No. 45379-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALFRED JAMES THIERRY, JR.

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER SOURCES

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The case should be remanded for resentencing because appellant Alfred James Thierry, Jr., is indigent and the sentencing judge did not consider his individual financial circumstances or make a specific inquiry into his current and future ability to pay before imposing legal financial obligations (LFOs), as required under RCW 10.01.160(3), as recently interpreted in State v. Blazina, __ Wn.2d __, 344 P.3d 680 (2015 WL 1086552) (March 12, 2015).[1]

2. This case presents the same policy issues as those which compelled the Supreme Court to act in Blazina and this issue is preserved because counsel raised indigence below in relation to imposition of LFOs.

3. Appellant assigns error to the boilerplate "finding" pre-printed on the judgment and sentence which provided:

> ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The 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 the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 186.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS

1. Under RCW 10.01.160(3) as interpreted in Blazina, a sentencing judge "must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay" before imposing discretionary LFOs on an indigent defendant. Did the sentencing court here err in failing to make such an inquiry before imposing such costs on appellant, who is indigent, despite counsel's arguments asking the court to consider that indigence below?

2. In Blazina, concerns about inequities, racial bias and other serious flaws in our current system of LFOs caused our

[1]For the Court's convenience, a copy of the slip opinion is submitted herewith as Appendix A.

highest court to unanimously agree that relief should be granted even though there was no objection below. One justice would have reached the issue applying RAP 1.2(a) because addressing the issue and granting relief was necessary in order "to promote justice."

In this case, unlike in Blazina, counsel raised her client's indigence in the discussion of LFOs below.

Should this Court grant relief to appellant, because the same issue is presented here and this case presents the same concerns as those raised in Blazina and the issue was preserved?

3. The Blazina Court held that the requirements of RCW 10.01.160(3) meant that a sentencing court "must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry."

Is reversal and remand for resentencing required because the only finding made in this case about appellant's "ability to pay" was just such an improper boilerplate finding and that finding was unsupported by the record?

C. SUPPLEMENTAL STATEMENT OF THE CASE

At the sentencing hearing on September 20, 2013, the Honorable Stanley J. Rumbaugh ordered Mr. Thierry to serve a sentence of a minimum of 318 months with a maximum of life, indeterminate. CP 190. The prosecutor asked for an exceptional sentence and "[s]tandard fines, $500 Crime Victim's Penalty Assessment, $200 court costs, $100 DNA sample fee, $1,500 to DAC" because the case had gone to trial. SRP 6.

For her part, counsel argued for a low end sentence, then said, "[r]egarding financial obligations, I'm going to ask the Court to take a look at the period of incarceration that Mr. Thierry is facing and also, and I can hand this up now if the Court wants to take a look, his declaration regarding his financial status." SRP 8. The court asked if counsel wanted an indigency order and she said that was a different issue but that Thierry,

Jr. had made a financial declaration as part of a planned request for an order of indigency, and the court should consider that declaration in this context. SRP 8. Counsel noted that Mr. Thierry, Jr., had worked as a truck driver in the past "but that's obviously over" and that he had been in custody for nearly a year. SRP 8. She also pointed out that "any income or any assets that [Mr. Thierry] had are gone and will be gone by the time he is released." SRP 8.

The court noted Mr. Thierry, Jr., was not "completely without redeeming factors" in his life because he had worked and had not had a lot of recent criminal history and declined to impose an exceptional sentence. SRP 10-11. Without discussion of Mr. Thierry, Jr.'s financial situation, the court simply declared, "[l]egal financial obligations as outlined by the State." SRP 12.

A few minutes later, there was a discussion about why there was a request for $573.92 in restitution to pay for the portion of exams not paid by the crime victims compensation fund. SRP 14. The court asked why that amount would not be "subsumed then into the $500" already ordered, and the prosecution said the $500 was "statutory for all crimes" but that actual costs for the specific case were set as restitution. SRP 14-15. The parties agreed to discuss the issue further at a later hearing and the court left the $500 fee on the judgment and sentence. SRP 16-17. The court subsequently found Mr. Thierry, Jr., indigent and entered an order of indigency accordingly. SRP 21-22.

In the written judgment and sentence, there was a preprinted portion which provided:

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS** The court has considered the total amount owing, the defend[ant]s past, present and future ability to pay legal financial obligation, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 187. The document included an order of a $500 crime victim assessment, $100 DNA database fee, $1500 for court-appointed attorney fees/costs and a $200 criminal filing fee, for a total of $2300. CP 188. The order also required that payments will be "commencing immediately," and that the court "shall report to the clerk's officer within 24 hours of the entry of the judgment and sentence to set up a payment plan" unless the court set a different rate. CP 187-88. Thierry, Jr., was provide financial and other information to set up payments and to pay any costs of "services to collect unpaid legal financial obligations per contract or statute." CP 187-88.

D. SUPPLEMENTAL ARGUMENT

THIS COURT SHOULD REVERSE AND REMAND FOR RESENTENCING BECAUSE THE LOWER COURT DID NOT MAKE THE REQUIRED INQUIRY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS ON THE INDIGENT APPELLANT, THE ISSUE WAS RAISED BELOW AND THE CONCERNS RAISED BY OUR HIGHEST COURT IN BLAZINA ARE PRESENT HERE

In addition to granting relief based upon the opening brief previously filed, reversal and remand for resentencing should be granted for the trial court to engage in the analysis set forth by the Supreme Court recently in State v. Blazina, supra, because the trial court did not follow

the requirements of RCW 10.01.160(1) and counsel raised Mr. Thierry, Jr.'s indigence below.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

> 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.

RCW 10.01.160(3).

In Blazina, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 344 P.3d at 683-84. In one case, the sentencing court ordered a $500 crime victim penalty assessment, a $200 filing fee, a $100 DNA fee, $1,500 for assigned counsel and restitution to be determined "by later order." 344 P.3d at 682-83. The other sentencing court ordered the same fees except only $400 for appointed counsel and an additional $2,087.87 in extradition costs. Id.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the prosecution first argued that the issue was not "ripe for review" until the state tried to enforce collection of the amounts imposed. 344 P.3d at 682-83 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual

development and involved a final action of the sentencing court, a conclusion of "ripeness" with which the concurring justice seemed to agree. Id.[2]

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court "**shall not**" order costs without making an "individualized inquiry" into the defendant's individual financial situation and their current and future ability to pay, and that the trial court "**shall**" take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" in determining the amount and method for paying the costs. 344 P.3d at 685 (emphasis in original). And the Court found that, in this context, the word "shall" is imperative. Id.

Further, the majority agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. 344 P.3d at 685. They then rejected the very same "boilerplate" language used in this case:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. 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.

344 P.3d at 686.

The Blazina majority also gave sentencing courts guidance on

---

[2]This portion of the decision was unanimous, but one justice would have used a different method of reaching the issues on appeal. See 344 P.2d at 686.

making the determination, referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance, and other questions. Id.

The Blazina majority then rejected the defense claim that the sentencing court's failure to conduct the required inquiry could be raised for the first time on review as an "unpreserved sentencing error" under State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). Blazina, 344 P.3d at 683-84. They found that the policy reasons behind Ford were to ensure uniformity of sentencing, a policy which is not served by allowing a challenge to imposition of legal financial obligations for the first time on appeal. Id.

Instead, the Court held, in crafting RCW 10.01.160(3) the Legislature "intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; see also, 344 P.3d at 686 (Fairhurst, J., concurring). Further, the majority believed that the trial judge's failure to consider the defendants' ability to pay in the consolidated cases on review was "unique to these defendants' circumstances." Blazina, 344 P3d at 683-84. The Court therefore believed that the failure of a sentencing court to properly consider the defendant's present and future ability to pay was an error not expected to "taint sentencing for similar crimes in the future," unlike the errors in Ford. 344 Wn.2d at 683.

The majority then held that, while the lower appellate courts had been within their authority to decide whether to exercise discretion to grant

review of the issues presented under RAP 2.5(a), "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." 344 Wn.2d at 683.

The Court chronicled national recognition of "problems associated with LFO's imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." Id. One of the proposed reforms the Court mentioned was a requirement "that courts must determine a person's ability to pay before the court imposes LFOs." Id.

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." 344 P.3d at 684. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. 344 P.3d at 683-85. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford $25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 344 P.3d at 684-85. This increased involvement "inhibits reentry," the justices noted,

because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other "reentry difficulties increase the chances of recidivism." Id.

Finally, the Blazina majority pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. 344 P.3d at 685-86. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

The concurrence in Blazina agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 344 P.3d at 686-87. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), "to promote justice and facilitate the decision of cases on the merits." Id. The concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error "because of the widespread problems" with the LFO system as applied to indigents "as stated in the majority." Id. And she also would have reached the error, because "[t]he consequences of the State's LFO system are concerning, and addressing where courts are falling short of the statute will promote justice." Id.

In this case, this Court should follow Blazina and grant Mr. Thierry, Jr., relief. Notably, unlike in Blazina, here counsel objected to LFOs below based upon Mr. Thierry, Jr.'s indigence, so there is no question of the issue being raised for the first time on appeal, as indigence

was raised below. Indeed, counsel presented evidence on the issue of indigence and asked it to be considered. 3RP 7-11.

This Court thus is not faced with the same troubling question of whether it should exercise its discretion to address the problem, as in Blazina.

In addition, Mr. Thierry, Jr. is indigent, just a the defendants were in Blazina. Even more so. Because of his sentence and the crimes of conviction, the possibility of Mr. Thierry, Jr., ever being able to pay is at best an unsupported hope. While there was evidence that Mr. Thierry, Jr. has worked as a truck driver, he received an indeterminate sentence and will serve a minimum of more than 25 years in custody. CP 186-87. Indeed, because his sentence is indeterminate, he might never be released. Id. And upon his release, his employment opportunities, if any, will be seriously limited by his first-degree rape of a child and child molestation convictions.

Further, just as in Blazina, the only findings on his "ability to pay" were the insufficient pre-printed "boilerplate" findings. Even though counsel raised the issue of Mr. Thierry, Jr.'s indigence, the sentencing court made no findings that he will *ever* be able to pay anything towards these amounts.

Thus, Mr. Thierry, Jr., is in the same situation as the defendants in the consolidated cases in Blazina, except that counsel here objected below, so the issue is properly before the Court without having to exercise discretion to hear it. Mr. Thierry, Jr., will suffer the impacts of the unfair and unjust system our Supreme Court has now condemned unless this

Court follows Blazina and orders resentencing. The resentencing court should be ordered to consider Mr. Thierry, Jr.'s "individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay," on the record, before deciding to impose legal financial obligations.

The imposition of costs and their substantial impact on the lives of indigents has recently been detailed at length by the ACLU, which discovered that lower courts in this state are requiring people to give up public assistance and other public monies given to cover their basic needs and even imprisoning poor people for failure to pay on such debt. *See* ACLU/Columbia Legal Services Report: Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor (February 2014).[3]

Similarly, a study from the Washington State Minority and Justice Commission examined the impact of such costs, finding that the imposition of them reduces income, worsens credit ratings, makes it more difficult to secure stable house, hinders "efforts to obtain employment, education, and occupational training" and has other serious effects "which in turn prevents people from restoring their civil rights" and becoming full members of society. *See* Washington State Minority and Justice Commission, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008).[4]

---

[3] Available at aclu-wa-org/news/report-exposes-modern-day-debtors-prisons-washington.

[4] Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

The Blazina decision represents a fundamental recognition by our highest court that the system under which appellant was ordered to pay LFOs is flawed and unjust. The concerns shared by all of the justices on the Supreme Court in Blazina apply equally to Mr. Thierry, Jr., as to the defendants in the two separate cases consolidated in Blazina. Further, this case does not present the same difficult question of whether the issue should be addressed for the first time on appeal, because counsel raised the issue below. This Court should grant Mr. Thierry, Jr. the same relief as the defendants in Blazina and, in addition to the other remedies requested, should strike the LFO's and order reversal and remand for resentencing with orders for the trial court to give full and fair consideration to Mr. Thierry, Jr.'s individual financial circumstances and present and future ability to pay before imposition of any LFOs.

E. CONCLUSION

This Court should reverse and remand for resentencing with instructions to conduct the individualized inquiry set forth in Blazina, and should further grant the relief requested in the pleadings previously filed.

DATED this 15th day of May, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Supplemental Brief to opposing counsel via this Court's upload portal at pcpatcecf@co.pierce.wa.us, and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Alfred J. Thierry, Jr., DOC 975405, Airway Heights CC, P.O. Box 1899, Airway Heights, WA. 99001-1899.

DATED this 15th day of May, 2015.

Respectfully submitted,

/s/ Kathryn A. Russell Selk
KATHRYN RUSSELL SELK
No. 23879
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

RUSSELL SELK LAW OFFICES

May 15, 2015 - 2:37 PM

Transmittal Letter

Document Uploaded: 5-453797-thierry.supp.pdf

Case Name: State v. Thierry, Jr.
Court of Appeals Case Number: 45379-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Supplemental Brief in light of Blazina

Comments:

No Comments were entered.

Sender Name: K A Russell Selk - Email: karsdroit@aol.com

A copy of this document has been emailed to the following addresses:

pcpatecf@co.pierce.wa.us