No. 46790-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MELVIN L. HARTFIELD,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY, No. 14-1-02239-7

The Honorable Philip K. Sorensen, trial judge

APPELLANT'S OPENING BRIEF

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

A. ASSIGNMENTS OF ERROR

1. The case should be remanded for resentencing because appellant Melvin L. Hartfield 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).

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 68.

B. ISSUES PERTAINING TO 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. 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."

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 appellant's "ability to pay" was just such an improper boilerplate finding and that finding was unsupported by the record?

C. STATEMENT OF THE CASE

1. Procedural history

Appellant Melvin L. Hartfield was charged by information filed in Pierce County Superior Court with first-degree robbery. CP 1-2; RCW 7.88.010; RCW 9A.56.190; RCW 9A.56.200(1)(b); RCW 35.38.060.

Pretrial and trial proceedings were held before the Honorable Philip K. Sorensen on September 25, 29 and 30, 2014, after which the jury acquitted Mr. Hartfield of robbery but found him guilty of first-degree theft. CP 60-61.

On October 17, 2014, Judge Sorensen imposed a standard-range sentence. CP 64-75. Mr. Hartfield appealed and this pleading follows. See CP 88.

2. Testimony at trial

Marlene Wheeler, assistant branch manager of a branch of Heritage Bank, was short-staffed on the morning of June 5, 2014, so she was working the teller line when she heard the doorbell letting her know someone had come in the back door to the bank. RP 72-73. A moment later, a man came in and she greeted him. RP 71-73. Wheeler would later

testify that she noticed he was holding a piece of paper and that made her think, "I was going to be robbed[,] most likely." RP 72-73. She had been robbed six times before and said that, while robberies did not always involve a note, they usually did. RP 73, 76.

Wheeler took the note from the man, whom she could not really describe except to say he was black, possibly tall in comparison to her and with medium build. RP 74. She did not remember what he was wearing and did not see anything on his head. RP 83. Later she was unable to recognize him in a photo montage. RP 83-84.

The note was about a half-sheet in size and had a lot of different writing, not all in the same style or "font" and some bigger and more bold. RP 75. Wheeler said it was not "easy to follow" what was written in the note but she tried to read it, concluding "the gist that it was a note, that it was a robbery." RP 75. She thought the note had a lot of instructions of what he wanted her to do but she did not read it all before he pulled the note back out of her hands. RP 75. She was able to see, however, that part of the note said, "[t]his is a robbery." RP 75-76.

At that point, the man said he wanted money. RP 80. Wheeler's "till" had close to $20,000 in it as she had just taken in a large deposit from someone just before the man entered. RP 77. The big bills were all in the top drawer and somehow the banker had them "all loose." RP 77. Wheeler refused to open the drawer all the way, however, and "wouldn't give" the man any of the "big bills" she had. RP 77-78. She opened the drawer halfway and pulled out some bills "and a device" which would explode when he left the bank and pour dye all over him and the money.

RP 80. When he saw it, he asked what it was and she told him, so he peeled off the $20 bills on the outside of the pack and threw the pack back to her. RP 80-83.

At that point, Wheeler said, the man asked why there were no "50s or hundreds" and she pulled the drawer out and told him he could have the blank checks in there but he did not want them. RP 83.

Ultimately, Wheeler guessed, the man ended up with between $400 and $600. RP 80. After he left out the back door, Wheeler called "9-1-1" with the phone "down," waited until she heard the back door "clack" and then "mag locked it." RP 84-85.

Wheeler admitted that, throughout the incident, she was really angry about what was going on. RP 86. In fact, she admitted, "but for bank policy," she might have "taken a poke" at the guy, even though he didn't say anything about hurting her and had no weapon that he showed her or anything like that. RP 86. In fact, his demeanor was "pleasant" when he first approached and he seemed "anxious" and "nervous" the entire time. RP 86-87.

Wheeler conceded she was really "more annoyed than anything else about, wow, here we go again, and man, am I angry[.]" RP 86-87. She was not feeling "fear or threat or any such thing" but rather "just overwhelming anger." RP 87.

Indeed, she said, part of the reason she made sure he was locked outside after the incident was because she was "afraid" she might "kick his butt" if he was locked in with her. RP 87. But she said that, whenever someone passed a note about a robbery, there was always a concern or

"threat" because she did not know what, exactly, someone might end up doing. RP 88-92.

She admitted, however, that she "wasn't experiencing anxiety" and was just so angry she was trying to keep herself from punching him. RP 91-92.

Another teller, Heather Thompson, was working the drive-through that day and got a call from her manager saying they were just robbed and the guy was headed out the back door. RP 95-97. She saw the man go into a little area down the alley walking very fast, then come back out. RP 98. Thompson thought the man had changed from possibly a dark t-shirt and jeans into a white tank top and basketball shorts. RP 98. He then went running off north. RP 98.

Laurent Boilly, who worked on the same block, said his dog was acting up in the back alley, which Boilly thought meant someone was in the back parking lot. RP 100. Boilly saw a man jogging out of the alley and thought it was strange to see a black person jogging at that time of day. RP 101. As Boilly started to drive through out of the parking into the alley, he saw some clothing on the ground and thought it was unusual, assuming the guy had dropped his sweater. RP 102. After Boilly got to the end of the alley there was a police car blocking it and some officers there, too. RP 102. Boilly told them what he had seen and went on his way. RP 103.

An officer secured the clothing and it included jeans which had a cell phone in one of the pockets. RP 135-36. A search warrant was issued to search the phone and an officer searched through it and saw that the

phone number assigned to the phone was the same number as the one listed for a man named Melvin Hartfield. RP 142.

Charles Lewis, Mr. Hartfield's "uncle," described a "SWAT" team descending on his house to try to find Hartfield about a day or so after Hartfield had come for a visit. RP 113-15. According to Lewis, Hartfield said "he had did something stupid" and that he had dropped or lost his phone while doing the stupid thing. RP 116-17.

Hartfield was interviewed by Detective Timothy Griffith and made it clear that he never had any weapons and never threatened anyone. RP 148. The teller also told the detective she never saw any weapons and was never threatened in any way. RP 149. Another Detective, Robert Baker, said that, after he was read his rights, Hartfield admitted being at the bank and taking the money. RP 157.

The jury acquitted Hartfield of the robbery charge but found him guilty of a lesser included offense of theft in the first degree. RP 219-20.

D. 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

Reversal and remand for resentencing should be granted with instructions 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. Hartfield is indigent and this Court should exercise its discretion to grant Mr. Hartfield

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 in Blazina are presented by this case.

a. Relevant facts

At sentencing on October 17, 2014, the prosecution stated that there was "an agreed restitution order, at least between the attorneys, for an amount of $624" in restitution. RP 222-23. The prosecutor also said the state was asking for "$500 crime victim penalty assessment, $200 in costs, $100 DNA fee, and given that there was a full trial in this matter. . .$1,000 in attorney's fees reimbursement to DAC." RP 222-23.

Counsel told the court Mr. Hartfield wanted the "low end" and was asking to be found indigent, planning to appeal. RP 222-23. The court ordered a high-end sentence and the legal financial obligations as requested by the state. RP 224-25.

The judgment and sentence included a "boilerplate" finding of ability to pay, as well as similar pre-printed requirements for an interest rate of 12% to apply, for the amount to be due immediately and for Mr. Hartfield to pay and costs of collection and to give certain financial information in order for the payments to be handled. CP 68-69.

Two months after the notice of appeal was filed, an invoice was filed in the case for clerk's papers costs of $45.00. CP 91. A criminal costs bill was filed December 23, 2014, adding further costs of more than $91 for things like prosecution witness travel fees. CP 92-93. As of January 8, 2015, DOC released its supervision of Mr. Hartfield and the release document showed the original amounts ordered (including $624 in

restitution) totaled $2,424.00. CP 94-97.

Just since sentencing less than 3 months before, $60.57 in interest had been added. CP 97. And the amounts of $45 and $91.44 were not yet reflected in the total. CP 93-97.

On February 24, just shy of 4 months after sentencing, Pierce County sent a preprinted, check-the-box "Dear Sir/Madam" form to a Tacoma address for Hartfield which listed the "Judgment Amount" now as "$2524.00," instead of the original $2,424 ordered, and listed the "Outstanding Balance" as "$2,589.46." CP 98 . The form letter had a check mark in a box next to a declaration that "[a]ccording to our records you have failed to comply with this condition of your Judgment and Sentence and are now delinquent on your LFO payments." CP 98. The letter also said the letter was a "one time courtesy" from the clerk's office and that it might impose a fee for "collection of unpaid legal financial obligations." CP 98.

The same day, a similar form letter was also sent with a check mark in a different box, which provided:

> According to our records you have made monthly payments and are in compliance with your Judgment and Sentence. However, it is now necessary for you to make new payment arrangements with the Clerk's Office.

CP 99. There was also new language added in bold, which provided, as follows:

> **Within 30 days from the date of this notice you must pay the outstanding balance due or make new arrangements for payment with this office. If you do not respond to this notice within the 30 days we will turn this case over to our Commercial Collection Agent. As of that time you will be**

> **required to deal ONLY with the collection agent regarding payments.**

CP 99 (emphasis in original).

b. Reversal and resentencing is required

This Court should reverse and remand for resentencing, because the trial court did not follow the requirements of RCW 10.01.160(1) and relief should be granted under Blazina.

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.[1]

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

[1]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.

> 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 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.

At that point, our highest 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 issues "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. Hartfield relief. Just like the defendants in Blazina, Mr. Hartfield is indigent. Just like those defendants, he is already subject to 12% interest, compounding now, even while he is in custody. See CP 68-69.

Indeed, Mr. Hartfield's situation illustrates the incredible impact of the LFO system in just a very short time. The original amount ordered was $1800, with $624 also ordered for restitution, for a total of $2424. CP 68-69. Just a few months after sentencing, however, the clerk's office sent Hartfield collections letters listing the amount as $2,589.46, a whooping $1,060+ in difference. CP 98, 99.

Based on the DOC documentation, it appears that the clerk erred and the number should have been $2,489.46 - an error this Court should fix. Compare, CP 94-97; 98, 99.

Regardless of that error, however, more than $60 capitalized and added in just a few months to a bill which started out as a little over $2,000 is a huge increase in LFO's of just the kind the Blazina Court condemned.

And just as in Blazina, here, there was no consideration of whether Mr. Hartfield has any present or future likelihood of having any hope of paying, despite the requirements of RCW 10.01.160. Further, just as in Blazina, the only findings on Hartfield's "ability to pay" were the insufficient pre-printed "boilerplate" findings, entered without

consideration of Mr. Hartfield's individual circumstances. CP 68. And he is already suffering the extreme results of the interest rate which the high Court noted often leaves indigent citizens drowning in an ever-deeper hole of legal financial debt.

Thus, Mr. Hartfield is in the same situation as the defendants in the consolidated cases in Blazina. He is already suffering the impacts of the unfair and unjust system our Supreme Court has now condemned and will continue to do so unless this Court follows Blazina and orders resentencing. The resentencing court should be ordered to consider Mr. Hartfield's "individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay," on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

Pursuant to RAP 1.2(a), this Court is tasked with interpreting the rules and exercising its discretion in order to serve the ends of justice. Blazina was a watershed in our state. Every single justice on our highest court agreed that our state's system of imposing legal financial obligations is so racially biased, unfair, improperly enforced and debilitating to the possibility of any rehabilitation for indigents that it was necessary to take the extremely unusual step of addressing the issue for the first time on appeal, *even though the justices agreed it was non-constitutional error*. In so doing, our Supreme Court took a courageous step towards working to ensure that poor people convicted of crimes are not permanently marginalized as a sub-class of our society, never able to climb out from the ever-deepening hole of legal debt even if, as the Blazina Court noted,

those people make full minimum payments for *years.*

For our highest state court to so rule sends a very clear message. While it was not error or an abuse of discretion for lower appellate courts to fail to take action prior to Blazina, the unprecedented message of Blazina is that our highest Court intends to ensure that the injustices in our LFO system are redressed. For this Court to decline to do so after the Blazina decision would not only perpetuate the same injustices our high Court has just condemned but amount to a significant unfairness, rising to the level of a due process violation.

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 here as to the defendants in the two separate cases consolidated in Blazina. This Court should grant Mr. Hartfield the same relief as the defendants in Blazina and 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. Hartfield's individual financial circumstances and present and future ability to pay before imposition of any LFOs.

E. CONCLUSION

For the reasons stated herein, this Court should grant relief.

DATED this 1st day of June, 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 Brief and Appendices to opposing counsel via the upload service at pcpatcecf@co.pierce.wa.us, and to Mr. Melvin Hartfield, KSDOC 48519, LCF, P.O. Box 2, Lansing, KS. 66042.

DATED this1st day of June, 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

June 01, 2015 - 10:28 AM

Transmittal Letter

Document Uploaded: 1-467909-Appellant's Brief.pdf

Case Name: State v. Hartfield
Court of Appeals Case Number: 46790-9

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: __Appellant's__

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: 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