

FILED
Court of Appeals
Division III
State of Washington
10/11/2018 10:58 AM

Nos. 35830-5-III,
35831-3-III

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

STATE OF WASHINGTON,
Respondent,
v.
JON PAUL SAUNDERS,
Appellant.

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

The Honorable M. Scott Wolfram

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

In March 2014, Jon Paul Saunders was sentenced to 30 days of confinement and one year of community custody for felony drug possession. While still on community custody, Mr. Saunders committed and pleaded guilty to four additional crimes: second degree burglary, disorderly conduct, forgery, and second degree escape, which occurred between April and June 2014. The court sentenced Mr. Saunders for these four additional convictions in October 2014 to a prison-based drug offender sentencing alternative (hereinafter “DOSA”) pursuant to RCW 9.94A.660. Mr. Saunders was ordered to serve 19 months of confinement and 19 months of community custody.

After being released from 19 months of confinement, Mr. Saunders was found to have violated the terms of his community custody, which included absconding to Texas. Based on these violations the sentencing court revoked Mr. Saunders’ prison-based DOSA. Because the law requires community custody terms to be served consecutively and not concurrently, the trial court erred by revoking Mr. Saunders’ prison-based DOSA. Mr. Saunders was serving under the original term of community custody from his March 2014 sentence when his prison-based DOSA was revoked. The case must be remanded for resentencing to reinstate the DOSA.

The trial court also erred by imposing sheriff's fees and extradition costs. Mr. Saunders is indigent and the court erroneously found he had an ability to pay without inquiry.

Mr. Saunders also preemptively objects to being assessed any costs associated with this appeal.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by revoking Mr. Saunders prison-based DOSA.
2. The trial court erred by finding an ability to pay without inquiry and imposing discretionary legal financial obligations.
3. Mr. Saunders preemptively objects to any costs associated with this appeal.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the sentencing court erred by revoking Mr. Saunders' prison-based DOSA when the alleged violations occurred while he was serving community custody under a different cause number.

Issue 2: Whether the sentencing court erred by imposing discretionary costs of sheriff's fees and costs of extradition when the court made no inquiry into Mr. Saunders' ability to pay and he is indigent.

Issue 3: Whether this Court should deny costs against Mr. Saunders on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

On March 24, 2014, Mr. Saunders was sentenced to 30 days of confinement and 12 months of community custody for felony drug

possession under Walla Walla County Cause Number 14-1-00049-6.

Additional Evidence per Commissioner Ruling 10/9/2018; trial court judgment and sentence Walla Walla Superior Court No. 14-1-00049-6.

Less than seven months later, on October 20, 2014, Mr. Saunders pleaded guilty to second degree burglary and disorderly conduct committed on May 17, 2014, under Walla Walla County Cause Number 14-1-00168-9. RP 13-14, vol. I ¹; CP 25-34. On the same date, October 20, 2014, Mr. Saunders also pleaded guilty under Walla Walla County Cause Number 14-1-001832 to forgery and second degree escape, committed on April 21, 2014, and June 27, 2014, respectively. RP 15-16, vol. I; CP 176-185. Consolidating these cause numbers, the court sentenced Mr. Saunders to a prison-based DOSA with 19 months of confinement and 19 months of supervised community custody. RP 2, 13-14, vol. I; CP 37-47, 188-198.

After serving 19 months of confinement pursuant to the prison-based DOSA, Mr. Saunders was released to serve community custody. CP 37-47, 62-66, 215-219. However, while on community custody it appears Mr. Saunders did not follow treatment requirements and did not check in

¹ Two volumes were transcribed in this case by transcriptionist Tina Driver. “Vol. I” refers to the volume containing four hearings (10/20/14, 10/19/17, 10/24/17, and 10/30/17). “Vol. II” refers to the volume containing four additional hearings (9/20/17, 10/2/17, 10/16/17, 10/18/17).

with the Department of Corrections. RP 2, vol. II; CP 65-66, 218-219.

Mr. Saunders also admitted to absconding to Texas for approximately two years during his term of community custody². RP 11-13, 19, vol. II; CP 71-73, 224-226. DOC filed a notice of violation on these points. CP 86-91, 231-236.

The sentencing court subsequently revoked Mr. Saunders' prison-based DOSA, and ordered Mr. Saunders be confined for the remaining half of the sentence. RP 49, vol. I; CP 101-102, 251-252.

Whether Mr. Saunders was to serve his community custody consecutively or concurrently was briefly mentioned on the record, but not clarified. RP 39-40, 46, vol. I; RP 11-12, vol. II.

At resentencing, the court struck the fees for a court-appointed attorney from the legal financial obligations without explanation. CP 107, RP 51, vol. I. Yet the sentencing court imposed costs of extradition in the amount of \$2,071.67 under Walla Walla County Cause Number 14-1-00183-2, and the costs of sheriff's fees of \$164.10 under both Walla Walla County Cause Numbers 14-1-00183-2 and 14-1-00168-9. CP 106-107, 256-257. The sentencing court did not inquire as to Mr. Saunders' ability to pay. RP 51, vol. I; CP 106, 256.

² Mr. Saunders was confined during a substantial portion of the time he was in Texas. CP 72-73, 86-91, 225-226, 231-236.

The court also entered the following boilerplate findings:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP 106, 256.

The court later found Mr. Saunders indigent, and entered an Order of Indigency, granting him the right to review at public expense. CP 153, 306. Mr. Saunders' Report as to Continued Indigency, dated 2/12/18, on file with this Court, indicates Mr. Saunders has no assets, no income, and has over \$14,000 in debt. Report Cont'd Indigency.

Mr. Saunders now appeals with permission from this Court.
Commissioner's Ruling, 4/4/18.

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E. ARGUMENT

Issue 1: Whether the sentencing court erred by revoking Mr. Saunders' prison-based DOSA when the alleged violations occurred while he was serving community custody under a different cause number.

Mr. Saunders was serving community custody under a cause number unrelated to this cause of action when his prison-based DOSA (drug offender sentencing alternative) was revoked. Because community custody terms must be served consecutively, and Mr. Saunders was not serving under this case's cause numbers at the time of revocation, the trial court erred by revoking his prison-based DOSA.

Erroneous or illegal sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A prison-based DOSA is a special sentencing alternative for drug offenders. RCW 9.94A.660, RCW 9.94A.662. Persons sentenced under this alternative are sentenced to confinement for “one-half the midpoint of the standard sentence range or twelve months, whichever is greater” and serve the remaining half of the sentence under community custody while participating in substance abuse treatment. RCW 9.94A.662(1)(a)-(b). Participants of the program must also follow crime-related prohibitions and submit to urinalysis or other monitoring. RCW 9.94A.662(c)-(d). When an offender fails to complete the substance abuse program or is administratively terminated from it, the offender must be “reclassified to

serve the unexpired term of his or her sentence as ordered by the sentencing court.” RCW 9.94A.662(3).

However, those offenders already obligated to serve other terms of community custody are statutorily required to complete their community custody before serving any additional community custody sentences. *See* RCW 9.94A.589(2)(a) & (2)(b); *also State v. Hughes*, 70 Wn. App. 142, 852 P.2d 1097 (1993).

RCW 9.94A.589(2)(a) states that when a person currently under sentence for a felony conviction commits another felony and is sentenced to another term of confinement, the latter sentence shall not begin until the expiration of all prior terms. In regard to community custody, specifically,

[w]henever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision *the court may require* that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

RCW 9.94A.589(2)(b) (emphasis added). In general, community custody terms are tolled when an offender absents himself from supervision without prior approval or if the offender is placed in confinement for any reason. RCW 9.94A.171.

The defendant in *State v. Hughes, infra*, was obligated to serve sentences for two consecutive terms of community supervision when she

admitted to four drug use violations and failures to report. 70 Wn. App. 142, 143-145, 852 P.2d 1097 (1993). Because the acts of noncompliance occurred while she was serving under the first community custody sentence, Division III found the violations did not apply to the second consecutive portion of community custody. *Id.* at 145. The court explained in detail as follows:

Here, the underlying sentences were consecutive rather than concurrent. Because her sentences were consecutive, [the defendant's] acts of noncompliance did not violate the conditions of both. Her violations applied only to the community supervision conditions of her 1989 sentence, *which she had not yet completed*. Although the terms of confinement on the consecutive sentences had to be served before other sentence conditions were performed, RCW 9.94A.400(5) [recodified as RCW 9.94A.589], the community supervision provisions of [the defendant's] sentences remained consecutive following her release from jail. The conditions of the February 1990 sentence do not become operational until the supervision period of the November 1989 sentence has expired.

Id. at 145 (emphasis added).

Mr. Saunders' situation closely resembles *Hughes*. Mr. Saunders did not complete the first term of community custody he was ordered to serve prior to the imposition of the prison-based DOSA.

Additional Evidence per Commissioner Ruling 10/9/2018; trial court judgment and sentence Walla Walla Superior Court No. 14-1-00049-6, p. 7; CP 37-47, 188-198. Because the statute requires terms of community custody to be served consecutively, Mr. Saunders was still serving the

original community custody sentence under Cause Number 14-1-00049-6 when he was released from prison for the confinement period of his prison-based DOSA. *Id.*; RCW 9.94A.589(2)(b); *see Hughes*, 70 Wn. App. 142. He was not legally serving his community custody sentence on the prison-based DOSA due to the requirement that community custody terms be consecutive. *Id.*

Also, despite the option to do so, the sentencing court did not order the terms and conditions of community custody be served concurrently. CP 37-47, 188-198; RCW 9.94A.589(2)(b). Thus, when Mr. Saunders violated the terms of his community custody, he actually only violated the conditions of community custody under Cause Number 14-1-00049-6, and did not violate the conditions of community custody under his prison-based DOSA, Cause Numbers 14-1-00168-9 and 14-1-001832. Additional Evidence per Commissioner Ruling 10/9/2018; trial court judgment and sentence Walla Walla Superior Court No. 14-1-00049-6, p. 7; CP 37-47, 188-198. Because the statute requires he complete the terms of community custody consecutively unless a court orders otherwise, the sentencing court erred when it revoked Mr. Saunders' prison-based DOSA. RP 49, vol. I; CP 101-102, 251-252. The sentencing court erred because it revoked the prison-based DOSA when the second portion of the

community custody sentence was not legally in effect at the time of revocation.

Pursuant to RCW 9.94A.589 and *Hughes*, Mr. Saunders did not violate the conditions of his community custody under the prison-based DOSA. The sentencing court erred when it revoked Mr. Saunders' prison-based DOSA under the wrong cause numbers.

Mr. Saunders respectfully requests this Court find the sentencing court erred by revoking his prison-based DOSA and remand the case for resentencing.

Issue 2: Whether the sentencing court erred by imposing discretionary costs of sheriff's fees and costs of extradition when the court made no inquiry into Mr. Saunders' ability to pay and he is indigent.

The sentencing court imposed costs of extradition in the amount of \$2,071.67 under Walla Walla County Cause Number 14-1-00183-2, and the costs of sheriff fees of \$164.10 under both Walla Walla County Cause Numbers 14-1-00183-2 and 14-1-00168-9. Despite boilerplate language to the contrary, the sentencing court did not inquire as to Mr. Saunders' ability to pay, and later on found Mr. Saunders indigent. RP 51, vol. I; CP 106, 153, 256, 306. Mr. Saunders requests this Court remand this case to the trial court to strike the discretionary sheriff's fees under Cause Numbers 14-1-00168-9 and 14-1-00183-2, and the discretionary extradition costs under Cause Number 14-1-00183-2. CP 106, 256-257.

“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.”

State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015).

“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). 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. “[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, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

Under current and former RCW 10.01.160, and case law, it appears sheriff’s fees and extradition costs are not mandatory costs. RCW 10.01.160(2); *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016) (noting

in dicta sheriff's fees are discretionary); *State v. Cawyer*, 182 Wn. App. 610, 623, 330 P.3d 219 (2014) (recognizing extradition costs fall under RCW 10.01.160's clause of "expenses specially incurred by the state in prosecuting the defendant"); *see also State v. Tutu*, 192 Wn. App. 1023 (2016) (unpublished)³ (dicta recognizing list of discretionary fees in the same statutory section as those "expenses specially incurred by the state" under RCW 10.01.160). RCW 10.01.160(1) also states the court "may" require a defendant to pay costs. "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

The court did not consider Mr. Saunders' financial position and his ability to pay LFOs. RP 51, vol. I. The court also entered an order of indigency granting Mr. Saunders the right to review at public expense. CP 153, 306. The court erred by imposing extradition costs and sheriff's fees when under RCW 10.01.160(3) a defendant shall not be ordered to pay discretionary costs if a defendant will be unable to pay them (i.e., is indigent). The extradition costs and sheriff's fees were discretionary costs and they should be stricken from Mr. Saunders' judgment and sentence.

³ GR 14.1(a) allows citation to unpublished nonbinding authorities filed after March 1, 2013.

Issue 3: Whether this Court should deny costs against Mr. Saunders on appeal in the event the State is the substantially prevailing party.

Mr. Saunders 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 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Saunders indigent was entered by the trial court, and there has been no known improvement to this indigent status. CP 153, 306. To the contrary, Mr. Saunders' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Saunders remains indigent. The report as to continued indigency shows he owes over \$14,000 in debt, owns no property, and has no source of income.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*, 182 Wn.2d at 835. In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or

future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.*

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). 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, the trial court entered an order of indigency, and Mr. Saunders' Report as to Continued Indigency demonstrates a continued inability to pay costs. CP 153, 306.

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. Mr. Saunders met this standard for indigency. CP 153, 306.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 1-2. “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.

Mr. Saunders’ report as to continued indigency, on file with this Court, shows Mr. Saunders remains indigent.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, 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 Mr. Saunders' current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, there is a completed report as to continued indigency showing that Mr. Saunders remains indigent. Appellate costs should not be imposed in this case.

F. CONCLUSION

Mr. Saunders requests his prison-based DOSA be reinstated. The trial court erred by revoking Mr. Saunders' prison-based DOSA while he was serving community custody under a different judgment and sentence.

Mr. Saunders requests this Court remand the case to strike the discretionary costs of extradition and sheriff's fees. Mr. Saunders also requests this Court deny any of the State's requests for appellate costs.

Respectfully submitted this 11th day of October, 2018.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA Nos. 35830-5-III,
vs.) 35831-3 III
)
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Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 11, 2018, 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:

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Having obtained prior permission from the Respondent, I also served the same at tchen@co.franklin.wa.us using Division III's e-service feature.

Dated this 11th day of October, 2018.

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October 11, 2018 - 10:58 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35830-5
Appellate Court Case Title: State of Washington v. Jon Paul Saunders
Superior Court Case Number: 14-1-00168-9

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