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Court of Appeals

Division III

State of Washington

No. 33167-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MICHAEL THOMAS COLLINS,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge (guilty plea)
Honorable Cameron Mitchell, Judge (mntn to withdraw plea, sentencing)

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentence for appellant’s conviction for second degree identity theft exceeds the statutory maximum penalty.

2. The record does not support the boilerplate finding that the court considered appellant’s present and future ability to pay, including his financial resources. (Judgment and Sentence, CP 26–27, 128)

3. The imposition of legal financial obligations is improper because appellant lacks the ability to pay.

Issues Pertaining to Assignments of Error

1. Second degree identity theft is a class C felony with a statutory maximum penalty of 60 months. Did the sentencing court exceed its authority where it imposed a prison sentence of 50 months plus 12 months community custody?

2. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court recently emphasized that “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the record established appellant was impoverished but the court

nevertheless imposed LFOs without mention of appellant's inability to pay. Should this Court remand with instructions to strike LFOs?

B. STATEMENT OF THE CASE

Under two cause numbers, the appellant, Michael Thomas Collins, pled guilty to one count of forgery and one count of second degree identity theft. 6/3/14 RP 3–6; CP 103, 199. In return, the state agreed to dismiss several counts and recommend concurrent sentencing. CP 99, 195.

At sentencing, the Honorable Cameron Mitchell imposed a sentence of 29 months on the forgery conviction, to run concurrent with the 50 month sentence imposed on the second degree identity theft conviction. CP 30–31, 132–33. The identity theft sentence included 12 months community custody¹. CP 133.

The court inquired whether Collins would be able to work once he was released from custody. Collins responded no, that he has spinal problems and nerve problems in his legs, that he was receiving disability payments until his arrest on the current charges, and that he has been on medication ever since then. 2/3/15 RP 3. The court imposed legal

¹ The Judgment and Sentence for the second degree identity theft conviction states the 12 months of community custody were imposed on Count 1. CP 133. This appears to be a scrivener's error. Count 1, a charge of forgery, was dismissed as recommended in the plea agreement. CP 129, 193, 199, 203.

financial obligations (LFOs) of \$958.96² on the forgery conviction and \$961.44³ on the second degree identity theft conviction, and provided that any award of costs on appeal could be added to the LFOs. CP 28–29, 130–31. Each Judgment and Sentence contained a boilerplate finding that “[t]he court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change” and “[X] That the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 26–27 and 128, at ¶ 2.5. Collins did not object to the imposition of the LFOs. No restitution was ordered.

On each of the two convictions, the court waived the \$600 fees for court-appointed attorney, the \$500 fines, and the \$100 felony DNA collection fees. CP 28, 130.

Mr. Collins timely appealed. CP 5.

² \$500 victim assessment, \$200 criminal filing fee, \$158.96 sheriff service fee, and \$100 bench warrant fee. CP 28.

³ \$500 victim assessment, \$200 criminal filing fee, \$161.44 sheriff service fee, and \$100 bench warrant fee. CP 130.

C. ARGUMENT

1: Collins' sentence on the conviction for second degree identity theft is unlawful because it exceeds the statutory maximum.

Second degree identity theft is a class C felony with a maximum authorized sentence of 60 months. RCW 9.35.020(1), (3); RCW 9A.20.021(c). The combination of prison time (50 months) plus community custody (12 months) exceeds this limitation and is unlawful.

In preprinted language, the Judgment and Sentence indicates, "The combined term of imprisonment and the term of community custody cannot exceed the statutory maximum for this offense." CP 134. This is not sufficient, however. Rather, under RCW 9.94A.701(9), the term of community custody "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." Judge Mitchell was required to expressly reduce Collins' community custody on this count so that the combination of confinement and supervision did not exceed 60 months. *See, State v Boyd*, 174 Wn.2d 470, 471–473, 275 P.3d 321 (2012); *State v Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

2. The legal financial obligations should be stricken because Collins lacks the ability to pay.

At the time of the sentencings, the record established Collins was 51-years old, was receiving disability, and was indigent for purposes of defending against the state's prosecution. 2/3/15 RP 3; CP 117. The court nevertheless imposed \$1,920 in legal financial obligations, including mandatory and discretionary assessments and costs. CP 28, 130. The Judgment and Sentence contained boilerplate language that the court had "considered" Collins' present and future ability to pay LFOs and his financial resources. The parties and the court did not discuss this finding at all.

a. The imposition of LFO's on an impoverished defendant is improper under the relevant statutes and court rules, and violates principles of due process and equal protection.

The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court

imposes LFOs.” *State v. Blazina*, 182 Wn.2d 127, 830, 344 P.3d 680 (2015).

There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” *Id.* at 837. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The state may argue that the court properly imposed some of these costs without regard to Collins’s poverty, because the statutes in question use the word “shall” or “must.” *See* RCW 7.68.035 (penalty assessment

“shall be imposed”); RCW 36.18.020(2)(h) (convicted criminal defendants “shall be liable” for a \$200 fee); RCW 43.43.7541 (every felony sentence “must include” a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution “shall be ordered” for injury or damage absent extraordinary circumstances, but also states that “the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 712–13, 355 P.3d 1093 (2015) (the

legislature's choice of different language in different provisions indicates a different legislative intent).⁴

It is true the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917–18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: “The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants.” *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not. *See also State v. Duncan*, No. 90188-1, 2016 WL 1696698, fn. 3 at *5, ___ P.3d ___ (Wash. Apr. 28, 2016) (stating “we have found that the victim penalty assessment statute was not unconstitutional on its face or as applied to the defendants in the case because there were sufficient safeguards to prevent the defendants from

⁴ The legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

being sanctioned for non-willful failure to pay. *See Curry*, 118 Wn.2d at 917”). In light of *Blazina*, the continued constitutional adequacy of the “safeguards” relied upon in *Curry* is questionable.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to “LFOs,” not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 (“we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.”); *id.* at 839 (“We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.”). It is noteworthy that when listing the LFOs imposed on the two defendants at issue, the court cited some of the same LFOs Collins includes in his challenge here: the Victim Penalty Assessment and criminal filing fee. *Id.* at 831 (discussing defendant *Blazina*); *id.* at 832 (discussing defendant *Paige-Colter*). Defendant *Paige-Colter* had only one other LFO applied to him (attorney’s fees), and defendant *Blazina* had only two (attorney’s fees and extradition costs). *See id.* If the Court were limiting its holding to a minority of the LFOs

imposed on these defendants, it presumably would have made such limitation clear.

It does not appear that the Supreme Court has ever held that the DNA fee and “criminal filing fee” are exempt from the ability-to-pay inquiry. And although the court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. Compare *Lundy*, 176 Wn. App. at 102–03 with *Blazina*, 182 Wn.2d at 830–39.

It would be particularly problematic to require Collins to pay the “criminal filing fee,” because many counties – including Washington’s largest – do not impose it on indigent defendants. See *State v. Duncan*, 2016 WL 1696698, fn. 3 at *5 (citing to *Lundy* in recognizing “[o]ther [legislative designation of fees such as the filing fee imposed by RCW 36.18.020(2)(h)] have been treated as mandatory by the Court of Appeals,” but suggesting the untested constitutionality of such statutes may depend on whether “there were sufficient safeguards to prevent the defendants from being sanctioned for non-willful failure to pay”). Disparate treatment means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. See *Conover*, 183 Wn.2d 706,

711–12 (“we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant’s favor”). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because “the error, if permitted to stand, would create inconsistent sentences for the same crime”); *see also id.* at 837 (discussing the “[s]ignificant disparities” in the administration of LFOs among different counties); *and see* RCW 9.94A.010(3) (stating that a sentence should “[b]e commensurate with the punishment imposed on others committing similar offenses”).

GR 34, which was adopted at the end of 2010, also supports Collins’ position. That rule provides in part, “Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant’s ability to secure access to judicial relief from a judicial officer in the applicable court.” GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at

522. The trial court granted a partial waiver of fees, but ordered Jafar to pay \$50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs “shall” be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527–30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading “would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees.” *Id.* at 529. Given Jafar’s indigence, the Court said, “We fail to understand how, as a practical matter, Jafar could make the \$50 payment now, within 90 days, or ever.” *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Our Supreme

Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the “criminal filing fee” across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528–29 (noting that “principles of due process or equal protection” guided the court’s analysis and recognizing that failure to require waiver of fees for indigent litigants “could lead to inconsistent

results and disparate treatment of similarly situated individuals”). Such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating some of the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45–46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. Unfortunately, this assumption was not borne out. As indicated in significant studies post-dating *Blank*, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. *See e.g.*, 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*, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).⁵ In other words, the risk of unconstitutional imprisonment for poverty is very real—certainly as real as the risk that Ms. Jafar’s civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar’s claim was ripe for review even though trial court had given her 90 days to pay \$50 and had neither dismissed her

⁵ Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Collins concedes that the government has a legitimate interest in collecting all of the costs and fees at issue. But imposing costs and fees on impoverished people like Collins is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature’s stated goals of encouraging rehabilitation and preventing recidivism. *See RCW 9.94A.010; Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

b. This Court should reverse and remand with instructions to strike legal financial obligations.

This Court should apply a remedy in this case notwithstanding that

the issue was not raised in the trial court. Prior to *Blazina*, the trial court may have been bound by the decision in *Lundy* for certain “mandatory” fees, so any objection would have been futile and contrary to the goal of judicial efficiency. See *State v. Robinson*, 171 Wn. 2d 292, 305, 253 P.3d 84 (2011) (granting relief even though issue not raised below, where trial court would have been bound by precedent that was abrogated post-trial). However, *Blazina* mandated consideration of ability to pay before imposing LFOs and held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the state’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does

little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev’d in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the

thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Collins’ case regardless of his failure to object. *See, Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259–60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”) (Citations omitted)).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Collins’ February 3, 2015, sentencings occurred one month before the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts and defense attorneys to make the appropriate inquiry on the record. The court below did not inquire. Collins respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

In sum, because *Blazina* clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record demonstrates Collins' extreme indigence, this Court should remand with instructions to strike legal financial obligations, or in the alternative make a fair inquiry into Collins' ability to pay.

3. Appeal costs should not be imposed.

Collins was sentenced to 50 months of confinement. CP 133. The evidence showed then 51-year-old Collins was receiving disability, and was indigent for purposes of defending against the state's prosecution. 2/3/15 RP 3; CP 117. The trial court waived some but not all mandatory and discretionary fees. CP 28, 130. The court also found Collins to be indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel wholly at public expense. CP 3–4. If Collins does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. *See State v. Sinclair*, __ P.3d __, 2016 WL 393719 at *6 (Wash. Ct. App. Jan. 27, 2016), petition for review filed February 18, 2016 (No. 92796-1) (instructing defendants on appeal to make this argument in their opening briefs).

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). Thus, this Court has ample discretion to deny the state’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. *Blazina*, 182 Wn.2d at 830. Only by conducting such a “case-by-case” analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.* Accordingly, Collins’ ability to pay must be determined before discretionary costs of appeal are imposed. The trial court made a boilerplate finding of no disability and ability to pay that contradicts the record including its own waiver of some mandatory and discretionary costs. *See* 2/3/15 RP 3; CP 26–27, 128 (Judgment and Sentence, paragraph 2.5). Without a basis to determine Collins has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing to expressly reduce community custody so that the term imposed, when combined with the term of confinement, does not exceed 60 months. Additionally, the matter should be remanded with instructions to strike legal financial obligations, or in the alternative make a fair inquiry into Collins' ability to pay. If Collins is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the state ask for them.

Respectfully submitted on June 3, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 3, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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