

FILED
August 10, 2015
Court of Appeals
Division III
State of Washington

NO. 32150-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESUS J. RUIZ-MARTINEZ,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises two issue on appeal. These can be summarized as follows;

1. Was the record sufficient to support the trial court's finding that Appellant had the current or future ability to pay court ordered legal financial obligations?
2. Is the mandatory DNA collection fee an unconstitutional violation of substantive due process when applied to person who do not have the current or future ability to pay this assessment?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient in evidence in the record to determine Appellant has the current or future ability to pay court ordered legal financial obligations.
2. The mandatory DNA fee assessment is not unconstitutional.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed.

III. ARGUMENT

Appellant failed raise either of these issues in the trial court therefore they are not preserved for appeal. In accordance with numerous prior rulings from this court and affirmation by the Washington State

Supreme court in State v. Blazina, *infra*, this court still maintains the ability to exercise its discretion to address issues for the first time on appeals under RAP 2.5 and specifically the issue of the imposition of legal financial obligations (LFO's). This court should exercise that discretion and deny this appeal.

Further the allegation that the collection of a specific fee for DNA testing is unconstitutional is not supported by the record and as stated above, was not preserved in the trial court.

Appellate did not object to any of the costs that the time of his sentencing.

RESPONSE TO ALLEGATION ONE

This court need not and should not address this issue. As this court ruled previously and as Division II of this court very recently ruled in State v. Lyle, Slip Opinion COA #46101-3-II (July 10, 2015);

Lyle did not challenge the trial court's imposition of LFOs at his sentencing, so he may not do so on appeal. Blazina, 174 Wn. App. at 911. Our decision in Blazina, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal. 174 Wn. App. at 911. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. Blazina, 182 Wn.2d at 830. We decline to exercise such discretion here.

This court has consistently ruled that this issue need not be

addressed for the first time on appeal, as did the court in Lyle. This division of the court has done so since this court's ruling in State v. Duncan, 180 Wn.App. 245, 250, 253, 327 P.3d 699 (2014) (petition for review accepted). In Duncan this court ruled that Duncan's failure to object was not because the ability to pay LFOs was overlooked, rather the defendant reasonably waived the issue, considering "the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive"

The opinion in Duncan was not changed by the ruling in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Blazina addressed RCW 10.01.160(3) which states a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." When determining the amount and method for paying the 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." RCW 10.01.160(3). In Blazina the Washington Supreme Court held RCW 10.01.160(3) requires a court "do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry"; rather, the record must show the court "made an individualized inquiry into the defendant's current and future ability to pay."

The Supreme Court ruling in Blazina also reaffirmed that RAP 2.5(a) provides appellate courts with discretion whether to review a defendant's LFO challenge raised for the first time on appeal. Blazina, 344 P.3d at 683. There, the Blazina court exercised its discretion in favor of allowing the LFO challenge. Id. Here, Appellant failed to object to the trial court's imposition of LFOs. And the court had heard trial testimony that the appellant was employed in the fields and working with a band, Q...what do you do for a living. "A. I'm a singer, and I like to work in the fields." (RP 315) This court therefore, has discretion to rely on the analysis in Duncan, supra, and not review the claimed error.

There has begun to be and is an enormous burden and expense to bring innumerable petitioner's and appellant's back from prison to conduct a new sentencing hearing to address this alleged error. This must be balanced against the possibility that the amount of LFO's which will be imposed will change. Additionally there is the consideration of the actual amount that will be collected contrasted to these new and added costs. Costs to the State from the return of each defendant, appointment of counsel, setting a new hearing the cost of the hearing itself and finally the return of the defendant to prison. Often the amount of money which would be subject to change or review is nominal because many of the costs found in the "boilerplate" sections of the judgment and sentence are

mandatory versus discretionary.

This court is well aware that a trial court is not required to inquire about the individual's ability to pay when imposing mandatory costs. Evidence of ability to pay was unnecessary to support the mandatory financial obligations imposed by the court. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) noting that, for these costs, "the legislature has directed expressly that a defendant's ability to pay should not be taken into account".

As Lundy so accurately states;

As a preliminary matter, we note that Lundy does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, No. 30548-1-III, 2013 WL 3498241 (2013). And our courts have held that these mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants." State v. Curry, 118 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

...

Additionally, a \$500 victim assessment is required by RCW 7.68.035(1)(a), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. See State v. Curry, 62

Wash.App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wash.2d 911, 829 P.2d 166; State v. Thompson, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's "finding" of a defendant's current or likely future ability to pay them is surplusage. (Lundy at 102-3, Footnote omitted emphasis in original.)

The following is the statement made by the trial court judge during sentencing addressing the costs imposed:

THE COURT: So I'm going to strike out \$15,000. I'm going to indicate \$1 subject to a hearing that we will set today. (The \$1 was subsequently agreed to at the amount of \$1500. RP Sentencing pg. 22)

\$500 crime penalty assessment, \$200 criminal filing fee, \$100 felony DNA collection fee, \$100 domestic violence assessment, \$60 sheriff's service fee. Again, these payments will need to be made to the address listed on the paperwork in section 4.D.3 at the clerk's office, for a total of \$961 at the moment, with restitution to be determined, which will change that figure. (RP Sentencing pg.13, CP 55)

It the present case Cliett was ordered to pay \$1500 in restitution, \$500.00 Crime Penalty Assessment, \$200.00 Criminal filing fee, \$60.00 Sheriff's service fee and, \$100.00 DNA collection fee. This final amount is to be paid "at the statutory rate as assessed by the Clerk." (RP 13, CP 56) The only discretionary costs in this case are the \$60.00 in "Sheriff's service fee and any amount that would be assessed for jail/prison costs that have not as of the time of this appeal been imposed and therefore any action on those would be purely speculative.

The State would urge this court to continue to exercise its right to deny these challenges of costs when they have not been raised in the trial court pursuant to RAP 2.5. The decision rendered in Duncan was appropriate, these costs are a matter that is not simply overlooked by a defendant. These costs are discussed in open court and Appellant failed to challenge anything and in fact at a later date, through his trial counsel, he agreed to a specific amount of restitution. As stated in Blazina, RAP 2.5(a) provides appellate courts with discretion whether to review a defendant's LFO challenge raised for the first time on appeal. Blazina, 344 P.3d at 683. The Supreme Court chose to select that one case and hear the issues presented. That court chose to exercise its discretion under RAP 2.5.

All three divisions of this court had held prior to Supreme Court's ruling in Blazina that a defendant's failure to raise this issue or to object to the imposition of these costs in the trial court was a failure to preserve the issue; State v. Blazina, 174 Wn.App. 906, 911, 301 P.3d 492, *reviewed granted*, 178 Wn.2d 1010 (2013); State v. Calvin, 176 Wn.App. 1, 316 P.3d 496, 507-08 (2013), *petition for review filed*, No. 89518-0 (Wash. Nov. 12, 2013); State v. Duncan, 180 Wn.App. 245, 253, 327 P.3d 699 (2014), *petition for review filed*, No. 90188-1 (Wash, Apr. 30, 2014) The Supreme Court's decision in Blazina did not change that reasoning, this

court should decline review of this case.

This issue has not been properly preserved, review should be denied.

RESPONSE TO ALLEGATION TWO

The next issue raised by Appellant is also being raised for the first time on appeal. Appellant challenges the mandatory \$100.00 fee DNA under RCW 43.43.7541 as violating due process. The trial court also imposed other mandatory fees such as the \$500.00 criminal victim's compensation fund fee.

Statutes are presumed constitutional, “and the party challenging a statute's constitutionality has the burden of proving otherwise beyond a reasonable doubt.” In re Pers. Restraint of McNeil, 181 Wn.2d 582, 334 P.3d 548 (2014) There have been previous challenges to the imposition of fees previously. A very similar issue was raised and rejected by previously in State v. Blank, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997) Appellant has not met the initial test as set out in Blank “Statutes are presumed to be constitutional. A party challenging the constitutionality of a statute has the heavy burden of proving its unconstitutionality beyond a reasonable doubt. Defendants in these cases have the burden of proving any unconstitutionality of RCW 10.73.160(4). (Citations and footnote omitted.)

The issue regarding fees was also raised in Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). The applicability of Fuller in this state is to fees that are assessed was addressed in State v. McCarter, 173 Wn.App. 912, 295 P.3d 1210 (Wn.App. Div. 3 2013). The ruling in McCarter refutes the claim by Appellant. This court ruled when addressing similar costs, “Finally, article I, section 22 of the constitution does not apply because the district court's imposition of \$250 in warrant fees did not compel Mr. McCarter to advance money or fees in order to secure his rights as a defendant under the Washington Constitution.” McCarter at 923. This same reasoning applies in the present case.

The Appellant lacks standing to challenge the DNA fee, his claim is not supported by anything in the record and in fact what little information is in the record would indicate that he was gainfully employed “in the fields” and as a singer, both occupations would appear to be such that he could resume them once released from his sentence. Nothing supports the claim that he is indigent.

In Spokane Research & Defense Fund v. W. Cent. Cmty., 133 Wn. App. 602, 606, 137 P.3d 120 (2006) the court declined to analyze an allegation for which appellant provided no reasoned argument, reference to the record, or legal authority supporting its argument.

Appellant cites to cases he asserts are relevant legal authority and

attempts to set forth argument supported by that case law however, the basic problem with his argument is that there are no facts in the record to support the claim that he is in fact indigent. An individual may qualify for indigent legal assistance and not be indigent with regard to payment of fees and assessments.

Appellant asserts the issue should be reviewed under a rational basis test, he states that the fee serves a valid purpose, but does not “rationally” serve that interest;

This ostensibly serves the State’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest. (Apps brief at 16)

The test is “Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause.” Nielsen v. Washington State Dep’t of Licensing, 177 Wn. App. 61, 52–53, 309 P.3d 1221 (2013) (citing *Russell W. Galloway, Jr., Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The circular argument then draws upon the argument presented earlier that it is unreasonable to impose the fee regardless of whether the

person has the future ability to pay that amount. That is not the test, the test is as noted above; is there a rational basis, is the statute rationally related to a legitimate interest of the State. The answer to that question is yes and because the answer is yes this court need take no further action.

Appellant's argument is that the statute is both constitutional and unconstitutional based on a person's ability to pay there is no such thing. If a statute meets the rationally bases standard then it is constitutional. A party may argue to the court that they have no ability to pay, that they are statutorily indigent and the court would have the ability to remove that payment. Here that was not the case, "Bearden essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine." State v. Johnson, 179 Wn.2d 534, 553-554, 315 P.3d 1090 (2014). (citing Bearden v. Georgia, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983) It is up to the party seeking review of an issue to provide an adequate record for review. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004)

The Johnson, supra, court examined a constitutional challenge to the driving while license suspended statute based on a claim of indigence. The Washington State Supreme Court rejected the challenge because Johnson, was statutorily indigent, however he *was not* constitutionally

indigent, and therefore Johnson was not in the class protected by the due process clause. Once again as stated in Johnson, “Bearden essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” Johnson, 179 Wn.2d at 554.

Here there is absolutely nothing in the record that would support a claim that Appellant was statutorily indigent, let alone whether he could get a job, or was capable of working, or that there was a totality of circumstances analysis to determine if he was constitutionally indigent. And as stated above the testimony in trial was that he had two jobs See Bearden, 41 U.S. at 663. There is simply an insufficient record to determine that Appellant has standing to raise this issue. It is his burden to provide that record, he has not.

As argued above this too is simply a challenge to a LFO; this alleged error is not manifest or constitutional issue and should not be reviewed under RAP 2.5 RAP 2.5 allows the appellate court to refuse to review any error raised for the first time on appeal. There was no objection to the DNA fee in the trial court. State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), relied upon by appellant, is based on statutory, not constitutional concerns. The Supreme Court affirmed in Blazina that the Court of Appeals did not abuse its discretion by declining to review

the issue under RAP 2.5 Blazina also implicated discretionary LFO's, not mandatory ones such as the DNA fee.

The State Supreme Court has already concluded there is no constitutional infirmity in not considering the defendant's ability to pay when imposing costs, as long as there is a requirement that the court determines there is an ability to pay before imposing punishment. State v. Blank, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997) A court must consider a defendant's ability to pay before sanctions are imposed or enforced payment. *Id.* at 247. A defendant who is unable to pay costs may, at any time, petition the court for remission of the costs or to modify the method of payment. RCW 10.01.164. In addition once a defendant has paid his or her costs, the court may waive the interest if it is causing a significant hardship. RCW 10.82.090.

Blank, and the case it relies upon, Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) identify the rational for imposing costs at sentencing, but allowing a claim of indigence at time of collection. At the time of sentencing the court's decision as to whether the defendant has the likely future ability to pay is, at best, an educated guess. It is perfectly rational to wait until the time of collection to make this determination, as better information will be available to all of the parties. There is simply no constitutional infirmity, and the court should decline to

hear this issue.

The one difference between this LFO and others objected to by Appellant is it is mandated to be paid after all other obligations have been paid and therefore is the least likely obligation to be paid. There has been no rational basis presented by Ruiz-Martinez to differentiate this mandatory cost from other costs.

This argument has been raised before, and failed, Blazina states that the statutory language of RCW 10.01.160 requires the court to consider the defendant's likely future ability to pay when assessing *discretionary* LFO's. The constitution mandates the court consider the defendant's ability to pay when the State attempts to enforce collections. This has not yet occurred in this case. Blazina was not a constitutional case and did not overrule prior precedent. This claim must be rejected.

IV. CONCLUSION

For the reasons set forth above this court should deny allegations set forth in this appeal.

Respectfully submitted this 10th day of August 2015,

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