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State of Washington  
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No. 50522-3-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

KYLE THOMAS BELL, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Toni Sheldon, Judge

No. 13-1-00292-2

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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<sup>1</sup> 182 Wn.2d 827, 344 P.3d 680 (2015).

<sup>2</sup> \_\_\_ Wn.2d \_\_\_, 426 P.3d 714 (No. 95249, Sep. 20, 2018)

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

*Is Bell's attempt to appeal the trial court's imposition of LFOs untimely because the LFO order was in effect for three years before Bell filed notice of appeal in the instant case?*

B. FACTS AND STATEMENT OF THE CASE

On January 28, 2014, the defendant, Kyle Bell, pled guilty to the crime of rape of a child in the second degree. CP 35-46. At sentencing, Bell requested an RCW 9.94A.670 special sex offender sentencing alternative (SSOSA) sentence. RP 84-91. On March 3, 2014, the trial court judge entered judgment and sentence, which granted the SSOSA sentence, imposed 90 months of incarceration with all but eight months suspended, and imposed the legal financial obligations (LFOs) that are now at issue. CP 49-64. Bell did not appeal the judgment and sentence or any part of it.

A little more than three years later, on May 26, 2017, the trial court held a hearing to decide whether Bell had violated the terms of the SSOSA

sentence. RP 201-308. The trial court judge found that Bell willfully violated the terms of the SSOSA by failing to timely complete the SSOSA treatment requirement. RP 304-05. The trial court revoked the SSOSA suspended sentence. RP 308. The parties appeared for disposition on June 5, 2018, but the court rescheduled the matter for June 13, 2018. RP 310-11. At the June 13, 2017, hearing the trial court judge entered a written order finding the violation and imposed the previously suspended, remaining 82 months of the sentence. RP 314-15; CP 147.

On June 14, 2017, Bell filed a notice of appeal of the “termination from a SSOSA findings of fact [and] conclusions of law entered on June 5, 2017.” CP 139. The notice of appeal is dated “6-2-17”. *Id.* Although the June 2, 2017, notice of appeal states that it is appealing the court’s June 5 findings and conclusions, the court’s oral findings were on May 26, 2017, the written order was entered on June 13, 2017, and neither order pertains to LFOs. RP 304-08; CP 147.

The LFOs at issue were ordered by the court on March 3, 2014. CP 49-64. Now, more than three years after the court ordered LFOs, Bell is attempting to appeal them.

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C. ARGUMENT

1. Bell's notice of appeal in this case specifies that he is only appealing the trial court's recent order revoking the suspended portion of his SSOSA sentence; therefore, Bell's attempt to expand his appeal to include LFOs that were imposed in his judgment and sentence three years earlier should be barred by RAP 2.4(c) and RAP 5.2(a).

Bell's notice of appeal in this case states only that he is seeking review of the trial court's "termination from a SSOSA findings of fact [and] conclusions of law entered on June 5, 2017." CP 139. The order imposing LFOs was a separate order, which was entered on March 3, 2014. CP 49-64. Thus, the State contends that Bell's attempt to challenge the LFOs at this point is barred by RAP 2.4(c).

Still more, however, for Bell's attempt to appeal the trial court's imposition of LFOs to be timely, he would have had to have filed a notice of appeal within 30 days of the March 3, 2014, order imposing LFOs. RAP 5.2(a). But Bell has not appealed the imposition of LFOs at any time in the history of this case, and the unrelated notice of appeal that he did file in this case, which does not attempt to challenge the LFOs, was filed

more than three years after the court imposed the LFOs. CP 49-64; CP 139.

When the trial court granted the SSOSA sentence, it was authorized by RCW 9.94A.670(6)(e) to require Bell – as a condition of the SSOSA suspended sentence – “to pay all court-ordered legal financial obligations as provided in RCW 9.94A.030[.]” The trial court ordered these LFOs on March 3, 2014. CP 49-64. The trial court order did not suspend Bell’s obligation to pay the LFOs; thus, Bell’s obligation became effective at the moment the trial court entered the order on March 3, 2014. CP 49-64. Bell’s obligation to pay LFOs, which had been in effect for three years, was unaffected by the trial court’s subsequent revocation of the suspended portion of the SSOSA term of incarceration. CP 49-64; CP 147. Bell’s appeal in the instant case is an appeal of the order revoking the suspended portion of the SSOSA sentence, not an appeal of the original judgment and sentence. CP 139. Thus, the State contends that Bell’s current attempt to appeal the imposition of LFOs should be barred by RAP 5.2(a).

2. De novo review of the record shows that under *State v. Blazina*<sup>1</sup> and *State v. Ramirez*,<sup>2</sup> the trial court did not conduct an adequate inquiry into Bell's ability to pay discretionary LFOs before imposing them, but the State contends that this Court should deny Bell's appeal of this issue because: the trial court's order imposing LFOs predates these cases; Bell did not preserve issue for review by objecting in the trial court, and his appeal of the LFO order, as distinct from the order revoking the suspended sentence, is time barred by RAP 5.2(a).

The trial court ordered the LFOs at issue in this case on March 3, 2014 – a date that was slightly more than one year before the Supreme Court entered its decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), on March 12, 2015. Without the benefit of the admonishments of *Blazina*, the trial court did not conduct any on-the-record inquiry into Bell's ability to pay LFOs. RP 96-98. Instead, as authorized by RCW 9.94A.670(6)(e), after granting Bell's request for a SSOSA sentence the trial court summarily imposed LFOs. RP 96-98.

The following four LFOs are at issue here: \$200 criminal filing fee; \$609 sheriff's service fees; \$600 fee for court-appointed counsel; and, \$1,550 expert witness fees and other defense costs. Br. of Appellant at 2; CP 53. In 2014 when Bell was sentenced, the filing fee was a mandatory

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<sup>1</sup> 182 Wn.2d 827, 344 P.3d 680 (2015).

fee. RCW 36.18.020(h) (2014). The remaining costs were discretionary. RCW 9.94A.030(31); RCW 9.94A.670(6)(e).

*State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), “held that former RCW 10.01.160(3) requires the trial court to conduct an individualized inquiry on the record concerning a defendant’s current and future ability to pay before imposing discretionary LFOs.” *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_, para. 19, 426 P.3d 714, 719 (No. 95249, Sep. 20, 2018). Thus, *Blazina* did not create the requirement that the sentencing court must conduct an individualized inquiry before imposing discretionary LFOs; instead, this requirement is a statutory requirement that predates *Blazina*. *Id.*

Here, the record shows that Bell retained private counsel (for at least part of his defense) and that he posted a \$35,000.00 bond for pretrial release, but it does not show that the trial court conducted any inquiry into Bell’s ability to pay before it imposed discretionary costs. RP 96; CP 11-12. The question of whether the trial court conducted an adequate inquiry is reviewed de novo on appeal. *Ramirez* at para. 18. “RCW 10.01.160(3) requires the trial court to inquire into a person’s present and future ability

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<sup>2</sup> \_\_\_ Wn.2d \_\_\_, 426 P.3d 714 (No. 95249, Sep. 20, 2018)

to pay LFOs.” *Ramirez* at para. 27. De novo review of the record here shows that the trial court did not conduct an individualized, on the record inquiry into Bell’s ability to pay.

However, Bell did not object in the trial court when the court imposed the discretionary LFOs at issue. RP 96-102. Because Bell did not preserve the claim of error with an objection in the trial court, this Court may refuse to review this issue on appeal. RAP 2.5(a). The State urges that this Court should exercise its authority to refuse review of this issue, particularly where Bell has delayed bringing this appeal until three years after the 30-day appeal deadline established by RAP 5.2(a).

Finally, Bell contends that because he has filed an appeal of the trial court’s revocation of his SSOSA suspended sentence, he should get the benefit of recent statutory amendments as discussed in *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_, 426 P.3d 714 (No. 95249, Sep. 20, 2018). But the trial court order imposing the LFOs was not on direct appeal when the Supreme Court decided *Ramirez*. And in fact, the LFO order has never been on appeal, because the only order that Bell has appealed is the trial court’s order revoking his suspended sentence. CP 139.

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Accordingly, the State contends that this Court should reject Bell's attempt to appeal the three-year old LFO order.

D. CONCLUSION

Bell received a SSOSA sentence in the trial court, which included a condition that he must pay the LFOs which are now at issue in this appeal. The LFO order was entered prior to the Supreme Court's decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Bell did not object in the trial court, and he did not appeal the LFO order. After the LFO order had been in effect for three years, however, the trial court revoked the suspended portion of Bell's SSOSA sentence. Bell appealed the trial court's revocation order, but not the LFO order. Accordingly, the State contends that pursuant to RAP 2.5(a) and 5.2(a) this Court should deny Bell's attempt to appeal the LFOs.

DATED: November 13, 2018.

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