

SUPREME COURT NO. 92473-2
COURT OF APPEALS NO. 46028-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIELLE ALYSIA GRAVES,

Petitioner.

FILED
NOV 13 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Michael Evans, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Danielle Graves asks this Court to review the decision of the Court of Appeals referred to in Section B

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals's Ruling Affirming Judgment and Sentence in *State v. Danielle Graves*, COA No. 46028-9-II, filed August 20, 2015 (Appendix A) and its Order Denying Motion to Modify filed October 9, 2015 (Appendix B).

C. ISSUE PRESENTED FOR REVIEW

Whether this Court should accept review of the Court of Appeals's refusal to consider Ms. Graves's challenge to legal financial obligations (LFOs) imposed against her when she objected to the LFOs for the first time on appeal.

D. STATEMENT OF THE CASE

Ms. Graves was tried on an amended information charging delivery of methamphetamine within 1,000 feet of a school bus stop.¹ CP 5-6. At trial, Ms. Graves stipulated that the substance the police received from informant Dale Nease after he was in Ms. Graves's house was methamphetamine, and that her house was located within 1,000 feet of a school bus stop. CP 3; RP 2A 257. The only issue at trial was whether

¹RCW 69.50.401(1); RCW 69.50.401(2)(b); RCW 69.50.435(1)(c)

informant Nease received the methamphetamine from Ms. Graves. RP 2B 372-416. A jury found Ms. Graves guilty as charged. CP 7, 8; RP 2B 422.

At sentencing, there was no discussion or inquiry into Ms. Graves's financial situation or her ability to pay discretionary legal financial obligations. RP 2B 437-81. Yet, in the Judgment and Sentence, the trial court entered the following boilerplate language:

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. 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.

CP 12. And the court imposed over \$1,600 in discretionary LFOs without an objection from Ms. Graves. CP 13.

Ms. Graves appealed all portions of her Judgment and Sentence. CP 23. On appeal, she challenged for the first time the imposition of discretionary LFOs with the trial court first making an individualized determination that she had the present and future ability to pay them.

E. REASON WHY REVIEW SHOULD BE ACCEPTED

Pursuant to RAP 13.4(b)(3) and (4), a petition for review will be accepted by the Supreme Court if it presents a significant question of law under the Constitution of the State of Washington or of the United States

or if it involves an issue of substantial public interest that should be determined by the Supreme Court.

1. This court should accept review.

Ms. Graves did not make an LFO argument to the trial court. However, this Court has held the ability to pay LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* this Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits” *Blazina*, 344 P.3d at 683. This Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by appellate courts. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the state’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As this Court in *Blazina* bluntly recognized, one societal reality is “the state cannot collect money from

defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from the Court of Appeals’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court can specify that appellate courts should embrace its obligation to uphold and enforce this Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005), *rev’d in part sub nom. Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis - “to stand by the thing decided” - binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Ms. Graves’s case regardless of her

failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”) (Citations omitted).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Ms. Graves’s sentencing occurred on March 6, 2014, before this Court’s *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Ms. Graves respectfully submits that in order to ensure she and all indigent defendants are treated as the LFO statute requires, this court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (Fairhurst, J. (concurring in the result)).

2. **As applied to Ms. Graves, there is insufficient evidence to support the trial court's boilerplate finding that she has the present and future ability to pay legal financial obligations.**

Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay

costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain non-

exhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915–16. The individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Ms. Graves's present and future ability to pay legal financial obligations. A finding must have support in the record. 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 trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’” *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). Here, despite the boilerplate language in the judgment and sentence, the record does not show the trial court took into account Ms. Graves’s financial resources and the potential burden of imposing LFOs on her. RP 2B 437-81. The court was generally aware Ms. Graves had a very serious – likely terminal – medical condition that had historically interfered with her ability to benefit from drug treatment for her methamphetamine dependence. RP 2B 458-60.

Knowing these facts and despite finding her indigent for this appeal, the trial court failed to “conduct on the record an individualized inquiry into [Ms. Graves’s] current and future ability to pay in light of such nonexclusive factors as the circumstances of [her] incarceration and [her] other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under GR 34” as is required by *Blazina*. Washington Supreme Court orders dated August 5,

2015, pp. 1–2, in *State v. Mickle* (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases to the superior court “to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements” of *Blazina*.).

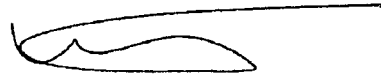
The boilerplate finding that Ms. Graves has the present or future ability to pay LFOs is not supported by the record. The matter should be accepted for review and ultimately remanded for the sentencing court to make an individualized inquiry into Ms. Graves’s current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

Also, in denying Ms. Graves’s appeal of the imposition of LFOs, the Court of Appeals relied on its earlier ruling in *State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015). In *Lyle*, the court held “this court will not consider challenges to LFOs” under *Blazina*, 182 Wn.2d 827, “unless the defendant challenged the LFOs in the trial court.” *Lyle* is set before this Court on January 5, 2016, for consideration of his Petition for Review.

F. CONCLUSION

This Court should accept review of Ms. Graves's Petition for Review.

Respectfully submitted this 9th day of November 2015.



LISA E. TABBUT/WSBA #21344
Attorney for Danielle Graves

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed this Petition for Review with (1) the Washington State Supreme Court via the Court of Appeals's Division Two efile; and (2) the Cowlitz County Prosecutor's Office, appeals@co.cowlitz.wa.us and (3) Danielle Graves/DOC# 888253, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 9, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Danielle Graves

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
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DIVISION II
2015 AUG 20 PM 1:09
STATE OF WASHINGTON
BY _____
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STATE OF WASHINGTON,

Respondent,

v.

DANIELLE ALYSIA GRAVES,

Appellant.

No. 46028-9-II

RULING AFFIRMING
JUDGMENT AND SENTENCE

Danielle Graves appeals from the sentence imposed following her conviction for unlawful delivery of methamphetamine within 1,000 feet of a school bus route stop, arguing that the trial court erred in imposing legal financial obligations (LFOs) against her without making an inquiry into whether she had the current or likely future ability to pay them. This court considered her appeal as a motion on the merits to affirm under RAP 18.14. Finding that this court declines to consider her challenge to the LFOs made for the first time on appeal, this court affirms Graves's judgment and sentence.

At sentencing, the State recommended the following mandatory LFOs: \$500 victim assessment, \$200 court costs, \$100 crime lab fee, and \$100 DNA collection fee. It also recommended the following discretionary LFOs: \$250 jury demand fee, \$150 incarceration fee, \$825 for Graves's court appointed attorney, \$2,000 fine, and \$500 to

the Cowlitz County Prosecutor Attorney's drug enforcement fund. Graves did not object to the State's recommendations.

Graves's judgment and sentence contains the following preprinted finding:

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. 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 at 12. On March 6, 2014, the trial court imposed the LFOs recommended by the State.

Graves argues for the first time on appeal that the trial court erred in imposing the LFOs without having made any inquiry into her current or likely future ability to pay them. On March 12, 2015, the Washington State Supreme Court decided *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (*Blazina II*), and held that before imposing LFOs, the trial court must make an individualized inquiry into the defendant's current and likely future ability to pay those LFOs. *Blazina II* also rejected the prior holdings that a challenge to LFOs was not ripe until the State sought to collect the LFOs. 182 Wn.2d at 833 n.1.

This court decided *State v. Lyle*, No. 46101-3, 2015 WL 4156773 (Wash. Ct. App. July 10, 2015) which held that for LFOs imposed after May 21, 2013, when this court decided *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded*, *Blazina II*, this court will not consider challenges to LFOs under *Blazina II* unless the defendant challenged the LFOs in the trial court. *Lyle*, 2015 WL 4156773 at *2.

Because she did not challenge the LFOs at sentencing, under *Lyle*, this court declines to consider Graves's challenges to her LFOs made for the first time on appeal.

Because Graves's appeal is clearly controlled by settled law, it is clearly without merit under RAP 18.14(e)(1). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Graves's judgment and sentence is affirmed. She is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 20th day of August, 2015.



Eric B. Schmidt
Court Commissioner

cc: Lisa E. Tabbut
Sean Brittain
Hon. Michael Evans
Danielle A. Graves

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIELLE GRAVES,

Appellant.

No. 46028-9-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated August 20, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 9th day of October, 2015.

PANEL: Jj. Bjorgen, Maxa, Lee

FOR THE COURT:

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DIVISION II
2015 OCT -9 PM 1:38
STATE OF WASHINGTON
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November 09, 2015 - 4:36 PM

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