

**FILED**

**MAY 20 2015**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30801-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

SIFA TUTU,

Appellant.

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

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APPELLANT'S SUPPLEMENTAL BRIEF  
ADDRESSING *BLAZINA*

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A. ARGUMENT.

**The financial penalties imposed on Mr. Tutu must be stricken when the court found he was unable to pay these monetary penalties and this finding is supported by the record.**

1. *Blazina* holds that LFOs are impermissibly imposed when the defendant is indigent.

Even when a court has statutory authority to impose legal financial obligations, it also “has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay *before* the court imposes” these costs. *State v. Blazina*, \_ Wn.2d \_\_, 344 P.3d 680, 685 (2015); *see* RCW 10.01.160. This statutory obligation reflects the constitutional prohibition on punishing a person by ordering him to pay LFOs he is unable to afford due to poverty. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Consequently, it is “imperative” to consider a person’s ability to pay LFOs prior to imposing them as part of a person’s sentence and imperative to refrain from imposing them when these considerations show the person is presently unable to pay and unlikely to have a substantially improved financial situation in the future. *Blazina*, 344 P.3d at 685; *State v. Curry*, 118 Wn.2d 911, 915, 829 P.2d 166 (1992).

The court's finding that a person is able to pay LFOs must be based on the court's "individualized inquiry into the defendant's current and future ability to pay." *Blazina*, 344 P.3d at 685. The court must consider incarceration and the defendant's "other debts, including restitution, when determining a defendant's ability to pay." *Id.* The Supreme Court in *Blazina* cited the indigence definitions in GR 34 as an appropriate tool for deciding when a person is unable to pay LFOs. *Id.*

The "salient features of a constitutionally permissible costs and fees structure" for LFOs mandate that "[r]epayment may only be ordered if the defendant is or will be able to pay;" and repayment "may not be imposed if it appears there is no likelihood the defendant's indigency will end," taking into account the defendant's financial resources. *Curry*, 118 Wn.2d 915. Here, the court imposed substantial financial penalties even though it simultaneously found Mr. Tutu is not able to pay them. This imposition of punitive fees is impermissible. *Blazina*, 344 P.3d at 685.

2. *The prosecution does not have authority to appeal the trial court's sentencing order finding Mr. Tutu lacks the ability to pay.*

The State's response brief concedes the court did not enter a finding that Mr. Tutu is able to pay the LFOs it imposed. By expressly declining to check the box that Mr. Tutu is able to pay, the court made the opposite finding that Mr. Tutu is indigent and unable to pay. CP 40.

The record supports this finding since Mr. Tutu is an orphaned childhood refugee from the Sudan without educational achievement or employment opportunities. RP 296, 298-301. His indigency was not contested during trial or appellate proceedings, where his lack of resources entitled him to court-appointed counsel. In his Affidavit of Defendant in Support of Motion for Order of Indigence, Mr. Tutu explained that "I am unemployed, . . . I have no assets, no real property, no stocks, no bonds." The court entered an Order of Indigence, ruling that Mr. Tutu "was previously declared indigent and the Court now find[s] that the defendant continues to lack sufficient funds" so that he is entitled to appointed counsel. Benton Co. No. 10-1-00934-9 (Order of Indigence, filed with Notice of Appeal).

The prosecution's response brief asks the Court to remand the case so the court can revisit its decision, giving the State another chance

to meet its burden of proof. The State did not file a cross-appeal. RAP 2.2(b)(6). The court's exercise of discretion at sentencing is not appealable by the prosecution. *Id.* The remedy is to strike the improperly imposed LFOs, not hold a second sentencing hearing.

3. *This Court should strike the LFOs imposed upon Mr. Tutu, who is an indigent person.*

The court's imposition of substantial financial penalties upon a person who is indigent is an error that is appropriately reviewed on appeal and remedied upon review even when no objection was lodged in the trial court. *Blazina*, 344 P.3d at 683. The unfair imposition of LFOs has led to “[n]ational and local cries for reform of broken LFO systems” and favors that an appellate court “exercise its RAP 2.5(a) discretion and reach the merits of this case.” *Id.*

“Washington’s LFO system carries problematic consequences.” *Id.* at 684. There are significant disparities between counties in the amount of LFOs routinely assessed, which impacts the public perception of fairness. *Id.* at 685. There is little reason to impose LFOs when “the state cannot collect money from defendants who cannot pay.” *Id.* at 684. An impoverished person will owe far more than a wealthy person because LFOs “accrue interest at a rate of 12 percent”

and “collection fees when they are not paid on time.” *Id.* Unpaid LFOs “have serious negative consequences on employment, on housing, and on finances.” *Id.* (citing Katherine A. Beckett, Alexes M. Harris & Heather Evans, Wash. State Minority & Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008), at 43)).

The court imposed over \$7000 in court costs, in addition to a \$500 fine, \$500 mandatory victim penalty assessment, and \$100 DNA collection fee, based on a “see attached” finding that refers to a clerk’s list of costs. CP 40-41, 48. The State did not establish that Mr. Tutu had the opportunity to contest the costs before they were imposed or that they were properly authorized after court found him able to pay upon the imperative individualized inquiry. Mr. Tutu fled to the United States as a child from his native country Sudan several years earlier to escape a war that left him without parents or a home. RP 296, 298-301. There was no evidence that he was employed, able to work, or had any resources. This Court should strike the costs ordered when Mr. Tutu is unable to pay and the court’s sentencing order contains a finding that Mr. Tutu has not been proven to be able to pay. CP 40-41, 45.



B. CONCLUSION.

Sifa Tutu respectfully asks this Court to strike the legal financial penalties from the judgment and sentence.

DATED this 18<sup>th</sup> day of May 2015.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30801-4-III
	)	
SIFA TUTU,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF MAY, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JULIE LONG, DPA [prosecuting@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	( ) ( ) (X) ( ) ( )	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] SIFA TUTU 357381 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( ) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF MAY, 2015.

X \_\_\_\_\_  


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