NO. 42728-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLAS BLAZINA,

Appellant.

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

The Honorable Edmund Murphy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

In his opening brief, appellant Nicholas Blazina asserts the trial court failed to follow the statutory mandate that it consider his ability to pay restitution and other legal financial obligations (LFOs) before ordering these be paid. Brief of Appellant (BOA) at 11-14. In response, the State claims the issue was not preserved for review, the record sufficiently shows the trial court did consider this factor, and the issue is not ripe. Brief of Respondent (BOR) at 7-12. For reasons stated below, the State is incorrect.

Case law does not support the State's claim that a defendant cannot challenge for the first time on appeal an order to pay LFOs where the trial court failed to first consider the defendant's ability to pay. See, State v. Bertrand, 165 Wn. App. 393, 395, 405, 267 P.3d 511 (2011) (explicitly noting issue was not raised at sentencing hearing, but nonetheless reviewing the issue and striking sentencing court's unsupported finding); see also, State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

Second, contrary to the State's assertion, the record does not suggest the trial court affirmatively considered Blazina's ability to pay. There is nothing beyond the preformatted language in the

sentencing form to support this assertion. While the State argues there was sufficient evidence to suggest Blazina had the present or future ability to pay (BOR at 9), the record also indicates the opposite may be true given the large amount of fees and restitution ordered, Blazina's felony conviction record, and his lengthy incarceration on this matter and others in Alabama (RP 516-525). Given this record, there is no way for this Court to conclude that the trial court made an individualized judicial determination of Blazina's ability to pay. As such, remand is required. Bertrand, 165 Wn. App. at 404-05.

Third, the State's argument that this issue is not ripe for review is also without merit. The State cites cases holding that a challenge to the imposition of the court-ordered LFOs is not ripe until the government decides to collect them. BOR at 10 (citing State v. Smits, 152 Wn. App. 514,216 P.3d 1097 (2009) and citing State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116, 837 P.2d 646 (1991)). However, this does not mean that the defendant cannot challenge the trial court's failure to make key findings that are a necessary prerequisite to support such an order. As Bertrand shows, a defendant may challenge the requisite finding and, if successful, the appellate court will then remand with instructions for

the trial court to consider whether the defendant has the present or future ability to pay. Bertrand, 165 Wn. App. at 405.

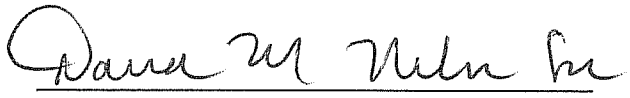
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this court should remand the case for further consideration.

DATED this 16th day of July, 2011

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC.



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