

No. 46382-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

KRISTEN HIGHSMITH,

Appellant.

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

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ADDITIONAL ASSIGNMENT OF ERROR

1. In imposing legal financial obligations upon Ms. Highsmith and ordering that she would be able to pay appellate costs, the trial court failed to conduct an adequate inquiry into Ms. Highsmith's ability to pay.¹

B. ADDITIONAL ISSUE

1. The trial court imposed discretionary legal financial obligations. The court also ordered that an award of costs for an appeal may be added to the total legal financial obligations. Before imposing legal financial obligations, however, the sentencing court must make an inquiry as to the defendant's ability to pay. As the Washington Supreme Court recently held, appellate courts may exercise their discretion and address a trial court's failure to conduct this inquiry for the first time on appeal. Cries for reform of broken legal financial systems demand that appellate courts exercise this discretion. While imposing legal financial obligations

¹ Ms. Highsmith filed a motion asking this Court to allow this supplemental assignment of error. Commissioner Bears granted the motion on May 29, 2015:

The Appellant's request to add an assignment or error related to *State v. Blazina* is granted. To ensure that the argument gets due consideration, appellant is requested to submit the additional issue in a supplemental brief, as opposed to just including it within a reply brief. Appellant has 10 days from the date of this ruling to submit the supplemental brief. The State then has 21 days to file any response. To save time and costs, there is no need to also resubmit a reply brief that removes the additional assignment of error.

against Ms. Highsmith, the sentencing court did not inquire on the record as to her ability to pay. Following our Supreme Court's lead, should this Court exercise its discretion and remand for a proper determination as to Ms. Highsmith's ability to pay legal financial obligations?

C. ARGUMENT

The trial court failed to inquire as to Ms. Highsmith's ability to pay legal financial obligations. This Court should remand for a new sentencing hearing.

- 1. Before imposing legal financial obligations, a sentencing court must inquire as to the defendant's current and future ability to pay. Appellate courts may address this issue for the first time on appeal.**

Recently, our Supreme Court held that before a trial court imposes legal financial obligations (LFOs), RCW 10.01.160(3) requires that the sentencing judge must make an individualized inquiry into the defendant's current and future ability to pay. *State v. Blazina*, __ Wn.2d __, 344 P.3d 680, 681 (2015). The Court further held that Washington appellate courts have discretion to review LFOs challenged for the first time on appeal and reviewed the claims before it due to the importance of the issue:

RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. *State v. Russell*, 171 Wn.2d 118, 122, 249, P.3d 604 (2011). Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.

Blazina, 344 P.3d at 683. The Court rejected the State's argument that the ripeness doctrine precluded review of LFOs. Blazina, 344 P.3d at 682 n.1. Following Blazina, this Court may properly review the issue.

2. The trial court failed to inquire as to Ms. Highsmith's ability to pay legal financial obligations. This court should exercise its discretion and remand for a new sentencing hearing.

The trial court imposed \$1135 in discretionary legal financial obligations (court-appointed attorney fees). CP 68. The court also found that Ms. Highsmith had the ability or likely future ability to pay legal financial obligations and that an award of costs for an appeal may be added to the total legal financial obligations. CP 68. At sentencing, however, the trial court did not inquire as to Ms. Highsmith's current or future ability to pay. 5/23/14RP 1-21. The State did not offer any evidence as to Ms. Highsmith's ability to pay. 5/23/14RP 1-21.

Still, the trial court orally ruled that Ms. Highsmith was capable of paying legal financial obligations because she was capable of working and had worked before:

Ms. Highsmith, I do note for the record that you are capable of working, and that but for your incarceration, you would be able to work, as you have been working, and so therefore, you would be capable of paying on a legal financial obligation.

5/23/14RP 21.

Under RCW 10.01.160(3) and Blazina, the trial court erred. The statute requires more than the court's assumption that Ms. Highsmith would be able to pay legal financial obligations because she had worked before. The statute requires an account of the defendant's resources and the burden the costs will impose:

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).

Further, as interpreted by our Supreme Court in Blazina, 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. Blazina, 344 P.3d at 685. The sentencing court should examine whether the defendant is indigent under GR 34. Blazina, 344 P.3d at 685. Accordingly, because the records did not show that the sentencing courts inquired into either defendant's ability to pay, the Court remanded for new sentencing hearings. Blazina, 344 P.3d at 685.

Likewise, the trial court did not engage in this inquiry before imposing legal financial obligations. Consistent with Blazina, this Court should also remand for a new sentencing hearing.

D. CONCLUSION

If the conviction is not reversed for the reasons argued in the opening and reply briefs, this Court should remand for resentencing because the trial court did not conduct a proper inquiry before imposing legal financial obligations.

DATED this 1st day of June, 2015.

Respectfully submitted,

/s _____
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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Respondent,)	
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v.)	NO. 46382-2-II
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KRISTEN HIGHSMITH,)	
)	
Appellant.)	

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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF JUNE, 2015.



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