

No. 49773-5-II  
Kitsap County No. 16-1-00709-9

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

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STATE OF WASHINGTON,

Respondent,

v.

TINA MARIE HUGHES,

Appellant.

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

---

The Honorable Jeffrey P. Bassett, Judge

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*APPELLANT'S OPENING BRIEF*

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KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant

RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, #176  
Seattle, Washington 98115  
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Appellant Tina Hughes was deprived of her Sixth Amendment and Article 1, § 22, rights to effective assistance of appointed counsel.
2. Improper, prejudicial evidence was admitted based on counsel's ineffectiveness and the error was not harmless.
3. Highly prejudicial "opinion" testimony on guilt was admitted without defense objection.
4. The trial court erred and acted outside its statutory authority in ordering "forfeiture" of property. Appellant assigns error to the condition which provides, as follows:

[x] **FORFEITURE** - Forfeit all seized property, referenced in the discovery to the originating law enforcement agency unless otherwise stated.

CP 72.

5. The trial court failed to properly conduct the required inquiry into appellant's present and future ability to pay before ordering her to pay legal financial obligations despite her indigence, in conflict with the requirements of *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), and RCW 10.01.160.
6. Appellant assigns error to the "finding" in the judgment and sentence which provided,

[t]he Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations.

CP 72.

B. QUESTIONS PRESENTED

1. The only question at trial was whether the jury believed Ms. Hughes that she unwittingly possessed drugs found inside her purse.

Was counsel ineffective in first allowing the jury to hear highly prejudicial, irrelevant ER 403(b) evidence which encouraged the jury to convict appellant based on "propensity" rather than evidence, then failing to object

when witnesses repeatedly gave highly improper, prejudicial testimony giving their opinion on appellant's guilt and veracity?

2. The authority to order forfeiture is wholly statutory and an order is only valid if it complies with the relevant statute's procedural requirements. Did the trial court act outside its authority in ordering forfeiture as a routine condition of a criminal sentencing even though there was no statute authorizing such an order?
3. Where the defendant is indigent and has appointed counsel at trial due to poverty, does the trial court err in imposing legal financial obligations without properly considering that poverty?
4. Is a "boilerplate" finding supported by sufficient evidence when the court did not conduct the required inquiry before entering that finding?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Tina Marie Hughes was charged in Kitsap County by information with possession of a controlled substance (methamphetamine). CP 1-6; RCW 69.50.4013; RCW 69.50.206(d)(2). Pretrial hearings were held before the Honorable Judges William C. Houser on June 6, Leila Milles on July 27, Jeffrey Bassett on August 31, Melissa Hemstreet on September 28 and October 31, and Kevin D. Hull on November 14, after which a jury trial was held before Judge Bassett on November 14-17, 2016.<sup>1</sup>

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<sup>1</sup>The verbatim report of proceedings consists of 8 volumes, which will be referred to as follows:

June 6, 2016, as "1RP;"  
July 27, 2016, as "2RP;"  
August 31, 2016, as "3RP;"  
September 28, 2016, as "4RP;"  
Oct 31, 2016, as "5RP;"  
November 14, 2016, as "6RP;"  
the trial proceedings of November 14-17, 2016, as "RP;"  
December 9, 2016, as "SRP."

Hughes was convicted as charged. CP 63. On December 9, 2016, Judge Bassett ordered a standard range sentence. CP 64-74. Hughes appealed and this pleading follows. See CP 75-86.

2. Relevant Facts

Kitsap County Sheriff's Office patrol deputy John Bass was working the night shift on May 27, 2017, patrolling in an area which was his favorite for finding people "running around without tabs" on their cars. RP 58-61. When cars would go by, the officer would "run their plates," checking to see if the tabs had expired or "maybe that driver is suspended." RP 61. This, in turn, Bass said, gave him "reason to make the stop or make the contact." RP 61.

A car plate Bass "ran" that night came back as "stolen" a few minutes after the car was out of his sight. RP 61-62. Bass then turned his patrol vehicle around and "caught back up" with the suspected stolen vehicle. RP 61-62. That other vehicle was "just driving normally" and the officer admitted the driver of the car ahead was not "trying to outrun" him or doing "anything too peculiar." RP 62. Bass also conceded that there was nothing about how the other car was driving which made him suspect anything wrong other than "the return on the plate." RP 63.

Bass followed and called for backup, waiting for help to arrive. RP 62. After a short while he "went ahead and initiated the stop." RP 62. Once other officers arrived, the driver and passenger of the stopped car were "brought. . .out" of the car with their hands up separately, secured into handcuffs and detained in a patrol car while

the car was searched to make sure no one else was inside. RP 63-64. The passenger, who was male, was released because he was not the driver. RP 65.

The driver, later identified as Tina Hughes, gave Bass permission to grab her license from out of her purse and Bass then “ran” her name, saying she “came back as a valid driver.” RP 65. The officer then returned the license to the wallet and the wallet to the purse, which was on the floor of the car of the car on the driver’s side. RP 65-66.

Bass asked Hughes if she wanted her purse to go with her to jail or leave with her passenger. RP 66. According to the officer, Hughes asked for the purse to come along so Bass put it in the back of his patrol car. RP 66, 76-77. They left for jail while other deputies waited to tow the car. RP 68.

Bass was still in the booking area when a corrections officer said they had found some suspected contraband in the purse. RP 69. Bass did not, however, see the contraband found. RP 70, 82. Robin Fitzwater, a corrections officer at the Kitsap County Jail, was the person who searched the purse after Bass arrived with Hughes at about 5 a.m. that morning. RP 90-91. Fitzwater testified that she found the suspected drugs in a makeup container “compact,” where the bottom “flipped up” to hold an applicator. RP 94-95. Fitzwater said the little “baggie” was inside. RP 95.

On cross-examination, Officer Fitzwater conceded that she only remembered certain parts of the incident. RP 97-98. Typically,

Fitzwater said, the booking officer would write a report after a booking incident like that, but one was not done in this case. RP 101. Fitzwater admitted she would have been the officer to write any such report but just did not do so, because it “slipped my mind,” she said. RP 102. She maintained, however, that she recalled the “memorable” parts. RP 98. For example, she did not remember the other items of clothing Hughes had with her. RP 99. She could not recall if others were in the booking area at the same time. RP 99.

She also could not remember other “more everyday aspects” of the booking. RP 99. The officer did not remember the size or shape of the purse. RP 99-100. She did not know the color of the purse. RP 99-100. She did not recall the color of the makeup container or what exactly it contained, although she thought it was “like a solid powder.” RP 100.

The officer testified that she took out the “baggie” and left the makeup container and purse in Hughes’ “property.” RP 100. Fitzwater found nothing else of “significance” in the purse. RP 100-101. She could not recall if there were other makeup containers inside. RP 100-101.

Bass “secured” the item, a “little baggie” with “a crystal-like substance.” RP 70. He carried it with him to go type a report. RP 70-71. At trial, he would admit he did not take fingerprints from the bag. RP 72. Without defense objection, he then declared:

Typically, when you find something in someone’s wallet or purse, **that’s their property**. I’m not going to fingerprint the gun I find on your hip. That’s just not common practice.

RP 72-73 (emphasis added).<sup>2</sup>

On the way to jail in the patrol car, Bass said, he had a conversation with Hughes. RP 78. He asked if she had “anything she shouldn’t have.” RP 78. She responded, “no,” also saying she was “not a drug user.” RP 78. When the baggie was later found, Bass conceded, he probably went over to where Hughes was being held and demanded, “[w]hat is this?” RP 82.

Bass conceded that, when he went into the purse to get the wallet, he saw no paraphernalia of any kind. RP 84. A forensic scientist tested the suspected drugs and testified they contained methamphetamine. RP 104-105.

Tina Hughes was 50 at the time of trial. RP 127-28. Before she was pulled over driving the truck, she was at a friend’s house. RP 129. The truck was outside, parked. RP 129. During that time, she left her purse in the truck for about five hours, unattended. RP 129-30. They were taking apart the truck to sell off the stereo system and she was driving because her friend did not have a license. RP 130.

As the officer pulled them over, her friend was nervous because he had “a little bit of a legal history,” but Hughes herself was not, because she knew she was driving legally. RP 130. Hughes said the truck was new and she was trying to find some kind of registration or whatever in her purse while officers were yelling for her to get out. RP 130. Hughes said she let the purse drop and it either fell in the car

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<sup>2</sup>Counsel’s ineffectiveness in handling this evidence is discussed in the argument section, *infra*.

or on the ground. RP 131. She said it was “one of these purses” that just “flies open.” RP 131.

Hughes was ordered to put her hands on the back of her head and walk backwards so she did so. RP 131-32. By this point, Hughes was thinking the guy who was selling it to them must have stolen the truck. RP 132. Bass was nice, however, and seemed sympathetic. RP 132. Hughes was not sure where her purse was at that point - on the floor of the car or on the ground. RP 133. When the officer was looking for her identification, Hughes asked the officer to get the green wallet in her purse and he ultimately did. RP 133-34.

After she was arrested, Hughes said, the officer asked if she wanted to bring her purse and she asked about the “protocol.” RP 134. The officer told her she had to get everything out of the truck that was hers and would keep track of the purse if they took it along. RP 134-35. Later, at jail, she was in a cell with others when the officer came over and held up something, asking what it was. RP 138. She could not really see him but thought the object he had looked like a glasses holder with initials on the front. RP 138. She guessed “glasses holder” to him but also said she did not know and it was not hers. RP 138. The officer was clearly angry and said something like, “[y]our bail is going to be a whole lot more now” and “it has rock.” RP 138-39.

At trial, Hughes said she did not have any makeup like the kind being described by the officer. RP 141-42. She testified that the compact the officers never took into custody was not hers. RP 141-42.

Deputy Bass denied seeing anything drop out of the car when

Hughes got out. RP 145. He said the purse was on the floorboard of the car, sitting right on top. RP 145-46.

D. ARGUMENT

1. A NEW TRIAL IS REQUIRED BECAUSE COUNSEL WAS PREJUDICALLY INEFFECTIVE AND HIGHLY PREJUDICIAL EVIDENCE AND IMPROPER OPINION TESTIMONY WERE ADMITTED

Both the Sixth Amendment and Article 1, § 22 of the Washington Constitution guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Counsel is ineffective if, despite a strong presumption he was effective, 1) his representation was “deficient,” and 2) that deficiency prejudiced his client. See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ineffective assistance of counsel is a mixed question of fact and law, reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

In this case, Ms. Hughes is entitled to a new trial with new counsel, because counsel’s performance was deficient in several ways and those deficiencies prejudiced Ms. Hughes. Two of the deficiencies were centered around the testimony of Deputy Bass and the crucial issue of whether Hughes was credible in her claim she had unwittingly possessed the drugs found into her purse.

Counsel was deficient in her handling of the prosecutor’s efforts to introduce irrelevant, prejudicial ER 403(b) evidence and improper opinion testimony at trial. Before trial, the prosecutor

asked to be able to tell the jury that the defendant was driving a suspected stolen vehicle. RP 14-15. She urged the court to admit this evidence even though Ms. Hughes was not accused of possessing that vehicle or anything related to it. RP 14-15. The prosecutor was concerned that, without that evidence, the officer might look bad for “pulling her over just to pull her over.” RP 14-15. She also argued that it was part of the “res gestae.” RP 15.

Counsel said first she would “probably agree” because that was an “important part” of why they were originally pulled over. RP 15. But counsel also admitted that, until that moment, she had believed the state was going to “go forward with the stolen car thing” and “fully expected that to be a part of this trial.” RP 16-17. Counsel then barely participated in the discussion, not asking for more time to think about the implications, as the court and prosecutor decided that the jury should be told that Hughes was suspected of driving a stolen car and how far he should “go into his testimony,” but no instruction given to explain that Hughes was not accused of anything in relation to the stolen car. RP 18.

Later, however, in opening argument, the prosecutor discussed how the officer had pulled over the truck Hughes was driving as a suspected stolen vehicle, and Hughes had been arrested in relation to that crime. RP 55. With the jury then out, counsel objected, “there was an agreement that we were going to say that there was an issue with the truck, not that it was a stolen vehicle.” RP 55. The court corrected her, “[n]o,” and told her the discussion was that the

prosecutor “didn’t have to go into . . .whether they filed charges or not” on the stolen car. RP 55. The prosecutor agreed but said she was not going to “harp” on it being stolen, just explaining because she did not want them to think the officer was just conducting a “random, harassing stop or something.” RP 55. Counsel ended up just saying, “[o]kay.” RP 55.

A little later, at trial, Deputy Bass testified about the serious danger when a stolen vehicle is involved and how they made the stop:

[W]e treat all stolen vehicles the same. It’s a high-risk stop You don’t know what’s going to jump out of the car. You don’t know if they’re going to run. You want to be set up for success prior to making that stop.

RP 62. A moment later, he repeated it was “a high-risk traffic stop.”

RP 62. Bass would detail the “high-risk traffic stop” and wanting “one person shouting commands,” another “providing security” and a third to “go retrieve the individuals as they’re backing up to your patrol car.” RP 67.

A little later, when the officer was asked about whether he had done fingerprint testing on the “baggie,” the officer opined:

Typically, when you find something in someone’s wallet or purse, **that’s their property**. I’m not going to fingerprint the gun I find on your hip. That’s just not common practice.

RP 72-73 (emphasis added). Counsel did not object.

Counsel was ineffective in failing to object to this improper opinion testimony and in her handling of the prejudicial “propensity” evidence of the stolen truck. Counsel’s representation is “deficient” if it fell below an objective standard of reasonableness, based on the

circumstances of the case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). That deficiency is prejudicial and compels reversal where, within reasonable probabilities, the outcome would have been different, absent counsel's errors. See id.

This does *not* require proof the defendant would likely have been acquitted. Strickland, 466 U.S. at 694. A "reasonable probability" is one sufficient to "undermine confidence in the outcome." State v. Crawford, 159 Wn.2d 86, 104-105, 147 P.3d 1288 (2006). Further, it involves a low standard of proof, less than a "preponderance of the evidence." See State v. Riofta, 166 Wn.2d 358, 376, 209 P.3d 467 (2009) (Chambers, J., concurring in dissent). To determine if such a probability exists, the Court asks if it can be confident that counsel's errors had no effect on the verdict. See, e.g., State v. Boehning, 127 Wn. App. 511, 532, 111 P.3d 899 (2005).

Such a conclusion is not possible in this case. The only issue at trial was whether the jury would believe Hughes had unwittingly possessed the drugs found in her purse. The officer's improper opinion that it was, in fact, her purse, was highly relevant and prejudicial. Opinion testimony from an officer is especially likely to hold sway with jurors. See State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Further, the improperly admitted evidence that the defendant was driving a suspected stolen vehicle was only enhanced by the deputy's testimony about how "high risk" and dangerous it is for police to stop a car when it is suspected to be stolen. All of that improper evidence went directly to the only issue in the case - Ms.

Hughes' defense. There could be no "tactical" reason to allow such evidence to be admitted and, indeed, the record indicates counsel was simply not paying sufficient attention to what was going on to ensure her client's interests were secured. Ms. Hughes received ineffective assistance of counsel and this Court should order a new trial.

2. THE LOWER COURT ERRED IN ORDERING  
FORFEITURE OF PROPERTY WITHOUT STATUTORY  
AUTHORITY

Even if a new trial were not required, Ms. Hughes would be entitled to relief, because the sentencing court acted outside its statutory authority in ordering a condition of forfeiture. The Legislature alone has the authority to establish the scope of legal punishment in our state. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). As a result, when a trial court imposes a sentence, that sentence must be authorized by statute. State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999). When a sentencing court exceeds its statutory authority, the resulting condition or portion of the sentence is void and must be stricken. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992). Further, the error may be raised for the first time on appeal. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002).

In this case, the sentencing court erred and acted without statutory authority in ordering, as part of the pre-printed language on the judgment and sentence, "[f]orfeit all seized property, referenced in the discovery to the originating law enforcement agency unless

otherwise stated. CP 72.

This Court applies de novo review. State v. Roberts, 142 Wn.2d 471, 14 P.3d 1087 (2012). As a threshold matter, in this state, “[f]orfeitures are not favored.” City of Walla Walla v. \$401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). Further, the trial court has no “inherent” authority to order forfeiture; instead, any forfeiture must be authorized by statute. Bruett v. Real Property Known as 18328 11<sup>th</sup> Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998).

Put another way, the sentencing courts of this state do not have authority to order forfeiture unless there is a specific statute authorizing that order. Alaway, 64 Wn. App. at 800-801. They do not have that authority simply based on conviction for a crime. Id. In addition, there is no “inherent authority to order the forfeiture of property used in the commission of a crime.” Id.

Indeed, RCW 9.92.110 specifically abolished the doctrine of forfeiture by conviction, providing in relevant part, “[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein.”

As a result, any order of forfeiture must be supported by statute. And it is the state’s burden of showing that the trial court had statutory authority to order the forfeiture. State v. Rivera, 198 Wn. App. 128, 392 P.3d 1146, review denied, \_\_ Wn.2d \_\_ (2017 WL 3276403) (August 2, 2017). Further, when there is a statute

authorizing forfeiture of property by the government, that statute must be followed for the forfeiture to be authorized thereby. Alaway, 64 Wn. App. at 800-801. This means that the government must use the procedures set forth in the authorizing statute in order to forfeit property of a person. Id., see, Espinoza, 87 Wn. App. at 865.

In this case, there was no discussion of the forfeiture condition at sentencing. SRP 1-15. Nor was the condition specific to the facts of the case. Instead, it was pre-printed on the form and applies as a “default,” i.e., forfeiture will occur of all property seized and referred to in discovery, without any evidence that property was even related to the conviction, unless a sentencing judge chooses to “otherwise state[.]” CP 72. But there was no statute cited to authorize this order. CP 72.

That the order was not statutorily authorized is made clear by brief look at several of the relevant statutes. RCW 10.105.010 authorizes law enforcement agencies to seize and forfeit certain items used in relation to or traceable in specific ways to commission of a felony, but has certain statutory requirements. The seizing agency must serve proper notice on all persons with a known right or interest in the property, who then have a right to a hearing at which they have the opportunity to provide evidence of such ownership. RCW 10.105.010(3), (4) and (5). The proceedings for forfeiture are also separate and held as a civil matter. RCW 10.105.010(5). Indeed, the deciding authority is not the superior court. RCW 10.105.010(5). Instead, if the seizing agency provides the proper notice served within

15 days following the seizure upon all with a known right or interest therein, a hearing objecting to the seizure is before the “chief law enforcement officer” or that officer’s “designee,” unless the “right of removal” to a court is made under civil procedure rules. RCW 10.105.010(5).

Other forfeiture statutes similarly authorize a law enforcement agency to conduct forfeiture proceedings for certain property when the accused commits a specific crime. RCW 9A.83.030 applies if the defendant is accused of money laundering under RCW 9A.83.020, and also involves a separate civil action, 15 days notice, and the rules of civil procedure. RCW 9.46.231 applies to “gambling devices” and items used in gambling crimes, also giving rights of removal and notice within 15 days of the seizure. RCW 69.50.505 provides for forfeiture of controlled substances and raw materials used to manufacture such substances, as well as “equipment” used to process, manufacture or otherwise commit a crime under RCW 69.41. But the statute also requires that the seizure occur within a specific time and does not involve the superior court at all. RCW 69.50.505(5) makes the “chief law enforcement officer” the arbiter of whether property should be seized. And again, the agency seeking the seizure has to provide notice of intent to anyone with known rights or interests in the property and the hearing held before “the chief law enforcement officer of the seizing agency” unless a right of removal is exercised. See id; see Smith v. Mount, 45 Wn. App. 623, 723 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (system of having chief officer

presiding when his agency stands to financially benefit is constitutional). The proceeding is civil and there is a right to reasonable attorney's fees if the agency does not prevail.

None of these statutes provide authority for a sentencing court to order forfeiture of the property of a defendant seized by police at the time of the arrest, without any discussion and based upon a boilerplate condition preprinted on a county's judgment and sentence documents.

Indeed, this Court has so held. Several times. Roberts, supra; Rivera, supra. As here, in Roberts, supra, the judge ordered forfeiture of property in the judgment and sentence entered in a criminal case but cited no authority in its support. 185 Wn. App. at 95-96. This Court declared that "the trial court erred in ordering forfeiture in the absence of any statutory authority." 185 Wn. App. at 95.

Similarly, in Rivera, despite Roberts, the state argued that the record was "insufficient for review" because the defendant had not identified any seized property in particular which had been forfeited and had not filed a "motion under CrR 2.3(e)." Rivera, 198 Wn. App. at 131-32. This Court rejected this claim, reaffirming its holding in Roberts that "the state had the burden to produce a record demonstrating that the sentencing court had statutory authority to include a forfeiture provision in the appellant's judgment and sentence." 198 Wn. App. at 131-32.

The state cannot meet that burden in this case. The trial court erred and acted outside its statutory authority in imposing an

unauthorized condition of forfeiture. That condition is thus void and must be stricken.

Once again, it is worth noting, counsel was ineffective. This Court first held that this type of general order of “forfeiture” was not authorized by statute in Roberts, in 2014. Yet counsel apparently never noticed. Failure to argue or cite relevant caselaw is below the objective standard of reasonableness if that failure prevents the court from making an informed decision. See State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). The condition of forfeiture here was not authorized by statute and this Court should strike it, even if reversal and remand for a new trial does not occur.

3. THE TRIAL COURT ERRED IN ORDERING LEGAL FINANCIAL OBLIGATIONS WITHOUT COMPLYING WITH THE REQUIREMENTS OF RCW 10.01.160

This Court should also reverse and remand for resentencing under Blazina, supra, and its progeny. The sentencing court failed to follow the requirements of RCW 10.01.160 and Blazina and subsequent cases control.

Ms. Hughes was represented by appointed counsel below, after the Honorable Judge William C. Houser entered a finding on June 6, 2016, “that the Defendant is presently financially unable to obtain a lawyer without causing substantial hardship to the Defendant or the Defendant’s family.” CP 7. The assignment was “conditioned” upon Hughes paying the costs of such counsel and “other defense services” if she became able to pay. CP 7.

At sentencing, after the prosecutor asked for “standard

obligations” and a 30-day sentence, the court asked, “[a]ny information as far as financial obligations?” SRP 5. The prosecutor responded, “[n]ot from the State, Your Honor.” SRP 5.

A moment later, the court asked counsel the same question, and counsel responded that Ms. Hughes is a retired nurse working at home caring for her dying father. RP 8. The judge inquired further:

Is she earning a living? Is she not working at all as far as earning any financial income because she’s taking care of her father? Because what you’ve told me, she has some obligations that are a reason for me not to throw her butt in the can for 180 days, but that doesn’t mean anything under Blazina. **I need to know why I should not impose discretionary costs.**

SRP 9 (emphasis added). Counsel then told the court that Hughes did not work and her sole source of income was as a “crafter.” SRP 9.

At that point, Hughes herself spoke up, informing the court she had applied for disability and was waiting for a hearing. SRP 9.

Hughes also was concerned about her very elderly mom having to take care of her dad without help from Hughes. SRP 11. Hughes’ father had “bad dementia” and a number of other medical conditions, including an inability to walk. SRP 11-12. Hughes herself was getting disability or had sought it because she had a mental condition -as she tried to explain, “[m]y brain broke.” SRP 12.

The judge imposed a chemical dependency evaluation and then went on:

Because of the cost concerned with that, because of the fact that you’re awaiting disability, which means to me you have made some efforts and you’re not earning an income, I’m going to waive all but the mandatory costs.

SRP 13. A moment later, the court signed an order of indigency for

appeal, finding Hughes too impoverished to pay for counsel or the costs of appeal at her own expense. SRP 14.

Preprinted on the judgment and sentence was the “finding,” “The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations.” CP 71-72. Hughes was ordered to pay a \$500 victim’s assessment, a \$200 filing fee, and a \$100 DNA fee. CP 72. Payments were ordered to “commence [x] immediately” and at a rate of “[x]\$100 [] \$50 []\$25 [] \_\_ per month, unless otherwise noted[.]” CP 72-73. Preprinted were additional terms, that 12% interest shall apply but the court might in its discretion waive it “if the Defendant makes timely payments under this payment schedule.” CP 73. Also preprinted and apparently applicable to every case was the following language:

**50% PENALTY FOR FAILURE TO PAY LEGAL FINANCIAL OBLIGATIONS** - Defendants shall pay the costs of services to collect unpaid legal financial obligations. Failure to make timely payments will result in assessment of additional penalties, including an additional 50% penalty if this case is sent to a collections agency due to non-payment.

CP 72. Further, Hughes was subject to “up to 60 days of confinement” for any violation of the terms of the sentence. CP 73.

This Court should reverse those orders, because the trial court failed to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” before ordering Ms. Hughes, who is indigent, to pay legal financial obligations (LFOs), under Blazina, 182 Wn.2d at 836.

The imposition - and collection - of legal financial obligations

(LFOs) has constitutional limitations. See State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976); Fuller v. Oregon, 417 U.S. 40, 44-47, 94 S.Ct. 2116, 40 L. Ed. 2d 642 (1974). The U.S. Supreme Court has held that, where a state chooses to impose legal financial obligations as a condition of a criminal conviction, the system must meet certain requirements. Fuller, 417 U.S. at 45. Repayment must not be mandatory. 417 U.S. at 45. Further, the court is required to “take into account the defendant’s financial resources and the burden that payment would impose.” If “there was no likelihood the defendant’s indigency would end,” no repayment obligation may be required. 417 U.S. at 46. Further, no convicted person can be jailed or held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

In Blazina, *supra*, our state’s highest Court found “ample and increasing evidence that unpayable LFO’s ‘imposed against indigent defendants’ imposed significant burdens on offenders and our community.” State v. Duncan, 185 Wn.2d 430, 437, 374 P.3d 83 (2016). In Duncan, decided before the sentencing in this case, the Court again reaffirmed the requirement that the trial court must make “an individualized inquiry” into the financial situation of each specific defendant before imposing LFOs. 185 Wn.2d at 437. And in Duncan, the Court ordered such consideration *despite* recognizing that a number of the LFO’s imposed had been described in authorizing statutes as “mandatory.” 185 Wn.2d at 436-37.

Here, at the outset, the sentence court’s focus was wrong. The

question was not whether there was evidence presented by the defense that legal financial obligations should *not* be imposed. See SRP 11-13. Instead, the question was whether there is sufficient evidence presented that the defendant has actual current or future ability to pay, before such payment can be ordered. See City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016). Richland, supra, is instructive. In that case, the defendant was homeless, disabled and indigent but had a social security check for disability payments of \$710 once a month. 186 Wn.2d at 607. The trial judge focused on the defendant's voluntary decisions, finding they had negatively impacted her ability to pay and demonstrated "willfulness on her part." 186 Wn.2d at 607. The trial court then faulted the defendant for failing to provide "bona fide efforts she has made to be current in her fine payments." Id.

In reversing, the Supreme Court found it was legal error when the trial court disregarded whether the defendant "could currently meet her own basic needs when evaluating her ability to pay." 186 Wn.2d at 608. Indeed, the Court found it "difficult to see how being unable to care for one's own basic needs - food, shelter, basic medical expenses - would not meet" the standard of indigence which would show inability to pay. Id. The Court reaffirmed that, when a defendant qualifies as indigent under GR 34, a court should seriously consider whether that defendant will honestly be able to meet the requirements of paying LFOs. Id. And if anyone makes an income falling below 125 percent of the federal poverty guidelines or is

receiving assistance from a “means-tested assistance program, such as Social Security or food stamps,” that is evidence of indigence. Blazina, 182 Wn.2d at 838.

Ms. Hughes was found indigent not just for trial due to poverty but for the purposes of appeal as well. There was *no* evidence presented that she had present or future ability to pay legal financial obligations, especially because of her mental condition and disability status. Further, the court is required to make a determination of ability to pay under RCW 10.01.160, not just make a “boilerplate” preprinted finding in a judgment and sentence. Blazina, 182 Wn.2d at 838.

Notably, once again, counsel was ineffective on her client’s behalf. Blazina was decided in March of 2015. Duncan was decided well before sentencing in 2016. Yet counsel appeared completely unprepared to present any information about the details of her client’s financial condition or debts, etc., at sentencing. And when urged by the court, it was *appellant*, not counsel, who told the court about her serious mental condition and application for disability status. SRP 11-12.

Reversal and remand for reconsideration of imposition of the legal financial obligations, interest and other financial conditions should be granted. Based on counsel’s repeated ineffectiveness below, new counsel should be appointed, either for a new trial or, in the alternative, for a resentencing hearing which actually complies with the requirements of RCW 10.01.160 and Blazina.

E. CONCLUSION

For the reasons stated herein, the Court should reverse and remand for a new trial with new appointed counsel. In the alternative, it should strike the improper “forfeiture” condition and reverse and remand for a proper evaluation of the defendant’s actual financial resources and “ability to pay” before legal financial obligations are imposed.

DATED this 7th day of August, 2017.

Respectfully submitted,

/s/ Kathryn Russell Selk  
KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 N.E. 65<sup>th</sup> Street, Box 176  
Seattle, Washington 98115  
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at Kitsap County Prosecutor's Office, [kcpa@co.kitsap.wa.us](mailto:kcpa@co.kitsap.wa.us), and to appellant by depositing first-class postage pre-paid, at the following address: 200 E. Gills Cove Drive, Allyn, WA. 98525.

DATED this 7th day of August, 2017,

/s/ Kathryn A. Russell Selk  
KATHRYN A. RUSSELL SELK  
WSBA No. 23879  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> St., Private Box 176  
Seattle, WA. 98115  
(206) 782-3353

# RUSSELL SELK LAW OFFICE

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Sender Name: Kathryn Selk - Email: KARSDroit@aol.com  
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