

Supreme Court No. _____

Court of Appeals No. 76741-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA D.C. RHOADES,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Joshua D.C. Rhoades, through his attorney, Sean M. Downs, requests the relief designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Rhoades requests review of the unpublished opinion of the Court of Appeals in 76741-1-I, filed on July 31, 2017. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether this court should accept review of the trial court's error in continuing to impose unpayable LFOs.

D. STATEMENT OF THE CASE

1. Cause No. 99-1-00424-2.

Mr. Rhoades was convicted in Lewis County Superior Court of Assault in the Second Degree on July 15, 1999 in cause number 99-1-00424-2. CP 1-8. LFOs were imposed, including \$4,054.00 in restitution, \$500.00 victim's assessment pursuant to RCW 7.68.035, \$110.00 criminal filing fee pursuant to RCW 9.94A.030, \$380.00 in court appointed attorney's fee pursuant to RCW 9.94A.030, and \$1,000.00 for incarceration costs in the Lewis County Jail pursuant to former RCW 9.94A.145 (recodified as RCW 9.94A.760). CP 3. Additional restitution

was ordered in the amount of \$3,528.61 in an amended restitution order.
CP 11-12.

On June 2, 2009, the State motioned the court to extend jurisdiction for collection of the LFOs pursuant to RCW 9.94A.760(4), as Mr. Rhoades still owed \$11,718.53. CP 13-14. The court granted the extension of jurisdiction. CP 15.

2. Cause No. 00-1-00169-1.

On April 11, 2000, Mr. Rhoades was convicted of Vehicle Prowling in the Second Degree (four counts), Theft in the Third Degree, and Theft in the Second Degree in Lewis County Superior Court. CP 38-45. The court imposed LFOs in the amounts of \$500.00 for victim's assessment, \$110.00 for criminal filing fee, \$380.00 for court appointed attorney fee, \$1,000.00 for incarceration in the Lewis County Jail. CP 40. Restitution was subsequently ordered on June 27, 2000 in the total amount of \$544.90. CP 46-47. On March 16, 2010, the State motioned the court to extend jurisdiction for collection of the LFOs, as Mr. Rhoades still owed \$4,770.68. CP 48-49. The court granted the extension of jurisdiction. CP 52.

3. Cause No. 06-1-00613-0.

On January 5, 2007, Mr. Rhoades was convicted of Harassment (gross misdemeanor) and Unlawful Display of a Weapon (gross

misdemeanor) in Lewis County Superior Court. CP 75-77. The court imposed LFOs in the amount of \$200.00 for criminal filing fee, \$500.00 for victim's assessment, \$800.00 for court appointed attorney fee, \$210.00 for subpoena service fee, and \$1,000.00 for jail recoupment fee. CP 76. On January 23, 2007, an order amending LFOs was entered to add a cost for investigative services in the amount of \$564.80. CP 78-79.

4. Consolidated cases.

On April 26, 2016, Mr. Rhoades filed a motion to terminate LFOs with supporting affidavit in cause numbers 99-1-00424-2, 00-1-00169-1, and 06-1-00613-0. CP 29-34, 65-70, 94-99. On May 3, 2016, a hearing to address the LFOs was held at the same time as a resentencing on an unrelated matter on cause number 13-1-00076-2. RP 1-2.

Mr. Rhoades argued that an individualized finding was not made in each of the three cases as required under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). RP 19; CP 34, 70, 99. Mr. Rhoades indicated in his affidavit that he has been confined at the Department of Corrections (herein "DOC") and that DOC has been taking money from him to pay LFOs. CP 34, 70, 99. The money taken from him by DOC has been an undue burden on him and his family. *Id.* During inquiry from the court, Mr. Rhoades indicated that he did not have any physical or mental reason that would prevent him from getting a job in the future. RP 13. He was

currently taking classes at DOC to be trained as a baker. RP 13. Mr. Rhoades has nine Superior Court cases that he is making LFO payments on. RP 14. He has four children that he would presumably be responsible for upon release. RP 14.

The court denied Mr. Rhoades's motions and found that he has the future ability to pay LFOs. RP 20; CP 35-36, 71, 100. Mr. Rhoades timely filed an appeal in each of these cause numbers and the matters were consolidated for appeal. CP 37, 72, 101. Mr. Rhoades was found by the court to be indigent and his appellate filing fee was waived by the Superior Court. CP 73-74, 102-103.

The Court of Appeals opined that since Mr. Rhoades had completed a number of training courses in prison and had no physical, mental, or emotional reason he could not work, that the record supported the trial court's decision that Mr. Rhoades would have the future ability to pay LFOs. *See* Appendix A.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The trial court erred in continuing to impose unpayable LFOs.

“The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “[T]he court shall take account of the financial resources of the defendant and the

nature of the burden that payment of costs will impose.” *Id.* The term “shall” as used in this statute is imperative, not discretionary. *Blazina*, 182 Wn. 2d at 838. “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.” *Blazina*, 182 Wn. 2d at 839. “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.” *Id.*

Likewise, there are seven requirements that were delineated in *State v. Curry*, 118 Wn. 2d 911, 915-916, 829 P.2d 166, 167 (1992) which must be met in order for there to be a constitutionally permissible costs and fees structure:

- (1) Repayment must not be mandatory;
- (2) Repayment may be imposed only on convicted defendants;
- (3) Repayment 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;
- (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.

Regarding restitution payments specifically, RCW 9.94A.750 indicates that “[t]he court should take into consideration the total amount of the restitution owed, the offender’s present, past, and future ability to pay, as well as any assets that the offender may have.” Regarding costs imposed on an offender for the costs of incarceration, RCW 9.94A.760(2) expressly requires a determination by the trial court “that the offender, at the time of sentencing, has the means to pay.” *State v. Leonard*, 184 Wn.2d 505, 507, 358 P.3d 1167, 1168 (2015).

In the instant case, Mr. Rhoades has no actual ability to make sufficient payments to the court such that he would be able to pay off his LFOs. He is currently incarcerated on cause number 13-1-00076-2 for 77 months. RP 11. Any money that he may receive on his books at DOC will be seized by DOC for his LFOs. CP 34, 70, 99. Moreover, upon release, Mr. Rhoades is unlikely to receive gainful employment due to his numerous prior felonies. RP 11, 14.

Mr. Rhoades's inability to pay LFOs is self-evident from the number of years that have elapsed since obligations have been in place – over 17 years on case 99-1-00424-2, over 16 years on case 00-1-00169-1, and nearly 10 years on case 06-1-00613-0. Mr. Rhoades has been deemed to be indigent by the court for at least the past 17 years, which leads one to believe that his indigency will not end. CP 3. These fines are seemingly lasting in perpetuity, which will continue to be a burden for the rest of Mr. Rhoades's life, if relief is not granted.

This court should accept review because this issue involves an issue of substantial public interest that should be determined by the Supreme Court. *See Blazina*, 182 Wn.2d at 836 (“on average, a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed”).

F. CONCLUSION

Given the foregoing, Petitioner respectfully requests this court to grant review.

DATED this 30th day of August, 2017.

Respectfully submitted,

s/ Sean M. Downs
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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Lewis County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on August 30, 2017 to email address appeals@lewiscountywa.gov. Service was made by email pursuant to the Respondent's consent. I also caused to be served Appellant, Joshua D.C. Rhoades, a true and correct copy of the document to which this certification is affixed on August 30, 2017 via first class mail postage prepaid to Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

s/ Sean M. Downs
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APPENDIX A

FILED
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DAVID CHARLES RHOADES,

Appellant.

No. 76741-1-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: July 31, 2017

LEACH, J. — Joshua Rhoades appeals the trial court’s denial of his motion to vacate his legal financial obligations (LFOs). Because the trial court adequately considered Rhoades’s ability to pay, it did not abuse its discretion when it denied Rhoades’s motion. We affirm.

Background

In 1999, Rhoades was convicted of assault in the second degree. The judgment and sentence imposed these LFOs: a \$1,000 Lewis County Jail fee, \$380 in court-appointed attorney fees, a \$110 filing fee, a \$500 victim assessment, and \$4,054 in restitution. The court later ordered him to pay an additional \$3,656 in restitution.

In 2000, Rhoades was convicted of four counts of vehicle prowling in the second degree, theft in the second degree, and theft in the third degree. The judgment and sentence imposed these LFOs: a \$1,000 Lewis County Jail fee,

\$380 in court-appointed attorney fees, a \$110 filing fee, a \$500 victim assessment, and \$545 in restitution.

In 2007, Rhoades was convicted of harassment and unlawful display of a weapon. The judgment and sentence imposed these LFOs: a \$200 filing fee, a \$500 victim assessment, \$800 in court-appointed attorney fees, a \$210 subpoena service fee, a \$1,000 Lewis County Jail fee, and \$565 for investigative services.

In April 2016, Rhoades filed a CrR 7.8 motion to modify or terminate his unpaid LFOs owed on these judgments.

At the motion hearing on the matter, Rhoades emphasized that he had four children to support. His counsel also told the court that Rhoades had completed a specialty pastry and baking college program, which qualified him to apply for baking jobs when released. In addition, he was enrolled in a number of other programs, including a math program and legal writing and paralegal courses. He had plans to take additional courses such as carpentry and business management. The court noted that Rhoades had been able to pay \$1,450 to take classes in prison.

Rhoades acknowledged that he had no physical, mental, or emotional reason why he could not hold a job, if offered one. When the court asked Rhoades if there was anything else it should know about his CrR 7.8 motion, Rhoades responded, "No."

Based on this information, the trial court found Rhoades had the future ability to pay and denied his motion. It offered, however, to waive the interest on

his LFOs once he had paid off the principal amount as long as he continuously made minimal payments and the debts were not sent to a collection agency.

To permit Rhoades to appeal at public expense, the superior court later entered an order of indigency.

Analysis

Rhoades challenges the trial court's denial of his motion to vacate his LFOs.

CrR 7.8(b) permits a court to amend a judgment to correct an erroneous sentence where justice requires. We review a decision on a CrR 7.8 motion for abuse of discretion.¹ We also review a decision imposing LFOs for abuse of discretion.² A trial court abuses its discretion when it exercises discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons.³

Rhoades contends that the trial court did not adequately consider his ability to pay his LFOs. "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them."⁴ As our Supreme Court explained in State v. Blazina,⁵ a trial court must conduct "an individualized inquiry into the defendant's current and future ability to pay" before it may impose discretionary LFOs. It must consider factors like incarceration and the defendant's other debts.⁶

¹ State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996).

² State v. Clark, 191 Wn. App. 369, 372, 362 P.3d 309 (2015).

³ State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

⁴ RCW 10.01.160(3).

⁵ 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

⁶ Blazina, 182 Wn.2d at 838.

First, Rhoades does not distinguish between his mandatory and discretionary LFOs. A trial court cannot consider ability to pay before it imposes mandatory LFOs like the criminal filing and DNA (deoxyribonucleic acid) testing fees.⁷ Restitution is also a mandatory obligation for which a sentencing court may not consider ability to pay.⁸ Thus, a trial court's duty to consider ability to pay applies only to discretionary LFOs like jail fees and attorney fees.

For the discretionary LFOs, the court adequately considered Rhoades's ability to pay. First, it considered the job training that Rhoades received while incarcerated. It also considered whether any disability impeded his ability to work or hold a job. The court gave Rhoades the opportunity to identify any other debts. And, notably, the court considered the burden that the LFOs imposed, particularly in light of the steep 12 percent interest rate that LFOs accumulate.⁹ The court told Rhoades that if he continued to make regular, minimal payments, the court would later waive any remaining interest. The trial court adequately considered Rhoades's ability to work and the burden that LFOs would impose before it denied his motion.

⁷ State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

⁸ Lundy, 176 Wn. App. at 102. "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . unless extraordinary circumstances exist which make restitution inappropriate . . ." RCW 9.94A.753(5). "The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753(4).

⁹ Blazina noted that "on average, a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed." Blazina, 182 Wn.2d at 836.

Rhoades also contends that the court abused its discretion by finding that he had the future ability to pay. But given that Rhoades had completed a number of training courses and had no physical, mental, or emotional reason he could not work, the record adequately supports the court's conclusion that Rhoades would have the future ability to pay his LFOs, particularly in light of the court's offer to forgive the interest on his LFOs.

We next address Rhoades's pro se arguments.

First, he asserts that the trial court's inquiry into his ability to pay LFOs when considering his motion to vacate cannot cure the original sentencing court's failure to consider his ability to pay each time it first imposed LFOs. His argument ignores the appropriate relief for this error. When a trial court fails to consider ability to pay, the appropriate remedy is to remand for resentencing, not to vacate the LFOs the court imposed.¹⁰ CrR 7.8 does not provide a procedural loophole for Rhoades to obtain this inappropriate remedy unavailable on direct review. And because the trial court engaged in the analysis required by Blazina, he cannot show that the original court's error harmed him.

Next, citing Blazina and RCW 10.01.160(3), Rhoades asserts that the trial court had to vacate his LFOs because Lewis County courts have found him indigent. But the only orders of indigency in the record were entered after the court's decision on the CrR 7.8 motion. In addition, while Blazina advises courts

¹⁰ State v. Duncan, 185 Wn.2d 430, 437, 374 P.3d 83 (2016).

to look to GR 34 for guidance in deciding whether to impose LFOs,¹¹ “Blazina’s reference to GR 34 does not change the law; it simply gives courts guidance when determining the individual’s ability to pay LFOs.”¹² As we have discussed, the trial court adequately considered Rhoades’s ability to pay.

Finally, Rhoades asserts that the trial court should have applied the “manifest hardship” standard of RCW 10.01.160(4).

RCW 10.01.160(4) provides,

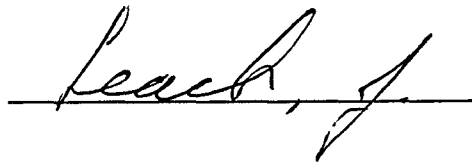
A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant’s immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

This statute applies to a motion for remission. Rhoades did not move for remission.

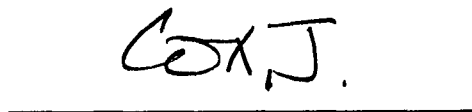
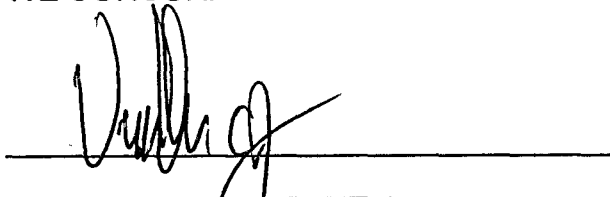
Thus, the statute’s standard did not apply to his motion.

Conclusion

We affirm the trial court’s denial of Rhoades’s CrR 7.8 motion.



WE CONCUR:



¹¹ Blazina, 182 Wn.2d at 838-39.

¹² In re Pers. Restraint of Flippo, 191 Wn. App. 405, 411, 362 P.3d 1011 (2015), aff’d, 187 Wn.2d 106, 385 P.3d 128 (2016).

GRECCO DOWNS, PLLC

August 30, 2017 - 6:25 AM

Filing Petition for Review

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