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Court of Appeals  
Division II  
State of Washington  
1/26/2018 9:39 AM

NO. 50288-7-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

TOMAS KEEN,

Appellant.

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RESPONDENT'S BRIEF

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**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>I. ISSUES: .....</b>	<b>1</b>
<b>II. ANSWERS: .....</b>	<b>1</b>
<b>III. FACTS:.....</b>	<b>1</b>
<b>IV. ARGUMENT: .....</b>	<b>1</b>
<b>I. THE SUPERIOR COURT MISAPPREHENDED THE STATUTE THAT GOVERNED ITS ABILITY TO HEAR KEEN’S CASES AND SHOULD BE ALLOWED TO MAKE A DETERMINATION OF REMITTANCE OF KEEN’S DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS. ....</b>	<b>1</b>
<b>1. THE SUPERIOR COURT SHOULD ONLY REVIEW THE IMPOSITION OF DISCRETIONARY FEES. ....</b>	<b>5</b>
<b>2. KEEN MISAPPREHENDS THE IMPACT OF HIS HARDSHIP. ....</b>	<b>9</b>
<b>II. RESTITUTION IS MANDATORY.....</b>	<b>10</b>
<b>V. CONCLUSION:.....</b>	<b>12</b>

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Jafar v. Webb</i> , 177 Wash.2d 520, 523, 303 P.2d 1042 (2013).....	8
<i>Richland v. Wakefield</i> , 186 Wash.2d 596, 380 P.3d 459 (2016).....	10, 11
<i>State v. Blazina</i> , 182, Wash.2d at 839, 344 P.3d 680 (2015) .....	2, 3, 6, 10, 11
<i>State v. Clark</i> , 191 Wn.App. 369, 362 P.3d 309 (2015).....	6, 8
<i>State v. Lundy</i> , 176 Wash.App. 96, 308 P.3d 755 (2013).....	7, 11
<i>State v. Mathers</i> , 193 Wn.App. 913, 918, (2016).....	6, 8
<i>State v. Shirts</i> , 195 Wash.App. 849, 381 P.3d 1223 (2016) .....	4, 5, 10
<i>State v. Thornton</i> , 188 Wn.App. 371, 353 P.3d 642 (2015).....	6
<i>State v. Velezmoro</i> , 196 Wash.App. 552, 384 P.3d 613 (2016).....	7
<b>Statutes</b>	
RCW 10.01.160 .....	3, 4, 7, 8, 10
RCW 10.01.160(1).....	7
RCW 10.01.160 (2).....	7

RCW 10.01.160(3).....	7, 8, 10
RCW 10.01.160(4).....	4
RCW 10.01.170 .....	4
RCW 10.73.090(1).....	3, 4
RCW 36.18.020(2)(h).....	6
RCW 43.43.7541 .....	5, 6
RCW 7.68.035(1)(a) .....	5, 6
RCW 9.94A.505(8).....	11
RCW 9.94A.735(5).....	6
RCW 9.94A.753 .....	6
RCW 9.94A.753(4).....	11
RCW 9.94A.753(5).....	6, 11
RCW 9.94A.753(6).....	11

**Other Authorities**

Policy 330.700 .....	9
----------------------	---

**Rules**

GR 34.....8

GR 34(a) .....8

**I. ISSUES:**

- I. Did the Superior Court commit reversible error by first imposing legal financial obligations without first determining Keen's present or future ability to pay and then denying his motion for remittance based on statutory misapprehension?
- II. Should the Court remit Keen's mandatory restitution?

**II. ANSWERS:**

- I. The Superior Courts should have made an initial determination whether Keen had the present or future ability to pay his discretionary legal financial obligations, but its mistaken refusal to hear Keen's motions for remittance is not reversible error.
- II. No. Restitution is mandatory.

**III. FACTS:**

State will refer to any relevant facts within its argument.

**IV. ARGUMENT:**

- I. THE SUPERIOR COURT MISAPPREHENDED THE STATUTE THAT GOVERNED ITS ABILITY TO HEAR KEEN'S CASES AND SHOULD BE ALLOWED TO MAKE A DETERMINATION OF REMITTANCE OF KEEN'S DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.**

Keen requests this court to terminate his Legal Financial Obligations (LFO's) on grounds the Superior Court committed an error that substantially limited or prohibited further action. On March 6, 2017,

Cowlitz Superior Court denied his request to terminate legal financial obligations (LFO's) in four cause numbers: 07-1-00435-9, 07-1-00506-1, 08-1-00931-6, and 10-1-00182-1.

The Superior Court originally ordered restitution in four of five of the Keen's felony convictions. In 07-1-00435-9, of the mandatory fines and fees, he agreed to pay \$75,000 in restitution, a victim assessment of \$500, \$200 filing fee, and the \$100 DNA collection fee. CP 22. In that cause, his total owed LFO's were \$76, 848. In 07-1-00506-1, Keen was ordered to pay the \$500 victim assessment fee and \$200 criminal filing fee—the court waived the DNA collection fee because he was sentenced at the same time as 07-1-00435-9—and his LFO's totaled \$850. CP 119. Eventually, an order for restitution of \$5000 was entered. Defendant waived his presence at the entry of that order. In 08-1-00931-6, Keen was again ordered to pay the \$500 victim assessment fee, the \$200 filing fee, and the \$100 DNA collection fee. His LFO's totaled \$1840. Finally, in 10-1-00182-1, Keen was ordered to pay the victim assessment, the filing fee, and DNA collection fee along with other ancillary court related fees, for a total of \$2123.69. Eliminating any of the non-mandatory fines and fees, Keen owes \$83,100, excluding any interest.

Keen argues the Superior Courts that sentenced him committed reversible error because they failed to determine his present or future ability

to pay his mandatory LFO's. In *State v. Blazina*, where the records did not provide evidence that the sentencing courts considered either defendants' ability to pay discretionary LFO's, the Court of Appeals denied discretionary review because the defendant's failed to object at sentencing, and, therefore, failed to preserve the issue for appeal. 182 Wash.2d 827, 830, 344 P.3d 680 (2015). The defendants petitioned the Supreme Court for discretionary review. In determining to review the case, the Court first admonished defendants that it was their obligation to preserve a claim of error. It then held that the Court of Appeals did not err by declining to reach the merits, before exercising its own discretion to hear the merits of the cases. *Blazina*, 182 Wash.2d at 830.

Keen does not provide records for the original sentencings in each of the four matters. The record does show that on March 6, 2017, the Superior Court declined to hear his motions to terminate his LFO's because the Superior Court judge determined the motions to be time barred, under 10.73.090(1) and CrR 7.8(c)(2). The records also show that each sentencing court imposed standard fees and fines, both mandatory and discretionary, and in some cases even waived duplicative, mandatory fees. *See* 07-1-00506-1.

RCW 10.01.160(4) allows a defendant who is not in “contumacious default” to seek relief “at any time for remission of the payment costs or any unpaid portion thereof,” on the basis of hardship. It states:

(4) a defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant’s immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(4) unequivocally provides a defendant the right to seek relief from court costs. The language is unambiguous, permitting a defendant to petition the Superior Court for remission of his LFO’s “at any time” so long as he owes them and is not in “contumacious default.” *State v. Shirts*, 195 Wash.App. 849, 859, 381 P.3d 1223 (2016).

Here, the Superior Court did not make a determination on the merits. Instead, it found Keen’s motion for remittance to be time-barred under RCW 10.73.090(1). The Superior Court’s decision may have been technically correct when addressing collateral attacks, but it did not comport with RCW 10.01.160(4).

Be that as it may, the trial court should be allowed to rectify its mistake. In *Shirts*, the defendant petitioned the trial court to reduce or remit his LFO’s because they prevented his ability to take advantage of

transitional classes while in the custody of the Department of Corrections. 195 Wash.App. at 851, 381 P.3d 1223. The Superior Court failed to make a determination whether or not the defendant made a satisfactory showing of “manifest hardship.” Instead the superior court denied the motion as untimely. 195 Wash.App. at 860. This Court determined that Superior Court erred by not following the plain language. *Id.* This Court further determined that an evidentiary hearing was not required under statute, and remanded to the Superior Court for a determination on the merits alone. *Id.* at 861.

As the Court did in *Shirts*, this Court should remand the case to the Superior Court for a determination on the merits. Without that determination, the record is incomplete and the Court cannot determine whether an actual error in remittance occurred.

**1. The Superior Court should only review the imposition of discretionary fees.**

There are two types of LFO’s: mandatory and discretionary. Fines and restitution are mandatory legal financial obligations, costs are not. RCW 7.68.035(1)(a) provides that a \$500 crime victim penalty assessment “shall be imposed” for every felony conviction and the amount “shall be” \$500. RCW 43.43.7541 provides that every sentence imposed for a crime specified in RCW 43.43.754 (subsection (1)(a) states that a collection must be made for every adult felony) must include a fee of \$100. RCW 36.18.020

(2)(h) provides that upon conviction in superior court, the defendant “shall be liable” for a \$200 fee for services of the court clerk. These are mandatory financial obligations that cannot be waived. RCW 7.68.035(1)(a) and RCW 36.18.020(2)(h) expressly use the word shall when discussing fees. The word “shall” presumptively creates an imperative duty rather than confers discretion. *Blazina*, 182 Wash.2d at 838. The word “must” as used in RCW 43.43.7541 has the same meaning as “shall.” *State v. Thornton*, 188 Wn.App. 371, 375, 353 P.3d 642 (2015). Courts have determined these fees to be mandatory. *See State v. Mathers*, 193 Wn.App. 913, 918, (2016); *State v. Clark*, 191 Wn.App. 369, 373, 362 P.3d 309 (2015)(victim penalty assessment, DNA fee and criminal filing fee are mandatory).

Similarly, any restitution is mandatory. RCW 9.94A.753(5) provides that:

restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court’s judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor’s recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

RCW 9.94A.753 applies “whenever the offender is convicted of an offense which results in injury to any person...” RCW 9.94A.735(5). *See*

*State v. Velezmoro*, 196 Wash.App. 552, 384 P.3d 613 (2016)(restitution is mandatory for all offenses that result in injury); *State v. Lundy*, 176 Wash.App. 96, 103, 308 P.3d 755 (2013)(defendant’s restitution is mandatory and any finding of a defendant’s current ability to pay them was unnecessary). Restitution is mandatory “unless extraordinary circumstances exist which make restitution inappropriate.” *Id.* Further, restitution is not limited to specific crimes but applies to “whenever the offender is convicted of an offense which results in injury to any person...” *Velezmoro*, 196 Wash.App. at 563, 196 Wash.App. 552.

Under the plain language of the applicable statutes, a trial court must impose mandatory LFO’s and therefore is not required to assess the defendant’s ability to pay them.

Now, RCW 10.01.160 does give the sentencing court discretion when imposing certain costs. It states that a trial court may require a defendant to pay costs, limited to those specially incurred by the State in prosecuting a defendant. RCW 10.01.160(1) and (2). The discretion is limited to those cost the defendant is able to pay. RCW 10.01.160(3). 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.

The victim penalty assessment, DNA fee, and criminal filing fee do not fall within this definition, and are not subject to RCW 10.01.160.(3). *Clark*, 191 Wn.App at 374. Similarly, restitution does not come under RCW 10.01.160(3).

Keen disagrees with the firm reasoning of the majority of Washington State's Courts of Appeal that mandatory LFO's should remain mandatory, arguing that this court or the superior court should follow the guidance of GR 34, and remit all of his LFO's. GR 34 provides that a person may seek, on the basis of indigent status, the waiver of mandatory filing fees or surcharges required to obtain access to judicial relief. This was adopted to "ensure that indigent litigants have equal access to justice." *Jafar v. Webb*, 177 Wash.2d 520, 523, 303 P.2d 1042 (2013). However, GR 34(a) applies only to civil litigants who must pay filing fees to seek relief in the courts. It has no application to criminal defendants, and the payment of LFO's imposed as part of a criminal sentence is completely different than a civil filing fee. *Mathers*, 193 Wn.App. at 923-24 (declining to deduce the Supreme Court's or legislature's intent behind DNA and VPA statutes, or RCW 10.01.160 through the application of GR 34).

Keen is correct, however, that the Superior Court could have reviewed whether it was appropriate to require him to repay the

discretionary costs imposed on him at the time of sentencing. However, he has a total of \$83,100 of mandatory fines and restitution as ordered in the original judgements and sentences to repay. Even if the court remits his discretionary costs, as is the custom of the Cowlitz County Superior Court, Keen must still repay the mandatory fines and restitution.

**2. Keen misapprehends the impact of his hardship.**

Keen argues that he suffers hardship because he is denied access to the International Transfer of Offenders program provided by DOC under Policy 330.700. Keen claims to be a citizen of the Netherlands and wishes to be nearer to his family. This Policy is available to any prisoner who petitions, regardless of conduct within the system, as long as the prisoner meets the legal requirements for application and is a citizen of one of the enumerated participant countries. 330.700(C). An offender is not eligible if any one of the following remains unresolved:

- a. A non-immigration and Customs detainer;
- b. A pending appeal or collateral attack on the current conviction(s);
- c. A pending fine(s)/restitution obligation imposed by a United States court of component jurisdiction, and/or
- d. A sentence for civil contempt.

Policy 330.700(c)(2).

Here, Keen does have several pending fines and restitution obligations which were imposed by the Cowlitz County Superior Court in

four separate cause numbers, making him ineligible for this program. Additionally, Keen has filed a Petition for Review, which is currently pending in the Supreme Court (50542-8-II)—also prohibiting transfer under this program.

The Superior Court should have considered Keen's motion for remittance of his discretionary LFO's, but its failure to do so did not prevent Keen an opportunity to transfer to the Netherlands under 330.700. Consequently, Keen is not aggrieved in the way the defendant in *Shirts* was aggrieved; his grievance is that the record does not reflect a determination under RCW 10.01.160(3) and *Blazina*, therefore, he was denied an opportunity to be heard on the merits. When this Court remands the case for further determinations of Keen's ability to pay his LFO's, the Superior Court can at that time consider Keen's relative issues of drug addiction, incarceration, and other debts, when determining his actual hardship and ability to pay his discretionary LFO's. *Blazina*, 182, Wash.2d at 839, 344 P.3d 680.

## **II. RESTITUTION IS MANDATORY.**

Keen further argues the restitution he owes should be remitted because he is unable to work. He compares his situation to that in *Richland v. Wakefield*, where the appellant claimed repayment of her LFO's caused

a manifest hardship because she was homeless, disabled, and indigent. 186 Wash.2d 596, 380 P.3d 459 (2016). There the defendant requested remittance of her LFO's after several months of failing to make payments. Rather than determining the defendant's ability to pay, the court ordered her to work crew and to pay \$15 per month. The Supreme Court held the municipal court erred in both application and analysis, and that the trial court could not attach payments to the defendant's Social Security. The Court remitted the defendant's LFO's, which did not include restitution, because both parties agreed it was appropriate. 186 Wash.2d at 600.

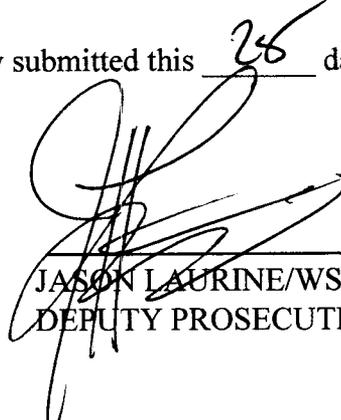
Keen's comparison with *Wakefield* is inapposite. The legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing mandatory obligations such as restitution. *State v. Lundy*, 176 Wash.App. 96, 102, 308 P.3d 755 (2013). Therefore neither *Wakefield* nor *Blazina* apply. Restitution is mandatory. RCW 9.94A.753(5)(restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person); RCW 9.94A.505(8)(a sentencing court shall order restitution). A 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(4). Only when a defendant has shown extraordinary circumstances can a court consider the reduction or remittance of restitution. RCW 9.94A.753(6). Keen has not shown these circumstances.

The fact Keen agreed to the original restitution amounts should not be disregarded by the Court. When he pled to Burglary in the Second degree and Theft in the First degree, and then subsequently sentenced on September 12, 2007, in 07-1-00435-9, Keen also agreed that the amount of restitution he owed was \$75,000. CP 22. He also agreed to \$5000 restitution in 07-1-00506-1.

**V. CONCLUSION:**

For the above reasons, the motion for remittance should be remanded to Superior Court for a determination on the merits, but limited to the discretionary LFO's.

Respectfully submitted this 25 day of January, 2018.



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JASON LAURINE/WSBA# 36871  
DEPUTY PROSECUTING ATTORNEY

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on Jan 26<sup>th</sup>, 2018.

Michelle Sasser  
Michelle Sasser

# COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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## Transmittal Information

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