

NO. 49944-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KAELA GLOVER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Kaela Glover was convicted of burglary in the second degree for stealing \$16.44 worth of property from Walmart after she had previously been trespassed. For this crime, she was sentenced to 63 months of incarceration and ordered to pay \$2,900 in legal financial obligations. At sentencing, Ms. Glover informed the court that she had only worked a few days in the past two and a half years. The court made no other inquiry into her ability to pay legal financial obligations, but found she could pay \$25 a month towards her fees and fines. In addition to mandatory fees and fines, the court imposed \$2,100 in attorney's fees, based on the number of days Ms. Glover spent in trial.

This Court should strike the attorney fees because they violate RCW 10.01.160 (2), which states it is improper to impose fees on expenses inherent in providing a constitutionally guaranteed jury trial. The court should order a new hearing and require the sentencing court to determine whether Ms. Glover has the current or future ability to pay legal financial obligations. Finally, the court should find that, because Ms. Glover is only able to pay \$25 a month towards her legal financial obligations, that the imposition of discretionary fees and fines, including the attorney fees, was unjustly punitive.

B. ASSIGNMENTS OF ERROR

1. The imposition of attorney's fees for the time Ms. Glover spent in trial was an improper imposition of fees on expenses inherent in providing a constitutionally guaranteed jury trial, violating RCW 10.01.160(2).

2. The sentencing court failed to make an adequate inquiry into whether Ms. Glover had a present or future ability to pay legal financial obligations.

3. The imposition of a legal financial obligations where Ms. Glover was only able to pay \$25 a month towards the principal was unjustly punitive.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Legal financial obligations cannot include expenses inherent in providing a constitutionally guaranteed jury trial. Must attorney's fees that directly correlate to the number of days Ms. Glover spent in trial be stricken for violating this statutory restriction on the imposition of legal financial obligations?

2. Before legal financial obligations may be imposed, the court must make an individualized assessment of the defendant's current or future ability to pay the fines and fees imposed. Where the court fails to

make an adequate finding, remand is required in order for the sentencing court to determine whether the defendant has the current or future ability to pay the imposed amounts. Did the sentencing court fail to adequately inquire into Ms. Glover's ability to pay legal financial obligations, where the only inquiry was into Ms. Glover's work history, which demonstrated that she had only worked a few days in the past several years?

3. It is unjustly punitive to impose payments on legal financial obligations that will only cause legal financial obligations to increase. Because of the 12 % interest rate imposed on legal financial obligations, payments below \$50 a month cause the amount owed to increase and makes repayment impossible. Where the court found Ms. Glover only had the ability to pay \$25 a month towards her legal financial obligations, was imposition of the discretionary fines and fees, including attorney fees, unjustly punitive?

D. STATEMENT OF THE CASE

Ms. Glover was charged with burglary in the second degree when the government alleged she had shoplifted from the Chehalis Walmart after the store had issued a trespass order against her. CP 1-2. She was seen secreting items on her person and leaving the store

without paying for them. CP 4. The total stolen was valued at \$16.44.

CP 4. Although Ms. Glover was not stopped and no items were recovered, the jury found her guilty. CP 15, RP 212.

Ms. Glover was sentenced to 63 months of incarceration. RP 241. Ms. Glover had a history of committing property and drug offenses. CP 39. At sentencing, the court questioned Ms. Glover about her ability to pay any legal financial obligations the court might impose. RP 242. The court asked:

And then with regard to legal financial obligations, Ms. Glover, when you're not in custody, is there any physical or other reason why you can't work and have a job, earn an income?

MS. GLOVER: No.

THE COURT: Have you had a job before?

MS. GLOVER: Yes.

THE COURT: All right. When is the last time you worked?

MS. GLOVER: Two and a half years ago I worked at the Nike outlet in Centralia.

THE COURT: Okay. You haven't worked since then?

MS. GLOVER: No.

THE COURT: All right.

MS. GLOVER: Under the table I did some landscaping stuff for a friend that has a landscaping company, but it

was just here and there, you know, like a day or two here and there.

RP 242.

The court made a finding based on this record that Ms. Glover had the ability to pay legal financial obligations. RP 242-43. The court found Ms. Glover had the ability to pay \$25 a month. CP 43, RP 243.

The court imposed a total of \$2,900 in legal financial obligations. RP 243. The court imposed the \$500 crime victim assessment, a \$200 filing fee, \$2,100 in attorney's fees, and the \$100 DNA fee. RP 243. The attorney's fee was derived from the number of days Ms. Glover spent in trial. RP 243. For each day Ms. Glover spent in trial, the court imposed \$700. RP 243. No objection was made to the imposition of these fees, including the attorney fees.

E. ARGUMENT

1. The imposition of attorney's fees for the days Ms. Glover spent in trial was an improper imposition of expenses inherent in providing a constitutionally guaranteed jury trial.

RCW 10.01.160(2) states that legal financial obligations cannot include "expenses inherent in providing a constitutionally guaranteed jury trial." At sentencing, the court imposed \$2,100 in attorney's fees because Ms. Glover had gone to trial, calculating the amount based on

the days Ms. Glover had spent in trial. CP 42, RP 243. When the court calculated attorney fees based on the number of days Ms. Glover had been in trial, the court imposed expenses inherent in providing Ms. Glover her constitutionally guaranteed jury trial. RCW 10.01.160(2). These fees should be stricken.

RCW 9.94A.030(31) defines attorney fees as a legal financial obligation. RCW 10.01.160 states that fees cannot include expenses inherent in providing a constitutionally guaranteed jury trial. *See also State v. Diaz-Farias*, 191 Wn. App. 512, 514, 362 P.3d 322 (2015). Review of this type of error is appropriate even when not raised in trial court “because the error, if permitted to stand, would create inconsistent sentences for the same crime ... and some defendants would receive unjust punishment simply because his or her attorney failed to object.” *Diaz-Farias*, 191 Wn. App. at 520 (quoting *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015)).

The sentencing court violated RCW 10.01.160 when it imposed attorney fees based on the length of Ms. Glover’s trial. It is clear from this record that the attorney fees the court imposed on Ms. Glover directly correlate to the expenses in providing her with her right to a jury trial. RP 243. The attorney fee imposed was calculated by the

number of days she spent in trial. RP 243. There does not seem to be any other basis for the calculation of this fee.

In *State v. Diaz-Farias*, this Court addressed the question of when fees may be imposed based on the decision of a defendant to go to trial. 191 Wn. App. at 521. Mr. Diaz-Farias pled guilty as his trial was beginning and the court imposed jury costs, court reporter costs, and interpreter costs. *Id.* at 516. This Court held that RCW 10.01.160(2) forbade the imposition of expenses “relating to a defendant’s jury trial itself.” *Id.* at 525.

Like in *Diaz-Farias*, the imposition of attorney fees here is directly related to Ms. Glover’s exercise of her right to go to trial. RP 243. This is expressly prohibited by RCW 10.01.160(2). This Court should find this fee violates RCW 10.01.160 and order it stricken.

2. The sentencing court failed to make an adequate inquiry into whether Ms. Glover had a present or future ability to pay legal financial obligations.

The sentencing court made a finding that Ms. Glover had the current or future ability to pay \$25 a month in court fees. RP 243. There is insufficient evidence to support the court’s finding. When the court only inquired into Ms. Glover’s work history, which indicated Ms. Glover had only worked a few days in the last two years, it had no

basis to find that Ms. Glover had a current or future ability to pay legal financial obligations. RP 242. This Court should remand this matter for a hearing where the court can make a meaningful inquiry into Ms. Glover's current or future ability to pay legal financial obligations.

Legal financial obligations may only be imposed where the court has found the defendant has a current or future ability to pay the costs. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); RCW 10.01.160(3); RCW 9.94A.760(2). Under RCW 10.01.160(3), the sentencing judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay. *Blazina*, 182 Wn.2d at 837-38. As the *Blazina* Court held, "[b]y statute, 'the court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.'" *Id.* at 838, quoting RCW 10.01.160(3) (emphasis added in *Blazina*).

Even where the question of whether legal financial obligations is not raised below, reviewing courts will consider whether the fees were properly imposed. *Blazina*, 182 Wn.2d at 835 ("National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.") Reversal

and remand is necessary where the sentencing court fails to make an adequate individualized inquiry into the defendant's ability to pay legal financial obligations. *Id.* at 830.

The Washington Supreme Court addressed the dire consequences of imposing legal financial obligations on persons who cannot afford to pay them in *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016). In reversing the Court of Appeals decision on whether Ms. Wakefield was entitled to remittance of her legal financial obligations, the Supreme Court recognized “the particularly punitive consequences of LFOs” for indigent individuals: “[O]n average, a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.” *Id.* (quoting *Blazina*, 182 Wn.2d at 836.) The imposition of costs against indigent defendants raises problems that are well documented and include “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 839.

To determine a person's ability to pay costs, “the court shall take account the financial resources of the defendant and the nature of

the burden that payment of costs will impose.” *Blazina*, 182 Wn.2d at 838. (emphasis added in *Blazina*). However, in making its determination that Ms. Glover had the ability to pay legal financial obligations, the court did not make this inquiry. The only inquiry the court made into Ms. Glover’s present or future ability to pay legal financial obligations was into Ms. Glover’s non-existent work history. RP 242. The only work Ms. Glover could point to was time she spent working retail nearly two years ago and days she had spent working for a friend landscaping. RP 242. Ms. Glover does not appear to have worked more than a few days in the past few years. RP 242.

The only other information regarding Ms. Glover’s ability to pay was the fact that she was indigent and unable to pay for an attorney. The court lacked any information regarding Ms. Glover’s financial circumstances, including questions of whether she was financially responsible for other persons, whether there were any persons who supported her, whether she had any assets, and what other debts she had accrued. Given that Ms. Glover has two other Washington state convictions, it is likely Ms. Glover has incurred other court debt. CP 38-39. Further, the court made no inquiry into whether Ms. Glover depended on needs-based assistance programs or whether

her household income fell below 125 percent of the federal poverty line. *Wakefield*, 186 Wn.2d at 607. There was no evidence that Ms. Glover has been able to pay any of the fees already imposed by the courts. This inquiry was insufficient. This Court should remand this matter for a hearing to determine whether Ms. Glover has the current or future ability to pay the legal financial obligations imposed.

3. The imposition of legal financial obligations where Ms. Glover has the limited ability to pay \$25 a month towards her fines and fees was unjustly punitive.

Ms. Glover was sentenced to 63 months of incarceration. RP 241. The court determined Ms. Glover could pay \$25 a month towards her legal financial obligations. RP 243. With an interest rate of 12 percent, Ms. Glover will never be able to pay off this debt. RCW 10.82.090. This Court should find that the imposition of the legal financial obligations where there is no likelihood that the defendant will be able to complete payment on the schedule imposed by the court is unjustly punitive. This Court should strike the discretionary fines and fees, including the attorney fees. *See Wakefield*, 186 Wn.2d at 465.

When the Supreme Court's Minority and Justice Commission studied legal financial obligations, it discovered that the fines and fees imposed by sentencing courts could not be paid off within a reasonable

time, unless payments of at least \$50 a month were imposed. Katherine Beckett and Alexes Harris, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, Washington State Minority and Justice Commission, 17 (2008). The chart below was created by Dr. Beckett to demonstrate how it was impossible for poor persons who could not pay at least \$50 a month to ever extinguish their debt. *Id*; see also *Wakefield*, 186 Wn.2d at 607.

Average Amount Owed by Monthly Payment in 5, 10, 15 and 30 Years for Average LFO				
	\$10 Payment	\$25 Payment	\$50 Payment	\$100 Payment
Debt: 5 Years	\$3,798	\$2,073	\$531	Paid: 30 Months
Debt: 10 Years	\$6,083	\$2,623	Paid: 72 Months	0
Debt: 15 Years	\$10,234	\$2,740	0	0
Debt: 30 Years	\$56,362	\$3,938	0	0

Note: The average (mean) LFO amount assessed by the Washington Superior Courts in 2004 was \$2,540. The calculations assume the current interest rate of 12%.

Ms. Glover will never be able to pay off her debt. The court set her payment schedule to begin 60 days after imposition of the sentence and required her to pay \$25 a month. CP 43, RP 243. With interest, this

means that Ms. Glover will owe more money at the end of each year. *Blazina*, 182 Wn.2d at 839. At 12 percent, she will accumulate about \$350 a year in additional debt. RCW 10.82.090. According to the court's finding, she is only able to pay \$300 a year towards the principal. CP 43, RP 243. This means Ms. Glover will accumulate an additional \$50 a year on this debt, with no possibility of it ever ending.

In *Wakefield*, the Supreme Court emphasized the punitive nature of imposing legal financial obligations on poor persons. 186 Wn.2d at 465; *see also Blazina*, 182 Wn.2d at 836. The Court held that "low payments should be generally ordered only for short term situations." *Wakefield*, 186 Wn.2d at 607-08. In ordering remittance, the Court recognized that it was unjustly punitive to impose payments that will only cause legal financial obligations to increase. *Id.*

Under RCW 10.01.160(3), the "ability to pay" means the ability "to actually pay off" all LFOs. *Wakefield*, 186 Wn.2d at 607. If a person lacks this actual ability, it is not appropriate for a court to impose any discretionary costs. *Id.* When the sentencing court found Ms. Glover could only pay \$25 a month towards her fines and fees, it did exactly what *Wakefield* forbids. If this Court affirms the finding Ms. Glover had a limited ability to pay legal financial obligations, it

should also hold that the imposition of legal financial obligations imposed by the sentencing court was unjustly punitive. By imposing fines and fees Ms. Glover can never pay, the court put Ms. Glover into the financial straits that *Wakefield* holds is unjustly punitive. *Id.* Accordingly, this Court should order Ms. Glover's discretionary legal financial obligations, including the imposed attorney fees, stricken.

F. CONCLUSION

Ms. Glover asks this Court to hold that expenses inherent in providing a constitutionally guaranteed jury trial includes attorney's fees imposed for days spent in trial. Accordingly, the attorney's fees imposed by the court should be stricken.

In addition, Ms. Glover asks this Court to hold that the sentencing court failed to adequately inquire into Ms. Glover's ability to pay legal financial obligations imposed by the court.

Ms. Glover also asks this Court should also hold that where the sentencing court finds that the defendants are only able to pay a small amount towards their legal financial obligations, discretionary fees, including attorney's fees, should not be imposed.

DATED this 23 day of August 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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Attorneys for Appellant

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

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)	
Respondent,)	
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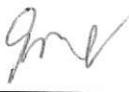
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