

**FILED**

JUN 07, 2016

Court of Appeals  
Division III  
State of Washington

No. 33346-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

PHILLIP JOHN MOTYKA, JR.,

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 14-1-01113-3

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BRIEF OF RESPONDENT

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The defendant acknowledged and stipulated to his felony criminal history resulting in an offender score of 16 and thus eliminated the State's burden to provide further documentation supporting said score.
- B. A review the imposition of the defendant's legal financial obligations under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay.
- C. Trial counsel's failure to object to the imposition of discretionary legal financial obligations did not violate the defendant's right to effective assistance of counsel due to defendant's admission on the record he was employable and able to pay the fines imposed.
- D. The trial court sufficiently inquired into the defendant's present and future ability to pay.

## **II. STATEMENT OF FACTS**

The defendant was found guilty of Unlawful Possession of a Firearm in the First Degree after a stipulated facts bench trial on May 18, 2015. CP 185-87. The defendant was sentenced to 90 months in prison on said charge on May 20, 2015. CP 207-20. At the sentencing hearing, the State presented to the court a letter dated May 19, 2015, setting forth all 16 of the defendant's prior felony criminal convictions. CP 218. Prior to

presentation to the court, the defendant had reviewed the document with his attorney of record and signed the document, indicating he agreed the 16 crimes listed his true and accurate felony criminal history supporting an offender score of 16. CP 218. The sentencing judge, the Honorable Vic Vanderschoor, recited to the defendant his criminal history including all 16 of the felony convictions and their conviction dates. RP 05/20/2015 at 3. The defendant did not contest any of the crimes set forth in the May 19, 2015, letter or recited by the judge. RP 05/20/2015 at 3-5.

The sentencing judge also imposed legal financial obligations (“LFOs”) on the defendant in the amount of \$3,561.12. CP 207-20; RP 05/20/2015 at 5. When asked if he was employable by the sentencing judge, the defendant indicated that he was. RP 05/20/2015 at 3.

### III. ARGUMENT

#### A. **The defendant’s written acknowledgment of his criminal history supports his offender score of 16.**

At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). “The best evidence of a prior conviction is a certified copy of the judgment.” *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). It is the obligation of the

State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. *Ford*, 137 Wn.2d at 480. This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing “some minimal indicium of reliability beyond mere allegation.” *Ford*, 137 Wn.2d at 481 (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)); *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). “This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence.” *Mendoza*, 165 Wn.2d at 920; *see also State v. Ross*, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004); *Ford*, 137 Wn.2d at 480. “[T]he court may rely on the defendant's stipulation or acknowledgement of prior convictions to calculate the offender score.” *State v. James*, 138 Wn. App. 628, 643, 158 P.3d 102 (2007).

In the instant matter, the defendant signed and acknowledged his 16 prior felony criminal convictions in a letter dated May 19, 2015, sent to his attorney of record. CP 218-19. The letter sets forth the criminal convictions, their dates of offense and conviction, as well as the court of record. *Id.* The defendant's signature on said document acknowledged and stipulated that the 16 felony convictions listed were a true and accurate recitation of his criminal history. *Id.* The defendant did not object to the

inclusion of any of the crimes set forth therein. RP 05/20/2015 at 3. Thus, the defendant's stipulation and acknowledgment of his criminal history relieves the State of its burden to produce any further evidence supporting the defendant's offender score of 16 and the court properly relied on the defendant's acknowledgment in sentencing the defendant with an offender score of 16.

**B. A review of the imposition of the defendant's legal financial obligations under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay.**

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003). The defendant contends an inadequate inquiry under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), can be raised for the first time on review under RAP 2.5(a)(2) because insufficient facts support the finding of ability to pay; however, a review under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay.

A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.

*Blazina*, 182 Wn.2d 827. 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 applies where the proof of particular facts at trial is required to sustain a claim. *Mukilteo Ret. Apts., LLC v. Mukilteo Investors LP*, 176 Wn. App. 244, 246, 310 P.3d 814 (2013). This exception “is fitting inasmuch as ‘[a]ppeal 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)).

The court in *Blazina* noted that unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny. *Blazina*, 182 Wn.2d at 833; *Ford*, 137 Wn.2d at 477-78. “As stated in *Ford* and reiterated in our subsequent cases, concern about sentence conformity motivated our decision to allow review of sentencing errors raised for the first time on appeal . . . allowing challenges to discretionary LFO orders would not promote sentencing uniformity in the same way.” *Blazina*, 182 Wn.2d at 833-34. The court held that the trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on particular facts of the defendant’s case. *Id.* at 834.

Following the *Blazina* decision, in *State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015), the court determined that Lyle’s failure to

challenge the trial court's imposition of LFOs at his sentencing precluded him from raising the issue on appeal. Lyle is directly analogous to the present case. Here, not only did the defendant fail to challenge the trial court's imposition of LFOs at his sentencing, he indicated that he was employable, which would make him able to pay his LFOs. RP 05/20/2015 at 3. While the appellate court has the discretion to review the matter, the trial court properly considered the defendant's current and future ability to pay his LFOs. The trial court's findings are supported by evidence in the record; therefore, a review under RAP 2.5(a) is not appropriate.

**C. The trial court sufficiently inquired into the defendant's present and future ability to pay.**

The defendant does not distinguish between the mandatory and discretionary LFOs imposed by the trial court. This is an important distinction because for mandatory LFOs, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). For victim restitution, victim assessments, DNA fees, and criminal filing fees, the defendant's ability to pay should not be taken into account. *Id.*; see, e.g., *State v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013). Mandatory obligations are constitutional so long "there are sufficient safeguards in the current sentencing scheme to prevent

imprisonment of indigent defendants.” *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992).

A victim assessment fee of \$500 is required by RCW 7.68.035(1), 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. *State v. Curry*, 62 Wn. App. 676, 680-81, 814 P.2d 1252 (1991); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009).

Unlike mandatory obligations, if a court intends on imposing discretionary LFOs as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay. *Lundy*, 176 Wn. App. at 103. Here, the defendant requests the Court reverse his sentence and remand the case for resentencing. The trial court imposed LFOs, including a \$500 victim assessment, \$500 fine, \$100 DNA collection fee, and \$2,461.12 court costs, which included the \$200.00 filing fee. CP 211, 220. The victim assessment, filing fee, and DNA collection fee are mandatory, regardless of the defendant’s ability to pay. Therefore, at issue is whether the trial court properly inquired into the defendant’s present and future ability to pay the \$500 fine and \$2,261.12 in court costs.

Under RCW 10.01.160(3), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. However, the sentencing court cannot order a defendant to pay court costs “unless the defendant is or will be able to pay them.” RCW 10.01.160(3). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering the payment of court costs. *Id.*

The trial court’s determination “as to the defendant’s resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.” *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.2d 123 (2000). In *Baldwin*, the court determined that the burden imposed by RCW 10.01.160 was met by a single sentence in a presentence report that the defendant did not object to. *Baldwin*, 63 Wn. App. at 311. The presentence report contained the following statement, “Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense.” *Id.* *Baldwin* made no objection to this assertion at the time of sentencing. *Id.*

Therefore, the court determined that when the presentencing report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied. *Id.* at 312.

In *State v. Bertrand*, the record revealed that the trial court failed to consider whether the defendant could pay LFOs and also showed that "in light of Bertrand's disability, her ability to pay LFOs now or in the near future is arguably in question." *State v. Bertrand*, 165 Wn. App. 393, 404 n.15, 267 P.3d 511 (2011). Therefore, under *Bertrand*, a repayment obligation may not be imposed "if it appears there is no likelihood the defendant's indigency will end." *Lundy*, 176 Wn. App. at 106. In *Blazina*, the Supreme Court of Washington ruled that trial courts must hold an on-record hearing where judges must inquire into a defendant's current and future ability to pay before imposing discretionary LFOs. When making the inquiry, trial courts must also consider other factors such as incarceration, as well as the defendant's other debts, including restitution. *Id.* at 839.

The *Blazina* court also determined RCW 10.01.160(3) requires the trial court to "do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Id.* at 838. Instead, "[t]he record must reflect that the trial court made an

individualized inquiry into the defendant's current and future ability to pay." *Id.* This inquiry includes consideration of factors such as the defendant's financial resources, incarceration, and other debts, including restitution. *Id.*

In the present case, the only discretionary LFOs imposed in this case were a \$500.00 fine and \$2,261.12 in court costs. CP 211, 220. Contrary to the defendant's assertions, evidence in the record supports the trial court's finding that he had the present and future ability to pay these fees.

During sentencing, the trial court asked the defendant, "You're employable, are you not, Mr. Motyka?" to which the defendant responded, "Yes, I am." RP 05/20/2015 at 3. Unlike the defendant in *Bertrand*, this defendant has no known disabilities that preclude the possibility of him working in the future. *Bertrand*, 165 Wn. App. at 404 n.15.

Moreover, there is nothing in the record to suggest that the defendant's indigency would extend indefinitely. Unlike the situation in *Bertrand*, where the evidence suggested that there was no likelihood that the disabled defendant could begin payment of LFOs within 60 days of entry of the judgment and sentence while still incarcerated, the situation here more closely approximates that of the defendant in *Baldwin*. The trial court's inquiry addressed the defendant's future ability to pay by inquiring

as to whether or not the defendant was able to work and be gainfully employed. As such, this Court should affirm the trial court's imposition of discretionary LFOs.

**D. Trial counsel's failure to object to the imposition of discretionary legal financial obligations did not violate the defendant's right to effective assistance of counsel.**

The defendant argues that trial counsel's failure to object to the imposition of discretionary LFOs was a violation of his right to effective assistance of counsel. However, because the defendant indicated he had the present and future ability to pay the fines, counsel did not violate the defendant's right to effective assistance of counsel.

Ineffective assistance of counsel claims are reviewed de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland*, 466 U.S. at 685-86. To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for

counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

In *State v. Lyle*, the defendant's trial counsel did not challenge the LFOs based on Lyle's current or future ability to pay. 188 Wn. App. at 853. The court noted that because the sentencing hearing was after the *Blazina* decision, counsel should have been aware that to preserve any issue related to the LFOs, he was required to object. *Id.* Thus, counsel was deficient by failing to object. *Id.* However, the court examined whether the deficient performance was prejudicial. *Id.* Lyle presented some evidence relevant to his financial situation during the sentencing hearing, but it was not provided as evidence to show Lyle's present or future ability to pay. *Id.* The facts presented suggested that Lyle may be disabled but that he was able to do at least some work as evidenced by the fact he had been working for several months before sentencing. *Id.* The court ruled that Lyle's ineffective assistance of counsel claim failed because he did not establish prejudice. *Id.* at 853-54.

In the present case, the defendant has failed to show both deficient performance and resulting prejudice. Trial counsel did not challenge the discretionary LFOs because the defendant indicated to the trial court that

he had the present and future ability to pay the costs. Additionally, the trial court asked the defendant, "You're employable, are you not, Mr. Motyka?" to which the defendant responded, "Yes, I am." RP 05/20/2015 at 3. Therefore, because the defendant indicated he had the present and future ability to pay, trial counsel's failure to object to the imposition of discretionary LFOs did not violate the defendant's right to effective assistance of counsel.

If this Court determines trial counsel was deficient, the defendant must also show that defense counsel's deficient representation prejudiced the defendant in such a way that except for counsel's unprofessional errors, the result of the proceeding would have been different. In making the determination whether the specified error resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary sufficiency, that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, contentiously, and impartially applying the standards that govern the decision. *Id.* at 695.

Here, the defendant has failed to show that defense counsel's deficient representation prejudiced the defendant. Trial counsel was not ineffective for failing to object to the imposition of the discretionary LFOs

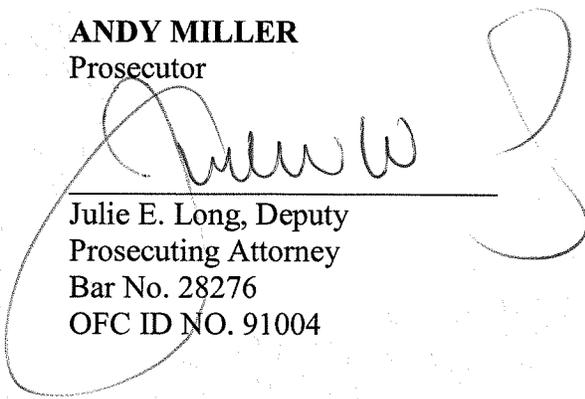
because the defendant indicated he had a present and future ability to pay the court costs. Had trial counsel objected to the imposition of the discretionary LFOs, the trial court would have still found, by the defendant's own admission, that he had the present and future ability to pay; therefore, the result of the proceeding would not have been different. The court should hold that failing to object to the imposition of LFOs did not constitute ineffective assistance of counsel.

#### IV. CONCLUSION

Based upon the aforementioned rationale, the defendant was properly sentenced with an offender score of 16 as the defendant stipulated and acknowledged, in a signed document, the State's recitation of his felony criminal history as a true and accurate reflection of his offender score. Additionally, the State respectfully requests that this Court affirm the trial court's finding of the defendant's ability to pay legal financial obligations.

**RESPECTFULLY SUBMITTED** this 7<sup>th</sup> day of June, 2016.

**ANDY MILLER**  
Prosecutor



Julie E. Long, Deputy  
Prosecuting Attorney  
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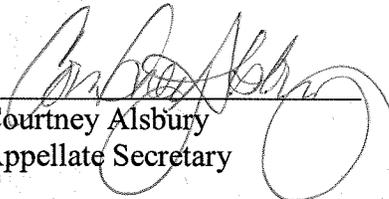
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on June 7, 2016.

  
\_\_\_\_\_  
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Appellate Secretary