

**FILED**

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WASHINGTON STATE  
SUPREME COURT

SUPREME COURT NO. 92651-4  
COURT OF APPEALS NO. 47075-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

**TRAVIS THOMPSON,**

Petitioner.

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

The Honorable Amber L. Finley, Judge

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**PETITION FOR REVIEW**

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A. IDENTITY OF PETITIONER

Petitioner Travis Thompson, Jr., asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS'S DECISION

Petitioner seeks review of the Court of Appeals's Ruling Affirming Judgment and Sentence in *State v. Travis Thompson*, COA No. 47075-6-II, filed December 15, 2015. (Attached at Appendix).

C. ISSUE PRESENTED FOR REVIEW

Whether this Court should accept review of the Court of Appeals's refusal to consider Mr. Thompson's challenge to discretionary legal financial obligations (LFOs) imposed against him when he objected to the LFOs for the first time on appeal?

D. STATEMENT OF THE CASE

The Mason County prosecutor charged Travis Thompson with felony violation of a no-contact order and residential burglary. CP 34-35, 36-37. Both were alleged domestic violence offenses. CP 34-35, 36-37. A jury heard Thompson's trial.<sup>1</sup> RP<sup>2</sup> 20-164. Its found guilty on the no-contact violation but not as a domestic violence offense. CP 31, 33. An irregularity on the residential burglary verdict caused the court to declare a mistrial on

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<sup>1</sup> Thompson was tried on the first amended information. CP 34-35; RP 38-39.

<sup>2</sup> This appeal has a single volume of verbatim.

that count. CP 30; RP 172-180. Thompson subsequently pleaded guilty to the residential burglary as a domestic violence offense. CP 20-29; RP 185-88.

The court held one sentencing hearing. RP 190-99. It imposed 33 months for the no-contact violation and 22 months for the residential burglary. CP 7; RP 195. The court ordered Thompson to serve 12 months of community custody. CP 8; 196.

The court also imposed discretionary legal financial obligations with no consideration for Thompson's present or future ability to pay them. CP 9-10; RP 196-97. Thompson did not object. RP 197-99.

Thompson appealed. CP 3. His only issue was a challenge to the imposition of the discretionary LFOs without the trial court first making an individualized determination he had the present and future ability to pay it. See Appellant's Brief at 2-5. The Court of Appeals denied his appeal finding that without an objection at the trial court, Mr. Thompson waived his right to appeal the imposition of LFOs. Court of Appeals's opinion at 1-3.

E. REASON WHY REVIEW SHOULD BE ACCEPTED

Under 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.**

Mr. Thompson made no 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 with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by appellate courts. Indigent defendants 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 LFOs 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 could 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 a 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 inquire 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 (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 and the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Thompson'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 (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*, 344 P.3d at 685. Mr. Thompson’s sentencing occurred on December 30, 2014, before this Court’s *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect future trial courts to make the ability to pay inquiry on the record or defense attorneys to object to preserve the error for direct review. Mr. Thompson respectfully submits that 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*, 344 P.3d at 687 (Fairhurst, J. (concurring in the result)).

**2. As applied to Mr. Thompson, there is insufficient evidence to support the trial court's boilerplate finding he 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). Imposing costs under a scheme that does

not meet with these requirements, or imposing a penalty for a failure to pay absent proof that the defendant could 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, 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). 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 meets 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*, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Mr. Thompson'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 considered Mr. Thompson’s financial resources and the potential burden of imposing LFOs on him. RP 190-99.

Despite finding him indigent for this appeal, the trial court failed to “conduct on the record an individualized inquiry into [Mr. Thompson’s]

current and future ability to pay in light of such nonexclusive factors as the circumstances of [his] incarceration and [his] other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under GR 34” as 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 Mr. Thompson has the present and 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 inquire into Mr. Thompson’s current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

Also, in denying Mr. Thompson’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 (No. 92079-6).

F. CONCLUSION

This Court should accept review of Mr. Thompson's Petition for Review.

Respectfully submitted this 30th day of December 2015.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut", written over a horizontal line.

LISA E. TABBUT/WSBA #21344  
Attorney for Travis Thompson

**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled this Petition for Review with (1) the Washington State Supreme Court via the Court of Appeals's Division Two efile; and (2) the Mason County Prosecutor's Office, timw@co.mason.wa.us and timh@co.mason.wa.us; and I mailed it to (3) Travis Thompson/DOC#704035, Airway Heights Corrections Center, PO Box 1899, Airway Heights, WA 99001.

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

Signed December 30th, 2015, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Travis Thompson

# APPENDIX



December 15, 2015

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS W. THOMPSON,

Appellant.

No. 47075-6-II

UNPUBLISHED OPINION

MELNICK, J.—Travis Thompson appeals his sentences for felony violation of a no-contact order and residential burglary (domestic violence), arguing that the trial court improperly imposed legal financial obligations (LFOs). Because Thompson failed to preserve his LFO challenge, we affirm.

**FACTS**

The State charged Thompson with felony violation of a no-contact order and residential burglary. It further alleged that these were domestic violence crimes. After a jury trial, Thompson was convicted of violation of a no-contact order and the trial court declared a mistrial on the residential burglary charge. Thompson later pled guilty to residential burglary as a domestic violence offense.

On December 30, 2014, the trial court held a sentencing hearing. The State requested LFOs. The court imposed a \$500 victim assessment; \$950.08 in court costs; \$1,125 in attorney fees; and, a \$100 DNA collection fee. Thompson did not object.<sup>1</sup> The judgment and sentence contained language that provided, “The court has considered the total amount owing, the defendant’s present and future ability to pay, . . . and the likelihood that the defendant’s status will change.” CP at 7.

#### ANALYSIS

Thompson contends that the trial court erred by imposing LFOs without actually considering his ability to pay them. Thompson did not object to the LFOs at sentencing. His sentencing occurred after our decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), and before the Supreme Court's reversal of that decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

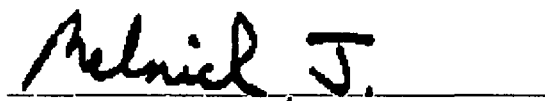
In *State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015), we held that parties who failed to challenge LFOs in sentencings after our 2013 decision in *Blazina* have waived those challenges. *See also* RAP 2.5(a). Thus, under *Lyle*, Thompson has waived his LFO challenge.

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<sup>1</sup> His statement on plea of guilty for the residential burglary charge acknowledges that the State would recommend “standard costs & fees.” CP at 23.

We affirm.

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.

  
Melnick, J.

We concur:

  
Worswick, J.

  
Sutton, J.

**LISA E TABBUT LAW OFFICE**

**December 30, 2015 - 10:16 AM**

**Transmittal Letter**

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