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Court of Appeals
Division II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM EDWARD LUNDSTROM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00065-6

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the issue of whether the court failed to make an independent determination regarding any need for Lundstrom to appear in court in restraints was moot and should not be reviewed as it does not present a substantial public interest?
2. Whether the issue of whether the court failed to make an independent determination regarding any need for Lundstrom to appear in court in restraints is not reviewable as the record is inadequate and depends upon facts and evidence outside the record?
3. Whether the court erred by imposing mandatory legal financial obligations when Lundstrom's income was limited to social security benefits?
4. Whether the court erred by failing to exercise discretion as to either waiving or ordering Lundstrom to pay supervision fees as determined by the department?

II. STATEMENT OF THE CASE

On Feb. 22, 2016, the State filed an information charging Lundstrom with two counts of possession of a controlled substance. CP 43. On Nov. 9, 2016, Lundstrom was in-custody after being arrested for failing to appear at a prior court hearing on Oct. 16, 2016. RP 31. The State asked for bail after

addressing conditions of release. RP 31. The trial court then inquired whether counsel had a response to the State's request for bail. RP 31. Counsel for Lundstrom simply stated as follows:

Yeah, I don't have much of one. But I do take exception to the gentleman being -- *looks like* five-point shackles without an independent fiduciary (sic) determination of the appropriateness of that. It looks like Mr. Oakley is his current assigned counsel, so Mr. Oakley will be getting this new case as well.

RP 32 (emphasis added).

That same day, defense counsel filed a written motion objecting to the use of the restraints but did not note the motion up for a hearing or pursue the matter further and the court did not address the issue. CP 37, RP 30–33.

On December 6, 2016, Lundstrom entered a plea of guilty and the court accepted the sentencing recommendation agreed by the parties and sentenced Lundstrom accordingly. RP 64, CP 32.

Defense counsel objected the imposition of all legal financial obligations as Lundstrom informed counsel that his “disability payments -- benefits are in the neighborhood of \$750 per month, and, . . . that he is permanently and totally disabled, and therefore he has no ability to work.” RP 57. The court took the position that legislature determined there were mandatory legal financial obligations required in all cases. RP 64. The court then waived all the discretionary legal financial obligations (LFOs) and imposed mandatory LFOs only stating, “Anything else that's discretionary,

the Court will not impose.” RP 64–65; *see also* CP 21–22.

The court imposed a \$500 victim assessment fee, \$200 court filing fee, \$100 DNA fee and waived the drug related assessments. CP 21–22; RP 64–65.

III. ARGUMENT

A. THIS COURT SHOULD DECLINE TO REVIEW THE USE OF RESTRAINTS IN THIS CASE BECAUSE THE ISSUE IS MOOT AND THE RECORD IS INSUFFICIENT FOR REVIEW.

1. The Court should decline to review the use of restraints in this case because the issue is moot and not of substantial public interest.

“A case or an issue is moot when the court can no longer provide effective relief.” *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995) (citing *Washam v. Pierce Cy. Democratic Cent. Comm.*, 69 Wn. App. 453, 457, 849 P.2d 1229 (1993), *review denied*, 123 Wn.2d 1006 (1994)).

Lundstrom argues that this is an issue of continuing and substantial public interest and is likely to evade review.

This Court may still reach the merits of a moot issue if it involves matters of a continuing and substantial public interest. *In re Det. of W.R.G.*, 110 Wn. App. 318, 322, 40 P.3d 1177 (2002).

First, Lundstrom’s claim fails to present an issue of continuing and substantial public interest because the use of restraints was limited to pre-trial hearings rather than at trial and there has been no showing of prejudice.

Although a court must be persuaded by compelling circumstances and must pursue lesser restrictive alternatives before requiring a defendant to appear before a jury in shackles, this rule historically does not apply to non-jury and non-guilt phase proceedings. *See Deck v. Missouri*, 544 U.S. 622, 626, 125 S.Ct. 2007, 2010–11 (2005) *abrogated on other grounds by Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (“In discussing the “deep roots” of this rule, however, the Court noted that ‘the rule did not apply at ‘the time of arraignment,’ or like proceedings before the judge.’”).

The cases that address shackling of defendants in the courtroom “turn in large part on fear that the jury will be prejudiced by seeing the defendant in shackles.” *See Deck*, 544 U.S. at 630, 125 S.Ct. 2007; *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995); *see also Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)). “[A] judge in a pretrial hearing presumably will not be prejudiced by seeing defendants in shackles.” *Id.* at 1012 (citing *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (“We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors.”)).

The issue was also addressed in the U.S. Court of Appeals, 2nd Circuit case of *U.S. v. Zuber*, which upheld the restraint policy at issue without an individualized determination by the court. *U.S. v. Zuber*, 118 F.3d 101, 103 (2d Cir. 1997). “In *Zuber*, the court held that ‘the rule that courts

may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints does not apply in the context of a non-jury sentencing hearing.” *Zuber*, at 102; *see also DeLeon v. Strack*, 234 F.3d 84, 87–88 (2d Cir. 2000).

The U.S. Court of Appeals, 11th Circuit, also concluded “the rule against shackling pertains only to a jury trial,” adding it “does not apply to a sentencing hearing before a district judge” in *U.S. v. LaFond*, 783 F.2d 1216, 1225 (11th Cir. 2015), *cert. denied*, 136 S. Ct.213 (2015).

Moreover, “[s]hackling, except in extreme forms, is susceptible to harmless error analysis.” *Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995) (citing *Castillo v. Stainer*, 997 F.2d 669, 669 (9th Cir. 1993) (“The remaining question is whether this error prejudiced the outcome of the sentencing hearing.”)).

Here the court followed the agreed sentencing recommendation of the parties. There was no jury trial or sentencing before a jury and no apparent prejudice.

Lundstrom cites to *United States v. Sanchez-Gomez*, 859 F.3d 649, 661 (9th Cir. 2017) which is not binding on Washington trial courts. *See State v. Glasmann*, 183 Wn.2d 117, *cert.denied*, 136 S. Ct. 357, 193 L. Ed. 2d 289 (2015) (state court need not follow Ninth Circuit holding that a blank jury verdict form returned after jury got “unable to agree” instruction amounts

to an acquittal such that double jeopardy prohibits retrial on the charge the jury failed to unanimously agree upon.)

“It would undermine our role as an independent state court in our system of federalism if we overturned our precedent simply because it conflicted with a Ninth Circuit decision.”
Id. at 127.

In that same vein, the Court is referred to *Lockhart v. Fretwell*, 506 U.S. 364, 376, 113 S. Ct. 838, 846, 122 L. Ed. 2d 180 (1993) (Thomas concurring) where Justice Thomas wrote: “neither federal supremacy nor any principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) (sic) federal court’s interpretation.” He added “[i]n our federal system, a state court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court sits. (citation omitted).” *Id.*

The issue of restraints in non-jury proceedings in this case is moot. Additionally, the facts of this case regarding the use of restraints do not present a substantial public interest as there has been no showing of prejudice as Lundstrom did not appear in restraints before a jury and the trial court is presumed to not be prejudiced. Finally, the court followed the sentencing recommendations which were agreed between the parties showing a lack of prejudice to Lundstrom.

Therefore, this Court should decline to review.

//

2. **The Court should decline to review the use of restraints in this case because the record is insufficient to review as it may require evidence or facts that are not part of the record.**

In *State v. Walker*, Washington State, under the court must make the determination whether to adopt a blanket restraint policy for non-jury proceedings rather than the jail or prison officials. *State v. Walker*, 185 Wn. App. 790, 344 P.3d 227 (2015).

“On direct appeal, we cannot consider evidence outside the trial court record.” *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

An issue is not reviewable on appeal where the record is insufficient. *See State v. Hunter*, 35 Wn. App. 708, 719 669 P.2d 489 (1983) (citing *State v. Beckstrom*, 17 Wn. App. 372, 376, 563 P.2d 217 (1977) (appellate review of trial court’s bail determination precluded because the judge's statements at the time of the denial of bail were absent from the record).

Here, we have no record showing what if any consideration that the court gave to the use of restraints in pre-trial hearings. That is because there was no hearing on the issue.

On Nov. 9, 2016, Lundstrom was in-custody after being arrested for failing to appear at a prior court hearing on Oct. 16, 2016. RP 31. The State asked for bail after addressing conditions of release. RP 31. The trial court

then inquired whether counsel had a response to the State's request for bail.

RP 31. Counsel for Lundstrom simply stated as follows:

Yeah, I don't have much of one. But I do take exception to the gentleman being -- *looks like* five-point shackles without an independent fiduciary (sic) determination of the appropriateness of that. It looks like Mr. Oakley is his current assigned counsel, so Mr. Oakley will be getting this new case as well.

RP 32 (emphasis added).

That same day, Defense counsel filed a written motion objecting to the use of the restraints but did not note the motion up for a hearing or pursue the matter further so that the State could have the opportunity to respond and the court could hear the matter. CP 37. It is also not clear from the record whether the court had a chance to read defense counsel's memorandum and argument and affidavit supporting Lundstrom's objection to restraints.

Thus, the trial court never went on record to state whether it did have a basis for the use of restraints or whether it had adopted any particular policy on the use of restrains and the reasons for adopting such a policy.

The importance of the emphasized "*looks like*" above in defense counsel's response is that counsel made a major assumption about the use of restraints in this case and because there was no hearing on the issue, the record was never developed and is not sufficient to determine whether the assumption was accurate or not or whether the court exercised any discretion in the matter or whether that discretion was sufficient to justify the use of

restraints.

Therefore, this record is not sufficient for a fair review of the issue and this Court should decline review.

“If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A personal restraint petition is the more appropriate avenue for this claim. *Id.* at 339.

B. THE COURT PROPERLY ORDERED THE STATE TO IMPOSE MANDATORY LEGAL FINANCIAL OBLIGATIONS.

1. The trial court lacked the discretion to waive statutory mandatory legal financial obligations.

[F]or mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, No. 30548-1-III, 2013 WL 3498241 (Wash.Ct.App., July 11, 2013). And our courts have held that these mandatory obligations are constitutional so long as “there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants.” *State v. Curry*, 118 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013); *see also*

State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (“The trial

court imposed a \$500 victim assessment fee, a \$200 criminal filing fee, and a \$100 DNA collection fee. RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 respectively mandate the fees regardless of the defendant's ability to pay. Trial courts must impose such fees regardless of a defendant's indigency. (citation omitted) *Blazina* addressed only discretionary legal financial obligations.”).

Furthermore, the *Curry* Court held “that there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants.” *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992); *see also State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (pointing out a defendant may not be jailed for failure to pay due to indigence and that a defendant has an opportunity to prove the violation was not willful).

Here, the trial court lacked the statutory authority and discretion to waive the mandatory legal financial obligations.

Lundstrom cites to *City of Richland v. Wakefield*, for the proposition that the court may not impose the *mandatory* legal financial obligations when the defendant’s only source of income is social security disability benefits. *City of Richland v. Wakefield*, 186 Wn.2d 596, 609, 380 P.3d 459 (2016) (“In this case, the court ordered Wakefield to turn over \$15 from her social security disability payments each month. That meets the Supreme Court's

definition of “other legal process.” Accordingly, we hold that federal law prohibits courts from ordering defendants to pay LFOs if the person's only source of income is social security disability.”)

Lundstrom’s argument fails because it is clear in *Wakefield* that the only legal financial obligations that were at issue were *discretionary* costs and not mandatory costs.

Wakefield is specifically challenging the discretionary costs imposed as a result of the latter two convictions.

She is not challenging fines or nondiscretionary LFOs. Wakefield acknowledges that she did not appeal the costs imposed as part of her judgment and sentence, and thus she is not challenging the original decision imposing those costs.

Wakefield, 186 Wn.2d at 600–01.

“The district court's repeated references to Wakefield's LFOs as “fines” during the fine review hearing were incorrect; only discretionary costs are at issue.” *Id.* at n.1.

This is an important distinction because the trial court is commanded by legislature to inquire about a defendant’s ability to pay prior to imposing discretionary costs:

The 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).

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

In *Wakefield* it was clear that only discretionary costs were at issue and that Wakefield's ability to pay was severely limited such that the imposition of discretionary costs was improper. The *Wakefield* Court never addressed the mandatory legal financial obligations which are at issue in this case.

Lundstrom also cites to *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016) suggesting that the *Duncan* Court required an individualized inquiry of ability to pay even for mandatory legal financial obligations. See Appellant's Br. at 25. *Duncan* does not stand for this proposition as nothing in *Duncan* extends the hold of *Blazina* to mandatory legal financial obligations.

It was clear in *Duncan* that there was absolutely no inquiry into ability to pay at all and that some of the legal financial obligations included discretionary costs. *Duncan*, 185 Wn.2d at 435. Further, the *Duncan* Court cited to the Court's other opinions which followed *Blazina* showing that the individualized inquiry into ability to pay applies to discretionary legal financial obligations and not mandatory obligations:

Consistent with our opinion in *Blazina* and our other cases decided since then, we remand to the trial court for resentencing with proper consideration of Duncan's ability to pay LFOs.

Duncan, 185 Wn.2d at 437–38 (citing *State v. Marks*, 185 Wn.2d 143, 368 P.3d 485 (2016) (remanding case to the superior court to reconsider discretionary legal financial obligations in light of *Blazina*); *State v. Licon*, noted at 184 Wn.2d 1010, 359 P.3d 791 (2015); *State v. Leonard*, 184 Wn.2d 505, 358 P.3d 1167 (2015) (per curiam); *State v. Vansycle*, noted at 183 Wn.2d 1013, 353 P.3d 634 (2015); *State v. Cole*, 183 Wn.2d 1013, 353 P.3d 634 (2015)).

2. The issue of whether the court erred in ordering payments is not ripe for review as there is no evidence the State has attempted to enforce payment.

The trial court in this case did not order Lundstrom to pay the mandatory legal financial obligations from social security benefits. Additionally, there is no evidence of any effort by the State to collect Lundstrom's social security disability benefits as payment towards legal financial obligations. Therefore, the issue is not ripe for review.

"[G]enerally challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013).

Therefore this Court should uphold the trial court's imposition of the mandatory legal financial obligations which include the \$500 victim assessment, \$200 court filing fee, and the \$100 DNA fee.

3. The State concedes that the court has discretion to waive supervision fees.

“Unless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . (d) Pay supervision fees as determined by the department[.]” RCW 9.94A.703(2) (Waivable conditions).

“When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law.” *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (citing *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). Where a sentencing court errs with respect to a statutory sentencing provision by failing to exercise discretion, the proper remedy is for remand for resentencing to amend the judgment. *See McFarland*, 189 Wn.2d at 58; *see also State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (citing *Cf. In re Habbitt*, 96 Wn.2d 500, 636 P.2d 1098 (1981) (where the trial court improperly applied firearm findings to enhance first degree robbery convictions, remand for resentencing, rather than simply striking firearm enhancements, is the appropriate remedy)).

The State concedes that the trial court may waive a condition that the

defendant pay supervisions fees as determined by the department under RCW 9.94A.703(2)(d). The court did not waive this condition, but the court did not order it either. There is also evidence on the record that the court may very well have waived this discretionary cost if it knew it had statutory authorization because it waived all the other discretionary costs and only imposed the mandatory costs. *See* RP 64–65 (“Anything else that’s discretionary, the Court will not impose.”).

Therefore the State moves this Court to remand this cause to the trial court for resentencing on this issue.

IV. CONCLUSION

The Court should decline to review the issue of whether the court failed to make an independent determination regarding any need for Lundstrom to appear in court in restraints because the issue is moot and does not present a substantial public interest. Additionally, the Court should decline to consider this issue because the record is inadequate and would require facts outside the record in order to fairly review the issue.

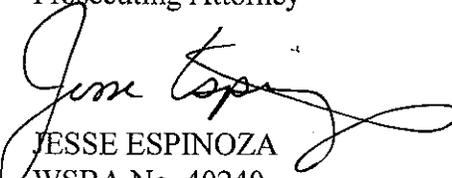
Furthermore, the court was required by statute to order the mandatory legal financial obligations without regard to ability to pay and there has been no order or effort to collect from Lundstrom’s social security disability benefits to satisfy these obligations. Therefore the court did not err and the

issue is not ripe for review.

Finally, the State concedes that the case should be remanded to address the issue of whether the court will impose or waive the condition that the defendant pay supervision fees as determined by the department.

Respectfully submitted this 4th day of December, 2017.

MARK B. NICHOLS
Prosecuting Attorney



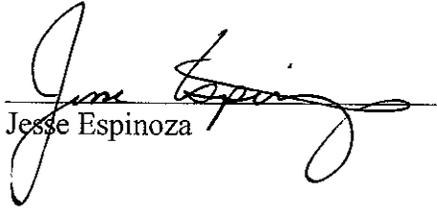
JESSE ESPINOZA
WSBA No. 40240

Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Kathryn Russell Selk on December 4, 2017.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY PROSECUTING ATTORNEY'S OFFICE

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