No. 47558-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

DOCIE E. BURCH, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 14-1-00554-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. STATE'S RESTATEMENT OF BURCH'S SUPPLEMENTAL ISSUE ON APPEAL

Burch cites the recent case of *State v. Sinclair*, No. 72102-0-I (Jan. 27, 2016) and challenges whether this Court should award appellate costs against her if the State is the substantially prevailing party on this appeal.

B. FACTS AND STATEMENT OF THE CASE

The underlying facts of this case are provided in the parties' original briefs. This supplemental brief, in answer to Burch's supplemental brief, addresses only the issue described above.

C. ARGUMENT

The State's position is that if the State is the substantially prevailing party in this appeal, this Court should award the appellante costs requested by the State, provided that the State properly files an accurate cost bill. RCW 10.73.160(4) directs that Burch should bring a motion for relief in the trial court if these costs impose an undue hardship upon her.

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RAP 14.1 and RCW 10.73.160(1) grant this Court authority to impose costs on appeal. RCW 10.73.160(4) then provides as follows:

> A defendant or juvenile offender 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, the defendant's immediate family, or the juvenile offender, 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.

Court of Appeals precedent establishes that "the recoupment statute provides that a defendant whose conviction has been affirmed may petition the sentencing court at any time for partial or complete remission of the obligation where payment will impose manifest hardship on the defendant or upon his or her immediate family...." *State v. Nolan,* 98 Wn. App. 75, 77, 988 P.2d 473, 475 (1999) *aff'd,* 141 Wn. 2d 620, 8 P.3d 300 (2000). Our state Supreme Court has clarified that appellate courts have discretion to award costs on appeal but are not required to do so. *State v. Nolan,* 141 Wn.2d 620, 628-29, 8 P.3d 300 (2000).

Burch asserts that she was indigent at the beginning of this case and that her indigent status is unlikely to change. Supp. Br. of Appellant at 4. But there are no facts about the instant case to indicate that Burch

suffers from any *dis*ability. While she may not have the current *means* to pay these costs – and while she might or might not lack the future *will* to obtain the means of paying these costs – irrespective of her will, there are no facts to indicate that she is unlikely in the future to have the *ability* to pay these costs.

Here, the anticipated costs associated with appeal are the costs of the transcript, copies of clerks' papers, and court appointed attorney fees. The anticipated costs are not so extraordinary or excessive so as to cause the balance to grow excessively with compound interest. And if compounding interest were to outpace Burch's ability to pay the costs, then RCW 10.82.090 provides a process for her to follow to obtain relief from the financial judgment in the trial court and allows the trial court to reduce or waive the accrued and accruing interest.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), held only 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.

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Id. at para. 22. But *Blazina* refers to the trial court, not appellate courts. *Blazina* does not overrule or invalidate the process established by RCW 10.01.160(4), 10.73.160 and 10.82.090; nor does *Blazina* hold that the terms "means" and "ability" mean the same thing.

Burch's right to have her conviction reviewed on appeal was protected and preserved by the practice of providing her with a transcript, a public attorney, and clerk's papers irrespective of costs. But with the right of appeal having been provided to her irrespective of guilt or innocence, a jury has found her guilty beyond a reasonable doubt, and the appellate costs will potentially become her burden only if her conviction is affirmed on appeal. RAP 14.2.

The Court of Appeals when rendering its decision in *State v. Sinclair*, No. 72102-0-I (Jan. 27, 2016), declared that "[t]he State merely needs to articulate the factors that influenced its own discretionary decision to request costs in the first place." *Id.* at para. 28. But while the legal decision to request costs on appeal may be discretionary to the State, as a matter of principle it is questionable just how generous the individual prosecutor should be with other people's money.

Here, the prosecutor's office is unlikely to recover more than a few dollars for itself ($2.00 per page for the prosecutor's brief). Most, or

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almost all, of the money recovered is to recoup the public defenders and the professionals who prepare the transcripts. The money to pay for these services, of course, comes from taxpayers. Presumably, those who have an income from which to pay taxes have made choices in life that have served to retain and enhance their abilities to earn an income. Presumably, they have made sacrifices, such as avoiding crime and giving up certain ideas in life in order to do what is necessary to prosper and to pay taxes.

To be indigent is to have no assets. But one can have no assests and yet still possess the ability to give up certain ideas, and to make sacrifices in regards to lifestyle choices, in order to prosper and to pay their own way in life. Indigency is not *per se* a disability. To label Burch as disabled merely because she is currently indigent and convicted of a crime is tantamount to fostering the abandonment of any hope rehabilitation or reform. Rather than burden her with an expectation of failure, she should be encouraged to believe in her own potential for success.

Still more, the problem for prosecutors is that where there is no indication that a defendant suffers from a permanent disability, a prosecutor does not have a *per se* moral right to make a gift of public funds in order to enable those who have the ability to pay, but who will

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not pay, to nevertheless avoid payment merely because they are indigent. In some ways it may be a dereliction of duty for a prosecutor to summarily gift the public's money without effort to preserve it. Where crime is committed against the peace and dignity of the State, the community at large, to include taxpayers, are to some extent victims of the crime. Requiring the victims to pay for the defendant's crimes is in some way tantamount to revictimizing the the victims.

The defendant who has been convicted beyond a reasonable doubt by a jury and whose conviction has been affirmed on appeal is not an innocent victim upon whom these costs have been arbitrarily imposed. Presumably, the defendant chose to commit the crime that led to conviction and chose to incur the costs to pursue the appeal.

The 12% interest rate is arguably oppressive and unjustified as a measure of economic risk for the lender, but we are bound by statute. And there is a statutory process for the defendant to follow to obtain relief in the event of an *undue* hardship. *See*, RCW 10.01.160(4), 10.73.160 and 10.82.090.

Here, there is no indication that Burch suffers from any *disability*. Granted, the trial court should have conducted a meaningful inquiry into her *ability* to pay before it imposed costs against her. *State v. Blazina,* 182

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Wn.2d 827, 344 P.3d 680 (2015). And because the trial court in this case did not conduct a meaningful inquiry, this court has no trial court record from which it can determine Burch's *ability* to pay appeal costs. But what is clear is that there is no indication that Burch suffers from any *disability*, and there is a statutory process that she can follow to obtain relief if the imposition of costs imposes an undue hardship upon her. RCW 10.01.160(4), 10.73.160 and 10.82.090.

Therefore, absent any indication that Burch suffers from an income-limiting disability, the State asks that this court impose appellate costs against Burch if the State is the substantially prevailing party on appeal.

Finally, the State contends that because did not preserve any objection to the imposition of costs by raising an objection in the trial court, this Court should decline to hear her challenge to costs for the first time on appeal. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

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D. CONCLUSION

The State asks that this court impose appellate costs against Burch if the State is the substantially prevailing party on appeal.

DATED: March 29, 2016.

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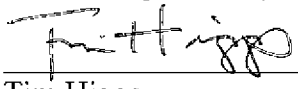

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March 29, 2016 - 4:38 PM

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