the prosecutor provides specific performance on the agreement, or an opportunity for the accused to withdraw his plea. *Santobello*, 404 U.S. at 263; *see also Sledge*, 133 Wn.2d at 846 n.8 (sentencing before a different judge is appropriate when the sentencing judge has already-expressed views on the sentence). Because the fundamental rights waived by entering a guilty plea belong to the accused, the defendant's preference controls unless the State can show compelling reasons not to allow that remedy. *Tourtellotte*, 88 Wn.2d at 585; *Jerde*, 93 Wn. App. at 780; *Santobello*, 404 U.S. at 267 (Douglas, J., concurring). A

defendant's right to either remedy exists even though the sentencing judge was not bound or influenced by the prosecutor's recommendation.

*Santobello*, 404 U.S. at 262–263; *In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982).

The trial court erred in denying Mr. Gleim's motion to withdraw his guilty plea because the record substantiates the state breached the plea agreement in violation of his constitutional right to due process. The matter must be remanded for resentencing before a different judge.

**2. The court abused its discretion at resentencing by failing to recognize a non-mandatory legal financial obligation.**

Where the sentencing court fails to exercise its discretion because it incorrectly believes it is not authorized to do so, it abuses its discretion.

*State v. O'Dell*, 183 Wn.2d 680, 696–97, 358 P.3d 359 (2015).

In Mr. Gleim's first appeal, the court remanded for an individualized inquiry into his financial resources consistent with *Blazina* before imposing discretionary LFOs. CP 99–102. Mandatory LFOs included the \$500 victim assessment and the \$100 deoxyribonucleic acid (DNA) collection fee. CP 101. Discretionary LFOs included the \$775 court-appointed attorney fee, the \$64.10 sheriff's service fee, and the \$200 in "court costs." CP 102. The court noted it could not assume on appeal

the \$200 LFO was the “criminal filing fee” mandated by RCW 36.18.020(2)(h), both under *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) and because the judgment and sentence did not list RCW 36.18.020(2)(h) as its basis for imposing the \$200 fee. CP 102.

The resentencing court struck the discretionary \$775 court-appointed attorney fee and the \$64.10 sheriff’s service fee from the judgment and sentence, noting that it had taken off all the “voluntary [*sic*] fines.” 6/27/16 RP 12; CP 76. However the \$200 “clerk’s filing fee” is also discretionary.

Pursuant to *Kuster*, 175 Wn. App. at 425, the reviewing court cannot assume “clerk’s filing fee” instead means the criminal filing fee authorized by RCW 36.18.020(2)(h). This is especially true where RCW 36.18.020 subsections (a) through (i) list a number of filing fees that could be referred to as “clerk’s filing fee” but not all would be appropriately recoupable in this instance. Further, the judgment and sentence does not list RCW 36.18.020(2)(h) as its basis for imposing the \$200 fee. CP 76. The statutes the document does list do not authorize imposition of a \$200 “clerk’s filing fee.” See CP 76 (RCW 9.94A.030 – SRA definitions; RCW 9.94A.760 – generally addressing LFOs imposed upon a defendant’s conviction; RCW 10.01.160 – generally addressing costs a defendant may

be required to pay; RCW 10.46.090 – liability of convicted person for jury fee).

The trial court incorrectly believed the \$200 clerk’s filing fee was a mandatory cost and thus failed to exercise its discretion to strike it from the judgment and sentence as it had done with the two other discretionary costs. The court’s failure to exercise discretion because it incorrectly believed it was not authorized to do so was an abuse of its discretion. *O’Dell*, 183 Wn.2d at 696–97. The error is subject to reversal and remand for resentencing. *Id.* at 697.

### **3. Appeal costs should not be imposed.**

Mr. Gleim asks this court to exercise its discretion not to award costs in the event the state substantially prevails on appeal.

Under RAP 14.2, clerks or commissioners may not exercise discretion in imposing appellate costs; costs must be awarded. However, the appellate courts have discretion to refrain from ordering an unsuccessful appellant to pay appellate costs even if the state substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); RAP 14.2. In *Sinclair*, the

court affirmed that RCW 10.73.160 authorizes the appellate court to deny appellate costs in appropriate circumstances. 192 Wn. App. at 388.

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. In the same way that imposition of legal financial obligations following a trial creates problematic ongoing consequences for the criminal defendant, so, too, costs on appeal grow at a compounded interest rate of 12%, lengthen court jurisdiction, interfere with employment opportunities, and create barriers to re-integration in the community. *Blazina*, 182 Wn.2d at 835. Under *Sinclair*, it is "entirely appropriate for an appellate court to be mindful of these concerns." *Sinclair*, 192 Wn. App. at 391.

Under RAP 15.2(f), where a trial court has made an unchallenged finding of indigency, there is a presumption of continued indigency throughout review. *Sinclair*, 192 Wn.2d at 393. The appellate courts should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant "cannot contribute anything toward the costs of appellate review." *Sinclair* 192 Wn. App. at 391.

In *Sinclair*, the court ordered appellate costs not to be awarded. *Id.* at 363. The court found the trial court had authorized the defendant to pursue his appeal in *forma pauperis*, and to have appointed counsel and preparation of the record at state expense. *Id.* at 392. The court held Sinclair's indigency, advanced age and lengthy prison sentence precluded the possibility he could pay appellate costs.

Mr. Gleim was 51 years old at time of resentencing. 6/27/16 RP 4. The court found Mr. Gleim remained indigent for purposes of appeal and was unable to pay for the expenses of appellate review and was entitled to appointment of appellate counsel at public expense. CP 89–90. The record establishes he was recently ruled 100 percent disabled by the Veterans Administration for a service related disability for which he qualifies for payment once he is released from confinement, has no money, no extensive work history, a high school education, and a current sentence of 102 months (8.5 years). 6/27/16 RP 5, 9; CP 60, 88; Suppl CP 114<sup>4</sup>. Appellate counsel anticipates filing a report as to Mr. Gleim's continued indigency and likely inability to pay an award of costs no later than 60 days

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<sup>4</sup> Counsel has filed a supplemental designation of clerk's papers to include the Pre-sentence Investigation report filed February 24, 2015. She anticipates they will be numbered as Supplemental Clerk's Papers 109–119.

following the filing of this brief, as required by the General Court Order, Court of Appeals, Division III (filed June 10, 2016).

RAP 15.2(f) provides there is a presumption of continued indigency throughout the appeal. In the event he does not substantially prevail on the state's appeal, Mr. Gleim asks the court to consider his present and/or likely future inability to pay and not assess appellate costs against him.

**D. CONCLUSION**

For the reasons stated, the matter should be remanded for resentencing before a different judge, allowing Mr. Gleim the choice between specific performance of the original plea agreement or withdrawal of his plea or, alternatively, for resentencing. If Mr. Gleim is not deemed the substantially prevailing party on appeal, he asks this Court to decline to assess appeal costs should the state ask for them.

Respectfully submitted on January 6, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 6, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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