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AUGUST 17, 2016
Court of Appeals
Division III
State of Washington

34112-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS ROY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF ASOTIN COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENTS OF ERROR1

B. ISSUES1

C. STATEMENT OF THE CASE.....3

D. ARGUMENT6

 1. COST OF COLLECTIONS DOES NOT INCLUDE EXPENDITURES IN CONNECTION WITH THE MAINTENANCE AND OPERATION OF GOVERNMENT AGENCIES.....6

 2. THE COUNTY HAS NOT INCURRED AUTHORIZED COSTS FOR COLLECTIONS ACTIVITY FOR WHICH THE OFFENDER MAY BE CHARGED A FEE8

 3. A FEE FOR COSTS OF COLLECTIONS IS NOT PROPERLY IMPOSED AS AN ADDITIONAL PENALTY FOR OFFENDERS WHO ARE UNABLE TO PAY LEGAL FINANCIAL OBLIGATIONS.....9

 4. THE COURT’S DECISION NOT TO SELECT THE PRE-PRINTED SECTION OF THE JUDGMENT AND SENTENCE THAT PERMITS THE CLERK OF THE COURT TO COLLECT FEES FOR THE COST OF COLLECTIONS EXPRESSES THE COURT’S INTENT THAT SUCH FEES NOT BE IMPOSED.....11

 5. IF THE STATE PREVAILS IT SHOULD NOT BE AWARDED THE COSTS OF THIS APPEAL.....14

E. CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE BAILEY, 162 Wn. App. 215, 252 P.3d 924 (2011).....	8
IN RE RIVARD, 183 P.3d 1115 (Wash. Ct. App.), <i>on reconsideration</i> , 146 Wn. App. 891, 193 P.3d 195 (2008), <i>rev'd sub nom.</i> RIVARD V. STATE, 168 Wn.2d 775, 231 P.3d 186 (2010)	12
STATE V. BLAZINA, 182 Wn.2d 827, 344 P.3d 680 (2015).....	10, 14
STATE V. BROADAWAY, 133 Wn.2d 118, 942 P.2d 363 (1997).....	12
STATE V. CLARK, 191 Wn. App. 369, 362 P.3d 309 (2015).....	7
STATE V. HATHAWAY, 161 Wn. App. 634, 251 P.3d 253 (2011).....	7
STATE V. JONES, 96 Wn. App. 649, 980 P.2d 791 (1999).....	12
STATE V. LUNA, 172 Wn. App. 881, 292 P.3d 795 (2013).....	12, 13
STATE V. NOLAN, 141 Wn.2d 620, 8 P.3d 300 (2000).....	14
STATE V. PHARRIS, 120 Wn. App. 661, 86 P.3d 815 (2004).....	12
STATE V. SCHULTZ, 146 Wn.2d 540, 48 P.3d 301 (2002).....	12
STATE V. SINCLAIR, 192 Wn. App. 380, — P.3d — (2016).....	14

STATUTES

RCW 9.94A.760(5)-(12)..... 8, 9
RCW 9.94A.780(7)..... 5, 6, 8, 13
RCW 10.01.160(2)..... 7
RCW 10.73.160(1)-(2)..... 8, 14, 15
RCW 36.18.016(29)..... 5, 6, 13
RCW 36.18.190 9
RCW 36.23.110 9

COURT RULES

CrR 7.2(d) 11
RAP 15.2(f)..... 14
RAP 18.1..... 2

A. ASSIGNMENT OF ERROR

1. The court erred in denying the defendant's motion to strike numerous assessments for the purported costs of collection of legal financial obligations.

B. ISSUES

1. Do allowed costs imposed for the collection of legal financial obligations include expenditures in connection with the maintenance and operation of the county clerk's office?
2. Absent employment of any collection agency or county collection services, is there any basis for imposing a costs assessment for the maximum amount permitted by statute?
3. May the county clerk impose a fee for costs as a penalty for an offender's failure to pay legal financial obligations?
4. Does the court's decision not to select the pre-printed section of the Judgment and Sentence that permits, inter alia, action by the clerk's office to initiate actions authorized by the legislature for collection of all fines and costs, including discretionary costs, imposed by the court, and to collect from the defendant additional fees for such

actions, bar the subsequent imposition costs for clerk's having undertaken such collection actions?

5. The records show Nicholas Roy has legal financial obligations exceeding \$30,000; his only known employment in the last 25 years has been provided by the Department of Corrections, for which he is paid \$35 to \$40 per month; his convictions reflect his continuous use of methamphetamine and other addictive substance throughout this time, interrupted if at all by periods during which he has been incarcerated. Should this court exercise its discretion not to award costs in the event the State substantially prevails on appeal?
6. The June 10, 2016, General Order of Division 3 of the Court of Appeals requires an appellant in a criminal case to object, if at all, to the State's request for an award of attorney fees and the expenses of an appeal, by asking the court to exercise its discretion not to award such costs, and providing supporting argument for such request, in the opening brief, or by motion within 60 days. Is such an order inconsistent with the provisions of RAP 18.1? Does such a rule supercede RAP 18.1?

C. FACTS

Nicholas Roy is appealing from an Asotin County Superior Court decision denying his motions to strike the Asotin County Clerk's \$100 annual assessments from 2008 through 2014 for the purported cost of collecting legal financial obligations imposed following four of Mr. Roy's prior Asotin County felony convictions. (CP 121-23, 142-46, 286-88, 307-11, 429-431, 450-54, 670-72, 678-82) In each case, the Judgment and Sentence included a preprinted section incorporating statutory provisions for the collection of legal financial obligations, and a box for the court's use in selecting such provisions. (CP 10, 157, 319, 466) In no case did the court adopt these provisions by checking the box or otherwise indicate in the record an intent to adopt such provisions.

Mr. Roy was convicted of delivering marijuana and possessing methamphetamine in 1995. (CP 6) The court imposed a sentence of 22 months' confinement and costs and fees totaling \$2160. (CP 7-8) In 1998 he was convicted of possessing methamphetamine and less than 40 grams of marijuana. (CP 154) He was again sentenced to 22 months' confinement and costs of \$610 were imposed. (CP 156-57) In 2000 he was convicted of possessing methamphetamine and sentenced to 12.75 months of confinement under the special drug offender sentencing alternative and ordered to pay \$3160. (CP 317-18 320) In 2002 he was

convicted of possessing methamphetamine with intent to deliver, sentenced to 112 months' confinement and ordered to pay \$6244. (CP 598)

The Department of Corrections supervised Mr. Roy pursuant to his 1995 and 1998 convictions until 2003. (CP 168) In January 2008 the clerk initiated annual cost assessments of \$100.¹

Mr. Roy was also supervised by the Department of Corrections, including supervision of payment of legal financial obligations, until February 19, 2010, pursuant to his March 6, 2000, conviction. (CP 386-89) On February 19, 2010, the Department discontinued supervising Mr. Roy's financial obligations and the county clerk assumed collection responsibilities and began assessing annual \$100 costs. (CP 389)

From June 24, 2002, until August 12, 2011, the Department of Corrections supervised Mr. Roy's payment of legal financial obligations, pursuant to his 2002 conviction. (CP 617-23) On August 12, 2011, the Department discontinued supervising Mr. Roy's financial obligations and the clerk initiated cost assessments. (CP 619)

¹ No documents reflecting these assessments appear to have been filed in any of the cases involved in this appeal. The periodic notations of "costs assessed" appear on the dockets, which are available to this court. Mr. Roy alleged that these costs were being assessed and the State did not refute the allegation. The trial court order expressly denies Mr. Roy's motion to strike these assessments. (CP 143, 308, 451, 679)

Mr. Roy moved to strike the collection costs imposed in these cases. (CP 121-23) In response, the State argued: “With regard to imposition of collections fees, the Clerk’s Office is authorized, pursuant to RCWs 36.18.016(29) and 9.94A.780(7), to assess this fee to offset the costs of collecting legal financial obligations. The imposition of these costs was therefore lawful.” (CP 137) The State did not identify any collection costs incurred by the Clerk’s Office for which recovery was sought. The Superior Court ruled that RCW 36.18.016(20) and RCW 9.94A.780(7) authorize the clerk’s costs assessments. (CP 146)

Nicholas Roy has legal financial obligations exceeding \$30,000; his only known employment in the last 25 years has been provided by the Department of Corrections, for which he is paid \$35 to \$40 per month; his convictions reflect his continuous use of methamphetamine and other addictive substance throughout this time, interrupted if at all by periods during which he has been incarcerated. (CP 126-30, 176, 243-46, 250, 253, 291-95, 385, 390-92, 506-09, 600-16, 619) Nothing in the record supports the State’s contention Mr. Roy remains addicted to drugs and commits crimes related to and necessary to support his addiction for the purpose of avoiding payment of his legal financial obligations. (CP 137)

During this time the State has repeatedly opposed, and the court has denied, Mr. Roy’s requests for remission of his legal financial

obligations. (CP 171, 183-86, 336-37) It may be noted Mr. Roy has initiated the present litigation as well as litigation in the past in order to correct the State's erroneous efforts to recover costs and fees to which it was not entitled. (CP 143, 148, 155, 169,198-216, 276-78)

D. ARGUMENT

1. COST OF COLLECTIONS DOES NOT INCLUDE EXPENDITURES IN CONNECTION WITH THE MAINTENANCE AND OPERATION OF GOVERNMENT AGENCIES.

RCW 36.18.016 authorizes, but does not purport to set the amount of, an annual fee for the collection of costs: "For the collection of an adult offender's unpaid legal financial obligations, the clerk may impose an annual fee of *up to* one hundred dollars, pursuant to RCW 9.94A.780." RCW 36.18.016(29) (*emphasis added*).

The amount of the fee is to be based on the actual costs of collecting an offender's legal financial obligations: "If a county clerk assumes responsibility for collection of unpaid legal financial obligations . . . the clerk may impose a monthly or annual assessment for the cost of collections. *The amount of the assessment shall not exceed the actual cost of collections.*" RCW 9.94A.780(7). The term "cost of collections" is not defined in Title 9 RCW.

Division 2 of this court has relied on relevant portions of the criminal procedure statutes, Chapter 10 RCW in determining the legislature's intent in the clerk's imposition of a fee under RCW 36.18.016. See *State v. Hathaway*, 161 Wn. App. 634, 652-53, 251 P.3d 253 (2011). There, the court undertook to harmonize the provisions of the relevant statutes in determining the amount that may be imposed as a jury demand fee.

Title 10 RCW contains two sections that elucidate the meaning of the term "costs" in the context of criminal procedure. RCW 10.01.160 addresses the scope of costs that may be imposed on the defendant by the trial court in a criminal case:

Costs shall be limited to expenses *specifically incurred* by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

RCW 10.01.160(2); see *State v. Clark*, 191 Wn. App. 369, 375, 362 P.3d 309 (2015). RCW 10.73.160(2) specifies the costs that may be imposed in a criminal appeal:

Appellate costs are limited to expenses *specifically incurred* by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate

government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.

RCW 10.73.160(2); see *In re Bailey*, 162 Wn. App. 215, 220-21, 252 P.3d 924 (2011).

These statutes illustrate a legislative intent to charge a convicted criminal with costs incurred by the state with respect to specific legal violations; payment of legal financial obligations by convicted persons are not to be relied upon to subsidize the day-to-day operations of government.

2. THE COUNTY HAS NOT INCURRED AUTHORIZED COSTS FOR COLLECTIONS ACTIVITY FOR WHICH THE OFFENDER MAY BE CHARGED A FEE.

RCW 9.94A.780(7) limits the costs for which the clerk may charge the offender to "the cost of collecting legal financial obligations under RCW 9.94A.760." That statute specifies collection activities the costs of which the offender may be required to pay: "costs incurred related to accepting credit card payments" and "costs for collection services." RCW 9.94A.760(8) and (12). Collection services are authorized by statute:

Superior court clerks may contract with collection agencies under chapter 19.16 RCW or may use county collection services for the collection of unpaid court-ordered legal

financial obligations as enumerated in RCW 9.94A.030 that are ordered pursuant to a felony or misdemeanor conviction and of unpaid financial obligations imposed under Title 13 RCW. The costs for the agencies or county services shall be paid by the debtor.

RCW 36.18.190. In this context, the costs for county collection services would presumably be those comparable to the costs paid to a private collection agency.

Nothing in the record suggests the Asotin County Clerk has incurred any expenses other than the cost of maintaining and operating the Clerk's Office. That office is required by statute to perform a number of administrative functions relative to the collection of defendants' legal financial obligations. RCW 9.94A.760(5) through (11); RCW 36.23.110. These are routine administrative tasks that cannot be considered as being "specially" or "specifically" incurred with respect to the collection of costs from any individual offender.

3. A FEE FOR COSTS OF COLLECTIONS IS NOT PROPERLY IMPOSED AS AN ADDITIONAL PENALTY FOR OFFENDERS WHO ARE UNABLE TO PAY LEGAL FINANCIAL OBLIGATIONS.

In its answer to Mr. Roy's motion, the State argued:

The State notes that the primary bar to his payment of legal financial obligations would appear to be his insistence on committing new crimes upon release, which results in his further incarceration. As Division Three has noted, incarceration alone is insufficient to support a finding of

indigence for the purposes of legal financial obligations.
See: State v. Mayer, 120 Wn.App 7201 728 (Div. III, 2004)

(CP 137) This view, however, is superceded by the Supreme Court's analysis of how indigency is to be determined:

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider *important factors . . . such as incarceration* and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The Supreme Court has noted that the majority of offenders in Washington are unable to pay their legal financial obligations within three years. 182 Wn.2d at 827. The Court also pointed out the inequities in the imposition of legal financial obligations:

Significant disparities also exist in the administration of LFOs in Washington. For example, drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties. Additionally, counties with smaller populations, higher violent crime rates, and smaller proportions of their budget spent on law and justice assess higher LFO penalties than other Washington counties.

182 Wn.2d at 837. It is apparent that Mr. Roy's current financial difficulties result from these inequities.

4. THE COURT'S DECISION NOT TO SELECT THE PRE-PRINTED SECTION OF THE JUDGMENT AND SENTENCE THAT PERMITS THE CLERK OF THE COURT TO COLLECT FEES FOR THE COST OF COLLECTIONS EXPRESSES THE COURT'S INTENT THAT SUCH FEES NOT BE IMPOSED.

The trial court apparently concluded that the provisions of RCW, permitting the clerk to undertake collection activities and impose a fee for the costs thereof superceded the trial court's failure to check the box expressly authorizing the clerk to undertake such actions. The court misconstrues the significance of boilerplate language contained in the Judgment and Sentence.

Use of the "boilerplate" form for recording the court's judgment and sentence is required by court rule. CrR 7.2(d).² The prescribed form provides a concise and convenient form for recording many of the court's decisions with respect to various findings, conclusions, and other terms and conditions of the sentence. See *State v. Schultz*, 146 Wn.2d 540, 547,

² **(d) Judgment and Sentence.** For every felony sentencing, the clerk of the court shall forward a copy of the uniform judgment and sentence to the Sentencing Guidelines Commission. The uniform judgment and sentence shall be a form prescribed by the Administrator for the Courts in conjunction with the Supreme Court Pattern Forms Committee. If the sentence imposed departs from the applicable standard sentence range, the court's written findings of fact and conclusions of law shall also be supplied to the Commission.

CrR 7.2.

48 P.3d 301 (2002); *State v. Broadaway*, 133 Wn.2d 118, 135–36, 942 P.2d 363 (1997); *State v. Luna*, 172 Wn. App. 881, 882–83, 292 P.3d 795 (2013); *In re Rivard*, 183 P.3d 1115, 1117 (Wash. Ct. App.), *on reconsideration*, 146 Wn. App. 891, 193 P.3d 195 (2008), *rev'd sub nom. Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186 (2010). The trial court's actions in striking or not striking preprinted text, or checking or not checking the boxes, accompanying various boilerplate provisions in the judgment and sentence are reviewed as expressing the trial court's intended resolution of those issues. *Id.*

In *Schultz* our Supreme Court held that checking the applicable box on the judgment and sentence constitutes the court's affirmative indication that a previous no-contact order is extended as a sentencing condition. 146 Wn.2d at 547. In *Broadaway* the Court held "boilerplate" language purporting to order community placement, although not stricken by the trial court, was insufficient because the judgment and sentence failed to include any provision specifying the length of such placement. 133 Wn.2d at 135-36. *State v. Jones* held that such a deficiency could be remedied, however, by the simple expedient of "providing single blank line upon which to specify the applicable placement term." 96 Wn. App. 649, 653, 980 P.2d 791 (1999); see also *State v. Pharris*, 120 Wn. App. 661, 666, 86 P.3d 815 (2004).

In *Luna*, this court held that, where the prohibited conduct is set out in a no-contact order entered before trial, checking the “box on the judgment and sentence that stated, “ ‘[N]o-contact order [] to remain in effect’ . . . effectively extended the pretrial no-contact [order].” 172 Wn. App. at 885.

Neither RCW 36.18.016 nor RCW 9.94A.780 mandates certain actions by the clerk of the court. While the statutes provide authority and procedures for cases in which those actions are taken, the clerk is nevertheless bound by the provisions of the judgment and sentence in exercising such authority. When the judgment and sentence contains language specifying whether the provisions of those statutes should apply in the particular case before the court, the court’s decision whether to check the box provided for authorizing action under those statutes should be reviewed as expressing the trial court’s intended resolution of that issue.

In each of the cases from which this appeal is taken, the trial court failed to take any action expressing an intention to authorize the authority permitted by RCW 36.18.016 nor RCW 9.94A.780. The imposition of collection fees was not authorized by the court in these cases and is not mandated by statute. The fees should be stricken.

5. IF THE STATE PREVAILS IT SHOULD NOT BE AWARDED THE COSTS OF THIS APPEAL.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider *important factors . . . such as incarceration* and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 838. Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, — P.3d — (2016). *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—*e.g.*, ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

The trial court found Mr. Roy indigent for purposes of this appeal. (CP 149-50) In light of Mr. Roy's indigent status, and the presumption under RAP 15.2(f) that he remained indigent “throughout the review”

unless the trial court finds that his financial condition has improved, this court should exercise its discretion to waive appellate costs. RCW 10.73.160(1).

E. CONCLUSION

The Superior Court Order declining to strike the fees assessed against Mr. Roy by the Clerk of the Asotin County Superior Court should be reversed. Alternatively, this court should exercise its discretion to waive appellate costs.

Dated this 17th day of August, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 34112-7-III
)	
vs.)	CERTIFICATE
)	OF MAILING
NICHOLAS ROY,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on August 17, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on August 17, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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