

NO. 34656-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER LOPEZ, SR.,

Appellant.

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

The Honorable M. Scott Wolfram, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE STATE'S ARGUMENTS ON APPELLATE COSTS ARE FRIVOLOUS AND ENCOURAGE THIS COURT TO VIOLATE THE LAW

Lopez rests on his opening brief's substantive arguments pertaining to the appeal. However, he replies to the State's request for appellate costs.

The State mischaracterizes Lopez's appellate cost arguments, stating, "The Defendant claims that appellate costs may not be imposed on a criminal defendant if he or she has been found indigent for purposes of appointment of counsel." Br. of Resp't at 14. This is not Lopez's claim. Lopez's claim is that he is entitled to a continuing presumption of indigency based on the trial court's finding of indigency unless a preponderance of the evidence demonstrates that Lopez's "financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Neither Lopez nor the State has put forth any evidence indicating that Lopez's financial circumstances have significantly improved since he was last found indigent. Thus, under the rule, appellate costs may not be awarded.

The State's argument to the contrary is frivolous. It asks that appellate costs be awarded yet fails to support its request with either a factual or legal basis. An argument is frivolous where there is no debatable issue over which reasonable minds could differ. Goad v. Hambridge, 85 Wn.

App. 98, 105, 931 P.2d 200 (1997). That is certainly the case here. Lopez was found indigent. The applicable rule on appellate costs states that his indigency presumptively continues unless a preponderance of evidence shows that the offender's financial circumstances have improved. The State hasn't so much as attempted to argue or demonstrate any change in Lopez's financial circumstances, likely because Lopez has been and continues to be incarcerated for a lengthy period and thus the State could not possibly show any change in circumstances. Instead, the State urges this court to violate the applicable court rule by awarding appellate costs anyway. Because it has no factual or legal basis, the State's request for appellate costs is entirely frivolous.

The State also disputes that there is a conflict of interest in the appellate cost scheme. But the State does not dispute that most of the money in an appellate cost award is earmarked for the Office of Public Defense or that, if Lopez loses on appeal, the Office of Public Defense, through which undersigned counsel represents Lopez, will attempt to collect Lopez's money to fund undersigned counsel's work simply because undersigned counsel did not prevail. By way of illustration, if counsel were to request additional funding from the Office of Public Defense to be more fairly compensated based on his work in this or any other appointed case, any award of additional funding counsel receives would be passed directly to the client in

a cost bill. Appointed defense counsel is thus forced to make a choice between advancing their own financial interests to the detriment of their client's and protecting their client's financial interest to the detriment of counsel's. Because the appellate cost scheme directly pits the lawyer's financial interests against the client's, it creates a repugnant conflict of interest that has no place in a so-called justice system.

And Walla Walla County is not the real party in interest because it would stand to recover next to nothing if appellate costs were awarded. See, e.g., State v. Sinclair, 192 Wn. App. 380, 386, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016) (cost bill required \$6,923.21 to be paid to the Office of Public Defense and only \$59.98 to the county prosecutor). The real party in interest is indisputably the Office of Public Defense. Because the Office of Public Defense is the real beneficiary of the appellate cost scheme, the Office of Public Defense's interests with respect to appellate costs are adverse to Lopez's. Should the court have any question about the conflict of interest created by Washington's infirm appellate cost system, it should invite the Office of Public Defense to weigh in on this issue. See RAP 10.6(c) ("The appellate court may ask for an amicus brief at any stage of review, and establish appropriate timelines for the filing of the amicus brief and answer thereto."). Doing so would greatly assist the court in considering the conflict of interest claim Lopez advances.

B. CONCLUSION

For the reasons stated in his opening brief, this court should remand for a fair remission proceeding where the trial court actually considers the question of manifest hardship on the merits. Because the State provides nothing but frivolous arguments (and no facts at all) to support its request for appellate costs, appellate costs must be denied.

DATED this 19<sup>th</sup> day of July, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Kevin A. March', written over a horizontal line.

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