Supreme Court No. _____
Court of Appeals No. 31700-5-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

COLE L. HEALY,
Defendant/Appellant.

APPEAL FROM THE PEND OREILLE COUNTY SUPERIOR COURT
Honorable Allen C. Nielson, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Cole Healy, is the Appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, unpublished opinion filed on October 20, 2015. A copy of the opinion is attached as Appendix A.[1]

III. ISSUE PRESENTED FOR REVIEW

Whether the trial court erred by imposing discretionary legal financial obligations without considering Mr. Healy's ability to pay.

IV. STATEMENT OF THE CASE

Correctional Sergeant Stephen Higgins, Pend Oreille County Sheriff's Office, overheard loud talking in the cell next to his office at the jail facility. 5/20/13 RP 25–27. As he opened the door, the defendant, Cole Healy, jumped off a bunk bed and threw one un-connecting overhead punch at a fellow cell mate. 5/20/13 RP 27–28. Sgt. Higgins stepped between the two, saying "Stop", and put his hand on Mr. Healy's chest when he appeared to try another contact. 5/20/13 RP 28. Mr. Healy

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[1] The current online version is found at *State v. Healy*, No. 31700-5-III, 2015 WL 6166609 (Wash. Ct. App. Oct. 20, 2015).

stepped slightly back, while knocking or pushing the officer's hand off, and then backed away as the officer said, "Don't". 5/20/13 RP 28–29.

A jury found Mr. Healy guilty of third degree assault against a law enforcement officer, as charged. CP 1, 73; 5/20/13 RP 85. The court imposed a low-end standard range sentence of three months confinement. CP 78; 5/20/13 RP 96. As a condition of sentence, the court prohibited Mr. Healy from engaging in "obstructing behavior". CP 80. On appeal, Division III affirmed the conviction but agreed the "no obstructing behavior" language was unconstitutionally vague. It has directed the trial court to strike the condition from the judgment and sentence. *Slip Opinion*, p. 4–5.

The court imposed discretionary costs of $300 and mandatory costs of $800, for a total Legal Financial Obligation ("LFO") of $1,100. CP 80–81 at ¶ 4.3. The trial court made no express finding that Mr. Healy had the present or future ability to pay the LFOs. CP 76–84; 5/20/13 RP 88–102. The Judgment and Sentence contained a boilerplate finding the court had "considered the total amount owing, the defendant's 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 78.

The trial court did not inquire into Mr. Healy's financial resources, and the nature of the burden that payment of LFOs would impose. 5/20/13 RP 88–102. The trial court ordered Mr. Healy to make monthly payments of not less than $25, commencing upon release from custody. CP 81 at ¶ 4.3; 5/20/13 RP 101.

After reviewing supplemental briefing requested after the decision and mandate in *State v. Nicholas Peter Blazina*, #89028-5, Division III declined to consider the LFO claim for the first time on appeal. Letter dated April 16, 2015, from Court of Appeals, Div. III, to parties (on file); Brief of Appellant at 3–10; Supplemental Brief of Appellant at 3–11; Supplemental Brief of Respondent; *Slip Opinion*, p. 5.

Mr. Healy now seeks review.

V. ARGUMENT IN SUPPORT OF REVIEW

1. This Court should accept review under RAP 13.4(b)(1) and (4).

Division III "decline[d] to consider" the LFO claim [for the first time on appeal] because the "small amount [of $300 in discretionary obligations] does not raise the questions presented by the larger sum at issue in *Blazina*" and "Mr. Healy remains free to seek remittance at any time should he desire to raise the question of his financial situation before the court." *Slip Opinion*, p. 5. Division III abused its discretion by

deciding not to review Mr. Healy's issue based on reasons that disregard the holding and are inconsistent with the policy announced in *Blazina*. Review is warranted under RAP 13.4(b)(1) and (4).

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. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685, 344 P.3d 680 (2015). The *Blazina* inquiry must consider at a minimum the circumstances of the defendant's incarceration, and his or her other debt obligations and indigency status. Washington Supreme Court orders dated August 5, 2015, at 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 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 bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684.

Division III's assumption that a later remittance procedure satisfies

Blazina's required "pre-imposition of LFO" inquiry is wrong. Its conclusion that the required inquiry may be dispensed with if the amount of discretionary costs is "small" is also mistaken. Both errors undermine *Blazina*'s mandate that an individualized on-the-record inquiry must be made into each defendant's circumstances of ability to pay prior to imposing any amount of legal financial obligations.

Division III's failure to accurately uphold and enforce this Court's decision in *Blazina* should be addressed as a matter of public policy. See *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 Mr. Healy's case regardless of his 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).

Finally, Division III's decision arbitrarily and unfairly denies Mr. Healy the benefit of this Court's decision that a 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. Mr. Healy's May 2013 sentencing occurred before the *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. Mr. Healy respectfully submits that in order to ensure he 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. The trial court erred by imposing discretionary legal financial obligations without considering Mr. Healy's ability to pay.

There is insufficient evidence to support the trial court's finding that Mr. Healy 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 Constitutuion, Article 1, § 12 and United States Constitutuion, 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 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." 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 nonexhaustive, 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 biolerplate statement that the trial court has "considered" Mr. Healy's present or 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, notwithstanding the boilerplate language in the judgment and sentence, the record does not show the trial court took into account Mr. Healy's financial resources and the potential burden of imposing LFOs on him. 5/20/13 RP 88–102. Despite finding him indigent for this appeal, the Court failed to conduct on the record an individualized inquiry into Mr. Healy's current and future ability to pay as is required by *Blazina*. The boilerplate finding is not supported by the record. The matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Healy 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

VI. CONCLUSION

For the reasons stated, the petition should be granted under RAP 13.4(b)(1) and (4) and the case remanded for the trial court to make an individualized inquiry into Mr. Healy's current and future ability to pay before imposing LFOs.

Respectfully submitted on November 19, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 19, 2015, 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 appellant's petition for review:

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CASE # 317005
State of Washington v. Cole L. Healy
PEND OREILLE CO SUPERIOR COURT No. 131000183

Dear Counsel:

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:ko
Attach.
c: **E-mail** Hon. Allen C. Nielson
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FILED
OCTOBER 20, 2015
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. COLE LEE HEALY, Appellant.	)	No. 31700-5-III
	)	UNPUBLISHED OPINION

KORSMO, J. — Cole Healy challenges two requirements of his judgment and sentence, arguing that the trial court should revisit his legal financial obligations (LFOs) and should not have imposed a "no obstructing behavior" condition as part of his community supervision. We agree with his latter claim and strike that language from the judgment, but otherwise affirm.

FACTS

A jury convicted Mr. Healy of one count of third degree assault that occurred in the Pend Orielle County Jail. That incident occurred when he fought with a corrections officer who was attempting to stop Mr. Healy from attacking another inmate.

At sentencing, the court stressed the need for Mr. Healy to avoid becoming involved with police officers:

> And Mr. Healy, I've just added "no obstructing behavior." That's kind of redundant, actually, but the idea would be to discourage any further behavior problems with law enforcement.

Report of Proceedings at 101. The noted phrase was added to the community custody provisions of the judgment and sentence. There the court hand wrote under the "comply with the following crime-related prohibitions" box of the judgment:

> No criminal law violations; No assaultive behavior; No obstructing behavior.

Clerk's Papers at 80.

The court also imposed $1,100 in total legal financial obligations. There were $800 in mandatory assessments (victim assessment, filing fee, DNA[1] collection fee) and $300 in discretionary costs (booking fee, public defender recoupment). Mr. Healy was directed to begin payment at $25 per month upon release from custody.

Mr. Healy timely appealed his conviction to this court.

ANALYSIS

Mr. Healy asks that this court strike the "no obstructing behavior" language and remand the LFOs for a new hearing concerning his ability to pay. We address the claims in the order stated.

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[1] Deoxyribonucleic acid.

Obstructing Behavior

Mr. Healy argues that the "obstructing behavior" language is unconstitutionally vague. Although its meaning was clear in context, we agree that the written formulation in the judgment and sentence does not provide sufficient direction to prevent improper enforcement and strike the provision.

A sentencing condition must be sufficiently clear to allow the offender to comply with the condition and prevent arbitrary enforcement. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010); *State v. Bahl*, 164 Wn.2d 739, 752-753, 193 P.3d 678 (2008). The vagueness doctrine does not require "complete certainty" of expression, and the terms are considered in context. *Valencia*, 169 Wn.2d at 793. When a term is undefined, courts can turn to a dictionary to provide the plain and ordinary meaning of the language in question. *Bahl*, 164 Wn.2d at 754.

The imposition of a sentencing condition is reviewed for abuse of discretion. *Valencia*, 169 Wn.2d at 793. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused when exercised contrary to law. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

In the context of the sentencing hearing, the court explained that Mr. Healy needed to stop confronting law enforcement officers. The court noted that the "obstructing behavior" language was redundant since it was part of a condition to "obey all laws" and

commit "no criminal violations." It appears the court merely was reinforcing the notion that obstructing a law enforcement officer was a crime and that Mr. Healy needed to avoid confrontation with authority. However, the written language of the condition does not contain those limitations. The terms "obstructing" or "obstruction" have a rather broad common meaning. The standard dictionary definition is "a condition of being clogged or blocked." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1559 (1993). As written, neither Mr. Healy nor a law enforcement officer would know what the court intended.

Accordingly, we believe that the "no obstructing behavior" language is vague. We direct the trial court to strike the condition from the judgment and sentence.

Legal Financial Obligations

Mr. Healy also asks that we remand the case for the court to more fully consider the question of his LFOs. He did not object to the court's finding below. We decline to review the claim.

This court reviews the trial court's determination concerning a defendant's resources and ability to pay under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 403-404, 267 P.3d 511 (2011). A decision on whether to impose fees is reviewed for abuse of discretion. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). RCW 10.01.160(3) provides that, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will

impose." This inquiry is only required for *discretionary* LFOs. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, which include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate according to the current sentencing scheme and without the court's discretion by legislative design). Trial courts are not required to enter formal, specific findings. *Id.* at 105.

If the defendant does not address the LFO issue in the trial court, appellate courts are not required to consider the claim on appeal because it arises from a statute rather than the constitution. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 832-834, 344 P.3d 680 (2015). Appellate courts do retain discretion to decide if they will hear an LFO claim for the first time on appeal. *Blazina*, 182 Wn.2d at 834-835.

Here, we decline to consider the claim. Only $300 of the total financial obligations was discretionary (public defender, booking fee) with the trial judge, while the remaining $800 fell in the mandatory category. *Lundy*, 176 Wn. App. at 102. This small amount does not raise the questions presented by the larger sum at issue in *Blazina*. Moreover, Mr. Healy remains free to seek remittance at any time should he desire to raise the question of his financial situation before the court. RCW 10.01.160(4).

The conviction is affirmed, but the matter is remanded for the trial court to strike the "obstructing behavior" language from the judgment and sentence.

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.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.