

No. 47961-3-II

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

STATE OF WASHINGTON, RESPONDENT

V.

RICHARD G. HALLEK, APPELLANT

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

No. 15-1-00137-0

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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Shelton, WA 98584
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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Hallek was charged with obstruction of a law enforcement officer after he obstructed officers who were attempting to enter his residence under authority of a search warrant so they could arrest him for a domestic violence for which he was subsequently acquitted. Because proof of the offense of obstruction of a law enforcement officer on these facts did not require the State to prove that officers showed Hallek a valid signature on the warrant before his arrest, the evidence is sufficient to sustain the jury's verdict of guilty for the charge of obstruction.
2. After the jury returned a guilty verdict for the offense of obstructing a law enforcement officer, the trial court at sentencing ordered Hallek to pay legal financial obligations. Before order the LFOs, Hallek's trial counsel gave the court some information about Hallek's ability to pay, which the court considered. Hallek did not object in the trial court to the court's imposition of LFOs, but he now challenges these costs for the first time on appeal. Because Hallek did not object below, the State contends that this court should deny review.
3. Hallek contends that his trial counsel was ineffective for not objecting to the trial court's imposition of LFOs. The State contends that Hallek's claim should fail because he had not shown that any objection that his counsel could have made on this issue would have had merit and has not shown that there is any reasonable probability that the outcome would have been different had his attorney objected.

B. FACTS AND STATEMENT OF THE CASE

On March 14, 2015, sheriff's deputies were dispatched to a home in rural Mason County in response to a report of domestic violence between Stephanie Hernandez and the defendant, Richard Hallek. RP 14-

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15. Ms. Hernandez reported that Hallek assaulted her and that as a result she had lost consciousness when he choked her. RP 20-21.

Deputy Trout responded, and when he arrived a tribal officer (Officer DeRoche, RP 72) was already there. RP 56. Ms. Hernandez was in an ambulance and exhibited signs of having been strangled. RP 58-60. Deputy Trout tried to contact Hallek. RP 60. But Hallek refused to leave the house. RP 61. Trout tried to talk Hallek into coming out, but Hallek refused. RP 61. Hallek said that he wanted to press charges against Hernandez, and Trout responded with a ruse to coax Hallek from the house by telling him he needed to come out of the house and go down to Deputy Trout's patrol car where he could take a report and take pictures of his injuries, but Hallek still refused to leave the house. RP 60-61, 78-79.

Deputy Trout called his supervisor, Corporal Michael Sargent, who then came to the scene to try to figure out how to get Hallek out of the house. PR 42-43. Hallek said he wasn't coming out without a warrant. RP 43-44, 62. Corporal Sargent told Deputy Trout to apply for a warrant. RP 44. Deputy Trout applied for the warrant and received one. RP 44, 63-64. Deputy Trout made an announcement from his car up to the house, telling Hallek that he'd obtained a warrant. RP 44, 65-66.

Trout and Sargent approached the house and went to the carport door and began knocking. RP 67. Hallek came to the door and appeared in the window, but he continued to refuse to open the door. RP 45, 67. The deputies numerous times told Hallek that they had a warrant. RP 67-68. Sargent held the warrant up and showed it to Hallek. RP 68. The deputies told Hallek numerous times that they had a warrant and told him to open the door. RP 68.

Deputies tried the doorknob, but it was locked. RP 69. Sargent then tried to kick the door in, but failed. RP 45, 69. He then tried to force the door open with an axe handle. RP 45, 70. When he swung it, he ended up breaking the glass in the door. RP 45, 70. After the window broke, the door "got unlocked," and they went in. RP 70. There is no explanation for how the door "got unlocked."

The deputies entered and tried to take control of Hallek, but Hallek tensed up and resisted. RP 70, 82. They ordered him to put his hands behind his back, but he resisted. RP 70, 82. Deputy Cotte came and assisted. RP 70. The three of them finally succeeded in taking Hallek to the ground. RP 71. Hallek continued to disobey commands and continued to resist. RP 71, 82. The three deputies finally succeeded in placing handcuffs on Hallek. RP 71.

The warrant was a telephone warrant, so it was not signed. RP 79-80. The deputies held up the warrant and showed it to Hallek, but it was two pages long with the signature line on the second page, so he did not see the signature page. RP 80.

The State charged Hallek with assault in the second degree (with a lesser included offense of assault in the fourth degree) and charged him obstructing a law enforcement officer. CP 57-58. The jury returned not guilty verdicts for the charge of assault in the second degree and the lesser included offense of assault in the fourth degree. RP 156. But the jury found Hallek guilty of obstructing. RP 156.

C. ARGUMENT

1. Hallek was charged with obstruction of a law enforcement officer after he obstructed officers who were attempting to enter his residence under authority of a search warrant so they could arrest him for a domestic violence for which he was subsequently acquitted. Because proof of the offense of obstruction of a law enforcement officer on these facts did not require the State to prove that officers showed Hallek a valid signature on the warrant before his arrest, the evidence is sufficient to sustain the jury's verdict of guilty for the charge of obstruction.

In this case the State alleged that Hallek locked himself in his home and refused to come out of his house or to open his door to officers

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after the officers told him that they had a warrant for his arrest, thus forcing officers to break in the door to arrest him. Once officers forced their way into the house, Hallek then tensed up and refused to cooperate with officers. Three officers had to forcibly move Hallek's hands into position against his resistance in order to handcuff him. Based on these facts the State charged Hallek with obstructing a law enforcement officer, and after trial a jury returned a guilty verdict on this charge. From these facts Hallek contends on appeal that there was insufficient evidence to convict him of obstructing a law enforcement officer because, he contends, the officers serving the warrant did not show him the signature page of the warrant before attempting his arrest.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d

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634, 638, 618 P.2d 99 (1980). Specific criminal intent can be inferred from conduct that plainly indicates such intent as a matter of logical probability. *State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011).

Proof of the crime of obstructing a law enforcement officer in this case required proof that Hallek willfully hindered, delayed or obstructed any law enforcement officer in the discharge of his or her official powers or duties. RCW 9A.76.020. Here, there is ample evidence that officers informed Hallek that they had a warrant and that Hallek willfully refused to open or unlock his door in order to enable the officers to execute the search, forcing officers to break the door to gain entry. Once officers gained entry, Hallek then tensed up and obstructed the officers' attempts to restrain him, thus indicating the willful nature of his obstruction. RP 70-71, 82.

Without citing any authority, Hallek contends that the evidence of obstruction of a law enforcement officer is insufficient because officers executing the search warrant did not first show him the entire page, and particularly, did not show him the signature page. Br. of Appellant at 10. A search for legal authorities reveals no citation to any authority that would require the officers to show Hallek a copy of the warrant before executing it. Instead, the nearest source from which Hallek's assertion

might be extrapolated is CrR 3.2(d). This rule requires that when property is seized pursuant to a search warrant, the defendant should be provided with a copy of the warrant, but “[n]othing in the language of the rule says that a copy of the warrant must be provided before the search is begun.” *State v. Ollivier*, 178 Wn.2d 813, 852, 312 P.3d 1 (2013).

Here, officers informed Hallek of the warrant, first by announcing it over a loud speaker, and then by knocking on the door and telling him face to face. There is no evidence at all that Hallek disbelieved the officers or that he was in any way aware that an officer had attempted a ruse to lure him from the house. Nor is there any evidence that Hallek knew or cared whether the warrant contained an original of the judge’s signature. Instead, the evidence there is shows that Hallek knew of the warrant and that he nevertheless willfully obstructed the officers’ efforts to execute it.

2. After the jury returned a guilty verdict for the offense of obstructing a law enforcement officer, the trial court at sentencing ordered Hallek to pay legal financial obligations. Before order the LFOs, Hallek’s trial counsel gave the court some information about Hallek’s ability to pay, which the court considered. Hallek did not object in the trial court to the court’s imposition of LFOs, but he now challenges these costs for the first time on appeal. Because Hallek did not object below, the State contends that this court should deny review.

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At sentencing, the trial court in this case imposed \$2,151.00 in costs as legal financial obligations (LFOs). CP 17; RP 165-66. The judgment and sentence in this case does not contain any boilerplate or other language regarding Hallek's ability to pay these LFOs, but during the sentencing hearing the trial court considered Hallek's ability to pay. RP 162-66.

At sentencing, Hallek's trial attorney informed the trial court that Hallek is a physical education teacher and that he has been working off and on as substitute teacher, that he volunteers at a local school, and that he is a referee for the Special Olympics. RP 162. Other than the instant case, which is a conviction for a gross misdemeanor, Hallek has no criminal history. RP 163. The trial court sentenced Hallek to 30 day in jail, but Hallek agreed to a proposal to convert these days to community service, which the court granted by imposing 216 hours of community service. CP 16-17; RP 163.

These accomplishments do not indicate a disability; instead, these accomplishments indicate that Hallek has the ability to work and earn an

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

income. His trial attorney voiced no objection to the court's order of

LFOs. Instead, his trial attorney informed the court that:

In terms of ability to pay, as I said he is a licensed educator. I'm not sure that a resisting/obstructing, I don't know how that's going to interact with his educational certificate and his ability to continue to work in schools. And so there's going to be a bit of an issue there. He occasionally is capable of getting part-time work, but he's kind of nearing the end of his employability and so his ability to pay is very limited, though not entirely gone. I'd ask the court to take that into consideration as well.

RP 163-64. In response, the trial court inquired as follows: "I didn't really hear any actual numbers as to how much Mr. Hallek makes per month so I can make a determination." RP 166. To this inquiry from the court, Hallek's trial attorney answered, "It's sporadic and part-time, Your Honor." RP 166. After this inquiry and answer, the court then set payments at \$25.00 per month. RP 166.

Even though Hallek did not object in the trial court, on appeal he now seeks to challenge the trial court's imposition of LFOs. Under RAP 2.5(a) this Court may refuse to review Hallek's claim because he did not preserve it with an objection in the trial court. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (footnote omitted). Instead, appellate courts retain

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discretion whether to accept or deny review. *Blazina* at 832; *State v. Duncan*, 180 Wn. App. 245, 250-51, 327 P.3d 699, 701 (2014) *review granted*, (Wash. Aug. 5, 2015). Here, as Hallek has not demonstrated any probable unfair prejudice related to the trial court's imposition of discretionary costs, the State contends that this court should deny review.

The trial court's imposition of LFOs included both mandatory and discretionary costs. The mandatory costs included a \$500.00 victim assessment fee under RCW 7.68.035 and a \$200.00 criminal filing fee under RCW 36.18.020(2)(h). CP 17. Trial courts must impose these mandatory fees regardless of a defendant's indigence. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). *Blazina* addressed only discretionary legal financial obligations.

The discretionary costs, which are discretionary under RCW 10.01.160, included \$950.00 for court appointed counsel, \$251.00 for sheriff's service fees, and a \$250.00 jury demand fee, for a total of \$1,451.00. CP 17. But the State contends that the trial court did not err by imposing these costs. The record shows that the trial did, to some degree, consider Hallek's ability to pay. RP 162-66. While Hallek's classification of indigent may indicate that he does not have significant cash savings, it does not mean that he is necessarily disabled to the extent that he has no

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PO Box 639
Shelton, WA 98584
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ability to pay the costs of his criminal conviction. Hallek had the ability to obtain a \$10,000.00 bail bond for his release pending trial in this matter, which was exonerated after trial, and he is able to perform 216 hours of community service and to perform other work. RP 158, 159, 162-66. These facts and circumstances show that Hallek has an ability to pay the discretionary costs imposed by the court.

3. Hallek contends that his trial counsel was ineffective for not objecting to the trial court's imposition of LFOs. The State contends that Hallek's claim should fail because he had not shown that any objection that his counsel could have made on this issue would have had merit and has not shown that there is any reasonable probability that the outcome would have been different had his attorney objected.

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 v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, Hallek must show that but for the deficient performance, there is a reasonable probability that the outcome would

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have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Hallek contends that his trial counsel was ineffective because he did not object to the imposition of LFOs at sentencing. But Hallek has not shown that there would have been any merit to counsel's objection had he made one; nor has he shown that there is any probability that the outcome of trial would have been different had his trial counsel objected to the imposition of LFOs.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), does not hold that indigence and ability to pay are the same thing. Instead, *Blazina* holds only 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. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id. at 839. Here, the trial court underwent a brief inquiry into Hallek's ability to pay, and based on that inquiry set the payments at \$25.00 per month. There is nothing in this record to show that Hallek's had any basis to object or that the result would have been any different had he objected.

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

As such, Hallek's assertion that his counsel was ineffective for not objecting should fail.

D. CONCLUSION

There was no legal requirement in this case that officers had to show Hallek a copy of the search warrant before they entered his house to arrest him. Nevertheless officers told Hallek numerous times that they had a warrant, and they showed him a copy of it through a window in the door to the house. He did not see the signature page of the warrant, but there is no requirement that they show him the signature page; nor is there any evidence that he cared about the signature page.

The evidence shows that despite his knowledge of the warrant, Hallek willfully obstructed the officers' efforts to execute the warrant. Thus, there is ample evidence in this case to overcome Hallek's claim of insufficiency of the evidence for the charge of obstruction.

Next, Hallek for the first time on appeal challenges the trial court's imposition of legal financial obligations in this case. Not only did Hallek not object in the trial court, but he also actively participated in a discussion with the trial court judge about Hallek's ability to pay these costs. The State contends that on these facts this court should deny review of this issue because it was not preserved with an objection in the trial court.

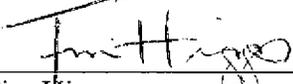
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Finally, Hallek contends that his attorney was ineffective for not preserving the LFO issue with an objection in the trial court. But the record does not support an assertion that any such objection would have had merit or that the result of the court's order would have been different had trial counsel made this objection. For this reason Hallek's claim of ineffective assistance of counsel should fail.

DATED: March 14, 2016.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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

MASON COUNTY PROSECUTOR

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