73564-4

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Court of Appeals
Division I
State of Washington

NO. 73564-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TYLER,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the conviction for possession of a stolen vehicle.

2. RCW 43.43.7541's DNA-collection fee and RCW 7.68.035's Victim Penalty Assessment (VPA) violate substantive due process when applied to defendants who do not have the ability – or likely future ability – to pay.

3. The trial court failed to comply with RCW 10.01.130(3) and therefore erred in imposing Legal Financial Obligations (LFOs).

Issues Pertaining to Assignments of Error

1. Appellant was charged with possession of a stolen motor vehicle. The "to convict" instruction listed as alternative means that defendant received, retained, possessed, concealed, or disposed of the stolen vehicle. The State did not object. The State failed to provide sufficient evidence from which the jury could conclude appellant disposed of the property at issue. Should the conviction be reversed based on the insufficiency of the evidence?

2. RCW 43.43.7541 requires trial courts impose a DNA-collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection,

testing, and retention of a convicted defendant's DNA profile. RCW 7.68.035 requires trial courts to impose a VPA of $500. The purpose is to fund victim-focused programs. These statutes mandate that trial courts order these LFOs even when the defendant has no ability to pay. Do the statutes violate substantive due process when applied to defendants who do not have the ability – or the likely future ability – to pay the fees?

3. The Supreme Court recently emphasized: "a trial court has a statutory obligation [under RCW 10.01.160(3)] to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the trial court was informed that appellant was unemployed and indigent. Yet, it imposed so-called "mandatory" LFOs without any consideration of his ability to pay. Should this Court remand with instructions to strike the LFOs and undertake a proper inquiry?

B. STATEMENT OF THE CASE

1. Procedural History

On May 14, 2014, the Snohomish County prosecutor charged appellant Robert Tyler with one count of possessing a stolen motor vehicle. CP 80-81. By general verdict, the jury found Tyler guilty

as charged. CP19. With an offender score of zero, Tyler was sentenced to 45 days confinement. CP 7. The trial court also imposed a $100 DNA-collection fee and a $500 VPA, believing these to be "mandatory" fees. CP 16. Tyler appeals. CP 1-4.

2. Substantive Facts

On January 10, 2014, at approximately 2:30 in the morning, deputy Scott Stitch was patrolling Forest Service Road 2070 near Darrington, Washington. RP 35-36. He saw a White Honda Accord on a jack and a Ford Ranger pick-up truck about twenty feet away. RP 37.[1]

Upon reaching the scene, Stitch observed two men outside the truck and a man and woman inside the truck cab. RP 38-39. He later determined that Robert Tyler was in the driver seat of the pick-up truck. RP 40. Rebekah Nicholson was the woman inside the truck with him. RP 40, 57-58. Anthony Coleman and Tyson Whitt were outside the car. RP 38, 40, 102. Stitch observed that the Honda looked as if it was being stripped of some of its parts. RP 42, 49.

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[1] The reference to report of proceedings refers to the trial transcript for March 30, 2015 to April 1, 2015.

Stitch never saw Tyler near the Honda or even outside his truck. RP 60, 63. However, he observed what appeared to be some of the stripped parts from the Honda Accord in Tyler's truck. RP 42, 45, 54. Stitch arrested Tyler after he did not give what the deputy perceived to be a satisfactory explanation as to where the items in his truck had come from. RP 43, 46, 54.

Eventually, police determined the Honda Acord had been reported stolen. RP 17. Nicholson soon told police that Whitt stole the vehicle, not Tyler. RP 58. Separately, Tyler then told police that he was doing a favor for Whitt's parents when he followed Whitt to the Forest Service Road. RP 81. He admitted that he deduced from the circumstances of the situation that the Honda Accord Whitt was driving was stolen. RP 82, 84.

Subsequently, Whitt was arrested, charged, and convicted of stealing the Honda Accord. RP 114, 120. In Tyler's trial, Whitt testified that he only wanted Tyler to give him a ride back home, and he did not want to involve Tyler in the criminal activity. Whitt said he never told Tyler that the Honda Accord was stolen. RP 117-18.

C. ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR POSSESSION OF A STOLEN VEHICLE.

Appellant was charged with possession of a stolen vehicle. The to-convict instructions specifically listed as alternatives means that the defendant received, retained, possessed, concealed, or disposed of a stolen vehicle. CP 27. The State did not object. RP 134. Thus, the State was required to prove each alternative as elements of the offense. As shown below, the State failed to provide sufficient evidence that Tyler, or anyone else, "disposed of" the Honda.

Criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. I, § 21. To safeguard the defendant's constitutional right to a unanimous verdict as to an alleged crime that can be committed by alternative means, "substantial evidence of each of the relied-on alternative means must be presented." State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

To-convict jury instructions must contain all the elements of the crime. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). In a criminal case, if the State fails to object to an unnecessary element in the to-convict instruction, the added

element becomes the law of the case and the State assumes the burden of proving the added element. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Specifically, when the State fails to object to the inclusion of the definitional alternatives for possessing stolen property in the to-convict, the law of the case doctrine requires the State to prove each of these alternatives as if they were statutory elements. Compare, State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004) (holding the State was required to prove the defendant concealed property when that means was included in the to-convict); with, State v. Hayes, 164 Wn. App. 459, 478, 262 P.3d 538 (2011) (holding the State was not required to prove concealment when that means was not found in the to-convict instruction).

On appeal, a criminal defendant may challenge the sufficiency of the evidence to support added elements in the to-convict. Hickman, 135 Wn.2d at 102. If one of the listed means is not supported by substantial evidence and there is only a general verdict, the reviewing court must vacate the conviction unless it can definitively determine that the verdict was founded upon one of the means supported by substantial evidence. State v. Nicholson, 119

Wn. App. 855, 860, 84 P.3d 877 (2003) overruled on other grounds, State v. Smith, 159 Wn.2d 778, 155 P.3d 873 (2007).

Under RCW 9A.56.068(1), a person is guilty of possessing a stolen motor vehicle if he knowingly receives, retains, possesses, conceals, or disposes of a stolen motor vehicle. State v. Hayes, 164 Wn. App. 459, 480, 262 P.3d 538 (2011). Although it is generally unnecessary for the State to prove all of these alternatives to show "possession," the State takes on this burden when it includes all of these in the to-convict. Id. at 481. In other words, where a to-convict instruction specifically lists the alternative definitions of "possession" as an element of the offense to be proved by the State, there must be sufficient evidence to support each alternative. Id.; Lillard, 122 Wn. App. at 434-35.

The decision in State v. Hayes is directly on point here and supports reversal. Hayes was charged and convicted of both possession of stolen property and possession of a stolen motor vehicle. Id. at 474. Looking first at the possession of stolen property charges, this Court held that the State was not required to prove concealment because it was not a means that was included in the to-convict instruction. Id. at 479. However, this Court reversed Hayes' conviction for possessing a stolen motor vehicle

because the to-convict instruction included "disposing of" as a means of committing the crime and there was no evidence showing Hayes disposed of the vehicle. Id. at 480-81.

As in Hayes, the jury instructions here defined possessing a stolen motor vehicle as "knowingly to receive, retain, possess, conceal, or dispose of a stolen motor vehicle knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." CP 26. Again, as in Hayes, the to-convict instruction essentially echoed this language, setting forth as an element: "that the defendant knowingly received, retained, possessed, concealed, disposed of a stolen motor vehicle." CP 27. Consequently, there were five potential means of possession.

For purposes of appellate review, the first three means listed in the instruction (receive, retain, possess) are considered to be essentially synonymous. Lillard, 122 Wn. App. at 435. Hence, practically speaking, there are three means presented in this case: (1) to receive, retain possess, (2) to conceal, or (3) to dispose of. Only the third is at issue here.

When used in the context of RCW 9A.56.068(1), the term "disposed of" means "to transfer into new hands or the control of

someone else." Hayes, 164 Wn. App. at 481. In this case, there was no evidence that Tyler or Whitt handed over control of the Honda to someone else or transferred it into new hands. Indeed, the evidence supports just the opposite – that Whitt stole the car, drove the car, and maintained control over the car until police arrived. As such, the evidence did not prove beyond a reasonable doubt that Tyler, Whitt, or anyone else "disposed of" the Honda.

In sum, by not objecting to the to-convict instruction, the State undertook the burden of proving as an element of the crime that Tyler or someone else "disposed of" the Honda Accord. There is no such evidence on the record, however. Hence, Tyler's conviction must be reversed. Hayes, 164 Wn. App. at 480-81.

II. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY LFOS.

RCW 9.94A.760 permits the trial court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 43.43.7541 authorizes the collection of a $100 DNA-collection fee. RCW 7.68.035 provides that a $500 VPA "shall be imposed" upon anyone who has been found guilty in a Washington Superior court. However, these statutes violate substantive due

process when applied to defendants who are not shown to have the ability or likely future ability to pay the fine. Hence, this Court should find the trial court erred in imposing these fees without first determining Tyler's ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Turning first to RCW 43.43.7541, the statute mandates all felony defendants pay the DNA-collection fee. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

As for RCW 7.68.035, it mandates that all convicted defendants pay a $500 VPA. This ostensibly serves the State's interest in funding "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Again, while this may be a legitimate interest, there is nothing reasonable about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability – or likely future ability – to pay.

Imposing these fees without a Blazina inquiry does not further the State's interest in funding DNA collection or victim-focused programs. For as the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 344 P.3d at 684. Hence, there is no

legitimate economic incentive served in imposing these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognized that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. Id. This is because imposing LFOs upon a person who does not have the ability to pay actually "increase[s] the chances of recidivism." Id. at 836-37 (citing relevant studies and reports).

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than their wealthier

counterparts. Id. at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are utterly pointless. It is simply irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue appellant's due process challenge is foreclosed by the Washington Supreme Court's rulings in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), which conclude due process was not violated with the imposition of the VPA regardless of whether there was an ability-to-pay inquiry. However, the "constitutional principles" at issue in those cases were considerably different than those implicated here. Hence, any reliance on these cases would be misplaced.

Tyler's constitutional challenge to the statute authorizing the DNA-collection fee and VPA is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are

unable to pay LFOs. Hence, Curry's constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

By contrast, Tyler asserts there is no legitimate state interest in requiring sentencing courts to impose a mandatory DNA-collection fee without the State first establishing the defendant's ability to pay. In other words, rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Tyler challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants who have not been shown to have the ability to pay. As such, the holdings in Curry and Blank do not control.

The State's reliance on Curry and Blank would also be misplaced because when those cases are read carefully and considered in the light of the realities of Washington's current LFO collection scheme, they actually support Tyler's position that an ability-to-pay inquiry must occur at the time that any LFO is imposed. Indeed, after Blazina's recognition of the Washington

State's "broken LFO system," 182 Wn.2d at 835, the Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington's current LFO scheme.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay).

Washington's legislatively sanctioned debt cycle does not conform to the necessary constitutional safeguards established in Blank. In Blank, the Washington Supreme Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns only arise if the government seeks

to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for this inquiry:

- "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.

- "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.

- "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any "enforced" collection; (2) any additional "penalty" for nonpayment is assessed; or (3) any other "sanction" for nonpayment is imposed.[2] Id.

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[2] "Penalty" means: "a sum of money which the law exacts payment of by way of punishment for... not doing some act which is required to be done." Black's Law Dictionary, Sixth Edition, at 1133.

Given Washington's current LFO collection scheme, the only way to regularly comply with Blank's safeguards is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time the VPA or DNA-collection fee is imposed. Although Blank says that prior case law suggests that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State's current collection scheme in that case. As shown below, Washington's LFO collection scheme provides for immediate enforced collection processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the VPA or DNA-collection fee is imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina,

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"Sanction" means: "Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations." Id., at 1341.

"Enforce" means: "To put into execution, to cause to take effect, to make effective; as to enforce ... the collection of a debt or a fine." Id. at 528.

182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See, Harris, supra at 1776-77 (explaining that "those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order a "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a "processing fee." RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

The examples set forth above show that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgement and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. As such, any reliance on holdings of Curry and Blank by the State would miss the mark because Washington's current LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum, Washington's LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability – or likely ability – to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Tyler who do not have the ability to pay LFOs, the mandatory imposition of the DNA-collection fee and VPA does not reasonably relate to the State interests served by those statutes. Consequently, this Court should

find RCW 43.43.7541 and RCW 7.68.035 violate substantive due process and vacate the LFO order.

III. THE LFO ORDER SHOULD BE STRICKEN BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH RCW 10.01.160(3).

RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability.[3] The record shows Tyler was unemployed and indigent – but the trial court imposed legal financial obligations with no analysis of ability to pay. The judgment and sentence includes a boilerplate finding that "the defendant has the present or likely future ability to pay the legal financial obligation imposed." Yet, the parties and the court did not discuss this finding at all. As such, the trial court did not comply with RCW 10.01.160(3) and the LFO order should be stricken.

The Supreme Court recently emphasized: "a trial court has a statutory obligation to make an individualized inquiry into a

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[3] RCW 10.01.160(3) provides: "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."

defendant's current and future ability to pay before the court imposes LFOs." Blazina, 182 Wn.2d at 827. There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." Id. at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. Id. at 836. In turn, this causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." Id. at 837; All of these problems lead to increased recidivism. Blazina, 182 Wn.2d at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. See RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Tyler's poverty, because these are so-called "mandatory" LFOs and the authorizing statutes use the word "shall"

or "must." RCW 7.68.035; RCW 43.43.7541; State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). However, these statutes must be read in tandem with RCW 10.01.160(3), which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants. See, State v. Jones, 172 Wn.2d 236, 243, 257 P.3d 616 (2011) (explaining that statutes must be read together to achieve a harmonious total statutory scheme).

When the legislature means to depart from a presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. See, State v. Conover, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the legislature's

choice of different language in different provisions indicates a different legislative intent).[4]

Although Curry states the VPA was mandatory notwithstanding a defendant's inability to pay, as explained above, it was only presented with the argument that the VPA was unconstitutional. Curry, 118 Wn.2d at 917-18. In the context of that argument, the Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." Id. at 917 (citation omitted). That portion of the opinion is arguably dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not. Moreover, it does not appear that the Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry.

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[4] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. Compare RCW 43.43.7541 (2002) with RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

In response, the State may argue that this issue has been waived and should not be considered for the first time on appeal. Even though defense counsel did not object to the imposition of these LFOs below, this Court has the discretion to reach this error consistent with RAP 2.5. Blazina, 344 P.3d at 681. As shown below, given the trial court's failure to conduct any semblance of an inquiry into Tyler's ability to pay and given his indigent status, this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant's ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal. The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence. Blazina, 344 P.3d at 683-85. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against

the State's interest in reducing recidivism. Id.

As a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider, on direct appeal, whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in Blazina, the fact is "the state cannot collect money from defendants who cannot pay." Id. at 684. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge who is already familiar with the case so he may actually make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

Finally, the erroneous ability-to-pay finding entered here is

representative of a systemic problem that requires a systemic response. Unquestionably, the trial court erred in imposing discretionary LFOs without making any inquiry into Tyler's ability to pay. The Supreme Court has held that "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 a court may impose legal financial obligations. Id. at 685. This did not happen.

The pre-formatted language used here, and in the majority of courts around the state, is simply inadequate to meet the requirements of RCW 10.01.160(3). The systemic misuse of this boilerplate finding requires a systemic response. Part of this response must come from appellate courts through the immediate rejection of such boilerplate and remand for the trial court to follow the law. For these reasons, this Court should exercise its discretion and consider the merits of Tyler's challenge.

In sum, RCW 10.01.160(3) requires that the trial court conduct an ability-to-pay inquiry for all LFOs. While other statutes purport to impose mandatory fees, these must be harmonized with RCW 10.01.160(3). As such, unless the statute specifically says that an LFO must be paid regardless of a defendant's financial

situation, there must be an ability-to-pay inquiry. Consequently, this Court should exercise its discretion, consider the issue, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Tyler's ability to pay LFOs.

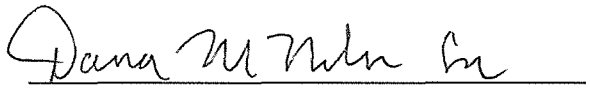
D. CONCLUSION

For reasons stated above, this Court should reverse appellant's conviction for lack of sufficient evidence. Alternatively, this Court should strike the trial court's order that Tyler pay LFOs and remand for a hearing on his ability to pay.

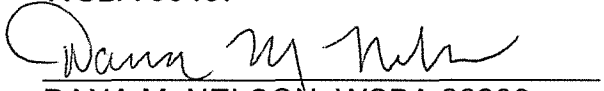
Dated this 21st day of December, 2015.

Respectfully submitted

NIELSEN, BROMAN & KOCH



JENNIFER L. DOBSON,
WSBA 30487



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73564-4-I
	)	
ROBERT TYLER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT TYLER
2314 177TH AVENUE NE
SNOHOMISH, WA 98290

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2015.

X Patrick Mayovsky