

FILED
Feb 15, 2017
Court of Appeals
Division III
State of Washington

No. 34763-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ERIC A. HAGGIN,

Appellant.

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

The Honorable Judge Scott R. Sparks

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

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A. SUMMARY OF ARGUMENT

Eric Haggin was convicted of two counts of unlawful possession of a firearm, two counts of possession of a controlled substance with intent to deliver (methamphetamine and heroin), second-degree theft, and tampering with a witness. He now appeals from a resentencing hearing following this Court's decision in his first direct appeal: *State v. Haggin*, 195 Wn. App. 315, 381 P.3d 137 (2016). After that first appeal, the case was remanded so Mr. Haggin's unlawful possession of a firearm offenses would run concurrently to one another rather than consecutively, which was accomplished on remand.

During the resentencing hearing, defense counsel also suggested Mr. Haggin's two firearm counts and two drug counts should each be considered same criminal conduct for offender scoring purposes. But the trial court maintained Mr. Haggin's offender score of twelve and imposed the high end of the standard range, explaining the higher sentence was necessary because Mr. Haggin would otherwise go unpunished for his other current offenses.

This matter should now be remanded for resentencing, because it is not clear the trial court would have imposed the same high-end standard-range sentence had it known Mr. Haggin's offender score was actually a "nine" rather than a "twelve." Mr. Haggin's offender score was

miscalculated by the improper inclusion of three prior juvenile offenses that had “washed out” (resulting in one additional point erroneously being added to the offender score), and by failing to count the firearm and drug offenses, respectively, as same criminal conduct (resulting in two additional points erroneously being added to the offender score). The proper remedy in this case is to remand so the trial court may exercise its sentencing discretion while aware of Mr. Haggin’s correct offender score of nine rather than twelve.

In the event Mr. Haggin is not the substantially prevailing party in this appeal, he requests this Court deny the imposition of any costs on appeal.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to consider counts one and eight (both first-degree unlawful possession of a firearm) and counts three and four (both possession of a controlled substance with intent to deliver) as same criminal conduct.
2. The trial court erred by sentencing Mr. Haggin while harboring a misunderstanding that the defendant’s offender score was a “twelve” rather than a “ten” after properly accounting for same criminal conduct counts.
3. The trial court erred by imposing the high end of the standard range based on its incorrect belief that Mr. Haggin’s other current offenses would otherwise go unpunished.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred by sentencing Mr. Haggin to the high end of the standard range while harboring a misunderstanding of the defendant's offender score.

Issue 2: Whether, in the event the State is the substantially prevailing party on review, this Court should deny the imposition of appellate costs against this appellant.

D. STATEMENT OF THE CASE

This appeal represents the second appeal in this matter; that is, Eric Haggin appeals from the resentencing decision following this Court's opinion in *State v. Haggin*, 195 Wn. App. 315, 381 P.3d 137 (2016) (hereinafter *Haggin I*) (*see also* CP 130-63).

The facts are more fully set forth in this Court's published decision in *Haggin I*. CP 130-63. In sum, in August 2014, officers executed search warrants at Mr. Haggin's and his girlfriend's shared apartment in Ellensburg, Washington, after a video showed Mr. Haggin taking someone else's clothing from a local laundromat. CP 131. Upon execution of the warrants, officers located drug paraphernalia; heroin on a tray in the apartment and in the freezer; heroin and methamphetamine in a backpack; a pistol in the backpack; and a revolver inside of a box that was on a dresser with female items on top of it. CP 131-32.

The jury found Mr. Haggin guilty of the following crimes: (counts 1 and 8) two counts of first-degree unlawful possession of a firearm;

(counts 3 and 4) two counts of possession of a controlled substance with intent to deliver (methamphetamine and heroin), including firearm enhancements on both; (counts 5 and 6) use of drug paraphernalia; (count 7) second-degree theft; and (count 9) tampering with a witness. CP 78-83, 133.

Following Mr. Haggin's first appeal, this Court affirmed the defendant's convictions but remanded for resentencing. *Haggin I*, 195 Wn. App. at 318-24; CP 131-63. In pertinent part, this Court held the two unlawful possession of a firearm convictions should not have been subjected to consecutive sentencing, pursuant to RCW 9.95A.589(1)(c). *Id.*; CP 133-41. This Court also remanded for the trial court to determine whether Mr. Haggin had a prior qualifying drug conviction so that his statutory maximum sentence could double from 10 to 20 years pursuant to RCW 69.50.408. CP 160. And, this Court directed that a scrivener's error be corrected so Mr. Haggin's LFO (legal financial obligation) payments would not commence until his release. CP 162-63.

At the resentencing hearing, the State submitted Mr. Haggin's two prior judgments and sentences for manufacturing marijuana and possession of methamphetamine. RP 3-4, 9; CP 169. The State then contended Mr. Haggin's offender score should be calculated as a "twelve." RP 17. Defense counsel disagreed with the score calculation and argued

the two unlawful possession of a firearm counts, and the two possession of a controlled substance with intent to deliver counts, should each be respectively considered same criminal conduct (effectively reducing Mr. Haggin's offender score by two points, from twelve to ten). RP 12. The trial court did not specifically address this argument. See RP 12-17. Instead, the court invited Mr. Haggin to exercise his right of allocution (RP 15-16), and then the court explained the sentence it was imposing as follows:

(Court): ...it is – still my understanding that there are nine-plus – points on the felony crimes that I'm required to take into consideration...

(Prosecutor): -- score's a twelve, Judge.

RP 17.

(Court): ... [The standard range is] 192 months. Because it's 120, plus 36 and 36. So, you say why should you have to sit that long. You're getting a standard range sentence on Count 3 and really that's the only standard range sentence that you're doing. Everything else is running concurrently. So it's as if you did one crime – plus the – the firearm enhancements.

RP 18-19.

The trial court then imposed the high end of the standard range: 120 months plus two consecutive 36-month firearm enhancements, for a total period of confinement of 192 months plus 12 months community

custody. RP 19-20; CP 167-76. The court also corrected the scrivener's error regarding the LFO payment schedule. RP 19; CP173.

Mr. Haggin timely appealed. CP 180.

E. ARGUMENT

Issue 1: Whether the trial court erred by sentencing Mr. Haggin to the high end of the standard range while harboring a misunderstanding of the defendant's offender score.

Mr. Haggin's offender score was a "nine" rather than a "twelve" as calculated at the sentencing hearing. First, the defendant's offender score mistakenly included one point for three prior class C juvenile offenses that had "washed out." Next, the defendant's offender score was calculated another two points too high when, as argued by defense counsel, the trial court failed to consider certain offenses to be same criminal conduct. The two unlawful possession of a firearm counts constituted the same criminal conduct as each other (counts one and eight), as did the two counts for possession of a controlled substance with intent to deliver (counts three and four). The trial court stated that a sentence at the high end of the standard range was necessary in this case, because, otherwise, Mr. Haggin was effectively only being punished for one offense plus the firearm enhancements rather than his other current offenses. But, since Mr. Haggin's offender score should have been a nine rather than a twelve, and since the other current offenses were effectively punished by bringing Mr.

Haggin's offender score from a six to a nine, it cannot be said from this record that the trial court would have imposed the same sentence if it had known the correct offender score.

a. The trial court miscalculated Mr. Haggin's offender score by one point when it included prior nonviolent class C juvenile offenses that had "washed out."

As a threshold matter, a trial court's calculation of a defendant's offender score is reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). An offender may challenge erroneous sentences lacking statutory authority for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses and prior convictions and juvenile adjudications. RCW 9.94A.030(11); RCW 9.94A.589(1)(a). Mr. Haggin's current and prior convictions used to calculate his offender score are listed on his judgment and sentence at CP 167 and 169.

When calculating the offender score for nonviolent offenses, as is the case here,¹ prior convictions add “one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and ½ point for each juvenile prior nonviolent felony conviction.” RCW 9.94A.525(7). Mr. Haggin acknowledges that his six prior adult felonies committed between 1998 and 2009 each added one point toward his offender score. CP 169.

Conversely, a prior conviction “washes out” and is not included in the offender score calculation, as set forth below:

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2) (emphases added).

Mr. Haggin’s prior class C juvenile offenses committed in 1996 and 1997 should have been excluded from his offender score calculation, because Mr. Haggin spent at least five consecutive years in the community without committing a crime. *See* CP 169; RCW 9.94A.525(2)(c). Mr.

Haggin was crime-free between 1998 and 2007. CP 169. He did have two

¹ Mr. Haggin was convicted in this case of the following nonviolent felony offenses: two counts of unlawful possession of a firearm (RCW 9.41.040(1)), two counts of possession of a controlled substance with intent to deliver (RCW 69.50.401(2)), second-degree theft (RCW 9A.56.040), and tampering with a witness (RCW 9A.72.120).

second-degree burglary convictions in 1998, but – assuming the worst case scenario in that Mr. Haggin had no credit for time served, received no good time credits, and received a high-end standard range sentence of 12 months² for these offenses – Mr. Haggin would still have been released from confinement no later than September 1999. The five-plus-years spent in the community without committing a crime between 1999 and Mr. Haggin’s next offense in April 2007 results in the nonviolent class C juvenile offenses from 1996 and 1997 washing out. The three juvenile offenses, which collectively added three “half-points” to Mr. Haggin’s offender score in this case (RCW 9.94A.525(7)), should be stricken.

Mr. Haggin’s offender score was calculated one point too high when his washed out juvenile offenses were included. As set forth above, Mr. Haggin’s prior convictions only contributed six points to his offender score.

b. The trial court miscalculated Mr. Haggin’s offender score by another two points when it failed to consider the two drug offense counts and the two unlawful possession of a firearm counts as same criminal conduct.

In addition to Mr. Haggin’s six prior conviction points addressed above, it is also necessary to determine how many points for “other current offenses” should be included in the defendant’s offender score. In

² See RCW 9A.52.030 and RCW 9.94A.525(16), standard range of 9-12 months as scored based on Mr. Haggin’s one other current burglary offense and three prior juvenile offenses.

this case, Mr. Haggin’s “other current offenses” should have only resulted in three rather than five points, for a total offender score of “nine.”

“A defendant’s current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses ‘encompass the same criminal conduct.’” *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998); *see also* RCW 9.94A.589(1)(a). “[I]f two current offenses encompass the ‘same criminal conduct,’ as defined in RCW 9.94A.400(1)(a) [recodified as RCW 9.94A.589], then those current offenses together merit only one point.” *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000).

RCW 9.94A.589(1)(a) sets forth when two or more current offenses should be counted as one crime for sentencing purposes:

...whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime . . . “Same criminal conduct,” as used in this subsection, means two or more crimes that require the [1] same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim . . .

RCW 9.94A.589(1)(a) (emphasis added).

In order for the trial court to find same criminal conduct, all three requirements set forth in RCW 9.94A.589(1)(a) must be met. *State v.*

Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)). A “finding of ‘same criminal conduct’ does not require simultaneity of crimes.” *State v. Channon*, 105 Wn. App. 869, 877 n.6, 20 P.3d 476, 480 (2001) (citing *Porter*, 133 Wn.2d at 182-83). In *Porter*, our Supreme Court held that two drug sales, occurring back to back within a 10 minute period of time satisfied the “same time” requirement, reasoning “[t]he sales were part of a continuous, uninterrupted sequence of conduct over a very short period of time.” *Porter*, 133 Wn.2d at 183. “As to intent, the relevant inquiry is to what extent the criminal intent, when viewed objectively, changed from one crime to the next.” *State v. Wright*, 183 Wn. App. 719, 734, 334 P.3d 22 (2014) (citing *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999)).

Moreover, drug offenses generally involve the same victim, the public at large. *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). Where a person possesses two different drugs with intent to deliver at the same time, the offenses constitute the same criminal conduct for sentencing purposes. *Id.* at 49-50. The objective criminal intent does not change simply because more than one type of drug is possessed or delivered in a single transaction. *Id.* Accord *State v. Rodriguez*, 61 Wn. App. 812, 812 P.2d 868, *review denied*, 118 Wn.2d 1006 (1991)

(possession with intent to deliver cocaine and heroin constituted the same criminal conduct for purposes of calculating the offender score).

In *State v. Garza-Villarreal*, the Court reviewed sentence of one defendant (Garza-Villarreal) who was convicted of two counts of possession with intent to deliver based on two different drugs, and a second defendant (Casarez) who was convicted of two counts of delivery of a controlled substance after arranging the sale of both cocaine and heroin to a confidential informant. *Garza-Villarreal*, 123 Wn.2d at 44-45.

The Court held as follows:

...concurrent counts of possession with intent to deliver which occur in the same transaction constitute the same criminal conduct because the objective criminal intent in each case is identical—an intent to deliver any controlled substance in the future. We hold concurrent counts of delivery which occur in the same transaction likewise constitute the same criminal conduct because the objective criminal intent in each case is identical—an intent to deliver any controlled substance in the present. In the absence of evidence the defendant intended to deliver in multiple transactions, it would be inappropriate to conclude that the defendant intended to deliver the substances in multiple transactions...

...In the cases before us, the State presented no evidence to establish Garza–Villarreal intended to deliver the heroin and cocaine in more than one transaction, and Casarez facilitated the delivery of both cocaine and heroin in the same transaction. Thus, in each case, the concurrent convictions constitute the same criminal conduct for purposes of RCW 9.94A.400(1)(a) [since recodified as RCW 9.94A.589].

Garza-Villarreal, 123 Wn.2d at 49-50 (emphases added).

Here, Mr. Haggin was convicted of two counts of possession of a controlled substance with intent to deliver two separate substances: methamphetamine and heroin. Officers found both of these substances while executing search warrants at Mr. Haggin's apartment while they were searching for clothing that had been reported stolen from the laundromat. *Haggin I*, 195 Wn. App. at 317; CP 131-32. The heroin and methamphetamine had been packaged in baggies in the backpack in apparent preparation for sale, and officers testified that the drug amounts were of a quantity more than would be typically found for personal use. *Id.*; *Haggin I*, CP 142.

Under these circumstances, the trial court should have found that Mr. Haggin's two counts of possession with intent to deliver constituted the same criminal conduct. Just because two different substances were involved – methamphetamine and heroin – does not mean that the two offenses were not the same criminal conduct. *Accord Garza-Villarreal*, 123 Wn.2d at 49-50. Mr. Haggin possessed the two different drugs at the same time when officers executed the search warrants. The drugs were both located at the same place, Mr. Haggin's apartment. The substances that appeared packaged and ready to sell were both specifically located within the backpack. The victim of the two drug offenses was the same: the public at large. *Garza-Villarreal*, 123 Wn.2d at 47. And, Mr.

Haggin's intent did not change between the offenses: an intent to deliver any controlled substance in the future. *Id.* at 49-50. The State did not present evidence Mr. Haggin intended to deliver heroin and methamphetamine in multiple transactions, so "it would be inappropriate to conclude that he intended to deliver the substances in multiple transactions." *Id.* Mr. Haggin's offender score was calculated one point too high when the trial court failed to acknowledge the two drug offenses constituted the same criminal conduct, as was argued by defense counsel at the sentencing hearing (*see* RP 12).

Similarly as to Mr. Haggin's two counts of unlawful possession of a firearm, the identical "same criminal conduct" analysis set forth above applies here. Mr. Haggin unlawfully possessed the revolver and pistol at the same time, the same place, with the same intent, and against the same victim (the public at large). *Haddock*, 141 Wn.2d at 110-11 (internal citations omitted) ("the victim of the offense of unlawful possession of a firearm is the general public. We believe that this offense is analogous to unlawful possession of a controlled substance, a crime which we have held victimizes the general public.") *Accord State v. Murphy*, 98 Wn. App. 42, 51, 988 P.2d 1018 (1999) (acknowledging application of the SRA's "same criminal conduct" provision to calculate offender score for multiple counts of unlawful possession of a firearm); *State v. McReynolds*, 104 Wn. App.

560, 582, 17 P.3d 608 (2000), *as amended on denial of reconsideration* (2001) (internal citations omitted) (“Unlawful possession of multiple firearms may be the same criminal conduct because they all involve the same victim – the public at large.”)

In *State v. Haddock*, police were summoned to a residence after the defendant started an altercation. 141 Wn.2d at 106. According to testimony, the defendant had brandished two handguns in the presence of his former girlfriend and other witnesses before police arrived. *Id.* After police arrived, they found six additional rifles in the home where the defendant had lived, although the two firearms that the defendant initially brandished were never located. *Id.* Mr. Haddock was convicted of eight counts of unlawful possession of a firearm as to the six rifles and two handguns. *Id.* at 107.

On appeal, the Supreme Court agreed with the Court of Appeals that the eight unlawful possession of a firearm offenses constituted the same criminal conduct and only merited a single point for offender scoring. *Haddock*, 141 Wn.2d at 106, 108-09. Despite Haddock having brandished two of the firearms on his person, whereas the other six firearms were located somewhere within the residence, the multiple current counts still constituted the same criminal conduct. *Id.* Haddock possessed the multiple firearms at the same time, at the same place,

against the same victim (the public at large) and with the same intent (possessing a firearm contrary to the Legislative intent that convicted felons not possess firearms and be punished heavily for doing so). *Id.* at 110-11, 115.

Like in *Haddock, supra*, Mr. Haggin's unlawful possession of multiple firearms at his home constituted the same criminal conduct. Both guns were found in Mr. Haggin's apartment. The same victim was involved with both offenses: the public at large. The guns were found at the same time when officers executed a search warrant. And, the offenses were both committed with the same intent: to possess firearms contrary to Legislative intent that convicted felons not possess firearms. Under these circumstances, the trial court should have counted counts one and eight as the same criminal conduct, thereby meriting only one point in the offender scoring and effectively reducing Mr. Haggin's total offender score by another point.

Ultimately, when scoring for each unlawful possession of a firearm count, Mr. Haggin's offender score should have included the six points for his non-washed prior convictions, one point total for the two possession of a controlled substance counts, one point for second-degree theft, and one point for tampering with a witness, for a total offender score of nine. Similarly, when scoring for the drug possession counts, Mr. Haggin would

have six points for the priors, one point total for the two unlawful firearm possession counts, one point for second-degree theft, and one point for tampering with a witness, for a total offender score of nine. This process would repeat for each of the counts, so that Mr. Haggin's offender score for each count should have been a "nine" rather than a "twelve."

c. Remand for resentencing is the appropriate remedy where it is not clear the trial court would have imposed the same sentence had it known the correct offender score.

"A correct offender score must be calculated before a presumptive or exceptional sentence is imposed." *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). "Remand is necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence." *Id.* (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

Mr. Haggin acknowledges that the correct calculation of his offender score does not change his standard range for sentencing purposes, because his offender score remains a "nine-plus." However, where the offender score has been miscalculated, remand is still the proper remedy unless the record makes it clear the trial court would have imposed the same sentence had it known the correct offender score. The record in this case does not make it clear that the same sentence would have been imposed if the trial court knew Mr. Haggin's correct offender score was a

nine rather than a twelve. Instead, the comments by the trial court suggest it felt compelled to impose the top of the standard range because of Mr. Haggin's higher offender score that would have effectively allowed certain offenses to go unpunished.

Defense counsel requested a mid-standard-range sentence. RP 14. Mr. Haggin then requested an explanation from the trial court as to why a higher sentence was believed to be necessary in his case, pointing out that he was serving time for these nonviolent offenses alongside of "killers...[who] terrorized people's lives... why you think I should sit there for that amount of time. I just don't understand it. So, that's the only thing I ask, your Honor." RP 16. The court responded that Mr. Haggin had been convicted of multiple offenses (RP 16-17), discussed his offender score, and explained why the top of the standard range was being imposed:

[Court] ... still my understanding that there are nine-plus – points on the felony crimes that I'm required to take into consideration –

[Prosecutor] -- score's a twelve, Judge.

RP 17.

[Court] ... So, you say why should you have to sit that long. You're getting a standard range sentence on Count 3 and really that's the only standard range sentence that you're doing. Everything else is running concurrently. So it's as if you did one crime – plus the – the firearms enhancements.

RP 18-19.

Mr. Haggin's offender score increased from six to nine due to the counting of his other current offenses. Contrary to the trial court's suggestion above, Mr. Haggin's offender score of nine specifically results in punishment for the other current offenses due to the increase in his offender score from a six (considering his prior offenses) to an offender score of nine (adding the current offenses to the prior criminal history). If Mr. Haggin's offender score was actually a twelve, as the State and trial court believed (RP 17), the trial court's concern about certain offenses going unpunished may have been more apt. In other words, the imposition of a high-end standard range sentence would have been consistent with the trial court's reasoning that such a sentence was necessary to account for the otherwise unpunished current offenses. But, since the court's reasoning was based on a miscalculated offender score, it is impossible to say on this record that the trial court would have still rejected a mid-standard-range sentence had it known Mr. Haggin's offender score (including both prior and current offenses) was a "nine" rather than a "twelve."

It is not clear from the existing record that the trial court would have imposed the same maximum standard range sentence had it known Mr. Haggin's offender score is actually three points lower, a "nine." Mr. Haggin respectfully requests this matter be remanded for resentencing to

allow the trial court to exercise its principled discretion based on a correct offender score calculation. *See Tili*, 148 Wn.2d at 358 (setting forth this remedy).

Issue 2: Whether, in the event the State is the substantially prevailing party on review, this Court should deny the imposition of appellate costs against this appellant.

Mr. Haggin preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

Mr. Haggin was found indigent by the trial court in September 2014, after he was first charged in this case. CP 106. There has been no change in his financial status since that time, another order of indigency was entered when this appeal was pursued (CP 107-08), he remains indigent, and he remains in DOC Custody at the correctional facility in Clallam Bay, Washington. According to Mr. Haggin's Report as to Continued Indigency, contemporaneously filed with this opening brief pursuant to this Court's General Order dated June 10, 2016, Mr. Haggin is and will be unable to pay costs that may be imposed on appeal. Mr. Haggin owns no real property, he owns no personal belongings, his income consists of only \$25-\$35 per month, he owes \$5,000 in legal

financial obligations (LFOs), he has over \$50,000 in other debts, he is financially responsible for three dependent children, and he is unable to pay any amounts toward his existing debts. *See* Appellant's Report as to Continued Indigency. Mr. Haggin declared he would be unable to pay any amount toward costs if awarded to the State. *Id.*

Mr. Haggin's ability to pay is unlikely to change in the future. Mr. Haggin is currently serving a 192-month sentence for offenses committed when he was thirty-four-years-old, so he will likely be entering the community in his fifties with only a GED, no known work history, no job training and a mental condition of PTSD that may interfere with his ability to secure employment. *See* Mr. Haggin's Report as to Continued Indigency, dated 10-21-16.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at

834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Haggin has demonstrated his indigency and current and future inability to pay costs.

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed, because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for *Blazina's* recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The *Blazina* Court also expressly rejected the State's ripeness claim that

“the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839. After viewing Mr. Haggin’s Report as to Continued Indigency, it is clear his inability to pay LFOs has not changed since the trial court found him indigent just prior to

filing his notice of appeal to this Court. This Report also shows a likely inability to pay costs in the future.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *Blank*, 131 Wn.2d at 252-53.

It is also critical that this Court consider the recent amendments to RAP 14.2 (effective January 31, 2017) when deciding whether costs should be imposed in this appeal. This Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence that Mr. Haggin’s current indigency or likely future ability to pay has significantly improved since the trial court entered

its order of indigency in this case. Rather, Mr. Haggin's Report as to Continued Indigency demonstrates he remains indigent with no assets, a great amount of debt, and significant barriers to acquiring gainful employment upon his release from incarceration (including a lack of any higher education, work history, or job training, along with PTSD that may interfere with Mr. Haggin's ability to secure future employment). Appellate costs should not be imposed in this case.

F. **CONCLUSION**

Based on the foregoing, Mr. Haggin respectfully requests this matter be remanded for resentencing so the trial court may exercise its sentencing discretion while being mindful of the correct offender score. In the event Mr. Haggin is unsuccessful in this appeal, he requests this Court deny this imposition of any costs against him on appeal.

Respectfully submitted this 15th day of February, 2015.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34763-0-III
vs.) No. 14-1-00231-8
)
ERIC ALLEN HAGGIN) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 15, 2017, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Eric Allen Haggin DOC #786070
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Having obtained prior permission from the Kittitas County Prosecutor's Office, I also served the foregoing by email at prosecutor@co.kittitas.wa.us using Division III's e-service feature.

Dated this 15th day of February, 2017.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com