

FILED
Court of Appeals
Division III
State of Washington
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NO. 35378-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JEREMY DANIEL BENNETT,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises four assignments of error:

- 1.** The trial court erred when it imposed a legal financial obligation the legislature has not authorized.
 - a. The \$900 “drug court fine” is not authorized as a “cost” under RCW 10.01.160.
 - b. The \$900 “drug court fine” is not otherwise authorized as a “legal financial obligation” under RCW 9.94A.760.
- 2.** The imposition of discretionary legal financial obligations should be stricken because Mr. Bennett lacks the ability to pay.
 - a. The finding that Mr. Bennett has the current or future means to pay costs of incarceration is not supported in the record and should be stricken.
 - b. This Court should reverse and remand with instructions to strike the discretionary legal financial obligations.
- 3.** The court exceeded its statutory authority by imposing a no contact order with an operative length of ten years.
 - a. The court exceeded its statutory authority under chapter 10.99 RCW by imposing a post-conviction no-contact order for a duration that exceeds the length of the five-year sentence imposed.
 - b. The court exceeded its statutory authority under chapter RCW 9.94A by imposing a no contact order for a duration that exceeds the five-year maximum penalty for felony violation of a no-contact order, a class C felony
- 4.** Appeal costs should not be awarded.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

The State’s response is as follows:

1. The State does not concede the legality of the trial courts actions but agrees that based on this defendant’s financial limitations this monetary amount should be removed from his judgment and sentence. The State shall amend the judgment and sentence to remove this monetary amount.
2. The State concedes this issue and requests that the court

remand and allow the ex parte filing of a motion to amend the judgement and sentence to strike any discretionary costs to include medical and costs of incarceration, even it capped in the original judgment and sentence.

3. Once again without conceding the trial courts ability to impose the no contact order as it presently exists the State agrees to amend that order to reflect the time frames that Bennett claims are required.
4. Because the actions of the State address all of defendant's issues in a manner that in effect negates these issues no party will "primarily" prevail and no costs of appeal should be awarded.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT

Response to allegation one – two: The State shall not address the propriety of the actions of the court but shall agree that based on this defendant's current financial situation, caused by his criminal actions, certain monetary assessments shall be removed from his judgment and sentence.

The only thing of an analytical nature that the State shall note in this brief is that when Bennett agreed to the use of the Drug Court to resolve his pending case this monetary amount was assessed based on a **contractual** arrangement between he and the court/State. He contractually bound himself to this monetary amount whether he

completed Drug Court or not. CP 14, 19.

The record reflects that the court questioned Bennett and his attorney regarding his ability to pay any monetary amount imposed. This colloquy was sufficient to satisfy State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015). RP 6-7.

That said, the State would note that Bennett has an offender score of “10” at the time of sentencing and that most of these crimes have occurred in the last ten years. There were eleven offenses listed in Bennett’s criminal history in this case. CP 34 Bennett has twenty-two cases where he still owes a monetary balance. Bennett has approximately \$28,800.00 owed for his various criminal offenses; in Superior court, District court and Municipal court. See Appendix A.

The imposition of this added monetary amount is never going to be paid and in the long run it will cost the State more in administrative costs trying to recoup this money than will ever be collected.

Therefore, the State shall amend the judgment and sentence in this case in order to remove this \$900.00 amount, strike section 4.D.4, even though this cost was not technically assessed as the “box” before this cost was not checked, however the trial court hand wrote in “capped @ \$350.”

Bennet requests that the medical cost section, 4.D.5, be struck but this judgment and sentence form was purposely changed to include a

“box” before this section that must be “checked” in each judgment and sentence in an effort to make counsel and court take specific action regarding the past issues with boilerplate forms. This box was not checked therefore that cost is not at issue in this case.

With regard to the monetary amounts addressed in this brief the State would request this court remand this case to the trial court with an express order that an ex parte order be entered removing this and the other challenged monetary amounts.

The State request that this be done in this manner so that there is no additional cost incurred to bring this defendant back from prison, assign him counsel, set this for hearing or hearings with the end result being these cost is struck but also “allowing” this defendant the opportunity to appeal those hearings.

These actions are administrative and have literally no effect on the substantive actions taken by the trial court and as such there is no need for additional hearings.

The only other costs that were imposed were mandatory, Crime Penalty Assessment \$500.00 and DNA collection fee \$100.00. RCW 7.68.035(1)(a) (victim assessment); RCW 43.43.7541 (DNA testing fee); CP 598. In general, mandatory LFO’s must be imposed regardless of the defendant's ability to pay. State v. Kuster, 175 Wn.App. 420, 424, 306

P.3d 1022 (2013); State v. Lundy, 176 Wn.App. 96, 102-03, 308 P.3d 755 (2013); State v. Shelton, 194 Wn.App. 660, 674-75, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002 (2017)

Response to allegation three – Operative length of domestic violence no contact order.

In the interests of justice and judicial economy the State will move for an ex parte order that will change the original order to reflect a period of time which conforms with the five-year maximum sentence in this case and as requested by Bennett in his brief

The order presently indicates that it expires on 6/19/2027. The State shall amend this order to reflect an expiration date of 6/19/22 which is five (5) years from the date of issuance.

Response to allegation four – Appellate costs.

The State has indicated innumerable cases that State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) allows for the awarding of costs to the primary prevailing party on appeal. “The commissioner or clerk “will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our

decision on factors the parties set forth in their briefs rather than remanding to the trial court.”

The State, by and through the Yakima County Prosecutors Office continues to assert the right to request these costs on a case by case basis.

However, as Yakima County has also indicated in each and every appeal in which this issue, in the interests of justice and judicial economy the State shall not be requesting appellate costs.

IV. CONCLUSION

Based on the facts presented above and in the interests of judicial economy the State would request this court grant the trial court the jurisdiction to amend and file orders amending both the judgment and sentence and the domestic violence not contact order and that this court allow that to be done in the form of an ex parte order.

Respectfully submitted this 3rd day of May 2018,

By: s/ David B. Trefry

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APPENDIX A

COURT	BALANCE
Yak Municipal	\$858.00
Yak Municipal	\$708.00
Yak Municipal	\$858.00
Kittitas District	\$2,702.00
Kittitas District	\$600.00
Kittitas District	\$1,173.00
Kittitas District	\$100.00
Kittitas District	\$1,080.00
Kittitas District	\$1,135.50
Kittitas District	\$100.00
Kittitas District	\$1,135.50
Kittitas District	\$120.00
Kittitas District	\$100.00
Kittitas District	\$300.00
Yakima Superior	\$2,072.31
Kittitas Superior	\$3,253.34
Kittitas Superior	\$3,466.21
Kittitas Superior	\$2,629.23
Kittitas Superior	\$2,862.36
Kittitas Superior	\$3,201.22
Kittitas Superior	\$180.51
Kittitas Superior	\$181.51
TOTAL:	\$28,816.69

DECLARATION OF SERVICE

I, David B. Trefry state that on May 3, 2018 emailed a copy of the parties, of the Respondent's Brief, to, Mrs. Susan Gasch at gaschlaw@msn.com

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

DATED this 3rd day of May, 2018 at Spokane, Washington.

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YAKIMA COUNTY PROSECUTORS OFFICE

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