

FILED
Aug 27, 2015
Court of Appeals
Division III
State of Washington

NO. 32253-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS M. CLIETT,

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. Certain sections shall also be set forth in the appendix to this document.

III. ARGUMENT

Cliett failed to preserve either claim raised by this appeal in the trial court. According to numerous prior rulings from this court and

affirmation by the Washington State Supreme court in the recently opinion State v. Blazina, infra, this court still maintains the ability to exercise its discretion to address this type of issue for the first time on appeals under RAP 2.5. 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, the court stated that it believed the defendant had the ability to pay those obligations.

RESPONSE TO ALLEGATION ONE

This court need not and should not address this issue. As Division II of this court just 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 as the Lyle court did since this

court's ruling in State v. Duncan, 180 Wn.App. 245, 250, 253, 327 P.3d 699 (2014). There this court ruled that the defendant'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."

However 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, Cliett failed to object to the trial court's imposition of LFOs. This court therefore, has discretion to rely on the analysis in Duncan, supra, and not review the claimed error.

There has been great discussion regarding the looming burden and expense of bringing innumerable petitioner's back from prison to conduct a new sentencing hearing in contrast to the likelihood that the amount of LFO's imposed would change and the actual amount that could be collected against the cost to the State to demand return of each defendant, appointment of counsel, setting a new hearing, and the cost of the hearing itself and finally the return of the defendant to prison.

Often the amount of money which could be reconsidered is nominal because many of the costs found in the judgment and sentence are mandatory as opposed to discretionary. As this court is well aware the trial court has no need to address 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 Appellant’s ability to pay on the monies owed in the Judgment and Sentence;

There’s a \$500.00 crime penalty assessment, a \$200.00 criminal filing fee, a \$600.00 court appointed attorney recoupment and \$100.00 DNA collection fee for a

total of \$1,400.00. The costs of incarceration will be capped at \$2,500.00. I do make the observation, Mr. Cliett does appear to be capable of working and thus has the ability to pay. RP Sentencing at page 10

It the present case Cliett was ordered to pay no restitution, \$500.00 Crime Penalty Assessment, \$200.00 Criminal filing fee, \$600.00 Court appointed attorney recoupment, \$100.00 DNA collection fee. Along with these costs the court ordered that Appellant pay the costs of his incarceration in an amount not to exceed \$2500.00. This final amount is to be paid “at the statutory rate as assessed by the Clerk.” (CP 57) The only discretionary costs in this case are the \$600.00 in attorney recoupment fees 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.

Given that the court has already imposed these costs the probability that they will be removed or reduced is at best minimal.

The State would urge this court to continue to deny these challenges of costs when they have not been raised in the trial court. 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 Cliett did nothing to challenge the courts specific statement that it believed that the defendant had the ability to pay. Once again as

stated in Blazina, the Supreme Court held 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. 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.

This court and the trial courts are and will continue to be inundated with specious claims such as this. This court should exercise that discretion and not consider this matter for the first time on appeal. As our supreme court noted, an appellate court may use its discretion to reach unpreserved claims of error. Blazina, 344 P.3d at 681. This court should decline to exercise such discretion here.

As this court is well aware all three divisions of this court had held prior to the 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 will be considered 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.

RESPONSE TO ALLEGATION TWO

Also for the first time on appeal the appellant challenges the mandatory \$100.00 fee DNA under RCW 43.43.7541 as violating due process. In this case the court also imposed other mandatory fees such as \$500.00 criminal victim's compensation fund fee. It is unclear why the appellant accepts the greater fee as constitutional, but not the lesser.

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 Appellant lacks standing to challenge the DNA fee, he claims without support that he is indigent. There is nothing in the record before this court to support that argument. In Spokane Research & Defense Fund v. W. Cent. Cmty., 133 Wn. App. 602, 606, 137 P.3d 120 (2006) the court declined to analyze contention for which appellant provided no reasoned argument, reference to the record, or legal authority supporting its argument. Cliett cites to what he claims is relevant legal authority and attempts to set forth a reasoned argument however the glaring omission are facts in the record to support the claim that Cliett is in fact indigent. An individual may qualify for legal assistance and in the eyes of the court qualify as indigent for that purpose and not be indigent with regard to payment of fees and assessments.

Appellant states the test is a rational basis test and then concedes that the fee as applied serves a State interest. As this court is aware 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)). Appellant defeats his own argument by this statement that the fees serve a legitimate purpose. However he then states “but” the imposition does not

“rationally” server that interest. This 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. This 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.

Cliett in effect argues that this statute is both constitutional and unconstitutional based on a person’s ability to pay. He admits the statute is rationally based and constitutional if someone has the ability to pay, but argues that it unconstitutional as applied to him because the court did not find he had the likely future ability to pay. The problem with this argument is that after proffering it he fails to include any record of his alleged indigency. There is nothing in the clerk’s papers or the verbatim report of proceedings that would even support more inquiry regarding Cliett’s alleged indigency. There is nothing in this record that would indicate that the court found Cliett statutorily indigent, and the record does not support the more in-depth analysis required to find him constitutionally indigent. “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)

In fact from the record it would appear that the Appellant was able to post bail, an indication that he was not indigent” in the constitutional sense. His bail was revoked. (CP 48)

In Johnson the court examined a constitutional challenge to the driving while license suspended statute based on a claim of indigence. The State Supreme Court rejected the challenge because Johnson, while statutorily indigent, was not constitutionally indigent, and therefore 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 Cliett 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. 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. As noted above the Supreme Court affirmed in Blazina 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 rationale 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. There is simply no constitutional infirmity, and the court should decline to hear this issue.

The one difference between this LFO and other set forth by Cliett is that it is mandated to be paid after all other obligations have been paid and therefore is the least likely obligation to be paid. (Appellant's brief at 17) Appellant presents no rational reason that the DNA fee should be treated differently.

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 27th day of August 2015,

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