

NO. 47961-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICJHARD HALLECK
Appellant.

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

The Honorable Toni Sheldon, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	6
Issues Presented on Appeal.....	6
B. <u>STATEMENT OF THE CASE</u>	7
a. <u>Obstructing</u>	7
b. <u>LFO's</u>	8
C. <u>ARGUMENT</u>	8
1. THE STATE FAILED TO PROVE THAT HALLECK OBSTRUCTED AN OFFICER BY REFUSING TO OPEN THE DOOR AFTER BEING SHOWN A WARRANT THAT DID NOT INCLUDE A JUDGE'S SIGNATURE.....	8
a. <u>The State was required to prove the elements of the offense beyond a reasonable doubt</u>	8
b. <u>The State did not prove Halleck obstructed law enforcement officers</u>	9
2. THE TRIAL COURT'S FAILURE TO CONSIDER HALLECK'S ABILITY TO PAY BEFORE IMPOSING LFOs CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL	10

TABLE OF CONTENTS

	Page
a. <u>The Legal Validity of the LFO Order May Be Challenged For The First Time On Appeal As An Erroneous Sentencing Condition</u>	13
3. HALLECK’S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.	15
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	14
<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	12, 13, 17
<u>State v. Duncan</u> , 180 Wn.App. 245, 327 P.3d 699 (2014) <i>review granted</i> , 183 Wn.2d 1013, 353 P.3d 641 (2015).....	15, 16, 17
<u>State v. Ford</u> , 137 Wn.2d 427, 973 P.2d 452 (1999).....	14
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	10
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	15
<u>State v. Lundy</u> , 176 Wn. App. 96, 308 P.3d 755(2013).....	11
<u>State v. Lyle</u> , 188 Wn.App. 848, 355 P.3d 327 (2015).....	14, 16, 17
<u>State v. Mahone</u> , 98 Wn. App. 342, 989 P.2d 583 (1999).....	17
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	14
<u>State v. Shaver</u> , 116 Wn. App. 375, 65 P.3d 688(2003).....	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	15
<u>State v. Smits</u> , 152 Wn. App. 514, 216 P.3d 1097 (2009).....	11
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	15
<u>State v. Williams</u> , 142 Wn.2d 17, 11 P.3d 714(2000).....	10

FEDERAL CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	9
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	9
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	9, 10
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969).....	10
<u>reversed on other grounds</u> , <u>Alabama v. Halleck</u> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).....	10
<u>Payton v. New York</u> , 445 U.S. 573, 602, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).....	9
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	15

TABLE OF AUTHORITIES

	Page
<u>STATUTES, RULES AND OTHERS</u>	
Fourteenth Amendment.....	8
Sixth Amendment.....	15
Article I, section 7.....	9
Article I, section 22.....	15
RCW 9A.76.020.....	9
RCW 9.94A.550.....	10, 11
RCW 9.94A.760.....	11
RCW 9.94A.763.....	10
RCW 10.01.160.....	6, 11, 15, 16
RAP 2.5(a).....	13, 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering appellant to pay legal financial obligations (LFOs) without first taking into consideration his ability to pay. CP 53-54.

2. Trial counsel was ineffective to Halleck's prejudice by failing to object to the LFO's.

3. The state failed to prove that Halleck willfully hindered a police officer in the obstructing charge when he refused to open the odor after being shown a partial view of an arrest warrant.

Issues Pertaining to Assignments of Error

1. RCW 9.94A.753 and RCW 10.01.160 require the trial court to consider the defendant's present and future ability to pay the amount ordered before imposing discretionary LFOs. The trial court ordered appellant to pay \$2,151 in legal financial obligations, including \$950 for court appointed attorney fees. The judgment and sentence did not include any language indicating that Halleck had an ability to pay. CP 16-20. There is also nothing in the record indicating that the trial court considered Halleck's financial resources or likely future resource other than defense counsel informing that Halleck sporadically worked part-time. RP 166.

Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations (LFOs) as part of appellant's sentence, thus, making the LFO order erroneous and challengeable for the first time on appeal?

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

3. Did the state fail to prove that Halleck willfully, hindered a police officer by refusing to open the door after being presented with only a partial view of the warrant?

B. STATEMENT OF THE CASE

The Mason County prosecutor charged Halleck with one count of assault in the second degree and one count of obstructing an officer. CP 57-58. Halleck was acquitted of the assault and convicted by a jury of obstructing. CP 23-26, 57-58.

a. Obstructing.

Tribal officer Michael Sargent responded to Halleck's residence and attempted to gain entry based on a 911 call regarding a domestic situation. RP 42. Bradly Trout a Mason county police officer also responded to the scene and attempted to get Halleck to open the door using a ruse. RP 77-78. Trout told Halleck that if he came outside he would take photographs of his injuries, but Trout had already decided to arrest Halleck. RP 78-79. Halleck refused to exit the home or to permit the police to enter without a warrant. RP 42-43.

Trout applied for and obtained a telephonic warrant which he filled out and signed for the judge. RP 80. Sargent showed the warrant to Halleck through a glass window but never showed Halleck the signature page. RP 45, 80. Halleck continued to refuse to open the door. RP 45, 81.

Trout kicked in the door and stumbled over Halleck with Sargent, placing Halleck in handcuffs while Halleck tensed his muscles and refused to put his hands behind his back. RP 46-47, 82. Halleck never actively resisted arrest or struggled to free himself from the officers. RP 82.

b. LFO's.

The trial court imposed a standard range sentence and \$2,151 in Legal Financial Obligations (LFO's), including \$950 for court appointed attorney fees. CP 16-20.

The judge indicated that he had no idea of Halleck's financial situation, but counsel offered that Halleck worked part time, sporadically. RP 165-66. The Judgement and Sentence did not contain any language indicating that Halleck had an ability to pay LFO's and the court did not make such a finding. RP 16-20. Halleck's order of indigency indicated no income from any source and \$10,000 in debt. CP 4-5. The trial court ordered Halleck indigent for this appeal. CP 4-5. This timely appeal follows. CP 8-13.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE THAT HALLECK OBSTRUCTED AN OFFICER BY REFUSING TO OPEN THE DOOR AFTER BEING SHOWN A WARRANT THAT DID NOT INCLUDE A JUDGE'S SIGNATURE.

a. The State was required to prove the elements of the offense beyond a reasonable doubt.

In a criminal prosecution, the Fourteenth Amendment Due

Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State did not prove Halleck obstructed law enforcement officers.

A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

RCW 9A.76.020.

Here the State contended Halleck obstructed police because he refused to leave his home to allow the waiting officers to arrest him after the police showed Halleck part of a warrant but not the page with the judge's signature. RP 80. After the police broke a window to gain entry, Halleck did not flee, but rather refused to put his hands behind his back and tensed his muscles without otherwise struggling, while the officers placed him in handcuffs. RP 46-47, 82.

The Fourth Amendment and Article I, § 7 protect a person's home from government intrusion absent a search warrant or recognized exception to the warrant requirement. Payton v. New York, 445 U.S. 573, 602, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); State v.

Williams, 142 Wn.2d 17, 24, 11 P.3d 714(2000). Halleck does not argue that the police could not lawfully enter his home in order to effect his arrest with a warrant, but Halleck was entitled to see the entire warrant, not just the first page, particularly since one of the officers had just engaged him in an attempted ruse to get him to exit his home. RP 78. Halleck was entitled to remain in his home subject to a police entry with a warrant that he could see. Halleck's exercise of his right to the privacy of his home cannot give rise to a conviction of obstructing.

The Court must reverse Halleck's conviction because the absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Halleck, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Because the State failed to prove Halleck obstructed a law enforcement officer the Court must reverse his conviction and dismiss the charge.

2. THE TRIAL COURT'S FAILURE TO CONSIDER HALLECK'S ABILITY TO PAY BEFORE IMPOSING LFOs CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

Trial courts may order payment of LFOs as part of a sentence. RCW

9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless “the defendant is or will be able to pay them.” In determining LFOs, courts “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).

The trial court imposed a mandatory LFO of \$500 crime victim assessment. RCW 9.94A.550. The court imposed \$1621 in discretionary fees consisting of \$710 in court costs, including, \$251 Sheriff’s service fee; \$250 Jury demand fee; and a \$200 criminal filing fee, and \$950 in discretionary court-appointed attorney fees and defense costs. CP 16-20. RCW 10.01.160(1), (2), .190; State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755(2013); State v. Smits, 152 Wn. App. 514, 521-22, 216 P.3d 1097 (2009) (recognizing courts costs are discretionary).

The trial court failed to make an individualized inquiry into Halleck’s present and future ability to pay before it imposed these discretionary LFOs. In doing so, the court exceeded its statutory authority, and the discretionary LFO order should be vacated.

The Washington Supreme Court recently recognized the “problematic consequences” LFOs inflict on indigent criminal defendants.

State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” *Id.* This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Blazina, 182 Wn.2d at 836-37. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Blazina, 182 Wn.2d at 837.

The Court in Blazina thus held that RCW 10.01.160(3) requires trial courts to first consider an individual’s current and future ability to pay before imposing discretionary LFOs. Blazina, 182 Wn.2d at 837-39. This requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” Blazina, 182 Wn.2d at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Id.* The court should consider such factors as length of incarceration and other debts, including restitution. *Id.*

The Court in Blazina further directed courts to look to GR 34 for guidance. Blazina, 182 Wn.2d at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. *Id.* For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. *Id.* If the individual qualifies as indigent, then “courts

should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Blazina, 182 Wn.2d at 834.

At sentencing, the court failed to make an individualized inquiry into Halleck's current or future ability to pay \$2,151 in LFOs. RP 165-66. The court however agreed that Halleck was indigent because he had no income and \$10,000 in debt but nonetheless, the court imposed \$2151 in LFO's without inquiring into Halleck's future ability to pay and without considering Halleck's \$10,000 debt burden or his indigent status. CP __

Despite all these reasons to waive discretionary LFOs, the trial imposed \$1621 in LFO's contrary to Blazina. Blazina 182 Wn.2d at 838. Accordingly, this Court should vacate the LFO order and remand for resentencing. Blazina 182 Wn.2d at 839.

The State may ask this court to decline review of the erroneous LFO order. The Blazina court held that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). Blazina 182 Wn.2d at 834. The court nevertheless concluded that "[n]ational 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." Id. Asking this court to decline review would essentially ask this court to ignore the serious consequences of LFOs. This court should instead confront the issue head on by vacating Halleck's discretionary LFOs and remanding for resentencing.

- a. The Legal Validity of the LFO Order May Be Challenged For The First Time On

Appeal As An Erroneous Sentencing
Condition.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise sentencing challenges for the first time on appeal); see also, State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). Specifically, the Court has held a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

By contrast, in State v. Lyle, 188 Wn.App. 848, 355 P.3d 327 (2015), two judges of this court, with one dissenting, held that this Court may exercise its discretion not to consider the imposition of LFO's raised for the first time on appeal. Lyle, 188 Wn.App. at 852. Lyle is legally and factually distinguishable. In Lyle, the Court actually considered Lyle's financial situation and entered boiler plate language indicating that Lyle could pay his LFO's. Lyle, 188 Wn.App. at 850.

Here by contrast to Lyle, the trial court did not have any information on Halleck's ability to pay, and the trial court did not in any manner, determine that

Halleck had an ability to pay. CP 16-20. Distinguishable from Lyle, here, the judgement and sentence did not contain any such boiler plate language. CP 16-20.

The record here shows the trial court failed to comply with the statutory requirements set forth in RCW 10.01.160(3) by not inquiring into Halleck's ability to pay which makes his sentence illegal. Halleck may therefore challenge the trial court's LFO order for the first time on appeal.

3. HALLECK'S COUNSEL WAS
CONSTITUTIONALLY INEFFECTIVE FOR
FAILING TO OBJECT TO THE IMPOSITION OF
LEGAL FINANCIAL OBLIGATIONS.

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Stenson, 132 Wn.2d at 705-06; State v. Duncan, 180 Wn.App. 245, 327 P.3d 699 (2014) *review granted*, 183 Wn.2d 1013, 353 P.3d

641 (2015).

In Duncan, the Court recognized ineffective assistance of counsel is “an available course for redress” when defense counsel fails to address a defendant’s inability to pay LFOs. Duncan, 180 Wn.App. at 255. The Court in Duncan also stated, “In the unusual case of an irretrievably indigent defendant whose lawyer fails to address his or her inability to pay LFOs at sentencing and who is actually prejudiced, a claim of ineffective assistance of counsel is an available course for redress.” *Id.* Halleck presents such a claim herein.

In Lyle, this Court held that counsel was ineffective for failing to object to the LFO’s, but in that case, the defendant had not established prejudice. Lyle, 188 Wn.App. at 329. Lyle is distinguishable because therein, Lyle established that he had some ability to work but he did not provide any information regarding his debts or other financial situation and the court did not consider his affidavit of indigency in determining an inability to pay LFO’s.

These facts suggest that Lyle may be disabled but that he was able to do at least some work as evidenced by the fact he had been working for several months before the sentencing. The trial court stated that many of Lyle’s assertions were unsupported and there are no additional facts in the record, such as whether Lyle has additional debt, which would allow us to determine whether the trial court would have ****330 *854** imposed fewer or no LFOs if defense counsel had objected

Lyle, 188 Wn.2d at 329-330. Counsel’s failure to object to the discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court to comply with the requirements of RCW 10.01.160(3).

Here, while Halleck provided additional information to the trial court that he had no income and that he has \$10,000 in debt, the trial court did not consider this in ordering LFO's. CP 4-5, 16-20. This additional information is however sufficient under Lyle and Duncan, for this Court to determine that had counsel objected, the trial court would not have imposed LFO's. Lyle, 188 Wn.App. at 329; Duncan, 180 Wn.App. at 255.

Accordingly, counsel's failure to object to discretionary LFOs was prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Here in addition to legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Blazina, 182 Wn.2d at 836-37. Furthermore, in a remission hearing to set aside LFOs, Halleck will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160 (4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

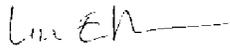
Blazina and Lyle, demonstrates there is no strategic reason for failing to object. Halleck incurs no possible benefit from LFOs. Given Halleck's indigency and his debt, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Halleck's current and future ability to pay. Halleck's constitutional right to effective assistance of counsel was violated. Accordingly, this court should vacate the LFO order and remand for resentencing on this alternative basis.

D. CONCLUSION

Mr. Halleck respectfully requests this Court reverse his conviction and in the alternative remand for resentencing for determination of Halleck's ability to pay LFO's.

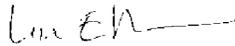
DATED this 7th day of January 2015.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Mason County Prosecutor's Office Mason county Prosecutor Appeals Department timw@co.mason.wa.us and Richard Halleck, 450 N. Highway 106, Shelton, WA 98584 a true copy of the document to which this certificate is affixed, on January 7, 2016. Service was made electronically to the prosecutor and by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

ELLNER LAW OFFICE

January 07, 2016 - 2:45 PM

Transmittal Letter

Document Uploaded: 2-479613-Appellant's Brief.pdf

Case Name: State v. Halleck

Court of Appeals Case Number: 47961-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

A copy of this document has been emailed to the following addresses:

timw@co.mason.wa.us