33198-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARLOS VALDEZ,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Page No.

Statutes and Rules

Page No.

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentencing of the Appellant.

III. ISSUES

1. Does the record, which the judge reviewed prior to sentencing, support the court's finding that the Defendant has the ability to pay his legal financial obligations at a rate of $50/mo after release?
2. Is RCW 43.43.7541 constitutional as applied to this Defendant who plainly has the ability to pay the $100 fee?
3. Is the lower court's decision on the CrR 4.2 motion the proper subject of this appeal where the decision is not named in the notice of appeal nor was even existent at the time of the filing of the notice of appeal?

IV. STATEMENT OF THE CASE

The Defendant challenges for the first time on appeal the record

supporting the lower court's finding of his ability to pay legal financial obligations (LFO's). Brief of Appellant (BOA) at 8-15. Because the Defendant has failed to provide the relevant record which this Court would need to review the challenge, the State has filed a supplemental designation.

The Defendant Carlos Valdez was charged with murder in the first degree and pled guilty to murder in the second degree of Yesica Olivos in Walla Walla, Washington. CP 1-14.

Although the Defendant had been dating Ms. Olivos, he did not treat her well. CP 86, 94. The Defendant and his "homie" Andres "Dragon" Torres discussed killing Ms. Olivos over a drug debt. CP 17, 68, 90, 92, 94. On December 31, 2013, the Defendant, his cousin Andy Garcia, and Ms. Olivos drove from Pasco to Walla Walla in a Nissan Altima that the Defendant was in the process of purchasing from Mr. Torres. CP 16, 68, 70, 73, 87, 90, 91. The Defendant told Ms. Olivos that she could buy an ounce of methamphetamine in Walla Walla, which they would cut, double, and resell. CP 92.

In Walla Walla, Mr. Garcia and Breanne Rutherford (the Defendant's other girlfriend) observed the Defendant being intimate with Ms. Olivos. CP 16, 86, 90, 92. This upset Mr. Garcia and caused friction

between the two women. CP 16, 70, 88, 90.

The group then drove Ms. Olivos purportedly to buy the ounce of methamphetamine. CP 16, 92. However, before accomplishing this task, the Defendant pulled over by a bridge and told Ms. Olivos to get out. CP 17, 92, 94. He shot her in the back of the head, dragged her body to the side of the bridge, and threw her along the river bank. CP 17, 84, 89, 94. He kept her shoes, later depositing them in a trash can in the Tri-Cities. CP 92.

The Defendant then met in a parking lot with Mr. Torres and reported the murder to him. CP 17, 92. Mr. Torres replied that he wished it hadn't come to this, but he was tired of being on the bottom of the food chain, and when someone did not come through on their word, they were going to be taught a lesson. CP 17, 94.

The Defendant, Ms. Rutherford, and Mr. Garcia travelled to the Tri-Cities, cleaned the car, and then drove to Spokane. CP 17. On January 3, 2014, Ms. Olivos' body was found with the pants pulled down to her knees not far from several used condoms. CP 15, 85. The Defendant, Ms. Rutherford, Mr. Garcia, Mr. Torres, and Mr. Torres girlfriend were arrested on January 7, 2014 in a Spokane motel following a lengthy standoff with the Spokane Violent Crimes Gang Enforcement

Team. CP 16, 87.

In the motel room, police recovered a laptop and an iPad. CP 94-96. Mr. Torres had 13 separate cell phones in his property. CP 95. Ms. Rutherford had bank checks that did not belong to her. CP 95. And the Defendant had two phones, one newly purchased. CP 95. On the iPad, there were photos of the Defendant and his brother Javier posing with a .22 rifle and pistol. CP 104. The day before his arrest, he had uploaded a carefree photo of himself in the company of his co-defendants. CP 123.

Police retrieved the murder weapon, a Browning .22 semi-automatic rifle, from Torres' car. CP 91-92. The butt stock had been sawed off so that only the pistol grip remained and so that the rifle fit under the driver's seat with the grip toward the front of the seat and the barrel extended into the floor of the backseat covered by the floor mat. CP 91. They also recovered a Ruger .22 pistol and two kinds of ammunition. CP 91.

In jail, the Defendant showed another inmate a newspaper article with Ms. Olivos' photo and bragged "this was the person I shot, I'm kind of sick … ha ha." CP 106. He explained that he used a .22 hollow tip bullet, which he believed would expand so as to confound ballistics testing. CP 106. He said he should have shot Ms. Rutherford, too. CP

106. The Defendant talked about methamphetamine constantly and called himself a "hitman," even writing the word on his cell walls. CP 106-07. He laughed about telling police he was not a gang member, but only an affiliate. CP 107. Several months after his arrest, the Defendant continued to update his facebook page with a photograph of himself in a bandanna and sunglasses labeled "Southside Rider" and "aka Hitman." CP 124.

At sentencing, the judge explained:

> I have had an opportunity to spend a great deal of time to reflect on the file and victim impact statements, and everything that sort of went into your discovery back and forth that's been filed in the file.
>
> Based on your age -- and I have taken that into consideration and your lack of criminal history, because of that I am not going to impose an exceptional sentence, but based on the presentence investigation and for the most part lack of remorse, I am going to impose the top end of the standard range, which is a total of 280 months.

II RP[1] 17. That file, which the court reflected upon, included transcripts of the interviews with Ms. Rutherford and Mr. Garcia. CP 41; PE 1; PE 2. The State has designated the 33 pages of victim impact statements that are date stamped on or before the sentencing date. CP 110-43.

The victim impact statements explain that the Defendant is a gang member and the killing was gang-related and for hire. CP 111, 121, 124,

[1] II RP refers to the transcript for the sentencing hearing on February 2, 2015.

128, 134, 137. For him, "drugs, guns, and money are the way of life." CP 122. They note that after the murder, the Defendant travelled, took pictures posing with weapons, and uploaded them to facebook. CP 116.

The Defendant was 17 years old at the time of his arrest. CP 16. He has completed the 11th grade and intends to get his GED and additional education while in prison. CP 20; RP 3. He is described as intelligent and personable. CP 23; II RP 11 (l. 16). He has the capacity to work as a laborer, but not the desire. CP 20 (the Defendant self reports that he has worked as a laborer). His siblings are in the Florencia and 18th Street gangs. CP 21. He was supporting himself as well as his circle of friends "via criminal means, primarily drug dealing and retail thefts." CP 20. The presentencing report notes that "[t]his [financial] area was not a big stressor for Carlos; he felt he was able to meet his needs prior to his incarceration." CP 20.

Finding the Defendant had the ability to pay, the court imposed both mandatory and discretionary legal financial obligations (LFO's) totaling $11,680.61. CP 28. This includes in significant part $5099.01 owed in restitution to the Crime Victim's Compensation Program and $4657.50 in expert fees. CP 28; II RP 17. It also includes a $100 fee mandated under RCW 43.43.7541. CP 28. The Defendant is ordered to

begin making payments on his LFO's beginning 90 days after his release from custody at a rate of $50 per month. CP 28-29; II RP 17. No objection was made.

After the sentence was imposed, the Defendant filed a pro se motion to withdraw his guilty plea, citing CrR 4.2, and arguing that the prosecutor was required to enthusiastically support the plea agreement, that the factual basis for the plea was inadequate, that the presentencing reporter was unqualified to opine on the Defendant's lack of remorse, and that his counsel had a conflict due to having represented a defense witness on a previous occasion. CP 40-43. The State responded. CP 50-63. The Defendant did not note his motion for hearing. Instead, he filed a letter asking to "be informed if my motion [to withdraw guilty plea] has been granted or denied." CP 49.

On February 24, 2015 and again on March 16, 2015, the Defendant filed a notice of appeal. CP 44-47. This appeal "of the Judgment and Sentence entered on February 9, 2015" follows. CP 47.

On March 23, 2015, the court denied the Defendant's CrR 4.2 motion. CP 64-65; III RP[2] 20.

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[2] III RP refers to the transcript for March 23, 2015, the hearing on the Defendant's Motion to Vacate Guilty Plea.

V. ARGUMENT

A. THE SENTENCING COURT'S UNCHALLENGED FINDING REGARDING THE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS IS WELL SUPPORTED IN THE RECORD.

As the Defendant acknowledges, he did not object to the finding of ability to pay his LFO's or their imposition so as to preserve this claim for review. BOA at 8.

He cites *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015) in support of his challenge. BOA at 8. There the Washington Supreme Court held that "it is well settled" that a defendant who fails to object at the time of sentencing, "is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d at 832. None of the exceptions in RAP 2.5(a) apply. *State v. Blazina*, 182 Wn.2d at 833. It held that the court of appeals "properly declined discretionary review" of the challenge. *State v. Blazina*, 182 Wn.2d at 834. The *Blazina* court only opted to review the challenge in an exercise of its discretion. *State v. Blazina*, 182 Wn.2d at 835.

The Defendant argues that as a matter of stare decisis, this Court must both accept review and reverse the imposition of LFO's. BOA at 10. But the *Blazina* decision does not require review and most assuredly did not overrule *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014)

(refusing to review unpreserved challenges to the imposition of LFO's). Moreover, the record, which the Defendant failed to supply, amply supports the court's finding, notwithstanding the Defendant's "boilerplate" challenge.

As the *Duncan* opinion explains, at imposition, the State's burden of proof is so low that it can be met by a single reference in a presentence report in which the defendant described himself as employable. *State v. Duncan*, 180 Wn. App. at 250, (citing *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013)). That burden is more than met here.

The sentencing judge explicitly stated that he had spent "a great deal of time" reviewing everything in the file. The Defendant, while only 17 at the time of his offense, was operating as a de facto emancipated minor. He was supporting himself, purchasing a car, and travelling around the state at whim. He told the community corrections officer that financial matters were not a big stressor for him. CP 20. He felt he was able to meet his needs and even supported his circle of friends. CP 20.

The Defendant has every ability to work and earn an income. He is an English speaker. At 17, he had completed the 11th grade. He is intelligent and personable. The Defendant is a young, vigorous man with the admitted ability to labor in the fields, although not the inclination. He

had been employed in labor. In other words, he is mentally and physically fit. But he preferred to support himself through various criminal enterprises. He was able to support a lifestyle of easy travel, money, drugs, and firearms. At this young age, he was competent to cut and sell drugs, to load and operate firearms, and to carry out a "hit" while disposing of evidence.

There is no barrier to the Defendant's ability to learn and earn money, other than the criminal conviction, which is a prerequisite to any LFO imposed as part of a criminal sentence. He is not disabled. He has no dependents. Because the State's burden is low, on this record, the record is more than sufficient to justify the lower court's finding that he will be able to pay $50/month upon his release.

The Defendant's boilerplate argument that indigency equals no ability to pay is faulty logic. Indigency alone is not a prohibition against the imposition of legal financial obligations. *State v. Lundy*, 176 Wn. App. 96, 99, 308 P.3d 755 (2013). There is a significant difference between one's ability to pay $50/mo (which can be earned by mowing one lawn every other week) and being immediately able to come up with the thousands of dollars necessary to retain an attorney and transcribe a record. In any case, indigency is a condition, not an ability. And it is not

a static condition. The challenge is without basis in law or fact and must be denied.

B. THE DEFENDANT HAS NO STANDING TO RAISE A CONSTITUTIONAL CHALLENGE TO RCW 43.43.7541 WHERE HE PLAINLY HAS THE ABILITY TO PAY THE $100 FINE.

This Court has recently decided that regardless of previous felony convictions and sample collection, a criminal defendant is mandated to pay the $100 DNA collection fee, which will be used to fund the state DNA database and agencies that collect samples. *State v. Thornton,* -- Wn. App. --, 353 P.3d 642 (2015).

The Defendant now argues that a mandatory LFO, in particular the one required under RCW 43.43.7541 for a mere $100 fee, is unconstitutional as applied to a defendant who lacks the ability to pay. The Defendant's premise fails. *He* does not lack the ability to pay. *He* is not a member of that class. Accordingly, he does not have standing to make this challenge on behalf of other criminal defendants who may lack the ability to pay. RAP 3.1 (only an aggrieved party may seek review by the appellate court).

Even were there standing, the challenge must fail. Substantive due process protects against arbitrary or capricious government action.

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). The collection of a mere $100 after a guilty plea or finding of guilt beyond reasonable doubt of a felony in order to support a criminal database is not arbitrary or capricious government action. Substantive due process requires that deprivations of property be substantively reasonable, supported by legitimate justification, and rationally related to a legitimate state interest. *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). The Defendant acknowledges that the State has a legitimate interest in collecting the fee, but argues that imposition upon defendants who cannot pay does not rationally serve that interest. BOA at 17. The collection of a small fee from convicted criminals in order to police those same criminals is rationally related to a state interest. The Defendant acknowledges the $100 fee "is such a small amount that most defendants would likely be able to pay." BOA at 18.

The Defendant argues that because the fee is not prioritized, it *could* be the cause for the accumulation of significant interest. BOA at 18. Again, an appeal cannot be based on a hypothetical. The appellant must be actually aggrieved. However, *if* down the road a payment of $50/mo comes to impose a manifest hardship on the Defendant, the legislature and the courts have provided a mechanism for relief. Under RCW

10.01.160(4), a defendant may petition for remission of any portion of unpaid costs, including interest, if it imposes a hardship on the defendant or his immediate family. The court has created court forms CR 08.0800 and CR 08.0810 to assist a defendant in filing such a petition. And legal aid offices have additional forms for this purpose. The law has provided for this hypothetical should it come into existence.

C. THE MARCH 23rd ORDER ON THE CrR 4.2 MOTION IS NOT THE PROPER SUBJECT OF THIS APPEAL.

The Defendant challenges the lower court's decision of his CrR 4.2 motion. BOA at 19-20. It is not the proper subject of this appeal.

A notice of appeal must designate the decision, which the party wants reviewed. RAP 5.3(a)(3). This notice of appeal seeks review "of the Judgment and Sentence entered on February 9, 2015." CP 47. It does not seek review of a decision that is neither named in the notice nor even existent at the time of the filing of the notice.

The notice of appeal was filed ***before*** the decision on the CrR 4.2 motion was entered on March 23, 2015. But a notice of appeal must be filed "***after*** the entry of the decision of the trial court which the party filing the notice wants reviewed." RAP 5.2(a) (emphasis added).

The matter of the CrR 4.2 motion is not before this Court.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: September 16, 2015.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

David Gasch <gaschlaw@msn.com> Carlos Valdez #379475 1830 Eagle Crest Way Clallam Bay, WA 98326	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 16, 2015, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**