NO. 47588-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

FLOYDALE ECKLES, JR.,

Appellant.

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

The Honorable Anna M. Laurie, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The judgment and sentence contains a scrivener's error that must be corrected.

2. The community custody condition prohibiting appellant from possessing "pornography" and/or "information pertaining to minors via computer" is unconstitutionally vague.

3. The community custody condition prohibiting appellant from entering any "bar or place where alcohol is the chief item of sale" is not crime-related.

4. The community custody condition prohibiting appellant from possessing "tracking equipment" is not crime-related.

5. The court imposed legal financial obligations in excess of its authority under RCW 10.01.160(2) and in violation of Wash. Const. Art. 1, Sec. 22 and the Fifth Amendment.

6. The court erred when it failed to consider appellant's ability to pay before imposing discretionary legal financial obligations (LFOs).

Issues Pertaining to Assignments of Error

1. In anticipation of sentencing, the department of corrections (DOC) submitted a pre-sentence investigation (PSI)

report. Attached was "Appendix F," in which DOC recommended various community custody conditions. The parties and court agreed "Appendix F" was "peculiar" and inconsistent with the conditions set forth in "Appendix H," which they also agreed are generally imposed and included as part of the judgment and sentence in cases such as this. Following this discussion, the court expressly imposed the conditions set forth in Appendix H, which it attached to the judgment and sentence. Incongruously, however, the judgment and sentence also contains a provision incorporating the conditions recommended in the PSI into the judgment and sentence. Should this Court remand to have this provision stricken from the judgment and sentence?

2. Where the condition prohibiting appellant from possessing pornography or "information pertaining to children via computer" fails to provide appellant with fair notice of what he can and cannot do, and exposes him to arbitrary enforcement, should the condition be stricken from the judgment and sentence?

3. Where there was no allegation the current offenses were in any way connected to a bar or place where alcohol is primarily sold, was the court without authority to prohibit appellant from entering such a place as a condition of community custody?

4. Where there was no allegation "tracking equipment" was in any way involved in the current offenses, was the court without authority to prohibit appellant from possessing such equipment as a condition of community custody?

5. Where no legislative authority exists, does a court exceed its statutory sentencing authority by imposing a "contribution" to the prosecuting attorney's "Special Assault Unit?"

6. Where the state did not call any expert witness and offered no expert testimony, does the court exceed its statutory sentencing authority by imposing a "contribution" to the prosecuting attorney's "Expert Witness Fund?"

7. The trial court ordered appellant to pay $1,135.00 for court-appointed attorney fees. There was no on-the-record inquiry into his ability to pay. Where the trial court failed to comply with RCW 10.01.160(3), is remand required for the trial court to consider appellant's ability to pay before imposing this discretionary fee?

B. STATEMENT OF THE CASE[1]

1. Background

Following a bench trial in Kitsap County Superior Court, appellant Floydale Eckles was convicted of the following 4 counts: (1) second degree rape of a child, allegedly committed against K.T., between June 17, 2011, and June 16, 2012, when K.T. was 12 years old and Eckles was approximately 18 years old; (2) second degree rape of a child, allegedly committed against K.T, between June 17, 2012, and June 16, 2013, when K.T. was 13 years old and Eckles was approximately 19; (3) third degree rape of a child, allegedly committed against K.T., between June 17, 2013, and June 16, 2014, when K.T. was 14 years old and Eckles was approximately 20; and (4) attempted third degree rape of a child, allegedly committed against K.R., between July 26, 2013, and July 25, 2015, when K.R. was 15 and Eckles was approximately 20. CP 8-12; RP 59, 116.

For counts 2 and 3, the court found K.T. was a willing participant, as she an Eckles were in a dating relationship at the

[1] The transcripts for the bench trial held in February 2015 are contained in three volumes, consecutively paginated and referred to as "RP." Sentencing held on March 11, 2015 is referred to as 1RP.

time. 1RP 43. Because the court found no mitigation with respect to count 1, however, it declined to depart from the standard range for the offenses. 1RP 43. Although the court imposed low-end minimum terms under RCW 9.94A.507, Eckles will serve a minimum of 17.5 years and remain on community custody for the rest of his life. CP 42-46; RCW 9.94A.507; RCW 9A.44.076.

2. Trial Testimony

K.T. testified she met Eckles when she was 12 years old through mutual friends at the Viking Fest in Poulsbo. RP 59. A month or so later, K.T. was spending the night at her friend Ashley's house and Eckles came over. RP 62. K.T. claimed she fell asleep but woke up because Eckles was having sex with her. RP 62. K.T. reportedly did not know what to do and eventually went back to sleep. RP 88-89.

K.T. testified she knew she was 12 years old at the time, because they smoked marijuana that night, not methamphetamine. RP 82-85. K.T. started smoking methamphetamine a few days after her 13th birthday. RP 85. K.T. testified Eckles did not ask about her age until approximately two years later when she was 14. RP 63.

K.T. testified she had sex with Eckles on another occasion when she was 13 years old. RP 70. K.T. and some friends had skipped school and were spending the morning at her friend Courtney's house. RP 70-71. K.T. invited Eckles to Courtney's house, and the two had sex in one of the bedrooms. RP 71, 98.

K.T. testified that when she was 14 years old, she and Eckles spent a lot of time together and frequently engaged in what she characterized at the time as consensual sex.[2] RP 64-65. K.T. described one instance when she was 14 years old and she and Eckles had sex at a big party. RP 73.

K.T. testified there came a time when she and Eckles no longer spoke to each other. RP 105. According to K.T., it was because she was on probation and could not afford to run away with During the time period that K.T. was running away, however, she often ran away with her friend K.R. RP 67. K.T. introduced K.R. to methamphetamine and harder drugs. RP 67.

K.R. testified that when she was 15, Eckles and some of his friends picked her and K.T. up to go to "Crazy Mike's" house. RP 121-22. K.R. testified she and K.T. told Eckles' friends they were

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[2] In hindsight, K.T. doubted whether she was in a position to consent due to her extensive drug use. RP 65-66.

18. RP 128, 142-43. At Crazy Mike's, they consumed heroin, methamphetamine, marijuana and pills. RP 121-22. Afterward, K.R. went to sleep in the same bed as K.T. and Eckles, but with her head at the opposite end of the bed. RP 124.

K.R. testified she awoke at one point and asked K.T. if she was okay; apparently K.T. and Eckles had been arguing. RP 125. K.T. said she was fine, and K.R. fell back asleep. RP 125, 146. According to K.R., she awoke a second time with her pants down. RP 125. She claimed Eckles hopped off her and pretended to be asleep. RP 125. K.R. did not know if anything happened. RP 125.

Detective Martin Garland interviewed Eckles as part of the investigation. RP 161. Eckles admitted he had sex with K.T. on one occasion. RP 170. But when K.T. pursued him, Eckles believed she was 16 or 17; that's what K.T. and others told him. RP 171. Eckles told Garland he broke off the relationship when he found out K.T. was really only 14 years old. RP 171-72. Garland did not ask Eckles about K.R. RP 175.

Eckles' stepfather Albert Glover testified Eckles lived with him and Eckles' mother continuously except for a period of time between May 2013 and February 2014. RP 195, 1999. During this

time, Glover recalled receiving telephone calls from Eckles from an unfamiliar, possibly out-of-state area code. RP 197-98.

Eckles confirmed there was a time between July 2013 and early 2014, when he was living in Astoria, Oregon. RP 212. He met K.T. shortly thereafter; she was 14 at the time. CP 8-12; RP 214. Eckles testified he first became acquainted with K.T. while doing drugs at his friend Craig's house, although he may have briefly met K.T. previously at Viking Fest. RP 214.

That night at Craig's, Eckles, K.T. and K.R. smoked weed and methamphetamine. RP 218. Eckles remembered he, K.T. and K.R. slept in the same bed, but he had no sexual contact with either female. RP 222.

A couple months later, however, Eckles did have sexual intercourse with K.T. RP 225. They were at a big party and Eckles and K.T. hit it off. RP 226-227. Eckles did not ask K.T. her age, but believed she was at least 16 or 17, because that was the youngest age of the other partygoers. RP 227-228. Eckles was shocked the next day when one of his friends told him K.T.'s true age. RP 228.

3. Sentencing Conditions

In anticipation of sentencing, DOC submitted a Pre-Sentence Investigation (PSI) report. CP 59-71. Attached to the report was "Appendix F," outlining a number of community custody conditions recommended by the department. CP 70-71.

The department's report contained several factual inaccuracies the prosecutor brought to the corrections officer's attention. 1RP 4-5. Accordingly, DOC filed a revised PSI. CP 23-33; 1RP 5. The Revised PSI did not include "Appendix F." CP 22-33.

Nonetheless, at sentencing, the prosecutor urged the court to reject "Appendix F" and instead impose the conditions set forth in "Appendix H:"

> MS. LEWIS [prosecutor]: . . . Ms. Hudson attached an attachment to her pre-sentence investigation, and Mr. Thimons [defense counsel] pointed out today – to be frank, I hadn't looked at even the attachment before I came in, and I'm not sure where she got that template. It's not consistent with the other Attachment Hs, I believe they're called, that I've seen in a sex offense. I happen to have another PSI in my file from a different case that does have the Appendix H which I've seen Courts routinely impose.
>
> Mr. Thimons did have a chance to review it, and he agrees that the – that is the attachment that generally – that the courts generally impose as far as community custody. So obviously I'll hand that

> forward, but that Appendix H is my recommendation as far as community custody.

1RP 13-14.

The court agreed "Appendix F" was "very peculiar." 1RP 24. Regarding the PSI as a whole, the court described it as "worthless." 1RP 41. The court specifically adopted the community custody conditions set forth in Appendix H: "You will be on lifetime community custody with the conditions that were outlined in Appendix H." 1RP 45.

Despite the court's express adoption of Appendix H, the judgment and sentence contains a checked box with the following provision:

> PSI CONDITIONS – All conditions recommended in the Pre-Sentence Investigation are incorporated herein as conditions of community custody, in addition to any conditions listed in this judgment and sentence, unless otherwise noted[.]

CP 47.

Among other community custody conditions, the court imposed the following, which are challenged below: (1) shall possess or access "no pornography, sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet)"; (2) shall "enter no bar or place where alcohol is the chief item of

sale;"[3] and (3) shall not possess "tracking equipment." CP 47, 55-56.

Regarding LFOs, the prosecutor urged the court to impose a $1,135.00 court-appointed attorney fee, $100 contribution to the Kitsap County Expert Witness Fund, and a $500 contribution to the Kitsap County Special Assault Unit. RP 13. With no discussion, the court imposed "the standard legal and financial obligations." CP 45-46. The judgment and sentence includes the following discretionary fees: $1,135.00 court-appointed attorney fee; $100 Contribution – Kitsap County Expert Witness Fund; and $500 Contribution – Kitsap County Special Assault Unit. CP 48.

Eckles timely filed a notice of appeal. CP 34.

C. ARGUMENT

1. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO REFLECT THE INTENT OF THE TRIAL COURT NOT TO IMPOSE THE "PECULIAR" COMMUNITY CUSTODY CONDITIONS RECOMMENDED IN THE DEPARTMENT'S PSI.

The court clearly intended to impose the community custody conditions set forth in Appendix H, not those suggested in the department's "Appendix F." Nonetheless, the judgment and

[3] This condition appears in two locations on the judgment and sentence. CP 47, 55.

sentence contains a checked box that incorporated the conditions recommended in the PSI. This was a scrivener's error that should be corrected.

Sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Clerical errors such as the one at issue here may be corrected at any time. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P .3d 353 (2005) (citing CrR 7.8(a) ("clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time")). The remedy is to remand to the trial court for correction of the scrivener's error in the judgment and sentence. Mayer, 128 Wn. App. at 701.

2. THE COURT WAS WITHOUT AUTHORITY TO IMPOSE SEVERAL OF THE CONDITIONS OF COMMUNITY CUSTODY.

The court erred in imposing several conditions of community custody. Specifically, the condition that Eckles possess or access "no pornography" and/or "information pertaining to minors via computer" is unconstitutionally vague. CP 47. In addition, neither condition prohibiting Eckles from entering any "bar or place where alcohol is the chief item of sale" or from possessing "tracking

equipment" is crime-related CP 47, 55-56. These conditions therefore should be stricken from the judgment and sentence.

Although the defense did not object to the challenged sentencing conditions below, sentencing errors may be raised for the first time on appeal. Bahl, 164 Wn.2d at 744; State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose specific community custody conditions is a question of law reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

(i) The Condition that Eckles Possess no "Pornography" or "Information Pertaining to Minors Via Computer" Violates Due Process Because It Does Not Provide Fair Notice and Invites Arbitrary Enforcement.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the state to provide citizens fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide

ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Community custody conditions must be reversed if manifestly unreasonable. Id. at 791-92. Imposition of an unconstitutionally vague condition is manifestly unreasonable. Id. at 792.

In Bahl, the trial court imposed the following condition: "Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer." 164 Wn.2d at 743 (quoting clerk's papers). The Washington Supreme Court held this to be unconstitutionally vague. Id. at 758. The court explained, "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Id.

In Sanchez Valencia, the challenged condition specified the "defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or

that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices." 169 Wn.2d at 785 (quoting clerk's papers). The Supreme Court held the condition failed both prongs of the vagueness test.

First, the term paraphernalia, without specifying drug paraphernalia, was so broad that it failed to provide the petitioners with fair notice of what they can and cannot do. Id. at 794. Second, the condition might potentially encompass a wide range of everyday items, like sandwich bags or paper, depending on the particular CCO's whim. Id. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague. Id. at 795.

The community custody condition prohibiting Eckles from possessing pornography or "information pertaining to minors via computer" does not provide sufficient definiteness such that Eckles knows what he can or cannot do. As held in Bahl, the term "pornography" has never been given a precise legal definition and is entirely subjective. Bahl, 164 Wn.2d at 754. What is meant by "information pertaining to minors via computer" is likewise entirely subjective. Theoretically, it could include the sports scores of a

local high school football team or a news article relating to the spread of whooping cough. Both conditions do not provide fair notice of proscribed conduct and expose Eckles to arbitrary enforcement. The conditions do not meet the requirements of due process and should be stricken.

(ii) The Conditions Prohibiting Eckles from Entering any Bar or Place where Alcohol Is Primarily Sold or from Possessing Tracking Equipment Are Not Crime-Related.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, allows trial courts to impose crime-related prohibitions during the course of community custody. RCW 9.94A.505(8), .703(3)(f). A crime-related prohibition is an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A .030(10). Crime-related prohibitions may last only as long as the maximum sentence allowed for the associated offense. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). A community custody condition is overbroad if it encompasses matters that are not crime-related. State v. Bahl, 137 Wn. App. 709, 714-15, 159 P.3d 416 (2007), reversed in part on other grounds, 164 Wn.2d 739, 193 P.3d 678 (2008).

In State v. Zimmer, Zimmer was convicted of methamphetamine possession. 146 Wn. App. 405, 410-11, 190 P.3d 121 (2008). The trial court imposed a community custody condition prohibiting her possession of cellular phones and data storage devices. Id. at 411. The appellate court reversed, holding the condition did not directly relate to Zimmer's crimes. Id. at 413. Though such devices may be used to further illegal drug possession, the court explained, there was no evidence in the record (1) that Zimmer possessed a cell phone or data storage device in connection with possessing methamphetamine, or (2) that she intended to distribute or sell methamphetamine using such devices. Id. at 414.

In State v. O'Cain, O'Cain was convicted of second degree rape. 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). As a condition of community custody, the trial court prohibited O'Cain from accessing the internet without prior approval from his CCO and sex offender treatment provider. Id. at 774. The court struck the condition, reasoning:

> There is no evidence in the record that the condition in this case is crime-related. There is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the

> internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775.

Similarly, in State v. Jones, the court held it was error to mandate alcohol counseling, without evidence to indicate the requirement of alcohol counseling was crime-related. Jones, 118 Wn. App. at 207–08.

As in the above cases, there is no evidence the challenged conditions here are crime-related. There is no evidence Eckles went to a bar or used tracking equipment before the offenses or that either bars or tracking equipment contributed in any way to the charged offenses. This is not a case where a defendant was stocking someone and used tracking equipment to keep tabs on that person. Nor did Eckles meet either complainant at or near a bar. The court therefore was without authority to impose these conditions.

3. THE COURT EXCEED ITS AUTHORITY BY IMPOSING A FICTITIOUS LEGAL FINANCIAL OBLIGATION.

The Fifth Amendment guarantees that the people will not be deprived of life, liberty or property without due process of law. A court's authority to recover costs is entirely statutory, because it

was unknown at common law. State v. Smits, 152 Wn. App. 514, 519, 216 P3.d 1097 (2009). RCW 10.01.160 allows the superior court to require an indigent defendant convicted of a felony to pay certain costs. Those costs, however, are limited to "expenses specially incurred" by the State in prosecuting the particular defendant and to those special programs that are relevant to the particular prosecution. RCW 10.01.160(2).

The Kitsap County Code (KCC) includes all laws of Kitsap County that impose "any fine, penalty or forfeiture." KCC 1.01.010. The Code's plain language conditions its authority in "courts and tribunals, and in all other matters" upon citation to the applicable code section. "I[n] any proceeding at law or in equity, it is sufficient to refer to the appropriate "Kitsap County Code" sections or to the underlying ordinance or resolution[.]" KCC 1.01.010.

Here, Eckles' judgment and sentence purports to impose a $500.00 penalty assessment called "Contribution — Kitsap Co. Special Assault Unit." CP 48. The judgment includes no reference to any code section and does not cite to any underlying ordinance. Moreover, no such section can be found. KCC 4.92.010 authorizes the prosecuting attorney's office to maintain a victim/witness fund. The Code lists other currently operative funds in Title 4, article 3.

That list includes a prosecuting attorney's Expert Witness Fund (Chapter KCC 4.84), but does not mention a Special Assault Unit fund. KCC Chapter 4.132 authorizes a $20.00 assessment in certain superior court cases, but not a Special Assault Unit contribution. An internet search of the Code using the term "prosecuting attorney" discloses no such authorized "contribution."[4]

The Court should remand with instructions to strike the unauthorized Special Assault Unit Fund assessment.

4. THE COURT EXCEEDED ITS AUTHORITY BY IMPOSING AN EXPERT WITNESS FEE IN A PROSECUTION WITH NO EXPERT WITNESS.

The superior court also imposed a $100 contribution to the prosecuting attorney's Expert Witness Fund. CP 48. As with the Special Assault Fund assessment, the Kitsap County Code does not authorize this.

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4 http://www.codepublishing.com/WA/KitsapCounty/#!/Kitsap01/Kitsap01.html, visited September 22, 2015.

Kitsap County Code Chapter 4.84 is the "Expert Witness Fund Ordinance." KCC 4.84.010. The ordinance authorizes the superior court to require defendants to reimburse the State for the cost of expert witnesses. KCC 4.84.030(d). However, the sole purpose of the fund is to provide reasonable compensation to expert witnesses. KCC 4.84.040(a). This authority does not include police officers.

First, an expert witness is one who, "by reason of education or specialized experience, possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or deducing correct conclusions, or any person skilled in any particular art, trade or profession, being possessed with peculiar knowledge concerning it, and who has given the subject in question particular study, practice or observation." KCC 4.84.020(3). The courts exclude from this category fact testimony from a police officer. See, e.g., State v. Chavez, 76 Wn. App. 293, 299, 884 P2.d 624 (1994) (referring to testimony from an expert or a police officer.) Extensive training and experience gained as a police officer may qualify a person as "an expert in certain areas." State v. Sanders, 66 Wn. App. 380, 386, 832 P.2d 1326 1992). But the prosecutor must

qualify the witness as an expert in a particular aspect of the case. See, e.g., State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (police witness not qualified as an expert); State v. Campbell, 78 Wn. App. 813, 823, 901 P2.d 1050 (1995) (permitting a police officer to testify as an expert on gang culture).

Here, the prosecuting attorney presented no expert witness. Bremerton police detectives Crystal Gray and Martin Garland testified, but neither was qualified as an expert or offered any expert testimony. Both were strictly fact witnesses. RP 47-53 (tried to locate Eckles) 159-187 (interviewed Eckles).

The superior court expressed its intention to impose solely "the standard legal and financial obligations." 1RP 45-46. Therefore, extracting a contribution" from Eckles to an expert witness fund violated the Kitsap County Code as well as RCW 10.01.160(2). This Court should remand for resentencing to eliminate nonstandard, unauthorized financial obligations.

5. THE TRIAL COURT FAILED TO CONSIDER ECKLES' ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS AND THUS THE CASE SHOULD BE REMANDED FOR PROPER CONSIDERATION.

The court indicated its intent to impose "the standard legal and financial obligations." 1RP 45-46. Accordingly, it is not clear

the court intended to impose $1,135.00 in discretionary attorneys fees. See e.g. State v. Johnson, 59 Wn. App. 867, 802 P.2d 137 (court-appointed attorney fees discretionary), rev'd on other grounds, 119 Wn.2d 143, 829 P.2d 1078 (1990). Remand is therefore appropriate to clarify the court's intent. But remand is also required because the court failed to consider Eckles' ability to pay attorney fees, assuming arguendo it intended to impose this fee.

The trial court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he 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." RCW 10.01.160(3).

A trial court thus has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. State v. Blazina, 182 Wn.2d 827, 344 P.3d 680, 681 (2015). The record reflects no such consideration here. 1RP 45-46.

In the judgment and sentence, the following pre-printed, generic language appears:

> 4.1 LEGAL FINANCIAL OBLIGATIONS – RCW 9.94A.760. The court finds that the defendant has the ability or likely future ability to pay legal financial obligations. The Defendant shall pay by cash, money order, or certified check to the Kitsap County Superior Court Clerk at 614 Division Street, MS-34, Port Orchard, WA 98366, as indicated --

CP 48.

Despite this, the trial court did not in fact consider Eckles' individual financial resources and the burden of imposing such obligations on him. This boilerplate language is inadequate to meet the requirements under RCW 10.01.160(3).

> "[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 trial court made an individualized inquiry into the defendant's current and future ability to pay.

Blazina, 344 P.3d at 685. The trial court failed to do anything more than enter the boilerplate language. Thus, it failed to follow statutory mandate in imposing the legal financial obligations and the remedy is a new sentencing hearing. Id.

In response, the state may argue that this issue has been waived and should not be considered for the first time on appeal.

Even though defense counsel did not object to the imposition of this LFO below, this Court has the discretion to reach this error consistent with RAP 2.5. Id. at 681. As shown below, given the trial court's failure to conduct any semblance of an inquiry into Eckles' ability to pay and given his indigent status, this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant's ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal.

The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence. Blazina, 344 P.3d at 683-85. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many reentry difficulties that ultimately work against the State's interest in reducing recidivism. Id.

As a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina

shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider on direct appeal whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in Blazina, the fact is the state cannot collect money from defendants who cannot pay. Id. at 684. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge who is already familiar with the case so he or she may actually make the ability-to-pay inquiry is more efficient, saving the defendant and the state from a wasted layer of administrative and judicial process.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response. Unquestionably, the trial court erred in imposing discretionary LFOs without making any inquiry into Eckles' ability to

pay. The Supreme Court has held 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 imposing legal financial obligations. Id. at 685. This did not happen.

For these reasons, this Court should exercise its discretion, accept review, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Eckles' ability to pay LFOs.

D. CONCLUSION

The trial court did not intend to impose the community custody conditions recommended by the department in "Appendix F" to the PSI. Remand is appropriate to correct this scrivener's error.

Several of the court's community custody conditions should be stricken as unconstitutionally vague and/or not crime-related. This Court should also strike the imposition of unauthorized contributions to the Kitsap County prosecutor's office.

Finally, remand is also required because the court failed to consider Eckles' ability to pay before it imposed discretionary court-appointed attorney fees.

Dated this 25th day of September, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH

DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 47588-0-II
	)	
FLOYDALE ECKLES, JR.,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FLOYDALE ECKLES, JR.
DOC NO. 380667
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF SEPTEMBER 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 25, 2015 - 2:36 PM

Transmittal Letter

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Court of Appeals Case Number: 47588-0

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