

NO. 47740-8-II (consolidated cases)

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

STATE OF WASHINGTON, Respondent

v.

JASON ALLEN SHIRTS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01206-7

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court did not err when it denied Shirts' motion to terminate or remit his legal financial obligations (LFOs) pursuant to RCW 10.101.160(4).**
- II. **Shirts is not an aggrieved party because presently he only has a contingent interest in the denial of his motion under current, and still good, case law.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State adopts the Appellant's Statement of the Case as it pertains to the procedural posture of the motions, the denial of which Shirts challenges. For the purpose of clarity the State will provide a summary of the procedural history. Any additional facts relevant to the resolution of issues will be presented in the argument section.

In the spring of 2015, Shirts filed motions under RCW 10.01.160(4) seeking remission of his LFOs in four separate cases for which he had been convicted because he claimed those LFOs now imposed a manifest hardship on him and his family. At that time Shirts was in prison and had been since 2012; Shirts remains in prison. Shirts also filed voluminous material in support of his motions.

On May 21, 2015 the trial court denied Shirts' motions in orders that stated that "[t]he Court finds that the Defendant has failed to allege or

provide evidence that Clark County is attempting or seeking enforcement/ collection of Legal Financial Obligations at this time.” Shirts filed notices of appeal based on the denial of his motions, which in turn were treated as motions for discretionary review with this Court. A commissioner of this Court then granted review and consolidated Shirts’ four cases.

ARGUMENT

I. The trial court did not err when it denied Shirts’ motion to terminate or remit his legal financial obligations (LFOs) under RCW 10.01.160(4).

RCW 10.01.160(4) provides that:

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.

(emphasis added). To provide context, RCW 10.01.160(3) provides that:

The court *shall* not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(emphasis added). Construction of a statute is a question of law. *State v.*

Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). Statutory construction

or interpretation begins with a statute's plain meaning. *State v. Gray*, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). “The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Engel*, 166 Wn.2d at 578.

Where a statute contains “both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them. . . .” *In re Rogers*, 117 Wn.App. 270, 274, 71 P.3d 220 (2003) (citations omitted); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (noting that “[i]t is well established that when different words are used in the same statute, it is presumed they mean different things”). Accordingly, “[t]he word ‘may’ usually implies ‘permissive, optional, or discretionary, and not mandatory action or conduct.’ In contrast, the word ‘shall’ is ‘generally imperative or mandatory.’” *State v. Pineda-Guzman*, 103 Wn.App. 759, 763, 14 P.3d 190 (2000) (citing BLACK'S LAW DICTIONARY 979, 1375 (6th ed.1990)).

Shirts asserts that because under RCW 10.01.160(4) “defendant’s may move for remission at any time, it follows that [(1)] they must be given some process on the subject of remission . . . [(2)] without some fact finding process, no court could satisfy itself that payment will or will not

impose a manifest hardship, . . . and [(3)] no manifest hardship determination can be made unless and until the moving party is able to present evidence and arguments to the trial court” at a hearing. Brief of Appellant at 12-13. In short, Shirts contends that “a commonsense reading” of the statute “requires a hearing.” *Id.*

But the permissive language of the subsection of the statute at issue does not support Shirts’ contention—that a defendant “*may* at any time petition the sentencing court for remission” and “the court *may* remit all or part of the amount due” if “it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship” does not mean that the court *shall* hold a fact finding hearing. RCW 10.01.160(4) (emphasis added).¹ Had the legislature contemplated a mandatory hearing it would have included that language in this subsection as it straightforwardly demonstrated it knew how to do when in subsection (3) it ordered that trial courts “*shall* not order a defendant to pay costs unless the defendant is or will be able to pay them” and that trial courts “*shall* take account of the financial resources of the defendant” when determining whether defendants can pay. RCW 10.01.160(3) (emphasis

¹ To be clear, the State is not arguing that a trial court cannot hold a hearing on a motion to remit LFOs, rather the trial court can assess the present status of the person filing the motion, whether in custody or in the community, the documents supplied with motion, both for evidentiary sufficiency and persuasiveness, and any other information provided to it before electing to proceed by hearing or on the papers.

added). The same is true regarding any findings that a trial court may make regarding a manifest hardship determination, that is, had the legislature wanted to require trial courts to make specific findings in all cases regarding how they determined whether a manifest hardship existed the legislature could have included that mandatory language in the statute.

Moreover, the statute contemplates that “*payment of the amount due* will impose manifest hardship on the defendant or the defendant's immediate family.” RCW 10.01.160(4). If a person is in prison and will continue to be imprisoned and the State is not making any attempt to collect “payment of the amount due,” it is implausible that the person’s LFOs are, at the time of the motion, imposing a manifest hardship on the defendant or the defendant’s immediate family. It logically follows that recognizing a manifest hardship under these circumstances would have the practical effect of excusing all or substantially all incarcerated offenders from payment of LFOs despite the fact that in prison a person’s basic necessities are provided and payment of the amount due is not being sought. As noted in *State v. Smits*:

[a] decision to grant or deny a motion to remit LFOs is a determination of *whether the defendant should be required to pay* based on the conditions as they exist when the request is made. It does not alter or amend the judgment but rather changes the requirement of payment *based on a present showing that payment* would impose manifest hardship.

152 Wn.App. 514, 524, 216 P.3d 1097 (2009) (emphasis added) (footnote omitted).

Accordingly, Shirts' additional claims—that the trial court is required, by statute, to make a specific manifest hardship determination when denying a motion to remit and the claim that trial court failed to do so in this instance—fail. The trial court in denying Shirts' motions stated “[t]he Court finds that the Defendant has failed to allege or provide evidence that Clark County is attempting or seeking enforcement/ collection of Legal Financial Obligations at this time.” Based on the permissive nature of the statute, as addressed above, and the fact that the manifest hardship determination is “based on a present showing that payment would impose” on the person who moves to remit, the trial court's order reaches the merits since the fact that no collection of payment is being sought means the *payment* of the LFOs cannot impose a manifest hardship on Shirts. *Smits*, 152 Wn.App. at 524.

Additionally, the fact that a trial court can plainly make its decision as to whether to remit LFOs based on affidavits and other documents supplied with a motion also rebuts Shirts' position. In fact, Shirts provided voluminous material to the trial court to help it decide whether to schedule a hearing, remit the LFOs, or deny the motion. That the production of such

material can be sufficient for a trial court to reach the merits of whether a manifest hardship exists is best evidenced by Shirts' own argument that through his motions and documents provided to the trial court he "advanced several reasons demonstrating the LFOs cause him manifest hardship" and his recitation of those reasons for this Court. Br. of App. at 18-19.

Furthermore, Shirts completely ignores the fact that *State v. Crook* has already rejected the argument that RCW 10.01.160(4) requires a hearing to be held. 146 Wn.App. 24, 189 P.3d 811 (2008). In *Crook*, a prisoner moved to modify or terminate his legal financial obligations for two separate and past convictions alleging that the LFOs were an undue burden on himself and his family. *Id.* at 26. The trial court denied his motion without conducting an evidentiary hearing, and defendant appealed contending that he was entitled to a hearing to determine his financial resources. *Id.* at 26-27. Based on the record before it, *Crook* held that the defendant failed to show that the court "erred in denying his motion without a facts hearing." *Id.* at 28. The State provided this authority to the

trial court in response to Shirts' motions. Appellant's Appendix (App.) at 71, 155, 245, 324.²

II. Shirts is not an aggrieved party because presently he only has a contingent interest in the denial of his motion under current, and still good, case law

Pursuant to RAP 3.1, “[o]nly an aggrieved party may seek review by the appellate court. A party who is aggrieved in the legal sense is one “who has a present, substantial interest, as distinguished from a mere expectancy, or [] contingent interest in the subject matter.” *State v. Mahone*, 98 Wn.App. 324, 347-348, 989 P.2d 583 (1999) (citation and internal quotation omitted); *State v. Taylor*, 114 Wn.App. 124, 126, 56 P.3d 600 (2002) (holding that an injury in the legal sense cannot be conjectural or hypothetical).

Before Shirts could be aggrieved by the decision to deny his motion to terminate his LFOs, two things must happen: “[i]t must be determined that he has the ability to pay and the State must proceed to enforce the judgment for costs.” *Mahone*, 98 Wn.App. at 348. Until the State attempts to collect on the LFOs, any claim of hardship is mere speculation. *Id.* This is evident because RCW 10.01.160(4) allows a

² The State also cited *Crook* for the proposition that a defendant may bring a motion to terminate LFOs only after the State makes an attempt to collect. That is not correct; the defendant may bring his motion at any time, but the denial of the motion only implicates constitutional principles when the State seeks to collect LFOs following the denial of the motion. RCW 10.01.160(4); *Crook*, 146 Wn.App. at 27-28.

defendant to file a petition to modify or terminate LFOs with the sentencing court “at any time.” *Smits*, 152 Wn.App. at 525 (“Because the obligation to pay LFOs imposed as part of a judgment and sentence is conditional [a defendant] can bring a motion under RCW 10.01.160(4) at any time. . . .”).

Dispositively, under *Mahone* and *Smits*, a prisoner whose motion to terminate LFOs is denied by a trial court is not an aggrieved person. *Mahone*, 98 Wn.App. at 347-349; *Smits*, 152 Wn.App. 514, 524-525. Consequently, a prisoner whose motion to terminate LFOs is denied by a trial court “may not appeal” that ruling. *Smits*, 152 Wn.App. at 525.

State v. Blazina, does not change the calculus of the analysis. *State v. Blazina*, 182 Wn.2d 827, 34 P.3d 680 (2015). *Blazina* was a consolidated, direct appeal of trial courts’ initial imposition of LFOs. *Id.* Thus, it was an appeal of the actual sentence the trial courts imposed. *See Id.* Importantly, the holding of *Blazina*, grounded in RCW 10.01.160(3)³ and RAP 2.5, was simply that though the Courts of Appeal did not err in declining to reach the LFO challenge, an appellate court may consider for the first time on direct appeal whether a trial court complied with the

³ “The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.”

mandatory provisions of RCW 10.01.160(3) at sentencing. *Blazina*, 182 Wn.2d at 830, 839.

Because appellate courts may still decline to hear challenges to LFOs for the first time on appeal, many defendants will still only be able to challenge the manner in which the LFOs were assessed, or their ability to pay at the time of collection or enforcement. This result is necessarily countenanced by *Blazina*. *Shirts* argues that “the time-of-enforcement . . . rationale fails to account for the compounding accrual of interest.” Br. of App. at 23. But the problem of interest is a policy issue and not an issue that compels a different legal conclusion. That LFOs accrue interest was acknowledged by *Blazina*, as was the fact that LFOs may make indigent defendants’ lives more difficult, but such acknowledgments have no bearing on whether a person is aggrieved in the legal sense when seeking to appeal a denial of motion to terminate LFOs under RCW 10.01.160(4). Straightforwardly, *Blazina* did not hold that the time-of-enforcement or time-of-collections cases were decided incorrectly, did not state in dicta that the time-of-enforcement or time-of-collections cases were decided

incorrectly⁴, and, most importantly, did not even obliquely touch on RCW 10.01.160(4) and the cases applying that statute. Consequently, *Smits* and *Mahone* remain good law.

This case is not an appeal, direct or collateral, of the sentence imposed, nor is it an appeal of an order denying a motion to amend the judgment and sentence. Shirts only filed a motion to terminate or modify his LFOs pursuant to RCW 10.01.160(4); such a motion does not open the door to any and every challenge to his sentence as it pertains to his LFOs. Thus, *Smits* and *Mahone* control and Shirts may not seek review of the trial court's orders denying his motion to terminate or modify his LFOs pursuant to RCW 10.01.160(4).

⁴ Arguably, footnote one of *Blazina* casts doubt on the continuing viability of time-of-collections cases as they pertain to the doctrine of ripeness when a defendant challenges on direct appeal whether a trial court properly followed RCW 10.01.160(3) when it imposed the defendant's LFOs and, therefore, his or her sentence. 182 Wn.2d at 832 FN 1. That the footnote is *dicta*, i.e., not necessary for the resolution of the case, is evident as is its inapplicability to this case's procedural posture, which differs substantially from those defendants involved in *Blazina*, where the State is not invoking the ripeness doctrine.

CONCLUSION

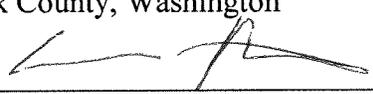
For the foregoing reasons this court should decline Shirts' invitation to entertain his appeal, but if this Court reaches the merits of the issue it should affirm the trial court's denial of Shirts' motions.

DATED this 5 day of Feb, 2016.

Respectfully submitted:

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