

NO. 47174-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHANNA WILLIAMS,

Appellant.

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

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

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KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH.
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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it determined it had no choice but to impose a high end standard range sentence.

2. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. At sentencing following appellant's termination from Drug Court, the sentencing judge stated it had no choice but to sentence appellant to a high end standard range sentence based on his mistaken belief that such a sentence was required under the Drug Court agreement. Did the judge abuse his discretion by failing to exercise his independent discretion at sentencing?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

On November 5, 2013, the Pierce County Prosecuting Attorney charged appellant Shanna Williams with residential burglary. CP 1. On December 12, 2013, Williams pled guilty to the charge and entered the Drug Court Program. CP 4-13, 14-17.

In Williams' statement on plea of guilty, she acknowledged that

The prosecuting attorney will make the following recommendation to the judge: if [Williams] successfully completes drug court, State agree to exceptional downward sentence of credit for time served, if [Williams] does not successfully complete drug court, ***State will ask for standard range sentence***; \$500 CVPA; \$500 court costs; \$100 DNA. SR currently is 63-84 [months].

CP 7 (emphasis added). Under the terms of the Drug Court Agreement, if Williams completed the program successfully, the court would enter a sentence of time served. CP 15. If she was terminated from the program, however, her case would proceed to sentencing. CP 14. In the agreement, Williams states, "I understand that my standard range sentence is 63-84 months. This range may increase if I am convicted of additional felonies." CP 17. The Drug Court notification issued to Williams contains the following statements: "You agree that should you be terminated from the Drug Court Program or elect to withdraw from it, ***you stipulate you will be sentenced within the standard range***", CP 18 (emphasis added), and "You understand and agree that if the Court terminates you from the Drug Court Program ***you will be sentenced within the standard range.***" CP 19 (emphasis added).

Williams was terminated from the Drug Court program on January 12, 2015, and the case proceeded to sentencing. CP 20-21. At the sentencing hearing, the prosecutor told the court that Williams' standard

range was 63 to 84 months, and the State was asking for 84 months based on paperwork saying she would receive the high end of the standard range. 2RP¹ 7. Defense counsel also stated that Williams had agreed to a high end standard range sentence as part of the Drug Court contract but asked the court to impose a low end sentence. 2RP 7. Williams asked the court to impose less than the high end of the standard range, so that she would not be away from her children for seven years. 2RP 8-9.

The court responded, “Part of the understanding and the agreement when you come into Drug Court is the high end of the sentencing range. We’ve got to be consistent in regards to that.” 2RP 10. After acknowledging the effect a seven year sentence would have on Williams’ family, the court stated, “I don’t take this lightly. I don’t like doing this. But, I don’t feel like, as I said, I had any choice. So I’m [going to] sentence you to 84 months. That’s the agreement of the Drug Court.” 2RP 10.

The court imposed a high end standard range sentence of 84 months, and Williams filed this appeal. CP 31, 40.

¹ The verbatim report of proceedings is contained in two volumes, designated as follows: 1RP—1/7/15; 2RP—1/12/15.

C. ARGUMENT

1. THE SENTENCING COURT'S FAILURE TO EXERCISE ITS INDEPENDENT DISCRETION REQUIRES REMAND FOR RESENTENCING.

The sentencing court failed to recognize that it had discretion to sentence Williams anywhere within the standard sentencing range for her offense. See RCW 9.94A.505(2)(a)(i); State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986). When judicial discretion is called for, the judge must exercise some sort of meaningful discretion. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005) (Court's refusal to consider DOSA as part of defendant's sentence was reversible error).

A trial court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). A trial court's failure to exercise its discretion or to understand the breadth of its discretion is an abuse of discretion. See State v. Elliot, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a

failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was a security risk before ordering “shock box” was abuse of discretion), review denied, 137 Wn.2d 1002 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing exceptional sentence below standard range is reviewable error), review denied, 136 Wn.2d 1002 (1998).

A sentencing court’s failure to recognize its discretion is an abuse of discretion. State v. McGill, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). In McGill, the defendant was convicted of three counts of delivery of cocaine and one count of possession of cocaine with intent to deliver based on three controlled buys within the same week. Although defense counsel did not ask for an exceptional sentence below the standard range, the court’s comments indicated it would have considered an exceptional sentence had it known it had authority to do so:

I'm sure you are aware that the legislature has decided that judges should not have discretion beyond a certain sentencing range on these matters. And sometimes some of these drug cases, it seems like, when you compare them to some of the really violent and dangerous offenses, it doesn't seem to be justified. But it's not my call to determine the standard range. The legislature has done that for me.

So I have no option but to sentence you within the range on these of 87 months to 116 months. But I do get to decide where in that range the sentence is appropriate.

McGill, 112 Wn. App. at 98-99 (emphasis in original).

On appeal McGill argued that the sentencing court erred in failing to recognize it had authority to impose an exceptional sentence. The Court of Appeals agreed, noting that the court had discretion under the SRA multiple offense policy to consider and impose an exceptional sentence downward, but it “refused to exercise its discretion to consider an exceptional sentence because it erroneously believed it lacked the authority to do so.” McGill, 112 Wn. App. at 99-100; see also Grayson, 154 Wn.2d at 342 (all defendants have the right to the trial court’s examination of available sentence alternatives).

A similar situation exists here. The sentencing court erroneously believed it lacked authority to impose anything except a high end standard range sentence. The sentencing court concluded that it was required to impose a high end standard range sentence by the terms of Williams’ Drug Court agreement, stating it had no choice but to impose such a sentence. 2RP 10. The court was mistaken. The terms of the Drug Court agreement, the statement on plea of guilty, and the Drug Court notification call for a sentence within the standard range should Williams be terminated from the program. There is no agreement to, or requirement of, a high end sentence. CP 4-13, 14-17, 18-19. The court’s imposition of a high end sentence was thus based on untenable grounds and constitutes

an abuse of discretion. The court's failure to recognize and exercise its discretion to determine the appropriate sentence within the standard range was also an abuse of discretion. See McGill, 112 Wn. App. at 99-100.

Because it is unclear whether the court would have imposed the same sentence had it known it had discretion to impose a lesser sentence within the standard range, this Court should remand to allow the court to properly exercise its discretion. See McGill, 112 Wn. App. at 101.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

Williams filed a motion for an order of indigency, certifying that she owns no real property or personal property, she has no income from any source, she has undischarged debt in the amount of \$10,500, and she has no other means to prosecute her appeal. Supp. CP (Motion and Declaration for Order of Indigency, filed 2/5/15). The lower court entered an order of indigency authorizing her to seek appellate review at public expense, including filing fees, counsel for review, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. Supp. CP (Order of Indigency, filed 2/25/15).

- a. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.

Our supreme court in Blazina recognized the “problematic consequences” legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM’N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: “The trial court must decide to

impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that

Blazina held was essential before including monetary obligations in the judgment and sentence.

Williams has been determined to qualify for indigent defense services on appeal. To require her to pay appellate costs without determining her financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship.² Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover,

² Troubling still, under Blank's time-of-enforcement rule, the State has seemingly unfettered power to control the amount of interest that accrues simply by delaying its collection efforts months or years before attempting to exact awarded appellate costs from indigent persons.

indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” Blazina, 182 Wn.2d at 832, n.1. Blank’s questionable foundation has been thoroughly undermined by the Blazina court’s exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to “look to the comment in GR 34 for guidance.” Blazina, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The Blazina court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts

should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The 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." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. 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). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Williams respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

- b. Alternatively, this court should remand for superior court fact-finding to determine Williams' ability to pay.

In the event this court is inclined to impose appellate costs on Williams should the State substantially prevail on appeal, she requests remand for a fair pre-imposition fact-finding hearing at which she can present evidence of her inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Williams to assist her in developing a record and litigating her ability to pay.

If the State is able to overcome the presumption of continued indigence and support a finding that Williams has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on her actual and documented ability to pay.

D. CONCLUSION

For the reasons discussed above, this court should reverse and remand for resentencing. Moreover, this Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

DATED March 11, 2016.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

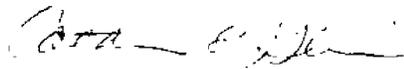
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I certify under penalty of perjury of the laws of the State of Washington
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Catherine E. Glinski
Done in Port Orchard, WA
March 11, 2016

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