NO. 47528-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEO FANNON,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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Assignment of Error

This court should not impose appellate costs on appeal.

Issues Pertaining to Assignment of Error

Should an appellate court impose costs on appeal if an indigent client has no present or future ability to pay those costs?

STATEMENT OF THE CASE

On April 15, 2015, the Cowlitz County Superior Court sentenced the defendant to 84 months in prison plus 24 months community custody following a trial in which a jury convicted him of five felony drug charges, including possession of methamphetamine with intent to deliver within a school zone. CP 74-75. The defendant had 15 prior felony convictions and a total offender score of 18 points. CP 92-93. At sentencing the trial court did not impose any discretionary legal financial obligations. CP 81.

The initial bail study prepared in this case revealed that the defendant was then 57-years-old, unemployed, had no income, did not own a car, did not own any real estate, and did not have any type of bank account or other assets. CP 2-3. Based upon this document the trial court found the defendant indigent and appointed an attorney to represent him. CP 102. Following imposition of sentence the defendant filed a notice of appeal. CP 102-105. The trial court then entered an order of indigency and ruled that the defendant was entitled to the appointment of an attorney on appeal as well as the preparation of the record necessary to prosecute his appeal at public expense. CP 102-105.

ARGUMENT

THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at both the trial and appellate level. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate

court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is

assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra*. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses

of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

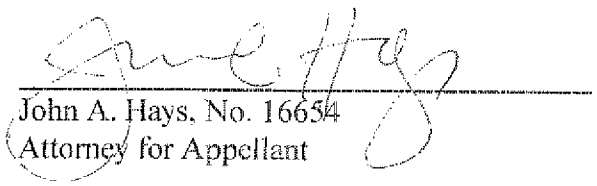
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. During sentencing, the trial court did not impose any discretionary legal financial obligations. The court also entered an order authorizing the defendant to appeal *in forma pauperis*, finding that he lacked sufficient funds to prosecute an appeal. This finding is supported by the record. The defendant is a 57-year-old drug addict with no assets whatsoever who has 84 months in prison to service. Given these factors, it is unrealistic to think the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail on appeal.

CONCLUSION

If the state prevails, this court should not impose costs on appeal.

DATED this 24th day of May, 2016.

Respectfully submitted,



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COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **LEO FANNON,** **Appellant.**	**NO. 47528-6-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 24th day of May, 2016, at Longview, WA.

Donna Baker

HAYS LAW OFFICE

May 24, 2016 - 11:15 AM

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Supplemental Brief of Appellant

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