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Court of Appeals  
Division III  
State of Washington  
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No. 35637-0-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

BRENNAN THOMAS PLATT,  
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Kevin Naught, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

The trial court erred in imposing restitution.

*Issue Pertaining to Assignment of Error*

The state did not propose a restitution amount but asked for a \$1 “placeholder” to cover restitution should there be future surgeries. Was the trial court’s imposition of \$1 restitution without a hearing in error?

**B. STATEMENT OF THE CASE**

Brennan Thomas Platt was charged with vehicular assault under RCW 46.61.522(1)(a) (while driving in a reckless manner) for an incident that occurred a year earlier on April 2, 2015. CP 1, 557.

That afternoon, twenty-year-old Mr. Platt began passing two trucks in his lane and crashed his motorcycle into a vehicle ahead of them that was turning left, which he had not seen. RP 532. His young girlfriend, Hayla Eder-Cadden, was thrown through the air and landed 25 feet away in a ditch. RP 392, 403, 506–07. They were both released from the hospital later that night. RP 553–54.

Mr. Platt, who was home-schooled and graduated in 2012, lived outside the home for one year and then returned to live with his parents. RP 532–33; CP 578 at paragraph 11. He bought the cycle in the spring of 2014 and had ridden it often to work into the fall. RP 538–39. He’d

ridden it 3 to 4 times in the weeks prior to the accident. RP 540; CP 577 at paragraph 9. He and Ms. Eder-Cadden were wearing protective clothing and fully enclosed helmets during the ride. RP 379–80, 401–02, 541–44; CP 575 at paragraph 1. This was the first time Mr. Platt had had a passenger on his bike and he instructed his girlfriend regarding basic training he'd received about what he and the passenger should do while riding together. CP 575 at paragraphs 3, 4.

This was the first motorcycle ride together for the young couple, who had been officially dating about three weeks. RP 376–77, 535–36; CP 577 at paragraph 10. They said they loved each other. RP 532, 555, 589. They'd met through social media and mutual friends. RP 346, 533–34. They did not consider themselves the “partying” kind and were getting to know each other by sharing time cooking meals and singing together at the church Mr. Platt was involved in. RP 398–99, 533–37. They'd planned to return from the motorcycle ride in time for Ms. Eder-Cadden to begin her work shift at 4:00 p.m. RP 380.

The accident took place outside of Yakima, Washington, at the intersection of Wiley City and Ahtanum Roads. RP 384, 497. The posted speed for the lane Mr. Platt traveled in was 50 or 55 miles per hour (m.p.h.). RP 389, 478. Witnesses estimated his speed at the time of the

incident as faster than 35 m.p.h. RP 422, 438–39, 478. Mr. Platt and Ms. Eder-Cadden testified he'd been obeying all traffic rules prior to the accident and was going 35 to 40 m.p.h. when he pulled out to pass the trucks. RP 403, 410, 531, 549–52.

Ms. Eder-Cadden broke her leg and left thumb. RP 350–51. She was on crutches for ten months and has had several corrective surgeries. RP 396–97. Their dating intensified after the accident, with both families providing transportation. RP 411–12, 554–56. At some point they ceased dating. RP 589.

Mr. Platt was not familiar with the intersection. CP 577 at paragraph 9. His testimony was consistent with his statements to police at the hospital that at the time of the incident he was going 35 to 40 m.p.h., that he did not see signs warning of the upcoming intersection or the solid yellow line in his lane indicating no passing, and that he believed the center line was instead marked by dotted or dashed painted lines. RP 531, 549–50, 554, 556; CP 576 at paragraphs 5, 6; CP 577 at paragraphs 7, 8. One witness apparently honked his vehicle horn in warning as Mr. Platt began to pass him. RP 428. His passenger remembered nudging Mr. Platt with her arm, kind of indicating “hey, this is probably not the best idea.” RP 391, 411. The enclosed helmets made it difficult to hear. RP 552–53.

The jury was given the definitional instruction, “To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences. CP 540; WPIC 90.05 (portion). At the jury instruction conference defense counsel had unsuccessfully proposed the jury be given the remainder of WPIC 90.05, which defines disregard for the safety of others and distinguishes it from ordinary negligence. Defense counsel believed it would help the jury better understand the different levels of mens rea that can, but don’t necessarily, result in criminal conduct. RP 579–84; CP 528.

The jury began deliberations late in the afternoon on August 28, 2017. RP 650. The jury reconvened at noon on August 29 and submitted an inquiry shortly thereafter: “Can we get a clarified definition of -rash - heedless and -indifferent?” After discussion, the court responded, “Please rely on the instructions previously provided.” RP 654–57, 659–60; CP 549. About 2:30 the jury indicated it was not able to reach a verdict and there was no reasonable probability it could do so within a reasonable time. RP 658–61. Reasoning in part that deliberation time of only 2-1/2 hours was brief, the parties agreed on a form of oral instruction which the court read to the jury before suggesting they continue deliberations. RP 661–69. Within an hour the jury inquired, “This is labeled as a “crime of

vehicular assault.” If convicted guilty, does this label Brennan as a “Criminal?” The jury was again instructed to “Please refer to the instructions previously provided.” RP 669–72; CP 550. The jury was sent home at 4:30 p.m. RP 675.

The following morning, the jury found Mr. Platt guilty as charged. RP 676; CP 551.

Based on an offender score of zero, the standard range was three to nine months. CP 583. The court imposed an exceptional sentence downward of 90 days consisting of two days confinement and 88 days of home detention. RP 773–74; CP 579–81<sup>1</sup>, 583–84. The State asked the trial court to impose \$1 as a restitution “place holder” in the event the victim required any future surgeries. RP 729. The court entered a \$1 restitution award as a “place holder” and imposed an additional \$1050 in legal financial obligations. RP 774; CP 585. No hearing was scheduled and a restitution hearing has never occurred.

Mr. Platt timely appeals. CP 597–98. The court found he had previously been declared indigent and remained indigent for purposes of appeal. CP 590.

## C. ARGUMENT

### 1. The trial court lacked authority to impose restitution without first holding a restitution hearing.

A trial court's authority to impose restitution is entirely statutory. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 790, 291 P.3d 939 (2013). Restitution shall be ordered whenever an offender is convicted of an offense which results in injury to any person or damage to or loss of property. RCW 9.94A.753(5); *State v. Griffith*, 164 Wn.2d 960, 965–966, 195 P.3d 506 (2008). When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days. RCW 9.94A.753(1).

At sentencing, the State did not propose a restitution amount but asked for a \$1 “place holder” to cover restitution should the victim require any future surgeries. Without setting a hearing, the court entered a \$1 restitution award on the judgment and sentence as a “place holder.”

Restitution is a matter within the trial court's discretion, and its ruling will be disturbed on appeal only if there is an abuse of discretion. *State v. Young*, 63 Wn. App. 324, 333, 818 P.2d 1375 (1991). A trial

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<sup>1</sup> Findings of Fact and Conclusions of Law re: Exceptional Sentence Downward.

court abuses its discretion when its action is manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons. *State v. Woods*, 90 Wn. App. 904, 905, 953 P.2d 834 (1998).

Here the trial court abused its discretion. The restitution statute does not contemplate “place holder” restitution. RCW 9.94A.753. The trial court failed to conduct a hearing on the amount of restitution within 180 days of the sentencing hearing as required by RCW 9.94A.753(1). The court’s imposition of even \$1 was an abuse of discretion and is in error. The remedy is to vacate the restitution order. *State v. Grantham*, 174 Wn. App. 399, 406, 299 P.3d 21 (2013).

## **2. Appeal costs should not be awarded.**

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

*State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant

or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. Platt was 20 years old at the time of the April 2, 2015, incident. RP 532. The court had before it Mr. Platt's declaration made under penalty of perjury as to work history, lack of assets, and outstanding debts. CP 592–96. The court appointed trial counsel due to his indigency, and found he remained indigent for purposes of this appeal and was entitled to appointment of counsel and costs of review at public expense. CP 590–91.

In light of Mr. Platt's indigent status, and the presumption under RAP 15.2(f), that he remains indigent "throughout the review" unless the appellate court finds his financial condition has improved "to the extent [he] is no longer indigent,"<sup>2</sup> this court should exercise its discretion to waive appellate costs.<sup>3</sup> RCW 10.73.160(1).

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<sup>2</sup> *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

<sup>3</sup> Appellate counsel anticipates filing a report as to Mr. Platt's continued indigency no later than 60 days following the filing of this brief.

**D. CONCLUSION**

For the reasons stated, this matter should be remanded to strike the \$1 restitution award. Should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on April 22, 2018.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 22, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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