Supreme Court No. 89977-1
(Court of Appeals No. 43753-8-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS COLE,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Thomas Cole asks this Court to review the opinion of the Court of Appeals in *State v. Cole*, No. 43753-8-II. A copy is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Whether the imposition of legal financial obligations may be challenged for the first time on appeal.[1]

C. STATEMENT OF THE CASE

Thomas Cole was convicted of failure to register as a sex offender following a bench trial. CP 8-15. In November of 2011, Mr. Cole registered as "transient," but in December he slept on a friend's couch and registered that address. His friend moved out of the apartment on December 30, and Mr. Cole became transient again but did not register his change of circumstances within three days as required. 7/2/12 RP 44-56, 62-63, 81-82. The trial court thus found him guilty, but noted, "it's kind of unfortunate Mr. Cole suffers from homelessness because he's unemployed." 7/2/12 RP 137; CP 8-15.

Despite the acknowledgment that Mr. Cole was homeless and unemployed, the court ordered him to pay not only the mandatory victim

[1]This issue is currently pending in this Court in *State v. Blazina*, No. 89028-5.

penalty assessment of $500 and mandatory DNA fee of $100, but also $500 in "court-appointed attorney fees and defense costs." The preprinted judgment and sentence states, "The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 26.

On appeal, Mr. Cole challenged the boilerplate finding of ability to pay and the imposition of discretionary costs. The Court of Appeals held Mr. Cole could not raise this issue for the first time on appeal under *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013).

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Because this issue is pending in *Blazina*, this Court should either grant review or should defer consideration of the petition pending *Blazina*. The issue is one of substantial public interest because most criminal defendants are indigent and the imposition of legal financial obligations upon them delays successful reentry into society to the detriment of both the defendants and the community. *See generally* American Civil Liberties Union of Washington & Columbia Legal Services, *Modern-Day*

Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor (February 2014);[2] RAP 13.4(b)(4).

In this case, the sentencing court imposed legal financial obligations ("LFOs") totaling $1,100. CP 26. Although the $100 DNA fee and $500 Victim Penalty Assessment ("VPA") are mandatory, it was improper for the court to impose $500 in attorney fees and defense costs given Mr. Cole lacks the present and future ability to pay.

Courts may not require an indigent defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court *must* consider the financial resources of the defendant before imposing costs. *Id.* This requirement is both constitutional and statutory. *Id.* A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

The sentencing court erred in imposing attorney costs and fees upon Mr. Cole because substantial evidence does not support a finding

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[2] Available at: https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf. (last viewed 2/13/14).

that he has or will have the ability to pay. On the contrary, all evidence showed Mr. Cole was unemployed and homeless, and that is why it was difficult for him to comply with the registration requirement. 7/2/12 RP 137. Because of his indigence, he qualified for and continues to qualify for court-appointed counsel. CP 26.

This case stands in contrast to others in which courts have affirmed the imposition of costs. In *Richardson*, the Court of Appeals affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, the court affirmed the imposition of costs because the Presentence Report "establishe[d] a factual basis for the defendant's future ability to pay." *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991). But unlike the defendant in *Richardson*, Mr. Cole is not employed. And unlike in *Baldwin*, the record in this case indicated a *lack* of ability to pay. The trial court simply failed to consider Mr. Cole's ability to pay before imposing costs.

The Court of Appeals dismissed the problem by holding Mr. Cole could not raise the issue on appeal because he did not object below. But it is well-settled that erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). The trial court here failed to comply with its statutory duty to

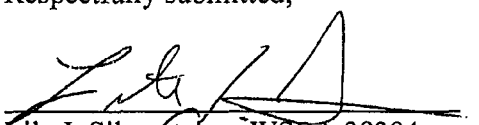
consider Mr. Cole's ability to pay before imposing discretionary LFO's. This type of issue may be raised for the first time on appeal, and it is a matter of substantial public interest that courts are burdening poor people with debts they can never repay. This Court should grant review.

E. CONCLUSION

Thomas Cole respectfully requests that this Court grant review. In the alternative, the petition should be deferred pending a decision in *Blazina*.

DATED this 13th day of February, 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS A. COLE, Appellant.	No. 43753-8-II UNPUBLISHED OPINION

BJORGEN, J. — Following a bench trial, the trial court found Thomas Cole guilty of failure to register as a sex offender. Cole appeals his sentence, asserting that the trial court erred (1) by finding that he had the present or future ability to pay legal financial obligations (LFOs), and (2) by imposing a variable term of community custody. In accord with our decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013), we decline to address for the first time on appeal Cole's challenge to the trial court's finding that he had a present or likely future ability to pay his LFOs. With regard to Cole's community custody claim, we accept the State's concession that the trial court erred by imposing a variable term of community custody, and we remand for a correction of Cole's sentence consistent with this opinion.

FACTS

In 2006, Cole was convicted of first degree child rape, which triggered RCW 9A.44.130's sex offender registration requirements. On February 7, 2012, the State charged Cole with one count of failure to register as a sex offender. After Cole waived his jury trial right,

his case proceeded to a bench trial on June 28, 2012. The trial court found Cole guilty of his charged offense.

At Cole's sentencing hearing, the trial court stated that it would waive imposing court costs based on Cole's "very limited income," but that it would impose a mandatory $500 crime victim assessment fee, a mandatory $100 deoxyribonucleic acid (DNA) collection fee, and a $500 Department of Assigned Counsel recoupment fee. Report of Proceedings (RP) (Jul. 20, 2012) at 11 The trial court sentenced Cole to a low-end standard range sentence of 17 months of incarceration with a 0-36 month community custody term "not to exceed [the] statutory max[imum]." RP (July 20, 2012)) at 10. Cole timely appeals his sentence.

ANALYSIS

I. LFOs

Cole first contends, for the first time on appeal, that the trial court erred by finding that he had a present or future ability to pay a $500 assigned counsel recoupment fee.[1] Specifically, Cole challenges the following preprinted boilerplate language in his judgment and sentence:

> 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 obligations, 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.

Clerk's Papers (CP) at 26.

In *Blazina*, 174 Wn. App. at 911-12, the defendant challenged this same boilerplate language, arguing, as Cole does here, that the evidence before the trial court did not support the

[1] Cole does not challenge the trial court's imposition of the mandatory $500 crime victim fee or the mandatory $100 DNA collection fee.

trial court finding that he had a present or future ability to pay LFOs. We declined to reach the merits of Blazina's argument, however, because he did not object to this finding at sentencing. *Blazina*, 174 Wn. App. at 911-12. As in *Blazina*, here Cole did not object at sentencing to the trial court's finding that he had a present or future ability to pay LFOs. 174 Wn. App. at 311-12. Accordingly, we decline to reach the merits of Cole's argument on this issue.

II. COMMUNITY CUSTODY

Next, Cole contends that the trial court erred by imposing a variable term of community custody. The State concedes error. We accept the State's concession and remand for a correction of Cole's sentence consistent with this opinion.

RCW 9.94A.701 provides in relevant part:

> (1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:
>
> (a) A sex offense not sentenced under RCW 9.94A.507;
>
> . . . .
>
> (9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Under RCW 9.94A.701, "a court may no longer sentence an offender to a variable [community custody] term [that is] contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing." *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).[2] Here, Cole was convicted of failure to

[2] Before 2009, the trial court could order variable terms of community custody under former RCW 9.94A.715 (2006). *Franklin*, 172 Wn.2d at 835. In 2009, the legislature removed language permitting variable terms of community custody. *Franklin*, 172 Wn.2d at 835-36.

register as a sex offender, a sex offense not sentenced under RCW 9.94A.507. Thus, his conviction was subject to RCW 9.94A.701(1)(a)'s provision requiring a 3-year term of community custody.[3] Here the trial court imposed a 0-36 month term of community custody "not to exceed [the] statutory max[imum]." CP at 29. This variable community custody term does not comport with RCW 9.94A.701. *Franklin*, 172 Wn.2d at 836. Accordingly, we remand to the trial court to issue a corrected judgment and sentence consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, J.

We concur:

WORSWICK, C.J.

JOHANSON, J.

[3] Because Cole's 17-month confinement term when combined with a 3-year community custody term does not exceed the 5-year statutory maximum sentence for his offense, RCW 9.94A.701(9)'s reduction provision does not apply and, thus, the trial court was required to impose a fixed 3-year term of community custody. *See* RCW 9A.44.132(a)(ii); RCW 9A.20.021(c).

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NINA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 14, 2014

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