No. 46350-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEE FLOYD,

Appellant.

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

APPELLANT'S SUPPLEMENT TO OPENING BRIEF

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The case should be remanded for resentencing because appellant Thomas L. Floyd 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 __, __ P.3d ___ (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 Court should similarly exercise its discretion to grant relief.

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 380.

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?

2. In Blazina, concerns about inequities, racial bias and other serious flaws in our current system of LFOs caused our highest court to unanimously agree that relief should be granted even though there was no objection below. Two

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

justices would have reached the issue applying RAP 1.2(a) because addressing the issue and granting relief was necessary in order "to promote justice."

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?

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 Mr. Floyd's "ability to pay" was just such an improper boilerplate finding and was unsupported by the record?

C. SUPPLEMENTAL STATEMENT OF THE CASE

At the May 5, 2014, resentencing hearing, the Honorable Judge Frank Cuthbertson simply declared that the sentence would include "[s]tandard legal financial obligations[.]" SRP 23. The prosecutor then reminded the court that restitution had already been ordered and said he wanted to make sure that was not "upset" by the court's order, at which point the court stated, that, if the restitution had been agreed to or litigated it would not be changed. SRP 23.

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 380. The court ordered the $500 crime victim assessment, $100 DNA database fee, $1,000 for court-appointed attorney fees/costs and the $200 criminal filing fee, for a total of $1800. CP 382. 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 382. Floyd was required to provide financial and other information to the group, and to pay any costs of "services to collect unpaid legal financial obligations per contract or statute." CP 382.

Counsel made no objection to the imposition of the costs. SRP 1-24. Floyd appealed and was determined by the trial court to be indigent and entitled to appointed counsel on appeal. CP 325-45; 398-99.

Floyd filed his opening brief on appeal but the prosecution has not yet filed its response.

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 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), Mr. Floyd is indigent and this Court should exercise its discretion to grant Mr. Floyd the same relief as

that given to the defendants in Blazina, because the very same policy concerns which compelled our highest court to act even absent an objection below are presented by this case.

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. App. A at 1-2. 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." App. A at 2-3. The other sentencing court ordered the same fees except only $400 for appointed counsel and an additional $2,087.87 in extradition costs. App. A at 2.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. App. A at 2.

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. App. A at 4 n.1. The Supreme Court majority and the

concurrence both disagreed, finding instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court. Id.[2]

The Court majority and concurrence 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. App. A at 10 (emphasis in original). And the Court found that, in this context, the word "shall" is imperative. App. A at 10.

Further, the majority and concurrence agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. App. A at 10-11. 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.

App. A at 11.

The majority and concurrence also gave sentencing courts guidance

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[2]This portion of the decision was unanimous, but two justices would have used a different method of reaching the issues on appeal. See App. A at 10, 13-16.

on making the determination, referring them to the comments tor 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. App. A at 11.

The Blazina majority and concurrence disagreed on how the issue should be reached, however. Both 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, App. A at 5. The policy reasons behind Ford were to ensure uniformity of sentencing, but allowing a challenge to imposition of legal financial obligations would not serve the same goals, the Blazina majority found. Blazina, App. A at 5.

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." Blazina, App. A at 5-6; see also App. A at 14-17 (concurring on this point). 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." App. A at 6.

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." App. A at 7.

The Court then 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." App. A at 7. 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." App. A at 7.

The Court then noted the problems in our own state's LFO system, and its "problematic consequences." App. A at 8. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. App. A at 8-9. 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. App. A at 8-9. 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. App. A at 8-9.

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. App. A at 9. 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. App. A at 9. The Court recognized that this

and other "reentry difficulties increase the chances of recidivism." App. A at 9.

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. App. A at 10. The court also noted that certain counties seem to have higher LFO penalties than others. App.. A at 9-10.

For their part, the two concurring justices 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. App A at 14-15. Those justices 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." App. A at 15-16.

Those justices 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." App. A at 16. They 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." App. A at 16-17.

In this case, this Court should follow Blazina and grant Mr. Floyd relief despite trial counsel's failure to object to imposition of legal financial obligations below. Just as in Blazina, Mr. Floyd is indigent. Just

as in Blazina, the only findings on Floyd's "ability to pay" were the insufficient pre-printed "boilerplate" findings. Thus, Mr. Floyd is in the same situation as the defendants in the consolidated cases in Blazina. And just like those defendants, here trial counsel did not object to the trial court's imposition of LFOs without consideration of Mr. Floyd's individual financial circumstances and future ability to pay.

As a result, Mr. Floyd will suffer the impacts of the unfair and unjust system our Supreme Court has now condemned, unless this Court exercises its discretion to grant him relief. Under Blazina, that relief is to order resentencing at which the trial court must simply consider Mr. Floyd's "individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay" and "the record must reflect this inquiry." App. A at 10.

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

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

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]

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. Floyd as to the defendants in the two separate cases consolidated in Blazina. In light of those concerns, this Court should exercise its discretion to grant Mr. Floyd the same relief as the defendants in Blazina. To do otherwise would only perpetuate the system the Blazina Court condemned so strongly. Further, it would be patently unfair.

RCW 10.01.160(3) mandates that a court "shall not order a defendant to pay costs" unless and until the court finds the defendant "is or will be able to pay them," and further that the court "shall" take the defendant's financial resources and the nature of the financial burden into account before imposing it. In Blazina, our highest court held that a sentencing court must make that determination on the record and must further conduct an individualized inquiry into the specific defendant's

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

circumstances before imposition of the same $500 victim penalty assessment, $200 filing fee and $100 DNA fee as those imposed here, as well as amounts for assigned counsel. App. A at 2. Although the Blazina majority believed that the total failure of the two sentencing courts to conduct the required inquiry was "unique to th[o]se defendants' circumstances, unfortunately for Mr. Floyd, it was not -the very same error occurred here.

Because he suffered the same harm as in Blazina and the very same serious concerns about the system exist in this case, this Court should reverse the order of LFOs against Mr. Floyd and reverse and remand for resentencing with instructions to perform the individualized inquiry under RCW 10.01.160(3) set forth in Blazina.

E. CONCLUSION

The trial court did not consider appellant's indigency or conduct the required inquiry before imposing LFOs. Although counsel did not object below, the same concerns as those raised in our highest Court in Blazina are present here. 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 April, 2015.

Respectfully submitted,

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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 Thomas Floyd, 8539 Zircon Drive, SW Unit 78, Lakewood, WA. 98498-5112.

DATED this 15th day of April, 2015.

Respectfully submitted,

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