

No. 47147-7-II

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

STATE OF WASHINGTON, RESPONDENT

V.

SHAWN N. SALTERS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 14-1-00410-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>STATE’S COUNTERSTATEMENTS OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
B. <u>FACTS AND STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	2
1. At sentencing, the only evidence provided to prove Salters’ offender score was the prosecutor’s oral recitation of Salters’ criminal history, to which Salters did not object. Therefore, the State concedes that even if the offender score calculation is correct and will not change upon resentencing, resentencing with proof of Salters’ criminal history is required.....	2
2. There is no citation to the record to indicate that alcohol contributed in any way to Salters’ crime of conviction, and it appears that no such nexus exists; therefore, the State concedes that the trial court lacked statutory authority for its sentencing condition that prohibits Salters from going to bars, taverns, or other places where alcohol is sold or served....	3
3. The trial court erred when it ordered Salters to pay dis- cretionary LFOs without first conducting an on-the-record, individualized inquiry into Salters’ ability to pay LFOs, as required by RCW 10.01.160(3) and <i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015). Salters did not object. If this Court invokes its discretion under RAP 2.5(a) to review this issue, then the State asks that the case be remanded to the trial court for the trial court to resentence Salters after engaging in the required inquiry.....	5

State’s Response Brief
Case No. 47147-7-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

4. Salters' claim of ineffective assistance of counsel should be rejected because Salters has not shown that the calculation of his offender score is incorrect or that there is a reasonable probability that the offender score would have been different had his attorney objected or had he required the State to prove his prior convictions..... 6

D. CONCLUSION.....7

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Table of Cases

	Page
<u>State Cases</u>	
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	1, 5, 6, 8
<i>State v. Cobos</i> , 182 Wn.2d 12, 338 P.3d 283 (2014).....	3
<i>State v. Foster</i> , 140 Wn. App. 266, 166 P.3d 726 (2007).....	7
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	7
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	2, 3
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	4, 5
<i>State v. Jones</i> , 182 Wn.2d 1, 338 P.3d 278 (2014).....	3
<i>State v. Kolesnik</i> , 146 Wn. App. 790, 192 P.3d 937 (2008).....	4

Federal Cases

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).....	6, 7
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State’s Response Brief
Case No. 47147-7-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Statutes

RCW 10.01.160(3)5, 8
RCW 9.94A.525(1).....2
RCW 9.94A.530(2).....3
RCW 9.94A.703(3).....4

Rules

RAP 10.3(b).....2
RAP 2.51, 5, 6

State’s Response Brief
Case No. 47147-7-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. At sentencing, the only evidence provided to prove Salters' offender score was the prosecutor's oral recitation of Salters' criminal history, to which Salters did not object. Therefore, the State concedes that even if the offender score calculation is correct and will not change upon resentencing, resentencing with proof of Salters' criminal history is required.
2. There is no citation to the record to indicate that alcohol contributed in any way to Salters' crime of conviction, and it appears that no such nexus exists; therefore, the State concedes that the trial court lacked statutory authority for its sentencing condition that prohibits Salters from going to bars, taverns, or other places where alcohol is sold or served.
3. The trial court erred when it ordered Salters to pay discretionary LFOs without first conducting an on-the-record, individualized inquiry into Salters' ability to pay LFOs, as required by RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Salters did not object. If this Court invokes its discretion under RAP 2.5(a) to review this issue, then the State asks that the case be remanded to the trial court for the trial court to resentence Salters after engaging in the required inquiry.
4. Salters' claim of ineffective assistance of counsel should be rejected because Salters has not shown that the calculation of his offender score is incorrect or that there is a reasonable probability that the offender score would have been different had his attorney objected or had he required the State to prove his prior convictions.

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Salters' statement of facts. RAP 10.3(b).

C. ARGUMENT

1. At sentencing, the only evidence provided to prove Salters' offender score was the prosecutor's oral recitation of Salters' criminal history, to which Salters did not object. Therefore, the State concedes that even if the offender score calculation is correct and will not change upon resentencing, resentencing with proof of Salters' criminal history is required.

The trial court sentenced Salters based upon an offender score calculation of seven. CP 23. The only evidence in the record to support the offender score calculation is an oral recitation of Salters' criminal history by the prosecutor. RP 278-79.

Sentencing courts are required to calculate a defendant's offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). The State bears the burden of proving the defendant's criminal history by a preponderance of the evidence, and the only evidence the sentencing court may rely upon is that which the defendant has admitted or acknowledged, or that which is proved in a trial or at the time of sentencing. *State v.*

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). Bare assertions unsupported by evidence do not meet this standard. *Hunley*, 175 Wn.2d at 910.

Here, the only evidence to support the calculation of Salters' offender score was the prosecutor's bare assertion of Salters' criminal history. Salters did not object, but despite the lack of objection, he may nevertheless raise this issue for the first time on appeal. *State v. Jones*, 182 Wn.2d 1, 6, 338 P.3d 278 (2014). Therefore, the State respectfully concedes this error.

Because the State failed to submit evidence to prove Salters' offender score and Salters failed to object to the calculation of his offender score, the State contends that the proper remedy is remand to the trial court so that the parties may present additional evidence of Salters' criminal history. RCW 9.94A.530(2); *Jones*, 182 Wn.2d at 10-11; *State v. Cobos*, 182 Wn.2d 12, 14-15, 338 P.3d 283 (2014).

2. There is no citation to the record to indicate that alcohol contributed in any way to Salters' crime of conviction, and it appears that no such nexus exists; therefore, the State concedes that the trial court lacked statutory authority for its sentencing condition that prohibits Salters from going to bars, taverns, or other places where alcohol is sold or served.

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
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The State was unable to locate any citation to the record to support any finding that alcohol contributed to Salters' crime of conviction in this case.

The legislature has sole province to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009); *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

Pursuant to RCW 9.94A.703(3)(e) the sentencing court had statutory authority to require Salters, as a condition of community custody, to "[r]efrain from consuming alcohol." Additionally, the sentencing court had discretionary authority to impose crime related prohibitions. RCW 9.94A.703(3)(f). But there is no citation to the record to support a finding that alcohol or the patronizing of "bars, taverns, lounges, or other places whose primary business is the sale of liquor" contributed to Salters' criminal offense; therefore, the court lacked statutory authority to impose this community custody condition. *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

Because the condition is not crime related, and because there is otherwise no specific statutory authority to impose the condition, the

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
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360-427-9670 ext. 417

condition should be stricken from Salters' judgment and sentence. *State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003).

3. The trial court erred when it ordered Salters to pay discretionary LFOs without first conducting an on-the-record, individualized inquiry into Salters' ability to pay LFOs, as required by RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Salters did not object. If this Court invokes its discretion under RAP 2.5(a) to review this issue, then the State asks that the case be remanded to the trial court for the trial court to resentence Salters after engaging in the required inquiry.

It appears from the record that at sentencing the trial court imposed discretionary legal financial obligations against Salters without first conducting an on-the-record, individualized inquiry into Salters' ability to pay. RP 283-84. Such an inquiry, however, is statutorily required by RCW 10.01.160(3), and mere reference to boilerplate language in the judgment and sentence is inadequate to substitute for the required individualized inquiry. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Accordingly, the trial court erred by failing to conduct the required inquiry. *Id.* But Salters did not object to the court's imposition of LFOs. RP 283-84. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review."

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
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State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (footnote omitted). There is no explanation of why Salters failed to object in the trial court. However, under RAP 2.5 this Court may accept review even though Salters failed to preserve the issue with an objection in the trial court. *Blazina* at 834-35.

If this Court accepts review on this issue, the State contends that because the trial court did not engage in an on-the-record, individualized inquiry into Salters' ability to pay LFOs, the proper remedy is to remand to the trial court for resentencing, where the trial court may then undergo the required inquiry. *Id.* at 685.

4. Salters' claim of ineffective assistance of counsel should be rejected because Salters has not shown that the calculation of his offender score is incorrect or that there is a reasonable probability that the offender score would have been different had his attorney objected or had he required the State to prove his prior convictions.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984);

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
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State v. Grier, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, Salters must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Salters asserts that his trial counsel was ineffective for failing to object to the calculation of his offender score. But Salters has not shown that there was any miscalculation of the offender score or that a resentencing will result in any calculation that is different from the current calculation. Thus, Salters has not shown that there is a reasonable probability that his offender score would be different if his attorney would have objected. Without this showing, the State contends that this Court should reject Salters' claim of ineffective assistance of counsel. *Id.*

D. CONCLUSION

The State concedes that for the reasons argued above, this Court should remand this case to the trial court for resentencing.

The trial court's sentencing condition prohibiting Salters from going to bars or taverns is not a crime related sentencing condition, because there is no evidence showing that alcohol contributed to Salter's

State's Response Brief
Case No. 47147-7-II

Mason County Prosecutor
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crime of conviction. Therefore, the trial court lacks statutory authority to impose this restriction, and the trial court should, therefore, remove this condition at resentencing.

The State failed to present evidence of Salters' prior convictions to support the calculation of his offender score. Therefore this Court should remand this case for resentencing where, absent a stipulation from Salters, the State should be required to provide sufficient proof of Salters' prior convictions.

Finally, regardless whether this Court accepts review of Salters' unpreserved claim of error that occurred because the trial court did not conduct an on-the-record, individualized inquiry into his ability to pay discretionary LFOs, if this Court accepts the State's other concessions of error, then at resentencing the trial court should follow the mandates of RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015), and engage in this inquiry.

DATED: August 6, 2015.

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State's Response Brief
Case No. 47147-7-II

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

STATE OF WASHINGTON,)	
)	No. 47147-7-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/
)	PROOF OF SERVICE
SHAWN N. SALTERS,)	
)	
Appellant,)	
_____)	

I, Tim Higgs, declare and state as follows:

On Friday, August 7, 2015, I filed the Brief of Respondent by filing it with the Court through the electronic portal. I included the email address of the respondent, ted@t.me.com, in the additional parties section of the transmittal form. I checked with Tom Doyle, attorney for Mr. Salters, and he assured me that he received a copy of the State's Brief of Respondent when I filed it with the Court.

I, Tim Higgs, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 11th day of August, 2015, at Shelton, Washington.



Tim Higgs (WSBA #25919)

MASON COUNTY PROSECUTOR

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Comments:

I am sending this declaration of service in response to the Court's letter to me dated August 10, 2015, and in compliance with Ms. Field's telephone instructions to me today.

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