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Court of Appeals
Division I
State of Washington

NO. 73822-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

MONIQUE HOWARD,

Appellant.

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

The Honorable George N. Bowden, Judge

REPLY BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

THIS COURT SHOULD NOT ASSESS APPELLATE COSTS AGAINST HOWARD IN THE EVENT SHE DOES NOT SUBSTANTIALLY PREVAIL.

In her opening brief, Howard asked this Court to exercise its discretion and deny the State's request for appellate costs in the event she does not substantially prevail. Br. of Appellant, 17-18; see also State v. Sinclair, __Wn. App. __, __P.3d __, 2016 WL 393719, at *4-7 (Jan. 27, 2016). This Court explained in Sinclair that “[i]t is entirely appropriate for an appellate court to be mindful of” the hardships LFOs inflict on indigent individuals. Sinclair, 2016 WL 393719, at *6. “Carrying an obligation to pay [an appellate cost bill] plus accumulated interest can be quite a millstone around the neck of an indigent offender.” Id. The Sinclair court accordingly denied the State's request for appellate costs. Id. at *7.

In response, the State attempted to designate a financial summary of Howard's payments towards her legal financial obligations (LFOs) while incarcerated. Br. of Resp't, 15; State's Designation of Clerk's Papers (designating “Cover Sheet: Case Financial History for Monique S. Howard,” even though it lacked a trial court sub number).¹ The case financial history was not before the trial court. Rather, it was printed on February 11, 2016,

¹ The case financial history was subsequently assigned sub number 70 and now appears in the record at CP 67-70.

well after the notice of appeal was filed, and without any authentication. See Case Financial History; CP 1 (notice of appeal filed on August 6, 2015).

Appellate courts “do not accept evidence on appeal that was not before the trial court.” State v. Curtiss, 161 Wn. App. 673, 703, 250 P.3d 496 (2011) (citing RAP 9.11; State v. Madsen, 153 Wn. App. 471, 485, 228 P.3d 24 (2009)). Moreover, on direct appeal, appellate courts “cannot consider matters outside the record.” Curtiss, 161 Wn. App. at 703.

The proper way to supplement the record on appeal is through a RAP 9.11 motion. The following six criteria must be met for this Court to admit additional evidence on appeal:

(1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party’s failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a); Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 936-37, 206 P.3d 364 (2009).

The State has not filed a RAP 9.11 motion, nor has it addressed any of the RAP 9.11 criteria in its briefing. See Br. of Resp’t, 14-16. Instead the State attempted to use a supplemental designation of clerk’s papers as a

backdoor way to get additional evidence before this Court. This is improper. See State v. Fuentes, 179 Wn.2d 808, 826-27 318 P.3d 257 (2014) (affirming Court of Appeals' decision to strike appellant's supplemental clerk's papers where appellant failed to address all six RAP 9.11 requirements); see also Sinclair, 2016 WL 393719, at *6 (discussing only records that were before the trial court as a basis to determine an appellant's ability to pay). This Court should accordingly strike the "supplemental" case financial history.²

Even if this Court does not strike Howard's prison financial history, the document does not demonstrate Howard's ability to pay thousands of dollars in appellate costs. In fact, it demonstrates the opposite.

The trial court imposed \$600 in mandatory LFOs. CP 11. The court ordered that these LFOs "shall bear interest . . . at a rate applicable to civil judgments," which is 12 percent. CP 11; State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). The case financial history specifies Howard owes \$700 in fines and fees. CP 67-70. Howard has been incarcerated since July 2015. CP 16 (order of commitment). Through her employment while incarcerated, she has been able to pay only \$34.42 towards her trial LFOs. Meanwhile, the original \$700 has accrued \$46.30 in interest, so Howard now owes \$711.98—more than the initial obligation. At that rate, Howard will

² See Engstrom v. Goodman, 166 Wn. App. 905, 909 n.2, 271 P.3d 959 (2012) ("[T]he brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.").

owe more in LFOs when she leaves prison than when she entered, despite her attempts to pay. This demonstrates the onerous burden of LFOs accruing at a 12 percent interest rate.

The Blazina court recognized one of the “problematic consequences” of LFOs is the usurious interest rate: “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.” 182 Wn.2d at 836. As a result, courts retain jurisdiction “over impoverished offenders long after they are released from prison.” Id. This, in turn, “inhibits reentry,” because “legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs.” Id. at 837. Inhibiting reentry then “increase[s] the chances of recidivism.” Id.

Further, the trial court ordered Howard to pay “not less than” \$25 per month toward her LFOs beginning on August 31, 2015. CP 11. The fact that she has paid only \$34.42 since then shows she is already unable to meet the burdens of her existing financial obligations.

The State is correct that Howard is a young woman who was employed before she was convicted. 3RP 40. Howard explained at trial that she worked for a program called Green Corps, a partnership between Goodwill and the Seattle Parks Department. 3RP 40. However, she now has a violent class A felony on her record. CP 6. The State ignores the reality

that this will significantly diminish Howard's prospects for employment (not to mention housing). It is safe to assume the Green Corps job will not be waiting for Howard upon release from her 60-month prison term for first degree robbery with a deadly weapon. Saddling her with appellate costs further diminishes her prospects for turning her life around, creating "quite a millstone" around her neck. Sinclair, 2016 WL 393719, at *6.

Nor should it be dispositive that Howard is employed while in prison. The legislature has mandated that the Department of Corrections (DOC) create work programs for inmates. RCW 72.09.130. Inmates can then earn early release credit by participating in prison work programs. Id.; WAC 137-30-020. The fact that Howard is employed in one of these programs does not establish her employability in the outside world—it establishes only that DOC is complying with its statutory obligation to provide her with work opportunities.

Finally, the State emphasizes in its brief, "It is noteworthy that [Howard] has not addressed whether she is, in fact, employed at Purdy or if she has been found to be an indigent defendant. No deductions will be made if the defendant is an 'indigent inmate.'" Br. of Resp't, 16 (citing RCW 72.09.111(1)). The State's reasoning is erroneous for several reasons. First, the trial court already determined Howard was indigent and entitled to appellate review at public expense. CP 58; see also Br. of Appellant, 17-18

(discussing Howard's indigency). Second, Howard did not discuss her employment at Purdy in her opening brief because it is outside the record on review.

Third, the standard for determining whether an inmate is indigent is pathetically low. An "indigent inmate" means "an inmate who has less than a ten-dollar balance of disposable income in his or her institutional account on the day a request is made to utilize funds and during the thirty days previous to the request." RCW 72.09.015(15) (emphasis added). Many indigent persons in DOC custody are forced to forfeit wages to pay LFOs without any determination of their ability to pay: "Mandatory Department of Corrections' deductions from inmate wages for payment of LFOs are not collection actions by the State requiring inquiry into a defendant's financial status." State v. Crook, 146 Wn. App. 24, 27-28, 189 P.3d 811 (2008); accord RCW 72.11.020; RCW 72.09.11(1).

The fact that an inmate has \$10 in her prison account hardly demonstrates she has the current or future ability to pay thousands of dollars in appellate costs, combined with interest compounding at an annual rate of 12 percent. The State's contrary suggestions are meritless.

B. CONCLUSION

For the reasons articulated in the opening brief, this Court should reverse Howard's sentence and community custody term, and remand for resentencing. In the event Howard does not substantially prevail on appeal, this Court should deny the State's request for costs.

DATED this 11th day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

 #45397

for

MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorney for Appellant

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COA NO. 73461-0-1

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 11TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MONIQUE HOWARD
DOC NO. 384199
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACHIC ROAD NW
GIG HARBOR, WA 9833

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH 2016.

x Patrick Mayovsky