

NO. 47132-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

FOREST NAILLON,

Appellant.

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

The Honorable Jack Nevin, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to take into account appellant's financial circumstances before imposing discretionary legal financial obligations.

2. Trial counsel's failure to object to the discretionary legal financial obligations denied appellant effective assistance of counsel.

Issues pertaining to assignments of error

1. Does the trial court's failure to comply with RCW 10.01.160(3) when imposing discretionary legal financial obligations as part of appellant's sentence require remand?

2. Was appellant's trial attorney ineffective for failing to object to the imposition of discretionary legal financial obligations?

B. STATEMENT OF THE CASE

1. Procedural History

On September 22, 2014, the Pierce County Prosecuting Attorney charged appellant Forest Naillon with unlawful possession of a stolen vehicle and making or possessing motor vehicle theft tools. CP 1-2; RCW 9A.56.068 and RCW 9A.56.140; RCW 9A.56.063. The case proceeded to jury trial before the Honorable Jack Nevin, and the jury returned guilty verdicts. CP 62-63. The court imposed concurrent standard range

sentences of 26 months on the felony and 364 days on the misdemeanor. CP 73, 80-84. Naillon filed this timely appeal. CP 87.

2. Substantive Facts

On September 19, 2014, Dior Noel's car was stolen from behind a Chevron station in Puyallup, where Noel was working. 1RP¹ 77-79. She had just bought the car, a 1990 Toyota Camry, a day or two before for \$1400. 1RP 80. Noel reported the car stolen. 1RP 80. When police asked if she knew who might have taken the car, she described a homeless man who had been hanging around the gas station. 1RP 88-89. She thought he might have taken her car because he had been riding a bicycle, and the bicycle was abandoned where her car had been. 1RP 101.

Later that evening, Noel's nephew, Joshua Wetherbee, was in the Walmart parking lot about ten blocks away from the Chevron station, when Forrest Naillon approached and asked for a ride to his car. Naillon said the car was parked at the Fred Meyer parking lot, across the street from the Chevron. 1RP 109. Wetherbee agreed to give Naillon a ride, and when they got to the Fred Meyer parking lot, Naillon directed him to an older car in the lot, saying he ran out of gas and needed gas money. 1RP 110. Wetherbee thought the car looked like his aunt's car, which he knew had been stolen. After dropping Naillon off, Wetherbee drove

¹ The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—12/9-10/14; 2RP—12/15-16/14; 3RP—12/29/14, 1/16/15.

around the lot and called Noel to confirm that the car was hers. Once he had done so, he called 911. 1RP 111-12. Wetherbee parked his car and waited for Noel and the police to arrive, keeping his aunt's car in view. 1RP 112.

Wetherbee testified that he never saw Naillon try to get into the car. 1RP 115. At some point Naillon told Wetherbee he needed a metal file. 1RP 115. Wetherbee did not tell Naillon that he had called the police, although he believed Naillon suspected he had. 1RP 124. Naillon told Wetherbee that he had found \$500 and used it to purchase the car, but he had a bad feeling about the car and wasn't going to move it until the next day. 1RP 129-31.

Noel and her daughter and son arrived at the Fred Meyer parking lot about 20 minutes after Wetherbee called. 1RP 81, 91. She called 911 and remained in her son's van on the phone with the dispatcher until officers arrived. 1RP 81, 83. She described what was happening, saying that Naillon and Wetherbee were standing outside the car. She never said anything about Naillon opening the door of her car. 1RP 93-94. Noel testified at trial, however, that while she was waiting for police to arrive she saw Naillon reach into the car behind the driver's seat and remove a sweater or coat. 1RP 83.

Deputy James Maas responded to the Fred Meyer parking lot. 1RP 140. He spoke to Wetherbee and Noel, who pointed out Naillon. RP 141. Maas then approached Naillon and asked if the Toyota was his car. Naillon said he had bought it that day from James Haggerdorn, but he was leaving it there overnight. 1RP 143. Naillon said he had met Haggerdorn at the Chevron, where the car was located. They agreed on a price of \$500, Haggerdorn gave him a bill of sale, and then Haggerdorn drove him in the car to the Fred Meyer parking lot. 1RP 145-46. Naillon said he got a bad feeling about the car after buying it, and it was going to sit there until the next day when Haggerdorn returned and they went together to the DMV to put the title in Naillon's name. 1RP 147. Naillon had a set of four keys which Haggerdorn had given him when he bought the car. A couple of keys looked like they had been shaved, and there was no Toyota key. 1RP 151-52. Naillon did not provide any contact information for Haggerdorn. 1RP 155.

Maas never saw Naillon drive the Camry, and he never saw Naillon inside the car. Moreover, none of the witnesses told Maas they had seen him inside the car. 1RP 167-68. Nonetheless, Maas arrested Naillon for possession of a stolen vehicle. 1RP 156.

Police released the car to Noel without searching it, photographing it, or checking it for fingerprints. 1RP 165. Noel drove the car home,

although she had to jiggle her key in the ignition to get it to work, a problem she had not had before the car was stolen. 1RP 84-85. Deputy Maas testified at trial that use of a shaved key can cause damage to the ignition, making it difficult for the original key to start the car. 1RP 140. Noel testified that there were some garbage and receipts in the car and some junk food in the trunk that had not been there that morning. 1RP 85.

The jury returned guilty verdicts, and the court imposed standard range sentences. In addition, the State asked the court to impose “the standard legal financial obligations,” including a \$500 crime victim penalty, \$500 for court-appointed attorney fees and defense costs, \$100 DNA fee, and \$200 filing fee. 3RP 10. Defense counsel did not object to the State’s recommendation, and the court adopted it. 3RP 12. Although there is no indication the court considered any information regarding Naillon’s financial circumstances or ability to pay the LFOs, the judgment and sentence contains the following boilerplate language:

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 has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 70.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO TAKE INTO ACCOUNT NAILLON'S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Under RCW 10.01.160(3) the sentencing court may order a defendant to pay legal financial obligations only if it first considers the defendant's individual financial circumstances and concludes the defendant has the ability, or likely future ability, to pay. The record here does not show that the trial court considered Naillon's ability or future ability to pay before it imposed discretionary LFOs.

Even though Naillon did not object to the imposition of discretionary LFOs, as our Supreme Court recently recognized, this Court has discretion to review an objection to discretionary LFOs raised for the first time on appeal. State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) ("National 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."). This Court should exercise its powers under RAP 2.5(a) here and review the trial court's imposition of discretionary LFOs without first making an individualized inquiry into Naillon's ability to pay.

For mandatory LFOs, the trial court does not have discretion to consider the defendant's ability to pay. "For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account." State v. Lundy, 176 Wn.App. 96, 102, 308 P.3d 755 (2013). But for discretionary LFOs, RCW 10.01.160(3) provides that a sentencing 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.

In Blazina, the Supreme Court held that this language obligates the court to inquire into the defendant's financial circumstances and ability to pay before imposing discretionary LFOs. Moreover, a cursory inquiry is insufficient:

[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 sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, 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 fee for court-appointed counsel and defense costs imposed in this case is not a mandatory assessment. Thus, before the court can impose that obligation, it must conduct an individualized inquiry into Naillon's financial circumstances and his current and future ability to pay. The court failed to undertake this necessary inquiry. Moreover, nothing in the record would support the boilerplate finding included in the judgment and sentence. The only information in the record regarding Naillon's financial circumstances is found in his declaration filed with his motion for an order of indigency on appeal. That declaration indicates that Naillon owns no real estate, stocks, bonds, motor vehicles, or other substantial items of personal property. He has no income from interest or dividends and no checking or savings account. Naillon was unemployed and received food stamps prior to his incarceration. Supp. CP (Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense, filed 1/20/15).

Because the court failed to make the required inquiry into Naillon's ability to pay, this Court should vacate the discretionary LFO and remand for resentencing on this issue.

2. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE IMPOSITION OF DISCRETIONARY LFOS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” U.S. Const. amend. VI. The Washington State constitution similarly provides “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)).

A defendant is denied his right to effective representation when his attorney’s conduct “(1) falls below a minimum objective standard of

reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). In this case, trial counsel's failure to object to the discretionary LFOs amounts to ineffective assistance of counsel.

In 2013, this Court held that the failure to challenge the imposition of LFOs at sentencing waives the error on appeal. State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), remanded, 182 Wn.2d 827 (2015). This decision, issued well before Naillon was sentenced in January 2015, provided notice to defense counsel that an objection was needed to preserve any issue related to LFOs. Thus counsel's failure to object constitutes deficient performance. See State v. Lyle, ___ Wn. App. ___, Cause No. 46101-3-II (July 10, 2015) at 2.

Moreover, counsel's deficient performance prejudiced the defense. As noted above, Naillon's declaration in support of his motion for an order of indigency establishes that Naillon owns no real estate, stocks, bonds, motor vehicles, or other substantial items of personal property. He has no income from interest or dividends and no checking or savings account. Naillon was unemployed and received food stamps prior to his incarceration. Supp. CP (Motion and Declaration). Based on this record,

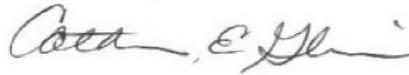
any actual consideration by the court of Naillon's ability or likely future ability to pay discretionary LFOs probably would have resulted in a different decision. But for counsel's failure to object, the discretionary LFOs would not have been imposed. Naillon received ineffective assistance of counsel at sentencing, and his case must be remanded for resentencing on this issue.

D. CONCLUSION

For the reasons stated above, this Court should permit Naillon to challenge the LFO order, vacate the order, and remand for resentencing.

DATED July 17, 2015.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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