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Division II
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NO. 53092-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS OYA,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 09-1-00534-8

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Defendant Dennis Oya has been ordered to pay $41,686.52 in restitution, $500 for the crime victim assessment, and $100 to support the maintenance of the DNA database. At his remand hearing to address a scoring issue, the Defendant Dennis Oya made no challenge to the LFO issues even when the trial court brought the matter to his attention and struck the $200 criminal filing fee *sua sponte*. For the first time on appeal, the Defendant challenges the $100 DNA fee and language directing the Defendant to the relevant statute on interest accrual. Both provisions were carried over from the original 2009 judgment without objection.

In the interest of judicial economy, this Court should decline to consider Oya's unpreserved claims regarding $100 in the context of $41K. Whether the DNA fee claim is with or without merit, the State is not motivated to defend it, because the costs of transporting the Defendant to address the issue on remand exceed $100. In other words, a win is more costly than a loss.

Refusing to review the unpreserved claim would be consistent with RAP 2.5(a) and the precedent of *State v. Duncan*, 185 Wn.2d 430, 437, 374 P.3d 83, 87 (2016); *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680, 682 (2015). This rule intends to encourage the efficient use of judicial

resouces by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. Entertaining the appeal encourages more wasteful appeals like this one.

II. RESTATEMENT OF THE ISSUE

A. Should this Court decline review under RAP 2.5(a) where Oya's unpreserved challenge is to a mere $100 within a judgment in excess of $41,000 and where the basis for challenge is unrelated to any claim of indigency?

III. STATEMENT OF THE CASE

On August 28, 2009, Oya pled guilty and was convicted of assault in the first degree with a firearm enhancement and unlawful possession of a firearm in the first degree. CP 20. Oya was sentenced to 300 months with $800 in legal financial obligations (LFOs), including the $500 crime victim assessment fee, $200 criminal filing fee, and $100 DNA fee. CP 21, 24. A restitution order was entered separately for $41,686.52 to be paid joint and several with the co-defendant. CP 31-32.

In 2018, the Court of Appeals granted Oya's personal restraint petition in this case, in which he argued (1) his offender score of 8 was incorrect and should be 7, (2) the error in his offender score rendered his plea involuntary, and (3) the trial court erred in imposing a term of community custody of 24 to 48 months. *Matter of Oya*, 6 Wn. App.2d 1007, 2018 WL 5810070 at *1 (2018). The Court found his offender score was

incorrectly calculated and the trial court erred in imposing the term of community custody. *Id.* at *2.

On remand, Oya was resentenced to 267 months incarceration and 36 months community custody. CP 102-03. The prosecutor recommended that that LFOs should remain the same. 3/1/19 RP 10. "Restitution was already previously ordered." *Id.* The Defendant did not address the LFOs at all. 3/1/19 RP 11-16. The court waived the $200 filing fee, noting recent changes in the law. 3/1/19 RP 17. And the court left intact the other LFO provisions. CP 100-01.

Both the previous and current judgments contain a boilerplate provision informing of the law regarding interest on LFOs and pointing to the relevant statute.

> **INTEREST** The financial obligations imposed in this judgment shall bear interest from the date of the judgment unti payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

CP 23, 101. This statute provides that interest shall accrue on that portion of LFOs that represent restitution only.[1] RCW 10.82.090. Any interest which accrued on non-restitution LFOs prior to the change in law shall be waived. RCW 10.82.090(2)(a).

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[1] The JIS software—the program used by clerks across the state—has been updated such that no non-restitution interest can accrue in any case in Washington after the effective date of June 7, 2018.

Oya inquired about the change in law. 3/1/19 RP 17-18. But neither the Defendant nor his defense counsel objected to the court's decision regarding LFOs. *Id.*

For the first time on appeal, the Defendant challenges the $100 DNA database fee and the standard language advising of the relevant authority on interest.

IV. ARGUMENT

A. This Court should decline to review Oya's claim under RAP 2.5(a), where the Defendant failed to preserve error.

It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53, 56 (2013). And in particular, unpreserved challenges to LFOs do not meet any RAP 2.5(a) exception. *State v. Duncan*, 185 Wn.2d 430, 437, 374 P.3d 83, 87 (2016); *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680, 682 (2015).

B. The Washington Supreme Court departed from the general rule to focus the trial courts' attention on making adequate ability-to-pay inquiries.

A few years ago, in *Duncan* and *Blazina*, the Washington Supreme Court exercised discretion, entertaining unpreserved LFO claims in order to

draw the trial courts' attention to this issue. *Duncan*, 185 Wn.2d at 437; *Blazina*, 182 Wn.2d at 835-37 (describing national focus on LFO issues). Both opinions made clear that this exercise of discretion was an exception to the general rule.

The departure from the general rule paid off. Courts of appeals have remanded many cases, directing the lower courts to improve their inquiry into the defendants' ability to pay. And the trial courts are making much more thorough inquiries and imposing far fewer LFOs.

The trial courts were not the only entities to take notice. The Legislature enacted HB 1783. Laws of 2018, ch. 269 (effective June 7, 2018). And Pierce County, like other counties, is reviewing old judgments with speedy and cost-effective procedures such as pro se forms and the LFO Reconsideration Day program.[2]

C. This case does not share those concerns where the trial court did not impose any costs under RCW 10.01.160.

This case is not representative of the concerns that permitted the departure from the rule. The Defendant was resentenced before a tribunal so attuned to indigency concerns that despite the fact that LFOs had not been the subject of the remand and despite the Defendant's silence on the

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[2] Alexis Krell, 'This is a big day for Tacoma' – 1,000 seek relief from Pierce County court debt, The News Tribune, Sept. 26, 2019. https://www.thenewstribune.com/news/local/article235282562.html

matter, the court *sua sponte* struck the $200 criminal filing fee. This demonstrates that the efforts of the higher courts have been successful.

It is not significant that the court waived the criminal filing fee while imposing the DNA database fee. Indigency or ability to pay is relevant to imposition of the filing fee. RCW 36.18.020(2)(h); RCW 10.101.010(3). It is not relevant to the imposition of the nominal DNA fee. RCW 43.43.7541 (only prior imposition is material).

The "ability to pay" requirement comes from former RCW 10.01.160(3): "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." This statute only regards costs, i.e. those LFOs which are costs of prosecution. RCW 10.01.160(2). In order not to chill the exercise of the right to counsel, the recoupment of legal fees (costs of prosecution) is only permitted if offenders have an ability to pay. *State v. Blank*, 131 Wn.2d 230, 237-38, 930 P.2d 1213 (1997); *State v. Barklind*, 87 Wn.2d 814, 815, 557 P.2d 314 (1976); *Fuller v. Oregon*, 417 U.S. 40, 51, 94 S. Ct. 2116, 2123, 40 L. Ed. 2d 642 (1974).

The filing fee is a cost of prosecution. The DNA fee is unrelated to exercise of the right to counsel or trial. It is a penalty of conviction.

D. The failure to object waives the issue on appeal.

At this resentencing, the Defendant informed the trial court in no uncertain terms that he intended to appeal. 3/1/19 RP 16. But he was not

concerned with LFOs. He complained that he believes his plea agreement resulted in an "illegal exceptional sentence" unsupported by written findings or conclusions. 3/1/19 RP 14-15. He wanted to challenge the consecutive sentence and enhancements. 3/1/19 RP 15. And he wanted to challenge the criminal history which he had stipulated to. *Id.*

This appeal addresses none of these concerns. If the Defendant's appellate counsel found no merit to these claims,[3] one might expect an Anders brief. *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970); *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Instead, at no small expense to the public, the appeal discusses a $100 assessment in the context of a judgment that imposes over $41,000 in restitution. The concerns raised in this appeal were never brought to the lower court's attention.

The failure to object was not due to any timidity on the Defendant's part. He was demonstratively inquisitive and assertive at his hearing. 3/1/19 RP 17-18 (questioning whether it was appropriate to apply new law ex post facto). Nor was it due to a lack of representation or assistance. He was represented by counsel and assisted by the court. The court stated, "so you will only be imposed $600 rather than $800 of legal and financial

[3] The Defendant has designated a record that shows the parties agreed to the standard range sentence involving a single enhancement, and the counts ran concurrent to each other. CP 8, 10, 12, 21, 24, 99, 102.

obligations because the law changed since the time you were originally sentenced." 3/1/19 RP 17. Despite the court calling attention to the legislative changes, counsel for Oya chose not to object to the DNA fee or any form language in the standard judgment.

The decision not to address LFO issues at a sentencing hearing is "unsurprising" and often made "consciously and prudently." *State v. Duncan*, 180 Wn. App. 245, 250-51, 327 P.3d 699, 701 (2014), *aff'd and remanded,* 185 Wn.2d 430, 374 P.3d 83 (2016). In this case, it is unsurprising because the $100 fee is inconsequential in light of the $41K restitution order. The fee will only be paid after, if ever, the Defendant pays off the restitution.

The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142, 148 (2014) (citing *State v. Robinson,* 171 Wn.2d 292, 304–05, 253 P.3d 84 (2011)). If the Defendant had made timely objections, these small complaints could have been addressed and resolved at that time without any additional expense.

The failure to object must be determinative of this claim.

E. The form is not in error for giving the Defendant notice of the law on interest by citing the amended statute.

The form language which the Defendant challenges for the first time on appeal correctly references the relevant statute. He is required to pay interest on his $41K restitution order. Due to software changes responsive to the new law, there is no risk that any offender will accrue interest on non-restitution LFOs. This claim is frivolous.

F. It is not in the State's interest to request a transport order for a hearing on $100.

The Defendant challenges the DNA database fee for the first time on appeal. Before HB 1783, the DNA database fee was mandatory for all offenders at every conviction. *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016). Under the current law, the fee is only imposed on indigent offenders if it was not collected in the past. *State v. Phillips*, 6 Wn. App. 2d 651, 431 P.3d 1056, *review denied*, 193 Wn.2d 1007, 438 P.3d 116 (2018).

The Defendant notes that he has been convicted of other felonies. Brief of Appellant at 3-4. This alone does not demonstrate that the DNA fee was collected in the past. Because the Defendant did not address this below, there is no record to show whether there was a previous collection or not. The appeal is limited to the record on review. RAP 9.1(a).

His unpreserved claim regards a mere $100. The costs of responding to the claim far exceed this amount. It is not worth the public expense to transport the Defendant for a hearing to determine whether the $100 fee has been collected in the past. In other words, the State has no motivation to challenge a frivolous claim. If the courts of appeal entertain these claims over $100 and contrary to RAP 2.5(a), claimants will be encouraged to make inefficient use of judicial resources.

Therefore, the State requests this Court abide by the general rule and deny this unpreserved claim of error.

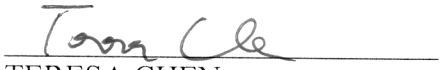
If the Court does not dismiss the appeal under the court rule, then the State requests the Court minimize expenses a la *State v. Phillips*, 6 Wn. App.2d 651, 678, 431 P.3d 1056, 1070 (2018), *review denied,* 193 Wn.2d 1007, 438 P.3d 116 (2019) (remanding for a ministerial order striking the $100 DNA fee).

V. CONCLUSION

For the reasons stated above, this Court should decline to review Oya's claim and affirm the sentence.

RESPECTFULLY SUBMITTED this 4th day of November, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



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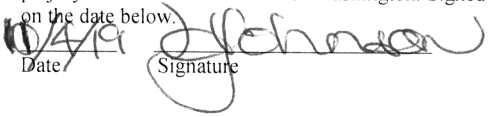
11/4/19 
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