SUPREME COURT NO. 94327-3

NO. 47702-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRIS FORTH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine M. Stolz, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Chris Allen Forth, the appellant below, seeks review of the Court of Appeals decision in State v. Forth, No. 47702-5-II, 2017 WL 499453 (Feb. 7, 2017), following the denial of his motion for reconsideration on March 2, 2017.

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it refused to consider Forth's request for remission of appellate costs or to determine whether the appellate costs imposed a manifest hardship on Forth?

2. Does the imposition of thousands of dollars in appellate costs without any consideration of a defendant's ability to pay fail to rationally serve a legitimate state interest, thereby violating substantive due process?

C. STATEMENT OF THE CASE

On February 20, 2014, the Court of Appeals issued an opinion in to of Forth's previous consolidated appeals affirming Forth's bail jumping and first degree child molestation convictions, but remanded for the trial court "to recalculate the credit for time served that Forth is entitled to under RCW 9.94A.505(6)." CP 40.

The mandate issued in these appeals on January 9, 2015. CP 42-43. The mandate awarded costs and attorney fees solely to Pierce County in the amount of $5,600.72, listing Forth as the judgment debtor. CP 42.

The trial court on remand credited Forth's time served by 13 days per the parties' agreement. CP 51-52.

However, Forth wished to address the substantial amount of appellate costs imposed. Forth's attorney stated Forth was not entitled to counsel on the issue of appellate costs and the trial court thus permitted Forth to address the court directly. RP 3. Forth stated, "I have no income at this point and have no way of paying [appellate costs]; and according to State vs. Blazina, I cannot afford the financial obligations at this point." RP 4-5. The trial court responded, "Well, the Court of Appeals has sent it back for the imposition of costs as you did not prevail on that appeal; and the Court is going to impose costs." RP 5. The trial court then entered an order adding $5,600.72 in appellate costs to the judgment and sentence. CP 61-62.

Forth appealed. CP 53. Among other things, Forth argued that his request to the trial court was a proper and timely request for remission from appellate costs pursuant to RCW 10.73.160(4), and that the trial court erred in refusing to consider it as such. Br. of Appellant at 3-5. Specifically, Forth asserted that a defendant who has been sentenced to pay costs may petition for remission at any time and, when a defendant did so, the trial court was required to consider whether the payment of the amount due would impose manifest hardship on the defendant or the defendant's immediate family. Br. of Appellant at 4-5.

Forth also challenged appellate costs on constitutional grounds, contending that the imposition of appellate costs without an ability-to-pay determination served no rational state interest and therefore violated substantive due process. Br. of Appellant at 11-14.

The State agreed with Forth, conceding that the trial court should have considered Forth's ability to pay appellate costs. Br. of Resp't at 2.

Despite the parties' agreement, the Court of Appeals affirmed after more than one year had passed. The court's holding rested on two grounds. First, the court stated, "there must actually be a 'petition' and our record does not show Forth requested remission. RCW 10.73.160(4)." Appendix at 3. Second, the court stated, "the costs were not yet added to the judgment and sentence. [Forth], therefore, could not request remission of costs that were not yet included in his judgment and sentence." Appendix at 3. The court did not address Forth's substantive due process argument.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS' INTERPRETATION OF RCW 10.73.160(4), THE APPELLATE COST REMISSION STATUTE, DEFIES THE STATUTE'S PLAIN TEXT AND CONFLICTS WITH ANOTHER COURT OF APPEALS DECISION

The Court of Appeals concluded that Forth was not permitted to seek remission of his appellate costs before the trial court because (1) there was no petition in the record and (2) appellate costs had not yet been imposed.

Appendix 3-4. These conclusions contradict RCW 10.73.160(4)'s plain text and merit review.

"The imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations." State v. Duncan, 185 Wn.2d 430, 436, 374 P.3d 83 (2016). One of the requirements of a constitutional LFO system is a defendant's ability to petition the court for remission of costs. Fuller v. Oregon, 417 U.S. 40, 45, 94 S. Ct. 2116. 40 L. Ed. 2d 642 (1974); State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976). RCW 10.73.160(4) provides Washington's procedure for remitting appellate costs:

> 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.

This court recently acknowledged that this statute's trial court analogue, RCW 10.01.160(4), contains little case law. City of Richland v. Wakefield, 186 Wn.2d 596, 605, 380 P.3d 459 (2016). The same is true of RCW 10.73.160(4).

The Court of Appeals decision in this case is among the first to address, as a matter of statutory interpretation, what triggers the remission process. Because guidance on this question is a matter of public importance and because it pertains to a constitutionally mandated procedure, this case merits review under RAP 13.4(b)(3) and (4).

The Court of Appeals first determined Forth had not adequately invoked the remissions process because there was no petition in the record. Appendix at 3. But RCW 10.73.160(4) does not require a petition. Rather, the statute uses the word "petition" as a verb: "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 . . . for remission . . . ." RCW 10.73.160(4) (emphasis added). The statute does not define the verb petition; however, courts "may discern the plain meaning of nontechnical statutory terms from their dictionary definitions." State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). The verb "petition" means "to make a request to : ENTREAT." WEBSTER'S THIRD NEW INT'L DICTIONARY 1690 (1993).

Under this definition, Forth's statements to the trial court constituted petitioning for remission of the more than $5,600 imposed in appellate costs. Forth said he had no income and could not afford this substantial amount. RP 4-5. Forth's assertions were plainly a request that he not be required to

pay the appellate costs. This request qualifies as petitioning for remission within the meaning of RCW 10.73.160(4).

The Court of Appeals concluded otherwise based on a preference for form over substance. It is unclear from the Court of Appeals decision whether courts require an actual written petition for remission in the record or whether simply stating the word "petition" would suffice. This court should take the opportunity to make clear what is required, given that neither a written petition nor any particular utterance is required to trigger the remission process under the plain language of RCW 10.73.160(4).

The Court of Appeals' second reason for holding Forth had not adequately invoked the remissions process was that "the costs were not yet added to the judgment and sentence. He, therefore, could not request remission of costs that were not yet included in his judgment and sentence." Appendix at 3. This basis for concluding Forth was not entitled to remission has no support in RCW 10.73.160's text.

RCW 10.73.160(3) states precisely when and how appellate costs become part of the judgment and sentence, which the Court of Appeals did not acknowledge. "An award of costs shall become part of the trial court judgment and sentence." RCW 10.73.160(3). The legislature's language is clear: appellate costs become part of the judgment and sentence upon their award. This statute operates automatically and simply: when a court awards

appellate costs, RCW 10.73.160(3) makes them a required part of the judgment and sentence. The statute contains no requirement that the trial court add or impose the appellate costs in the judgment and sentence. Rather, upon award, the appellate costs become part of the judgment and sentence by operation of the statute—the trial court does not need to add them or do anything else, as the Court of Appeals erroneously indicated.[1]

At the time Forth made his remission request, appellate costs had already been awarded. CP 42. Thus, the appellate costs had already become part of the trial court judgment and sentence. Because the costs had already been awarded and because they were already part of the judgment and sentence, RCW 10.73.160(4) entitled Forth to request remission of those costs at any time. The Court of Appeals contrary interpretation of RCW 10.73.160(3) and (4) defies the statute's plain text.

The Court of Appeals recently confirmed that a defendant may petition for remission at any time pursuant to the plain language of RCW 10.76.160(4). State v. Shirts, 195 Wn. App. 849, 859, 381 P.3d 1223 (2016).

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[1] The Court of Appeals cited State v. Wright, 97 Wn. App. 382, 985 P.2d 411 (1999). Appendix at 3. There, the State brought a motion in superior court to amend the judgment and sentence to include an appellate cost award. Wright, 97 Wn. App. at 383. The court concluded, "the inquiry outlined in RCW 10.73.160(4) arises only after a defendant is sentenced to pay costs and only pursuant to a petition for relief. Neither of these conditions had been satisfied when the superior court considered the motion to amend." Id. at 385. Wright's interpretation of RCW 10.73.160 conflicts with RCW 10.73.160's plain language as discussed above, however.

Forth petitioned for remission on June 12, 2015, which qualifies under the statute's temporal language. The trial court was then required to consider whether the appellate costs imposed a manifest hardship on Forth or his family. RCW 10.73.160(4); Shirts, 195 Wn. App. at 859-60. Because the Court of Appeals decision conflicts with Shirts's holding that a defendant may petition for remission at any time, review is also appropriate under RAP 13.4(b)(2).

Forth asks that this court grant review pursuant to RAP 13.4(b)(2), (3), and (4) to provide definitive guidance on what a defendant must do to petition for remission of appellate costs under RCW 10.73.160(4).

2. THE IMPOSITION OF THOUSANDS OF DOLLARS IN APPELLATE COSTS WITHOUT CONSIDERING ABILITY TO PAY SERVES NO RATIONAL STATE INTEREST AND THEREFORE VIOLATES SUBSTANTIVE DUE PROCESS

In any event, appellate costs are unconstitutional because they do not take account of a defendant's financial circumstances and therefore do not rationally serve any state interest.

The United States and Washington Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV; § 1; CONST. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and

substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 158 Wn.2d 208, 143 P.3d 571 (2006).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. It requires "deprivations of life, liberty, or property be substantively reasonable," meaning such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Wash. State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Wash. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54. To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id.

Although the rational basis test is deferential, it "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). "[T]he court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998). Statutes

that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

There can be no dispute that funding the Office of Public Defense is a legitimate state interest. But attempting to fund it on the backs of indigent persons when their public defenders lose their appeals, without first ascertaining their ability to pay, does not rationally serve this interest. Indeed, "the state cannot collect money from defendants who cannot pay." State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 380 (2015). It is not rational for appellate courts to impose appellate costs on indigent litigants without even inquiring into whether they have the ability or likely future ability to pay them.

The discretionless imposition of appellate costs also undermines the state's interest in deterring crime, given that imposing LFOs without an ability-to-pay determination inhibits reentry into society and "increase[s] the chances of recidivism." Id. at 836-37. And the State's interest in enhancing offender accountability through LFOs is thwarted when a person cannot pay. To foster accountability, a sentencing condition must be achievable. If not, the condition actually undermines efforts to hold a defendant accountable.

A recent dissent by Chief Judge Bjorgen aptly identifies the problem with imposing LFOs without an ability-to-pay determination:

> Without the individualized determination required by Blazina for discretionary LFOs, mandatory LFOs will be imposed in many instances on those who have no hope of ever paying them. In those instances, the levy of mandatory LFOs has no relation to its purpose. In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

State v. Seward, 196 Wn. App. 579, 589, 384 P.3d 620 (2016) (Bjorgen, C.J., dissenting). Although Judge Bjorgen was discussing mandatory LFOs imposed by trial courts, his persuasive reasoning applies with equal force to the imposition of appellate costs without inquiring into ability to pay.[2]

In sum, there is no rational basis for imposing appellate costs on defendants who cannot pay. Appellate cost therefore violate substantive due process as applied to these individuals.

This court's decisions in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), support Forth's position that an ability-to-pay inquiry must occur at the time

[2] Prior to State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016), and the recent amendments to RAP 14.2, appellate costs were automatically imposed against indigent appellants who did not substantially prevail on appeal upon the filing of a cost bill, making them virtually mandatory.

appellate costs are imposed in light of the realities of Washington's current LFO collection scheme.

Currently, Washington's laws provide for an elaborate and aggressive collections process that includes: the immediate assessment of interest; enforced collections methods through a variety of different entities; and the authorization of numerous additional sanctions and penalties. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See generally Alexes Harris, Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. SOC. 1753 (2010) (reviewing LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). This cycle does not conform to the necessary constitutional safeguards established in Curry and Blank.

In Blank, this court held that "monetary assessment which are mandatory may be imposed against defendants without a per se constitutional violation." 131 Wn.2d at 240 (emphasis added). It reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (citing Curry, 118 Wn.2d at 917-18).

However, this noted that the constitutional of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at

certain key times. This inquiry must occur (1) before "enforced" collection; (2) prior to any additional "penalty" for nonpayment; and (3) before any other "sanction" for nonpayment is imposed. Id. at 242. Neither the legislature nor the courts are complying with these directives.

Given Washington's current LFO collection scheme, the only way to effectively comply with Blank's due process requirements is to conduct meaningful ability-to-pay inquires at the time LFOs are imposed. Although Blank noted that prior case law "suggests" that such an inquiry is not required at sentencing, this court was not confronted with the realities of the State's current collection scheme in Blank.

Washington's LFO system consists of a complicated patchwork of enforced collection procedures and myriad penalties and sanctions before which there is not ability-to-pay inquiry. Onerous and relentless enforced collection procedures, sanctions, and penalties begin long before an indigent person is faced with imprisonment for failure to pay.

Under RCW 10.82.090(1), LFOs accrue interest at a rate of 12 percent, which is an astounding level given the historically low interest rates of the last several years. Blazina, 182 Wn.2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 SEATTLE J. SOC. JUST. 963, 967 (2013)). LFO interest accrues from the date of judgment. RCW 10.82.090(1). This mechanism of

enforcement has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. Blazina, 182 Wn.2d at 836 (explaining that on average, a person who pays $25 per month toward their LFOs will owe more 10 years after conviction than they did when the LFOs were initially assessed). There is no requirement for the courts to conduct an inquiry into ability to pay before interest is assessed upon unpaid mandatory LFOs.

Washington law also authorizes an annual fee of up to $100 to go to the court clerk for any unpaid account. RCW 36.18.016(29). There is no ability to pay inquiry before this additional sanction is imposed.

Washington law permits courts to use private collection agencies or county collection services to actively enforce collection of LFOs. RCW 19.16.500; RCW 36.18.190. Nothing in the statutes prohibits the courts from using such collection services immediately after sentencing. The defendant must pay any penalties or additional fees these agencies assess. Id. And, when accounts are assigned to such agencies, the court clerks may impose a transfer fee equal to "the full amount of the debt up to one hundred dollars per account." RCW 19.16.500. Yet there is no requirement that an ability-to-pay inquiry occur before court clerks use this enforcement mechanism.

Washington law permits payroll deductions immediately upon sentencing. RCW 9.94A.760(3). This permits employers to deduct wages to cover LFOs and permits the imposition of other fees to be taken from earnings. RCW 9.94A.7604(4). No ability-to-pay inquiry occurs before this collection and sanction mechanism is employed.

RCW 6.17.020 permits wage garnishment, which may begin immediately after entering judgment. RCW 9.94A.7701 allows wage assignment within 30 days of a defendant's failure to pay an ordered monthly sum. Employers can then charge the defendant a "processing fee" to facilitate such collections. RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring ability-to-pay determinations before using this enforced collection method.

This handful of examples shows that under Washington's current LFO system, there are several instances where the legislature permits "enforced collection" or additional sanctions or penalties without first requiring an ability-to-pay inquiry. If the constitutional requirements in Curry and Blank mean anything, courts must conduct an ability-to-pay inquiry when any LFOs are imposed.

Forth's substantive due process challenge to the discretionless imposition of appellate costs presents a significant constitutional question and, given its impact on the entire statewide system of indigent appeals,

pertains to an issue of substantial public interest that should be determined by this court. RAP 13.4(b)(3)–(4).

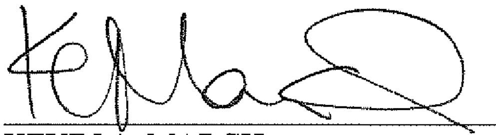
E. CONCLUSION

Because Forth satisfies the review criteria in RAP 13.4(b)(2), (3), and (4), he asks that this petition be granted.

DATED this 3d day of April, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRIS ALLEN FORTH, Appellant.	No. 47702-5-II UNPUBLISHED OPINION

MELNICK, J. – Chris Allen Forth appeals his sentence, arguing the sentencing court erred when adding $5,600.72 in appellate costs from his first appeal to his judgment and sentence without first inquiring into his ability to pay. The State concedes the error. We reject the concession because RCW 10.73.160(3) required the sentencing court to add the costs to Forth's judgment and sentence. The remaining issue, raised in Forth's statement of additional grounds (SAG), is whether the court erred in only giving him credit for 204 days served in an Idaho jail. Because the parties agreed to the credit for time served, we hold this issue is waived. We affirm.

FACTS

In 1994, a jury found Forth guilty of child molestation in the first degree and bail jumping. In 1995, Forth appealed his first degree child molestation conviction. While his appeal was pending in this court, Forth fled the state. He was later apprehended in Idaho.

Forth's appeal was reinstated after his arrest and this court affirmed Forth's molestation conviction, but remanded for a determination of the correct credit for time served while Forth was incarcerated in Idaho. *State v. Forth*, noted at 179 Wn. App. 1034, 2014 WL 689743, at *1, *review*

denied, 181 Wn.2d 1023 (2014) (*Forth* I). A commissioner of this court entered a cost ruling on December 15, 2014, awarding the State $5,600.72 in costs. Forth's appeal mandated on January 9, 2015. The mandate included the $5,600.72 cost award.

It appears from our record that the sentencing court did not act on this court's directive in *Forth I*. On April 14, 2015, Forth filed a motion to modify or correct his judgment and sentence, relying on *Forth I*. The sentencing court scheduled a hearing for June 12, 2015. At the hearing, the parties stated that they had "an agreed order"[1] that Forth's credit served would increase from 191 days to 204 days. Report of Proceedings (RP) at 4. The court then granted Forth credit for 204 days served.

At the conclusion of the hearing, the court stated, "the other issue, then, is the imposition of appellate costs which the Court of Appeals has returned for the imposition of . . . costs." RP at 4. Forth replied, "according to *State v. Blazina*,[182 Wn.2d 827, 344 P.3d 680 (2015)], I cannot afford financial obligations at this point." RP at 5. The court replied, "Well, the Court of Appeals has sent it back for the imposition of costs." RP at 5. The court then added $5,600.72 in appellate costs to Forth's legal financial obligations (LFOs). Forth appealed.

ANALYSIS

I APPELLATE COSTS

Forth contends the sentencing court erred by failing to inquire into his current and future ability to pay before adding $5,600.72 in appellate costs to Forth's judgment and sentence. We disagree.

"The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1). Under current Washington

[1] The actual order is not in this court's record.

authority, a defendant may object to appellate costs before the appellate court files its decision, after the State files its cost bill, or in a motion to modify the commissioner's cost ruling. RAP 14.5; *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016)); *State v. Grant*, ___ Wn. App. ___, 385 P.3d 184, 187 (2016).

However, once a commissioner of this court orders appellate costs, and there is no motion to modify the commissioner's cost ruling, "[a]n award of costs shall become part of the trial court judgment and sentence." RCW 10.73.160(3). "The general rule is that the word 'shall' is presumptively imperative and operates to create a duty rather than conferring discretion." *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985). "Moreover, a superior court is required to follow a mandate of this court." *State v. Wright*, 97 Wn. App. 382, 383, 985 P.2d 411 (1999). In *Wright*, we held that adding appellate costs to an offender's judgment and sentence, "was required by this court's mandate and by RCW 10.73.160." 97 Wn. App. at 384. Thus, the sentencing court had no discretion to decide whether to add the costs award to Forth's judgment and sentence once this court ordered appellate costs. The sentencing court properly concluded likewise during the June 2015 hearing.

Forth counters that he was actually requesting remission of the costs at the June 2015 hearing. RCW 10.73.160(4) permits a defendant to petition the sentencing court for the remission of costs if the amount due "will impose manifest hardship on the defendant or the defendant's immediate family." But there must actually be a "petition" and our record does not show Forth requested remission. RCW 10.73.160(4). Forth does not even mention remission in his motion to modify his judgment and sentence or during the June 2015 hearing. Moreover, the costs were not yet added to the judgment and sentence. He, therefore, could not request remission of costs that were not yet included in his judgment and sentence. If Forth has materials outside this court's

record showing he requested remission, his argument would be best raised in a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Moreover, we are mindful that Forth may petition the sentencing court for the remission of costs in the future as set forth in RCW 10.73.160(4). Thus, the potential future availability of a remission hearing permits Forth to raise many of the issues raised here.

In sum, we hold that the sentencing court's addition of appellate costs to Forth's judgment and sentence based on this court's appellate cost ruling was mandatory and not discretionary. Thus, the court was not required to inquire into Forth's ability to pay before adding the appellate costs to the judgment and sentence.[2]

II. SAG ISSUES

In Forth's SAG, he argues the court erred in only giving him credit for 204 days served in an Idaho jail. This issue is waived.

During the remand hearing, the parties stated that they had "an agreed order"[3] that Forth's credit served would increase from 191 days to 204 days. RP at 4. The court then entered an order correcting Forth's judgment and sentence to give him credit for 204 days served. There was no objection.

Because Forth stipulated to the time credit amount, he is deemed to have waived the challenge. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002) (a defendant is deemed to have waived a challenge if the defendant made an affirmative stipulation of fact). Accordingly, we hold this issue is waived.

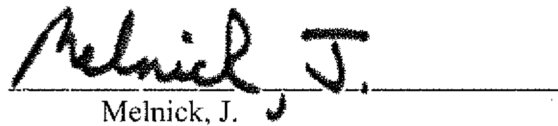
[2] Forth also argues a portion of the appellate costs should have been awarded to the State and not just Pierce County. Like Forth's objection to the award of costs, this issue should have been raised before the court of appeals commissioner. RAP 14.5.

[3] The actual order is not in this court's record.

Lastly, Forth includes a somewhat vague argument at the end of his SAG that the sentencing court "lost jurisdiction" to amend his judgment and sentence and include additional LFOs under RCW 9.94A.760(4).[4] SAG at 6. RCW 9.94A.760(4) provides, "legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever period ends later." Because Forth is still incarcerated, the sentencing court retains jurisdiction to enforce LFOs.

We affirm.

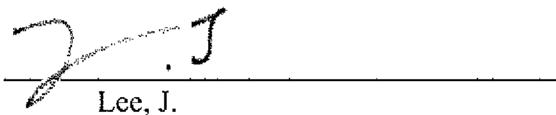
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

We concur:

Maxa, A.C.J.



Lee, J.

[4] Forth attaches two documents to his SAG in support of this argument, but the documents are not in our record. RAP 10.3(a)(8) provides, "An appendix may not include materials not contained in the record on review without permission from the appellate court." Accordingly, documents not included in this court's record will not be considered.

NIELSEN, BROMAN & KOCH, PLLC
April 03, 2017 - 2:07 PM
Transmittal Letter

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Case Name: Chris Forth

Court of Appeals Case Number: 47702-5

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Comments:

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