No. 72419-3-I

King County #13-1-03205-0

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS HO,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
KING COUNTY

The Honorable Teresa Doyle, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF IN LIGHT OF RECENT CASELAW

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A. OVERVIEW

In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), our state's highest court issued a historic indictment of the current system of collections and imposition of trial legal financial obligations.

Recently, in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), this Court held that Blazina does not apply to the issue of whether costs on appeal should be imposed against an indigent appellant. The Court also noted that there is a presumption of indigency which continues through appeal and is not rebutted unless the state presents a trial court order finding a lack of indigency or new ability to pay. Further, the Court created a new pleading requirement for both appellants and respondents, for appellants to present argument and/or evidence in their initial briefing about whether appellate costs should later be imposed and also requiring the prosecution to similarly address the issue in its response in order to preserve the ability to later file a request for costs.

The prosecution has not filed a supplemental brief regarding costs, nor has it rebutted the presumption of indigence. This Court should therefore deny any future state's requests for costs.

Further, interpreting Sinclair to mandate that appellate costs will be presumptively awarded against an indigent appellant unless he object in advance runs afoul of not only State v. .Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), but also the mandates of Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). Finally, while Blazina may not directly apply to costs on appeal, in this case, this Court should decline to impose costs on appeal in light of that case, even if the Court's decision on the

merits ultimately allows the state the ability to argue that it is the "substantially prevailing party" on review.

B. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The prosecution has failed to request costs or rebut the presumption of indigence under Sinclair, supra, and thus no costs should be awarded, regardless if the decision on the merits later might allow an argument that the prosecution is the "substantially prevailing party" on review.

2. Interpreting Sinclair, supra,to apply a presumption that appellate costs will be imposed on an indigent who has exercised his constitutional right to appeal unless he objects is in direct conflict with the Supreme Court's decision against such a presumption in Nolan, supra, and further unconstitutional under Fuller, supra.

3. This Court should exercise its considerable discretion to decline to impose costs on appeal in light of Blazina, supra.

C. SUPPLEMENTAL ISSUES

1. Where the prosecution has not filed a supplemental brief of respondent to preserve the issue and has not presented any argument or evidence to rebut the presumption of indigence, should this Court deny any future request for costs from the state under Sinclair?

2. To the extent that Sinclair might be seen to create an additional briefing requirement which amounts to a presumption of imposition of costs on appeal against an indigent person who has exercised his constitutional right to appeal, does Sinclair run afoul of Nolan and the constitutional requirements of Fuller?

3. Although this Court held in Sinclair that Blazina did not apply because it did not interpret the appellate costs statute, should this Court exercise its considerable discretion to deny costs on appeal in the event the decision this Court ultimately issues is favorable enough to the prosecution that the state may have a claim it is the "substantially prevailing party" on review?

D. SUPPLEMENTAL ARGUMENT

THE PROSECUTION HAS NOT MET ITS BURDEN UNDER SINCLAIR AND APPLYING A PRESUMPTION OF COSTS UNDER SINCLAIR RUNS AFOUL OF NOLAN AND THE CONSTITUTIONAL MANDATES OF FULLER

In Sinclair, supra, this Court recently looked at the issue of costs on appeal and made several rulings directly applicable to Mr. Ho's pending appeal. Sinclair occurred when a defendant/appellant unsuccessfully appealed his conviction, after which the prosecution filed a request for costs. Sinclair, 192 Wn. App. at 385. The defendant objected. Id.

On reconsideration, the prosecution urged this Court to impose costs on appeal against an unsuccessful appellant in every criminal case, claiming that the statutory opportunity for a defendant to later bring a request to remit costs was sufficient to ensure that appellate costs were proper. 192 Wn. App. at. This Court disagreed. Instead, the Court stated its intent to comply with its duty to exercise its discretion on the issue of costs, rather than delegating it to be based later and solely on "ability to pay" at either a remission hearing or on remand to the trial court, as done in Division Two. 192 Wn. App. at 388-90.

This Court then crafted two new pleading requirements; 1) that an appellant must set forth "[f]actors that may be relevant to an exercise of discretion" to impose appellate costs in case there is a future request by the respondent for such costs to be imposed, and 2) the prosecution must also make arguments in its "brief of respondent" in order to "preserve the opportunity to submit a cost bill." 192 Wn. App. at. 390-91.

The Court also ruled on the merits of the request, noting that there

is a presumption of indigence which applies throughout the appeal under RAP 15.2(f), unless it is rebutted by the state. Sinclair, 192 Wn. App. at 391-92. It rejected the idea that imposition of costs on appeal was proper because of the defendant's prior solid work history and the lack of evidence that he might be "unable" to work in the future. Id.

Instead, the Court noted that, due to the length of the sentence, the appellant was likely to die in prison. 192 Wn. App. at 392-93. The Court also pointed out that Mr. Sinclair had been found indigent both at trial and on appeal, and there was "no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent)." Id. Because there was no trial court order that Sinclair's financial situation had improved or was likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s if he did not die in prison, the Court exercised its discretion to deny the state's request for appellate costs. Id.

In this case, to date, the prosecution has filed no supplemental brief of respondent. It has not filed a supplemental order or anything similar indicating an intent to even attempt to rebut the presumption of indigence. Nor is such a document likely to be entered, given that Mr. Ho was indigent for trial and appeal and is serving a sentence of more than 50 years in prison, thus likely to die before release. Under Sinclair, the prosecution has failed to preserve the later opportunity to submit a cost bill. This Court should so hold.

Further, the decision in Sinclair should not be interpreted to create a presumption that costs on appeal will be imposed against an indigent

appellant unless they meet a requirement of proving otherwise. This very question has been decided by our highest Court. In Nolan, supra, the prosecution argued that costs should be awarded virtually as an "automatic" process in every criminal case, even if the defendant is indigent and the appeal not wholly frivolous. 141 Wn.2d at 625-26. The Court rejected those claims, holding that imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Indeed, the Nolan Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs is technically entitled to them. Nolan, 141 Wn.2d at 628.

There is a second problem with interpreting Sinclair to provide that an appellant's failure to preemptively object to imposition of costs on appeal will result in automatic imposition of such costs. In order to fully understand this issue, it is important to look at the rights involved. There is no federal constitutional right to appeal a criminal conviction. See McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894). Our state constitution, however, guarantees such a right. State v. Blank, 131 Wn.2d 230, 244-46, 930 P.2d 1213 (1997).

As a result, anyone convicted of a crime in our state courts has a constitutional right to a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v. Giles, 148 Wn.2d 449, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

The state constitutional right to appeal is not, however, the only right involved. Where, as here, a state creates a right, federal due process and equal protection mandates apply to the that right and preclude the state from burdening it in particular ways. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). As a result, where the state has created a right to appeal, that appeal must be more than a "meaningless ritual," so that the indigent appellant in a criminal case must be given appointed counsel. See Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The due process clause of the Fourteenth Amendment guarantees a criminal appellant who is pursuing her first appeal of "right" in a state court certain minimum safeguards to make the appeal "adequate and effective," including the right to counsel. Id. Further, even though no federal right to appeal is involved, federal due process and equal protection mandates apply to the procedures used in deciding appeals and guarantee the right to effective assistance of appointed counsel for a state's first appeal as of right. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

Thus, state constitutional rulings are not the only arbiter of the constitutionality of a state practice in an appeal brought as a matter of state constitutional right.

This intertwining of federal and state constitutional principles is at issue here, where an impoverished person chooses to exercise a state constitutional right and is required to pay as a result. In general, it is unconstitutional to require someone to pay to exercise a constitutional right. See Fuller, supra. In Fuller, however, the U.S. Supreme Court

upheld a statute requiring an indigent defendant who received appointed counsel due to poverty to later repay that cost if he had become able. 417 U.S. at 45.

In reaching its conclusion, the Fuller Court relied on several crucial features of the statute in question. First, the statute did not make repayment mandatory. 417 U.S. at 45. Second, it required the appellate court to "take into account the defendant's financial resources and the burden that payment would impose." See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller). Third, the statute provided that no payment obligation could be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46. Fourth, under the statute, no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

Based upon these careful proscriptions on how the repayment obligation was imposed and enforced, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply "provided that a convicted person who later becomes able to pay . . .may be required to do so." 417 U.S. at 53-54. Because the legislation was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship," the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and upheld our state's own "recoupment" statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

(1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.

(3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Blank, 131 Wn.2d at 245; quoting, RCW 10.73.160. Blank was convinced that the remission procedure in subsection (4) of the statute would operate to ensure that the statute was consistent with the mandates of Fuller, as the Court was confident that trial courts would be following the analysis and requirements of Fuller in deciding those cases. Blank, 131 Wn.2d at 246.

In Blazina, the Supreme Court dealt with the related issue of imposition of trial costs on an indigent defendant if he is convicted of a crime. 182 Wn.2d at 832. The Court chronicled widespread "problems associated with LFO's imposed against indigent defendants," including

inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." Id.

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." Id. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford $25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 836-37. This increased involvement "inhibits reentry," the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other "reentry difficulties increase the chances of recidivism." Id.

Finally, the Blazina court pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. Id. The Court also

noted that certain counties seem to have higher LFO penalties than others. Id. The fact that the LFO system effectively ensured that people in poverty would be supervised by courts far longer than those who could pay off their LFOs right away - and the resulting social costs of that continuing contact - were also of grave concern. Id.

This Court is correct when it noted, in Sinclair, that Blazina examined a different statute, RCW 10.01.160(3), which provides, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them," and "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." But in fact, those same policy concerns also largely apply here. Under the statute, an award of costs on appeal becomes part of the judgment and sentence, so that it may be collected against by the state. RCW 10.73.160(3). The same 12 percent interest that the Supreme Court found untenable, the same ever-deepening hole of collection, the same problems of enforcement against an indigent, the same difficulty of the defendant to make any money let alone sufficient money to pay off the costs of appeal while in custody - in short, all but the concerns about the racial disparity in imposition of costs are clearly present in both situations.

Further, while the Court did not discuss this in Sinclair, even though the language of RCW 10.73.160(3) does not apply to costs on appeal, Fuller does. Under Fuller as noted in Blank, to be constitutional, a repayment requirement for exercising the constitutional right to appeal must be imposed only after the appellate court "take[s] into account the defendant's financial resources and the burden that payment would

impose." See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller). Further, any failure to pay must not result in a finding of contempt when the failure is due to poverty. In addition, no payment obligation could be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46.

Blazina noted that lower courts are, in fact, finding contempt for failure to pay when that failure is due to poverty, in some counties more than others. 182 Wn.2d at 132. Further, under Fuller, this Court cannot impose costs on appeal unless it considered the appellant's actual ability to pay, not simply based on a presumption that costs *will* be imposed.

Finally, there is no likelihood that Mr. Ho's indigency will end. He was found indigent by a court at trial and also for the purposes of appeal. He was also ordered to serve more than 50 years in custody. It is highly unlikely he will be released in his lifetime, and his prospects of earning a wage in custody are slim. He is not able to pay - and will not be, given his situation. Even if the prosecution had presented a supplemental respondent's brief, to award costs in this case would require turning a blind eye to Mr. Ho's indigency and the very real concerns raised in Blazina.

E. CONCLUSION

By failing to file a supplemental response, the prosecution has failed to preserve the opportunity to file a later request for imposition of costs on appeal against Mr. Ho, and this Court should so hold. Further, interpreting Sinclair to create a presumption of imposition of costs against indigent appellants runs afoul of Nolan and Fuller. Finally, Mr. Ho was ordered to serve more than 50 years in custody. It is highly unlikely he will be released in his lifetime. He was indigent for trial and found indigent for the purposes of appeal. And given his situation, imposing costs on appeal knowing that the result is he will be completely unable to pay while in custody and is unlikely to be able to work in the unlikely event he is released from custody in his lifetime would require turning a blind eye to the concerns raised in Blazina.

DATED this 6th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental Opening Brief to opposing counsel via this court's portal upload at king county prosecutor's office at paoappellateunitmail@kingcounty.gov, and first-class postage prepaid, to Mr. Douglas Ho, DOC 377746, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 6th day of June, 2016

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