

FILED  
June 17, 2016  
Court of Appeals  
Division I  
State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 72497-5-1
	)	
vs.	)	
	)	STATE'S RESPONSE TO
DOUGLAS HO,	)	APPELLANT'S
	)	SUPPLEMENTAL BRIEF
Appellant.	)	REGARDING POTENTIAL
	)	AWARD OF APPELLATE
	)	COSTS
	)	

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The State respectfully disagrees with this Court's approach to the awarding of costs on appeal as set forth in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). The State's petition for review of Sinclair is before the Supreme Court of Washington, which has scheduled its consideration *en banc* of the petition on June 30, 2016. See Washington Courts web page on Petitions for Review, May 31, 2016, at [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/index.cfm?fa=atc\\_supreme.currentPetitions](http://www.courts.wa.gov/appellate_trial_courts/supreme/index.cfm?fa=atc_supreme.currentPetitions).

As in most cases, Ho's ability to pay appellate costs was not litigated in the trial court because it was not relevant to determination of his culpability for the charged offenses. His ability to pay appellate costs was not addressed at his sentencing hearing because it was extremely unripe and largely, if not entirely, outside of the trial court's jurisdiction. As a result, the State did not have the right to obtain information about his financial circumstances as part of any sort of ordinary discovery processes, and sufficient information was not presented to the trial court and included in the record available to this Court. The only data presented to the trial court and to this Court has come in the form of unexamined self-reporting by Ho.<sup>1</sup>

Moreover, the declaration that Ho filed when he requested the appointment of appellate counsel addressed only his present financial situation and his ability to pay appellate costs up-front. It did not address his future ability to pay or his ability to pay over

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<sup>1</sup> In his supplemental brief, Ho assigns error to the State's failure to preliminarily submit a supplemental brief to "preserve" the issue of the awarding of appellate costs. Supplemental Brief of Appellant, at 2. However, as this Court noted in Sinclair, it is only appropriate for the Court of Appeals to consider the issue of appellate costs in a criminal case "when the issue is raised in an appellant's brief." Sinclair, 192 Wn. App. at 389-90. Ho did not present this issue in his original amended brief to this Court. Ho presents no authority for his seeming proposition that the State is obligated to address claims that an appellant could have presented, but did not.

time. The future ability to pay is also very relevant in determining whether the imposition of appellate financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 242, 930 P.3d 1213 (1997).<sup>2</sup>

Ho further asserts in his supplemental brief to this Court that imposition of recoupment for appellate costs amounts to an unconstitutional penalty on a defendant's exercise of his right to appeal his conviction. Supplemental Brief of Appellant, at 5-8, citing to Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). The Blank court had the benefit of the Supreme Court's 1974 decision in Fuller when it considered a challenge to the constitutionality of the state statute allowing for recoupment of appellate costs, and affirmed the statute's comportment with due process. See Blank, 131 Wn.2d at 239. The state supreme court has not overruled Blank, and this Court is bound to follow precedent as set forth by the state's highest court, even if this Court

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<sup>2</sup> The Blank court further observed:

[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay.

Blank, 131 Wn.2d at 242.

disagrees with it. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112.

The State has not submitted a cost bill in this yet-to-be-resolved appeal of Ho's convictions. The State respectfully maintains that Ho's request to this Court to decline an award of costs to the State as the substantially prevailing party is thus premature. Furthermore, should this Court elect to consider that request, it would be doing so on the basis of a record that the State was unable to develop at Ho's trial. Finally, Ho cannot demonstrate why this Court would be allowed to depart from binding precedent establishing the constitutionality of statutory law allowing for recoupment of appellate costs. For these reasons, the State respectfully asks this Court to reject Ho's supplemental claim as to the awarding of appellate costs.

Submitted this 17<sup>th</sup> day of June, 2016.

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kathryn Russell Selk, containing a copy of the Respondent's Supplemental Answer, in STATE V. DOUGLAS HO, Cause No. 72497-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

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Name

Done in Seattle, Washington

6/17/16

Date