

FILED
February 16, 2016
Court of Appeals
Division I
State of Washington

NO. 73863-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

GRIFFIN HOWLAND,

Appellant.

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

The Honorable Bruce I. Weiss, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER HOWLAND'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING A DISCRETIONARY LEGAL FINANCIAL OBLIGATION.....	3
2. APPEAL COSTS SHOULD NOT BE IMPOSED.	10
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000)	10
<u>State v. Adamy</u> , 151 Wn. App. 583, 213 P.3d 627 (2009)	8
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015)	5, 7, 9, 10
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009)	8
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 755 (2013)	4
<u>State v. Mahone</u> 98 Wn. App. 342, 989 P.2d 583 (1999)	9
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003)	8
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997)	8
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987)	7

FEDERAL CASES

<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	7
---	---

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Former RCW 10.99.080(5)	4
Laws of 2015 c. 265 § 24	4
RAP 2.5	7
RAP 14	10
RCW 7.68.035	3
RCW 9.94A.753	2
RCW 9.94A.760	3
RCW 10.01.160	1, 3, 5, 8
RCW 10.73.160	10
RCW 10.99.080	2, 4
RCW 43.43.7541	4

A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority when it imposed a discretionary legal financial obligation (LFO) without making an individualized inquiry into appellant's current and future ability to pay.

Issues Pertaining to Assignment of Error

1. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed a discretionary LFO without first considering appellant's current and future ability to pay?

2. Was appellant's trial counsel ineffective for failing to object to imposition of the discretionary LFO?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged Griffin Howland with one count of Assault in the Second Degree (domestic violence), alleging that he assaulted Krista Anderson, his girlfriend at the time. CP 59-63. A jury convicted Howland and, on a special verdict form, found that Howland and Anderson were members of the same household at the time of the assault. CP 24-25; 1RP¹ 175.

At sentencing, defense counsel explained that Howland had lost his job as an exterminator because of the charge in this case.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – July 27-28, 2015; 2RP – August 5, 2015.

2RP 4. And, since he had now been convicted of felony assault, Howland was no longer eligible to obtain the license necessary to continue in that line of work. 2RP 4. Counsel asked the court to “waive any non-mandatory financial penalties.” 2RP 5.

The Honorable Bruce Weiss imposed a standard range 9-month sentence. CP 15-16; 2RP 7. In addition to imposing mandatory LFOs, Judge Weiss also imposed one non-mandatory LFO: a \$100.00 domestic violence penalty under RCW 10.99.080. CP 18. In doing so, Judge Weiss did not meaningfully consider Howland’s ability to pay. See 2RP 8. Rather, Howland’s judgment merely contains the following preprinted, boilerplate language:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds that the defendant is an adult and is not disabled and therefore the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 15. Judge Weiss also ordered Howland to begin making payments on his LFOs within 90 days of his release from jail, pay \$25.00 per month toward his obligation, that the LFOs will bear interest until paid, that the total obligation be paid within four years,

and that Howland pay any costs associated with collection of these LFOs. CP 18, 69; 2RP 8.

Howland timely filed his Notice of Appeal. CP 1-12. As part of the paperwork associated with the appeal, Howland filed a declaration indicating he was unemployed and did not own or have any financial interest in real or personal property. CP 68. He was found to be indigent and permitted to appeal at public expense. CP 64-66.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER HOWLAND'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING A DISCRETIONARY LEGAL FINANCIAL OBLIGATION.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The trial court imposed two mandatory LFOs: a \$500 crime victim penalty assessment and a \$100 biological sample fee. CP 18; RCW 7.68.035(1)(a) (penalty assessment "shall be imposed"); RCW

43.43.7541 (every sentence “must include a fee of one hundred dollars” for collection of biological samples); State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) (identifying both LFOs as mandatory).

The court also imposed a \$100 domestic violence penalty under former RCW 10.99.080.² This statute’s permissive language reveals it to be a discretionary LFO. See former RCW 10.99.080(1) (courts “may impose a penalty assessment not to exceed one hundred dollars” for a crime involving domestic violence) (emphasis added). Similarly, the statute’s suggestion that judges seek victims’ input regarding this penalty reveals its discretionary nature:

When determining whether to impose a penalty assessment under this section, judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution.³

Former RCW 10.99.080(5) (emphasis added).

² The statute was modified slightly in 2015 to apply to “any adult offender” rather than “any person.” See Laws of 2015 c. 265 § 24.

³ There is no indication in the record that Judge Weiss sought Krista Anderson’s input on this subject.

Howland is unemployed, will no longer be able to work as an exterminator, and owns no real or personal property. Yet, Judge Weiss failed to make an individualized inquiry into Howland's present and future ability to pay before imposing the discretionary domestic violence penalty. In doing so, he exceeded his statutory authority, and this LFO should be vacated.

The Washington Supreme Court recently recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those "who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. at 837.

The Blazina court thus held that RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. Id. at 837-39. This

requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” Id. at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court further directed courts to look to GR 34 for guidance. Id. at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then “courts should seriously question that person’s ability to pay LFOs.” Id. at 839. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. at 834.

At sentencing, Judge Weiss failed to make an individualized inquiry into Howland’s current or future ability to pay LFOs. Instead, he relied on boilerplate language in the judgment indicating that any able-bodied adult has the current or future ability to pay LFOs. See CP 15. Blazina holds this is insufficient to justify a discretionary LFO.

182 Wn.2d at 838. This court should accordingly vacate the discretionary LFO and remand for resentencing. Id. at 839.

In response, the State may ask this court to decline review of the erroneous LFO order in the absence of an objection to that LFO. The Blazina court held that the Court of Appeals “properly exercised its discretion to decline review” under RAP 2.5(a). 182 Wn.2d at 834. The court nevertheless concluded that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Id. Asking this court to decline review would essentially ask this court to ignore the serious consequences of LFOs. This court should instead confront the issue head on by vacating Howland’s discretionary LFO and remanding for resentencing.

A second reason this Court should review the issue is that, assuming it is otherwise waived, Howland was denied his right to the effective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney’s performance was

deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to all discretionary LFOs fell below the standard expected for effective representation. Counsel clearly sought to prevent imposition of these LFOs because he asked the court to waive them. 2RP 5. There was no reasonable strategy for not also insisting that the judge comply with the requirements of RCW 10.01.160(3) regarding discretionary financial liabilities. See, e.g., State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel's failure in this regard constitutes deficient performance.

Counsel's failure to object to discretionary LFOs was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in a remission hearing to set aside LFOs, Howland will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160 (4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Howland incurs no possible benefit from LFOs. Given his indigency (as established by undersigned counsel's appointment on appeal) there is a substantial likelihood the trial court would have waived all discretionary LFOs had it properly considered Newman's current and future ability to pay. Indeed, the court imposed no other discretionary LFOs beyond the one – the domestic violence penalty – requested by the State. See 2RP 3; CP 18. Howland's constitutional right to effective assistance of counsel was violated. Therefore, this court should also vacate this discretionary LFO on this alternative basis.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Howland to be indigent and entitled to appointment of appellate counsel at public expense. CP 64-66. If Howland does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

As discussed above, trial courts must make individualized findings of current and future ability to pay before they impose LFOs. Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Howland’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Without a basis to determine that Howland has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

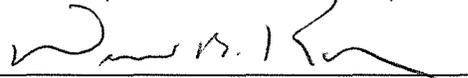
D. CONCLUSION

This court should vacate the domestic violence penalty and remand for proper consideration of Howland's financial circumstances.

DATED this 16th day of February, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73863-1-I
)	
GRIFFIN HOWLAND,)	
)	
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 16TH DAY OF FEBRUARY 2016 2014, 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] GRIFFIN HOWLAND
 NO. 843635
 SNOHOMISH COUNTY JAIL
 3025 OAKES AVNUE
 EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF FEBRUARY 2016.

X *Patrick Mayovsky*