Filed
Washington State Supreme Court

JAN 20 2016

Ronald R. Carpenter
Clerk

E
mg

SUPREME COURT NO. 92690-5

NO. 46907-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK WILMER,

Petitioner.

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

The Honorable John R. Hickman, Judge

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

FILED IN COA ON JANUARY 13, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Mark Wilmer, the appellant below, asks this Court to grant review of the Court of Appeals' decision in State v. Wilmer, No. 46907-3-II, filed December 15, 2015 (attached as an Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly exercise its discretion in declining to review the trial court's imposition of legal financial obligations (LFOs) on the sole basis that Wilmer's sentencing hearing occurred after the Court of Appeals issued its opinion in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), remanded, 182 Wn.2d 827, 344 P.3d 680 (2015), but before this Court's opinion in that case?

2. Was Wilmer's trial counsel constitutionally ineffective for failing to object to the imposition of discretionary LFOs at sentencing?

C. STATEMENT OF THE CASE

The State charged Mark Wilmer with second degree assault, alleging that Wilmer recklessly inflicted substantial bodily harm when he intentionally assaulted his wife, Sharde Baumann. CP 1-2.

A jury found Wilmer guilty. CP 33. The court held a sentencing hearing on November 14, 2014, and sentenced Wilmer to 55 months confinement. RP 352; CP 71-75.

Wilmer qualified as indigent, reporting zero savings, real estate, or other assets. CP 90-97. He further reported receiving $720 a month in social security before incarceration, also qualifying him as indigent under GR 34. CP 90-97.

Nevertheless, the trial court imposed $1,500 in discretionary LFOs, including court-appointed attorney fees and defense costs. CP 73-74. The court did not consider Wilmer's current or future ability to pay at the sentencing hearing. See RP 351-55. The court entered only the following boilerplate finding:

> 2.5 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 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 72. The court also imposed restitution for Baumann's medical bills, which were likely extensive given her injuries, ambulance ride, and four-day hospital stay. CP 74; RP 81-85, 178-80, 229-35, 349, 352. The court did not consider the burden of this additional debt. CP 74; RP 352.

On appeal, Wilmer argued the trial court exceeded its statutory authority in failing to consider his current and future ability to pay before imposing discretionary LFOs, pursuant to this Court's decision in State v.

Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Br. of Appellant, 3-6. Wilmer also argued his trial counsel was constitutionally ineffective for failing to object to the imposition of LFOs. Br. of Appellant, 6-8.

The Court of Appeals affirmed, declining to consider Wilmer's LFO challenge because it was made for the first time on appeal. Appendix at 2. The court relied on its own decision in State v. Lyle, 188 Wn. App. 848, 355 P.3d 327 (2015), explaining it "held that for LFOs imposed after May 21, 2013, when we decided State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), remanded by Blazina II, we will not consider challenges to LFOs under Blazina II unless the defendant challenged the LFOs in the trial court." Appendix at 2.

The Court of Appeals also rejected Wilmer's ineffective assistance of counsel claim. Appendix at 3. The court agreed "Wilmer's counsel's failure to challenge the imposition of LFOs at sentencing appears to constitute deficient performance." Appendix at 3. The court concluded, however, that Wilmer failed to show prejudice. Appendix at 3. Even though the trial court did not make any individualized findings, the Court of Appeals made its own finding that, "at the time of the assault, [Wilmer] was cleaning his deceased father-in-law's house in preparation for selling it, indicating that he would

receive some of the proceeds of that sale."[1] Appendix at 3. The court further reasoned that "nothing in the record suggests that he suffered from any physical limitations on his ability to become employed." Appendix at 3.

Wilmer now seeks review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' PURPORTED "EXERCISE OF DISCRETION" IN REFUSING TO CONSIDER WILMER'S CLAIM CONTRAVENES THIS COURT'S DECISION IN BLAZINA.

The Court of Appeals' reliance on the timing of its own decision in Blazina should not form the sole basis for refusing to consider an LFO argument on appeal. The law was still unsettled following that court's decision in Blazina. It was even less settled at the time of Wilmer's sentencing in November 2014. At that time, this Court had already accepted review and heard argument in Blazina. Wilmer asks this Court to accept review of his case under RAP 13.4(b)(1) and (4), and reverse the Court of Appeals.

---

[1] Baumann testified the house she and Wilmer were cleaning belonged to her deceased father-in-law, not Wilmer's father-in-law. RP 70-74. Nothing in the record indicated Wilmer would collect any proceeds from the sale. The court also imposed a lifetime no-contact order between Wilmer and Baumann, further indicating Wilmer would no longer be sharing in any proceeds. RP 352. Regardless, the trial court is mandated to make factual findings regarding Wilmer's individualized ability to pay, not the Court of Appeals.

In Blazina, this Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. 182 Wn.2d at 836. LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. at 837.

To confront these problems, the Blazina Court emphasized the importance of judicial discretion. Id. at 834. In particular, RCW 10.01.160(3) requires the record reflect that the sentencing court made an individualized inquiry into the defendant's current and future ability to pay before imposing discretionary LFOs. Id. at 834, 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

This Court determined that—although ripe for review—a challenge to discretionary LFOs may not may be raised for the first time on appeal as a matter of right in the same manner as challenges to

sentences under State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), and similar cases. Blazina, 182 Wn.2d at 832 n.1, 832-33. This is because, unlike in those cases, uniformity is not the goal. Rather, the goal is a fair and individualized determination of ability to pay. Id. at 834.

As this Court observed, however, RAP 2.5(a) gives appellate courts discretion to accept review of certain errors not appealed as a matter of right. Id. at 835. Although "[e]ach appellate court must make its own decision to accept discretionary review," the broken LFO system demanded that this Court reach the merits of the underlying appeals. Id.

Wilmer recognizes this Court announced in Blazina that appellate courts have discretion to decide whether to reach the merits of LFO challenges. However, the Court of Appeals' action here was not an exercise of reasoned discretion, but the perpetuation of an arbitrary and artificial impediment created in Lyle.

In Lyle, two judges at Division Two of the Court of Appeals rejected Lyle's challenge to the imposition of discretionary LFOs on the basis that Lyle waived the issue by not objecting at the sentencing hearing. Lyle, 188 Wn. App. at 851-52. As the same court held in Wilmer's case, the two judges explained:

> Our decision in Blazina, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error

> on appeal. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. We decline to exercise such discretion here.

Id. at 852 (footnote and citations omitted).

In a dissenting opinion, Judge Bjorgen pointed out the fallacy of the majority's logic:

> [B]etween the two Blazina decisions the law took the pose of a Janus, telling parties both that they must raise the issue of ability to pay LFOs at sentencing and that it would be futile to do so. This contradiction is not relieved by holding that a defendant must raise the issue at sentencing, even though he may not know until some distant enforcement stage whether he actually has a meaningful challenge. With this equivocation in the law after our Blazina decision, that decision should not serve as the threshold beyond which this error cannot be raised for the first time on appeal. Only with the Supreme Court's *Blazina* decision is that threshold crossed.

Lyle, 188 Wn. App. at 856 (Bjorgen, J., dissenting).

As Judge Bjorgen aptly observed, Lyle raised the same issue and arrived at the court in the same posture as the Blazina petitioners, but received no benefit from this Court's groundbreaking decision:

> The same effects of the LFO system that led the Supreme Court to reach the issue in Blazina face Lyle as much as they faced Blazina. If those consequences demanded that the Supreme Court reach the issue in Blazina, they surely demand the same of us here.

Lyle, 188 Wn. App. at 854 (Bjorgen, J., dissenting).[2]

---

[2] A petition for review was filed in Lyle, No. 92079-6. The matter was continued for consideration at this Court's February 11, 2016 En Banc Conference.

The date of issuance of the *Court of Appeals'* Blazina decision should not form an ill-advised temporal barrier between the privileged few and those who are, once again, out of luck. See Lyle, 188 Wn. App. at 854-56 (Bjorgen, J., dissenting). This is so because the law was obviously in a state of flux following the Court of Appeals' Blazina decision. See, e.g., State v. Duncan, 180 Wn. App. 245, 252, 327 P.3d 699 (2014) (Division Three rejected LFO challenge but noted Blazina was pending in this Court and would ultimately clarify the law). At the time of Wilmer's sentencing there was also authority establishing a challenge to the imposition of LFOs was not ripe for review, contrary to this Court's ultimate conclusion in Blazina. See, e.g., State v. Lundy, 176 Wn. App. 96, 107-08, 308 P.3d 755 (2013). It is also worth noting that by the time of Wilmer's sentencing hearing, this Court had already granted review and heard arguments in Blazina.

The Court of Appeals' refusal to consider an LFO argument on the sole grounds that its own Blazina decision provided unequivocal notice to accused persons is unsound. Because the consequences of such a misguided decision are potentially far-reaching, affecting all but the few appellants sentenced before May of 2013, this Court should grant review and reverse the Court of Appeals.

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE WILMER'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

The Court of Appeals agreed counsel's failure to object to discretionary LFOs fell below the standard expected for effective representation. Appendix at 3. There was no reasonable strategy for not requesting the trial court to comply with the requirements of RCW

10.01.160(3). See, e.g., State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel simply failed to object. Such neglect constitutes deficient performance.

Counsel's failure to object to discretionary LFOs was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in a remission hearing to set aside LFOs, Wilmer will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160(4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Wilmer incurs no possible benefit from LFOs. Given Wilmer's indigency and restitution debt, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered his current and future ability to pay. Wilmer's constitutional right to effective assistance of counsel was violated. This Court should therefore accept review under RAP 13.4(b)(3).

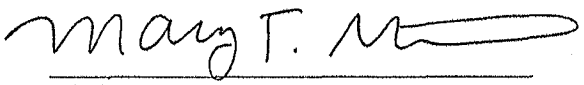
E. CONCLUSION

As this Court made clear in Blazina, the hardships that can result from erroneous imposition of LFOs are numerous, as studies show the snowballing of such legal debts are the rule rather than the exception. This Court should accept review of Wilmer's case under RAP 13.4 (b)(1), (3), and (4), and reverse.

DATED this 13th day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. MARK WILMER, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 46907-3-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARK WILMER
DOC NO. 855697
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JANUARY 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 13, 2016 - 12:56 PM

Transmittal Letter

Document Uploaded: 6-469073-Petition for Review.pdf

Case Name: Mark Wilmer
Court of Appeals Case Number: 46907-3

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: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

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

PCpatcecf@co.pierce.wa.us

Filed
Washington State
Court of Appeals
Division Two

December 15, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK DOUGLAS WILMER, Appellant.	No. 46907-3-II UNPUBLISHED OPINION

WORSWICK, P.J. — Mark Wilmer appeals the sentence imposed following his conviction for second degree assault—domestic violence, arguing that the trial court erred in imposing legal financial obligations (LFOs) against him without having made a determination of his current or likely future ability to pay them. He also argues that his trial counsel provided ineffective assistance by not challenging the imposition of the LFOs at sentencing. Declining to consider his challenge to the LFOs made for the first time on appeal and concluding that he does not demonstrate ineffective assistance of counsel, we affirm.

At sentencing, the State recommended the following mandatory LFOs: a $500 victim assessment, $200 court costs, and a $100 DNA (deoxyribonucleic acid) collection fee. It also recommended the following discretionary LFOs: $1,500 for Wilmer's court appointed attorney. Wilmer did not object to the State's recommendations or argue that he was unable to pay the LFOs.

Wilmer's judgment and sentence contains the following preprinted finding:

> 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 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.

Clerk's Papers at 72. On November 14, 2014, the trial court imposed the LFOs recommended by the State.[1]

Wilmer argues for the first time on appeal that the trial court erred in imposing the LFOs without having made any inquiry into his current or likely future ability to pay them. On March 12, 2015, the Washington State Supreme Court decided *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (*Blazina* II), and held that before imposing discretionary LFOs, the trial court must make an individualized inquiry into the defendant's current and likely future ability to pay those LFOs. *Blazina* II also rejected prior holdings that a challenge to LFOs was not ripe until the State sought to collect the LFOs. 182 Wn.2d at 833 n.1.

But in *State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015), we held that for LFOs imposed after May 21, 2013, when we decided *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded by Blazina* II, we will not consider challenges to LFOs under *Blazina* II unless the defendant challenged the LFOs in the trial court. Because he did not challenge the LFOs at sentencing, we decline to consider Wilmer's challenge to his LFOs made for the first time on appeal.

[1] The trial court also ordered restitution, but the record before this court is silent as to whether an order of restitution was entered.

Wilmer also argues that by not challenging the imposition of LFOs at sentencing, his trial counsel provided ineffective assistance. To establish ineffective assistance of counsel, he must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court presumes strongly that trial counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). Wilmer's counsel's failure to challenge the imposition of LFOs at sentencing appears to constitute deficient performance. *Lyle*, 188 Wn. App. at 853. But Wilmer must still show a reasonable probability of a different result had his counsel challenged the imposition of the LFOs. *McFarland*, 127 Wn.2d at 337; *Lyle*, 188 Wn. App. at 853-54.

In his declaration for appointment of appellate counsel, Wilmer declared that he did not own any property or cash and that he had been receiving $720 per month in social security. But at the time of the assault, he was cleaning his deceased father-in-law's house in preparation for selling it, indicating that he would receive some of the proceeds of that sale. And nothing in the record suggests that he suffered from any physical limitations on his ability to become employed. Wilmer fails to show a reasonable probability that the trial court would not have imposed the discretionary LFO had his trial counsel objected to it, and so fails to show prejudice resulting from his trial counsel's deficient performance.

We affirm the imposition of Wilmer's LFOs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Melnick, J.

Sutton, J.