No. 92750-2
Court of Appeals No. 46350-4 -II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEE FLOYD,

Petitioner.

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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A. IDENTITY OF PETITIONER

Thomas Lee Floyd, appellant below, petitions this Court to grant review of a portion of the unpublished decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1) and (4), Petitioner asks this Court to review a portion of the unpublished decision of Division Two of the Court of Appeals, issued under No. 46350-4-II, in State v. Floyd, on December 1, 2015 (2015 WL 773715) (filed herewith as Appendix A).

C. ISSUES PRESENTED FOR REVIEW

Division Two refused to consider whether a sentencing court erred under RCW 10.06.160 and this Court's decision in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), in ordering Mr. Floyd, who is indigent, to pay legal financial obligations (LFOs) without conducting the required inquiry into Mr. Floyd's actual ability to pay.

1. Did Division Two abuse its discretion in categorically denying relief to an impoverished person being subjected to the same unfair and broken LFO system this Court condemned in Blazina simply because a two-judge majority of Division Two created an artificial barrier to such relief in a case pending review, State v. Lyle, 188 Wn. App. 848, 355 P.3d 327 (2015)?

2. Is Division Two's categorical decision to exclude certain appellants whose cases were pending when this Court decided Blazina from the benefits of Blazina in conflict with State v. Leonard, __ Wn.2d __, 358 P.3d 1167

(October 8, 2015), as well as the purpose of Blazina?

3. Should Petitioner and those other indigents like him remain subjected to the same legal financial obligation system this Court recognized in Blazina as broken and unfair even though their appeals were still pending when Blazina was decided, they are in the same position as the defendants in Blazina and the same serious, systemic concerns and policy issues are present?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Thomas L. Floyd was charged with and convicted after jury trial in 2011 of second-degree assault and six counts of violation of a presentence no-contact order, all charged as "domestic violence" offenses. CP 9-12, 349-75; RCW 9A.36.021(1)(a); RCW 10.99.020; RCW 26.50.110(1). In 2013, Division Two ordered resentencing, which occurred in 2014. CP 376-89; SRP 1-24.[1] Floyd appealed and, on December 1, 2015, the court of appeals, Division Two, affirmed in part and reversed in part in an unpublished opinion. Brief of Appellant "BOA" at 9; App. A. This Petition timely follows.

2. Facts relevant to issues on review

Petitioner Floyd filed his opening brief on appeal on February 17,

[1]The verbatim report of proceedings on appeal is two volumes: February 7, 2014 ("1RP") and May 6, 2014 ("SRP").

2015, challenging imposition of a forfeiture condition at the resentencing. Brief of Appellant "BOA" at 9. In March of 2015, this Court issued its landmark decision in Blazina, supra. On April 15, 2015, Floyd filed a motion asking the court of appeals to accept for filing a Supplemental Brief of Appellant ("Supp."), addressing the application of Blazina to Mr. Floyd's case.

In that brief, Floyd assigned error to "boilerplate" findings preprinted on the judgment and sentence indicating "ability to pay" and which presumed that the trial court had conducted the required consideration. Supp. at 1-2. At the resentencing hearing on May 5, 2014, there was no discussion of ability to pay; instead the court just said it was going to impose "[s]tandard leal financial obligations[.]" SRP 23.

Preprinted as "boilerplate" on the form judgment and sentence used was the following language, as section 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 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 380. Someone also marked on the form a pre-printed "boilerplate" portion

of the order which indicated that the payments on the amount were to commence immediately, that the clerk had the ability to set the minimum payment, that the defendant was required to "report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan," and requiring the defendant to pay any collection costs. CP 282.

Also ordered as a preprinted section was the following:

> **INTEREST** The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to. civil judgments. RCW 10.82.090[.]

CP 382-83.

Floyd made no objection to the imposition of costs below. SRP 1-24. He was determined by the trial court to be indigent and entitled to appointed counsel not only at trial but on appeal. CP 325-45, 398-99. In his Supplemental Brief, Floyd pointed out that the "boilerplate" clause used in his case had been struck down as inadequate to provide the required "individualized" assessment of ability to pay by this Court's decision in Blazina. Supp. at 3-11. Floyd also argued that this indigent case presented the very same concerns this Court raised in Blazina about inequities and the incredibly negative social impact of our broken system of legal financial obligations (LFOs). Supp. at 1-11. Noting his indigence, he argued that the

sentencing court's failure to make the required individualized inquiry into his current and future ability to pay despite his situation was error under RCW 10.01.160(3) as this Court interpreted it in Blazina during the pendency of Floyd's appeal. Supp. at 1, 2, 4, 7-11.

In ruling, Division Two first addressed a challenge Floyd raised to another part of the judgment and sentence entered after the resentencing - an order of forfeiture. App. A at 3-4. Although Floyd had not raised an objection to that order in his original sentencing and had not raised it at resentencing, the court of appeals rejected the prosecution's claim that Floyd could not raise it on appeal. App. A at 3 n. 2. The resentencing was a full proceeding and not just a remand for correction of a sentence, the court held, and "[t]he defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding[.]" App. A at 3 n. 2, quoting, State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). The court struck the order of forfeiture which was imposed on the judgment and sentence without statutory authority. App. A at 4.

But Division Two then agreed with the prosecution that Floyd should be denied relief from the imposition of $1800 of LFOs despite his indigency, even though the trial court failed to make the required individualized

assessment of ability to pay under RCW 10.01.160(1) and Blazina. App. A at 4-5. Relying solely on its decision in State v. Lyle, 188 Wn. App. 848, 852, 355 P.3d 327 (2015), the court of appeals declared that, during the narrow window of time between the court of appeals decision in Blazina and this Court's decision reversing that holding, a defendant was required to make a specific objection at sentencing or will be deemed to have "waived" a challenge to the sentencing court's failure to comply with the statutory requirements of RCW 10.06.160. App. A at 4-5.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS HAS ARTIFICIALLY ERECTED A TIME BARRIER FOR IMPOVERISHED DEFENDANTS AND IS FAILING TO APPLY THE PRINCIPLES AND HOLDING OF BLAZINA EVEN THOUGH THE CASE WAS DECIDED DURING THE PENDENCY OF AN APPEAL AND IN CONFLICT WITH BLAZINA AND LEONARD

Mr. Floyd is asking this Court to grant review and reverse the court of appeals decision upholding the imposition of $1800 in legal financial obligations, at 12 percent interest, starting the day of the sentencing. Only by granting such review and holding that Blazina applies to all cases pending review when it was issued will this Court ensure that the landmark effort in made towards fair treatment of indigent defendants will have full weight. The court of appeals below failed to apply Blazina and instead relied on the

artificial barrier to relief erected by the two-judge majority in Lyle, which is inconsistent with Blazina and in apparent conflict with Leonard.

This Court should grant review, for several reasons. First, review should be granted to address whether the court of appeals decision is in conflict with Leonard, supra, and Blazina, aupra. In Leonard, as in Blazina, the defendant did not object below, but this Court granted him relief on the Blazina issue, because it had stayed Leonard pending Blazina and found it was "consistent with Blazina" to exercise its discretion to grant Leonard the same relief as that granted in Blazina. See Leonard, __ Wn.2d at __, 358 P.3d at 1167 (October 8, 2015). The court of appeals here declined to grant Floyd the same relief as that granted in Blazina even though Blazina was issued by this Court in an exceptionally rare unanimous decision addressing an issue *for the first time on appeal* because it was so compelling the interests of justice demanded it. This Court should grant review under RAP 13.4(b)(3)(1) to address whether that refusal is in conflict with Blazina but also with Leonard, which ensured that an appellant raising the same issue for the first time on appeal whose case was pending when this Court decided Blazina would be granted relief from our unjust system.

Second, review should be granted to address whether the categorical time-bar and additional requirements Division Two imposed on some

appellants like Mr. Lyle and Mr. Floyd but not others is in violation of not only Blazina and Lyle but also fundamental principles of equal protection and due process. In Blazina, this Court did not fault the lower appellate courts for failing to exercise their discretion under RAP 2.5(a) to address the issue of whether the imposition of legal financial obligations on indigent defendants without consideration of ability to pay was a violation of RCW 10.01.160(3). Blazina, 182 Wn.2d at 834-42. But this Court found that the urgency of our broken "LFO" system compelled the exercise of its own discretion to reach the issue.

The Court then made a clear declaration that RCW 10.01.160(3) requires that an indigent criminal defendant's present and future ability to pay must be considered prior to imposition of legal financial obligations. 182 Wn.2d at 839-40.

Both the majority and the single concurring justice in Blazina acted on their deep concern for not only the individual but social harms being caused by the current system and its enforcement against indigents. The Blazina decision appeared to ensure that future indigent defendants will at least have a hope of a reasonable ability to get out from under some of the unending weight of LFOs they are unable to shoulder. After Blazina, it was believed that impoverished people who are found guilty of crimes will not be subjected to crushing legal

debt without full consideration by a court of their actual financial situation in light of the very real concerns set forth in Blazina.

The court of appeals decision here denies that hope. And it did so based upon an artificial distinction made by a two-judge majority in a case still pending review in this Court, Lyle. App. A. That distinction is that the court of appeals, in Lyle, felt that failure to object to the imposition of legal financial obligations amounts to a "waiver" of the issue on appeal even in cases pending on appeal when Blazina was decided, because trial counsel *should* have been objecting during that window of time between the court of appeals decision in Blazina and this Court's decision in Blazina granting relief. App. A; Lyle, 188 Wn. App. at 852-54. The two-judge majority in Lyle faulted the defendant for having failed to object to imposition of LFOs at sentencing because that court had held in its decision in Blazina, issued in 2013, that such objection was required. Lyle, 188 Wn. App. at 852-53.

Put simply, in Lyle, Division Two created a time window for impoverished defendants during which they were required to object or else "waive" getting relief under Blazina, even though this Court has now granted without an objection below not only in Blazina and even though this Court issued Blazina while their cases were pending on appeal.

This Court should grant review. Before this Court's decision in

Blazina, at the time the court of appeals faults Floyd for failing to object below, the law seemed to still hold that a challenge to LFOs based on ability to pay was not "ripe" for review until enforcement. See State v. Lundy, 176 Wn. App. 96, 107-108, 308 P.3d 755 (2013). Further, case law had established that RCW 10.01.160(3) did not require a finding of "ability to pay" at the time of sentencing but instead at the time of enforcement. See, e.g., Lundy, 185 Wn. App. at 105. The cursory declaration in the court of appeals decision in Blazina focused on the failure to object was in response to an apparent effort by the defendant to argue that failure to object below was no longer fatal, as Division Two had addressed the issue in State v. Bertrand, 165 Wn. App 404, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012).

This Court's concerns over the impact of our broken LFO system on people just like Mr. Floyd led it to take the unusual step of addressing the error for the first time on appeal in Blazina. And it started the process of relieving one of most serious systemic barriers faced by impoverished citizens who have served their time in custody and are struggling to integrate into society with all that entails. Division Two's decision here and the decision in Lyle should not be the last word on whether appellants whose cases were pending when this Court decided Blazina and who are in the very same situation as the defendants in Blazina should be denied the benefits of that decision.

Finally, review should be granted so this Court can address the scope and application of Blazina and clear the clog of cases such as this one raising this fundamental question. In Blazina, the Court appeared to believe that the failure to properly consider a defendant's indigency and present and future ability to pay before imposing legal financial obligations was "unique" to the petitioners in that case (344 P.3d at 684-86) - but obviously, as this case, Lyle and much of this Court's Petition calendar is likely making clear, it was not.

Thus, while Blazina was sufficient to remedy the scope of the potential injustice suffered by the petitioners in that case, its application to other appellants in the very same position was not made clear - as the actions of the court of appeals here show.

Imposition of legal financial obligations is not a minor, clerical event. It is an event which can reduce the rest of the defendant's life to a cycle of poverty and prevent them from ever becoming a productive member of society once they are released from prison. In Blazina, this Court recognized these highly troubling facts and that our system is, put simply, broken as it is applied to indigent defendants like Mr. Floyd. Despite these findings and this Court's historic recognition in Blazina of the failures of the LFO component of our criminal justice system, Division Two here denied Mr. Floyd relief. Only by granting review can this Court ensure that the injustices it tried to redress in

Blazina are not perpetuated in this case. This Court should grant review.

F. CONCLUSION

For the foregoing reasons, this Court should accept review of the decision of Division Two of the court of appeals.

DATED this 31st day of December, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via the upload portal at the Court of Appeals, Division Two, at their official service address, pcpatcecf@co.pierce.wa.us, and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Thomas Floyd, 8539 Zircon Drive, S.W. Unit 78, Lakewood, WA. 98498-5112.

DATED this 31st day of December, 2015.

/s Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

Filed
Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS LEE FLOYD, Appellant.	No. 46350-4-II UNPUBLISHED OPINION

JOHANSON, C.J. — Thomas Floyd appeals a forfeiture provision in his judgment and sentence.[1] In a supplemental brief, he appeals the trial court's imposition of legal financial obligations. We reverse the forfeiture order and remand to the superior court to strike the provision from the judgment and sentence. We decline to consider the legal financial obligation challenge because Floyd raises it for the first time on appeal.

FACTS

After a jury trial in 2011, Floyd was convicted of one count of second degree assault and six counts of violation of a presentence no-contact order, all charged as domestic violence offenses. At sentencing, the prosecutor discussed imposing legal financial obligations, and Floyd did not

[1] A commissioner of this court initially considered this appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

object. The trial court imposed a total of $1,800 in legal financial obligations. In addition, although the parties did not discuss forfeiture at sentencing, the 2011 judgment and sentence required Floyd to "forfeit items seized." Clerk's Papers at 308.

Floyd appealed his convictions and sentences. We affirmed his convictions, but remanded for resentencing with a new offender score to be calculated without consideration of two 1972 convictions. *State v. Floyd*, 178 Wn. App. 402, 316 P.3d 1091 (2013), *review denied*, 180 Wn.2d 1005 (2014).

At resentencing, the parties discussed the offender score. Further, the State raised the issue of legal financial obligations, asking that the sentencing court reimpose all other conditions of the original sentence, "including all the fines and fees." Report of Proceedings (May 5, 2014) at 11. Floyd did not object. The resentencing court imposed "standard" fines and fees of $1,800. In addition, although the parties again did not discuss forfeiture, the 2014 judgment and sentence again required Floyd to forfeit seized items.

ANALYSIS

Floyd contends that the trial court acted without statutory authority when it ordered him to forfeit seized property. We agree and remand to the trial court to strike the language "forfeit items seized" from Floyd's 2014 judgment and sentence. Floyd, in a supplemental brief, challenges the trial court's imposition of legal financial obligations. We decline to consider this issue, raised for the first time on appeal.

I. FORFEITURE

Floyd contends that the resentencing court exceeded its statutory authority when it ordered him to forfeit items seized.[2] Although Floyd did not object to the forfeiture requirement, it is well established that "[a]n appellant may challenge an illegal or erroneous sentence for the first time on appeal." *State v. McWilliams*, 177 Wn. App. 139, 150, 311 P.3d 584 (2013) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)), *review denied*, 179 Wn.2d 1020 (2014); *see also State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

The State argues, however, that we should decline to review this issue because the record is insufficient for review in that Floyd does not identify any property seized. The State also argues that Floyd may claim his seized property by requesting a hearing in the superior court pursuant to CrR 2.3(e).

In *State v. Roberts*, 185 Wn. App. 94, 96-97, 339 P.3d 995 (2014), we recently rejected these same arguments as a basis to refuse relief from a forfeiture order lacking statutory authority. There we held that

> [t]he State argues that CrR 2.3(e) allows a defendant to move at any time for the return of seized property, and that Roberts failed to do so. But CrR 2.3(e) does not provide any statutory authority for forfeiture of seized property. And even if CrR 2.3(e) somehow authorized forfeiture, that rule applies only to property seized in an *unlawful* search. There is no indication that any property here was seized in an unlawful search.

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[2] The State does not argue that Floyd is bound by the 2011 forfeiture order because he did not appeal it. Because we vacated Floyd's sentence in the original appeal, we will consider Floyd's argument even though he did not challenge the original forfeiture order. *See State v. Rowland*, 160 Wn. App. 316, 331, 249 P.3d 635 (2011), *aff'd*, 174 Wn.2d 150, 272 P.3d 242 (2012); *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) ("[T]he defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence.").

Roberts, 185 Wn. App. at 96-97.

In *Roberts*, we reversed the trial court's forfeiture order because neither the court nor the State provided any statutory authority for that order. 185 Wn. App. at 96-97. The same circumstances are present here. Although the record does not allow us to determine what, if anything, the State actually seized, it does plainly order Floyd to forfeit any property seized in this matter. Under *Roberts*, that order cannot stand.

The State additionally relies on *McWilliams*, in which we held that the trial court did not abuse its discretion in ordering the forfeiture of seized property. 177 Wn. App. at 152. In that case, however, the defendant did not argue that the trial court had no statutory authority to forfeit seized property. Instead, the defendant argued that the trial court *exceeded* its statutory authority by ordering forfeiture without procedural due process. *McWilliams*, 177 Wn. App. at 149. In that posture, *McWilliams* cannot support the presence of statutory authority here, in contradiction of *Roberts*.

As in *Roberts*, the State has not shown that the trial court had statutory authority to order forfeiture of Floyd's seized property. We hold that the trial court erred in entering the forfeiture order, and we remand to the trial court to strike the forfeiture order from Floyd's judgment and sentence.

II. LEGAL FINANCIAL OBLIGATIONS

Floyd's 2014 judgment and sentence contains a preprinted finding that he had the ability to pay the imposed legal financial obligations. Floyd did not challenge this finding during resentencing, which occurred after our decision in *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), and before the Supreme Court's remand decision in *State v. Blazina*, 182 Wn.2d

827, 344 P.3d 680 (2015) (affirming Court of Appeals' exercise of discretion to refuse to address issue raised for the first time on appeal, but exercising its own discretion to reach the issue and remand to trial court for further proceedings). In *State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015), we held that parties who failed to challenge legal financial obligations in sentencings after our decision in *Blazina* have waived those challenges. Under *Lyle*, Floyd has waived his legal financial obligation challenge.

Reversed and remanded to strike forfeiture provision from sentence.

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.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Sutton, J.
SUTTON, J.

RUSSELL SELK LAW OFFICES

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