NO. 90897-4

THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MATTHEW DAVID LEONARD

RESPONSE TO PETITION FOR REVIEW BY YAKIMA COUNTY

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A. INTRODUCTION

Petitioner/Appellant Leonard was charged with and convicted of one count of second degree felony murder. Leonard timely appealed raising several grounds. The Court of Appeals Division III upheld the conviction and denied the allegations raised in both the original appeal and Leonard's statement of additional grounds, the opinion was published in part.

Leonard is asking this court to address one of the issues that was raised and denied in the Court of Appeals as stated by Leonard;

"May a criminal defendant challenge for the first time on appeal the trial court's boilerplate finding that he has the ability to pay legal financial obligations (LFOs) imposed?"

Leonard argues that this court should accept review purporting that there is a conflict between cases from this court and cased decided by the three divisions of the court of appeals. However Leonard has not and cannot prove that any of the "LFO's" imposed were discretionary thus possibly necessitating the entry of findings or a colloquy by the trial court regarding Leonard's ability to pay those obligations.

B. ISSUE PRESENTED BY PETITION

As indicated above Leonard is only requesting this court address one issue from his appeal. That issue is;

"May a criminal defendant challenge for the first time on appeal the trial court's boilerplate finding that he has the ability to pay legal financial obligations (LFOs) imposed?"

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals properly denied the allegation pertaining to payment of legal financial obligations. Additionally the LFO's imposed were all mandatory and therefore the trial court was required to impose them irrespective of Leonard's ability to pay.

Further, there is no basis as set forth below which would allow this court to review this matter pursuant to RAP 13.4

C. STATEMENT OF THE CASE

In the unpublished portion of its decision the Court of Appeals ruled as follows:

> In State v. Duncan, 180 Wn. App. 245, 253,327 P.3d 699, *petition for review flied,* No. 90188-1 (April 30, 2014), we observed that whether a defendant will be perpetually unable to pay LFOs imposed at sentencing is not an issue that defendants overlook, it is one that they reasonably waive, and concluded that we would henceforth decline to address a challenge to a court's findings on that issue if raised for the first time on appeal. RAP 2.5(a). Our position is consistent with that of the other divisions of our court. *See* State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, *review granted,* 178 Wn.2d 1010 (2013) and State v. Calvin, 176 Wn. App. 1,316 P.3d 496, 507-08, *petition for review flied,* No. 89518-0 (Nov. 12,2013). The record in Mr. Leonard's case does not affirmatively show an inability to pay LFOs now or in the near future, as was the case in State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011). Mr. Leonard did not object to the findings in the trial court and thereby waived any challenge.

D. ARGUMENT

1. Standards of Review.

> RAP 13.4(b) Considerations Governing Acceptance of Review.;
>
> A petition for review will be accepted by the Supreme Court only: (**1**) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (**2**) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (**3**) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (**4**) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case does not **1**) Conflict with any decision by this court. Leonard's claim that the Court of Appeals ruling does so is not supported by valid argument, case law or the facts of this case. It is based on a reading of the court's decision which does not take into account the plain meaning of that ruling nor the facts; **2**) The ruling by the Court of Appeals, based on the specific facts of this case, does not conflict with any ruling by any other division of the Court of Appeals. This issue has been ruled on previously as indicated by the cases cited by the Court of Appeals in the unpublished ruling; the opinion issued in Leonard conforms with those prior opinions. **3**) The ruling of the Court of Appeals does not raise a significant question under either the State or Federal Constitution

All three Divisions of the Court of Appeals have ruled this type of error cannot be raise for the first time on appeal; State v. Calvin, 176 Wn.

App. 1,316 P.3d 496, 507-08, petition for review flied, No. 89518-0 (Div. I Nov. 12, 2013); State v. Blazina, 174 Wn.App. 906, 911, 301 P.3d 492 (Wn.App. Div. 2 2013) review granted, 178 Wn.2d 1010,311 P.3d 27 (2013) and. State v. Duncan, 180 Wn.App. 245, 327 P.3d 699 (Wn.App. Div. 3 2014)(Petition for Review filed – Stayed by this Court pending determination of Blazina) and State v. Kuster, 175 Wn.App. 420, 424-25, 306 P.3d 1022 (2013). This Court also has before it on review an unpublished case, State v. Paige-Colter 175 Wn. App. 1010, 2013 WL 2444604, review granted, 178 Wn.2d 1018, 312 P.3d 650 (2013) which distinguished Bertrand and followed Blazina.[1]

[1] Paige-Colter argues that the trial court erred in finding that he had the current or likely future ability to pay the legal financial obligations imposed by the court because nothing in the record supported that finding. State v. Bertrand, 165 Wn.App. 393, 404, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1024 (2012). Before making such a finding, the trial court must "'[take] into account [the] financial resources of the defendant and the nature of the burden'" imposed by the legal financial obligations. Bertrand, 165 Wn.App. at 404 (quoting State v. Baldwin, 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

But Bertrand did not address which, if any, of the legal financial obligations that the trial court imposed were mandatory. A $500 victim assessment is required by RCW 7.68.035, , irrespective of the defendant's ability to pay. State v. Curry, 62 Wn.App. 676, 680, 814 P.2d 1252 (1991). A $100 DNA collection fee is required by RCW 43.43.7541, irrespective of the defendant's ability to pay. State v. Thompson, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). A $200 criminal filing fee is required by RCW 36.18.020(2)(h). Because these legal financial obligations were mandatory, the trial court's finding of Paige-Colter's current or likely future ability to pay them is surplusage.

The only discretionary legal financial obligation imposed was the $1, 500 DAC recoupment fee. Paige-Colter did not object at his sentencing to the finding of his current or likely future ability to pay his legal financial obligations. Consistent with our recent decision in State v. Blazina, No. 42728-1-II, 2013 WL 2217206 (Wash.Ct.App. May 21, 2013) and RAP 2.5(a), we decline to allow Paige-Coulter to challenge that finding for the first time in this appeal.

Other cases have limited or followed Blazina and Duncan. [2]

There is no conflict between the three divisions of the court of appeals. Bertrand has been very specifically distinguished by all three divisions of the court of appeals. The record in Bertrand indicated that the Appellant had a very specific set of facts that made it impossible for Bertrand to ever be able to comply with the condition that payments be made. As was stated in Blazina;

> While we addressed the finding of current or future ability to pay in Bertrand for the first time on appeal under RAP 2.5(a), that rule does not compel us to do so in every case. We noted that Bertrand had disabilities that might reduce her likely future ability to pay and that she was required to begin paying her financial obligations within 60 days of sentencing. Bertrand, 165 Wn.App. at 404, 267 P.3d 511.

Leonard's bald assertion that State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) and State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) is in direct conflict with Division III's statement in State v. Duncan that;

> The Supreme Court may clarify this issue in Blazina and Paige-Colter, but for now we do not understand the reasoning and holdings of Moen, Ford, and later cases as requiring that we entertain challenges to LFOs and supporting findings that were never raised in the trial court.

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[2] State v. Ralph, 175 Wn.App. 814, 308 P.3d 729 (Wash.App. Div. 2 2013) JOHANSON, A.C.J. (concurring).

I concur with the majority opinion but write separately regarding Ralph's legal financial obligation (LFO) challenge because I would follow our analysis in State v. Blazina, 174 Wn.App. 906, 301 P.3d 492 (2013). I would decline to reach the merits of the LFO issue because Ralph did not object when the [308 P.3d 736] trial court failed to find that Ralph had a present or future ability to pay LFOs and when the trial court imposed the LFOs. Accordingly, I would hold that Ralph did not properly preserve the issue for appellate review. RAP 2.5(a).

As was stated by the Court in Duncan at 254-5;

> In State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996), the Supreme Court offered different reasoning for recognizing an exception for a defendant's failure to raise a timely objection to a sentencing error in the trial court, but reasoning that, again, does not apply here. At issue in Moen was a restitution order imposed after the deadline for entering a restitution order had passed. The court reasoned that an exception should be made to RAP 2.5(a) because (1) allowing a belated challenge would bring the defendant's sentence into compliance with sentencing statutes and (2)
> the challenge presented no risk that the defendant had engaged in a strategic waiver to the detriment of other parties and the court. Recognizing that a defendant's failure to object to a late order presents no potential for abuse, it held that " [t]his sort of 'correction' of an error does not fall sufficiently within the purpose of the rule" --which it described elsewhere as being to apprise the trial court of the claimed error at a time when it can correct it--" to justify requiring an objection as a prerequisite to appellate review." *Id.* at 547. In the case of LFOs, there is clear potential for abuse, since a defendant might well defer rather than raise a claim of permanent indigency at the time of sentencing, if he or she thought it could be successfully raised for the first time on appeal.

The court in Duncan analyzed the result and burden imposed by Ford as follows;

> State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999) (" Our holding in *Ford* was directly controlled by the clear burden of proof placed on the State by the [Sentencing Reform Act of 1981, ch. 9.94A RCW]."). By contrast, RCW 10.01.160(3) and RCW 9.94A.760(2) provide that the court is to take account of present or

future ability to pay at the time of sentencing but without imposing a burden of proof on the State at that time.

Further it would appear that all of the costs imposed in Leonard's case are mandatory. A trial court may order the repayment of court costs, including attorney fees, as part of his judgment and sentence. RCW 10.01.160(1); State v. Smits, 152 Wn.App. 514, 519, 521, 216 P.3d 1097 (2009) As was indicated in Smits a defendant is not precluded from raising this issue at some later date if collection of those LFOs later presents a financial hardship. A defendant may petition the court to modify his LFO payments as set forth in RCW 10.01.160(4). Therefore as indicated by many courts the time to examine a defendant's ability to pay is when the government seeks to collect those LFO costs not on direct appeal when there has been no attempt to enforce any condition or requirement. See, Smits, 152 Wn.App. at 523-24, 216 P.3d 1097.

Leonard's judgment and sentence indicates he is required to pay restitution – a mandatory payment pursuant to RCW 9.94A.753(4) and (5) dictate that " [r]estitution shall be ordered whenever the offender is convicted of an offense which results in ... damage to or loss of property" and " [t]he court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount."; Leonard was assessed a $500.00 payment for the victim assessment which is required by RCW 7.68.035, and must be imposed irrespective of the defendant's ability to

pay. State v. Curry, 62 Wn.App. 676, 680, 814 P.2d 1252 (1991), State v. Williams, 65 Wn.App. 456, 460-61, 828 P.2d 1158 (1992) (victim penalty assessment "is mandatory and requires no consideration of a defendant's ability to pay" at sentencing); he was assessed a $100.00 DNA collection fee which is required by RCW 43.43.7541, once again irrespective of the Leonard's ability to pay. State v. Thompson, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) and finally; a $200 criminal filing was assessed a fee which, as with the other costs that were imposed, is required/mandatory pursuant to RCW 36.18.020(2)(h).

All of these legal financial obligations were mandatory, the trial court's finding of Leonard's current or likely future ability to pay them is therefore "surplusage."

State v. Lundy, 176 Wn.App. 96, 308 P.3d 755 (Wn.App. Div. 2 2013);

> As a preliminary matter, we note that Lundy does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g.,* State v. Kuster, No. 30548-1-III, 2013 WL 3498241 (Wash.Ct.App., July 11, 2013). And our courts have held that these mandatory obligations are constitutional so long as "there are sufficient safeguards in the current

> sentencing scheme to prevent *imprisonment* of indigent defendants." State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).
>
> RCW 9.94A.753(4) and (5) dictate that " [r]estitution shall be ordered whenever the offender is convicted of an offense which results in ... damage to or loss of property" and " [t]he court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." Thus, the $554.52 in restitution Lundy owed is mandatory. Additionally, a $500 victim assessment is required by RCW 7.68.035(1)(a), a $100 DNA collection fee is required by RCW 43.43.7541, and a $200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. *See* State v. Curry, 62 Wn.App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166; State v. Thompson, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's "finding" of a defendant's current or likely future ability to pay them is surplusage. (Footnote omitted, emphasis in original.)

The record in this case is not as sparse as some of the cases where review has been denied. In the trial court there was a specific discussion regarding the amount of restitution. At that hearing Leonard did not state that he was objecting to the restitution because he was unable to pay the amount, he only objected to the total amount the State was requesting. This in and of itself manifests Leonard's agreement that he had the ability to pay these costs and conforms with the discussion between the court, counsel and Leonard regarding Leonard's specific waiver of his right to appear at any future hearing regarding that would address the amount not the ability to pay

restitution. (RP 8/24/12 84-87) State v. Lundy, 176 Wn.App. 96, 308 P.3d 755 (Wn.App. 2013) recently addressed the standard of review;

> The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one. In *Baldwin,* for instance, this burden was met by a single sentence in a presentence report that the defendant did not object to:
>
> > The presentence report contained the following statement, "Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense." Baldwin made no objection to this assertion at the time of sentencing.... [I]nformation contained in the presentence report may be used by the court if the defendant does not object to that information. [State v. Southerland, 43 Wn.App. 246, 250, 716 P.2d 933 (1986).] Therefore, when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied. 63 Wn.App. at 311, 818 P.2d 1116.

E. CONCLUSION

Petitioner has failed to set forth a basis for this matter to be reviewed by this court. The opinion issued in this case does not conflict with any of the law set forth in the cases cited by Petitioner. Leonard's claim does not meet the requirements of RAP 13.4. The actions of the trial court and the Court of Appeals should not be disturbed, this petition should be denied.

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Respectfully submitted this 21st day of November 2014.

s/ David B. Trefry
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Certificate of Service

I, David B. Trefry, hereby certify that on this date I emailed a copy of this motion, by agreement of the parties, to Mrs. Susan Gasch at gaschlaw@msn.com

Dated at Spokane, WA this 21st day of November, 2014.

s/ David B. Trefry

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Please find attached the State's response to the Petition for Review filed by Mr. Leonard.

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