

NO. 46382-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

KRISTEN A. MARIA HIGHSMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00159-1

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney


RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Richard Wayne Lechich
1511 3rd Ave Ste 701
Seattle, Wa 98101-3647
Email: richard@washapp.org;
wapofficemail@washapp.org

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED June 23, 2015, Port Orchard, WA 

Original e-filed at the Court of Appeals; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. SUPPLEMENTAL COUNTERSTATEMENT OF THE ISSUES..1

II. SUPPLEMENTAL STATEMENT OF THE CASE.....1

III. SUPPLEMENTAL ARGUMENT2

C. THIS COURT SHOULD DECLINE TO REVIEW
THE TRIAL COURT’S DETERMINATION
THAT HIGHSMITH WOULD HAVE A FUTURE
ABILITY TO PAY LFOs WHERE SHE DID NOT
OBJECT BELOW.....2

1. This Court should decline to review
Highsmith’s unpreserved claim.2

2. The record supports the conclusion that
Highsmith will have a future ability to pay
her LFOs.3

IV. CONCLUSION.....5

TABLE OF AUTHORITIES

CASES

State v. Blazina,
182 Wn.2d 827, 344 P.3d 680 (2015)..... 2, 3, 5

State v. Duncan,
180 Wn. App. 246, 327 P.3d 699 (2014)..... 3

State v. Ford,
137 Wn.2d 472, 973 P.2d 452 (1999)..... 2

State v. Lundy,
176 Wn. App. 96, 308 P.3d 755 (2013)..... 3, 4

State v. Scott,
110 Wn.2d 682, 757 P.2d 492 (1988)..... 3

STATUTES

RCW 7.68.035 3

RCW 10.01.160 4

RCW 36.18.020 3

RCW 43.43.7541 3

RULES

RAP 2.5(a) 3

I. SUPPLEMENTAL COUNTERSTATEMENT OF THE ISSUES

3. Whether this Court should consider Highsmith's claim regarding the \$1135 in attorney's fees where Highsmith did not raise the issue below?

4. Whether the record supports the trial court's conclusion that Highsmith would have a future ability to pay her LFOs?

II. SUPPLEMENTAL STATEMENT OF THE CASE

The State relies on its original statement of the case, and supplements it as follows.

At sentencing Highsmith in no way objected to or even referenced the imposition of legal financial obligations. The trial court nevertheless made the following finding on the record:

Ms. Highsmith, I do note for the record that you are capable of working, and that but for your incarceration, you would be able to work, as you have been working, and so therefore, you would be capable of paying on a legal financial obligation.

RP (5/23) 21. The court sentenced Highsmith to six months in jail and imposed a total of \$1950 in legal financial obligations in the judgment and sentence:

\$500	Victim Assessment
\$1135	Court-appointed attorney fees
\$200	Filing Fee
\$100	DNA/Biological Sample Fee

CP 68. No restitution was ordered. *Id.*

III. SUPPLEMENTAL ARGUMENT

C. THIS COURT SHOULD DECLINE TO REVIEW THE TRIAL COURT'S DETERMINATION THAT HIGHSMITH WOULD HAVE A FUTURE ABILITY TO PAY LFOS WHERE SHE DID NOT OBJECT BELOW.

For the first time on appeal, Highsmith challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of her present or future ability to pay, citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Three of the four legal financial were mandatory and are unaffected by the decision in *Blazina*. The Court should decline to consider the remaining fee, for attorney's fees, because there was no objection at sentencing. Moreover, the record supports the trial court's finding that Highsmith would have a future ability to pay.

1. *This Court should decline to review Highsmith's unreserved claim.*

In *Blazina*, the Washington Supreme Court specifically held that it is not error for this Court to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *Blazina*, 182 Wn.2d at 832. "Unreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Blazina*, 182 Wn.2d at 833 (citing *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). The

decision to review is discretionary with the reviewing court under RAP 2.5. *Blazina*, 182 Wn.2d at 835. In other words, *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), remains good law. *Duncan*, 180 Wn. App. at 250, 253 (defendant’s failure to object was not because the ability to pay LFOs was overlooked, rather the defendant reasonably waived the issue, considering “the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive”).

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). *Duncan* appropriately balances the efficient use of judicial resources with fairness. Here there was no objection from Highsmith at sentencing. Nor is there obvious error in the record. This court should decline to review this issue.

2. *The record supports the conclusion that Highsmith will have a future ability to pay her LFOs.*

Highsmith challenges the imposition of \$1135 in attorney’s fees.¹

¹ As Highsmith concedes, three of the four LFOs ordered by the trial court were mandatory, and do not come within the reach of *Blazina*, which by its terms only applies to discretionary awards. See RCW 7.68.035(1)(a) (victim assessment); RCW 36.18.020(2)(h) (filing fee); RCW 43.43.7541 (DNA fee). These fees are mandatory, not discretionary. *State v. Lundy*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) (“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.”).

Neither RCW 10.01.160 nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay discretionary court costs. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013). Any findings made are reviewed under the clearly erroneous standard. *Id.* A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a definite and firm conviction that a mistake has been committed. *Id.* As such, the State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary LFOs is a low one. *Lundy*, 176 Wn. App. at 106.

Highsmith claims there is no support on the record for the court's finding that she has the present or future ability to pay. This is not true. Because the State's burden is low, the fact that Highsmith is able-bodied and without apparent barriers to employment, the record is sufficient. The record shows, as the trial court specifically orally determined, that Highsmith was employable.

In a letter to the judge she describes a long and stable employment history, and describes skills including real estate and elder care. *See* State's Supp. CP. Two of her supporters sent letters to the court describing Highsmith's skills in the latter field. *Id.* During sentencing she argued that she could afford to pay \$400 a month for electronic home

monitoring in lieu of jail time. RP (5/23) 9. She also indicated that she owned her own home. RP (5/23) 12. *Blazina* held that sentencing courts should take into consideration other debts, like restitution. *Blazina*, 182 Wn.2d at 837. However, there was no restitution in this case, and the remaining costs total \$700. Highsmith fails to show that this issue should be reviewed, or if it were, that the trial court erred.

IV. CONCLUSION

For the foregoing reasons, and those set forth in the original brief, Highsmith's conviction and sentence should be affirmed.

DATED June 23, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

June 23, 2015 - 9:28 AM

Transmittal Letter

Document Uploaded: 5-463822-Respondents' Brief.pdf

Case Name: State of Washington v Kristen Highsmith

Court of Appeals Case Number: 46382-2

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: Respondents'

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: Sheri Burdue - Email: siburdue@co.kitsap.wa.us

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

richard@washapp.org

wapofficemail@washapp.org