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APRIL 10, 2017
Court of Appeals
Division III
State of Washington

NO. 34656-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER LOPEZ, SR.,

Appellant.

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

The Honorable M. Scott Wolfram, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Sylvester Cantu Lopez Sr.'s motion to modify and/or remit his outstanding discretionary LFOs, in failing to consider whether payment of the LFOs worked a manifest hardship on Lopez and his family, and in entering findings 2 and 3.

2. The imposition of interest and the forced collection of LFOs from Lopez's Department of Corrections (DOC) account without any consideration of his ability to pay them violates due process under clear precedent.

Issues Pertaining to Assignments of Error

1a. Must a trial court inquire into the defendant's financial circumstances, ability to pay, and employ the GR 34 indigency standard when determining whether payment of LFOs would cause a manifest hardship to the defendant and his family under RCW 10.01.160(4) and RCW 10.73.160(4)?

1b. Must a trial court engage in an ability-to-pay inquiry on the record as stated in the immediately preceding issue statement rather than sign a boilerplate order stating the trial court engaged in these inquiries?

1c. Does a trial court violate remission statutes RCW 10.01.160(4) and RCW 10.73.160(4) when it delays consideration of remission based the supposed availability of a future remissions process,

given that the statutes provide that a defendant may petition for remission at any time?

2. Does assessing additional penalties, such as interest, and forcing collection without any ability-to-pay inquiry violate due process under United States and Washington Supreme Court precedent?

B. STATEMENT OF THE CASE

In January 2000, the State charged Lopez with four counts of first degree assault and one count of unlawful possession of a firearm in the first degree. CP 3-4. A jury convicted him of two counts of first degree assault, two counts of second degree assault, and first degree unlawful possession of a firearm, and he was sentenced to lifetime imprisonment without the possibility of parole under the Persistent Offender Accountability Act. CP 9. The trial court also imposed $110 in court costs, $70.99 in witness fees, $50 in jury demand fees, $47.70 in sheriff's fees, and a $500 victim penalty assessment, totaling $778.69. CP 8.

Lopez appealed. CP 15. This court vacated the lifetime sentence due to the State's failure to establish the predicate convictions and reversed the first degree unlawful possession of a firearm charge. State v. Lopez, 107 Wn. App. 270, 27 P.3d 237 (2001), aff'd, 147 Wn.2d 515, 55 P.3d 609 (2002). The Washington Supreme Court affirmed. State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002), superseded by LAWS OF 2008, ch. 231, § 4

(codified as amended at RCW 9.94A.530(2)); CP 27-44. The mandate awarded Lopez $199.72 in costs.

On resentencing, the trial court imposed 297 months' confinement. CP 51. The $778.69 imposed in LFOs remained the same. CP 48-49.

Lopez appealed again. CP 57-58. This court affirmed Lopez's sentence and assessed $2,512.49 against him in appellate costs. CP 74.

While this appeal was pending, Lopez filed a CrR 7.8 motion, which the trial court denied. CP 72. This court affirmed the denial and assessed an additional $2,597.45 against Lopez in appellate costs. CP 80.

Several years later, Lopez filed another CrR 7.8 motion, which was denied. CP 88. Lopez appealed. CP 91. This court affirmed and assessed $2,477.26 more in appellate costs against Lopez. CP 92-97.

In July 2016, Lopez moved to modify his LFOs. CP 99-101. He explained that the trial court made a specific determination that he could pay $778.69 in LFOs but that this amount had increased to $15,703.37, which he could not pay. CP 100-01. He stated he was found indigent and remains indigent. CP 101. He stated, "the job he is likely to get based upon his age, education and ex-felon status are not likely to generate income above minimum wage. The increased LFO debt is a burden and hardship upon him and his family." CP 101. Lopez attached a current DOC balance sheet, showing his LFO balance was $15,703.37. CP 102.

The prosecution and trial court conducted an ex parte proceeding. The prosecutor stated, "That is Mr. Lopez's pro se motion, your Honor. We filed a response." RP 1. The trial court stated, "I have reviewed that. That would be denied. Do you have an order?" RP 1. This was the extent of the discussion pertaining to Lopez's motion to terminate LFOs.

The trial court also entered an order prepared by the prosecution. The order included the following findings:

> 1. The mandatory obligations consisting of the criminal clerk's filing fee,[1] and the crime victims penalty cannot be waived;
>
> 2. Requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family, that none of the grounds for granting relief in RCW 9.94A.7605 or otherwise apply in this case;
>
> 3. The defendant has the right to petition the court for relief after he has been released from confinement; and
>
> 4. The defendant has the right to petition the court for waiver of accrued interest upon payment of the principal amount owed.

CP 103.

Lopez appealed from this order. CP 111. The trial court found Lopez indigent and determined he was entitled to appointment of counsel,

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[1] The criminal filing fee was never imposed on Lopez. CP 8, 48 (imposing court costs of $110, not the filing fee).

preparation of clerk's papers, and preparation of the verbatim report of proceedings at public expense. CP 114-17.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO MEANINGFULLY CONSIDER WHETHER THOUSANDS OF DOLLARS OF OUTSTANDING LFOs IMPOSED MANIFEST HARDSHIP

The trial court made no meaningful manifest hardship determination as RCW 10.01.160(4) and RCW 10.73.160(4) require. Instead, the trial court just signed a proposed order prepared by the prosecution that stated, "Requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family . . . ." CP 103. The trial court also seemed to defer any consideration of manifest hardship until a later date, noting, "The defendant has the right to petition the court for relief after he has been released from confinement . . . ." CP 103. This was not sufficient to satisfy the trial court's obligation under the remission statutes.

Division Two recently construed RCW 10.01.160 and RCW 10.73.160, holding they required "the superior court to determine whether [the defendant] had made a satisfactory showing of 'manifest hardship.'" State v. Shirts, 195 Wn. App. 849, 860, 381 P.3d 1223 (2016).[2] The superior

[2] Although the Shirts court primarily addressed the trial court remission statute, RCW 10.01.160(4), it acknowledged that the appellate remission statute, RCW

court's determination is a substantive one: under the plain language of the statutes, the superior court determines "whether it is satisfied that the defendant has shown 'manifest hardship' . . . ." Id. at 859-60.

Here, the court made no substantive determination. Lopez asserted he was able and willing to pay the amount of LFOs imposed by the trial court, $778.69. CP 100. But because his LFO balance had increased to nearly $16,000, he stated he could not pay and sought modification of the amount. CP 100-01. Lopez asserted he remained indigent and that based on his age, education, and ex-felon status, he was not likely to earn an income above the minimum wage; he wrote, "The increased LFO debt is a burden and hardship upon him and his family." CP 101. Lopez also asserted he would be in his sixties upon release from prison, "his employment opportunity has greatly decreased[, and] most likely he will collect Social Security, food stamps and other senior citizen benefits." CP 106. Lopez characterized the $16,000 LFO debt as a "life long hardship." CP 107.

The trial court gave a one-sentence ruling on Lopez's motion to modify or terminate LFOs without considering any aspect of manifest hardship. In response to the prosecutor's statement, "That is Mr. Lopez's pro se motion, your Honor. We filed a response," the trial court stated, "I

10.73.160(4) was "nearly identical" and noted the minor differences between the two. Shirts, 195 Wn. App. at 854 & n.4.

have reviewed that. That would be denied. Do you have an order?" RP 1. The trial court's cursory denial of Lopez's remission motion failed to comply with RCW 10.01.160(4) and RCW 10.73.160(4), which "require[] the superior court to determine whether [Lopez] had made a satisfactory showing of 'manifest hardship.'" Shirts, 195 Wn. App. at 860. The trial court here gave no reason at all for denying the motion. This was reversible error.

The trial court's written order stating, "Requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family," does not satisfy RCW 10.01.160(4) or RCW 10.73.160(4), either. The trial court's written order is akin to "boilerplate language stating the court considered his ability to pay the imposed legal fees," at issue in Blazina. 182 Wn.2d at 832. In Blazina, the Washington Supreme Court stated such boilerplate was inconsistent with the "imperative under RCW 10.01.160(3)," which "means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Blazina, 182 Wn.2d at 838. The record must establish that "the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when

determining a defendant's ability to pay." Id. To fulfill this obligation, "[c]ourts should look to the comment in court rule GR 34 for guidance. The rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status." Blazina, 182 Wn.2d at 838. "[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." Id. at 839.

The Washington Supreme Court recently extended Blazina's holding to the remission process. In City of Richland v. Wakefield, the court adopted the GR 34 to provide necessary guidance to the trial court to assess current and future ability to pay. 186 Wn.2d 596, 607-08, 380 P.3d 459 (2016). The Wakefield court also admonished,

> trial courts should be cautious of imposing such low payment amounts in the long term for impoverished people. For individuals . . . who show no prospects of any change in their ability to pay, it is unjustly punitive to impose payments that will only cause their LFO amount to increase. Therefore, such low payments should be generally ordered only for short-term situations. If a person has no present or future ability to pay amounts that will actually pay of their LFOs, remission in accordance with RCW 10.01.160(4) [and RCW 10.73.160(4)] is a more appropriate and just option.

Id. at 607.

The remission "process" Lopez experienced fell far short of complying with the principles outlined in Wakefield and Blazina. Assuming

the trial court actually made a manifest hardship determination—which is, at best, unclear—it gave no basis for determining Lopez's circumstances did not qualify as manifest hardship. It had information regarding Lopez's age upon release, likely future ability to pay, education, and enormous outstanding LFO debt. Yet it did not consider any of these circumstances or make any kind of individualized inquiry, based on Lopez's unique circumstances, regarding whether Lopez had made a showing of manifest hardship. Had the trial court done so, employing the GR 34 standard and acknowledging that Lopez could pay only a low monthly amount that would only cause his LFO amount to increase, the trial court would have seriously questioned Lopez's ability to pay nearly $16,000 in criminal debt. It is difficult to conceive that owing $16,000 (and counting) for doing nothing more than exercising the right to trial, to appeal, and to appointed counsel does not qualify as manifest hardship. And, consistent with Blazina and Wakefield, signing a boilerplate order stating the trial court engaged in the required inquiries isn't good enough. This court should reverse the trial court's order and remand so that the trial court can give Lopez the individualized process and consideration to which he is entitled under the remission statutes.

The trial court also violated RCW 10.01.160(4) and RCW 10.73.160(4) by finding, "The defendant has the right to petition the court for

relief after he has been released from confinement[.]" CP 103. This strongly indicates the trial court was merely delaying its obligation under the remission statutes until Lopez is released from prison. But Lopez asserted that payment of the outstanding $16,000 in LFOs caused him and his family current and future manifest hardship. The remission statutes explicitly state Lopez may petition for remission "at any time." RCW 10.01.160(4); RCW 10.73.160(4). "[T]he plain and unambiguous language of the statute[s] permitted [Lopez] to petition to remit his LFOs 'at any time.'" Shirts, 195 Wn. App. at 859. To the extent the trial court refused to consider Lopez's timely and appropriate remission motion because he was incarcerated or because there might be a remission hearing in the future, the trial court erred.

Lopez asks this court to reverse and remand for the trial court to comply with the letter of RCW 10.01.160(4) and RCW 10.73.160(4).

2. THE CONTINUING IMPOSITION OF ADDITIONAL MONETARY AMOUNTS AND ENFORCED COLLECTION WITHOUT ABILITY-TO-PAY DETERMINATIONS VIOLATES DUE PROCESS

"The imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations." Duncan, 185 Wn.2d at 436. State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976), distilled seven requirements of a constitutional LFO system from Fuller v. Oregon, 417 U.S. 40, 44-47, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974): (1)

repayment must not be mandatory; (2) repayment may be imposed only on convicted defendants; (3) repayment may only be ordered if the defendant is or will be able to pay; (4) the financial resources of the defendant must be taken into account; (5) a repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end; (6) the defendant must be permitted to petition the court for remission of the payment of costs or any unpaid portion; (7) the defendant cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

To pass constitutional muster under Fuller, "Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result." 417 U.S. at 46. The Washington Supreme Court has similarly provided that the constitutionality of Washington's LFO statutes depends on conducting ability-to-pay inquires at certain times, including "when sanctions are sought for nonpayment," "if the State seeks to impose some additional penalty for failure to pay," and "before enforced collection or any sanction is imposed for nonpayment." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). But Washington

courts are not complying with these directives. Significant fees, costs, and collections are routinely imposed and enforced with no financial inquiry whatsoever.

Currently, Washington's laws provide for an elaborate and aggressive collections process that includes the immediate assessment of interest, enforced collection methods through different entities, including the DOC, and the authorization of numerous additional sanctions and penalties. It is a vicious cycle that has devastating effects on the persons involved in the process and, often, their families. See generally Alexes Harris, Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. SOC. 1753 (2010) (reviewing Washington's LFO cycle and its damaging impact on those who do not have the ability to pay). Washington's LFO cycle does not conform to the necessary constitutional safeguards established in Blank, as this case demonstrates.

The Washington Supreme Court held that monetary assessments may be imposed against defendants without a per se constitutional violation. Blank, 131 Wn.2d at 240. It reasoned that fundamental fairness concerns arise only if the government seeks to enforce collection and the defendant is unable, through no fault of his own, to comply. Id. at 241 (citing State v. Curry, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992)). However, its holding was dependent on trial courts conducting an ability-to-pay at certain key

times. This inquiry must occur (1) before "enforced" collection; (2) prior to any additional "penalty" for nonpayment; and before any other "sanction" for nonpayment is imposed. Id. at 242. Neither the legislature nor the courts are in compliance.

Washington's LFO system consists of a complicated patchwork of enforced collection procedures and myriad penalties and sanctions before which there is no ability-to-pay inquiry. Onerous and relentless enforced collection procedures, sanctions, and penalties begin immediately upon imposition of LFOs.

Under RCW 10.82.090(1), LFOs accrue interest at a rate of 12 percent, which is an astounding level given the historically low interest rates of the last several years. Blazina, 182 Wn.2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of *Gideon* by Reducing the Burden, 11 SEATTLE J. SOC. JUST. 963, 967 (2013)). LFO interest accrues from the date of judgment. RCW 10.82.090(1). This mechanism of enforcement has been identified as particularly invidious because it burdens people who do have the ability to pay their principal LFO amounts and ensnarls them in the criminal justice system for decades. Blazina, 182 Wn.2d at 836 (explaining that on average, a person who pays $25 per month towards LFOs will owe more 10 years after conviction than they did when the LFOs were initially assessed). As Lopez asserted, interest has caused his

principal LFO amount to increase substantially and exponentially. CP 100 ("Since his conviction the interest has incurred in the amount of $15,703.37, far from the original set by the court. No hearing was held to determine Mr. Lopez's present or future ability to pay new and current LFO debt . . . ."). Yet there is no statutory or judicial requirement to inquire into ability to pay this interest before it is assessed. RCW 10.82.090 violates Fuller, Blank, and the most basic principles of due process.

In addition, indigent persons in DOC custody must forfeit their wages or monetary support from their families to pay LFOs without any determination of their current or future ability to pay. This court has held that mandatory DOC deductions "for payment of LFOs are not collection actions by the State requiring inquiry into a defendant's financial status." State v. Crook, 146 Wn. App. 24, 27-28, 189 P.3d 811 (2008). This court reasoned, "[s]tatutory guidelines set forth specific formulas allowing for fluctuating amounts to be withheld based on designated percentages and inmate account balances, assuring inmate accounts are not reduced below indigency levels. RCW 72.11.020; RCW 72.09.111(1); RCW 72.09.015(10)." Crook, 146 Wn. App. at 28.

This court was wrong. Crook cannot be squared with Blank and Fuller. A state agency's mandatory deduction from inmate wages or

accounts to pay LFOs is a state collection action. The mere fact that statutes[3] provide formulas to facilitate this enforced collection does not exempt the collection from qualifying as enforced collection; this aspect of Crook makes no sense at all. And Crook's assurance that accounts are not reduced below "indigency" levels is utterly meaningless, since "indigency" means having less than $10. RCW 72.09.015(15). DOC's prison account deductions are enforced collections notwithstanding Crook's faulty reasoning. The fact that no court inquires into financial status before enforcing collection in this way violates the constitutional principles espoused in Fuller and Blank.

This court should overrule Crook because it is both incorrect and harmful. Stranger Creek, 77 Wn.2d at 653. As discussed, Crook is incorrect because it directly conflicts with United States and Washington Supreme Court precedent that requires inquiry into financial status before enforcing collection. Crook is harmful because it contributes to all the harms identified in Blazina and Wakefield. It forces collection of generally small amounts that make no impact on the overall LFO balance, allowing the amount of LFOs to continue increasing. Lopez showed this by attaching his LFO balance sheet and ledger. CP 98, 102. It is harmful to take money from

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[3] See RCW 72.11.020 (DOC secretary is custodian for inmate funds and may disburse money to satisfy LFOs); RCW 72.09.110 (requiring inmates to "participate in the cost of corrections"); RCW 72.09.111 (enumerating deduction schedules and formulas for varying classes of wages).

indigent persons and their families without any inquiry into their ability to pay. Crook is incorrect, harmful, and must be overruled.

Washington's practice of assessing interest and enforcing collection from Lopez's inmate accounts violates the constitution. Because the trial court's ruling permitting these unconstitutional collection efforts to continue unchecked, Lopez asks that this court reverse.

D. CONCLUSION

Lopez asks that this court reverse and remand for a new and fair remission proceeding.

DATED this 10th day of April, 2017.

Respectfully submitted,

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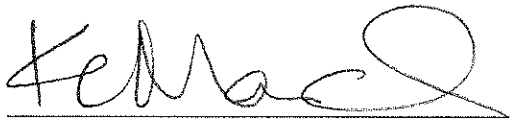

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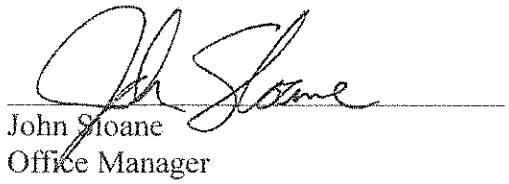
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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