

NO. 47693-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

PAUL A. GILMORE,

Appellant.

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SUPPLEMENTAL BRIEF OF APPELLANT

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## *ASSIGNMENT OF ERROR*

### *Assignment of Error*

1. The trial court erred when it imposed legal financial obligations upon an indigent defendant who does not now and in the future will not have the ability to pay.
2. This court should not impose costs on appeal.

### *Issues Pertaining to Assignment of Error*

1. Does a trial court err if it imposes discretionary legal financial obligations upon an indigent defendant who does not now and in the future will not have the ability to pay?
2. 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 June 5, 2015, the Kitsap County Superior Court sentenced the 32-year-old defendant to life in prison with a minimum mandatory time to serve of 198 months before first becoming eligible for conditional release on charges of first degree child molestation (DV), communication with a minor for immoral purposes, and four counts of viewing depictions of a minor engage in sexually explicit conduct. CP 219-230. It also sentenced him to community custody for life, as well as the following discretionary legal-financial obligations: (1) \$1,135.00 court appointed attorney's fees, (2) \$100.00 Kitsap County Exper Witness fee, (3) \$500.00 Kitsap County Special Assault Unit fee, \$100.00 fee under RCW 10.99.080. CP 225.

In fact, the court had previously found the defendant indigent and appointed an attorney to represent him. CP 8. The court later entered a new order finding that the defendant was an "indigent person wholly without funds necessary to prosecute an appeal." CP 248

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WHO DOES NOT NOW AND IN THE FUTURE WILL NOT HAVE THE ABILITY TO PAY

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be

able to pay;

4. The financial resources of the defendant must be taken into account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and

7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

*State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court imposed discretionary legal financial obligations in the form of court costs without any consideration of the defendant's ability to pay those obligations. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution,

Fourteenth Amendment. As a result, this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's ability to pay.

In this case the state may argue that this court should not address this issue because the defendant did not sufficiently preserve this statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including



restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

*State v. Blazina*, at 11-12.

In the case at bar the record reveals that the defendant has no present or future ability to pay any discretionary legal-financial obligations. He first has 198 months to serve before he can first be considered for conditional release. Once released he will be on community custody for life. He will also be a sex offender with little ability to find any meaningful employment. Thus, in this case the trial court erred when it imposed discretionary legal financial obligations. As a result, this court should reverse the imposition of all discretionary legal financial obligations.

## **II. 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. First, the trial court originally found the defendant indigent and assigned an attorney to represent him on appeal. Second, the trial court

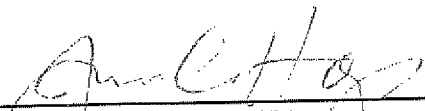
affirmed this ruling when it again found the defendant indigent, this time for purposes of appeal. Based upon this ruling the court assigned an attorney to represent the defendant on appeal. The court also ordered that the state pay the necessary costs of perfecting the record. These finding are supported by the record. The defendant is a 32-years-old sex offender facing a minimum of 16 years in prison before first being eligible for release. As a sex offender he will only have the capacity to find the most menial of employment. 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

This court should vacate the trial court's imposition of discretionary legal financial obligations and remand for consideration of the defendant's present and future ability to pay before considering assessment of those costs. In the alternative, if the state prevails on appeal this court should not impose costs on appeal.

DATED this 31st day of May, 2016.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**STATE OF WASHINGTON,**  
**Respondent,**

**NO. 47693-2-II**

**vs.**

**AFFIRMATION  
OF SERVICE**

**PAUL A. GILMORE,**  
**Appellant.**

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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 31st day of May, 2016, at Longview, WA.



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Donna Baker

## HAYS LAW OFFICE

**May 31, 2016 - 1:38 PM**

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