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Court of Appeals
Division III
State of Washington
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NO. 36631-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD YALLUP, JR.,

Appellant.

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

The Honorable Michael G. McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a \$200 filing fee despite the appellant's indigence.
2. The trial court erred by imposing interest on *all* legal financial obligations (LFOs).

Issues Pertaining to Assignments of Error

1. In light of recent statutory amendments and the Supreme Court's decision in State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), should the \$200 criminal filing fee be stricken from the appellant's judgment and sentence?
2. The judgment and sentence contains a provision requiring the appellant to pay interest on all LFOs. Based on recent statutory amendments and the Ramirez decision, must the provision imposing interest be modified to reflect that no interest shall accrue on non-restitution LFOs as of June 7, 2018?

B. STATEMENT OF THE CASE

The State charged appellant Richard Yallup, Jr., with several crimes based on events occurring in 2013. CP 3-19. The charges included attempt

to elude a pursuing police vehicle (count 5).¹ CP 15 (second amended information).

Following a jury trial occurring in late 2015, Yallup was convicted of several charges. But he was acquitted of two second degree assault charges (counts 3 and 4)² and found guilty on a lesser charge on count 9. CP 72-73, 294-95, 308-09.

In January of 2016, the court sentenced Yallup to 546 months of confinement. CP 75-76. The court ordered that Yallup pay LFOs including a including the \$500 crime victim assessment,³ a \$100 DNA database fee,⁴ a \$200 criminal filing fee.⁵ CP 78. The also ordered that he pay the costs of incarceration,⁶ but “capped” the cost at \$1,000, and ordered that he pay

¹ RCW 46.61.024 (1).

² Counts 3 and 4 had alleged that Yallup assaulted two police officers, Locati and Chiprez, with a vehicle. CP 14-15.

³ RCW 7.68.035 authorizes crime victim penalty assessments. In relevant part, RCW 7.68.035(1)(a) provides: “The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor.”

⁴ RCW 43.43.7541

⁵ RCW 36.18.020

⁶ RCW 9.94A.760(3)

the costs of supervision on community custody. CP 77-78. The court also ordered that Yallup pay more than \$50,000 in restitution. CP 78.

Yallup, represented by appointed counsel, appealed.⁷ CP 81. This Court affirmed Yallup's convictions. CP 93, 102. But this Court determined that Yallup was entitled to remand to address certain sentencing issues as follows:

We . . . remand for a restitution hearing. However, that hearing is limited to the restitution related to the city of Sunnyside's losses because that was the only [hearing] request made by defense counsel; his challenge to the insurance company claims was a meritless legal argument. *The trial court has discretion, if it so desires, to broaden the scope of the hearing on remand. If there is a restitution hearing, the court can take up the matter of the defendant's ability to pay incarceration costs.*

CP 100 (emphasis added); see State v. Yallup, noted at 200 Wn. App. 1067, 2017 WL 4512567, at *3 (2017), review denied, 190 Wn.2d 1005 (2018).

The remand hearing ordered by this Court was held on February 15, 2019. RP 3. The State submitted documentation in support of its restitution claims. CP 186-258. At the hearing, Yallup, who was represented by appointed counsel, argued that Sunnyside's claims for damage to two patrol cars were not warranted because Yallup was not convicted of assaulting the officers riding in the patrol cars. RP 11-12.

⁷ Yallup also filed a personal restraint petition pro se. This Court consolidated it with his direct appeal and ultimately dismissed it. CP 100-01.

Defense counsel appeared to misremember the fate of those charges. Rather than pretrial dismissal, Yallup was—as the trial court recognized—acquitted of the charges. RP 11-12.; CP 294-95. But the court found the State had submitted sufficient documentation for the damages; the court also found the damages were sufficiently connected to Yallup’s conviction for attempt to elude. RP 8-9. The court therefore did not alter the restitution amount. RP 10.

But, consistent with this Court’s remand order, the court announced it would waive all non-mandatory LFOs. RP 7. Specifically, the trial court indicated it was waiving the costs of supervision, the costs of incarceration, and the DNA fee. RP 10; see also 159-60 (Order on Remand).

But the court did not address the \$200 criminal filing fee, which it had previously imposed. CP 78.

The court also did not alter the judgment and sentence insofar as it required that Yallup pay interest on all LFOs. CP 78. Specifically, the judgment and sentence states

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

CP 78.

As the hearing concluded, Yallup attempted to address the court regarding several pleadings he had filed. But the court declined to address

Yallup's pleadings, stating that the matters were not properly before the court. RP 14-15.

Yallup again appealed. CP 161. Yallup, who had been found indigent several times, was again found indigent. CP 166, 168-69; see also CP 319-23 (indigency motion and order, prior appeal).

C. ARGUMENT

1. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE THE \$200 CRIMINAL FILING FEE.

Statutory amendments addressing LFOs prohibit the imposition of discretionary costs on indigent defendants. Here, despite stating its intent to waive all discretionary fees, the trial court maintained the \$200 filing fee. But, because Yallup was indigent, and his appeal of his judgment and sentence still pending, this filing fee should have been stricken as well.

Sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Last year, in Ramirez, the state Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783). That legislation became effective June 7, 2018, but also applies prospectively to cases pending on appeal. Ramirez, 191 Wn.2d at 739, 746-50.

HB 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 191 Wn.2d at 746 (citing LAWS OF 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

The statute defines an “indigent” person as one (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125 percent or less than the federally established poverty guidelines,⁸ or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

HB 1783 specifically “amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17.” Ramirez, 191 Wn.2d at 748. Thus, HB 1783 establishes that

⁸ The current federal poverty guideline is \$12,490. See U.S. Dep’t Of Health & Human Servs., Office Of The Asst. Sec’y For Planning & Evaluation, Poverty Guidelines (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited October 3, 2019).

the \$200 criminal filing fee should not be imposed if the defendant is indigent. Accordingly, the Ramirez court struck the fee due to indigency. Ramirez, 191 Wn.2d at 749-50.

Here, the trial court should have stricken the filing fee just as it did the other discretionary costs in this case. The record establishes Yallup's continuing indigency. The trial court found Yallup indigent and allowed this appeal at public expense. CP 166, 168-69. The record more broadly indicates that Yallup, who is serving a lengthy sentence, has minimal income and few assets. See CP 121-28, 145-47 (pro se indigency filings); CP 280-86 (additional pro se filings); see also CP 319-23 (indigency motion and order, prior appeal). Clearly, Yallup does not have an income at or above 125 percent of the federal poverty level. RCW 10.101.010(3). Thus, the fee should not have been imposed.

Yallup was originally sentenced in 2016, and his sentence amended in 2019, with the amended sentence retaining the filing fee. CP 78, 159-60. But Yallup is indigent and the new law applies to cases still pending on appeal. See Ramirez, 191 Wn.2d at 747-49; see also In re Personal Restraint of Skylstad, 160 Wn.2d 944, 949, 162 P.3d 413 (2007) (judgment was not final where, on second direct appeal, sentence was still being appealed). Thus, the \$200 filing fee must be stricken.

2. THE NOTATION IN THE JUDGMENT AND SENTENCE REGARDING INTEREST ON LEGAL FINANCIAL OBLIGATIONS IS LIKEWISE UNAUTHORIZED BY STATUTE.

The notation in the judgment and sentence regarding interest on LFOs is unauthorized by statute and must be modified to reflect current law.

The judgment and sentence states: “The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 78. This mandate does not comply with current law. The judgment and sentence must be amended to indicate that non-restitution legal financial obligations will not accrue interest from June 7, 2018.

The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that “restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution [LFOs].”

This statute was amended as part of HB 1783’s overhaul of the LFO system. Laws of 2018, ch. 269 § 1. Again, HB 1783 applies prospectively to cases currently pending on direct appeal. Ramirez, 191 Wn.2d at 747-49; Skylstad, 160 Wn.2d at 949. The judgment and sentence, then, must be modified to reflect that no interest shall accrue on non-restitution legal

financial obligations as of June 7, 2018 in accordance with RCW 10.82.090(1).

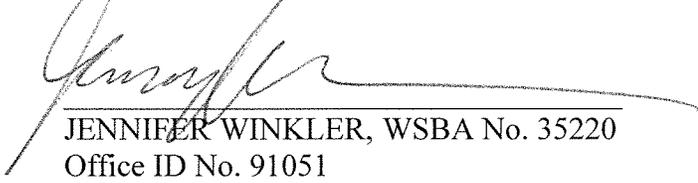
D. CONCLUSION

The \$200 filing fee should be stricken, and the provision imposing interest on LFOs modified to reflect that no interest shall accrue on non-restitution LFOs as of June 7, 2018.

DATED this 9th day of October, 2019.

Respectfully submitted,

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