

No. 48209-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

FRANK WALLMULLER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 08-1-00305-1

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

	Page
A. <u>STATE’S COUNTERSTATEMENTS OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
1) Because the trial court did not rule on the merits of Wallmuller’s RCW 10.01.160(4) motion for remittance of LFOs, this case should be remanded to the trial court for the trial court to rule on the merits of Wallmuller’s motion.	
2) The State contends that the issue of appeal costs is moot in this case because even if the State is the substantially prevailing party on this appeal, the State will not seek appeal costs on this particular appeal.	
B. <u>FACTS AND STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	1
1) The State respectfully concedes that under the recent case of State v. Shirts, No. 47740-8-II, this case should be remanded to the trial court for the trial court to exercise its discretion whether to hold an evidentiary hearing and for the trial court to then rule on the merits of Wallmuller’s RCW 10.01.160(4) motion for remittance of LFOs.....	1
2) The issue of appeal costs is moot because the State will not seek appeal costs in this particular appeal even if the State is the substantially prevailing party on this appeal.....	4
D. <u>CONCLUSION</u>	4

State’s Response Brief
Case No. 48209-6-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Table of Cases

	Page
<u>State Cases</u>	
<i>In re Flippo</i> , 191 Wn. App. 405, 362 P.3d 1011 (2015), review granted sub nom. <i>In re Pers. Restraint Petition of:</i> <i>EARL OWEN FLIPPO, Petitioner</i> , 185 Wn.2d 1032 (2016).....	2
<i>State v. Shirts</i> , ___ Wn. App. ___, ___ P.3d ___ (No. 47740-8-II, Aug. 30, 2016).....	<i>passim</i>
<u>Statutes</u>	
RCW 10.01.160(4).....	<i>passim</i>
<u>Court Rules</u>	
RAP 10.3(b).....	1

State’s Response Brief
Case No. 48209-6-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Because the trial court did not rule on the merits of Wallmuller's RCW 10.01.160(4) motion for remittance of LFOs, this case should be remanded to the trial court for the trial court to rule on the merits of Wallmuller's motion.
- 2) The State contends that the issue of appeal costs is moot in this case because even if the State is the substantially prevailing party on this appeal, the State will not seek appeal costs on this particular appeal.

B. FACTS AND STATEMENT OF THE CASE

Except where otherwise noted or where additional facts are provided in the argument sections below, for the purposes of the issues raised in this appeal, the State accepts Wallmuller's statement of facts, RAP 10.3(b).

C. ARGUMENT

- 1) The State respectfully concedes that under the recent case of *State v. Shirts*, No. 47740-8-II, this case should be remanded to the trial court for the trial court to exercise its discretion whether to hold an evidentiary hearing and for the trial court to then rule on the merits of Wallmuller's RCW 10.01.160(4) motion for remittance of LFOs.

Wallmuller's written motion that gives rise to the instant appeal was a preprinted motion that allowed the user of the form to check various

State's Response Brief
Case No. 48209-6-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

options. CP 12-15.¹ Wallmuller, acting pro se, checked all the options. CP 12. In his affidavit (declaration) supporting his motion, Wallmuller declared that the trial court did not conduct an individualized inquiry into his ability to pay before the trial court imposed LFOs. CP 10-11. It appears that the trial court and the State interpreted Wallmuller's motion to be a belated challenge of the trial court's failure to individually consider Wallmuller's ability to pay LFOs before imposing them in the judgment and sentence. RP 1-42; CP 4-5. Apparently relying on RCW 10.73.090(1), the trial court ruled that Wallmuller's motion was untimely. CP 5. The case of *In re Flippo*, 191 Wn. App. 405, 362 P.3d 1011 (2015), review granted sub nom. *In re Pers. Restraint Petition of: EARL OWEN FLIPPO, Petitioner*, 185 Wn.2d 1032 (2016), currently supports the trial court's ruling.

However, Wallmuller also moved for remission of LFOs under RCW 10.01.160(4). CP 12 (Para. 1.1, option "B"). The trial court's final

¹ Wallmuller has filed several challenges in the Court of Appeals, and these multiple filings have probably caused confusion with tracking the record. The Mason County Court Clerk initially provided an index of "Designation of Clerk's Papers" in this case that was later replaced by a substitute index of "Supplemental Designation of Clerk's Papers." When providing citations to the record, the State is referring to the supplemental index, while it appears that Wallmuller in his brief is referring to the original index. Therefore the page numbers differ between the two briefs even when referring to the same documents.

State's Response Brief
Case No. 48209-6-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

order is silent on the issue of remittance under RCW 10.01.160(4). CP 4-5.

After Wallmuller filed his opening brief in this case, this Court released its decision in the case of *State v. Shirts*, ___ Wn. App. ___, ___ P.3d ___ (No. 47740-8-II, Aug. 30, 2016). The State contends that this Court's opinion in *State v. Shirts* provides the answers to Wallmuller's contentions in the instant appeal.

Wallmuller provided no evidence or offer of proof to the trial court to support his motion for remittance. CP 10-11. In *Shirts*, the appellant "provided evidence that he is currently denied access to transitional classes and classification advances in DOC due to his outstanding LFOs." *Shirts* at para. 18. In the instant case, however, Wallmuller's only contention of hardship is that he is likely to die in prison before he is eligible for release. CP 11.

However, if Wallmuller were to provide evidence of hardship based on the LFOs currently imposed, and if he is not in contumacious default, then the trial court would be required to rule on the merits of his motion. *Shirts* at para. 24-26. But an evidentiary hearing is not required. *Id.* at para. 27. "If the superior court is able to make its 'manifest hardship' determination on the pleadings alone, an evidentiary hearing

State's Response Brief
Case No. 48209-6-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

would be superfluous.” *Id.* at para. 28. “On the other hand, if the superior court reviews the pleadings and believes an evidentiary hearing would be instructive, the statute does not prohibit an evidentiary hearing.” *Id.*

Here, because the trial court did not rule on Wallmuller’s remittance motion brought under RCW 10.01.160(4), the State respectfully concedes that this case should be remanded to the trial court for the trial court to decide whether an evidentiary hearing is appropriate and for the trial court to then rule on the merits of Wallmuller’s RCW 10.01.160(4) motion for remittance of LFOs.

- 2) The issue of appeal costs is moot because the State will not seek appeal costs in this particular appeal even if the State is the substantially prevailing party on this appeal.

The State contends that issue of appeal costs is moot in this particular appeal because even if the State is the substantially prevailing party in regards to this particular appeal, the State will not be seeking appellate costs in this appeal.

D. CONCLUSION

The State concedes that is case should be remanded to the trial court for the trial court to decide whether it will require an evidentiary

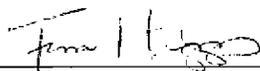
State’s Response Brief
Case No. 48209-6-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

hearing on Wallmuller's motion for remittance under RCW 10.01.160(4)
and for the trial court to then rule on the merits of Wallmuller's RCW
10.01.160(4) remittance motion.

DATED: September 6, 2015.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

State's Response Brief
Case No. 48209-6-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

MASON COUNTY PROSECUTOR

September 06, 2016 - 5:00 PM

Transmittal Letter

Document Uploaded: 7-482096-Respondent's Brief.pdf

Case Name: State v. Wallmuller

Court of Appeals Case Number: 48209-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: timh@co.mason.wa.us

A copy of this document has been emailed to the following addresses:

ltabbutlaw@gmail.com