

NO. 46227-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL DANIEL BERTLING, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 13-1-04512-7

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the imposition of legal financial obligations (LFOs) not ripe for review where defendant presents no evidence that the State has attempted enforcement?
2. Has defendant failed to preserve the issue for review when he failed to object to the imposition of LFOs below?
3. Whether the trial court properly imposed LFOs where defendant expressly agreed to them as part of his plea agreement and where there is evidence that the court considered defendant's present or future ability to pay?

B. STATEMENT OF THE CASE.

On November 25, 2013, the Pierce County Prosecutor's Office charged appellant, Michael Bertling ("defendant"), with one count of failure to register as a sex offender. CP 1.

On April 28, 2014, defendant pleaded guilty as charged. CP 7–16. In defendant's Statement on Plea of Guilty, he admitted that "Between 10/1/13 and 11/12/13 , in Pierce County, WA, I failed to register as

required by law, after having been convicted of a felony sex offense that requires me to register."¹ CP 7–16.

On the same day, the court sentenced defendant to 12 months confinement and imposed the following legal financial obligations (LFOs): \$500 (Crime Victim Assessment Fee); \$100 (DNA Database Fee); \$400 (Court-Appointed Attorney Fees and Defense Costs); and \$200 (Criminal Filing Fee). CP 19–33; RP 5, 10.²

Defendant timely filed his notice of appeal on May 5, 2014. CP 37.

On appeal, defendant does not challenge the validity of his plea, but instead challenges the legal financial obligations that he agreed to when he entered his plea.

C. ARGUMENT.

1. THE MATTER IS NOT RIPE FOR REVIEW WHERE DEFENDANT PRESENTS NO EVIDENCE THAT THE STATE HAS ATTEMPTED TO ENFORCE THE LFOs.

Challenges to orders establishing legal financial obligations (LFOs) are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. *State v. Lundy*, 176 Wn. App. 96,

¹ Defendant has a conviction for child rape in the third degree. CP 17–18 (Stipulation on Prior Record); CP 19–33. This conviction requires him to register as a sex offender indefinitely. RCW 9A.44.130.

² The State will refer to the Verbatim Report of Proceedings by RP followed by page number.

108, 308 P.3d 755 (2013); *see also State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation"). In the present case, there is nothing in the record showing that the State has attempted to enforce the LFOs. Therefore, the issue is not yet ripe for review, and this Court should decline to review it.

Defendant erroneously relies on *State v. Bahl* to assert his claim is ripe. 164 Wn.2d 729, 193 P.3d 678 (2008). The court in *Bahl* held: "a defendant may assert a preenforcement *vagueness challenge* to sentencing conditions if the challenge is sufficiently ripe." *Id.* at 751 (emphasis added). The court specifically distinguishes a vagueness challenge, which may be ripe for review before enforcement, from challenges to the imposition of LFOs, which are not ripe. *Id.* at 749. Defendant fails to argue why this Court should address the LFOs under a vagueness challenge, and thus the issue is not ripe for review.

2. DEFENDANT HAS NOT PRESERVED THE
ISSUE FOR REVIEW WHERE HE FAILED TO
OBJECT TO THE IMPOSITION OF LFOs
BELOW.

Failure to object precludes raising an issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496

(1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. See *State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

During sentencing, defendant was completely silent and made no objection as to the \$500 Crime Victim Assessment Fee and the \$200 Criminal Filing Fee. Regarding the \$400 DAC fee, defense counsel asked the court to "perhaps not impose" it, and likewise asked the court to "maybe not impose" the \$100 DNA Database Fee. RP 8. Counsel's comments appear to be mere suggestions, not an objection the imposition of those fees.

Defendant attempts to persuade the Court to accept review on policy grounds: that the process for requesting the modification of an LFO order when it is enforced is unduly burdensome on defendants. Br.App. at 10–13. However, defendant mischaracterizes the legal processes required. Although the legal system may be daunting to those without professional training, thousands of people across Washington State file motions pro se every day. A motion is simply required to be in writing, state the grounds for relief, and the relief sought. CR 7. Making a motion to modify LFOs is no more complicated than challenging a traffic citation or changing one's name. Further, defendant was afforded an opportunity to easily object to paragraph 2.5 of the Judgment and Sentence, which required no

more than a check mark and a sentence of explanation. CP 19–33.

Defendant failed to take the opportunity to object, and this Court should decline to allow him to object for the first time on appeal.

3. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS WHERE DEFENDANT EXPRESSLY AGREED TO THEM IN HIS PLEA AGREEMENT AND WHERE THERE IS EVIDENCE THAT THE COURT CONSIDERED DEFENDANT'S PRESENT OR FUTURE ABILITY TO PAY.

Defendant expressly agreed to be subject to the legal financial obligations he now complains of on appeal by entering his plea of guilty, which states in relevant part that:

5. I Understand I Have the Following Important Rights, and I Give Them Up by Pleading Guilty:

(e) In addition to sentencing me to confinement, the judge will order me to pay \$500 as a victim's compensation fund assessment and any mandatory fines or penalties that apply to my case. [...] The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.

CP 7–16 (emphasis in original).

Defendant argues that the record does not support the imposition of legal financial obligations, but any alleged deficiency in the record is directly attributed to the fact that defendant agreed to the fees prior to sentencing. *See* Br.App. at 5 ("The boilerplate language in section 2.5 of the Judgment and Sentence does not establish [that] the trial court actually gave independent thought and consideration to the facts of Bertling's

case."). Defendant's argument completely overlooks that he agreed to his legal financial obligations as part of his plea agreement.

Moreover, the question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013). A decision by the trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). If the appellant fails to meet this burden, the decision stands. *State v. Tracy*, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005) *aff'd*, 158 Wn.2d 683, 147 P.3d 559 (2006). Formal findings of fact about a defendant's present or future ability to pay LFOs are not required, but the record must be sufficient for the appellate court to review the trial court judge's decision under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1914, 287 P.3d 10 (2012).

Here, there is sufficient evidence in the record that the trial court considered defendant's ability to pay. Section 2.5 of defendant's Judgment and Sentence reflects as much:

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 has the likely future ability to pay the legal financial obligations imposed herein.

CP 19–33 (emphasis added). The content of section 2.5 (that the court considered defendant's ability to pay) is supported by the record. Notably, defense counsel stated that "I want [defendant] to be able to get back out of custody, **get his job**, do everything he needs to do and *try to pay off these court fines*, so he can restore his rights." RP 8 (emphasis added). The court was permitted to consider defense counsel's statement that defendant had a job in evaluating defendant's present and future ability to pay LFOs.³ Defendant's argument that "there was no specific evidence before the trial court regarding Bertling's past employment *or his future* education opportunities or *employment prospects*" is unsupported by the record. Br.App. at 5.

The evidence shows that the trial court considered defendant's financial situation as required by RCW 10.01.160. Defendant has failed to show the trial court judge acted in a clearly erroneous manner.

³ And, as argued above, any lack of on the record consideration of defendant's ability to pay is directly attributed to defendant's earlier agreement to the LFOs.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this court affirm defendant's conviction and sentence.

DATED: NOVEMBER 10, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

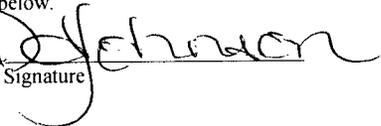


CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Chris Bateman
Rule 9

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The undersigned certifies that on this day she delivered by ~~US-mail~~ ^{email} or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature

PIERCE COUNTY PROSECUTOR

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