Supreme Court No. _____
Court of Appeals No. 31260-7-III

90981-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID WAYNE HALLS,
Defendant/Petitioner.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Robert G. Swisher, Judge, Guilty Plea Hearing
Honorable Carrie L. Runge, Judge, Sentencing Hearing

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, David Wayne Halls, the appellant below, asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Mr. Halls requests review of the Court of Appeal's unpublished opinion filed September 25, 2014, which affirmed his conviction for witness tampering but remanded to remove the domestic violence allegation and related assessment and no-contact order. A copy of the opinion is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

May a criminal defendant challenge for the first time on appeal the trial court's boilerplate finding that he has the ability to pay legal financial obligations imposed?

IV. GROUNDS FOR REVIEW

This issue is currently before the Court in *State* v. *Blazina*[1] and *State* v. *Paige-Colter*[2]. Oral argument was held February 11, 2014. Review should also be granted under RAP 13.4(b)(1) because a conflict exists with prior decisions of this Court (compare, Appendix A at 5 with *State v. Ford*,

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[1] 174 Wn. App. 906, 911, 301 P.3d 492, *review granted,* 178 Wn.2d 1010,311 P.3d 27 (2013).

[2] Noted at 175 Wn. App. 1010, 2013 WL 2444604, *review granted,* 178 Wn.2d 1018, 312 P.3d 650 (2013).

137 Wn.2d 472, 973 P.2d 452 (1999) and *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996)), and under RAP 13.4(b)(2) because a conflict exists between two divisions of the Court of Appeals (compare, Appendix A at 5 (Division III), with *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011) (Division II) (explicitly noting issue was not raised at sentencing, but nonetheless reviewing the issue and striking sentencing court's unsupported finding).

V. RELEVANT FACTS

The court entered a boilerplate finding stating it had considered Mr. Hall's circumstances and ability to pay Legal Financial Obligations ("LFOs"):

> **¶ 2.5 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 that the defendant's status will change.

CP 50 (bolding in original). The court made no inquiry into Mr. Halls' financial resources and the nature of the burden payment of LFOs would impose on him. 10/9/12 RP 7–10. The court ordered Mr. Halls to pay a total of $2,060 in LFOs including $860 as discretionary court costs. CP 51, 57.

Mr. Halls challenged the imposition of the LFOs for the first time on appeal. The State responded that despite absence of a finding of ability to pay the trial court had discretion to impose discretionary costs. Brief of Respondent (BOR) at 2. The State did not argue the issue was not properly preserved. *Id.* Division III concluded the issue had been waived. Appendix A at 5.

VI. ARGUMENT IN SUPPORT OF REVIEW

Review should be granted so this Court may resolve the conflicts between Division III and this Court as well as Division II, regarding whether a challenge to the trial court's LFO finding may be raised for the first time on appeal.

The trial court may order a defendant to pay court costs pursuant to RCW 10.01.160. However,

> 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).

It is well-established RCW 10.01.160(3) does not require the trial court to enter formal, specific findings. See *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). However, it is necessary the record is sufficient

for appellate courts to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404.

The issue presented here is whether a challenge to the trial court's boilerplate finding that a defendant has the ability to pay may be raised for the first time on appeal. The general rule is that issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). However, it also is well established illegal or erroneous sentences may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 477.

> A justification for the rule is that it tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court

Id. at 478 (citations omitted). Based on this justification, this Court has concluded in certain sentencing situations that RAP 2.5's general rule of limitation yields to the rule allowing for review of illegal and erroneous sentences. *Id.* at 477–78; *Moen*, 129 Wn.2d at 545-46.

Division III declined to address Mr. Halls' substantive argument because he "did not object to the trial court's imposition of discretionary costs in the trial court on the basis of the court's failure to consider his ability to pay. He thereby waived any challenge." Appendix A at 5. The court cited as support its recent decision in *State v. Duncan,* 180 Wn. App.

245, 327 P.3d 699, *petition for review filed*, No. 90188-1 (April 30, 2014)[3]. In *Duncan*, the court acknowledged it had previously reviewed the same issue when raised for the first time on appeal in a number of cases[4]. The court cited RAP 2.5 as authority for its decision not to review Duncan's challenge to the trial court's imposition of LFOs. In doing so the court recognized there is a non-rule-based exception to RAP 2.5(a) for sentences in excess of a trial court's statutory authority, citing among other cases *Ford* and *Moen*, and distinguishing the *Bertrand* decision as involving a less "typical situation of a record". 180 Wn. App. at 253–55.

As in *Duncan*, Mr. Halls asserts a direct challenge to the legal validity of the LFO order on the ground the trial court failed to undertake the statutorily required factual analysis required under RCW 10.01.160. During sentencing it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. *State v. Lundy*,

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[3] By order dated July 7, 2014, consideration of Mr. Duncan's Petition for Review has been deferred pending a final decision in Supreme Court No. 89028-5 - *State of Washington v. Nicholas Peter Blazina*.

[4] "In other cases, we have often taken our cue from the State's response to this issue-and the State's response has varied among the county prosecutors in our division. Taking our cue from the State, we have sometimes ordered that a finding of ability to pay be stricken if not supported by the record. Other times, we have remanded for a hearing on ability to pay. We have sometimes accepted the argument that an order to pay LFOs (unlike a finding of ability to pay) is not ripe for review before an attempt is made to enforce it. Sometimes, as in [*State v.*]*Kuster*[, 175 Wn. App. 420, 306 P.3d 1022 (2013)], we have refused to consider the challenge, citing RAP 2.5(a)." *Duncan*, 180 Wn. App. 252–53.

176 Wn. App. 96, 308 P.3d 755, 760 (2013). The defendant is not required to disprove this. *See, e.g. Ford*, 137 Wn.2d at 482 (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof).

In *Duncan*, Division III chose instead to shift the trial court's statutory burden to consider ability to pay onto an offender through the ruse of finding waiver if a defendant does not first make a showing that he cannot pay.

> The Supreme Court may clarify this issue in *Blazina* and *Paige-Colter,* but for now we do not understand the reasoning and holdings of *Moen, Ford,* and later cases as requiring that we entertain challenges to LFOs and supporting findings that were never raised in the trial court.

180 Wn. App. at 255.

This Court should grant review in Mr. Halls' case to resolve the conflict between its decision and those of other Divisions of the Court of Appeals as well as of this Court. RAP 13.4(b)(1) and (2).

VII. CONCLUSION

For the reasons stated, Petitioner respectfully asks this Court to grant review.

Respectfully submitted on October 27, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 27, 2014, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Mr. Halls' petition for review and Appendix A:

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September 25, 2014

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CASE # 312607 (consolidated with # 314430)
State of Washington v. David Wayne Halls; PRP of Halls
BENTON COUNTY SUPERIOR COURT No. 121006109

Dear Counsel and Mr. Halls:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:cl
Enc.
c: **E-mail**—Hon. Carrie L. Runge

FILED
SEPTEMBER 25, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. DAVID WAYNE HALLS, Appellant.	)	No. 31260-7-III (consolidated with No. 31443-0-III)
In the Matter of the Personal Restraint Petition of: DAVID WAYNE HALLS, Petitioner.	)	UNPUBLISHED OPINION

SIDDOWAY, C.J. — David Wayne Halls was convicted of witness tampering with a domestic violence allegation, following a plea of guilty. He appeals, arguing that the trial court erred in (1) finding that the domestic violence component was proved and, on that basis, imposing a $100 domestic violence penalty and no-contact order, and (2) imposing legal financial obligations (LFOs) without sufficient inquiry into his present or future ability to pay them.

In a CrR 7.8 motion that Mr. Halls filed in superior court and that was transferred to this court for resolution as a personal restraint petition (PRP), Mr. Halls sought to withdraw his guilty plea. Mr. Halls now appears to wish to withdraw the PRP.

The State concedes that the record does not support the domestic violence allegation, a concession we accept. We refuse to entertain a challenge to the LFOs for the first time on appeal. We grant that part of Mr. Halls's recent pro se submission that we construe to be a request to withdraw his CrR 7.8 motion.

We remand with directions to amend the judgment and sentence to remove the domestic violence allegation, strike the $100 domestic violence penalty assessment, and vacate the domestic violence no-contact order. We otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

In a separate case, David Wayne Halls was convicted of second degree assault for throwing a candle holder at his girl friend. *State v. Halls*, noted at ___ Wn. App. ___, 2014 WL 3697253, *petition for review filed*, No. 90711-1 (Sept. 8, 2014). Before his trial in that case, Mr. Halls sent a letter to the victim, asking her to make herself unavailable as a witness in his trial. As a result, Mr. Halls was charged with and pleaded guilty to witness tampering. At the plea hearing, the trial court reviewed with Mr. Halls the rights he was giving up by entering a guilty plea, and confirmed that his lawyer had reviewed the guilty plea statement with him. The court then accepted the guilty plea, finding that it was knowingly, voluntarily, and intelligently made.

Mr. Halls's sentencing was handled by a different judge than had accepted his guilty plea. At the sentencing hearing, Mr. Halls told the court that he wanted to "revoke" his guilty plea, apparently on the basis that he had not, in fact, understood what

he was doing. Report of Proceedings (Oct. 9, 2012) at 4. He appeared to attach importance to the fact that a no-contact order had not been in place at the time he sent the letter asking that his victim stay away from trial. The sentencing court explained to Mr. Halls that the purpose of that day's hearing was to sentence Mr. Halls based on his plea and proceeded with the sentencing.

The judgment and sentence entered by the court stated that Mr. Halls was guilty of witness tampering based upon a plea, and also that for the witness tampering charge, "domestic violence was pled and proved." Clerk's Papers at 48. In fact, Mr. Halls's statement on plea of guilty did not include language demonstrating that the offense was committed against a family or household member, nor was other evidence offered from which the court could make such a finding. On the basis of the domestic violence finding, the court imposed a $100 domestic violence fee and entered a domestic violence no-contact order.

A couple of months following the sentencing hearing, Mr. Halls filed a pro se motion to withdraw his guilty plea under CrR 7.8. The motion reiterated his belief expressed at sentencing that it somehow made a difference for purposes of the witness tampering charge that a no-contact order with the victim had not been in place at the time he sent the letter. The superior court found that Mr. Halls had failed to make a substantial showing that he was entitled to relief or that a factual hearing was required

and transferred the motion to this court for treatment as a personal restraint petition. The PRP was consolidated with the appeal.

Following the date on which this appeal was set for hearing without oral argument, Mr. Halls filed a pro se submission the overall purpose of which is not clear, but which asked, among other things, that we "reject [the case] and dismiss it matter leave it at rest. And leave Judgment & Sentence as is face [unintelligible] with Benton County Superior Courts as is 10-9-12." Letter from David Wayne Halls to Court of Appeals (Aug. 1, 2014), *State v. Halls*, No. 31260-7-III (Wash. Ct. App.).

ANALYSIS

I. Domestic Violence Allegation

Mr. Halls argues on appeal that his conviction with the domestic violence allegation, absent proof of domestic violence, violated his right to due process.

Mr. Halls was *charged* with witness tampering with a domestic violence allegation, but the State concedes that the record does not support the trial court's finding in the judgment and sentence that the domestic violence was proved. The State concedes that because domestic violence was not proved, the trial court lacked statutory authority to impose the domestic violence fee and to impose a domestic violence no-contact order that was unrelated to the crime as proved.

We accept the State's concessions.

II. Legal Financial Obligations

Mr. Halls's remaining challenge on appeal is to the trial court's imposition of discretionary court costs, where it failed to take into account his present or future ability to pay, as required by RCW 10.01.160.

In *State v. Duncan*, 180 Wn. App. 245, 253, 327 P.3d 699, *petition for review filed*, No. 90188-1 (Apr. 30, 2014), we observed that whether a defendant will be unable to pay LFOs imposed at sentencing is not an issue that defendants overlook, it is one that they reasonably waive, and concluded that we would henceforth decline to address a challenge to a court's failure to consider that issue if raised for the first time on appeal. RAP 2.5(a). Our position is consistent with that of the other divisions of our court. *See State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013) and *State v. Calvin*, 176 Wn. App. 1, 316 P.3d 496, 507-08, *petition for review filed*, No. 89518-0 (Nov. 12, 2013).

Mr. Halls did not object to the trial court's imposition of discretionary costs in the trial court on the basis of the court's failure to consider his ability to pay. He thereby waived any challenge.

III. Personal Restraint Petition

Mr. Halls's pro se submission filed with this court on August 6, 2014 is ambiguous, to say the least. If and to the extent it can be construed as a request that we dismiss review of Mr. Halls's appeal, we deny it as untimely, since it was filed after the

date set for hearing of the appeal without oral argument. *See* RAP 18.2.

We construe it, in part, to be a request for leave to withdraw Mr. Halls's untimely CrR 7.8 motion that was transferred to this court for treatment as a PRP. Recognizing that Mr. Halls may be concerned about future collateral consequences of our resolution of the motion as a PRP, we grant his request to withdraw the PRP. *Cf. State v. Smith*, 144 Wn. App. 860, 863-64, 184 P.3d 666 (2008) (citing RCW 10.73.140; *In re Pers. Restraint of Vazquez*, 108 Wn. App. 307, 313-14, 31 P.3d 16 (2001) as establishing that a CrR 7.8 motion resolved as a PRP following transfer will bar subsequent petitions).

We grant Mr. Halls leave to withdraw the PRP. We remand with directions to amend the judgment and sentence to remove the domestic violence allegation, strike the $100 domestic violence penalty assessment, and vacate the domestic violence no-contact order. We otherwise affirm.

A majority of the panel has determined that 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.

Siddoway, C.J.

WE CONCUR:

Brown, J.

Lawrence-Berrey, J.

GASCH LAW OFFICE

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Transmittal Letter

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