NO. 46101-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

IRVING LYLE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman, Judge

No. 13-1-04027-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Although the issue was not properly preserved at trial and is not ripe for review, whether the trial court's imposition of the legal financial obligation was clearly erroneous where the record shows it took account of Defendant's future ability to pay as required by statute.

2. Whether defense counsel was ineffective for failing to object to the imposition of the legal financial obligation where the trial court properly took account of Defendant's future ability to pay that obligation.

B. STATEMENT OF THE CASE.

1. Procedure

On October 21, 2013, the State charged Irving Lyle, hereinafter referred to as "Defendant," with one count of failure to register as a sex offender - third offense. CP 1. *See* RCW 9A.44.132(1)(b). Defendant was found guilty as charged after a bench trial. CP 18; RP 203.[1] Defendant was sentenced to a standard range sentence of 44 months. CP 22.[2] The sentencing court imposed mandatory legal financial obligations including

[1] The consecutively paginated verbatim report of proceedings will be referred to by RP and the page number (RP #).

a $500 Crime Victim assessment, $100 DNA Database Fee, and $200 Criminal Filing Fee. CP 20. It also imposed a discretionary legal financial obligation, a $1,500 recoupment for Department of Assigned Counsel services. CP 20.

2. Facts

Defendant was convicted of one count of rape in the first degree in 1991, a felony sex offense which imposed on him a duty to register as a sex offender. CP 34; RP 20. Defendant was advised of his duty to update his registration within three business days of changing residences. RP 21. He was also aware, given that he had been registered as such previously, that he could register as a transient offender but must report to the Sheriff's Office every seven days. *Id.*

Defendant was living with Harry Legg in a house at 1320 S. M Street beginning in December 2012. RP 28. He updated his registration accordingly. *Id.* However, in August 2013, Legg evicted Defendant at the request of the landlord of the property. RP 76. After Defendant left in August 2013, Legg did not see him return to 1320 S. M Street. RP 79.

Defendant's Community Corrections Officer (CCO), Tiffany Pate, last communicated with Defendant after he failed to report for a polygraph

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[2] Given Defendant's offender score of 12, the standard range was 43-57 months. CP 19.

appointment. RP 38. Legg's CCO, Theresa Hinds, saw Defendant at 1320 S. M Street on August 8, 2013. RP 61. Both CCO Pate and Hinds went to the residence at 1320 S. M Street in September 2013 and saw no sign of Defendant. RP 40, 61.

After receiving an anonymous tip, police found Defendant at the Woodmark Apartments on October 17, 2013 and arrested him on the outstanding warrant issued for failure to register. RP 142. Defendant admitted to officers, who testified at trial, that he was evicted from 1320 S. M Street in August 2013. RP 143. Defendant claimed that since the eviction, he had been staying in different motels before coming to the Woodmark apartments the previous week. RP 170.

Defendant waived his right to a jury trial, and a bench trial commenced before the Honorable Judge Hickman. CP 6. Defendant was represented by two attorneys from Department of Assigned Counsel. RP 7. Defendant's CCO testified that she was aware he had a job doing landscaping work. RP 44. Legg testified that Defendant paid him $240 a month in rent after obtaining a landscaping job. RP 74. Defendant did not testify. RP 174.

C. ARGUMENT.

1. ALTHOUGH THE ISSUE WAS NOT PRESERVED AND IS NOT RIPE, THE TRIAL COURT'S IMPOSITION OF THE LEGAL FINANCIAL OBLIGATION WAS NOT CLEARLY ERRONEOUS WHERE THE RECORD SHOWS IT TOOK ACCOUNT OF DEFENDANT'S FUTURE ABILITY TO PAY.

There are mandatory court costs and fees, which sentencing courts must impose, including a criminal filing fee, a crime victim assessment fee, and a DNA database fee. RCW 36.18.020(h); RCW 7.68.035; RCW 43.43.7541. Trial courts may also require a defendant to pay costs associated with bringing a case to trial, such as recoupment for Department of Assigned Counsel pursuant to RCW 10.01.160.

There are two limitations in the statute to protect defendants:

> (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.
> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs . . .

RCW 10.01.160. In this case, Defendant challenges the discretionary cost imposed: the Department of Assigned Counsel recoupment. *See* RCW 10.01.160; Brief of App., p. 3-4, 21.

a. Defendant has failed to show why this Court should treat defendant's legal financial obligation as illegal sentencing, therefore the issue may not be raised for the first time on appeal.

Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). The specific issue of whether a sentencing court considered a defendant's ability to pay is not one of constitutional magnitude that can be raised for the first time on appeal. ***State v. Calvin***, 316 P.3d 496, 507 (2013) (citing ***State v. Blank***, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997)). A defendant may only appeal a non-constitutional issue on the same grounds on which he objected below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

In this case, Defendant had an opportunity to object to the discretionary legal financial obligation (LFO) imposed and provide information of extraordinary circumstances that would make payment inappropriate in Paragraph 2.5 of the Judgment and Sentence. CP 20. Defendant failed to object. *See* CP 208-29. Defendant also failed to object to the imposition of the LFO when he spoke at the sentencing hearing held on March 14, 2014. RP 222-224. Defendant failed to properly preserve the issue for appeal.

An appellate court may grant discretionary review for three issues raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). *See also* ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); ***State v. Sisouvanh***, 175 Wn.2d 607, 618, 290 P.3d 942 (2012). Defendant does not specifically claim relief on any of these three grounds; rather, Defendant attempts to rely on caselaw discussing illegal sentencing conditions.

Defendant relies on ***State v. Moen*** for his assertion that this Court should review his LFO for the first time on appeal. 129 Wn.2d 535, 919 P.2d 69 (1996). The Court in ***Moen*** granted review of a challenge to a restitution order which had been untimely entered contrary to the applicable statute. *Id.* at 536.[3] The Court recognized a common law rule that "when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal." *Id.* at 545 (quoting ***State v. Paine***, 69 Wn. App. 873, 884, 850 P.2d 1369, *review denied*, 122 Wn.2d 1024, 866 P.2d 39 (1993)). Further, the Court looked to the underlying purpose for requiring issues to be preserved--particularly to give the trial court an opportunity to correct any alleged error and to

[3] The applicable former RCW 9.94A.142(1) mandated that a restitution order be entered within 60 days of sentencing, and the restitution order in ***Moen*** was entered almost three months after sentencing. 129 Wn.2d at 537.

prevent potential abuse of the appellate courts. *Id.* at 547. However, ***Moen*** is distinguishable from the case at hand.

In ***State v. Duncan***, Division Three of this Court analyzed a challenge to LFOs under the Court's ruling in ***Moen***. 180 Wn. App. 245, 254-55, 327 P.3d 699 (2014). ***Duncan*** distinguished ***Moen*** stating the recognition of an exception for a defendant's failure to raise a timely objection to a sentencing error did not apply to the LFO challenge raised by Duncan. *Id.* at 254. As the Court in ***Duncan*** explained, "[i]n the case of LFOs, there is clear potential for abuse . . . if [the defendant] thought it could be successfully raised for the first time on appeal." *Id.* at 255. The court reiterated: "we do not understand the reasoning and holding of ***Moen***, [***State v. Ford***], [137 Wn.2d 472, 973 P.2d 452 (1999)], and later cases as requiring that we entertain challenges to LFOs." *Id.*

Defendant has failed to show why this Court should follow ***Moen***, which concerned a blatant violation of a timeliness requirement for restitution orders rather than following the guidance of ***Duncan***, which disallowed LFO challenges raised for the first time on appeal. While Defendant argues that the court in ***Duncan***, "noted inconsistencies among the Court of Appeals divisions" (Br. of App. 8), the ***Duncan*** Court state the opposite. Its refusal to consider "a challenge to a boilerplate finding of ability to pay LFOs raised for the first time on appeal" was based on RAP

2.5(a), and it stated that "Other divisions of the Court of Appeals have taken the same position." ***Duncan***, 180 Wn. App. at 252.

This Court should similarly decline to grant review of the trial court's imposition of the LFO because Defendant failed to preserve the issue for appeal.

b. Defendant's challenge to the legal financial obligations is not ripe for review because the State has not attempted enforcement.

Challenges to orders establishing LFOs are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. ***State v. Lundy***, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). *See also* ***State v. Smits***, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation").

In the present case, there is nothing in the record showing that the State has attempted to enforce the LFO. Therefore, the issue is not yet ripe for review.

State v. Bahl, upon which Defendant relies to assert his claim is ripe, does not require a different result. 164 Wn.2d 729, 193 P.3d 678 (2008). The Court in ***Bahl***, held: "a defendant may assert a *preenforcement vagueness challenge* to sentencing conditions if the

challenge is sufficiently ripe." *Id.* at 751 (emphasis added). The Court specifically contrasted a vagueness challenge, which may be ripe for review before enforcement, with challenges to the imposition of LFOs, which are not ripe. *Id.* at 749.

Defendant further attempts to persuade this Court to accept review on policy grounds: that requesting modification of an LFO order when it is enforced is unduly burdensome on defendants. Br. of App. 15-18. However, Defendant mischaracterizes the legal process required. A motion is simply required to be in writing, state the grounds for relief, and the relief sought. CR 7. Defendant's challenge is not ripe for review because the State has not attempted enforcement.

c. Because the record shows the judge considered evidence of Defendant's ability to pay, the trial court judge did not act in a clearly erroneous manner by imposing legal financial obligations.

Even were the issue preserved and ripe for review, the LFO at issue should be affirmed. The question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. ***Lundy***, 176 Wn. App. at 105. A decision by the trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." ***State v. Wade***, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an

issue for review has the burden of proof. RAP 9.2(b); ***Sisouvanh***, 175 Wn.2d at 619. If the appellant fails to meet this burden, the decision stands. ***State v. Tracy***, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005), *aff'd,* 158 Wn.2d 683, 147 P.3d 559 (2006). Although formal findings of fact about a defendant's present or future ability to pay LFOs are not required, the record must be sufficient for the appellate court to review the trial court judge's decision under the clearly erroneous standard. ***State v. Bertrand***, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1914, 287 P.3d 10 (2012).

During the sentencing hearing, the court which presided over the entire bench trial was presented evidence from various sources of Defendant's future ability to pay LFOs. Defense counsel said his client was "gainfully employed." RP 213. Mr. Burke, a professional who came to speak to the court about Defendant's character, described how Defendant worked for him providing landscaping services and various other side jobs. RP 216. Defendant, while addressing the court during sentencing, also described his intermittent employment. RP 222. Defendant asked the court for leniency in regard to providing treatment for his mental health conditions, but did not request leniency for the LFO. RP 222-224.

The trial court properly considered evidence of Defendant's future ability to pay. When announcing the sentence, the judge said, "There are a lot of mitigating circumstances that have been brought up. One of them is the fact that Mr. and Mrs. Burke trust you to work on their property . . . . That does count for something with this Court." RP 227. This statement shows the judge took into consideration the statements made at the sentencing hearing, including those supporting a finding that Defendant had a future ability to pay the LFO.

The trial court's consideration of Defendant's financial situation is further indicated by Paragraph 2.5 of the Judgment and Sentence. CP 20. Defendant attempts to assert that a "boilerplate finding, *standing alone*, is antithetical to the notion of individualized consideration of specific circumstances." Br. of App. 10 (emphasis added). However, this ignores that in similar LFO cases, Washington courts have not found the standard form language to be clearly erroneous. *See, e.g.,* ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *review granted*, 178 Wn.2d 1010 (2013); ***Calvin***, 316 P.3d at 508.[4] This assertion also ignores that the judge

[4] Defendant cites two cases which are critical of boilerplate findings, but fails to demonstrate why this Court should apply the standard for dependency actions (***In re Dependency of K.N.J.***, 171 Wn.2d 568, 257 P.3d 522 (2011)) or the standard for determining credibility at an administrative hearing before an administrative law judge in a different jurisdiction (***Hardman v. Barnhart***, 362 F.3d 676 (10th Cir. 2004)) rather than case law addressing LFOs from this jurisdiction.

in this case did not simply provide a "boilerplate finding" that *stood alone*; the record without the boilerplate was sufficient to show the judge considered Defendant's future ability to pay the LFO.

Although Defendant is critical of Paragraph 2.5, including Paragraph 2.5 on every Judgment and Sentence provides a safeguard to protect defendants. Incorporating this paragraph into every Judgment and Sentence a judge must sign serves as a reminder to judges to consider the defendant's ability to pay before imposing LFOs. Thus, Paragraph 2.5 serves as an important judicial tool and safeguard for defendants.

2. DEFENDANT HAS FAILED TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE LEGAL FINANCIAL OBLIGATION WAS PROPERLY IMPOSED.

To demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The burden is on the defendant alleging ineffective assistance to show deficient representation based on the record below. ***McFarland***, 127 Wn.2d at 335. There is a strong presumption that counsel's representation was effective. *Id.*; ***State v. Brett***, 162 Wn.2d 136, 198, 892 P.2d 29 (1995).

Prejudice means there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (*quoting* ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). The failure of a defendant to show either deficient performance or prejudice defeats his claim. ***State v. Emery***, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

As explained above, the trial court did consider the evidence presented of defendant's future ability to pay the LFO as required by statute. Thus, defense counsel could not have successfully objected to the court's failure to do so. Therefore, Defendant has failed to show that defense counsel's failure to object to the trial court judge taking account of Defendant's ability to pay LFOs, as required by RCW 10.01.160, fell below an objective standard of reasonableness.

Defendant has also failed to show that defense counsel's failure to object to the imposition of the LFO on statutory grounds prejudiced him. First, Defendant fails to allege how the asserted error had practical and identifiable consequences in the trial of the case. *See,* Br. of App. 22. Second, the record provides evidence of Defendant's future ability to pay

the LFO. *See* RP 213, 216, 222. Defendant has failed to show that a different result would have transpired if the alleged error had actually occurred.

D. CONCLUSION.

This Court should decline to review Defendant's challenge to his legal financial obligation because the issue was not properly preserved for appeal and is not ripe for review. Even assuming the issue was preserved and ripe, Defendant's argument fails on its merits because the record shows the trial court judge did consider his ability to pay as required by the statute.

Defendant has failed to show defense counsel was ineffective for failing to object to the trial court's imposition of the legal financial obligation because the trial court acted within its statutory authority.

Therefore, the sentencing court should be affirmed.

DATED: OCTOBER 21, 2014

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTOR

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