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Court of Appeals  
Division III  
State of Washington

32476-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

PAUL HAROLD KALAKOSKY, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. "Did the court err in not finding that it had lost jurisdiction to collect LFO's on Mr. Kalakosky's 1989 conviction when he was sentenced under the laws in effect in 'June' of 1989 for his 1987 crimes which provided that the court had 10 years to collect from the time of sentencing and the presiding judge clearly indicates such was the law and his intent by writing it into the J & S?"
2. "Did the court err again on April 11, 2014 when it again disregarded [defendant's] ability to pay while at the same time taking notice of this issue in the letter of April 11, 2014?"

## **II. ISSUES PRESENTED**

1. Has the court lost jurisdiction to enforce Legal Financial Obligations where defendant has been subject to total confinement on a charge since he was sentenced in 1989?
2. Was the court required to consider the defendant's ability to pay where defendant filed a motion to terminate LFOs due to lack of jurisdiction, and should this court consider the issue when it was neither objected to at sentencing, nor properly raised to the trial court by motion?

### III. STATEMENT OF THE CASE

Mr. Kalakosky was sentenced June 19, 1989, to 645 months in prison for convictions on four counts of First Degree Rape and one count of Attempted First Degree Rape.

The Judgment and Sentence in this case was filed in Spokane County Superior Court on June 19, 1989. The defendant brought an appeal in the Washington State Supreme Court. The Court affirmed the appellant's convictions in a decision released on May 27, 1993. *State v. Kalakosky*, 121 Wn.2d 525, 852 P.2d 1064 (1993). In that appeal, the appellant did not raise any issue with respect to his legal financial obligations (LFOs).

In 2014, Defendant moved the trial court for relief from his LFOs based on his argument that the court lacked jurisdiction to enforce those obligations. The trial court denied this motion by letter dated April 11, 2014. The Defendant filed a notice of appeal based on that decision. On February 12, 2015, Court Commissioner Wasson determined that the matter was not appealable and was not subject to discretionary review, and ultimately dismissed the appeal. The defendant moved to modify this decision on March 18, 2015, and a panel of three judges from this Court remanded the matter to Superior Court for entry of a final order such that the case would be ripe for review.

Judge Salvatore Cozza entered an order on September 24, 2015 captioned “final order” indicating that “no further action will be taken in this matter” and that “at this point the matter is closed.”

Defendant again requested this Court grant him relief from his LFOs on December 31, 2015, alleging the trial court lacks jurisdiction to enforce the LFO order, and that the trial judge erred in failing to consider defendant’s ability to pay under *Blazina, infra*.

#### IV. ARGUMENT

##### **A. THE TRIAL COURT DID NOT ERR IN FINDING THAT IT RETAINED JURISDICTION TO ENFORCE COLLECTION OF DEFENDANT’S LFOS; DEFENDANT REMAINS INCARCERATED ON THESE CHARGES.**

The Legislature has set forth the jurisdictional time limits within which Washington trial courts may collect legal financial obligations.<sup>1</sup> With respect to payment of restitution, former RCW 9.94A.142 (1989), *recodified as* RCW 9.94A.753(4),<sup>2</sup> controls the issue. That statute

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<sup>1</sup> Legal financial obligations include restitution, court costs, and fines. RCW 9.94A.030(31). Defendant has failed to allege which of these obligations has been ordered in his case. The State assumes he is subject to financial obligations for restitution and court costs.

<sup>2</sup> “For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court’s jurisdiction for a term of ten years *following the offender’s release from total confinement* or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution.”

RCW 9.94A.753(4) (emphasis added).

provides that the court's jurisdiction to collect restitution for crimes committed before July 1, 2000, continues for ten years *after* defendant's release from total confinement. That statute applies here as Mr. Kalakosky committed these crimes prior to July 1, 2000. He has not yet been released. Despite his contention to the contrary, no order to extend jurisdiction was necessary in his case because the change in the statutes regarding restitution and other financial obligations had retroactive effect. *See, State v. Shultz*, 138 Wn.2d 638, 980 P.2d 1265 (1999):

Shultz had only a mere expectation that the court's jurisdiction over his restitution order would expire on a particular date. The restitution order is a legally imposed financial obligation, and Shultz has proven no vested right in that legal obligation expiring at any particular time. Shultz fails to establish he had a vested right in the expiration date of the restitution order.

*Shultz*, 138 Wn.2d at 647.

Mr. Kalakosky's obligation to pay toward other legal financial obligations is covered in RCW 9.94A.760(4). That statute, in part, provides:

All other legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend the criminal judgment an

additional ten years for payment of legal financial obligations including crime victims' assessments.

RCW 9.94A.760(4).

Because Mr. Kalakosky's crimes were committed prior to July 1, 2000, this statute directly applies to his LFOs. In *State v. Adams*, our Supreme Court held that this recodified version applies retroactively because "[t]he original 1989 enactment of this statute contained substantively comparable language and was in effect when Adams entered his 1990 guilty pleas." 153 Wn.2d 746, 751, 108 P.3d 130 (2005). See also *State v. Serio*, 97 Wn. App. 586, 589, 987 P.2d 133 (1999) (No *ex post facto* violation: "While RCW 9.94A.142 applies specifically to restitution, the general 'legal financial obligations' of felons, including restitution, costs, fines and other assessments, are covered by RCW 9.94A.145(4)"); *State v. Hotrum*, 120 Wn. App. 681, 87 P.3d 766 (2004).

Defendant argues that his case was final before the May 9, 1991 effective date of RCW 9.94A.760, and therefore, the statute does not apply to him. In 1991, the statute was amended, as discussed above, and the Legislature intended it to retroactively apply to all actions "commenced but not final" as of the May 9, 1991 effective date. Laws of 1991, ch. 93, §§ 2, 15, 16. The defendant's matter was not "final" until

after the Supreme Court of Washington issued the mandate in his proceedings.<sup>3</sup> This occurred in 1993 after the Court issued its decision affirming his conviction. *See Kalakosky, supra*. Defendant's matter was "commenced but not final" as of the date the amendment took effect, and therefore, the statute is applicable to his case. Thus, defendant's argument fails.

**B. DEFENDANT'S ARGUMENT THAT THE TRIAL COURT ERRED IN NOT CONSIDERING HIS ABILITY TO PAY FAILS AS DEFENDANT HAS NOT PROPERLY RAISED THE ISSUE, AND IS NOW BARRED FROM DOING SO.**

Defendant belatedly argues that the trial court failed to consider his ability to pay legal financial obligations in imposing them in 1989 when the defendant was sentenced. Defendant failed to preserve the matter for appeal by failing to object.<sup>4</sup> RAP 2.5.

In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that the LFO issue is not one that can be presented for the first time on appeal

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<sup>3</sup> For purposes of retroactive application of a new rule of law, "finality" is the point at which a judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time for a petition for certiorari elapsed or such a petition is finally denied. *See, In Re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 327, 823 P.2d 492 (1992).

<sup>4</sup> Defendant has presented no evidence in the record to support a contention that he preserved any conceivable "error" in the imposition of LFOs in 1989 by objecting at the time of sentencing. In any event, his time to appeal from the original imposition of LFOs has clearly passed.

because this aspect of sentencing is not one that demands uniformity. *Blazina*, 182 Wn.2d at 830. No constitutional issue is involved. *Id.* at 840 (Fairhurst, J. concurring in result). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5. While the court enjoys discretion to make an exception to the general requirement of error preservation, our Supreme Court has adopted a “strict approach” with RAP 2.5(a) “because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial” or, as in this case, avoid a resentencing. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

Additionally, the defendant’s 2014 motion to the trial court for relief from his LFOs involved the court’s jurisdiction and he has failed to demonstrate that he raised the *Blazina* issue to the lower court and presented it with an opportunity to consider whether it should engage in a *Blazina* analysis on his 1989 LFOs or consider remission of his LFOs based on his inability to pay without manifest hardship. Without any evidence in the record that the defendant raised this issue in 2014, the

court should decline to consider it.<sup>5</sup> *See, e.g., State v. Stoddard*, No. 32756-6, 2016 WL 275318 (Div. 3, 2016) (discussion of forfeiture of claim on appeal by failing to make a timely assertion to the lower court).

Furthermore, even assuming defendant could collaterally attack the LFO judgment in his case, he is time-barred from doing so. As previously stated, the decision in his case became final in 1993 at the time the mandate was issued. Under RCW 10.73.090, any collateral attack on the judgment needed to be made within one year of the mandate, unless the attack addressed the court's jurisdiction or the validity of the judgment on its face. *See, In Re Bonds*, 165 Wn.2d 135, 140, 196 P.3d 672 (2008). The nonconstitutional issue of the imposition of LFOs is neither a jurisdictional question, nor a question bearing on the validity of the judgment. Thus, any collateral attack on the imposition of LFOs (assuming one may be made) must have been made no later than one year after the mandate issued. Twenty-six years after the mandate issued is twenty-five years too late for this court to hear the issue as a collateral attack.

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<sup>5</sup> The defendant's motion was to "terminate legal financial obligations" based on his argument that the court did not have jurisdiction to enforce collection. He has presented no evidence in the record that he filed a motion for the trial court to consider remitting any or all of his legal financial obligations due to a demonstrated manifest hardship on the defendant. *See* RCW 10.01.160(4).

Policy and RAP 2.5 favor declining review of this LFO issue. The lower court properly declined to consider an issue that was not properly before it.<sup>6</sup> Likewise, this court should decline to consider an issue that was neither objected to at sentencing in 1989, nor properly brought to the lower court for its consideration in defendant's 2014 motion to terminate LFOs for lack of jurisdiction.

## V. CONCLUSION

The only issue that should be considered on appeal is whether the trial court erred in denying defendant's motion for relief based on lack of jurisdiction to enforce collection. The statutes that govern the court's ability to collect legal financial obligations clearly apply to defendant's case and allow the court to collect so long as defendant remains incarcerated and for at least ten years after his release.

Defendant's argument that the continued collection of legal financial obligations presents a hardship to him is not properly before this court. His failure to object to the imposition of LFOs at sentencing and his failure to properly address the issue with the trial court by motion, bar

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<sup>6</sup> Judge Cozza stated in his April 2014 letter to the defendant, "with respect to *any allegation* of hardship, it does not appear that Mr. Kalakosky's deductions are any different from deductions made in the cases of other DOC inmates." April 11, 2014 Letter from Judge Cozza (emphasis added). Defendant has failed to demonstrate that he actually raised this issue to the trial court or provided it any information upon which to make an informed decision.

any review on the issue by this court at this time. The State respectfully requests that the Court decline the invitation to do so.

Dated this 25 day of February, 2016.

LAWRENCE H. HASKELL  
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A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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v.

PAUL HAROLD KALAKOSKY,

Appellant,

NO. 32476-1III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 25, 2016, I mailed a copy of the Brief of Respondent in this matter addressed to:

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2/25/2016

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)