NO. 49801-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARRELL K. JACKSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan Chushcoff

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 1

This Court should strike the legal financial obligations because Jackson lacks the ability to pay. 2

a. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants; reading these provisions otherwise violates due process and the right to equal protection. 2

b. This Court should reverse and remand with instructions to strike the legal financial obligations 9

E. CONCLUSION 9

TABLE OF AUTHORITIES

STATUTES AND COURT RULES

RCW 7.68.035 3

RCW 9A.04.100(1). 4

RCW 9.94A.010. 8

RCW 9.94A.753. 4

RCW 10.01.160(3). 2,3,5

RCW 36.18.020(2)(h) 3

RCW 43.43.756 3

RAP 1.2(a) 9

RAP 14.2 10

General Rule 34 4,6

WASHINGTON CASES

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). 7

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) 1,2,3,5,9

State v. Clark, 191 Wn. App. 369, 362 P.3d 309 (2015) 3

State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015) 4

State v. Curry, 62 Wn. App. 676, 814 P.2d 1252, *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1991) 3,5

Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013) 6,8

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013). 3,6

Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 309 P.3d 1221 (2013) 8

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016) 9

State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009). 3

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 6

Const. art. I, § 3. 6

UNITED STATES SUPREME COURT CASES

James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) 6

REFERENCE MATERIALS

Katherine A. Beckett, et al., Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008) 7

A. ASSIGNMENT OF ERROR

The trial court erred in imposing legal financial obligations on an indigent defendant, requiring remand for entry of a judgment and sentence containing no legal financial obligations.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015), requires that indigent defendants shall not be required to pay legal financial obligations. Should this Court order remand for entry of a judgment and sentence containing no legal financial obligations?

C. STATEMENT OF THE CASE

Darrell K. Jackson was convicted of murder in Pierce County Superior Court. CP 6. Following an unsuccessful direct appeal, he filed a Personal Restraint Petition, gaining a new sentencing hearing to strike the judgment reference as to felony murder. CP 29, 64

At re-sentencing, Mr. Jackson's counsel stated that Mr. Jackson specifically desired that the court address the question of legal financial obligations in the judgment and sentence. RP 2.

The court addressed the requirements of State v. Blazina, and concluded that Mr. Jackson had no future earning ability. RP 3-4. The court also determined that he had been deemed indigent since the time of his original trial, and expressly declined to enter any appellate costs into

the judgment and sentence. RP 5; *see also* Supp. CP ___, Sub "ORIND" 10/19/16 (Order of Indigency).

However, the court did impose what it described as non-discretionary or mandatory Legal Financial Obligations, in the form of a $500 victim penalty assessment; a $100 DNA fee, and a $200 filing fee. RP 5-6.

Mr. Jackson appeals, arguing that his indigence prohibits imposition of costs, and asking the Court of Appeals to order remand for entry of a new judgment and sentence document clarifying that no legal financial obligations or costs are owed. CP 132.

D. ARGUMENT

This Court should strike the legal financial obligations because Jackson lacks the ability to pay.

a. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants; reading these provisions otherwise violates due process and the right to equal protection.

Our legislature mandates that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized this means That a defendant must be able to pay before the court can impose LFOs. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Imposing LFOs on indigent defendants causes significant

problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id.* at 837. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 43.43.756 ("must include" a DNA fee); RCW 36.18.020(2)(h) (filing fee). Mr. Jackson argues that the cases of *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015), and *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), are wrongly decided. *See also State v. Curry*, 62 Wn. App. 676, 680–81, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166; *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009).

In fact, these statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial

status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753. This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).

More than 20 years ago, the Supreme Court stated the Victim Penalty Assessment (VPA) was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). *Curry*, however, addressed a defense argument that the VPA was unconstitutional. *Id.* at 917-18.[1]

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1 The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who

The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). In addition, it does not appear that the Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry. Although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 with *Blazina*, 182 Wn.2d at 830-39.

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cannot pay it at all. In other words, the legislature did not explicitly exempt this statute

All of the costs assessed below must be read in conjunction with General Rule 34, which was adopted at the end of 2010, and also supports Jackson's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a); *see, e.g., Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013) (waiver of fees based on indigence, despite mandatory language).

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal cases. Indeed, the Supreme Court discussed GR 34 in *Blazina,* and urged trial courts in criminal cases to reference that rule when determining a defendant's ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32

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from the requirements of RCW 10.01.160(3).

L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Although the Court in *State v. Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits imprisoning people for inability to pay fines, but assumed that LFOs could still be imposed on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id.* at 241. This assumption was not borne out.

As significant studies post-dating *Blank* recognize, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, et al., Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay) (available at: http://www.courts.wa.gov/committee/pdf/ 2008LFO_report.pdf); *see Blazina*, 182 Wn.2d at 836 (discussing Beckett report with approval)

The risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be

dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing, even as to mandatory costs, in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Jackson concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like him is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

b. This Court should reverse and remand with instructions to strike the legal financial obligations.

This Court should apply a remedy in this case notwithstanding that the issue of mandatory LFOs was not debated in the trial court. In *Blazina*, the Supreme Court exercised discretionary review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand" it. 182 Wn.2d at 835. This case raises the same concern. *See also Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a), "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits," counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. Because the trial court specifically noted Jackson's indigence, this Court should remand with instructions to strike the legal financial obligations.

E. CONCLUSION

Based on the foregoing, Mr. Jackson asks that this Court of Appeals order remand for entry of a judgment and sentence containing no legal financial obligations.

Further, if Mr. Jackson does not substantially prevail in the present appeal, he respectfully asks this Court to exercise its discretion under *State*

v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016), and, considering the policy imperatives regarding costs in general, expressed in the afore-mentioned case of *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015), to deny any award of appellate costs under RCW 10.73.160(1). Importantly, although RAP 14.2 indicates that the issue may be decided by a Commissioner, it also provides that this Court may direct in its opinion that no costs be awarded, relying on the same Rule's presumption that Mr. Jackson's indigency continues. RAP 14.2.

Respectfully submitted this 24th day of April, 2017.

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Respondent,	)	
	)	NO. 49801-4-II
v.	)	
	)	
DARRELL JACKSON,	)	
	)	
Appellant.	)	

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