

Supreme Court No. 90305-1
(COA No. 44441-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIE LEE JOYNER,

Petitioner.

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

PETITION FOR REVIEW

FILED
JUN - 4 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON *ry*

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Willie Lee Joyner, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated April 22, 2014, pursuant to RAP 13.3(a)(1) and RAP 13.4(b). A copy of the decision is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Courts may only impose legal financial obligations (LFOs) upon a finding that a defendant has a present or future ability to pay. A finding that the defendant has the ability to pay such legal financial obligation must be supported by evidence. In Mr. Joyner's case a boilerplate finding was entered that he could pay, despite no evidence of this being presented at trial. The Court of Appeals declined to review Mr. Joyner's case on its merits. Should this Court accept review to resolve the conflict between Divisions I and II regarding whether a challenge to the trial court's LFO finding may be raised for the first time on appeal?

2. An illegal or erroneous sentence may be challenged for the first time on appeal. The imposition of LFOs in the present case was clearly erroneous because there was nothing in the record to support that sentence. The Court of Appeals declined to reach the merits of Mr.

Joyner's argument because he did not object at sentencing. Is the Court of Appeals decision contrary to case law allowing a challenge to imposed LFOs for the first time on appeal?

C. STATEMENT OF THE CASE

Willie Lee Joyner was convicted by a jury of two counts of assault in the fourth degree, both gross misdemeanors.¹ 01/18/2013 RP 2. He received a suspended sentence of two years less 125 days for credit for time served while awaiting trial, restitution by later order of the court, \$500 in mandatory fees under RCW 7.68.035, \$200 in court costs and \$1500 DCA recoupment, for a total legal financial obligation of \$2200. CP 98-99; 01/18/2013 RP 9. The only written order in regards to Mr. Joyner's financial ability to pay entered by the court is the boilerplate language included on the Conditions of Suspended Sentence form:

Attorney fees as reimbursement for a portion of the expense of his/her court appointed counsel provided by the Pierce County Department of Assigned Counsel. The court finds that the

¹ Mr. Joyner was charged by information filed in Pierce County Superior Court on September 17, 2012, with assault in the second degree (domestic violence), count I, one count of felony harassment (domestic violence), count II, and one count of assault in the fourth degree, count III, contrary to RCWs 9A.36.021(1)(g), 10.99.020, 9A.46.020(2)(b), and 9A.36.041(1), (2). CP 1-2. Mr. Joyner was found not guilty of the assault in the second degree and felony harassment. The incident arose out of an altercation between Mr. Joyner and his girlfriend and mother of his son, Rosalie Asis. CP 166-69.

defendant is able to pay said fee without undue financial hardship.

CP 99.

There is no evidence in the record establishing that the trial court took into account Mr. Joyner's ability to pay the fees, with undue financial hardship or not. 01/18/2013 RP 9-10.

On appeal, Mr. Joyner argued that the finding that he had a present or future ability to pay LFOs was unsupported by evidence. He also argued that such an erroneous sentence could be challenged for the first time on appeal. The Court of Appeals refused to reach the merits of Mr. Joyner's case and affirmed his sentence. Following the appeal the State filed a cost bill totaling \$3,408.09. These additional fees will be added to the Judgment and Sentencing. State's Cost Bill, April 25, 2014, 1-3. There has been no finding as to Mr. Joyner's ability to pay these costs.

The facts are further set forth in the Court of Appeals opinion, pages 1-2, and Appellant's Opening Brief, pages 1-2. The facts as discussed in these pleadings are incorporated by reference herein.

D. ARGUMENT

1. **The Court of Appeals was incorrect when it affirmed the imposition of LFOs on Mr. Joyner without reaching the merits of his case.**

The State bears the burden of proving the facts necessary to support the sentence imposed by the trial court. RCW 10.01.160(4) provides that a “court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” Although the trial court is not required to enter formal findings the record must be sufficient for appellate review. *See, State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). In Mr. Joyner’s case the record is silent as to his present or future ability to pay, and thus there is insufficient evidence to support the trial court’s finding of an ability to pay. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). The Court of Appeals, Division II, affirmed Mr. Joyner’s erroneous sentence concluding that previous case law did not make it compulsory for review on appeal when the issue was not brought up at sentencing. The Court of Appeals failed to reach the case on its merits.

- a. *An erroneous sentence may always be challenged for the first time on appeal.*

The issue in Mr. Joyner's case is exactly the same as the one presented in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), p'tn for review g'ntd 178 Wn.2d 1010, 311 P.3d 27 (2013) which is currently pending in this Court. That issue is whether a challenge to the trial court's boilerplate finding that a defendant has the ability to pay LFOs may be raised for the first time on appeal. The rule as it is laid out in RAP 2.5 prevents issue not raised at trial from being raised for the first time on appeal. However, it has been long held that an illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), *State v. Calvin*, 176 Wn.App 1, 302 P.3d 509 (2013).

Allowing defendants to challenge erroneous sentences on appeal helps to ensure conformity in sentencing and compliance with current sentencing statutes. Because of this there are certain situations in which the rule allowing for review of illegal and erroneous sentences trumps RAP 2.5's limitations. *State v. Ford*, 137 Wn.2d at 478, quoting *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369, (1993); *State v. Moen*, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996). In *State v. Blazina*, Division II cited RAP 2.5 as the reason to not review the defendant's challenge to the imposition of LFOs for the first time on appeal. *State*

v. *Blazina*, 174 Wn. App. at 909. Division I found the exact opposite, that a defendant's challenge to the imposition of LFOs may indeed be raised for the first time on appeal in *State v. Calvin*, 176 Wn.App at 20, n 2.

This confusion alone should be sufficient to grant review. The fact that there is substantial public interest in the imposition of LFOs as evidenced in the recent NPR feature on the topic bolsters the argument for review. RAP 13.4(b)(iv). The piece criticized the courts for ordering people to pay to have access to their constitutional rights. When a person is unable to pay his or her LFOs upfront there is a large interest rate placed on the balance and even the best-intentioned person may fall behind, resulting in probation violations and a subsequent loss of freedom.² The fact that LFOs can detrimentally impact a citizen's freedom means they should not be decided in generic written findings and if they are that sentence should be allowed to be challenged for the first time on appeal.

b. *Mr. Joyner's sentence was wrong because the finding that he had a present or future ability to pay court imposed LFOs was not supported by evidence in record.*

² Emma Anderson, et. al., "*As Court Fees Rise the Poor are Paying the Price*," <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>, (last accessed May 20, 2014).

To make a proper finding that a defendant has the present or future ability to pay LFOs a trial court must first consider “the financial resources of the defendant and the nature of the burden” imposed by such LFOs. *Bertrand*, 165 Wn.App at 404. The finding must be supported by evidence in the record.

At sentencing Mr. Joyner was ordered to pay a total of \$2,200 in legal financial obligations. CP 99; 01/18/2013 RP 9. \$1,500.00 of that was non-mandatory attorneys fees. Slip Op. 2. Although there was a written finding that Mr. Joyner was financially able to pay these costs the finding’s boilerplate language was not supported by evidence in the record and therefore it must be stricken.

Mr. Joyner was subject to the same type of boilerplate finding as to his present or future ability to pay his mandatory and discretionary court costs as the defendant in *State v. Calvin* and *State v. Blazina*. There is also nothing in the trial court’s record to support such a finding. The record is in fact silent as to Mr. Joyner’s financial situation and ability or lack thereof to pay any restitution or ordered LFOs. 01/18/2013 RP 9-10. Even when there was some minimal discussion in the record as to the defendant’s financial state the record

was found to be insufficient to support boilerplate findings allowing LFOs to be imposed. *State v. Calvin* 176 Wn.App. at 22. Mr. Joyner's trial record does not even provide this negligible support. As is the situation in the present case, when the record provides no support for a finding of a defendant's ability to pay ordered LFOs the remedy is to remand to the trial court for the baseless finding to be stricken. *Bertrand*, 165 Wn. App. at 405.

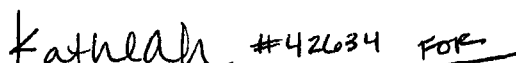
The Court of Appeals failed to reach Mr. Joyner's case on the merits but if it had his sentence should have been stricken as there is clearly insufficient evidence in the record to of his present or future ability to pay the imposed LFOs.

E. CONCLUSION

For the reasons stated above, petitioner Willie Lee Joyner respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 22nd day of May 2014.

Respectfully submitted,

 #42634 FOR
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APPENDIX A

FILED
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DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 44441-1-II

Respondent,

v.

WILLIE LEE JOYNER,

UNPUBLISHED OPINION

Appellant.

WORSWICK, C.J. — Willie Joyner appeals the conditions on his suspended sentence for two counts of fourth degree assault, arguing that the record did not support the trial court's finding that he had the ability to pay a \$1,500 legal financial obligation. Because Joyner did not object to this finding at sentencing, this court should not consider this issue. We affirm.

FACTS

Following Joyner's conviction for two counts of fourth degree assault,¹ the trial court imposed legal financial obligations (LFOs) on Joyner for victims' compensation,² court costs, and appointed counsel costs. The conditions on suspended sentence states:

¹ RCW 9A.36.041.

² RCW 7.68.035(1)(a).

[Joyner] will pay the following amounts

\$1,500 Attorney fees as reimbursement for a portion of the expense of [Joyner's] court appointed counsel provided by the Pierce County Department of Assigned Counsel. The court finds that [Joyner] is able to pay said fee without undue financial hardship.

Clerk's Papers at 100. Joyner did not object to this finding at sentencing.

ANALYSIS

Joyner argues that the record does not support the trial court's finding that he had the ability to pay the \$1,500 LFO. Joyner concedes that he did not object to this finding at sentencing, but argues that he may raise it for the first time on appeal because it is a challenge to his sentence. The State argues that Joyner's failure to object to the finding should lead this court to refuse to review Joyner's appeal under RAP 2.5(a). We decline to decide this issue under RAP 2.5(a) which states that we may decline to review any claim of error that was not raised at the trial court level.³

In *State v. Blazina*, a defendant challenged a trial court's boilerplate finding that he had the ability to pay LFOs, arguing that the evidence before the trial court did not support its finding. 174 Wn. App. 906, 911, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013). We declined to reach the merits of Blazina's argument, because he did not object at sentencing.⁴

Blazina, 174 Wn. App. at 911; *see also*, *State v. Snapp*, 119 Wn. App. 614, 626 n.8, 82 P.3d 252

³ Joyner challenges the finding as if the trial court found that Joyner had the ability to pay all the LFOs. But the trial court found only that he had the ability to pay the \$1,500 attorney fees LFO. Joyner's appeal is limited to challenging that finding.

⁴ This court addressed a trial court's finding that a disabled defendant had the ability to pay LFOs in *State v. Bertrand*, despite Bertrand's failure to raise the issue as required by RAP 2.5(a). 165 Wn. App. 393, 404, 267 P.3d 511 (2011). But "that rule does not compel [this court] to do so in every case." *Blazina*, 174 Wn. App. at 911.

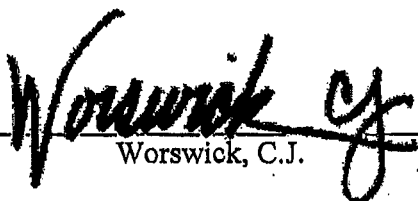
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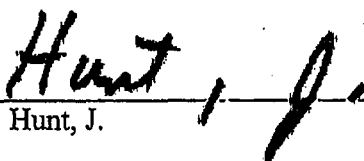
(2004) (declining to consider the defendant's argument challenging the trial court's finding that he had the ability to pay LFOs in part because he failed to raise the issue below).

Here, Joyner likewise did not object at sentencing to the trial court's finding that he was able to pay the LFO without undue financial hardship. Accordingly, we decline to reach the merits of Joyner's argument on this issue.

Affirmed.

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.


Worswick, C.J.


Hunt, J.


Melnick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 22, 2014

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