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Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36367-8-III

STATE OF WASHINGTON, Respondent,

v.

SCOTT THOMAS PESONEN, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Following a bench trial, the trial court convicted Scott Pesonen of first degree burglary with a deadly weapon enhancement and imposed a criminal filing fee of two hundred dollars. Due to Pesonen's indigency, the criminal filing fee should be stricken.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), and RCW 36.18.020(2)(h), the trial court erred in imposing a \$200 criminal filing fee without inquiring into Pesonen's ability to pay it.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the trial court's inquiry into Pesonen's ability to pay discretionary legal financial obligations was adequate under *Ramirez*.

ISSUE NO. 2: Whether the record sufficiently establishes Pesonen's indigency such that the criminal filing fee should be stricken.

IV. STATEMENT OF THE CASE

The facts leading to Scott Pesonen's conviction are not relevant to the alleged error on appeal. Briefly, the State charged Pesonen with breaking into the home of Wade Morrow, assaulting him with a shovel,

and taking Morrow's property when he left. CP 1, 222-28. He waived a jury and was tried to the bench on charges of first degree robbery, first degree assault, and first degree burglary. CP 120, RP (Hicks vol. I)¹ 7-10. The trial court acquitted Pesonen of robbery and assault but convicted him of first degree burglary and found he had used a deadly weapon in committing the crime. CP 189-90, 228-31. Pesonen had no prior felony history² and received a standard range prison sentence of 39 months. CP 191-94.

Pesonen was represented by a public defender throughout the trial process. CP 6. The trial court previously found him to be indigent due to his lack of income in May 2018 when he pursued an interlocutory appeal. CP 115-16. At sentencing, the trial court did not engage in any inquiry into Pesonen's ability to pay discretionary legal financial obligations, stating only:

THE COURT: With regards to the \$200 and a filing fee, at this point in time I am going to be ordering that you pay that filing fee. The -- I suppose the caveat that I will put on

¹ The Verbatim Reports of Proceeding consist of 7 volumes, non-consecutively paginated, reported by 6 different court reporters. For clarity, this brief will reference the verbatim reports by identifying the preparing court reporter, as "RP ([Court Reporter] [Volume, if applicable]) __ (page)."

² Pesonen was not eligible for a sentence under the first time offender waiver statute because his first degree burglary conviction was for a class A felony, which constitutes a disqualifying violent offense. *See* RCW 9.94A.650(1)(a) (excluding violent offenses); RCW 9.94A.030(55)(a)(i) (defining "violent offense" as any class A felony); RCW 9A.52.020(2) (classifying first degree burglary as a class A felony).

that is if, in fact, you are not able to support yourself upon release, then you can come back to the court at a legal financial obligation hearing to establish any indigency that you may have.

THE DEFENDANT: Okay.

THE COURT: Based upon what I heard at trial, I cannot waive that because you were employed at the time this occurred and it appears to this Court you potentially could be employed, especially based upon the letter that I received from your employer, which is actually low end recommendation for you. So I can't make a finding of indigency at this point in time and I will impose the \$200.

RP 360; CP 197 (imposing \$200 criminal filing fee). The same day, the court found Pesonen indigent for appeal based upon his lack of income, employment, and other assets. CP 185-88.

Pesonen now appeals. CP 204.

V. ARGUMENT

Trial courts may not impose discretionary legal financial obligations unless a defendant has the likely present or future ability to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). To make this determination, the trial court must make an individualized inquiry into a defendant's ability to pay discretionary LFOs before imposing them, and the inquiry must, at a minimum, consider the effects of incarceration and other debts, as well as whether the defendant

meets the GR 34 standard for indigency. *Blazina*, 182 Wn.2d at 838-39; *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018).

Under recently-enacted House Bill 1783, trial courts may not impose the \$200 criminal filing fee on defendants who are indigent under RCW 10.101.010(3)(a)-(c). *Ramirez*, 191 Wn.2d at 747; RCW 36.18.020(2)(h). House Bill 1783 became effective on June 7, 2018, before Pesonen was sentenced. Laws of 2008, ch. 269.

Here, the trial court did not engage in the inquiry required under *Ramirez* and *Blazina* before imposing the criminal filing fee. Moreover, the trial court's oral comments at sentencing reflect a misapprehension of the requirements to impose the criminal filing fee. Under the revised RCW 36.18.020(2)(h), the criminal filing fee may not be imposed on an indigent defendant, and under RCW 10.101.010(3)(c), a defendant is indigent if, at any stage in a court proceeding, he receives annual income that is less than 125% of the federal poverty level. Thus, contrary to the trial court's comments, present indigency as defined under RCW 10.101.010(3)(c) precludes the imposition of the criminal filing fee.

In this case, Pesonen had been appointed a public defender at the inception of his case and was found to be indigent due to his lack of income both contemporaneously at sentencing and during an early

interlocutory appeal. CP 6, 115-16, 185-88. His lack of income renders him indigent under RCW 10.101.010(3)(c). Accordingly, RCW 36.18.020(2)(h) does not authorize the criminal filing fee imposed here.

Because the record adequately establishes Pesonen's indigence under the applicable statutes, no remand is required. The \$200 criminal filing fee should be stricken from Pesonen's judgment and sentence.

VI. CONCLUSION

For the foregoing reasons, Pesonen respectfully requests that the Court STRIKE the \$200 criminal filing fee from his judgment and sentence.

RESPECTFULLY SUBMITTED this 29 day of April, 2019.

TWO ARROWS, PLLC



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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

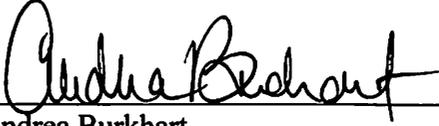
Scott T. Pesonen, DOC #411252
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

And, pursuant to prior agreement of the parties, by e-mail to:

Brian C. O'Brien
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

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

Signed and sworn this 29 day of April, 2019 in Kennewick,
Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

April 29, 2019 - 9:06 AM

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