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Court of Appeals
Division II
State of Washington

SUPREME COURT NO. 94620-5

NO. 48651-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN BAKER,

Petitioner.

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

The Honorable Nelson Hunt, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Allen Chagluak Baker, the appellant below, seeks review of the appended split decision of the Court of Appeals in State v. Baker, noted at ___ Wn. App. ___, 2017 WL 1907744, No. 48651-2-II (May 9, 2017).

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court contravene RCW 10.01.160(3) and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), when it imposed discretionary legal financial obligations (LFOs) without making adequate inquiry into Baker's financial resources and current and future ability to pay?

2. Criminal defendants and civil litigants are similarly situated with respect to the purpose of court filing fees provided in RCW 36.18.020(2), which is to fund counties, regional and county law libraries, and the state general fund. Courts may waive filing fees for civil litigants, but the Court of Appeals has held that courts may not waive filing fees for criminal litigants. Given that there is no rational basis for this differential treatment, does the mandatory imposition of the $200 criminal filing fee violate equal protection?

3. Is the $200 criminal filing fee provided in RCW 36.18.020(2)(h) a discretionary LFO that can be appropriately waived in cases involving indigent defendants?

C. STATEMENT OF THE CASE

The State charged Baker with third degree assault against Centralia police officer John Mercer. CP 1-2, 25-26. Mercer detained Baker and was attempting to place Baker in his car; Baker allegedly initially refused to get in the backseat but then suddenly dove in. RP 33-34. According to Mercer, Baker's right leg kicked up toward Mercer's head: "His heel struck the brim of my hat, and the inside of his insole scraped across my high cheek." RP 35. Baker was then arrested for third degree assault. RP 36-37.

Baker testified that his leg got caught on the seat and he slipped, explaining his shoes were old, worn, and had no traction because he could not afford new shoes given his homelessness. RP 61. Baker denied he intended to hurt Mercer. RP 62.

The jury returned a guilty verdict. CP 24; RP 110-12. The trial court sentenced Baker to 38 months. CP 34-35; RP 119-20.

Defense counsel stated Baker was "unemployed and receives assistance from the state in the form of food stamps but is potentially employable upon his release." RP 118. The trial court then asked Baker,

> Mr. Baker, I have two questions to ask you, and the first has to do with your financial situation and your ability to earn a living once you get out of custody.
>
> Is there anything about you emotionally, physically, mentally, financially, whatever, that would prevent you from

being able to pay your financial obligations if I set them at a reasonable rate, say, $25 a month?

RP 118. Baker answered, "I would say not. I don't believe so, sir." RP 118.

Following the State's recommendation, the trial court imposed a $500 victim penalty assessment, $1,200 for court-appointed counsel, $1,000 for jail reimbursement, and a $200 criminal filing fee. CP 36-37; RP 119. The trial court declined to impose a $100 DNA collection fee because Baker's DNA had already been collected. CP 37; RP 121. The court ordered LFOs to bear 12 percent annual interest, authorized the Department of Corrections to immediately issue a notice of payroll deduction, and required Baker to begin payments at $10 per month from the date of judgment to increase to $25 following release. CP 37; RP 119-20.

Baker appealed. CP 43. He argued the trial court's single question about whether there was anything about Baker "emotionally, physically, mentally, financially, whatever" was inadequate to comply with RCW 10.01.160(3) and Blazina. Br. of Appellant at 4-10. Baker also argued the $200 criminal filing fee listed in RCW 36.18.020(2)(h) is not mandatory and requires a preimposition ability-to-pay inquiry. Br. of Appellant at 10-14.

The Court of Appeals majority concluded, "Baker's response to this inquiry was tantamount to a concession that he had the current or likely future ability to pay the discretionary LFOs and, thus, relieved the trial court

of any further obligation to inquire about his financial situation before imposing the LFOs." Appendix at 4. The majority declined to address Baker's arguments about the $200 criminal filing fee. Appendix at 5.

Judge Bjorgen dissented that the trial court's inquiry was insufficient under Blazina. Appendix at 7. He found it problematic that the trial court's question "effectively placed the burden on Baker to raise the specific features that were the court's responsibility to discuss under Blazina." Appendix at 8. Judge Bjorgen concluded this error was compounded by the trial court's statement to Baker that the rate of payment would be "reasonable," "say, $25 a month," given that "a person who pays $25 per month toward their LFOs at the statutory interest rate will owe the state more 10 years after conviction that when the LFOs were initially assessed. Blazina, 182 Wn.2d at 836." Appendix at 8. Finally, Judge Bjorgen faulted the trial court for not "seriously question[ing]" Baker's ability to pay because Baker was indigent under GR 34. Appendix at 8. Judge Bjorgen surmised, "The court's inquiry resulted in an unemployed homeless man on public assistance facing LFOs at a rate that likely assures his obligation will increase even if he makes every payment." Appendix at 8.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS DECISION CONFLICTS WITH BLAZINA AND ENCOURAGES TRIAL COURT LFO INQUIRIES THAT GRAVELY UNDERMINE THIS COURT'S INTERPRETATION OF RCW 10.01.160(3)

The trial court's inquiry of Baker, whether there was anything "emotionally, physically, mentally, financially, whatever," that would make him unable to pay $25 per month was inadequate under RCW 10.01.160(3), GR 34, and Blazina. Because the Court of Appeals decision conflicts with Blazina and undermines actual ability-to-pay inquiries, review is warranted under RAP 13.4(b)(1) and (4).

In Blazina, this court held that under RCW 10.01.160(3) "the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." 182 Wn.2d at 838. The Court of Appeals decision conflicts with this statement, given that it endorses the trial court's failure to inquire into Baker's debts, work history, education, assets, or anything else that might have informed it about Baker's ability to pay. And the trial court's failure was significant, given that it imposed $2,400 in discretionary LFOs even after it had heard Baker was unemployed and received government assistance in the form of food stamps. RP 118. Baker had also recently testified that he was homeless and could not afford basic

necessities, such as shoes. RP 61. Baker had also been diagnosed with anxiety disorder. RP 68-69. Baker almost certainly owed a significant amount in LFOs from other convictions dating back to 1994. CP 27-28. As Judge Bjorgen correctly concluded, the trial court's inquiry "placed the burden on Baker to raise the specific features that were the court's responsibility to discuss under Blazina." Appendix at 8. Indeed, the trial court put blinders on to avoid considering Baker's dire financial circumstances and the Court of Appeals endorsed this plain circumvention of Blazina and RCW 10.01.160(3). Review is appropriate under RAP 13.4(b)(1).

The Court of Appeals decision that Baker conceded he had the ability to pay also conflicts with Blazina. The trial court asked Baker whether he could pay $25 per month, calling that a "reasonable rate." RP 118. The trial court omitted any notification to Baker that, at that rate, he "will owe the state more 10 years after conviction than [he] did when the LFOs were initially assessed." Blazina, 182 Wn.2d at 836. Had Baker understood that the LFO order would subject him to indefinite jurisdiction of Lewis County Superior Court, he would likely have responded differently. The trial court, by leaving out necessary context, "only helped draw Baker to his equivocal assent to an assessment that would assure his debt would increase even if he made every payment." Appendix at 8 (Bjorgen, J.,

dissenting). The Court of Appeals' endorsement of the trial court's inquiry and treatment of Baker's "concession" contravenes this court's decision in Blazina, necessitating RAP 13.4(b)(1) review.

The Court of Appeals decision also conflicts with Blazina's directive to look to GR 34 for guidance. See 182 Wn.2d at 838-39. GR 34 specifies that persons who receive "assistance under a needs-based, means-tested assistance program such as" food stamps, "shall be determined to be indigent." GR 34(a)(3)(A)(v). A person whose household income is at or below 125 percent of the federal poverty level also "shall be determined to be indigent." GR 34(a)(3)(B). Baker received food stamps. CP 50; RP 118. Baker had no income from any source, no assets, no savings account, no checking account, and no real or personal property of any kind. CP 49-50. Had the trial court complied with Blazina and "seriously question[ed]" Baker's ability to pay under GR 34, it would not have imposed $2,400 in discretionary LFOs. Because of the Court of Appeals decision endorses and encourages trial courts not to comply with RCW 10.01.160 and Blazina, review is warranted under RAP 13.4(b)(1) and (4).

2. THIS COURT SHOULD REVIEW WHETHER THE "MANDATORY" IMPOSITION OF THE $200 CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION, GIVEN THAT SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER

Baker acknowledges he raised no equal protection claim against the $200 criminal filing fee in the Court of Appeals. However, an equal protection violation is constitutional error, which may be raised for the first time when seeking the Washington Supreme Court's review. State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983), rev'd on other grounds by State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989). In addition, Baker didn't raise the issue in the Court of Appeals because his counsel had not thought of it yet. RAP 1.2(a) specifies that the rules of appellate procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." Baker should not have to forgo a constitutional argument because his attorney failed to think of it sooner. Consistent with RAP 1.2(a), this court should consider Baker's equal protection claim and grant review of this issue pursuant to RAP 13.4(b)(3) and (4).

"Under the equal protection clause of the Washington State Constitution, article [I], section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Coria,

120 Wn.2d 156, 169, 839 P.2d 890 (1992). When a fundamental right or constitutionally cognizable suspect class is not at issue, "'a law will receive rational basis review.'" Id. at 308 (quoting State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). No fundamental right or suspect class is at issue here, so a rational basis requires that the legislation and the differential treatment alleged be related to a legitimate governmental objective. In re Det. of Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The purpose of RCW 36.18.020 is the collection of revenue from filing fees paid by both civil and criminal litigants to fund counties, county or regional law libraries, and the state general fund. See RCW 36.18.020(1) ("Revenue collected under this section is subject to division with the state under RCW 36.18.025 and with the county or regional law library fund under RCW 27.24.070 . . . ."). RCW 36.18.025 requires 46 percent of filing fee monies collected by counties to "be transmitted by the county treasurer each month to the state treasurer for deposit in the state general fund." RCW 27.24.070 requires that $17 or $7, depending on the type of fee involved, be deposited "for the support of the law library in that county or the regional law library to which the county belongs." Civil and criminal litigants who pay filing fees under RCW 36.18.020 are similarly situated with respect to the statute's purpose: their fees are

plainly intended to fund counties, county or regional law libraries, and the state general fund.

Although similarly situated, criminal and civil litigants are treated differently without any rational basis for different treatment considering the purpose of RCW 36.18.020. Civil litigants may obtain waiver of their filing fees. The comment to GR 34 directly states as much:

> This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); . . . domestic violent prevention surcharges established pursuant to RCW 36.18.020(2)(b) . . . .

(Emphasis added.) Civil litigants have no constitutional right to access the courts. Criminal litigants do. Yet, according to State v. Gonzales, 198 Wn. App. 151, 154-55, 392 P.3d 1158 (2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), and State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), criminal litigants cannot obtain the same waivers of filing fees that civil litigants can. Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and regional and county law libraries, interpreting and applying the RCW 36.18.020(2)(h)

criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection. Given that this fee is treated as mandatory and imposed in many Washington counties, this court should grant review to address this constitutional question of substantial public interest pursuant to RAP 13.4(b)(3) and (4).

3. THIS COURT SHOULD GRANT REVIEW TO DETERMINE, ONCE AND FOR ALL, WHETHER THE $200 CRIMINAL FILING FEE IS DISCRETIONARY OR MANDATORY

RCW 36.18.020(2)(h) provides that a criminal defendant "shall be liable" for a $200 filing fee and that the clerk "shall collect" it. Divisions Two and Three of the Court of Appeals have held this statute imposes a mandatory obligation. Gonzales, 198 Wn. App. at 154-55; Stoddard, 192 Wn. App. at 225; Lundy, 176 Wn. App. at 102. None of these cases provides or even attempts any statutory analysis. These Court of Appeals decisions are incorrect and Baker asks this court to grant review pursuant to RAP 13.4(b)(4) to make an authoritative determination that the criminal filing fee provided in RCW 36.18.020(2)(h) is not mandatory.

a. The plain meaning of the word "liable" does not denote a mandatory obligation

By directing that a defendant be "liable" for the criminal filing fee, the legislature did not create a mandatory fee. The term "liable" signifies a situation in which legal liability might or might not arise. Black's Law

Dictionary confirms that "liable" might make a person obligated in law for something but also defines liability as a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990); see also WEBSTER'S THIRD NEW INT'L DICTIONARY 1302 (1993) (defining liable as "exposed or subject to some usu. adverse contingency or action : LIKELY"). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

Opinions addressing this challenge have overlooked the plain meaning of the word "liable." But there is no difference in meaning between "shall be liable" and "may be liable," however. From mandatory liability a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature's use of the word "liable" in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only be overlooking the meaning of the word "liable" have Divisions Two and Three reached their contrary result.

b. The difference in language in other provisions of RCW 36.18.020(2) supports Baker's interpretation that "shall be liable" does not impose a mandatory obligation

The Court of Appeals has simplistically reasoned that because RCW 36.18.020(2) contains the word "shall," the legislature intended the criminal filing fee to be mandatory. This misapprehends that the "'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). Baker's nonmandatory interpretation of RCW 36.18.020(2)(h) is supported by the language of other provisions in the same statute.

The beginning of the statutory subsection reads, "Clerks of superior courts shall collect the following fees for their official services," and then lists various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word "liable" or "liability." RCW 36.18.020(2)(a) ("In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred

dollars . . . ." (emphasis added)); RCW 36.18.020(2)(b) ("Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(c) ("For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(d) ("For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars." (emphasis added)); RCW 36.18.020(2)(e) ("For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(f) ("In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(g) ("For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars." (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), give a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing

only liability for a fee. "Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word." Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) ("When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings."). The Court of Appeals decisions conflict with these cases and this canon of statutory interpretation, warranting review under RAP 13.4(b)(1).

Because RCW 36.18.020(2)(h) contains the only provision in the statute where "liable" appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

c. RCW 10.46.190 provides that every person convicted of a crime "shall be liable to all the costs of the proceedings against him or her," yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

> Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a

> jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime "shall be liable" for all the costs of the proceedings.

But, even though RCW 10.46.190 employs the same "shall be liable" language as RCW 36.18.020(2)(h), the legislature and this court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs "unless the defendant is or will be able to pay them." This court confirmed this in Blazina. 182 Wn.2d at 838-39 (holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary LFOs). Even though a defendant "shall be liable" for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature's use of the phrase "shall be liable" does not impose a mandatory obligation but a contingent one. RCW 36.18.020(2)(h)'s criminal filing fee should likewise be interpreted as discretionary.

d. The legislature knows how to make LFOs mandatory and chose not to do so with the criminal filing fee

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA is recognized as a mandatory

fee, given that it states, "When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). This statute is unambiguous in its command that the VPA shall be imposed.

The DNA collection fee is likewise unambiguous. It states, "Every sentence imposed for a crime specific in RCW 43.43.754[1] must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the legislature mandated a $100 DNA fee to be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. It does not state that a criminal sentence "must include" the fee or that the fee "shall be imposed," but that the defendant is merely liable for the fee. Despite that the legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, the legislature did not do so in this statute.

This court recently acknowledged as much in State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016), observing that RCW 36.18.020(2)(h)'s criminal filing fee had merely "been treated as mandatory by the Court of Appeals." That this court would identify those LFOs

[1] RCW 43.43.754(1)(a) requires the collection of a biological sample from "[e]very adult or juvenile individual convicted of a felony . . . ."

designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction. The post-Duncan Court of Appeals decisions holding the filing fee is mandatory do not address this point, placing them in conflict with Duncan. RAP 13.4(b)(1).

Given the contingent meaning of the word "liable," the Duncan court seemed to indicate that the meaning of the phrase "shall be liable" is, at best, ambiguous with respect to whether it imposes a mandatory obligation. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Baker's favor. Jacobs, 154 Wn.2d at 601. To the extent that the Court of Appeals decisions conflict with the rule-of-lenity precedent of this court, review is warranted under RAP 13.4(b)(1).

e. Judicial notice is appropriate that not all superior courts agree the criminal filing fee is mandatory

In several counties, including Washington's most populous, King, the $200 filing fee is always waived. Baker asks this court to take judicial notice of the variance in treatment of the criminal filing fee when determining whether to take review. "Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy

and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). This court should consult any of the hundreds of judgments and sentences from criminal cases available in pending cases to establish that not all courts, counties, and judges agree that the $200 criminal filing fee is mandatory. Given the disparity, the mandatory or discretionary nature of the criminal filing fee presents an issue of substantial public interest that should be authoritatively determined by this court, once and for all. RAP 13.4(b)(4).

E. CONCLUSION

Because Baker meets the review criteria in RAP 13.4(b)(1), (3), and (4), his petition should be granted.

DATED this 7th day of June, 2017.

Respectfully submitted,

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

May 9, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALLEN CHAGLUAK BAKER, Appellant.	No. 48651-2-II UNPUBLISHED OPINION

MELNICK, J. – Allen Baker appeals from the judgment and sentence which ordered him to pay legal financial obligations (LFOs) following his conviction for assault in the third degree. He asserts that the trial court failed to adequately inquire about his ability to pay the LFOs before imposing them.[1] Baker also requests that we waive the imposition of appellate costs if the State prevails in this appeal. Because Baker conceded at sentencing that he had the likely future ability to pay the proposed LFOs, the trial court did not err by failing to inquire further about his financial circumstances before imposing discretionary LFOs. Additionally, we refer the matter of appellate costs to a commissioner of this court if the State files a cost bill and if Baker objects to it. We affirm.

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[1] Baker also asserts that his trial counsel was ineffective for failing to object to imposition of discretionary LFOs and for failing to ensure the trial court conduct a proper colloquy on Baker's ability to pay. Baker merely makes this assertion. He neither argues it nor cites to authority. We do not consider the assertions. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (this court will not consider a challenge unsupported by argument or authority). Although we decline to address Baker's LFO challenge in the context of an ineffective assistance of counsel claim, we exercise out discretion to address the issue under RAP 2.5 as discussed below.

FACTS

A jury convicted Baker of assault in the third degree. At a subsequent sentencing hearing, the State requested LFOs that included a $500 victim assessment, a $200 criminal filing fee, $1,200 for court appointed defense counsel, $1,000 for jail reimbursement, and a $100 DNA (deoxyribonucleic acid) collection fee. Baker's lawyer told the trial court, "I believe Mr. Baker at this time, of course, is unemployed and receives assistance from the state in the form of food stamps but is potentially employable upon his release." Report of Proceedings (RP) at 118. The following exchange then took place:

> [Trial court]: All right. Mr. Baker, I have two questions to ask you, and the first has to do with your financial situation and your ability to earn a living once you get out of custody.
>
> Is there anything about you emotionally, physically, mentally, financially, whatever, that would prevent you from being able to pay your financial obligations if I set them at a reasonable rate, say, $25 a month?
>
> [Baker]: I would say not. I don't believe so, sir.

RP at 118. The trial court did not inquire further about Baker's ability to pay LFOs. It sentenced Baker within the standard range and imposed the State's recommended LFOs, except for the DNA collection fee. Baker appeals from the portion of his sentence imposing discretionary LFOs.

ANALYSIS

I. LEGAL FINANCIAL OBLIGATIONS

Baker contends that the trial court erred by failing to make an adequate inquiry of his financial situation before imposing discretionary LFOs. We disagree.[2]

[2] As an initial matter, the State contends that Baker has not properly preserved for our review his contention with the imposition of LFOs. Assuming without deciding that Baker failed to preserve his contention with his LFOs, we nonetheless exercise our discretion under RAP 2.5 to address the issue. *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015).

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.

This requirement applies only to the imposition of discretionary LFOs. *State v. Mathers*, 193 Wn. App. 913, 918-24, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015 (2016). It is undisputed that the trial court inquired about Baker's ability to pay discretionary LFOs before imposing them. Baker argues, however, that the trial court's inquiry was insufficient under RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Blazina held that RCW 10.01.160(3) requires trial courts to make an individualized inquiry into a defendant's current and likely future ability to pay discretionary LFOs before imposing them. 182 Wn.2d at 837-39. *Blazina* further held that the record must reflect that the trial court made this required inquiry. 182 Wn.2d at 838-39. "[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina*, 182 Wn.2d at 838.

Although the issue of what constitutes an adequate inquiry under RCW 10.01.160(3) was not squarely before it, *Blazina* provided guidance to trial courts.

> Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.
>
> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a

> needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Blazina, 182 Wn.2d at 838–39.

Here, the trial court's question to Baker regarding whether he had any emotional, physical, mental, financial, or other reason why he could not pay the proposed discretionary LFOs was clearly designed to determine whether he had the current or likely future ability to pay the LFOs, as required under RCW 10.01.160(3) and *Blazina*. Baker's response to this inquiry was tantamount to a concession that he had the current or likely future ability to pay the discretionary LFOs and, thus, relieved the trial court of any further obligation to inquire about his financial situation before imposing the LFOs. Although a more thorough inquiry may have been preferable notwithstanding Baker's concession, the trial court did not err by failing to do so under these circumstances.

While acknowledging that, on its surface, the trial court's question to Baker would appear to be a sufficient inquiry of his ability to pay discretionary LFOs, the dissent finds reversible error in its failure to disregard Baker's own concession and further scrutinize Baker's financial situation. Although *Blazina* unequivocally places the burden on trial courts to inquire about a defendant's ability to pay LFOs, trial courts are neither required to advocate for a defendant nor produce evidence supporting a position on the defendant's financial situation. 182 Wn.2d at 837-39. To the contrary, a defendant and his or her attorney always retain the responsibility of making arguments and producing evidence supporting them. In holding that the trial court's inquiry was sufficient, we are aware of the significant burden LFOs may place upon defendants such as Baker. *See e.g., Blazina*, 182 Wn.2d at 835-37. However, where a defendant does not merely fail to object

to the imposition of discretionary LFOs but instead affirmatively concedes his or her current or likely future ability to pay those LFOs, a trial court does not err by imposing the LFOs absent further inquiry.

Furthermore, where a defendant's concession regarding his or her ability to pay is mistaken, a defendant unable to pay LFOs is not without recourse. RCW 10.01.160(4) provides that a defendant ordered to pay costs may petition the sentencing court at any time for remission of all or part of the amount owing and may be granted relief upon a showing that the amount due will impose a manifest hardship on the defendant or the defendant's immediate family. In addition, interest on LFOs, excluding restitution, may be reduced or waived. RCW 10.82.090(2). Because we hold that the trial court did not err in failing to conduct a more thorough inquiry before imposing discretionary LFOs, we need not address Baker's contention that the $200 criminal filing fee was a discretionary LFO.

II. APPELLATE COSTS

Baker argues that, should the State prevail on appeal, we should not require him to pay appellate costs. He opposes appellate costs in light of *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016), asserting that he does not have the ability to pay because he is indigent. A commissioner of this court will consider whether to award appellate costs under RAP 14.2 if the State decides to file a cost bill and if Baker objects to that cost bill.

We affirm.

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.

Melnick, J.

I concur:

Lee, J.

BJORGEN, C.J. (dissenting) — The trial judge's inquiry into Allen Baker's ability to pay legal financial obligations (LFOs) was undoubtedly a well-intended attempt to comply with the requirements of *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Nonetheless, for several reasons the trial judge's inquiry was insufficient under that decision.

In discussing Baker's ability to pay LFOs defense counsel stated, "I believe Mr. Baker at this time, of course, is unemployed and receives assistance from the state in the form of food stamps but is potentially employable upon his release." Report of Proceedings (RP) at 118. The following exchange then took place:

> [Trial court]: All right. Mr. Baker, I have two questions to ask you, and the first has to do with your financial situation and your ability to earn a living once you get out of custody.
>
> Is there anything about you emotionally, physically, mentally, financially, whatever, that would prevent you from being able to pay your financial obligations if I set them at a reasonable rate, say, $25 a month?
>
> [Baker]: I would say not. I don't believe so, sir.

RP at 118. The trial court did not inquire further into Baker's ability to pay LFOs.

On its surface, the question, "[i]s there anything about you emotionally, physically, mentally, financially, whatever, that would prevent you from being able to pay" might seem a comprehensive inquiry into the subject. However, the surface sheen of lexical meaning is not always a true guide to the effect of a statement in the real world. Considering the lack of specificity in this inquiry, its shifting of responsibility to the defendant to think of the absent specifics, and its context, the inquiry neither complies with the requirements of *Blazina* nor serves the critical purposes of that decision.

First, *Blazina* categorically states that in this inquiry, "the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at

838. The trial court here did not inquire into Baker's debts, assets, education, work experience or any other specific characteristic. Instead, by asking whether there was anything "emotionally, physically, mentally, financially, whatever", it effectively placed the burden on Baker to raise the specific features that were the court's responsibility to discuss under *Blazina*.

By itself, this sort of inquiry would be a closer call. Its inadequacy, however, was compounded by asking whether there was anything preventing payment "at a reasonable rate, say, $25 a month." RP at 118. The low rate and the court's characterization of it as reasonable surely inclines one to assent. Our Supreme Court, though, has recognized that on average, a person who pays $25 per month toward their LFOs at the statutory interest rate will owe the state more 10 years after conviction than when the LFOs were initially assessed. *Blazina*, 182 Wn.2d at 836. Thus, the court's characterization of its proposed LFOs as a sort of bargain was inadvertently misleading. It only helped draw Baker to his equivocal assent to an assessment that would assure his debt would increase even if he made every payment.

Finally, in addition to its strong and precise directives, the Supreme Court in *Blazina* held also that if "someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Baker was indigent under GR 34. Clerk's Papers at 44. However, instead of respecting the admonition of GR 34, the court's inquiry failed to ask about the specific features required by *Blazina*, improperly shifted the responsibility to Baker to raise them, and drew Baker to assent to payments that would only increase his debt if he made them. In no manner can this be deemed serious questioning of Baker's ability to pay.

The court's inquiry resulted in an unemployed homeless man on public assistance facing LFOs at a rate that likely assures his obligation will increase even if he makes every payment.

No inquiry was made into Baker's debts, assets, education or other features to determine if he could avoid this guaranteed delinquency by making greater payments. Nor was any inquiry made into these specifics to determine if he could even make the minimal payment imposed. This cursory inquiry is inconsistent with the directives of *Blazina* and works directly against its vital purposes. This case should be remanded to the trial court with instructions to inquire into Baker's ability to pay discretionary LFOs in a manner that fully honors *Blazina*.

Bjorgen, C.J.

BJORGEN, C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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