NO. 33829-1-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

DERRICK JONES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
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2. **IS TRIAL COUNSEL INEFFECTIVE FOR FOREGOING AN OBJECTION TO COURT ORDERED LEGAL FINANCIAL OBLIGATIONS IN FAVOR OF PUTTING HIS CLIENT IN THE BEST LIGHT POSSIBLE FOR PURPOSES OF ARGUING THE LENGTH OF HIS PRISON SENTENCE?**

B. RESPONSE TO STATEMENT OF THE CASE

The Appellant's case went to trial on July 29, 2015. 7/29/15 RP 3. The jury learned that the Appellant had been staying at the Union Gospel Mission during the time of the incident. During the day, when not at the mission, the Appellant would look for work. 7/30/15 RP 34. On nights he would drink, he was not allowed at the mission and would find another place to stay. 7/30/15 RP 34-35. Around this time period the Appellant had been caught and convicted of trespassing at several different locations. 7/30/15 RP 55-56.

One of the locations the Appellant had been arrested out of for trespassing was 416 West Shoshone, Pasco. 7/31/15 RP 93. Nelson Gomez testified that a couple days after that he found the Appellant and some friends were arrested, he caught the Appellant back at the same building. 7/29/15 RP 39, 70-71. When Mr. Gomez confronted the Appellant with a bat, the Appellant approached him in an aggressive and threatening manner. 7/29/15 RP 75-76. Mr. Gomez backed up to deescalate the situation, but the Appellant followed him and challenged him to a fight. 7/29/15 RP 88. The Appellant has a criminal history which includes four felony assaults and approximately five gross misdemeanor assaults. CP 51, 10/31/15 RP 103. The Appellant testified he did not run when confronted by the Mr. Gomez because he felt he had done nothing wrong. 7/30/15 RP 63.

On March 31, 2015, the jury returned a verdict of guilty to one count of Residential Burglary. 7/31/2015 RP 110.

C. RESPONSE TO ARGUMENT

1. THE APPELLANT IS NOT ENTITLED TO A REVIEW OF HIS LEGAL FINANCIAL OBLIGATIONS BECAUSE HE FAILED TO OBJECT TO THEM AT SENTENCING, AND IN ANY EVENT, THE RECORD ESTABLISHES THAT THE DEFENDANT HAS THE PHYSICAL ABILITY TO WORK.

The Court should decline to consider the issue of the Appellant's legal financial obligations (LFOs) for the first time on appeal. Any defendant who does not object to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. *State v. Blazina*, 182 Wash. 2d 827, 832, 344 P.3d 680 (2015) citing RAP 2.5(a). The general rule, that arguments not raised in the trial court cannot be considered on appeal, applies. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); Rules of Appellate Procedure (RAP) 2.5(a). The reason for this rule is to allow the trial court the opportunity to correct the error and to give the opposing party an opportunity to respond. If the Appellant had brought his issues with the legal financial obligations to the attention of the trial court, the issue could have been easily corrected with one or two questions. Instead, by waiting until his appeal, he asks the State to bear the costs of transporting him and

conducting another sentencing hearing, or the costs of having the fines stricken in their entirety.

The Appellant argues that RCW 10.01.160(3) requires an individualized inquiry into the Appellant's ability when imposing LFOs, therefore, a failure to make such an inquiry means the Court should vacate the discretionary LFOs. While the first part of this proposition is true, the second assumption is not the position of the Supreme Court. Unpreserved LFO errors do not automatically receive review. *Blazina* at 833. Such a broad review of unpreserved sentencing errors is only permitted in instances where a failure to grant review would cause defendants to be unjustly punished and to be treated inconsistently. *Id.* at 834. Allowing sentencing review of LFO orders does not promote sentencing uniformity in the same manner. *Id.* In cases such as this, "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." *Blazina* at 834.

Blazina took the opportunity to "emphasize" RCW 10.01.160(3)'s requirement of an individually inquiry into a defendant's ability to pay is required. *Id.* at 839. This case is not one that requires such emphasis, as the trial judge clearly had in mind the Appellant's ability to pay his court fines and costs, even if

he did not verbalize it. Page of five of the Judgment and Sentence indicates Judge Robert Swisher struck two of the discretionary fines, one for $600.00 attorney's fees and another for the $500.00 9A.20.021 fine. Although the trial court neglected to verbally address legal financial obligations on the record, this shows the court was considering the Appellant's indigence issues and giving him some redress for those circumstances. Given the timbre of the sentencing, this is the only explanation for the court crossing out those fines. Although Judge Robert Swisher did not follow the letter of RCW 10.01.160(3), he did follow the spirit of that rule by giving the Appellant some financial relief.

In any event, the record provided demonstrates the Appellant has the ability to obtain employment and pay his fines. The Appellant points out that the record shows he was homeless the time of the incident, and therefore, he cannot pay his fines or obligations. There mere fact someone is homeless does not mean they are unemployable and cannot pay anything toward their fines in the future. Courts have noted that even defendants of limited means can work to make some sort of accommodation with clerk's office to pay something, even "if it's five bucks a month" or some small payment. *State v. Woodward*, 116 Wn. App. 697, 705, 67

P.3d 530 (2003). Although the State accepts that no individualized inquiry was made, it does not concede that this means the Appellant can never work or make a payment again, such that his fines should be vacated.

The record actually indicates the opposite; that the Appellant has the ability to work. When the Appellant was asked about his schedule during the days when he was not at the mission, he responded that he would normally go out and see if he could find work. This statement is an admission that work is possible for the Appellant. Consistent with this explicit statement, the Appellant's actions during the incident implicitly suggest he does not have any physical deficiencies which would prohibit him from working. When confronted by the property owner, a large man holding a bat, the Appellant chose to aggressively confront him and try to instigate a fight. Consistent with the Appellant's actions in the underlying incident, is the Appellant's record of at least four felony assault convictions and numerous gross misdemeanor assault convictions. Fighting is vastly more strenuous then most kinds of work, if he the Appellant is able to engage in that activity, he can surely engage in labor of some kind.

2. THE APPELLANT'S TRIAL ATTORNEY PROPERLY FOCUSED ON ARGUING FOR A LESSER SENTENCE, INSTEAD OF FOCUSING ON HIS CLIENT'S INABILITY TO FIND EMPLOYMENT.

Once convicted, the Appellant faced a sentence of 63 to 84 months incarceration. CP 52. This is a sentencing range of almost two years. Because of the large range, there was a significant consequences to the arguments made during the sentencing hearing. The Appellant's counsel prioritized arguing for a bottom of the range. The goal of that sentencing argument was to provide mitigating information, not to explain to the judge that his client did not have a steady job and was not a productive member of society.

The standard of review for ineffective assistance of counsel is de novo. *State v. White*, 80 Wash.App. 406, 410, 907 P.2d 310 (1995) However, the Supreme Court has underlined the importance of taking a measured and deferential approach to examining a defense counsel's trial strategy:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558,

> 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. Louisiana*, supra, 350 U.S. at 101, 76 S.Ct., at 164.

Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984).

In order for the appellant to show he received ineffective assistance of counsel he must satisfy a two-pronged test. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). The first step for the appellant is to show that "defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances..." *Id.* In considering this factor the courts "engage in a strong presumption counsel's representation was effective. *Id.* at 335. Indeed, the burden is on the appellant in this case to demonstrate, based on the available record, that his trial defense

counsel was ineffective. *Id.* The second prong the appellant must satisfy is to make a showing that "defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

For the appellant to satisfy the first prong and show there is that deficient representation he must show that there is "no legitimate strategic or tactical reasons" for the trial defense counsel to have made his decision. *State v. Rainy*, 107 Wash.App 129, 135-36, 28 P.3d 10 (2001). The Appellant argues that there is not a legitimate trial strategy for not understanding the Appellant's "dire financial situation because counsel knew he was homeless and qualified indigent defense services." BOA 13. This does not take into account the practical effects of arguing that your client has not and does not intend to work anytime in the near future. Shedding your client in such negative light is the exact opposite of the goal of a defense attorney during their client's sentencing. If defense counsel really wanted to make a compelling argument about ability to pay LFO's he could also being up the fact his client had been incarcerated for many years for serious violent crimes, and therefore, had unable to work. This argument might help avoid the

discretionary fines of $1,391.00, but would obviously not be a good idea. Deliberately bringing up such negative qualities about your client is bad sentencing strategy.

Division Three addressed the same issue recently. *State v. Duncan*, 18 Wn. App. 246, 327 P.2d 699 (2014). The Court pointed out at least two reason why a defense attorney may wish to avoid an LFO argument during sentencing: one, the State's burden of proof is too low to mount a sufficient challenge, and two, an offender is trying to portray themselves in a positive light and it is unhelpful to describe oneself as perpetually unemployed and irretrievably indigent. *Id.* at 250-51. The Appellant's trial counsel prioritized the two years in prison over the $1,391.00 in legal fees. This is a strategic position, the kind which a trial counsel must be allowed to make undisturbed by 20/20 appellate hindsight.

In any event, the Appellant in this case cannot meet the requirements of showing prejudice. Upon release from prison, the Appellant will have the opportunity to move the court to reduce or waive the interest on his legal financial obligations pursuant to RCW 10.82.090(2). That statute allows such relief where the defendant has made a "good faith effort" to pay and the payment of interest would impose a significant hardship. "Good faith effort" is

defined by the same statute as either (a) payment of the principal amount in full, or (b) making twenty-four consecutive monthly payments, excluding any payments pursuant to mandatory deductions by the Department of Corrections, on his legal financial obligations under his payment plan with the Court. He will also retain the ability to petition under RCW 10.01.160(4) for remission of his financial obligations if payment would cause a manifest hardship. As long as these remedies are available, the Appellant does not face prejudice.

D. CONCLUSION

The Appellant certainly would have approved of his attorney's efforts to focus on seeking a lesser sentence. Since that effort was unsuccessful, he would now like to have the benefits of not bringing his history of underemployment and indigence to the court's attention during sentencing in the form of vacating his fines. This is not a fair and equitable position. The State respectfully requests that Judgment and Sentence of Superior Court for

Franklin County be upheld.

Dated this 12th day of July, 2016.

Respectfully submitted,
SHAWN P. SANT
Prosecuting Attorney

for By: _____ 32036
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WSBA #34277
Deputy Prosecuting Attorney

Affidavit of Service		
	David Koch mayovskyp@nwattorney.net	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated 12, July 2016, Pasco WA _____ Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 12th day of July, 2016 _____ Notary Public and for the State of Washington residing at Kennewick My appointment expires: 5/19/2018		