

NO. 49431-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KRISTOPHER W. ERDELBROCK,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly entered the judgement of conviction as there was sufficient evidence of Failing to Register as a Sex Offender.
2. The trial court failed to enter written findings of fact and conclusions of law following the bench trial.
3. The trial court did not impose a discretionary legal financial obligation on Erdelbrock.
4. The Court of Appeals should consider the appellant's ability to pay before imposing costs.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether there is sufficient evidence to convict Erdelbrock of the crime of Failure to Register as a Sex Offender?
2. Whether the trial court failed to enter findings of fact and conclusions of law?
3. Whether the court imposed a discretionary legal financial obligation when it signed the Judgment and Sentence that included the filing fee?

4. Whether to Court of Appeals should decline to impose appellate costs?

III. STATEMENT OF THE CASE

The State concurs with Erdelbrock's rendition of the Statement of the Case with the exceptions and additions as contained within the brief below.

IV. ARGUMENT

1. THE TRIAL COURT PROPERLY ENTERED THE JUDGMENT OF CONVICTION AS THERE WAS SUFFICIENT EVIDENCE OF FAILING TO REGISTER AS A SEX OFFENDER.

The standard of review for a claim of insufficient evidence is after viewing the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991). Additionally, the Court should afford the State all reasonable inferences. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Saunders*, 132 Wn.App. 592, 600, 132 P.3d 743 (2006). In such review, "circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability. *Id.* Lastly, the reviewing court defers to

the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 Wn.App. 193, 202, 110 P.3d 1171 (2005), *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d. 533 (1992), *State v. Camarilla*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court will not review credibility determinations).

At specific issue in the present case is RCW 9A.44.130(6)(b) which states in pertinent part:

A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request.

A "fixed residence" has been defined as:

a building that a person lawfully and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage. A nonpermanent structure including, but not limited to, a motor home, travel trailer, camper, or boat may qualify as a residence provided it is lawfully and habitually used as living quarters a majority of the week, primarily kept at one location with a physical address, and the location it is kept at is either owned or rented by the person or used by the person with the permission of the owner or renter. A shelter program may qualify as a residence provided it is a shelter program designed to provide temporary living accommodations for the homeless, provides an offender with a personally assigned living space,

and the offender is permitted to store belongings in the living space.
RCW 9A.44.128.

In a prosecution for Failing to Register as a Sex Offender the State is required to prove the defendant was convicted of a sex offense, that due to that conviction, the defendant was required to register in the State of Washington, County of Cowlitz as a sex offender that the defendant knowingly failed to comply with a requirement of sex offender registration, specifically lacking a fixed residence did fail to report weekly to the Cowlitz County Sheriff. *See* WPIC 49C.02.

Erdelbrock stipulated to his prior sex offense conviction and the registration requirement during the alleged time period. Report of Proceedings 6. Thus, these two of the elements are not at issue.

Erdelbrock's contention is that the State failed to prove he lacked a fixed residence. To give credence to his argument, he asserts the State cannot use his own statements against him based on the *corpus delicti* rule.

Washington has adopted the following application of the *corpus delicti* rule:

The confession of a person charged with the commission of a crime is not sufficient to establish *corpus delicti*, but it is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.

Deputy Ullmann testified he has verified Erdelbrock at residences in the past. RP 12. The deputy also testified he informed Erdelbrock that he needed to fill out a weekly transient log and report back every Tuesday with it between 8:30am and 4:30pm. RP 14-15. Additionally, Deputy Ullmann stated Erdelbrock has filled out several weekly transient logs prior to this registration. RP 14. Deputy Ullmann testified he had not received notice from another county that Erdelbrock had relocated, nor did he receive notification Erdelbrock had obtained a fixed residence. RP 15-16. Furthermore, the deputy testified he attempted to find Erdelbrock at the last locations Erdelbrock stated on his previous transient logs, known transient camps, jail rosters as well as the hospital. RP 16.

The failure of Erdelbrock to provide a transient log for specific dates in contradiction to past behavior, combined with Deputy Ullman's testimony concerning his attempts to locate Erdelbrock allow a reasonable inference to be drawn that Erdelbrock failed to register as a sex offender who was transient, thus there is no *corpus delicti* issue.

As there is no issue with *corpus delicti*, the State proved every element of the crime charge with sufficient evidence.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE BENCH TRIAL.

The State concedes the trial court failed to enter findings of fact and conclusions of law after the conclusion of the bench trial of Erdelbrock. The appropriate remedy is vacation of the judgment and sentence and remand for entry of written findings of fact and conclusions of law. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998).

3. THE COURT IS NOT OBLIGATED TO REVIEW THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

For the first time on appeal, Erdelbrock challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay. Recently, the Washington Supreme Court decided *State v. Blazina*, 344 P.3d 680 (2015). It held that it is not error for a Court of Appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *Id.* at 682. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Id.* at 684. The decision to review is discretionary on the reviewing court under RAP 2.5. *Id.* at 681.

This Court should continue to apply its initial decision in *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) ("Because he did not

object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.”). This is supported by this Court’s recent holding in *State v. Lyle*, COA No. 46101-3-II (July 10, 201) (“Our decision in *Blazina*, issued before Lyle’s March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal.”). Ms. Brooks was sentenced on November 6, 2014, well after the decision in *Blazina*. CP 53-64.

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Erdelbrock did not object to the legal financial obligations at the time of sentencing. The State respectfully requests this court not review Erdelbrock’s claim.

1. Even if the objection was not waived, the imposition of legal financial obligations was proper.

Because the defendant in this case did not object at sentencing, Erdelbrock bears the burden of demonstrating that he can raise this issue for the first time on appeal by showing that the sentencing court exceeded its statutory authority in assessing the LFOs. That is not shown here. In order to appeal based on the court’s failure to follow a procedural requirement, the appellant must show that “the sentencing court had a duty to follow

some specific procedure required by the SRA, and that the court failed to do so.” *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). There is no requirement that a court enter formal specific findings regarding a defendant’s ability to pay before legal financial obligations are imposed, either in the SRA or in the constitution. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013); *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). “The imposition of fines is within the trial court’s discretion...Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.” *Curry*, 118 Wn. 2d at 916. Because there is no requirement that formal findings be entered, the imposition of LFOs by the trial court was not improper.

However, if this Court finds the imposition was improper, the remedy is to remand so the trial court may make the required record. *State v. Bertrand*, 165 Wn. App. 393, 406, 237 P.3d 511 (2011).

4. THE COURT OF APPEALS SHOULD CONSIDER THE APPELLANT’S ABILITY TO PAY BEFORE IMPOSING COSTS.

RCW 10.73.160(1) provides the court with broad discretion concerning whether or not to impose appellate costs to the prevailing party. The Court also retains discretion to determine appellate costs after the

decision terminating review. RAP 14.1(a). The ability of an appellant's ability to pay is an important consideration in the discretionary imposition of appellate costs. *State v. Sinclair*, 192 Wash.App. 380, 389, 367 P.3d 612 (2016). If a trial court concludes a person meets the standards for indigency, then the courts should seriously question that person's ability to pay LFOs. *Blazina*, 182 Wn.2d at 839, 344 P.3d 680.

The record here indicates Erdelbrock is a transient individual who was appointed counsel by the trial court. Given this, it is unlikely that appellate costs should be imposed.

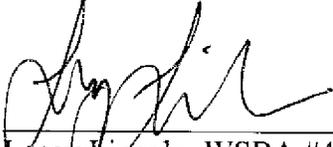
V. CONCLUSION

Based on the preceding argument, the State respectfully requests this Court find there was sufficient evidence to convict Erdelbrock of Failing to Register as a Sex Offender. Furthermore, the State concedes the case does need to be remanded for entry of findings of fact and conclusions of law, which would allow the court to address the legal financial obligation

issue raised as well should the court determine no financial obligations should be imposed.

Respectfully submitted this 20th day of April, 2017.

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 25, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR
April 28, 2017 - 11:52 AM
Transmittal Letter

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