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No. 49788-3-II
and 50575-4-II
(Consolidated)

Mason County No. 15-1-00177-9

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD K. LEFFLER,

Appellant.

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

The Honorable Judge Daniel L. Goodell
(trial, plea, sentencing and motion to withdraw)

*OPENING BRIEF ON BEHALF OF
APPELLANT*

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. QUESTIONS PRESENTED 1

C. STATEMENT OF THE CASE 1

 1. Procedural Facts. 1

 2. Overview of facts relating to charges 3

D. ARGUMENT. 3

 1. THE TRIAL COURT ERRED IN ORDERING
 DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS
 DESPITE APPELLANT’S INDIGENCE 3

 2. THE TRIAL COURT SHOULD HAVE ALLOWED
 WITHDRAWAL OF THE PLEA TO CORRECT A
 MANIFEST INJUSTICE 10

E. CONCLUSION. 14

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987). 11-13

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) 1, 5-10

State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006). 10

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 9

State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995) 9

State v. Riofta, 166 Wn.2d 358, 209 P.3d 467 (2009). 10

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). 9

State v. Taylor, 83 Wn.2d 594, 521 P.2d 699 (1974). 11

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 9, 10

Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976) 10

WASHINGTON COURT OF APPEALS

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 10

State v. D.T.M., 78 Wn. App. 216, 896 P.3d 108 (1995) 13

State v. Stough, 96 Wn. App. 480, 980 P.2d 298, review denied, 139 Wn.2d 1011 (1999) 11

State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993) 11, 12

FEDERAL AND OTHER STATE CASELAW

Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed 2d 108 (1976) 10

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) 1-3, 11-13

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d
674 (1984)..... 9, 10

RULES, STATUTES, CONSTITUTION AND OTHER

Article 1, § 22 9
RCW 10.01.160 1, 5, 6, 7, 8
RCW 9A.56.068 1
RCW 9A.76.170 2
Sixth Amendment 9

A. ASSIGNMENTS OF ERROR

1. The sentencing court failed to properly consider indigency in imposing discretionary legal financial obligations on appellant Richard Leffler, based on a “boilerplate” preprinted judgment and sentence clause, under State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).
2. Appellant assigns error to the “boilerplate” preprinted finding entered by the sentencing court, which provides as follows:

2.5 Legal Financial Obligations/Restitution.

The court has considered the total amount owing the defendant’s present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. (RCW 10.01.160).

CP 14.

3. The trial court abused its discretion in refusing to allow Mr. Leffler to withdraw his equivocal “no contest/no admission” plea, entered under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

B. QUESTIONS PRESENTED

1. Did the sentencing court err in failing to make an individualized inquiry into Mr. Leffler’s financial situation and considering his indigence before ordering discretionary legal financial obligations of “service fees” and a “jury demand fee?”
2. Should the trial court have allowed appellant to withdraw his Alford plea?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Richard Leffler was charged by first amended information filed in Mason County superior court with bail jumping and possession of a stolen motor vehicle. CP 27-28; RCW 9A.56.068;

RCW 9A.76.170. Continuances and other proceedings occurred before the Honorable Judges Amber L. Finlay, Toni A. Sheldon and Daniel L. Goodell on April 16 and 27, June 29, July 14 and 21, August 11 and 25, September 15-16, October 19 and 27, November 30, December 14 and 21, 2015, February 1 and 8, March 14 and 28, May 9, 15, 24 and 31, June 6, 7, 14, 15 and 21, July 5 and 19, August 8 and 22, 2016.¹

Pretrial and jury trial proceedings were held before Judge Goodell on September 6-9, 2016, after which the jury found Leffler guilty of bail jumping but could not reach a verdict on the stolen property count. CP 41, 43. Mr. Leffler then entered an Alford plea to a lesser count of third-degree possession of stolen property. CP 31-35; RP 418, 426. On December 12, 2016, Judge Goodell imposed a standard-range sentence for each offense. CP 11-26; RP 441. Mr. Leffler appealed. CP 8.

While the appeal was pending, on May 22, 2017, Mr. Leffler moved to withdraw his plea. CP 215-18. After hearings before Judge Finlay on June 6 and 13, 2017, the motion was denied. CP 214.²

¹The verbatim report of proceedings consists of four volumes, which will be referred to herein as follows:

-the three chronologically paginated volumes containing the pretrial and trial proceedings of April 16 and 27, June 29, July 14 and 21, August 11 and 25, September 15-16, October 19 and 27, November 30, December 14 and 21, 2015, February 1 and 8, March 14 and 28, May 9, 15, 24 and 31, June 6, 7, 14, 15 and 21, July 5 and 19, August 8 and 22, and September 6, 7, 8, and 9, October 10, November 7, December 12, 2016, as "RP;"

-the volume containing the post-trial proceedings of March 14, April 12 and 17, and May 23, 2017, before Judge Goodell, June 6 and 13, 2017, before Judge Finlay, and July 18, 2017, before Judge Sheldon, as "2RP."

²The other proceedings transcribed involve discussion of community service hours below and are not relevant to issues on appeal.

Mr. Leffler appealed and the two cases were consolidated. See CP 213. This pleading follows.

2. Overview of facts relating to charges

It was alleged that Mr. Leffler was in possession of a stolen vehicle found in the back of his van, and that he failed to appear for trial court proceedings one day after the charges against him had been filed. CP 27-28. After the jury convicted him of bail jumping but hung on the stolen property charge, Mr. Leffler entered an Alford plea to third-degree possession of stolen property in which he declared:

“ALFORD PLEA” AS ADOPTED IN STATE V. NEWMAN. WHILE I MAINTAIN MY INNOCENCE TO THIS CHARGE, I BELIEVE A JURY WOULD CONVICT ME IF IT WERE TO BELIEVE THE STATE’S EVIDENCE AND I THEREFORE WISH TO TAKE ADVANTAGE OF THE STATE’S OFFER.

CP 35.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ORDERING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS DESPITE APPELLANT’S INDIGENCE

The following legal financial obligations were ordered; a \$500 victim assessment, \$100 DNA collection fee, and \$1426 in “court costs” broken up as \$200 for a “filing fee,” \$976 “Sheriff service fees,” and a \$250 “Jury demand fee.” CP 17. The total amount ordered was \$2626. CP 17.

Before sentencing, Mr. Leffler received a continuance to try to do enough seasonal work to keep from losing his home, which was in foreclosure. RP 438. At the sentencing hearing itself, after

recommending a sentence consistent with the low end of the standard range and Leffler's lack of any other criminal history, the prosecutor asked the court to "assess fines and costs in this matter," including "sheriff service fees" and jury demand fees. RP 442. The state also asked for "pay as required on his legal financial obligations" as a condition of community custody. RP 443.

The judge asked if Leffler had anything keeping him from being able to work to pay his fines and Leffler said, "no." RP 445-46. The judge then said, "the Court is finding that Mr. Leffler has the ability to meet his legal financial obligations[.]" RP 446. As part of the order, the judge stated, "[a]ll that will be paid at the rate of not less than \$25 a month[.]" RP 447.

The sentencing court then entered a boilerplate, preprinted "finding" regarding ability to pay, as follows:

2.5 Legal Financial Obligations/Restitution.
The court has considered the total amount owing the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 14. Preprinted on the judgment and sentence were various provisions regarding payment on the legal financial obligations, including one which was selected by the court which provided:

[x] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$25.00 per month commencing no later than 60 days following today's date: RCW 9.94A.760.

CP 18.

The sentencing court erred in imposing these financial conditions under Blazina, supra, and its progeny. Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

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.

In Blazina, supra, our highest Court interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 182 Wn.2d at 828. In one case, the sentencing court ordered a \$500 crime victim penalty assessment, a \$200 filing fee, a \$100 DNA fee, \$1,500 for assigned counsel and restitution to be determined "by later order." 182 Wn.2d at 833-34. The other sentencing court ordered the same fees except only \$400 for appointed counsel and an additional \$2,087.87 in extradition costs. Id. At the sentencing hearings, neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. 182 Wn.2d at 837. The Blazina Court agreed. 182 Wn.2d at 837-39.

First, the Court noted that RCW 10.01.160(3) was mandatory, because that statute requires that a trial court “**shall not**” order costs without making an “individualized inquiry” into the defendant’s individual financial situation and their current and future ability to pay, and that the trial court “**shall**” take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” in determining the amount and method for paying the costs. 182 Wn.2d at 838 (emphasis in original). In this context, the Court held, the word “shall” is imperative. *Id.*

As a result, the Court declared, the statute requires the sentencing court to make an individualized inquiry of the financial situation of the specific defendant on the record *before* ordering any legal financial obligations. *Id.*

In reaching this conclusion, the Court addressed whether preprinted “boilerplate” clauses commonly found on form judgment and sentence documents were sufficient to satisfy the statute:

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. 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. . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

Id.

In making the decision to address the issue, the Blazina Court noted its importance. It noted that “[n]ational and local cries for reform of broken LFO systems” demanded attention for the issue,

and chronicled national recognition of “problems associated with LFO’s imposed against indigent defendants,” including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems “caused by inequitable LFO systems.”

The Court then noted the flaws in our own state’s LFO system and the system’s “problematic consequences.” 182 Wn.2d at 186-37. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford \$25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id. Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 636-37. This increased involvement “inhibits reentry,” the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other “reentry difficulties increase the chances of recidivism.” Id.

Finally, the Blazina Court pointed to the racial and other disparities in imposition of LFOs in our state, noting that

disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. 182 Wn.2d at 637. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

In this case, Mr. Leffler was ordered to pay two discretionary costs: the \$250 “jury demand fee” and the “service” fees of \$976, for a total of \$1226. CP 17. Such fees are not mandatory. See RCW 10.01.160(2) (providing that a court “may” order expenses for serving of warrants for failure to appear and for jury fees).

The judgment and sentence contained the same pre-printed clause which was found insufficient in Blazina. CP 14. Further, the court’s consideration of the actual financial circumstances and the burden placed on Mr. Leffler before imposing legal financial obligations was inadequate. The judge asked Leffler whether there was anything preventing him from working and paying his fines. RP 445-46. That is not a searching examination of Leffler’s ability to pay, including his financial resources, debts, etc., when Leffler qualified as indigent and was appointed a public defender for trial and again at the time of appeal. Even if asking someone whether there was something preventing him from working is a valid part of the Blazina analysis, it is only one part of the total consideration of debts, income, future incomes, assets, etc. which Blazina requires. See Blazina, 182 Wn.2d at 837-39.

Counsel was prejudicially ineffective in failing to object to imposition of discretionary legal financial obligations on his indigent

client below. 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 of capability, 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).

Where a person is entitled to appointed counsel because they have qualified as “indigent,” the trial court is required to go through the analysis under Blazina. The evidence in the record shows Mr. Leffler’s indigence, through the repeated orders of indigency granted below. See CP 6-7, 194-98; see also And the Supreme Court held, in Blazina, that when a person is found indigent for appointment of counsel, courts should entertain serious questions about their present and future ability to pay. Blazina, 182 Wn.2d at 838-39.

Mr. Leffler was prejudiced by counsel’s unprofessional failure to object to the imposition of the discretionary legal financial obligations below. 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.

But 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 decision below. See, e.g., State v. Boehning, 127 Wn. App. 511, 532, 111 P.3d 899 (2005).

Blazina was decided in 2015. It specifically requires a far more searching, thorough analysis of “ability to pay” than used by the sentencing court here. Had counsel raised the issue and argued that his client's indigence should preclude imposition of discretionary legal financial obligations, Mr. Leffler would not now be saddled with discretionary “service” fees of more than \$900 and “jury demand” fee of \$250 to pay. This Court should so hold.

2. THE TRIAL COURT SHOULD HAVE ALLOWED
WITHDRAWAL OF THE PLEA TO CORRECT A
MANIFEST INJUSTICE

Under both the state and federal due process clauses, a plea is not constitutionally valid unless it is knowing, voluntary and intelligent. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed 2d 108 (1976); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). Where a plea does not meet those standards,

reversal and remand in required, along with instructions to allow withdraw of the plea, because allowing the plea to stand would be a “manifest injustice.” See State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). It is “manifest injustice” where a defendant enters a plea without effective assistance of counsel. Id.; see State v. Stough, 96 Wn. App. 480, 486, 980 P.2d 298, review denied, 139 Wn.2d 1011 (1999).

In this case, this Court should reverse and remand with instructions to allow Leffler to withdraw his plea, because it was not knowing, voluntary and intelligent and was secured in violation of his rights to effective assistance of counsel.

As a threshold matter, it is important to note the standards which apply. Mr. Leffler entered an Alford plea. CP 31-35. Such pleas do not involve an admission of guilt. In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). Instead, an Alford plea is entered by a defendant maintaining his innocence but deciding to enter a plea to take advantage of the state’s offer. Id. Thus, an Alford plea is inherently equivocal. State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993).

As a result, an Alford plea is valid only if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Stowe, 71 Wn. App. at 187; Alford, 400 U.S. at 31. In Alford, the Supreme Court recognized that “there are situations in which a defendant ‘may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even

if he is unwilling or unable to admit his participation in the acts constituting the crime.” Stowe, 71 Wn. App. at 188. In such situations, the defendant makes “calculations about the costs and benefits of standing trial” or accepting a plea, despite maintaining her innocence. Stowe, 71 Wn. App. at 188.

Despite their utility, recognizing that such pleas already equivocal in nature, our courts apply higher standards to their entry and review. A judge accepting an Alford plea is required to be “especially cautious” to ensure that there is a sufficient factual basis to support it. See Montoya, 109 Wn.2d at 280. Further, a court reviewing the entry of an Alford plea to determine whether withdrawal should be allowed must examine not just whether the defendant knew the “direct” and “indirect” consequences of the plea but further, as this Court has noted, must scrutinize whether the decision to enter a plea “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Stowe, 71 Wn. App. at 187.

It is especially important that a defendant entering an Alford plea is given sufficient information to engage in his analysis, which includes not only the quantity but also the quality of the evidence the prosecution has against him:

A defendant considering an Alford plea undertakes a risk-benefit analysis. After consider the quantity and quality of the evidence against him, and acknowledging the likelihood of conviction if he goes to trial, he agrees to plead guilty despite his protestation of innocence to take advantage of plea bargaining.

State v. D.T.M., 78 Wn. App. 216, 219, 896 P.3d 108 (1995); see also Montoya, 109 Wn.2d at 280.

In this case, Mr. Leffler entered an Alford plea after a hung jury on a higher crime. See 2RP 28; CP 31-35. His motion for withdrawal was based upon his dissatisfaction with counsel's failure to introduce evidence which would have shown he lawfully possessed the item at trial, and witnesses he said would support that position. 2RP 23. Mr. Leffler said he asked his attorney to withdraw the plea before sentencing, but his attorney had refused. 2RP 24-26. In addition, Leffler said, his attorney also said he was going to withdraw after sentencing. 2RP 27.

In denying the motion to withdraw the plea, the judge first noted that Leffler had pled to a lesser charge so that was "better" and showed counsel was performing adequately, and that Leffler "actually made a conscious step by going to enter a plea[.]" 2RP 29. The court concluded that, because the plea was to a lesser charged, Leffler was not "coerced into pleading guilty[.]" 2RP 31.

There is no question that Mr. Leffler answered multiple "yes" or "no" questions when entering the plea, about what he understood. RP 429-35; see 2RP 28-30. The court considering the motion to withdraw, however, focused on whether objectively it thought Leffler got a good deal by entering the plea. The real question should have been whether, without the problems with counsel's representation of him, Mr. Leffler would have entered the plea or gone back to trial again to make the state prove its case. 2RP 28-30. The lower court

should have granted Mr. Leffler's request to withdraw his plea.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand with instructions to allow withdrawal of the Alford plea, or in the alternative, strike the discretionary legal financial obligations.

DATED this 1st day of February, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I caused to be sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at Mason count prosecutor's office, at timew@co.mason.wa.us, and to Mr. Richard Leffler, 1930 Eagle Crest View Dr., Shelton, WA. 98584.

DATED this 1st day of February, 2018,

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