

NO. 47226-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

The Washington Supreme Court has determined that before legal financial obligations may be imposed, a court must make an inquiry into a person's present or future ability to pay. The Supreme Court has recognized that imposing fines and fees upon people who cannot pay has resulted in a broken system and that the inquiry is an important piece in a fair system of justice.

Mr. Ma was convicted after trial of residential burglary. During trial and at sentencing, the court heard that Mr. Ma had been homeless and addicted to controlled substances. While he had moved in with his parents and had experienced a wakeup call as a result of his conviction, no evidence was presented that he had current employment or future prospects of employment. The court made no further inquiry into his ability to pay, other than what he heard from trial counsel.

At sentencing, the court imposed court costs, the DNA fee and the victim assessment penalty. Because the court failed to inquire into whether Mr. Ma has the ability to pay these legal financial obligations, he asks that this matter be remanded for a hearing on his ability to pay.

B. ASSIGNMENTS OF ERROR

1. The court failed to inquire into Mr. Ma's ability to pay legal financial obligations prior to their imposition.

2. The court imposed legal financial obligations without making a finding that Mr. Ma had the current or future ability to pay.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. In *State v. Blazina*, the Supreme Court determined that trial courts must make an individualized inquiry into a defendant's current and future ability to pay before imposing legal financial obligations under RCW 10.01.160(3). Where the court fails to make such an inquiry, must the matter be remanded for a proper inquiry by the trial court?

2. The issue of legal financial obligations, which the Supreme Court has described as "broken" may be reached under RAP 2.5. Where there a record is made that Mr. Ma may lack the current or future ability to pay legal financial obligations, should this court exercise its discretion in reaching the issue where it was not raised below?

3. Before any legal financial obligations may be imposed, including those that are mandatory, the court must inquire into a

defendant's current or future ability to pay. Was it error for the court to impose court fees, the DNA fee and the victim assessment penalty without inquiring into Mr. Ma's current or future ability to pay?

D. STATEMENT OF THE CASE

Michael Ma was charged with residential burglary on May 6, 2014, for entering or remaining unlawfully in the residence of Joel Repp with the intent to commit a crime. CP 1.¹

Mr. Ma made statements to police while in custody and, waived his CrR 3.5 hearing. CP 3. At Mr. Ma's trial, the jury heard from Joel Repp and Kimberly Ghilarducci, who were tenants of 5728 51st Avenue Court West in University Place where the State alleged the crime had occurred. 12/1/14 RP 143; 247. The State also presented the testimony of the officers involved in the arrest of Mr. Ma.

Mr. Ma presented the testimony of his investigator, Chris Taylor. 12/12/14 RP 435. Mr. Ma chose not to testify. The court granted Mr. Ma's request that the jury be instructed upon the lesser

¹ The record contains ten volumes. For purposes of this brief, counsel will refer to the date of the proceedings along with the page number on which the record is referenced. E.g. 1/23/15 RP 581. Because two volumes were created for proceedings which occurred on November 18, 2014, counsel will additionally refer to them by AM or PM, for morning and afternoon session. 11/18/14PM RP 1. References to the clerk's papers will be reflected by using the designation CP.

included charge of trespass. 12/2/14 RP 424. Mr. Ma was found guilty of residential burglary. 12/4/14 RP 556.

At sentencing, Mr. Ma requested a first time offender sentence. 1/23/14 RP 579-80. The court sentenced Mr. Ma to 4 months incarceration. CP 54. Additionally, he was ordered to pay \$200 in court costs, a \$100 DNA fee and the \$500 crime victim penalty. CP 53.

E. ARGUMENT

Imposing legal financial obligations on persons who cannot pay has resulted in what the Washington Supreme Court has described as a “broken system” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Imposition without consideration of the ability to pay has resulted in “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Id.* On average, those who pay \$25 per month toward their legal financial obligations will owe more money ten years after their conviction than they did when the obligations were imposed. *Id.* at 836. The *Blazina* court observed that less than 20 percent of legal financial obligations may be recovered three years after sentencing, “which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837. Additionally, in granting review even though the issue was not

preserved, the court noted the “significant disparities” which have resulted in greater fees being imposed for drug-related offenses, offenses resulting in trial, Latino defendants and male defendants. *Id.* Because the record here indicates Mr. Ma may was not likely to be able to pay legal financial obligations now or in the future, this court should review this matter under RAP 2.5.

1. Before legal financial obligations may be imposed, the court must make an inquiry into whether a person has the present or future ability to pay.

The legislature has mandated that a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). In *Blazina*, the Supreme Court determined that trial courts must make an individualized inquiry into a defendant’s current and future ability to pay before imposing legal financial obligations. 182 Wn.2d 827, 830, 833–34, 344 P.3d 680 (2015). Even though counsel had not raised the issue below, the court reached this issue under RAP 2.5 because it found that the pernicious consequences of “broken LFO systems” on indigent defendants “demand” that it reach the issue, even though it was not raised in the trial court. *Blazina*, 182 Wn.2d at 833–34.

At sentencing, the court heard from defense counsel that Mr. Ma had been homeless and “couch surfing” from home to home when this incident occurred. 1/23/14 RP 581. This was consistent with the evidence the jury heard at trial. 12/1/14 RP 179. Although the court heard he had reconciled with his family and was presently living with them, no inquiry was made with regard to his ability to find future employment. *See*, 1/23/14 RP 581. When the State asked the court “what it was going to do as far as the legal financial obligations,” the court informed the parties it would impose them “as recommended by the State”. *Id.* at 584.

The judgment and sentence contains the legal financial obligations imposed, which were \$200 in costs, the \$100 DNA fee and the \$500 crime victim penalty assessment, for \$800 in total. CP 53. While the court did not make an inquiry into whether Mr. Ma had the present or future ability to pay, the judgment and sentence contained the following 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 has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9A.753.

CP 52. Paragraph 2.5 of the judgment and sentence provided that the court considered the total amount owing, the defendant's past, present

and future ability to pay legal financial obligations, including his resources and the likelihood that his status would change. *Id.*

While the court asked defense counsel whether it should review the right to appeal with Mr. Ma and defense counsel advised the court she had discussed that with him already, there is no record that Mr. Ma was advised of that the costs of appeal would be added to his legal financial obligations without any further inquiry. 1/23/14 RP 585. The judgment and sentence, however, contained language indicating that these costs may also be added to his appeal. CP 54.

COSTS ON APPEAL. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

Id.

2. The record does not reflect Mr. Ma has the present or future ability to pay legal financial obligations.

The only record made at sentencing with regard to Mr. Ma's current or future finances was that he had previously been homeless and was now living with his parents. 1/23/14 RP 581. The court also heard that Mr. Ma had been "severely addicted" at the time of the offense to a controlled substance. *Id.* at 580. He had been on a drug binge for several days. *Id.* The only other evidence of Mr. Ma's financial situation was when Mr. Ma informed the court that "I'm

actually wearing what I was booked in.” when he was arrested for the burglary. *Id.* at 582.

While this Court has declined to exercise its discretion in *State v. Lyle* to reach an unpreserved legal financial obligation issue in another case, this Court need not decline to do so in every case. Compare *State v. Lyle*, --- Wn. App. ---, 355 P.3d 327, 329 (2015) with *Blazina*, 182 Wn.2d at 833–34 and *State v. Hart*, 188 Wn. App. 453, 353 P.3d 253 (2015). Under RAP 2.5, this Court may reach the issue of legal financial obligations, especially to provide guidance to lower courts on steps to improve the “broken LFO systems” which the Supreme Court found demanded it to reach the issue. *Blazina*, 182 Wn.2d at 833, 34.

Despite no inquiry into Mr. Ma’s ability to pay, this Court may observe that significant questions exist with regard to his financial circumstances. There was no evidence of employment or education. To the contrary, Mr. Ma provided the court with evidence of his drug addiction and transitory housing. Even at the time of sentencing, while it appears that his circumstances had improved, he was still living with his parents. 1/23/14 RP 581. This court should accept review and require that this matter be returned to trial court for an inquiry into

whether Mr. Ma has the ability to pay legal financial obligations. *Hart*, 188 Wn. App. at 353.

3. The inquiry into whether a person has an ability to pay must be made before a court may impose any legal financial obligations, including those the court determines are mandatory.

Imposing legal financial obligations on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 835. Legal financial obligations accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward legal financial obligations will owe more money ten years after conviction than when the legal financial obligations were originally imposed, even when the minimum amount is imposed by the trial court. *Id.* at 836. This, in turn, causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” *Id.* at 837. All of these problems lead to increased recidivism. *Id.* at 837. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which

include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Mr. Ma's ability to pay because the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 43.43.7541 (every felony sentence "must include" a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW

9.94A.753. This clause is absent from other legal financial obligations statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, --- Wn.2d ---, 355 P.3d 1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the victim penalty assessment was unconstitutional. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the victim penalty assessment, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830

(“we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.”); *Id.* at 839 (“We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.”). Indeed, when listing the legal financial obligations imposed on the two defendants at issue, the court cited the same legal financial obligations Mr. Ma challenges here. *Id.* at 831 (discussing defendant Blazina); *Id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other legal financial obligation applied to him (attorney’s fees), and defendant Blazina had only two (attorney’s fees and extradition costs). *See Id.* If the Court were limiting its holding to a minority of the legal financial obligations imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry. And although the Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina*, 182 Wn.2d at 830-39.

GR 34, which was adopted at the end of 2010, also supports Mr. Ma's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay \$50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Jafar*, 177 Wn.2d at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary

reading “would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees.” *Id.* at 529. Given Jafar’s indigence, the Court said, “We fail to understand how, as a practical matter, Jafar could make the \$50 payment now, within 90 days, or ever.” *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of

the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the “criminal filing fee” across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that “principles of due process or equal protection” guided the court’s analysis and recognizing that failure to require waiver of fees for indigent litigants “could lead to inconsistent results and disparate treatment of similarly situated individuals”). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94

S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See Id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing legal financial obligations.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits imprisoning people for inability to pay fines, but assumed that legal financial obligations could still be imposed on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. Unfortunately, this assumption was not borne out. Indigent defendants in Washington are regularly imprisoned because they are too poor to pay legal financial obligations. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice

Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay). In other words, the risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar’s civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar’s claim was ripe for review even though trial court had given her 90 days to pay \$50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing legal financial obligations on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Ma concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Mr. Ma is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837.

Moreover, imposing legal financial obligations on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose legal financial obligations on indigent defendants.

F. CONCLUSION

Because the court failed to inquire into Mr. Ma's current or future ability to pay prior to imposing legal financial obligations, this court should remand the matter for a hearing on whether Mr. Ma's legal financial obligations should be waived.

DATED this 30th day of September 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	NO. 47226-1-II
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MICHAEL MA,)	
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Appellant.)	

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