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SUPREME COURT
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BY SUSAN L. CARLSON
CLERK

Supreme Court No. 99427-7
(COA No. 36757-6-III)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

JUAN O. GONZALEZ,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Juan Gonzalez, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Juan Gonzalez seeks review of the Court of Appeals decision dated December 22, 2020, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

When a defendant is indigent and determined unable to pay discretionary LFO's, should the court apply this determination to foreclose imposition of statutory fines?

D. STATEMENT OF THE CASE

Mr. Gonzalez was found indigent by the Adams County Superior Court and on April 22, 2019, the trial court entered an order of indigency on appeal. CP 339-40.

Shortly thereafter, the trial court imposed a discretionary \$1,000 “other fines and costs.” CP 323-34; RP 200. Mr. Gonzalez did not object to the fine.

On appeal, Division Three of the Court of Appeals declined to reach the merits of Mr. Gonzalez’s case due to the error being unpreserved. However, Division Three still analyzed the issue as to why Mr. Gonzalez would still lose his appeal, even if the error was preserved.

The Court stated that fines pursuant to RCW 9A.20.021 are not “costs” as defined under RCW 10.01.160 and therefore *Blazina* and *Ramirez* did not apply.

A timely motion for reconsideration was denied on December 22, 2020.

This timely petition for review follows.

E. ARGUMENT

THERE IS A SPLIT IN DIVISION THREE REGARDING THE PROPER INQUIRY PRIOR TO THE IMPOSITION OF DISCRETIONARY STATUTORY FINES ON AN INDIGENT DEFENDANT.

The trial court in Mr. Gonzalez' case imposed a discretionary statutory fine without conducting a financial inquiry into his ability to pay discretionary financial obligations. *State v. Gonzalez*, No. 36757-6-III, 2020 WL 7041369 (December 1, 2020) Reconsideration Denied (December 22, 2020).

Under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), trial judges have a statutory obligation to consider former RCW 10.01.160(3) at sentencing and make an individualized determination of the defendant's ability to pay discretionary legal financial obligations. *Blazina*, 182 Wn.2d at 837. Even when a defendant does not object to discretionary fines, the court may review the matter under RAP 2.5. *Blazina*, 182 Wn.2d at 835.

In *State v. Malone*, 193 Wn. App. 762, 765, 376 P.3d 443 (2016), the Court, was “[p]ersuaded by the policy concerns outlined in *Blazina*” and chose “to exercise discretion ... to review the merits of a challenge to discretionary. *Id.* (citing *Blazina*, 182 Wn.2d at 835).

The policy concerns acknowledge, that there is a national level crisis associated with imposing fines on indigent defendants who cannot pay, and compounding the problem the courts impose an interest rate that accrues at 12%. *Id.* For example, “on average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” *Blazina*, 182 Wn.2d at 836 (internal citations omitted).

Division Three holds that a fine does not require the trial court to conduct an inquiry into a defendant’s ability to pay. *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015). However, the Court has strongly urged trial judges

to consider the defendant's ability to pay before imposing fines. *State v. Clark*, 191 Wn. App. at 376.

Notwithstanding the lack of absolute directive to make an inquiry into ability to pay, a trial court may always exercise discretion when imposing any discretionary statutory fines. *Id.*; see *State v. Mayer*, 120 Wn. Ap. 720, 727, 86 P.3d 217 (2004) (statutory fine); also *State v. Malone*, 193 Wn. App. 762, 764 n.2, 376 P.3d 443 (2016).

In this case, Division Three chose to disregard the Supreme Court in *Blazina*, and *Clark*, *supra*, and ruled without analysis, that it would not follow the directive strongly urging consideration of an indigent defendant's ability to pay. *Gonzalez*, No. 36757-6-III at *1.

In 2020, Division Three issued two opinions regarding whether the trial court should inquire into the ability to pay a statutory fine in the manner provided under *Blazina*. First in the unpublished opinion *State v. Gallegos*,

13 Wn. App. 2d 1113, 2020 WL 340075¹, and second the opinion in this case in *Gonzalez*. These two opinions are in conflict and the opinion in *Gallegos* is correct.

In *Gallegos*, the trial court imposed a \$2000 statutory VUCSA fine on an indigent defendant without considering his ability to pay. *Gallegos*, 13 Wn. App. 2d at *8. Without explicitly holding that an ability to pay inquiry was required before imposing of a statutory fine, the Court cited *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015), to “strongly urge[] trial judges to consider the defendant’s ability to pay before imposing fines.” *Gallegos*, 13 Wn. App. 2d at *8.

The state conceded that the trial court should have considered the defendant’s ability to pay the discretionary statutory fine before imposition. *Id.* Even though trial counsel did not object during trial, the Court of Appeals

¹ Cited in accordance with GR 14.1 and to demonstrate a conflict between unpublished opinions

agreed and remanded for this purpose without addressing RAP 2.5. *Gallegos*, 13 Wn. App. 2d at *8.

In Gonzalez' case by contrast, without explanation or analysis, the Court summarily held that the since the court was not required to make any such inquiry into ability to pay for an indigent defendant, it would not consider ability to pay. *Gonzalez*, No. 36757-6-III at *1. The decision in *Gonzalez* did not discuss *Gallegos* or correctly cite to *Clark* for the proposition that inquiry into ability to pay is "strongly" encouraged, but rather rejected Gonzalez request and merely mentioned such a practice is "encouraged". *Id.*

It is this difference in interpretation 'encourage vs. strongly encourage' that goes directly at the heart of the reasons this Court reached the merits in *Blazina*: the state and national outcry for LFO reform. Washington State still feels the impact of disproportionate LFOs. A 2018 report by a commission from this Court noted that between 2014 and 2016 Superior Courts in Washington imposed

\$130,982,403.61 in LFOs, yet only \$7,702,021.19 had been collected.²³

The continued imposition of discretionary LFOs, as the world and Washington State reels from a global pandemic that has halted economies all over the world, only exacerbates the issues identified by this Court. *Blazina*, 182 Wn.2d at 835-36. It is even more important now that this Court take this issue up to decide if a financial inquiry before imposing discretionary statutory fines is required.

This Court may accept review when a decision of the Court of Appeals conflicts with a published decision of the Court of Appeals. RAP 13.4(b)(2). Also, this Court may

² The Washington State Supreme Court Minority and Justice Commission, 2017-2019 Washington State LFO Stakeholder Consortium Progress Report 2018 LFO Symposium. Pg. 5. Retrieved from <https://www.courts.wa.gov/subsite/mjc/docs/2018/LFO%20Stakeholder%20Consortium%20Progress%20Report.pdf>.

³ The Commission's report of imposed LFOs, totaling \$130,982,403.61, includes restitution LFOs: "the data is intended only to provide some understanding of: (1) What dollar amounts of LFOs are being imposed?; (2) What is collected?; (3) How are collected funds disposed?; (4) What are courts' practices in making adjustments to LFOs previously imposed?"

accept review of issues “of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4).

In Mr. Gonzalez’ case, Division Three’s opinion, although unpublished, conflicts with another published opinion involving the same issue as well as an unpublished opinion involving similar statutory fines. *Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015); see also, *State v. Gallegos*, 13 Wn. App. 2d 1113, 2020 WL 340075. This conflict involves matters of substantial public interest that involve interpretation of this Court’s case law. See *Blazina*, 182 Wn.2d at 835. For these reasons, this Court should accept review under RAP 13.4(b)

F. CONCLUSION

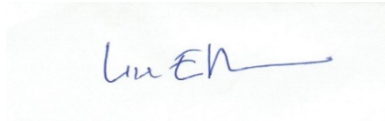
Based on the foregoing, petitioner Mr. Gonzalez respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 15th day of January 2021.

Respectfully submitted,

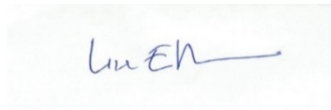
A handwritten signature in black ink, appearing to read 'K. Berti', written over a horizontal line.

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A handwritten signature in blue ink, appearing to read 'Lise Ellner', written over a horizontal line.

LISE ELLNER
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I, Lise Ellner, a person over the age of 18 years of age, served the Adams County Prosecutor (210 W Broadway Ave. Ste. 100, Ritzville, WA 99169-1860) and Juan O. Gonzalez, (685 S. Saddle Road, Othello, WA 99344), a true copy of the document to which this certificate is affixed on January 15, 2021. Service was made electronically and by depositing in the mails of the United State of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

APPENDIX

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2020 WL 7041369

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN
GR 14.1

Court of Appeals of Washington, Division 3.

STATE of Washington, Respondent,
v.
Juan O. GONZALEZ, Appellant.

No. 36757-6-III

FILED DECEMBER 1, 2020

Appeal from Adams Superior Court, Docket No: 18-1-
00138-2, Honorable [Steven B. Dixon](#)

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Respondent(s).

UNPUBLISHED OPINION

[Fearing, J.](#)

*1 Juan Gonzalez challenges the imposition of a \$1,000 fine imposed by the trial court after convicting Gonzalez of a Class B felony. Gonzalez is indigent. Because Gonzalez did not object before the trial court and because [RCW 9A.20.021\(b\)](#) authorizes a fine up to \$20,000 for a Class B felony, we reject the challenge.

FACTS

The facts underlying the charge are irrelevant on appeal.

PROCEDURE

The State of Washington charged Juan Gonzalez with one count of possession with intent to deliver a controlled substance, methamphetamine. The trial court found Gonzalez indigent and appointed him counsel. After a bench trial, the trial court found Juan Gonzalez guilty on the sole charge.

Possession with intent to deliver a controlled substance, methamphetamine, is a class B felony. [RCW 69.50.401\(2\)\(b\)](#). The trial court imposed a sentence of twelve months and a day and one year of community custody. The court also imposed mandatory legal financial obligations and a \$1,000 fine. Gonzalez did not object to the imposition of the \$1,000 fine. The trial court minutes memorialized the \$1,000 as a fine. CP 338. The felony judgment and sentence form labeled the \$1,000 as “[o]ther fines and costs.” Clerk’s Papers at 329.

LAW AND ANALYSIS

On appeal, Juan Gonzalez contends that the law precluded imposition of the \$1,000 fine because of his indigency. The State responds that Gonzalez failed to preserve the assignment of error for appeal because he registered no objection before the trial court.

An appellate court may refuse to review any claim of error which was not raised in the trial court. [RAP 2.5](#). A previously unchallenged fine is not subject to review

initially on appeal. *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015).

Even if we reviewed the merits of the appeal, we would affirm the trial court. Juan Gonzalez argues that, pursuant to RCW 10.01.160(3), *State v. Ramirez*, 191 Wn.2d 732, 738-39, 426 P.3d 714 (2018), and *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), the trial court should have considered his financial ability to pay a fine before imposing the fine. Nevertheless, the statute and the cases concern discretionary legal financial obligations or costs, not a statutory fine. RCW 9A.20.021(b) authorizes the trial court to impose a fine up to \$20,000 for a Class B felony regardless of the offender's financial condition. Although we encourage trial courts to consider the offender's financial status when imposing a fine, the trial court holds no obligation to do so. *State v. Clark*, 191 Wn. App. 369, 374 (2015).

CONCLUSION

We affirm the trial court's imposition of a \$1,000 fine on Juan Gonzalez.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

[Korsmo](#), A.C.J.

[Siddoway](#), J.

All Citations

Not Reported in Pac. Rptr., 2020 WL 7041369

LAW OFFICES OF LISE ELLNER

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