

FILED
Court of Appeals
Division III
State of Washington
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No. 36146-2-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JOSEPHINE L. GUERNSEY, Appellant.

BRIEF OF RESPONDENT

CURT L. LIEDKIE
Asotin County Chief Deputy
Prosecuting Attorney
WSBA #30371

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I. SUMMARY OF ISSUES

1. DID THE COURT ERR IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS?

II. SUMMARY OF ARGUMENT

1. THE COURT DID NOT ERR IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

III. STATEMENT OF THE CASE

On October 19, 2017, the Appellant, Josephine Guernsey, was charged with one count of Possession of a Controlled Substance (Methamphetamine) and court appointed counsel was assigned. Clerk's Papers (hereinafter CP) 6, 60, and Appendix A, *attached' hereto*.

After unsuccessfully seeking suppression of physical evidence, the Appellant was convicted upon stipulated facts at bench trial of on June 4, 2018. CP 7-18, 19-21, 22-25. Following trial, the Appellant was sentenced that same date and the and the sentencing court inquired of her employment status and other issues concerning her ability to pay legal financial obligations. Report of Proceedings (hereinafter RP) 28-29. At sentencing, the State recommended a midrange sentence of three months. RP 27. The Appellant informed the court that she had obtained employment as flagger (traffic control) and was working fifty plus hours per week. RP 28. The Appellant told the court that her life was different from when she was arrested and that she was working now and had been clean from methamphetamine for some time. RP 28-29. Through counsel, the Appellant asked for a sentence of thirty (30) days incarceration with

¹Apparently because the affidavit of indigence and the finding of indigence is not "filed" in the court file, the Superior Court Clerk is not able to designate this document to the Court of Appeals. A copy is therefore attached as an appendix hereto.

those days converted days to 240 hours of community service. RP 28. Based upon her representations, the sentencing court rejected the State's recommendation for jail time and imposed a sentence as requested by the Appellant. RP 30-31. The court also imposed, without objection from the Appellant, legal financial obligations, including a filing fee of two-hundred dollars (\$200.00), sheriff's service fees (costs) of one-hundred sixty-five dollars (\$165.00), a court appointed attorney fee of seven-hundred fifty dollars (\$750.00). CP 30. The sentencing court also imposed, again without objection, a VUCSA fine of one thousand dollars (\$1,000.00) pursuant to RCW 69.50.430.

Three days after sentencing, a new law went into effect which precludes a sentencing court from imposing a filing fee or costs pursuant to RCW 10.01.160, against a defendant who has been found to be indigent. See LAWS OF 2018, ch. 269 (hereinafter HB 1783).

The Appellant has filed this appeal, claiming that the court erred in imposing these costs and filing fee and requests remand for removal these assessments. Additionally, and without assigning error to the imposition of the VUCSA fine, the Appellant seeks remand for resentencing to require the sentencing court to reconsider whether to impose the fine.

IV. DISCUSSION

The Appellant does not argue that the sentencing court erred in imposing the discretionary costs and filing fee. The Appellant does not assign error to the sufficiency of the court's inquiry into her ability to pay these costs. The only error assigned by the Appellant relates to and assumes applicability of HB 1783 to her case. Because the court's inquiry was sufficient, and more importantly, because the Appellant fails to assign error thereto, the subsequent change in the law and Supreme Court decision in State v. Ramirez,² are inapplicable.

The second "assignment of error" is not really an assignment of error and is instead a request for relief. Just as the Appellant does not assign error to the sentencing court's inquiry into her ability to pay, the Appellant fails to assign error to the court's decision to impose the VUCSA fine. The trial court did not commit error in imposing the mandatory VUCSA fine. This Court should decline to grant the Appellant a "do over" for reconsideration of the VUCSA fine at a new sentencing where there is no claim of error nor did the Appellant object to imposition thereof. See RAPs 2.5, 10.3(g).

Finally, even if the Appellant is entitled to relief under Ramirez, based upon the analysis below, the proper remedy here is remand for entry of an order striking the Filing Fee, Court Appointed Attorney

²191 Wn.2d 732, 426 P.3d 714 (2018)

Fee, and Sheriff's Service Fees. The remedy should not be a new sentencing hearing. The Appellant's remedy, as it relates to the VUCSA fine, is to file a motion for remission pursuant to RCW 10.01.160(4).

1. THE COURT DID NOT ERR IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The Appellant first claims that the Filing Fee, Court Appointed Attorney Fee, and Sheriff's Service Fees should be stricken. The Appellant bases her argument on a change in the law and the subsequent Ramirez decision. After the court sentenced the Appellant, a new law went into effect that precludes imposition of discretionary costs against a defendant who has been found to be indigent. See HB 1783. This bill also precludes assessing the filing fee under RCW 36.18.020(h). Because this law was not in effect at the time the court below imposed sentence herein, the court committed no error.

The Appellant relies on the Washington Supreme Court's decision in State v. Ramirez, *supra*, and without analysis, assumes that case applies to her case. However, the Supreme Court did not announce that the case applied retroactively. Ramirez held that the law applied prospectively to Mr. Ramirez's case. *Id.* at 749. Careful review of the Court's decision reveals an important fact: the

defendant therein assigned error to the sufficiency of the court's inquiry into his ability to pay. *Id.* at 737. This was an important part of the Supreme Court's analysis, which began with consideration of whether or not the sentencing court sufficiently considered Mr. Ramirez's ability to pay. *Id.* 718-21. Having determined that the sentencing court's inquiry was inadequate, the Supreme Court then determined whether the amendments under HB 1783 would apply prospectively to Mr. Ramirez upon remand. *Id.* 747-50. In conclusion, the Court stated:

We reverse the Court of Appeals and hold that the trial court failed to conduct an adequate Blazina inquiry into Ramirez's current and future ability to pay. Although this Blazina error would normally entitle Ramirez to a resentencing hearing on his ability to pay, resentencing is unnecessary in this case. House Bill 1783, which prohibits the imposition of discretionary LFOs on an indigent defendant, applies on appeal to invalidate Ramirez's discretionary LFOs (and the \$200 criminal filing fee). We remand for the trial court to strike the \$2,100 discretionary LFOs and the \$200 filing fee from Ramirez's judgment and sentence.

Ramirez, at 750. (*Citing to State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)). What the Court recognized is that, on remand, the sentencing court would be bound to apply, prospectively, HB 1783, and would therefore be precluded from imposing the filing fee or any other discretionary costs. Stated in the negative, had the Court first determined that the sentencing court's inquiry into Mr. Ramirez's ability to pay been sufficient, HB 1783 would have had no effect on

the proceedings and the Court would have affirmed the sentencing court. Otherwise, the Court would not have spent several pages discussing the adequacy of the sentencing court's determination and would have, like the Appellant herein, skipped straight to the applicability of HB 1783, and would instead have ruled that it applied ***retroactively*** to cases not yet final on appeal.

Here, the other than passing and conclusory assertion³ of inadequacy, the Appellant neither assigns error to the sentencing court's consideration of her ability to pay, nor does she brief the issue. See Holland v. City of Tacoma, 90 Wn.App. 533, 538, 954 P.2d 290 (Div. II, 1998)(*"Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."*).

Assuming, *arguendo*, that this Court will address this unreserved, unassigned, and unbriefed claim of error, the remedy requested is unavailable under the very authority cited by the Appellant. The Appellant seeks remand for resentencing and asks that this Court instruct the sentencing court to reconsider the VUCSA fine. However, under Ramirez, resentencing is unnecessary. Ramirez, at 750. The proper remedy, assuming any relief is warranted, is "remand for the trial court to strike the discretionary

³The only assertion by the Appellant appears in her discussion of the VUCSA fine. As discussed below, there is no requirement that the court consider ability to pay when imposing a fine.

LFOs and the \$200 filing fee from Ramirez's judgment and sentence.”
Id. Here, the discretionary costs imposed are the two-hundred dollar (\$200.00) filing fee, the one-hundred sixty-five dollar (\$165.00) sheriff's service fee, and the seven-hundred fifty dollars (\$750.00). This does not require a new sentencing hearing. Entry of an order striking these costs is sufficient.

With regard to the VUCSA fine, the Appellant did not assign error to the imposition thereof, nor does she claim that the Court erred in imposing the same. Further, the Appellant hinges her claim on a misrepresentation or misconstruction of the record. The Appellant claims that the court only became aware of her financial situation after she was sentenced when she sought to pursue her appeal at public expense. See Brief of Appellant, p. 6. This is simply not true. Court appointed counsel was provided at the outset of the case. CP 6, Appendix A. She then represented to the Court, some eight months later, that she was more than gainfully employed. Subsequently, she petitioned for finding of indigency for the purpose of prosecuting her appeal. The Appellant shined herself up in order to convince the Court not to impose jail time, claiming incarceration would jeopardize her employment. She did not object to the imposition of the VUCSA fine, or any other fines, fees, or assessments. In fact, in support of her request for community service in lieu of jail time, she emphasized

her current employment status and concern that she might lose her job if she were required to go to jail. She should not be entitled to a new hearing to reconsider an issue that she failed to preserve through proper objection nor properly assign as error in this appeal.

Reaching the substantive issue, the Appellant's claim fails. The court was under no requirement to consider her ability to pay before imposing the mandatory fine. Imposition of a fine under RCW 69.50.430 only requires the court to consider ability to pay if waiver is sought. See RCW 69.50.430(2). Fines are discretionary and the court need not consider a defendant's ability to pay without regard to ability to pay. See State v. Clark, 191 Wn. App. 369, 375-76, 362 P.3d 309 (Div. III, 2015). The VUCSA fine is mandatory and "cannot be waived unless the court makes a finding of indigency." State v. Cowin, 116 Wn. App. 752, 760, 67 P.3d 1108 (Div. II, 2003). This finding is a condition precedent to deferral or suspension but does not necessarily result in deferral or suspension. The Appellant appears to argue that, because she was subsequently determined to be indigent, that the court necessarily will waive the fine. This is incorrect and wholly speculative. The court may only waive the fine *IF* the court finds the Appellant indigent. See RCW 69.50.430; see also Bale v. Allison, 173 Wn. App. 435, 450, 294 P.3d 789 (Div. I, 2013)(*use of the term "may" is permissive, not mandatory*).

Here, the Appellant did not raise the issue of her continued indigence, nor did she seek suspension or deferral of the VUCSA fine. The Appellant cannot claim that the court abused its discretion where she failed to ask the court to do so. See State v. Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002)(*noting that failure to identify a factual dispute for the court's resolution and to request an exercise of the court's discretion waives one's challenge to his offender score*). The sentencing court committed no error in assessing the VUCSA fine and the Appellant should not be permitted to reargue the issue, simply because there are grounds for striking other assessments not applicable to the VUCSA fine.

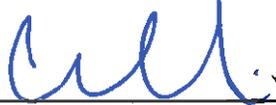
V. CONCLUSION

The Appellant fails to assign error to the sentencing court's inquiry into and consideration of the Appellant financial ability to pay. The trial court otherwise properly applied the law in effect at the time of sentencing and imposed the filing fee and costs as indicated. Assuming the Court determines that Ramirez does apply and the discretionary costs and filing fee should be stricken, remand for entry of an order striking those assessments is the proper and sufficient remedy. The State respectfully requests that the Court enter a decision affirming the Judgement and Sentence in full, or

alternatively, remands for entry of an order striking the Sheriff's Service Fees, Court Appointed Attorney Fees, and the Filing Fee.

Dated this 15th day of February, 2019.

Respectfully submitted,



CURT L. LIEDKIE, WSBA #30371
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
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(509) 243-2061

APPENDIX A

11.10.2017

CERTIFIED

17-1-00169-02

SAMPLE INDIGENCY SCREENING FORM

CONFIDENTIAL

[Per RCW 10.101.020(3)]

Name Josephine Louise Guernsey
 Address 2241 First Avenue North
 City Lewiston State MD Zip 21155

1. Place an "x" next to any of the following types of assistance you receive:

- Welfare
- Food Stamps
- SSI
- Medicaid
- Pregnant Women Assistance Benefits
- Other - Please Describe _____
- Poverty Related Veterans' Benefits
- Temporary Assistance for Needy Families
- Refugee Settlement Benefits
- Aged, Blind or Disabled Assistance Program

Recipients of public assistance are presumed indigent, but may be found able to contribute to the costs of their defense under RCW 10.101.010. *State v. Hecht*, 173 Wash. 2d 92 (2011).

2. Do you work or have a job? ___ yes no. If so, take-home pay: \$ _____
 Occupation: _____ Employer's name & phone #: _____
3. Do you have a spouse or state registered domestic partner who lives with you? ___ yes no
 Does she/he work? ___ yes ___ no If so, take-home pay: \$ _____
 Employer's name: _____
4. Do you and/or your spouse or state registered domestic partner receive unemployment, Social Security, a pension, or workers' compensation? ___ yes no
 If so, which one? _____ Amount: \$ _____
5. Do you receive money from any other source? ___ yes no If so, how much? \$ _____
6. Do you have children residing with you? yes ___ no. If so, how many? 23
7. Including yourself, how many people in your household do you support? 6
8. Do you own a home? ___ yes no. If so, value: \$ _____ Amount owed: \$ _____

9. Do you own a vehicle(s)? yes no. If so, year(s) and model(s) of your vehicle(s): _____ Amount owed: \$ _____
10. How much money do you have in checking/saving account(s)? \$ _____
11. How much money do you have in stocks, bonds, or other investments? \$ _____
12. How much are your routine living expenses (rent, food, utilities, transportation) \$ 280-300
13. Other than routine living expenses such as rent, utilities, food, etc., do you have other expenses such as child support payments, court-ordered fines or medical bills, etc.? If so, describe: Court ordered Child Support Payments - Court ordered Restitution to pay
14. Do you have money available to hire a private attorney? yes no
15. **Please read and sign the following:**

I understand the court may require verification of the information provided above. I agree to immediately report any change in my financial status to the court.

I certify under penalty of perjury under Washington State law that the above is true and correct. (Perjury is a criminal offense-see Chapter 9A.72 RCW)

Dee Brunsey 10-19-2017
 Signature Date
Clarkston Wash
 City State

FOR COURT USE ONLY - DETERMINATION OF INDIGENCY

Eligible for a public defender at no expense

Eligible for a public defender but must contribute \$ _____

Re-screen in future regarding change of income (e.g. defendant works seasonally)

Not eligible for a public defender

[Signature]
 JUDGE

COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Respondent,

v.

JOSEPHINE L. GUERNSEY,

Appellant.

Court of Appeals No: 36146-2-III

DECLARATION OF SERVICE

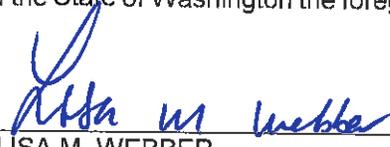
DECLARATION

On February 15, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

David B. Koch
sloanej@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on February 15, 2019.



LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTOR'S OFFICE

February 15, 2019 - 12:25 PM

Transmittal Information

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