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No. 91531-8

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CURTIS STUMP,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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ORIGINAL

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED

In this appeal from a criminal trial, appointed counsel moved to withdraw, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Court of Appeals granted counsel's motion to withdraw, and the appeal was dismissed. The State submitted a bill for costs, despite the fact that Mr. Stump did not actually litigate an appeal, and despite Mr. Stump's indigency.

Appellate costs may only be assessed under RAP 14.2 and RCW 10.73.160 where there is a substantially prevailing party. This Court has also discussed the need to reform our "broken LFO systems" and decried the consequences of legal financial obligations for impoverished offenders. This Court has plainly stated that costs cannot be collected from those who simply cannot pay them.

Where an indigent appellant does not file an appellate brief or receive review on the merits, resulting in no substantially prevailing party, and moreover, where an appellant is unable to pay the costs of the appeal, is the assessment of appellate costs improper under the appellate costs statute, and does it impede the access to justice for society's most vulnerable citizens?

B. STATEMENT OF THE CASE

1. The Trial

Curtis Stump, an indigent defendant, was detained during a traffic stop on June 21, 2013. RP 25-30.¹ His driver's license had been suspended due to unpaid tickets. RP 18-19. He was ordered out of his van, which was strewn with old clothing and other items. RP 19, 54-55.

Mr. Stump was charged with possession of a small bag of heroin, which officers stated they saw him drop to the ground. RP 20, 33-34, 48-49.² Following a bench trial, Mr. Stump was convicted of possession of a controlled substance. RP 6-12, 66; CP 7-8.

Mr. Stump was sentenced to a residential Drug Offender Sentencing Alternative (DOSA), at his request. 10/15/13 RP 2-6; CP 13-26. Mr. Stump appealed. CP 27-28.

2. The Appeal

Upon review of the record, appointed appellate counsel filed a motion to withdraw, pursuant to RAP 18.3 and Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating there was no

¹ The verbatim report of proceedings consists of one primary volume from the trial conducted on September 16, 2013, referred to as "RP." Other volumes are referred to by date.

² Mr. Stump admitted the heroin in the dropped bag belonged to him, after waiving Miranda. RP 23-25.

basis in law or fact upon which a claim for relief could be granted. Mr. Stump did not file a pro se statement of additional grounds.

The State agreed with appellate counsel's assessment of the record, and in a three-page response, urged the Court of Appeals to grant counsel's motion to withdraw. The Court of Appeals Commissioner granted the Anders motion to withdraw and dismissed the appeal, without raising any additional appellate issues *sua sponte*. State v. Stump, (Slip Opinion, No. 32015-4-III, Sept. 15, 2014).

The State then filed a cost bill, seeking costs as the party who had substantially prevailed on appeal, pursuant to RCW 10.73.160(3) and RAP 14.4. The cost bill seeks a total of \$3024.50 in appellate costs from Mr. Stump. Mr. Stump timely filed an objection to the cost bill under RAP 14.5. He argued that in light of the Anders procedure, the State did not "substantially prevail"; at best, no party substantially prevailed on appeal, since the Court of Appeals granted counsel's motion to withdraw and thereafter dismissed the appeal.

The Court of Appeals Commissioner found the State had substantially prevailed, "in that the trial court's decision was affirmed," and awarded costs. State v. Stump (Slip Opinion, No. 32015-4-III, Nov.

13, 2014). Mr. Stump's motion to modify the decision on costs was denied.

This Court granted Mr. Stump's motion for discretionary review on the issue of appellate costs.

C. ARGUMENT

1. **It is improper for courts to impose appellate costs where an Anders brief has been filed by appointed counsel and the appeal has been dismissed without the merits having been litigated in the appellate court.**

Curtis Stump, an indigent appellant, was assessed over \$3,000 in court costs and attorney fees, resulting from a dismissed appeal. This Court should find the appellate costs statute does not apply when an Anders brief is filed by appointed counsel on behalf of an indigent appellant.

- a. The standard of review is *de novo*.

The question in this case is whether the imposition of appellate costs is valid under RCW 10.73.160, where an Anders brief has been filed by appointed counsel on behalf of an indigent appellant and the appeal subsequently dismissed. Issues of statutory construction are reviewed *de novo*. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Court rules, such as RAP 14.2, are interpreted in the same manner as statutes. Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042

(2013). If a rule’s meaning is plain, this Court must give effect to that meaning; if a rule is ambiguous, this Court must “harmoniz[e] its provisions, ... using related rules to help identify the legislative intent embodied in the rule.” *Id.* (quoting *State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007)). “Although the same rules of construction apply to statutes and court rules, when interpreting court rules we are not concerned about usurping the role of the legislature because we alone are uniquely positioned to declare the correct interpretation of any court-adopted rule.” *Jafar*, 177 Wn.2d at 527.

RAP 1.2(a) provides this Court further authority to look at appellate costs anew, particularly in the case of dismissed appeals, as the “rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” *See State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015) (Fairhurst, J., concurring) (discussing the widespread problems associated with LFOs imposed against indigent defendants).

b. Pursuant to RCW 10.73.160, the Legislature has left the award of court fees and costs to the discretion of the courts.

The recoupment of appellate costs is specifically provided for by the portion of Title 10 entitled, Court Fees and Costs. RCW 10.73.160. The statute is discretionary, leaving to the courts the authority to

determine whether to award appellate costs, and if so, the amount thereof. RCW 10.73.160(1). Under the appellate costs statute, “The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents or another person legally obligated to support a juvenile offender to pay appellate costs.” (emphasis added).³ The only mandatory portion of the statute is subsection (3), which indicates that if costs are sought, they “shall” be requested through the procedures set out in Title 14 of the Rules of Appellate Procedure (RAP). RCW 10.73.160(3). This provision, which directs the award of costs under the rules promulgated by this Court, is further indication that the Legislature granted this Court plenary authority over the governance of appellate costs in criminal appeals.

RAP 14.2 specifies that appellate costs will be awarded “to the party that substantially prevails on review.” The rule continues, “If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party.” RAP 14.2.

It is clear that under RAP 14.2, costs may not be awarded where no party substantially prevails in the context of a criminal appeal.

³ The legislative preference for not burdening those with costs who cannot afford them is reflected in the 2015 juvenile justice amendments. Ch. 265, Laws of 2015, Senate Bill 5564 (which effectively ending the practice of awarding appellate costs from juvenile convictions).

Likewise in the civil context, when there is no clear victor on appeal, no costs are awarded because neither party has substantially prevailed. See, e.g., American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990) (when both parties prevail on significant issues, there may be no substantially prevailing party); Mellon v. Reg'l Tr. Servs. Corp., 182 Wn. App. 476, 498-99, 334 P.3d 1120, 1131 (2014) (no party stands as the clear victor where each party prevails on a major issue and loses on others, so no costs awarded); Marine Enter., Inc. v. Security Pac. Trading Corp., 50 Wn. App. 768, 772, 750 P.2d 1290 (1988) (“The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties”).⁴

- c. The structure of an *Anders* dismissal makes plain appellate costs cannot be awarded because no party substantially prevails.

Because neither party substantially prevails upon dismissal of an appeal following an Anders brief, no costs should be assessed against an

⁴ It is noted that in the civil context, this Court has been bound by RCW 4.84.330, a classic fee-shifting statute, which states in relevant part: “the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements (emphasis added).” The relevant statute here, RCW 10.73.160, substitutes “may” for “shall,” as costs are discretionary.

indigent appellant. RAP 14.2; see, e.g., State v. Nolan. 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Where a motion to withdraw is filed pursuant to Anders v. California, appointed appellate counsel petitions the appellate court for permission to withdraw, stating counsel has found no good faith basis for an argument on appeal. 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970); RAP 18.3. Under the Anders protocol, an indigent appellant, such as Mr. Stump, may still file a pro se supplemental brief, after he is served with the motion to withdraw. State v. Hairston, 133 Wn.2d 534, 538, 946 P.2d 397 (1997). This Court has upheld the Anders procedure, so long as the appellate court independently reviews the trial record before releasing counsel and dismissing the appeal. Id. at 541 (finding the Anders briefing and review maintain the constitutional right to counsel).

When the Court of Appeals dismisses an appeal under Anders, it merely grants appointed counsel's motion to withdraw as counsel, dismissing the matter in a manner this Court has found efficient and ethical. See Hairston, 133 Wn.2d at 541; c.f. S. Capitol Neighborhood Ass'n v. City of Olympia, 23 Wn. App. 260, 265, 595 P.2d 58, 61 (1979) (denying appellate costs under RAP 14.2, citing appellants'

failure to bring controlling authority to the attention of the court, resulting in “an overly complex trial and probably a needless appeal”).

The appellate court considering an Anders brief has not rendered an award or final judgment to either party, nor has it made a decision on the merits.⁵ The appeal has thus not resulted in a “substantially prevailing party,” as required by RAP 14.2, since the appellate court has merely dismissed the appeal and permitted counsel to withdraw. See Nolan, 141 Wn.2d at 625-26.

d. This Court’s analysis in *Nolan* also makes clear the State did not substantially prevail.

The first step in determining if costs may be awarded following a criminal appeal is to determine whether the State is the substantially prevailing party. Nolan, 141 Wn.2d at 625. “[T]he award of costs is based on who wins the review proceeding – not on who ultimately prevails on the merits.” Id. at 626 (quoting Family Med. Bldg., Inc. v. D.S.H.S., 38 Wn. App. 738, 739, 689 P.2d 413 (1984)). In Nolan, this Court suggested the State was mistaken in its understanding of

⁵ See, e.g., State v. C.A.G., (No. 70939-9-I, Jan. 7, 2015) (“This is an Anders appeal in which appellant’s counsel withdrew. No costs will be awarded.”). Mr. Stump asks the Court to consider this unpublished opinion, since, in counsel’s experience, requests for costs in Division One are addressed similarly under RAP 18.3(a)(1) and 18.3(a)(2) – that is, costs are denied, or the cost bills withdrawn. See also RAP 14.1(a); GR 14.1(a).

“substantially prevailing” under RAP 14.2. “The State reads the comment as directing the award of costs to the party who obtains a reversal or an affirmance.” Id. (quoting Family Med. Bldg, 38 Wn. App. at 739). This is a “misinterpretation of the comment to RAP 14.2 ... Such an interpretation does not take into consideration the language of the rule itself which allows costs to ‘the party that *substantially* prevails.’” Id. (quoting Family Med. Bldg, at 38 Wn. App. at 739 (emphasis original)).

Accordingly, appellate courts must “look beyond the bottom line of reversal or affirmance” when determining if the State is the substantially prevailing party on appeal, and thus, whether costs may be awarded under RAP 14.2. Nolan, 141 Wn.2d at 626 (quoting Family Med. Bldg, at 38 Wn. App. at 739).

This is precisely what the Court of Appeals failed to do in Mr. Stump’s case. In denying Mr. Stump’s objection to the cost bill, the Court of Appeals merely stated the following: “This Court therefore affirmed the trial court’s decision. Thus, the State of Washington did prevail in that the trial court’s decision was affirmed.” State v. Stump, (No. 32015-4-III, Nov. 13, 2014). That ruling relied upon the very factors this Court stated were a “misinterpretation” of RAP 14.2.

Nolan, 141 Wn.2d at 626. Rather than consider the party who prevails at the review proceeding – here, counsel for Mr. Stump moved to withdraw and was successful in gaining that relief – the Court of Appeals instead considered only that there was an affirmance. See id.

Accordingly, in this case, the Court of Appeals erred when it concluded the State was the substantially prevailing party, or indeed, that any party substantially prevailed. The fact that Mr. Stump’s conviction was ultimately affirmed is of no consequence to the issue of appellate costs. RCW 10.73.160, operating through RAP 14.2, relies upon there being a substantially prevailing party, not upon whether an affirmance or reversal was granted. Nolan, 141 Wn.2d at 626.

Because the Court of Appeals erred when it applied RCW 10.73.160 and RAP 14.2 in this case, the Court of Appeals ruling awarding costs following the dismissal of Mr. Stump’s appeal should be reversed.

Alternatively, when the Court of Appeals considered precisely the factors this Court stated were a “misinterpretation” of RAP 14.2 in State v. Nolan, the Court of Appeals abused its discretion. “A discretionary decision ‘is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record *or was reached by applying the*

wrong legal standard.” State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (emphasis in original, internal quotations omitted)). The Court of Appeals abused its discretion when it applied the wrong legal standard to the State’s request for costs following the dismissal of Mr. Stump’s appeal.

2. The equities reinforce the impropriety of assessing appellate costs against poor defendants who have withdrawn their appeals and who lack the ability to pay.

This Court recently held that courts may only require an indigent defendant to reimburse the state for authorized costs, and only if the defendant has the financial ability to do so. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) (“the state cannot collect money from defendants who cannot pay”); see also Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3) (“court is directed to consider ability to pay”).

This Court stated in Blazina that trial courts “must consider the defendant’s current or future ability to pay” based on the “particular facts of the defendant’s case.” 182 Wn.2d at 834; RCW 10.01.160(3) (the court shall take account of the financial resources of the defendant and

the nature of the burden that payment of costs will impose). This Court exercised its discretion and reached the merits on Blazina, in large part, due to significant concerns regarding equal justice and the need for reform of the “broken” LFO system. 182 Wn.2d at 835-36.

Great disparities exist in the administration of LFOs in Washington. The amount of fines and fees imposed upon conviction vary greatly by “gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced.” See id. at 837.⁶ In addition, since LFOs accrue interest at a rate of 12 percent, plus collection fees, indigent defendants will ultimately owe higher LFO sums than their wealthier counterparts who can pay in full. Id. at 836 (citing Beckett, et al, at 21).⁷ Moreover, the inability to pay off LFOs means the courts retain jurisdiction over poor offenders for years – inhibiting reentry and having adverse effects on employment, housing, and credit. Id. at 836-37 (citing Beckett, et al, at 43). These inequities apply with equal force to costs imposed on appeal.

⁶ See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008).

⁷ Blazina considered RCW 10.01.160, which governs discretionary legal financial obligations (LFOs), rather than RCW 10.73.160, the appellate costs statute. However, the same reasoning and equities apply.

That Mr. Stump, like many others against whom appellate costs are assessed, is indigent and without resources to pay appellate costs, is undisputed. The lower court found Mr. Stump indigent when it appointed him a public defender at trial, and the record supports the lower court's finding. When Mr. Stump was initially stopped, he was driving a used van that was strewn with old clothing and other assorted items. RP 55, 58. He was unable to pay his traffic tickets, to make bail, or to bond out of jail. RP 13, 19. He remained incarcerated throughout the proceedings, without the resources even to afford appropriate attire for his trial. RP 13. Mr. Stump, who was 48 years old at the time of his arrest, told the court that once he finished the DOSA, his plan for housing was to live with his mother. 10/15/13 RP 3.

This Court suggested in Blazina that courts look to court rule GR 34 for guidance on the waiver of fees on the basis of indigency. 182 Wn.2d at 838. 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).

This Court applied GR 34(a) in Jafar v. Webb, where an indigent mother attempted to obtain a parenting plan. 177 Wn.2d 520, 303 P.3d 1042 (2013). The mother in Jafar argued she could not afford to pay even the small court fee of \$50, after the court had granted her a partial waiver. Id. at 523. This Court held the lower court was required to waive “*all* filing fees and surcharges” for indigent litigants, even though the relevant statutes mandated the costs were mandatory. Id. at 532 (emphasis original). This 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 these 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 different conclusion “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 (“We fail to understand how, as a practical matter, [appellant] could make the \$50 payment now, within 90 days, or ever.”).

This inevitability is even more troubling for criminal defendants like Mr. Stump, who face barriers to employment and housing far beyond those faced by civil litigants. See Blazina, 182 Wn.2d at 837; 10/15/13 RP 3. Furthermore, Blazina has called into question the very

premise of State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997).

Unlike the 1990's, when this Court assured indigent defendants that they would not be incarcerated for their inability to pay the costs of appointed counsel and other LFOs, this Court acknowledged in Blazina that times have indeed changed. 182 Wn.2d at 835.

This Court detailed the devastating consequences of LFOs on indigent defendants, citing articles containing several reports of indigent defendants who were, in fact, incarcerated for failure to pay LFOs. Id. at 835 (citing Am. Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010) (ACLU), available at: <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons> last viewed Nov. 11, 2015; Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). This Court properly concluded in Blazina that LFOs imposed against indigent defendants result in problems that are threefold: increased difficulty in reentering society; doubtful recoupment of money by the government; and inequitable collection and administration. Id.

The Court of Appeals Commissioner improperly determined the State was the substantially prevailing party in this Anders dismissal,

and erroneously awarded costs. In doing so, the court saddled an already impoverished appellant with increased barriers to reentry. This impropriety demands reversal. The statute, the court rules, and legal precedent all give this Court the authority to do so.

This Court should reverse the award of costs in this matter, and should further hold that the assessment of appellate costs is improper when a dismissal has been granted.

D. CONCLUSION

For the foregoing reasons, Mr. Stump respectfully requests this Court reverse the Court of Appeals ruling awarding costs, and hold that the assessment of costs against an indigent defendant following a dismissal is improper.

DATED this 16th day of November, 2015.

Respectfully submitted,

s/Jan Trasen

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To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Petitioner

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