

NO. 48437-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MANUEL ANTONIO GONZALES,

Appellant.

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

The Honorable Elizabeth Martin, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE \$200 CRIMINAL FILING FEE IS A DISCRETIONARY LFO.....	3
2. APPEAL COSTS SHOULD NOT BE IMPOSED.	7
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000)	7
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015),	2, 3, 7
<u>State v. Duncan</u> ___ P.3d ___, 2106 WL 1696698 (April 28, 2016)	5
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 755 (2013)	4, 5
<u>State v. Moon</u> 124 Wn. App. 190, 100 P.3d 357 (2004)	3
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016)	7
<u>State v. Stoddard</u> 192 Wn. App. 222, 366 P.3d 474 (2016)	4
<u>State v. Thompson</u> 151 Wn.2d 793, 92 P.3d 228 (2004)	3
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
<u>Blacks Law Dictionary</u> 915 (6th ed. 1990)	6
RCW 9.94A.760	3
RAP 14	7
RCW 10.01.160	3
RCW 10.73.160	7

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 10.82.090.....	5
RCW 36.18.020.....	3, 4, 5, 6
RCW 36.19.020.....	6
RCW 43.43.754.....	5
RCW 43.43.7541.....	5

A. ASSIGNMENT OF ERROR

The sentencing court erred when it treated the \$200 criminal filing fee as a mandatory legal financial obligation (LFO).

Issue Pertaining to Assignment of Error

At sentencing, based on appellant's established indigence, the court waived all discretionary LFOs. While recognizing the \$200 criminal filing fee arguably was discretionary, the court assumed it was mandatory and ordered appellant to pay it. Did the sentencing court err?

B. STATEMENT OF THE CASE

The Pierce County Prosecutor's Office charged Manuel Gonzales with two counts of Assault in the Third Degree and one count each of Obstructing a Law Enforcement Officer, Resisting Arrest, and Bail Jumping. CP 5-7. A jury acquitted Gonzales of both assaults and convicted him on the remaining charges. CP 34-38.

At sentencing, the State asked the court to impose several LFOs for the bail jumping conviction: a \$500 crime victim penalty assessment, a \$100 DNA database fee, a \$200 filing fee, and \$1,500 for the cost of appointed counsel. RP¹ 3.

¹ RP refers to the verbatim report of proceedings for sentencing on November 12, 2015.

Defense counsel explained that, as a result of the charges in this case, Gonzales had lost his job as a janitor. RP 5. He had no sources of income and no means to pay for the services of appointed counsel. RP 7.

Citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the Honorable Elizabeth Martin found that Gonzales's indigency warranted waiving the costs of appointed counsel. RP 7. Judge Martin indicated she was only imposing statutorily-required LFOs and, regarding the \$200 filing fee, stated "[t]his Court has taken the position that \$200 is statutorily required. I'm willing to listen to argument to the contrary. I think it's debatable." RP 8. Defense counsel objected to the fee. RP 8. The prosecutor expressed his belief that it was mandatory, to which Judge Martin responded, "as I say, we have – it's debatable, but I will impose it." RP 9.

Judge Martin ultimately imposed three LFOs she deemed mandatory – the \$200 filing fee, the \$500 crime victim penalty assessment, and the \$100 DNA database fee. RP 9; CP 41. Gonzales timely filed his Notice of Appeal. CP 60.

C. ARGUMENT

1. THE \$200 CRIMINAL FILING FEE IS A DISCRETIONARY LFO.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing discretionary LFOs unless “the defendant is or will be able to pay them.” In determining LFOs, courts “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); see also Blazina, 182 Wn.2d at 837-839 (requiring trial courts to consider an individual’s current and future ability to pay before imposing discretionary LFOs).

Judge Martin complied with her obligations under RCW 10.01.160 and Blazina, determining that Gonzales should only be responsible for mandatory LFOs. She erred, however, in assuming criminal filing fees are mandatory. The nature of this fee is a question of statutory interpretation, which this Court reviews de novo. State v. Moon, 124 Wn. App. 190, 193, 100 P.3d 357 (2004) (citing State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004)).

RCW 36.18.020 provides:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited

jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h) (emphasis added).

In State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013), this Court found that criminal filing fees are mandatory, leaving sentencing courts without discretion to waive them based on a defendant's established poverty. But the Lundy court provided no rationale and no analysis of the language of RCW 36.18.020(2)(h). See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (without statutory analysis, Division Three merely cites Lundy for assertion filing fee must be imposed regardless of indigency).

The language of RCW 36.18.020(2)(h) is markedly different from that in statutes imposing mandatory fees. The Victim's Penalty Assessment (VPA) is recognized as a mandatory fee, with its authorizing statute providing: "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). The statute is unambiguous in its command that such a fee shall be imposed.

Likewise, the mandatory nature of the DNA-collection fee statute is also unambiguous, stating: “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added).

In contrast, RCW 36.18.020(2)(h) does not directly set forth a mandatory fee, providing only that: “Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.” Emphasis added. Despite the fact the Legislature clearly knows how to create an unambiguous mandatory fee, which absolutely must be included in a sentence, it did not do so in this statute. RCW 36.18.020(2)(h) does not say that every sentence must include the fee or that judges may not waive the fee.

Indeed, the Washington Supreme Court’s recent decision in State v. Duncan, ___ P.3d ___, 2106 WL 1696698 (April 28, 2016) acknowledges the different language found in RCW 36.18.020(2)(h). Discussing LFOs, the Duncan Court made the following observation:

We recognize that the legislature has designated some of these fees as mandatory. *E.g.*, RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals, State v. Lundy,

176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020(2)(h) is mandatory and courts have no discretion to consider the offender's ability to pay). . . .

Duncan, at *2 n.3 (underlined emphasis added). That the Court would identify those fees designated as mandatory by the Legislature, on the one hand, and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory, on the other, indicates an identified distinction.

By directing only that the defendant be "liable" for the criminal filing fee, the Legislature did not create a mandatory fee in RCW 36.18.020(2)(h). Blacks Law Dictionary recognizes the term "liable" encompasses a broad range of possibilities -- from making a person "obligated" in law to imposing on a person a "future possible or probable happening that may not occur." Blacks Law Dictionary 915 (6th ed. 1990). Thus, "liable" can mean a situation from which a legal liability *might* arise. At best, RCW 36.19.020(2)(h) is ambiguous and, under the rule of lenity, its language must be interpreted in Gonzales's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281, 283 (2005).

This Court should hold the criminal filing fee is to be treated as a discretionary LFO and remand so that the \$200 fee can be

stricken from Gonzales's judgment and sentence.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

Judge Martin properly found Gonzales, who is unemployed, to be indigent, unable to pay any costs for appointed counsel at trial, and entitled to appeal at public expense. CP 61-62; RP 7. Gonzales's prospects for paying the costs of litigation in this Court are no better than they were in Superior Court. Therefore, if he does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs. Under Blazina, Judge Martin made an individualized finding, based on Gonzales's circumstances, that he had no ability to pay for appointed counsel at trial. RP 7. There is no basis for a contrary finding concerning the costs associated with this appeal.

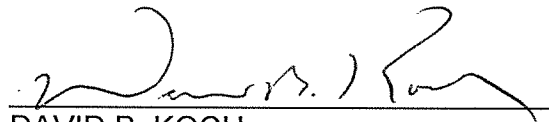
D. CONCLUSION

Gonzales respectfully asks this Court to strike the \$200 criminal filing fee from his judgment and sentence. Assuming the State prevails on appeal and seeks reimbursement for appellate costs, this Court should deny the State's request.

DATED this 24th day of June, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789

Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

June 24, 2016 - 9:45 AM

Transmittal Letter

Document Uploaded: 7-484374-Appellant's Brief.pdf

Case Name: Manuel Gonzales

Court of Appeals Case Number: 48437-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

The client's address is unknown, we are unable to serve a copy at this time

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us

Kochd@nwattorney.net