

NO. 48203-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD LANE,

Appellant.

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

The Honorable Elizabeth P. Martin, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in revoking appellant's Special Sex Offender Sentencing Alternative.

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. Did the trial court abuse its discretion when it revoked appellant's SSOSA on the grounds that appellant failed to make reasonable progress in treatment in direct contradiction to the testimony of the treatment provider?

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

In December 2009, appellant Richard Lane pleaded guilty to one count of first degree child molestation and two counts of witness tampering. CP 4-18. In February 2010 he was sentenced under the special sex offender sentencing alternative (SSOSA) to a sentence of 82 months to life on count 1, concurrent with 6 month sentences on the

witness tampering counts. CP 24. He was ordered to serve six months in confinement, with the remainder of the sentence suspended. CP 27.

Lane was found to have violated the conditions of his suspended sentence in March 2012, when he admitted having contact with a minor and being deceptive about that contact. Supp. CP (Order Re: SSOSA Revocation, filed 3/23/12). He was ordered to serve 105 days in jail for the violation. Supp. CP (Order Modifying Sentence, filed 3/23/12). Lane stipulated to violating his sentence conditions again in February 2015, when a UA he provided tested positive for methamphetamine and he was found to be deceptive regarding that incident in a polygraph. Supp. CP (Order Continuing SSOSA Treatment, filed 5/8/15). The court ordered 120 days in jail, directed the CCO to administer frequent UAs, and warned Lane that there was no margin for error. Id.

In August 2015, Lane's community corrections officer, Gregory Devorss, learned that Lane had been seen at a casino in Thurston County, even though he had not been given permission to leave Pierce County. 2RP<sup>1</sup> 7-8. When Devorss asked Lane whether he had left the county, Lane said he had not. He also said the last time he had been to the casino was about eight months earlier when Devorss had given him a travel voucher to take his mother there. 2RP 8-9. When Lane took a polygraph the next

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<sup>1</sup> The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—9/11/15; 2RP—10/22/15.

day, however, he admitted he had been to the casino. 2RP 11. Devorss asked Lane why he had initially been deceptive about leaving the county, and Lane said he had forgotten about going to the casino. 2RP 12.

The polygraph also indicated that Lane had been deceptive about illegal drug use. Lane explained to Devorss that some drug dealers he used to know had been calling him and offering to sell him drugs, and he must have been thinking about that when asked about illegal drug use in the polygraph. 2RP 12. In a follow up polygraph, Lane was asked if he had used any illegal drugs since he was released from jail in June, and he said no. The polygraph examiner's opinion was that Lane was being deceptive, although none of Lane's weekly UA results was positive for substances. 2RP 20-22.

After learning Lane had left the county without permission, Devorss visited Lane's home, where he lived with his mother and stepfather. Lane was not home at the time, and his stepfather's young grandchild was at the house. 2RP 15. Lane's parents explained that they babysat the child once or twice a week, but that Lane was never home when the child was there. 2RP 16, 31. Lane had not disclosed that the toddler had been to the home, but after Devorss' visit he completed a proposal for a safety plan to authorize future visits. 2RP 16, 31.

The State again sought to revoke Lane's SSOSA, alleging he (1) left Pierce County without permission and (2) failed to make satisfactory progress in sexual deviancy treatment. CP 37-55. At the hearing on the State's petition, Lane stipulated that he had left Pierce County without permission. 2RP 3.

Devorss testified that he believed Lane had failed to make satisfactory progress in treatment. He explained that someone in treatment is supposed to be forthcoming and honest, and a failure to do so raises questions about whether there has been progress. 2RP 23-24. Devorss felt that Lane's suspended sentence should be revoked because of this lack of progress, as he did not think it was feasible to successfully supervise Lane in the community. 2RP 24-25.

Throughout his community custody, Lane has engaged in sex offender treatment with Paula van Pul. 2RP 55. She testified at the hearing that Lane has consistently attended and participated in weekly group therapy sessions. Although he was not up to date with his payment for treatment, he had made arrangements and was making payments as he was able. 2RP 48, 50. He was in compliance with treatment and currently on section D of the relapse prevention phase. 2RP 54.

Van Pul testified that Lane suffers from severe chronic major depression and generalized anxiety disorder. 2RP 51. These are serious

disorders which require treatment and medication. 2RP 52. Because of these disorders, Lane can be defensive, isolative, non-communicative, and will say things just to make a situation go away because he cannot cope, which can make supervision difficult. 2RP 72. Lane's anxiety disorder can also affect his physiological responses during a polygraph, calling into question the usefulness of the results. 2RP 56.

Van Pul acknowledged that honesty and transparency with the treatment provider and CCO are important aspects of treatment, and they are consistently addressed in group. 2RP 53-54. She was aware that Lane was not open and honest about going to the casino, and he admitted as much in group. It was a concern that he was not transparent with his CCO. 2RP 61. But van Pul testified that Lane has acknowledged his mental health issues and started seeking treatment, which would teach him the necessary coping mechanisms so that he could be more transparent with his CCO. 2RP 73, 77. At the time of the hearing Lane had met with a mental health counselor and had set up future appointments. Van Pul testified that figuring out he had a problem and starting to address it was a huge step forward for Lane. 2RP 77.

In treatment, Lane has come to understand that he needs to avoid anything that is a disinhibitor. While mental illness can be a disinhibitor, Lane's recognition that he needs more external controls—through mental

health treatment and medication—is considered progress in treatment. 2RP 78. In fact, van Pul testified that on a scale of 1 to 10, Lane’s progress in treatment was a 7. If he continues to work with his mental health provider and his response to medication is positive, his prognosis is good. Van Pul testified that she did not see Lane as a danger to the community. 2RP 78-79. She acknowledged that Lane’s lack of transparency was a problem that needed to be addressed, but he nonetheless was making good progress in treatment. 2RP 79.

The court granted the State’s motion to revoke Lane’s suspended sentence. It found that Lane had left Pierce County without permission and that he had failed to make satisfactory progress in sexual deviancy treatment. The court stated it was revoking the suspended sentence because Lane is not amenable to treatment due to his ongoing history of being dishonest with his CCO. CP 101-03. Lane filed this timely appeal. CP 104.

C. ARGUMENT

1. THE COURT’S DECISION TO REVOKE LANE’S SSOSA WAS AN ABUSE OF DISCRETION.

The trial court may revoke a SSOSA if there is sufficient proof that the offender violated the conditions of the suspended sentence or failed to make satisfactory progress in treatment. RCW 9.94A.670(11); State v.

McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009). Revocation of a suspended sentence rests within the discretion of the trial court and will be reversed only for abuse of discretion. McCormick, 166 Wn.2d at 705-06; State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972); State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). A trial court abuses its discretion when its decision “is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Here, the court abused its discretion when it revoked Lane’s SSOSA because its decision was contrary to the evidence. Lane’s treatment provider directly addressed Lane’s treatment progress, testifying that Lane had progressed to part D of the relapse prevention phase. She characterized his progress as a 7 on a scale of 10, saying he was making good progress in treatment. 2RP 78-79. Moreover, she testified he had made a huge step forward in recognizing and seeking treatment for his mental illness, and this was also considered progress. Mental health treatment would provide necessary external controls which would help Lane be more transparent with his CCO. Van Pul testified that with continued mental health treatment Lane’s prognosis was good, and that Lane was safe to be in the community. 2RP 88.

The court's findings that Lane had failed to make satisfactory progress in sexual deviancy treatment and that he was not amenable to treatment directly contradict van Pul's testimony. The finding is manifestly unreasonable, and the decision to revoke Lane's SSOSA was therefore an abuse of discretion.

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

The court entered an order of indigency finding that Lane was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 105-06.

- 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](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](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.

Lane has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his 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. 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, 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. Lane 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 Lane’s ability to pay.

In the event this court is inclined to impose appellate costs on Lane should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his 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 Lane to assist him in developing a record and litigating his ability to pay.

If the State is able to overcome the presumption of continued indigence and support a finding that Lane 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 his actual and documented ability to pay.

D. CONCLUSION

The court abused its discretion in revoking Lane's SSOSA, and its decision should be reversed. Moreover, this Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

DATED April 20, 2016.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibits in *State v. Richard Lane*, Cause No. 48203-7-II as follows:

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Monroe Correctional Complex—TRU  
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
April 20, 2016

**GLINSKI LAW FIRM PLLC**

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