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Court of Appeals
Division III
State of Washington
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NO. 35708-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SMITH,

Appellant.

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

Scott D. Gallina, Judge
G. Scott Marinella, Judge Pro Tem

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court mischaracterized medical costs reimbursement for prescription medication Mr. Smith received at the jail as “restitution” on the judgment and sentence.

2. The trial court erred in imposing discretionary legal financial obligations (LFOs) without making an adequate finding Mr. Smith had the present or future ability to pay discretionary LFOs.

3. The judgment and sentence contains scrivener’s errors on the dates of the offenses.

4. This court should exercise its discretion to not award appellate costs if the State substantially prevails on appeal and submits a cost bill.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, on the judgment and sentence, the court mischaracterized medical reimbursement for prescription medication as “restitution” owed to the Columbia County Sherriff’s Office?

2. Whether the court improperly imposed discretionary legal financial obligations (LFOs) against Mr. Smith without first making a finding he had the present or future ability to pay LFOs?

3. Whether the judgment and sentence should be corrected to reflect the correct charging period for each count based on the amended information?

4. Whether this Court should exercise its discretion to not award appellate costs if the State substantially prevails on appeal and submits a cost bill?

C. STATEMENT OF THE CASE

Benjamin Smith pleaded guilty to an amended information charging him with seven sex offenses. CP 1-5; RP 3-12.

Counts 1-6 pertained to offenses against Mr. Smith's daughter, C.S., born March 31, 2001. CP 1-4. The amended information specified the offenses occurred over set windows of time between March 31, 2012, and January 23, 2017. CP 1-4.

Count 7 pertained to an offense against Mr. Smith's daughter, G.S., born September 26, 2004. CP 4-5. The amended information specified the offense occurred between September 26, 2015, and September 26, 2016. CP 4.

The State, at sentencing, called two witnesses and had them sworn in by the court. RP 19, 39. The first witness, Lisa Smyth, saw C.S. as a mental health counselor and had done evaluative work with C.S. and

G.S. RP 21-38. She believed both girls suffered from PTSD due to their father's abuse. RP 27-30. Both girls, in her opinion, would suffer ill effects from the abuse for many years. RP 36-37.

The second witness, Rick Walters, testified as the girls' school intervention prevention specialist. RP 39-40. He noted both girls struggled but had good support networks among friends. RP 42-43.

Mr. Smith objected to testimony at sentencing. RP 23. The court overruled the objection. RP 23.

The court denied Mr. Smith's request for a Special Sex Offender Sentencing Alternative (SSOSA) citing the statute limiting SSOSA eligibility to sentences with a standard range of fewer than 11 years. RP 66. See RCW 9.94A.670.

Because of the multiple counts and the sex crimes multiplier effect, Mr. Smith's had an offender score of 18. CP 47, 77. At the State's urging, the court imposed an exceptional sentence based on "free crimes." RP 54, 69-70; CP 88. The State argued without the exceptional sentence, Mr. Smith would receive no additional punishment for offending against G.S. RP 54.

Counts 1 and 7 were subject to Indeterminate Review Board sentencing. CP 78; RP 78-79. RCW 9.94A.589. The court fashioned an

exceptional sentence by ordering the minimum sentences for counts 1 and 7 to run consecutively to each other. RP 70; CP 78-79. The court imposed a minimum sentence of 347 months and a maximum sentence of life. RP 70-71; CP 78. Mr. Smith's sentence also subjected him to post-release community custody for the remainder of his life. RP 71; CP 79.

Mr. Smith is the father of 5 children. RP 49. Before his arrest, he worked as a corrections officer for the Department of Corrections at the Washington State Penitentiary in Walla Walla. RP 24. He and his wife married in high school when they were expecting their first child. RP 24-25.

Mr. Smith's wife and children no longer wished to have anything to do with him. RP 52-53.

Mr. Smith withdrew his DOC pension savings - \$30,000 – and gave it to his wife. CP 25.

Mr. Smith openly acknowledged his guilt and desired help understanding why he committed the offenses. RP 58-60.

At sentencing, the State asked the court about LFOs. RP 72. The court acknowledged Mr. Smith would earn "pennies on the dollar" at a prison job but thought the earnings should be "utilized to pay some of these costs." RP 73. The court imposed the following discretion costs:

- \$100 domestic violence fee RCW 10.99.080
- \$100 sheriff service fee
- \$750 court appointed attorney fee
- \$466.03 for Mr. Smith's prescription medication while in jail (mischaracterized as "restitution")

CP 80-81. The court imposed mandatory costs:

- \$500 victim assessment
- \$200 criminal filing fee
- \$30 extradition fee

CP 80-81. Defense counsel did not object to any of the costs.

The judgment and sentence lists the dates of each of the seven offenses as having occurred between March 21, 2016, and January 23, 2017. CP 59.

Mr. Smith makes a timely appeal of all portions of his judgment and sentence. CP 95.

D. ARGUMENT

Issue 1: The characterization of Mr. Smith's medical costs in jail as "restitution" should be stricken.

Mr. Smith incurred prescription medical costs while in jail pending the outcome of his case. RP 73-74; CP 81. In sentencing Mr. Smith and

imposing costs, the court characterized the medical costs as “restitution.”

CP 81. But the characterization is wrong and it should be stricken.

The authority to impose restitution is statutory. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Under the restitution statute, a court shall order restitution “whenever the 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). Restitution is only allowed for losses causally connected to the crime charged. *State v. Kinneman*, 155 Wn.2d 272, 286, 119 P.3d 350 (2005).

A trial court's order of restitution is reviewed for abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). A trial court abuses its discretion if its order rests on incorrect legal analysis. *State v. Velezmoro*, 196 Wn. App. 552, 557, 384 P.3d 613 (2016), *review denied*, 187 Wn. 2d 1023 (2017).

Here the trial court abused its discretion when characterizing Mr. Smith's \$466.03 cost as restitution owed to the Columbia County Sheriff's Office. CP 81. Instead, and accurately, the cost was related only to prescription medication Mr. Smith received in jail and paid for by the Columbia County Jail because of Smith's incarceration. RP 73-74. Nothing

suggested that Mr. Smith's prescription medication related to the abuse of his two daughters.

The trial court erred when characterizing the cost as restitution. CP 81. The mischaracterization is significant because if the cost were restitution, it would be a mandatory cost subject to repayment. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). As a discretionary cost, it should be stricken from Mr. Smith LFO obligation because, as argued below, the court erroneously found Smith had the ability to pay LFOs.

This Court should strike the restitution characterization from the judgment and sentence.

Issue 2: The trial court erred by imposing discretionary legal financial obligations against this indigent defendant without conducting a sufficient inquiry into Mr. Smith's present or likely future ability to pay.

Mr. Smith requests this Court remand this case for resentencing and directs the trial court to strike the discretionary legal financial obligations (LFOs) from his judgment and sentence. CP 80-81. The trial court's boilerplate finding that Mr. Smith had the present or likely future ability to pay was not supported by the record. CP 77. Imposing discretionary costs contradicts the principles enumerated in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), *State v. Blank*, 131 Wn.2d

230, 930 P.2d 1213 (1997), and *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999).

As a threshold matter, “[a] defendant who makes no objection to the imposition of discretionary LFOs [legal financial obligations] at sentencing is not automatically entitled to review.” *Blazina*, 182 Wn.2d at 832. Instead, “RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review.” *Id.* at 834-35.

Mr. Smith asks this Court to exercise its discretion under RAP 2.5(a) to decide the LFO issue for the first time on appeal. The factors identified by this Court when deciding whether to exercise its discretion to decide the LFO issue support deciding the issue. *See State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 693, 370 P.3d 989 (2016) (stating “[a]n approach favored by this author is to consider the administrative burden and expense of bringing a defendant to court for a new hearing, versus the likelihood that the discretionary LFO result will change.”). The trial court would not have to hold a resentencing hearing only to address this issue, because a remand for resentencing is already required (Issues 1 and 3). Also, there is a high likelihood that a new sentencing hearing would change

the LFO amount, given Mr. Smith's indigency, including as will be reconfirmed in the forthcoming report as to continued indigency.

Turning to the substantive issue, the 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). Mr. Smith was ordered to pay mandatory court costs (\$500 Crime Penalty Assessment, \$100 DNA Collection Fee, \$200 criminal filing fee, \$30 extradition cost) and discretionary court costs (\$100 domestic violence assessment, \$100 sheriff service fees, \$750 court appointed attorney fee, and \$466.03 medical cost reimbursement to Columbia County Sheriff's Office). CP 80-81; RP 72-74; *see also In re Pers. Restraint of Dove*, 196 Wn. App. 148, 152, 381 P.3d 1280 (2016), *review denied*, 188 Wn.2d 1008 (2017) (acknowledging that a \$500 crime victim assessment and a \$100 DNA collection fee are mandatory LFOs); *State v. Lass*, 55 Wn. App. 300, 307-08, 777 P.2d 539 (1989) (costs of extradition are recoverable); *State v. Leonard*, 184 Wn.2d 505, 506-508, 358 P.3d 1167 (2015) (costs of medical care are discretionary).

"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.” *Lundy*, 176 Wn. App. at 103 (emphasis in original).

The 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. *Blazina*, 182 Wn.2d at 834. 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 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 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.

The Washington State Minority and Justice Commission reported in 2008 that due to the 12 percent interest rate, a person who pays \$25 per month toward his or her legal financial obligations would typically owe the State more ten years after conviction than when the trial court assessed the obligations. *State v. Sorrell*, ___ Wn. App. ___, 408 P.3d 1100,

1111 (2018). In Mr. Smith's case, the court trial court made no effort to determine how much imprisoned Mr. Smith even had available to pay toward LFOs per month given Smith's prospective "pennies on the dollar" earnings.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it need not 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)). 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, in a cursory discussion of LFOs at sentencing, the court acknowledged Mr. Smith's earnings were zero until such time as he got a job in the prison system paying "literally pennies on the dollar." RP 73. The court further surmised that "some of the money can be utilized to pay

some of these costs” and thus the court was “unwilling to just zero them out.” RP 73.

The court also entered this boilerplate finding: “That, considering defendant’s conviction herein, criminal history, financial obligations and ability to earn income and the likelihood that won’t change, the defendant will have the ability to pay legal financial obligations beginning 90 days after from release after custody.” CP 77.

But the court’s oral and written findings are erroneous. The trial court did not consider Mr. Smith’s present or likely future ability to pay at sentencing, but rather, indicated it agreed that Mr. Smith was indigent, then imposed LFOs. RP 73-74.

The court did not consider Mr. Smith’s obligation to serve at least 347 months in prison and that he could be incarcerated for life. Given his age at sentencing, 34 years old, he will be eligible for release no sooner than age 62. CP 5 (date of birth June 14, 1983). He will not return to a well-paying state corrections job given his felony convictions. Instead, with his criminal history and life-long community custody obligation, he will likely only find low wages and intermittent jobs to sustain himself. He will have to pay for housing, utilities, food, and medical care. He will also likely have accrued a substantial, unpaid, child support obligation for his five children.

Our Supreme Court in *Blazina* detailed the inquiry the trial court should undertake before finding that a defendant has the ability to pay, but the trial court here did not conduct the required inquiry. RP 72-73; *see also Blazina*, 182 Wn.2d at 837-39.

The court's finding that Mr. Smith had the present or likely future ability to pay LFOs was not made after a sufficient individualized inquiry. The court's finding is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343.

Mr. Smith was found indigent by the trial court and remains indigent. CP 89-94. (A continued indigency of indigency soon to be filed will demonstrate his continued indigency.) His continued indigent status, coupled with the length of his prison term, weights against a finding that Mr. Smith has the current or future ability to pay LFOs.

The finding of Smith's ability to pay LFOs should be set aside, and discretionary court costs stricken from Mr. Smith's judgment and sentence.

Issue 3: The judgment and sentence should be corrected to amend the scrivener's error on the offense dates.

The court's judgment and sentence lists the dates of the offenses each as March 21, 2016 – January 23, 2017. CP 59. This limited date range

contradicts the amended information. CP 1-5. The amended information lists these offense dates:

Count 1 – March 31, 2012 - March 31, 2013

Count 2 - March 31, 2013- March 31, 2014

Count 3 – March 31, 2014 – March 31, 2015

Count 4 - March 31, 2015 – March 31, 2016

Count 5 – March 31, 2016 – January 23, 2017

Count 6 – March 31, 2016 – January 23, 2017

Count 7 – September 26, 2015 – September 26, 2016

CP 1-4.

This Court should remand to correct the judgment and sentence to indicate the proper date ranges for each count. *See State v. Moten*, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener’s error referring to wrong date in judgment and sentence form); *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

Issue 4: Appellate costs should not be imposed if requested by the State.

Under RCW 10.73 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. A commissioner or

clerk of the appellate court must award costs to the party that substantially prevails on review unless the appellate court directs otherwise in its decision terminating review. RAP 14.2.

In *State v. Sinclair*, the Court of Appeals concluded that where appellate costs in a criminal case are raised in the appellant's brief or on a motion for reconsideration, it is appropriate for the reviewing court to exercise its discretion and consider it. *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612 (2016). The *Sinclair* Court reasoned that exercising discretion meant inquiring into a defendant's ability or inability to pay appellate costs. *Sinclair*, 192 Wn. App. at 392. If a defendant is indigent and lacks the ability to pay, an appellate court should deny an award of costs to the State. *Sinclair*, 192 Wn. App. at 382.

The costs of appeal are added to the fees imposed by the trial court. As noted in Issue 2, the Washington Supreme Court recognizes the widespread "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long-term court involvement, which inhibits re-entry into the community and increases the chance of recidivism. *Blazina*, 182 Wn.2d at 836.

In *Sinclair*, the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied an award of those costs. *Sinclair*, 192 Wn. App. at 392.

Mr. Smith is serving a life sentence with only the possibility of release after 28.9 years. CP 78. Even if Mr. Smith's case is remanded for entry of only mandatory LFOs, he is still facing \$730 in mandatory costs accruing interest at 12 percent until paid in full. CP 80-81.

The trial court found Mr. Smith indigent and appointed counsel on appeal. CP 93-94. Under *Sinclair* and RAP 15.2(f), this Court should presume Mr. Smith remains indigent.

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The trial court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

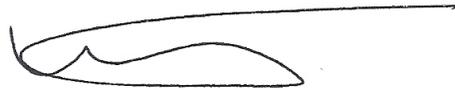
Mr. Smith anticipates filing a certification of indigency with this Court to assist the Court in exercising its discretion.

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Smith respectfully asks the Court to remand his case to superior court to strike the discretionary LFOs and the boilerplate language in the judgment and sentence indicating Mr. Smith had the current or future ability to pay LFOs. On remand, the court should also strike the characterization of Mr. Smith's medical costs as restitution and correct the scrivener's errors on the judgment and sentence.

Finally, if the State asks for the imposition of appellate costs, the court should decline to impose the costs.

Respectfully submitted May 1, 2018.



LISA E. TABBUT/WSBA 21344
Attorney for Benjamin Smith

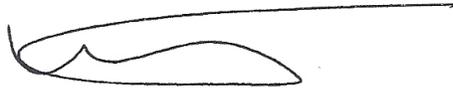
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Columbia County Prosecutor's Office, at rculwell@waprosecutors.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Benjamin Smith, DOC#401341, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 1, 2018, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Benjamin Smith, Appellant

LAW OFFICE OF LISA E TABBUT

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