

No. 35001-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

CATHE L. MCNEILL,

Appellant.

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

The Honorable Scott D. Gallina

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Cathe L. McNeill pleaded guilty to two counts of delivery of a controlled substance (methamphetamine), under RCW 69.50.401(2)(b). Her case should be remanded for resentencing.

The trial court sentenced Ms. McNeill to 60 months. The State presented insufficient evidence that Ms. McNeill's offender score was a seven, placing her in a standard sentencing range of 60-120 months. Instead, it appears from the record several of Ms. McNeill's prior convictions "washed out" from her record, resulting in an actual offender score of two. Because an offender score of two would place Ms. McNeill in a substantially different sentencing range of 12+ to 20 months, she respectfully requests this Court remand her case for resentencing.

Ms. McNeill also challenges discretionary legal financial obligations herein. Ms. McNeill was found indigent by the trial court, and yet the court assigned costs to her that were clearly erroneous given her physical disability and indigent status. Ms. McNeill also preemptively objects to being assessed any costs associated with this appeal.

Ms. McNeill's case must be remanded for resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by sentencing Ms. McNeill with an offender score of "seven" rather than a score of "two."

2. The trial court erred by assigning discretionary legal financial obligations to Ms. McNeill.

3. Ms. McNeill preemptively objects to any costs associated with this appeal.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in calculating Ms. McNeill's offender score by including prior convictions that had "washed out."

Issue 2: Whether the trial court's finding of ability to pay or likely future ability to pay was erroneous given its inconsistency with Ms. McNeill's indigent status, physical disability, lack of income, and large LFO debt.

Issue 3: 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

Ms. McNeill pleaded guilty to two counts of delivery of a controlled substance, methamphetamine, committed in July 2015. RP 106-07, 110; CP 82-85, 89-96.

According to the plea agreement, the State agreed to recommend 60 months of confinement. RP 105; CP 82. The plea agreement states the following:

SENTENCE The Defendant hereby represents and stipulates that her criminal history is as set forth in the Statement on Plea of Guilty and includes six prior felony convictions, resulting in an offender score of 7.

CP 82. The Statement of Defendant on Plea of Guilty also included a document titled “Statement of Criminal History,” which was signed by Ms. McNeill, and listed six prior felony convictions. CP 95. Four of the convictions were for attempting to obtain a controlled substance by fraud, with a sentencing date of April 10, 2006. CP 95. Two additional convictions were for delivery of a controlled substance (methadone) and unlawful possession of a firearm in the second degree, which Ms. McNeill was sentenced to on December 5, 2006. CP 95. The document states Ms. McNeil was sentenced to 60 months for the 2006 delivery of a controlled substance conviction. CP 95.

At the plea hearing, the trial court noted Ms. McNeill’s offender score was a seven, but did not inquire any further. RP 105. Nor did the State present any additional evidence as to Ms. McNeill’s criminal history or offender score. RP 105-116.

A few weeks later, on December 1, 2016, the trial court sentenced Ms. McNeill to 60 months, which was the low end of the standard range based on an assumed offender score of seven. RP 138; CP 96, 103-04, 106. The State did not present any additional evidence as to Ms. McNeill’s criminal history or offender score, and the trial court did not inquire as to her record. RP 124-143.

At sentencing the trial court also addressed legal financial obligations (LFOs). RP 135-136, 138-140; CP 104. Ms. McNeill explained her financial situation, stating she was unable to work because of a car accident which led to three neuro surgeries. RP 135-136. Ms. McNeill was receiving SSI until her children's father passed away and she began receiving his social security pension of \$1,100 per month. RP 136. She also stated she pays \$100 per month toward previous LFOs. RP 139. The trial court found her indigent, entered boilerplate findings Ms. McNeill had the likely present or future ability to pay LFOs, and imposed a total of \$3,445.00 in LFOs. RP 138-139; CP 104. The court commented Ms. McNeill could return to the court after her release to request a modification of her LFOs if they were creating financial hardship. RP 139-140.

Ms. McNeill's Report as to Continued Indigency, dated 2/13/17 and filed contemporaneously with this brief, indicates she owes approximately \$15,000 in LFOs, that she owns no assets, and is not receiving any income.

Ms. McNeill timely appeals. CP 113.

E. ARGUMENT

Issue 1: Whether the trial court erred in calculating Ms. McNeill's offender score by including prior convictions that had "washed out."

The State failed to offer sufficient evidence to prove Ms. McNeill's prior convictions had not "washed," and Ms. McNeill did not and could not stipulate to an incorrect offender score calculation. An understanding of Ms. McNeill's prior criminal history, together with her release dates from confinement, was essential to determining her correct offender score and resulting standard sentencing range. Ms. McNeill's offender score was miscalculated at sentencing. The trial court and State assumed Ms. McNeill's offender score was a "seven" and the court sentenced Ms. McNeill within the range of 60 to 120 months, accordingly. RP 138; CP 90, 95-96, 103-104. However, it appears five of Ms. McNeill's prior convictions "washed out" under RCW 9.94A.525(2)(c), and thus should not have been counted toward her offender score. Because this difference in the offender score calculation would significantly impact Ms. McNeill's standard range and her time in incarceration, this case should be remanded for resentencing. Moreover, because the correct calculation of an offender score may be challenged at any time, this issue is now properly before this Court for the first time on appeal.

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). In general, "a defendant cannot waive a challenge to a miscalculated offender score." *Goodwin*, 146 Wn.2d at 863-65, 874 (remanded for resentencing where prior convictions had "washed out" and were erroneously used to calculate defendant's offender score). Miscalculated offender scores require remand for resentencing unless the record clearly indicates the trial court would impose the same sentence. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

The offender score establishes the standard range for a felony drug offense. RCW 9.94A.530(1); RCW 9.94A.525; RCW 9.94A.517. The sentencing court calculates an offender score by adding current offenses, prior convictions, and juvenile adjudications. RCW 9.94A.030(11); RCW 9.94A.589(1)(a). When calculating the offender score for nonviolent

offenses, as is the case here¹, 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). 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)(c) (emphases added). Any consecutive five-year period qualifies to “wash out” a class “c” felony, even if the crime-free period is not immediately subsequent to the conviction. *State v. Hall*, 45 Wn. App. 766, 769, 728 P.2d 616 (1986).

“In determining the proper offender score, the court ‘may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.’” *State v. Zamudio*, 192 Wn. App. 503, 508, 368 P.3d 222 (2016) (quoting *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012) (quoting RCW

¹ Ms. McNeill pleaded guilty to the following nonviolent felony offenses: two counts of delivery of a controlled substance (methamphetamine) (RCW 69.50.401(2)(b)). CP 89, 103.

9.94A.530(2)). The “State bears the burden of proving prior convictions by a preponderance of evidence.” *State v. Blunt*, 118 Wn. App. 1, 7, 71 P.3d 657 (2003) (citing *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994)); *Hunley*, 175 Wn.2d at 909-10. “To meet this burden, the State must first produce ‘evidence of some kind’ bearing ‘minimum indicia of reliability’ that supports ‘the alleged criminal history.’” *Id.* at 7-8 (quoting *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999)).

The State’s burden for proving prior convictions is not overly difficult to meet:

The burden to prove prior convictions at sentencing rests firmly with the State. While the burden is not overly difficult to meet, constitutional due process requires at least some evidence of the alleged convictions. A prosecutor's bare allegations are not evidence, whether asserted orally or in a written document. The State in this case could have established Hunley's prior convictions through certified copies of the judgment and sentences or other comparable documents. Our constitution does not allow us to relieve the State of its failure to do so simply because Hunley failed to object. In other words, it violates due process to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations of prior convictions. And it violates due process to treat the defendant's failure to object to such assertions or allegations as an acknowledgment of the criminal history. The Court of Appeals held RCW 9.94A.500(1) and .530(2) cannot change this, and they are unconstitutional insofar as they attempt to do so.

State v. Hunley, 175 Wn.2d at 915 (internal quotations omitted).

“Sentencing information or facts are ‘admitted [or] acknowledged ... at the time of sentencing’ for this purpose if they are *affirmatively*

admitted or acknowledged; the mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgment." *Zamudio*, 192 Wn. App. at 508 (quoting *State v. Mendoza*, 165 Wash.2d 913, 922, 205 P.3d 113 (2009) (quoting former RCW 9.94A.530(2) (2005)). Relying on the defendant's silence in these circumstances would "obviate the plain requirements of the SRA...[and] result in an unconstitutional shifting of the burden of proof to the defendant." *Hunley*, 175 Wn.2d at 912.

The current and prior convictions used to calculate Ms. McNeill's offender score are listed on her judgment and sentence. CP 103-104. The judgment and sentence reflected six prior convictions when she was sentenced in this case. CP 103-104. The documents show four prior convictions for attempting to obtain a controlled substance by fraud, RCW 69.50.403, all of which she was sentenced to on April 10, 2006. CP 103-104. These are class "c" felonies. RCW 69.50.403(3). Ms. McNeill has one conviction for delivery of a controlled substance (methadone), which is a class "b" felony, RCW 69.50.401(2)(a), and one conviction for unlawful possession of a firearm in the second degree, which is a class "c" felony. RCW 9.41.040(2)(b). The defendant was sentenced to these latter two convictions on December 5, 2006, and it appears she was sentenced to

60 months of confinement for the delivery of methadone conviction. CP 104.

Unfortunately, the record does not reflect when Ms. McNeill was released from incarceration for the December 5, 2006, convictions. CP 95, 103-104; RP 130. Yet, Ms. McNeill was released prior to the full 60 months on the delivery of methadone conviction (see FN3 below and Ms. McNeill's contemporaneously filed RAP 9.11 motion and supporting declaration). CP 103-104; RCW 9.92.151; RCW 9.94A.729. Where Ms. McNeill was released from confinement prior to July 15, 2010, and where she did not commit any new crimes resulting in conviction until July 15, 2015, then five of Ms. McNeill's prior class "c" convictions would "wash out" and would be barred from being counted towards her offender score. RCW 9.94A.525(2)(c); CP 103-104. There would be a five-year, crime-free period which would "wash" the four convictions for attempt to obtain a controlled substance by fraud, and the one conviction for unlawful possession of a firearm in the second degree. *Id.* And, when five points are deducted from Ms. McNeill's score because the prior convictions "washed" out, Ms. McNeill's offender score would be a two, placing her in a standard sentencing range of 12+ to 20 months. RCW 9.94A.517(1). Yet here, Ms. McNeill was sentenced in the standard range of 60 to 120 months. *Id.*; CP 103-104; RP 138.

Unfortunately, the State did not provide sufficient information to prove Ms. McNeill's offender score. While Ms. McNeill may have acknowledged her prior criminal history in her statement on plea of guilt, this acknowledgement of criminal history did not address periods out of confinement or whether those priors had washed. The State provided a criminal history, without release dates, and the copies of the criminal history were not certified nor were other comparable documents² of record provided. CP 1-127. Most significant here, the State failed to prove the criminal history listed on the plea statement should actually contribute to Ms. McNeill's current offender score rather than "wash." *See Blunt*, 118 Wn. App. at 7; *Hunley*, 175 Wn.2d at 909-10.

The trial court relied upon the criminal history presented by the State and did not question the offender score. RP 105, 138; RP 127-143; CP 95, 103-104. Ms. McNeill did sign her name under the list of alleged prior convictions and also stipulated to them in her plea agreement, but the State never adequately proved her prior convictions had not "washed out," including with proof of any intervening criminal history during Ms. McNeill's five-plus years out of confinement. CP 82, 95. Moreover, waiver could not occur in these circumstances, because a defendant cannot

² While "the best method of proving a prior conviction is by the production of a certified copy of the judgment...", the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history. *In re Adolph*, 170 Wn.2d 556, 568, 243 P.3d 540 (2010) (citations omitted).

agree to a sentence in excess of what is statutorily authorized. *Goodwin*, 146 Wn.2d at 875-76. Ms. McNeill could not agree to a sentence based on an erroneously calculated offender score, even if she acknowledged having prior convictions.

Ms. McNeill respectfully requests this Court remand for resentencing, requiring the State to prove her prior convictions had not “washed out” due to some intervening criminal offense, or requiring the trial court to sentence Ms. McNeill based on an offender score of “two.”³ *State v. Jones*, 182 Wn.2d 1, 3, 8, 10-11, 338 P.3d 278 (2014) (citing RCW 9.94A.530(2)); *Hunley*, 175 Wn.2d at 915-16 (citing *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (setting forth this remedy)).

Issue 2: Whether the trial court’s finding of ability to pay or likely future ability to pay was erroneous given its inconsistency with Ms. McNeill’s indigent status, physical disability, lack of income, and large LFO debt.

Ms. McNeill requests this Court remand for resentencing and direct the trial court to strike the \$2,610 in discretionary legal financial obligations (LFOs) from her judgment and sentence. CP 104. The trial court’s boilerplate finding that Ms. McNeill had the present or likely

³ Ms. McNeill also filed a RAP 9.11 motion contemporaneously with this brief to aid this Court in deciding this offender score issue. Ms. McNeill requests this Court consider the declaration accompanying her RAP 9.11 motion for purposes of this sentencing argument. The additional evidence shows Ms. McNeill was, according to Department of Corrections records, released from confinement in May 2009 for her 2006 convictions. Ms. McNeill was out of confinement for five-plus years from May 2009 until this underlying offense was committed in July 2015.

future ability to pay (CP 104) was not supported by the record, and was clearly erroneous in light of the record developed at sentencing. The imposition of discretionary costs, and the trial court's suggestion that Ms. McNeill simply challenge those costs at a later date if she cannot pay at the time of enforcement (RP 139-140), is inconsistent with the principles enumerated in *Blazina, infra*, *Blank, infra*, and *Mahone, infra*.

A court may order a defendant to pay LFOs, including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). Ms. McNeill was ordered to pay mandatory court costs and discretionary fees of \$750 for her court appointed attorney and a \$760 sheriff service fee. CP 104. The trial court imposed a discretionary crime lab fee of \$100 pursuant to RCW 43.43.690 (permitting the trial court to waive this fee if it finds the person does not have the ability to pay). CP 104.

Another significant part of the LFOs imposed against Ms. McNeill included a \$1,000 fine pursuant to RCW 9A.20.021(1)(b). This statute limits punishment for class "b" felonies to a maximum of 10 years incarceration, a \$20,000 fine, or both. RCW 9A.20.021(1)(b). In *State v. Clark*, this Court held such fine was not a "cost" subject to the statutory requirement that a court inquire into a defendant's ability to pay before imposing discretionary LFOs. *State v. Clark*, 191 Wn. App. 369, 372-76,

362 P.3d 309 (2015). But the Supreme Court granted review in *Clark* and remanded to the trial court for an inquiry into the defendant’s ability to pay, explaining as follows:

The Department unanimously agreed that the superior court in imposing discretionary legal financial obligations on the Petitioner in connection with his criminal conviction did not adequately address his present and future ability to pay based on consideration of his financial resources and the nature of the burden that the payment of discretionary costs would impose, as required by RCW 10.01.160(3) and this court's decision in *State of Washington v. Nicholas Peter Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Pursuant to that decision, the superior court must conduct on the record an individualized inquiry into the Petitioner's current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under GR 34.

State v. Clark, 187 Wn.2d 1009, 388 P.3d 487 (2017).

“Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837-39. This inquiry requires the court to consider important factors, such as incarceration and a defendant's other debts, including any restitution. *Id.* at 838-39.

“[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)). “[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person's ability to pay LFOs.” *Id.* at 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful

recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants' inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). However, where the trial court does make the unnecessary finding that the defendant has the ability to pay, “perhaps through inclusion of boilerplate language in the judgment and sentence,” its finding is reviewed under the clearly erroneous standard. *Id.* (citing *State v. Bertrand*, 165 Wn. App. 393, 404 n.13, 267 P.3d 511 (2011)). Where a finding of fact is entered, it “is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Id.*

(internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, the written findings state, “the Defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 104. But this finding was clearly erroneous based upon the discourse at sentencing. Ms. McNeill explained her lack of employment history, her physical disability and inability to work, her reliance at the time of sentencing on her children’s father’s social security pension of only \$1,100 per month (she had previously been on SSI), and the monthly \$100 she contributes toward previous LFO debt. RP 135-136, 139; *see also* Report as to Continued Indigency, dated 2/13/17. The trial court ultimately found Ms. McNeil indigent. RP 138-139. However, the court ordered Ms. McNeill to pay some discretionary costs, adding she could always request the court later modify those costs if she could not pay them. RP 138-140; CP 104.

Ms. McNeill was collecting SSI until her children’s father passed away and she was given his social security pension. RP 136. This supports Ms. McNeill’s assertion she cannot work and pay LFOs in the future due to a disability. *Id.* If Ms. McNeill indeed qualified for SSI

benefits, the trial court should not have imposed discretionary LFOs. *See City of Richland v. Wakefield*, 186 Wn.2d 596, 599-613, 380 P.3d 459 (2016) (“federal law prohibits courts from ordering defendants to pay LFOs if the person’s only source of income is social security disability.”) A person’s ability to pay LFOs should be seriously questioned when she has a SSI-qualifying impairment and faces a lengthy period of incarceration. *Id.* at 607 (noting, “a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when LFOs were initially assessed”) (quoting *Blazina*, 182 Wn.2d at 836)).

Also, the trial court erred by deferring part of the inquiry as to Ms. McNeill’s financial hardship for another time. RP 139. The court found Ms. McNeill indigent, and struck some costs but not others due to her indigency, but proceeded to inform Ms. McNeill she could ask the court to reconsider her financial status after she was released. RP 138-139; CP 104. Prior to *Blazina, supra*, courts would not always inquire into an indigent appellant’s ability to pay at the time costs were imposed (at sentencing), because ability to pay would be considered at the time the State attempted to collect the costs. *State v. Blank*, 131 Wn.2d 230, 244, 246, 252-53, 930 P.2d 1213 (1997). But this time-of-enforcement inquiry is inadequate, especially in light of *Blazina*’s recognition that the

accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship that must be addressed when costs are imposed. *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 may not necessarily 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”); *but see State v. Shirts*, 195 Wn. App. 849, 862 n.10, 381 P.3d 1223 (2016) (declining appellant’s request for court to require appointment of counsel to assist all indigent persons in remissions process). 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 expressly rejected the argument 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. The trial court was required to consider Ms. McNeill’s ability to

pay before imposing any LFOs. *See Lundy*, 176 Wn. App. 96; RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827. This error is not remedied by Ms. McNeill's potential pro se future ability to challenge costs (which will have incurred significant interest) at the time of enforcement.

The court considered Ms. McNeill's financial position and entered the boilerplate finding that it had considered her total amount owing and her ability to pay LFOs. RP 138-140; CP 104. The court also entered the boilerplate finding that the defendant had the ability or likely future ability to pay the legal financial obligations imposed herein. CP 104. However, the court's finding that the defendant had the ability to pay both those present and later-imposed LFOs was not supported by the record. RP 138-140. Ms. McNeill has a disability that prevents her from working, has no current income, is 61 years old, has a large LFO debt of about \$15,000, is presently incarcerated, and was found indigent by the court. RP 135-136, 139-140; CP 19-20, 125-127; Report as to Continued Indigency. The court's order that Ms. McNeill pay discretionary costs of \$2,610 and written finding that Ms. McNeill had the present or likely future ability to pay LFOs was clearly erroneous. The court's finding is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343; *Lundy*, 176 Wn. App. at

103; RCW 10.01.160(3); *Blazina*, 344 P.3d at 683; *see also* CP 19-20, 104, 125-127; RP 135-136, 138-140.

The trial court also neglected to consider the nature of the burden that LFOs would impose on Ms. McNeill when she attempts to successfully reenter society. *Blazina*, 182 Wn.2d at 838-39; RCW 10.01.160(3). Given the defendant's indigent status, the trial court should have "seriously question[ed]" Ms. McNeill's ability to pay LFOs. *Id.*; CP 19-20, 125-127.

The finding on Ms. McNeill's ability to pay LFOs should be set aside, and the \$2,610 in discretionary legal financial obligations should be stricken from Ms. McNeill's judgment and sentence.

Issue 3: 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.

Ms. McNeill 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).

Ms. McNeill was found indigent by the trial court and eligible for a public defender in August 2015, after she was first charged in this case. CP 8-9, 19-20. She was also found indigent for purposes of this appeal.

CP 125-127. There has been no change in her financial status since that time. She remains indigent, and she is in DOC Custody at the correctional facility in Gig Harbor, Washington. Report as to Continued Indigency. According to Ms. McNeill, she is and will be unable to pay costs that may be imposed on appeal. Ms. McNeill is 61 years old, owns no real property, owns no personal belongings, has no income, owes approximately \$15,000 in legal financial obligations (LFOs), and pays \$100 per month towards LFO debt. Report as to Continued Indigency. Ms. McNeill also has a physical disability, with a severe neck injury due to a car accident, and the injury prevents her from working. Report as to Continued Indigency; RP 135-36. Given Ms. McNeill's status and history, it is unlikely she will ever be able to pay LFOs. As previously noted, Ms. McNeill is also currently serving a 60-month sentence. RP 138; CP 106.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*, as discussed in the issue above. See *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

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, Ms. McNeill has demonstrated her indigency and current and future inability to pay costs.

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 Ms. McNeill's Report as to Continued Indigency, it is clear her inability to pay LFOs has not changed since the trial court found her indigent just prior to filing her notice of appeal to this Court. The Report as to Continued Indigency 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 Ms. McNeill'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, Ms. McNeill's Report as to Continued Indigency demonstrates she remains indigent with no assets, a great amount of debt, and significant barriers to acquiring gainful employment upon her release from incarceration (including a physical disability that will likely interfere with her ability to secure future employment). Appellate costs should not be imposed in this case.

F. CONCLUSION

Ms. McNeill requests this matter be remanded for resentencing, as her offender score was miscalculated at a “seven” rather than at a “two” due to “wash out” provisions.

Ms. McNeill also requests this Court remand for resentencing to strike the discretionary legal financial obligations, and she requests this Court deny any appellate costs.

Respectfully submitted this 17th day of July, 2017.

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/s/ Kristina M. Nichols
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35001-1-III
vs.)
)
CATHE L. MCNEILL)
)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on July 17th, 2017, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Cathe McNeill, DOC #893440
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

Having obtained prior permission from the Asotin County Prosecutor's Office, I also served the Respondent State of Washington at **cliedkie@co.asotin.wa.us** using Division III's e-service feature.

Dated this 17th day of July, 2017.

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