

FILED

MAR 07, 2016

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33346-9-III

STATE OF WASHINGTON, Respondent,

v.

PHILLIP JOHN MOTYKA, JR., Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Philip Motyka, Jr. appeals the sentence entered following a stipulated facts trial. Because the State has failed to support the offender score of “16,” the sentence is unsupported and should be remanded. Further, the trial court erred in imposing legal financial obligations when its sole inquiry into Motyka’s ability to pay asked about his employability, without regard to Motyka’s existing debts. The failure to object to imposition of the LFOs at sentencing constituted ineffective assistance of counsel.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The State failed to provide a factual basis for Motyka’s offender score.

ASSIGNMENT OF ERROR w: The trial court erred in imposing legal-financial obligations without conducting an adequate inquiry into Motyka’s likely ability to pay as required by *State v. Blazina*.

ASSIGNMENT OF ERROR 3: Motyka’s trial counsel was ineffective for failing to object to the imposition of legal-financial obligations when Motyka lacks the present and likely future ability to pay.

ASSIGNMENT OF ERROR 4: Insufficient evidence supports the trial court's determination that Motyka has the likely present or future ability to pay legal-financial obligations.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the State alleges criminal history to support a score of "16" but does not present any supporting evidence or obtain the defendant's stipulation to the history, can the judgment and sentence be upheld? NO.

ISSUE 2: Because the *Blazina* Court established that the minimal inquiry for purposes of evaluating a defendant's ability to pay legal financial obligations must consider the existence of the defendant's other debts and the effect of incarceration, is an adequate inquiry conducted when the trial court only asks the defendant whether he is employable? NO.

ISSUE 3: When a trial court imposes discretionary legal financial obligations without inquiring into the defendant's ability to pay them, is trial counsel's representation ineffective when counsel does not object to the court's failure to satisfy the requirements of RCW 10.01.160 and *Blazina*? YES.

ISSUE 4: When, considering the resources available to the sentencing court to ascertain the existence of a defendant's other debts, the trial court imposes additional discretionary legal financial obligations without reviewing the Judicial Information System to determine if the defendant has other outstanding legal financial obligations, is the trial court's finding of ability to pay clearly erroneous? YES.

IV. STATEMENT OF THE CASE

Philip Motyka was convicted of unlawfully possessing a firearm following a stipulated facts trial. CP 183, 185-87. The trial court imposed a sentence of 90 months based upon a score of 16. CP 188-97. The State did not present evidence supporting the offender score, and Motyka neither agreed nor objected to the score. RP (5/20/15) at 3. The trial court also imposed \$3,561.12 in legal financial obligations ("LFOs"). CP 192. Before imposing the LFOs, the sole inquiry into ability to pay consisted of the court asking Motyka, "You're employable, are you not?" RP (5/20/15) at 3.

Motyka now appeals. CP 200.

V. ARGUMENT

A. Because the record does not support the offender score of “16,” the sentence should be vacated and the case remanded for resentencing.

Offender score error may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). When a court imposes a sentence based on an improperly calculated offender score, it acts without statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

The court of appeals reviews the calculation of an offender score *de novo*. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). In determining whether the offender score is supported by the record, the reviewing court considers that “the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530.

The burden of providing sufficient evidence to support the offender score rests squarely on the State. In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court

evaluated the State's burden of proof to establish the offender score, stating:

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction. While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." Further, unless convicted pursuant to a plea agreement, the defendant has "no obligation to present the court with evidence of his criminal history." (Internal citations omitted.)

While evidence of prior convictions need not be substantial, there must be some evidence beyond the assertions of the prosecutor, which are not evidence but are mere argument. *Hunley*, 175 Wn.2d at 911-12.

Moreover, a defendant's failure to object to the State's assertions of criminal history does not constitute an affirmative acknowledgment of the history sufficient to satisfy the State's burden. *Id.* at 913 (citing *State v. Mendoza*, 165 Wn.2d 913, 925, 205 P.3d 113 (2009); *State v. Weaver*, 171 Wn.2d 256, 260, 251 P.3d 876 (2001)). This is because the defendant has no burden of proof on the issue; as such, silence cannot operate as a waiver of the defendant's right to hold the State to its evidentiary burden.

Here, the record is devoid of any evidentiary proffer or any acknowledgment of criminal history by the defendant that would relieve

the State of proving the score. “[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *Ford*, 137 Wn.2d at 481. Because the State’s calculation of Motyka’s offender score is not supported by an evidentiary foundation in the record, the sentence imposed does not comport with minimal due process requirements.

The remedy for the error is to vacate Motyka’s sentence and remand the case for resentencing. *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950 (2010). The State should be permitted to present evidence substantiating the offender score on remand. RCW 9.94A.530(2); *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

B. The *Blazina* inquiry was inadequate, and failure to object constituted ineffective assistance of counsel.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court held that to comply with RCW 10.01.160, trial courts must conduct an individualized inquiry into the defendant’s ability to pay legal financial obligations (LFOs) before imposing them. Under *Blazina*, signing a judgment containing boilerplate language is insufficient; the record must demonstrate that the court considered “the

financial resources of the defendant and the nature of the burden that payment of costs will impose,” including the defendant’s incarceration and other debts. *Id.* at 838. The *Blazina* Court further recognized that if a defendant meets the GR 34 standard for indigency, “courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

Notably, the *Blazina* Court did not criticize the Court of Appeals’ decision declining discretionary review of the issue when no objection to the imposition of LFOs were raised below. 182 Wn.2d at 834. Here, no objection to the LFOs was raised at sentencing. Review of the LFO assessment is appropriate, however, under RAP 2.5(a)(2) and (3).

- i. When the trial court’s inquiry fails to meet the minimum standards established in *Blazina*, review of the LFO imposition is appropriate under RAP 2.5(a)(2)

RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges “failure to establish facts upon which relief can be granted.” The exception “is fitting inasmuch as “[a]ppel is the first time sufficiency of evidence may realistically be raised.”” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)). RAP 2.5(a)(2) has been applied to review of remedies imposed following a substantive

trial, including a party's entitlement to attorney fees. *Stedman v. Cooper*, 172 Wn. App. 9, 24-25, 292 P.3d 764 (2012). *Stedman* is directly analogous to the imposition of LFOs following a guilty plea when there is no stipulation as to the defendant's ability to pay. Where, as here, insufficient facts support the trial court's determination that the defendant has the likely ability to pay LFOs, the statutory requirements to impose LFOs under RCW 10.01.160 are not met. Likewise, in *Stedman*, insufficient facts supported the imposition of attorney fees because they failed to show the requirements of RCW 7.06.060 were met. As in *Stedman*, review should be granted here.

- ii. Review of the LFO imposition is appropriate under RAP 2.5(a)(3) when the failure to object constitutes ineffective assistance of counsel.

Division Two of the Court of Appeals has noted that failing to object to legal financial obligations may constitute deficient performance by trial counsel. *State v. Lyle*, __ Wn. App. __, 335 P.3d 327 (2015). However, the *Lyle* court declined to reverse the sentence on the grounds that the record did not reflect additional debt that would allow an evaluation of his ability to pay by the appellate court. *Id.* at 329-30.

In the present case, Motyka has sought to present additional evidence to the court to show the existence of substantial outstanding LFO debt. *See Ruling on Motion to Take Additional Evidence on Review*, filed February 22, 2016. The existence of this debt supports Motyka's request for review pursuant to RAP 2.5(a)(3) because it tends to show that he was prejudiced by the failure to object to the LFO assessment. Had Motyka's counsel held the trial court to its duty under *Blazina* to inquire into the existence of his other debts and the effect of incarceration, the information set forth in the pending Motion to Take Additional Evidence would have significantly undermined the conclusion that Motyka would have any realistic ability to pay additional LFOs upon his release.

- iii. The trial court's nominal inquiry fails to satisfy the requirements of *Blazina* that it consider "the financial resources of the defendant and the nature of the burden that payment of costs will impose."

The *Blazina* Court responded to national attention given to the burdens associated with imposing unpayable legal financial obligations on indigent defendants, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." 182 Wn.2d at 835. Under Washington's system, unpaid

obligations accrue interest at 12% per annum and can be subject to collection fees, creating the perverse outcome that impoverished defendants who pay only \$25 per month toward their obligations will, on average, owe more after ten years than at the time of the initial assessment. *Id.* at 836. As a result, unpaid financial obligations can become a burden on gaining (and keeping) employment, housing, credit rating, and increases the chances of recidivism. *Id.* at 837.

In response to these unanticipated and unintended effects, the *Blazina* Court reaffirmed the trial court's statutory duty to conduct an individualized inquiry into the defendant's current and future ability to pay, considering factors "such as incarceration and a defendant's other debts, including restitution." *Id.* at 838. Moreover, the *Blazina* Court specifically the indigency standard established in GR 34 and noted, "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." *Id.* at 839.

In the present case, the nominal inquiry conducted by the trial court fails to satisfy the requirements of *Blazina* because it inquired only into whether he was able to work for wages in the future, without considering his living expenses, whether he supports dependents, the effect of his pretrial incarceration on his debt burden, the outstanding legal

financial obligations already existing at the time of sentencing, the impact of accruing interest on the rate of repayment, or any factor whatsoever related to Motyka's debts and liabilities. The inquiry failed specifically to address the factors specifically identified by the *Blazina* Court as mandatory, namely, the effect of incarceration and the defendant's other debts. *Blazina*, 182 Wn.2d at 838. As such, the inquiry is inadequate to satisfy the minimum requirements identified by the *Blazina* Court.

The *Blazina* Court itself, notably, acknowledged that under RCW 10.01.160(3), the obligation to conduct an individualized inquiry rests with the trial court. 182 Wn.2d at 839. This structure suggests that to the extent the State wishes the court to impose discretionary legal financial obligations, the State carries the burden of production to demonstrate to the court that the defendant will be able to pay them. In an analogous setting, the imposition of sentence, the trial court is required to impose a sentence within the standard range established for the offense. RCW 9.94A.505. There, the Washington Supreme Court has held that the burden of proving prior criminal history necessary to calculate the offender score rests with the State and cannot be shifted to the defendant without violating his right to due process. *Hunley*, 175 Wn.2d at 907.

Where the State fails to meet its evidentiary burden, no strategic reason exists to justify the failure to object. *See, e.g., State v. Lopez*, 107 Wn. App. 270, 27 P.3d 237 (2001). Under these circumstances, counsel’s failure to object cannot be attributed to legitimate trial strategy because no possible advantage inures to the defendant. *Id.* at 277. Here, where the inquiry is nominal, failed to address significant LFOs already owed by the defendant, and ultimately disregarded two of the obligatory factors recognized in *Blazina* – the effect of incarceration and the existence of other debt – failing to hold the State and the trial court to their obligations provides no conceivable benefit to Motyka. The court should hold that failing to object to an inadequate *Blazina* inquiry constitutes deficient performance, and under the facts of this case, prejudicial in light of Motyka’s ongoing indigency and substantial debt.

- iv. The trial court’s finding that Motyka has the likely ability to pay legal financial obligations is clearly erroneous.

The *Blazina* Court specifically required sentencing courts to evaluate, as part of the inquiry into the defendant’s ability to pay, the defendant’s other debts. 182 Wn.2d at 838. Information about a defendant’s other outstanding LFO balances is accessible through the statewide Judicial Information System (JIS), which “serves as a statewide

clearinghouse for criminal history information” and principally serves judicial officers and court staff. Judicial Information System (JIS), *available online* at <http://www.courts.wa.gov/jis/> (last visited March 7, 2016). When information that comprises part of the required inquiry is readily available to the sentencing court in its own information system, judicial officers should be charged with reviewing that information as part of the process of determining an offender’s ability to pay LFOs.

This court should grant the motion to take additional evidence and consider whether the additional evidence renders the sentencing court’s determination that Motyka has the likely ability to pay LFOs clearly erroneous. A finding of ability to pay is reviewable under a “clearly erroneous” standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). This court should consider, as directed by *Blazina*, the extent of Motyka’s debts and the effects of the 90 month term of incarceration, considering the amount of interest that will accrue on the obligations, as well as Motyka’s likely earning capacity upon release. Motyka respectfully submits that review of these facts will demonstrate that the imposition of LFOs in this case implicates all of the negative consequences associated with subjecting offenders to perpetual debt and is clearly erroneous in light of the amount of debt outstanding and term of confinement imposed.

VI. CONCLUSION

For the foregoing reasons, Motyka respectfully requests that the court REVERSE the sentence and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

A handwritten signature in black ink, appearing to read "Andrea Burkhardt". The signature is written in a cursive style with a horizontal line underneath it.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7th day of March, 2016 in Walla Walla, Washington.


Breanna Eng