

FILED
Court of Appeals
Division III
State of Washington
5/2/2018 9:52 AM

NO. 35442-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHELLE BROOKS,

Appellant.

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

The Honorable John Hotchkiss, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED IN ORDERING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS (LFOs).

In her opening brief, appellant Michelle Brooks asserts the trial court erred in ordering discretionary LFOs after concluding she could pay only a monthly amount that was insufficient to cover the accrued monthly interest. Brief of Appellant (BOA) at 4-11. In response, the State suggests that because there was evidence appellant was going to college and had a job in the college library, the trial court ipso facto made a sufficiently individualized and reasonable determination regarding her ability to pay discretionary LFOs. Brief of Respondent (BOR) at 5-6. The record does not support this.

Before the trial court may properly exercise its discretion under RCW 10.01.160 and order discretionary LFOs, “the record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (emphasis added). The State fails to point to anything in the record that establishes the trial court engaged in such an individualized consideration as to what amount of discretionary LFOs Brooks could pay. This is because

the record actually shows the trial court imposed in rote fashion the same discretionary fees that it generally imposes. RP 324. Thus, its LFO order was more the product of a default position than the type of individualized consideration contemplated in Blazina.

Despite the State's suggestion to the contrary, the fact that there was evidence before the trial court that arguably might have supported the trial court's decision to impose discretionary LFOs does not compensate for the fact that the trial court never engaged in the proper consideration. One cannot point to what the trial court might have done given the record, while ignoring what the trial court actually did. Blazina requires the trial court to evaluate the defendant's financial resources, including other debts and restitution, before imposing discretionary LFOs. Here, the trial court imposed its standard LFOs without any genuine consideration of Brooks' individual circumstances.

Additionally, the State fails to address the aspect of this order that makes it unjustly punitive. The trial court imposed significant discretionary LFOs while at the same time acknowledging Brooks could only pay a monthly amount that does not even cover the accrued monthly interest. See, BOA at 7 (explaining this in detail). The particularly pernicious effect of the

12% interest rate that is applied to outstanding LFOs is well established. See, City of Richland v. Wakefield, 186 Wn.2d 596, 607, 380 P.3d 459 (2016); Blazina, 182 Wn.2d at 836. Both this Court and the Washington Supreme Court have admonished sentencing courts against imposing discretionary LFOs where the defendant can only make monthly payments that will not even touch the judgement principle and, thus, result in ever-growing debt. Wakefield, 186 Wn.2d at 607; State v. Sorrell, 2 Wn.App.2d 156, 174-75; 408 P.3d 1100 (2018). Yet, that is exactly what happened here.

Finally, the State side steps the core issue here by pointing out the “legislature has set in place a safety valve” via the remission process. BOR at 5. Just because there is a remission process available, however, does not excuse the trial court from conducting a proper Blazina inquiry in the first place. The Legislature clearly intends that trial courts consider the individual financial status of the defendant at the time LFOs are imposed regardless of whether there is a remission process. RCW 10.01.160.

Additionally, the State’s reliance on the remission process to correct Blazina errors would result in an unnecessary waste of judicial resources. It makes no sense for a sentencing court to

impose discretionary LFOs that would immediately trigger the need for remission. What this Court seems to have recognized in State v. Davis, 200 Wn. App. 1053 (2017) (unpublished opinion cited pursuant to GR 14.1), is that common sense dictates that discretionary LFOs create a significant hardship unless the trial court finds: (1) the defendant likely will be able to pay the total judgement (including the interest) at some point, and (2) the defendant can pay a monthly amount that it is sufficient to cover the rate of accrued monthly interest. If these conditions are not present, the imposition of discretionary LFOs creates a hardship and should not be ordered in the first place. Hence, the State's "safety valve" approach to Blazina errors unnecessary results in an additional layer of judicial process that wastes judicial resources.

In sum, as explained in detail in appellant's opening brief, the record shows the trial court erred in imposing discretionary LFOs. BOA at 4-12. The record establishes Brooks had few financial resources and, given the nature of her conviction, bleak financial prospects. RP 315-19. The trial court determined she could only pay a monthly amount that fails to even cover the accrued monthly interest she owes. RP 323. Finally, the trial court never found Brooks had the ability to pay the total amount ordered.

RP 323-24. Under these circumstances, the imposition of discretionary LFOs was unjustly punitive and reversal is required.

B. CONCLUSION

The order imposing discretionary LFOs should be reversed.

DATED this 15 day of ~~April~~^{May}, 2018.

Respectfully submitted,

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May 02, 2018 - 9:52 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35442-3
Appellate Court Case Title: State of Washington v. Michelle Dianne Brooks
Superior Court Case Number: 14-1-00167-7

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