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NO. 51753-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROGER FORD,

Appellant.

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

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing discretionary legal financial obligations (LFOs) following appellant's expressed inability to pay.

2. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Related to Assignments of Error

1. Did the sentencing court err in imposing discretionary LFOs after making only a minimal inquiry into appellant's ability to pay and appellant's indigency and inability to work had been made known to the court?

2. Was defense counsel ineffective for failing to object to the imposition of discretionary LFOs?

B. STATEMENT OF THE CASE

1. Procedural Facts

On November 3, 2017, the Mason County prosecutor charged appellant Roger Ford with one count of vehicular assault. CP 6-7. On November 28, 2017, the court entered a finding that Ford "is financially unable to obtain a lawyer without causing substantial hardship to the defendant or the defendant's family." CP 55-56.

On January 22, 2018, Ford entered a guilty plea. CP 8-18; RP 1-7. He admitted he had been driving when he hit a tree and a passenger suffered a dislocated hip. CP 17; RP 5. He had no prior convictions. CP 9, 21; RP 3.

Sentencing occurred on February 5, 2018. The state asked the court to impose a two-month sentence. The state also asked the court to impose the following LFOs: "\$500 victim assessment, \$200 criminal filing fee, \$600 attorney's fees, and a \$100 DNA collection fee[.]" RP 9.

Defense counsel noted the accident occurred when Ford and his friends were goofing around on a dirt road and he ended up accidentally hitting a tree. RP 9-10. Ford lost his job as a result. Counsel mentioned that Ford "was employable on a limited basis because of lack of having a driver's license, probably for the next year, so I'd ask the Court to take that into consideration when determining what the LFO's are going to be." RP 10.

The court imposed the two-month sentence. RP 11; CP 23. In imposing LFOs, the court engaged in no further colloquy or discussion of Ford's financial circumstances, but instead simply stated:

The Court will find that Mr. Ford does have the ability to pay legal financial obligations and will require that he pay the filing fee of \$200, \$500 to the victims compensation fund, \$100 to the DNA fund, \$600 the county to help pay for the cost of court appointed counsel[.]

RP 11.

The written judgment and sentence imposed those amounts, totaling \$1,400. CP 25. In addition, the court sentenced Ford to a period of up to 12 months of community custody. CP 24. As a condition of “community custody,” the court also ordered Ford to “pay a community placement [sic] fee as determined by the Department of Corrections[.]” CP 31-32.

Ford timely appealed. CP 37. In seeking to allow the appeal to proceed in forma pauperis, Ford stated he was “more indigent” than when the court initially found him to be indigent, and he did not anticipate improvement in his financial condition in the foreseeable future. CP 50-52. In an order of indigency, the Court found that Ford “lacks sufficient funds to prosecute an appeal.” CP 53.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS, DESPITE FORD'S INABILITY TO PAY.

Prior to trial, the court entered a finding that Ford was financially unable to obtain a lawyer without substantial hardship. CP 55-56. At sentencing, defense counsel informed the court that Ford had lost his job due to this charge. RP 10. The court engaged in no further colloquy before imposing \$1,400 in LFOs. RP 10-11. Defense counsel did not further object. The court thereafter found Ford to be indigent for purposes of the appeal and entered an order of indigency. CP 53-54.

In the judgment and sentence, the trial court broke down the LFOs as follows: \$500 victim assessment fee, \$200 criminal filing fee, \$100 DNA collection fee, and \$600 court appointed attorney fee, for \$1,400 total. CP 25. Although the judgment and sentence included a boilerplate paragraph discussing the court's obligation to consider Ford's ability to pay LFOs,¹ the court made no written finding

¹ "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 the defendant's status will change. (RCW 10.01.160)." CP 22. Although there were two possible boxes the court might have checked to make a "specific finding," the court checked neither box. CP 22.

regarding Ford's ability to pay. CP 22. The court orally stated it found Ford had the ability to pay, with no further elaboration. RP 11. In so ruling, the court erred.

The law distinguishes between discretionary and mandatory LFOs. State v. Sorrell, 2 Wn. App. 2d 156, 173, 408 P.3d 1100 (2018). The legislature has mandated that trial courts impose the \$500 victim assessment fee, \$200 criminal filing fee, and \$100 DNA collection fee regardless of the defendant's indigency or ability to pay. Id. Other LFOs are discretionary, including the court appointed attorney fee imposed in Ford's case. Id.; see also RCW 10.01.160 (1), (2); In re Pers. Restraint of Dove, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016) (court-appointed attorney fees and defense costs are discretionary), rev. denied, 188 Wn.2d 1008 (2017).

In State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015), the Washington Supreme Court generally held that challenges to discretionary LFOs do not fit within an exception to RAP 2.5(a) and an appellate court "must make its own decision to accept discretionary review." Nevertheless, the Blazina court exercised its discretion to consider unpreserved LFO arguments in light of the "[n]ational and local cries for reform of broken LFO systems." Id. Following Blazina, appellate courts have heeded this message and regularly exercise

discretion to reach the merits of unpreserved LFO arguments. See, e.g., State v. Malone, 193 Wn. App. 762, 765, 376 P.3d 443 (2016). Ford asks this Court to do so in his case.

By statute, trial courts are not authorized to order a defendant to pay discretionary LFOs unless he possesses or will possess the financial ability to pay. Sorrell, 2 Wn. App. 2d at 173-74. At the time of Ford's sentencing, former RCW 10.01.160 (3) (2015) read:

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.

Blazina held this statute requires trial courts to consider an individual's current and future ability to pay before imposing discretionary LFOs. 182 Wn.2d at 837-39. "[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. at 838. Instead, the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id. The court should consider such factors as the defendant's "financial resources, incarceration, and other debts, including restitution." Sorrell, 2 Wn. App. 2d at 175.

The Blazina court further directed courts to GR 34 for guidance. 182 Wn.2d at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then “courts should seriously question that person’s ability to pay LFOs.” Id. at 839. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. at 834.

Here, the trial court engaged in no inquiry into Ford’s ability to pay. Ford had previously been found indigent and to qualify for appointed counsel. Defense counsel stated Ford had lost his job because of this, and was “employable on a limited basis because of lack of having a driver’s license, probably for the next year[.]” RP 10.

The court made no inquiry into Ford’s ability to work or make payments to the court. Nor did the court ask Ford about his financial resources or circumstances, such as whether he was financially responsible for others, whether anyone supported him, or whether he had any assets. The court made no inquiry into whether Ford depended on needs-based assistance programs or whether his

household income fell below 125 percent of the federal poverty line. RP 10-11; cf. City of Richland v. Wakefield, 186 Wn.2d 596, 607, 380 P.3d 459 (2016). Although the court made an oral finding that Ford had the ability to pay, the judgment and sentence does not include any written finding.

The court of appeals' recent decision in State v. Glover, ___ Wn. App. 2d ___, 423 P.3d 290, 2018 WL 3737729 (Aug. 7, 2018), is on point. There, the sentencing court asked only about Glover's work history and whether there was any reason she could not work. Id. at *1. Glover told the court there was no reason she could not work; the last time she held a job was 30 months before sentencing; and she sporadically worked "[u]nder the table" for a friend's company. Id. Based solely on this exchange, the sentencing court found Glover had the future ability to pay and imposed \$2,100 in discretionary LFOs. Id. Glover did not object. Id. at *2.

This Court reached the merits of Glover's LFO challenge and held "the sentencing court's inquiry into Glover's ability to pay was inadequate under Blazina." Id. at *2-*4. The court explained the sentencing court failed to inquire into Glover's debts and failed to examine her financial situation, such as the extent of her assets. Id. at *3. The court further emphasized Glover was later found to be

indigent, “calling into question her ability to pay.” Id. “[M]inimally questioning Glover about her employment potential” was insufficient. Id. The court accordingly reversed the LFO order and remanded for a new LFO hearing. Id. at *4.

The trial court’s limited inquiry into Ford’s debts and ability to work was insufficient under Blazina and Glover. It is not clear how Ford’s inability to work or make payments warrants the imposition of discretionary LFOs. Alternatively, it is not clear the trial court understood that some of the imposed LFOs were discretionary, given that it made no distinction between the various LFOs. RP 11. Only \$800 of the imposed LFOs were mandatory. CP 25.

The court therefore erred in imposing \$600 in discretionary LFOs—whether based on the faulty conclusion that Ford had the ability to pay or the faulty conclusion that the entire \$1,400 in LFOs was mandatory. For the same reasons, the court also erred in directing Ford to pay an unquantified “community placement [sic] fee as determined by the Department of Corrections.” CP 32.

This Court should exercise its discretion under Blazina, reverse the LFO order, and remand for a new LFO hearing, given Ford’s indigency and expressed inability to pay. Glover, at *4; State v. Duncan, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016) (“Consistent

with our opinion in Blazina and our other cases decided since then, we remand to the trial court for resentencing with proper consideration of Duncan's ability to pay LFOs.").

2. FORD'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

If this Court does not exercise its discretion under Blazina, Ford was denied his right to effective assistance of counsel. Every accused person enjoys the right to effective assistance under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to the discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court to comply with the requirements of RCW 10.01.160(3). See, e.g., State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel simply failed to object. Such neglect constitutes deficient performance.

Counsel's failure to object to discretionary LFOs was also prejudicial. The hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in any future remission hearing to set aside LFOs, Ford will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160(4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina has been the law in Washington for several years now. It demonstrates there is no strategic reason for failing to object. Ford

reaps no possible benefit from LFOs. Given Ford's indigency and stated inability to pay, there is a substantial likelihood the trial court would have waived discretionary LFOs had it applied the proper statutory analysis. Ford's right to effective assistance was violated. This court therefore should vacate the LFO order and remand for a new LFO hearing on this alternative basis.

D. CONCLUSION

This Court should vacate the imposition of nonmandatory LFOs and remand for a new hearing.

DATED this 30th day of August, 2018.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "Eric Broman", is written over a horizontal line.

ERIC BROMAN, WSBA 18487

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