

FILED  
4-26-16

Court of Appeals  
Division I  
State of Washington

NO. 73323-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DONNIE GREER,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

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REPLY BRIEF

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A. ARGUMENT IN REPLY

THE STATE HAS WAIVED THE ABILITY TO SEEK APPELLATE COSTS BY FAILING TO RESPOND TO GREER'S SINCLAIR ARGUMENT.

In his opening brief, Greer argued this Court should deny the State's request for appellate costs because he has been found indigent and unable to pay for the expenses of appellate review. Br. of Appellant, 15-16. This Court recently held in State v. Sinclair "that it is appropriate for this 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 appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Despite this very clear directive, the State did not respond to Greer's appellate costs argument in its briefing, did not discuss Greer's ability to pay appellate costs, and, most significantly, did not ask this Court to impose appellate costs.

It is unclear whether the State's failure to discuss appellate costs means it does not intend to seek costs or means it intends to litigate this issue at the cost bill phase of the appeal in the event Greer does not substantially prevail. However, Washington courts recognize that where the respondent fails to respond to an argument by the appellant, the respondent concedes that issue. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it.").

This Court “indisputably” possesses the discretion to deny appellate costs. Sinclair, 192 Wn. App. at 388 (pointing to RCW 10.73.160 and State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000)). The Sinclair court recognized the State “has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill.” Id. at 391 (emphasis added); see also id. at 392 (“Both parties can be helpful to the appellate court’s exercise of its discretion by developing fact-specific arguments from information that is available in the existing record.” (Emphasis added.)). Therefore, where the appellant properly makes a Sinclair argument in his or her opening brief, the State waives the right to seek appellate costs where it fails to respond to the issue in its briefing.

The Sinclair court further noted that “where the State knows at the time of receiving the notice of appeal that no cost bill will be filed, a letter so advising defense counsel would be courteous.” Id. at 390. It would likewise be courteous of the State to inform the appellant (and this Court) in its response brief that it does not intend to seek appellate costs, rather than remaining silent and leaving the specter of appellate costs looming over the appellant.

Finally, there has been no order finding Greer’s financial condition has improved or is likely to improve. RAP 15.2(f) specifies “[t]he appellate court will give a party the benefits of an order of indigency throughout the

review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." The State has not rebutted this presumption of indigency with any specific facts or argument in its briefing. This Court must presume Greer remains indigent and give him the benefits of that indigency. RAP 15.2(f).

The obligation of paying thousands of dollars in appellate costs, plus accumulated interest, would be "quite a millstone" around Greer's neck. Sinclair, 192 Wn. App. at 391. Greer properly objected to appellate costs in his opening brief, giving the State an opportunity to respond. The State failed to do so and therefore failed "to preserve the opportunity to submit a cost bill." Id. This Court should hold the State has waived its right to seek appellate costs by failing to comply with Sinclair and request appellate costs in its response brief.

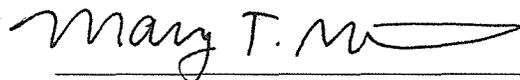
B. CONCLUSION

Greer respectfully requests this Court not impose appellate costs in the event he does not substantially prevail on appeal.

DATED this 26<sup>th</sup> day of April, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Respondent,	)	
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DONNIE GREER,	)	
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Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26<sup>TH</sup> DAY OF APRIL 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONNIE GREER  
17341 32ND AVENUE, APT P-120  
SEATAC, WA 98188

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF APRIL 2016.

X *Patrick Mayovsky*