

FILED

APR 26, 2016

Court of Appeals
Division III
State of Washington

NO. 33829-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DERRICK JONES,

Appellant.

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

The Honorable Robert G. Swisher, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant's current and future ability to pay.

Issues Pertaining to Assignments of Error

1. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering appellant's current and future ability to pay?
2. Was appellant's trial counsel ineffective for failing to object to imposition of the discretionary LFOs?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Franklin County Prosecutor's Office charged Derrick Jones with one count of Residential Burglary. CP 5. Jurors convicted Jones, and the Honorable Robert G. Swisher imposed a high-end standard range sentence of 84 months. CP 48, 56; 1RP¹ 109.

Although Jones was homeless prior to his arrest in this case, Judge Swisher imposed \$1,391.00 in LFOs. 1RP 108; 2RP 33-34; CP 53. In addition to mandatory LFOs, Judge Swisher imposed

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – July 29 and October 13, 2015; 2RP – July 30 and 31, 2015.

several non-mandatory LFOs: a \$305.00 “sheriff service fee,” a \$143.00 “jury demand fee,” and another \$143.00 for “court appointed defense expert and other defense costs.” CP 53. Judge Swisher noted that, in light of Jones’s criminal and work history, these were substantial financial obligations, but he did not meaningfully consider Jones’s ability to pay. There is no discussion whatsoever of Jones’s sources of income or his liabilities. See 1RP 108.

The judgment merely contains the following preprinted, boilerplate language:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.

The court finds:

[X] That the defendant is an adult and is not disabled and therefore the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 52. Judge Swisher ordered Jones to pay a minimum of \$100.00 per month on his LFOs, plus interest that began accruing immediately, and to pay the costs associated with any collection efforts. CP 54. Jones timely filed his Notice of Appeal. CP 63.

2. Substantive Facts²

Derrick Jones is homeless and when he is unable to stay at Pasco's Union Gospel Mission, he is forced to find shelter elsewhere. 2RP 33-34. His efforts in this regard sometimes led to contact with local police, his removal from the premises, and his arrest for trespassing. 1RP 49-51. In February 2015, and again the following month, police removed Jones from the Thunderbird Motel. 1RP 49-51; 2RP 55. But it was Jones's removal from 416 West Shoshone Street in March 2015 that marked the beginning of events leading to the burglary charge in this case.

The dwelling at 416 West Shoshone was one of several properties owned by Nelson Gomez. 1RP 68. At the time, it was vacant and Gomez was in the process of remodeling it. 1RP 68-69. On March 22, police arrested four individuals found in the basement, which had a separate entrance and could be accessed from the back of the home through a door at the bottom of some stairs. 1RP 69-70; 2RP 10. The door had been broken, and the individuals left personal belongings behind. 1RP 69, 71. Later that same day, Gomez saw Jones enter his back yard and then the basement. 1RP 71, 83.

² Given the narrow focus of the issues raised in this brief, this discussion of the trial evidence may be unnecessary. But it highlights Jones's homelessness, and Jones himself may file a Statement of Additional Grounds for Review raising issues more dependent on the trial evidence.

Gomez called police again, they returned to the scene, and Jones was arrested for trespass. 1RP 71, 92-93. Jones was cooperative and, on the way to jail, expressed concern about his personal belongings, which were still back at the house on Shoshone. 1RP 97.

By March 31, Jones had been released from jail. Still determined to retrieve his personal belongings, he returned to 420 West Shoshone. 2RP 44-45. One of Gomez's neighbors – Jose Rosales-Mosqueda – saw Jones enter the backyard, walk down the stairs, and enter the dwelling through the basement door.³ 2RP 4-5, 10-11. Rosales-Mosqueda telephoned Gomez, who arrived at the address within minutes. 2RP 5-6.

What happened next was disputed at trial.

According to Gomez, he armed himself with a bat and peered in the open basement door. The light was on and he could see Jones sitting at a table. 1RP 73-74. Gomez, who did not identify himself as the property owner, told Jones to stay where he was. 1RP 74, 89. Jones stood up and headed for the door with a walking stick in hand. 1RP 74-75. Gomez backed out of the doorway and started up the stairs. 1RP 75.

³ Gomez could not recall whether the door had been repaired after the March 22 incident or whether it remained broken on March 31. 1RP 85.

According to Gomez, Jones was acting aggressively and jabbing the walking stick in his direction, although he never made contact with Gomez. 1RP 75, 89-90. As Gomez backed up the stairs, he noticed a knife among tools he had left in the basement and grabbed it. 1RP 76. At the top of the stairs, Gomez tripped and fell backward on some debris. 1RP 77, 86-87. Jones did not, however, take advantage of the fall by attacking Gomez at that point. 1RP 87.

Once both men were off the stairs and in the backyard, Gomez told Jones to "stay put"; Jones then assumed a fighting posture with his arms and clenched fists and asked if Gomez was "ready," which Gomez interpreted as "ready to fight." 1RP 76, 88; 2RP 6; 2RP 29-30. Gomez was yelling at Jones in Spanish, but Jones does not speak Spanish. 2RP 32, 41, 59.

Multiple neighbors were now watching the confrontation and one of them called 911. 1RP 77, 87; 2RP 7, 23 32. Police arrived very quickly and both Gomez and Jones immediately de-escalated. 2RP 7, 32. Jones was not holding his walking stick, which was found leaning against the house at the top of the stairs. 1RP 42, 55; 2RP 18, 21-22. Gomez put down the knife as officers arrived and put down the bat when asked to do so. 1RP 42, 55. Gomez was not sure whether he ever made contact with Jones with the bat, although

he did try to hit Jones at one point when Jones got too close. 1RP 78. After speaking with several people present, police arrested Jones. 1RP 42-43.

In a statement to police immediately following his arrest, Jones explained that he knew he was not supposed to be at 416 West Shoshone on March 31, but he went back to retrieve the personal property he had left behind on March 22. He also claimed that "Jose" had said it was okay, and he denied use of the walking stick during the altercation with Gomez. 1RP 45-47, 49.

Jones also testified at trial. 2RP 33. He explained that he and several other individuals had been at 416 Shoshone the morning of March 22 and Jones left his backpack there. 2RP 35-37. When Jones returned that evening, he could not find his backpack. 2RP 37. While on the premises, Gomez arrived and began yelling at him in Spanish. 2RP 38-39. The two had trouble communicating, but Jones encouraged Gomez to call the police and waited for them to arrive. 2RP 40-42. Jones asked the arresting officer about his personal property – including his backpack, wallet, coat, and walking stick – and the officer said he would look into it. 2RP 42-43. Once released from jail, Jones heard that his property was still at the house, and he asked others to retrieve his property for him, but to no avail. 2RP 44.

Jones testified that, on March 31, "Little Mario" confirmed for him that his property was still at 416 Shoshone and the two men walked there. Only Mario went inside, while Jones waited at the bottom of the steps and just outside the basement door. Mario then emerged with Jones's walking stick, which Jones leaned against a wall. 2RP 45-46. Mario then went back into the basement to look for additional property. 2RP 46, 49.

At this point, Jones heard Lopez arrive in his truck. 2RP 46. Lopez was screaming in Spanish, and Jones tried to explain that Mario was in the basement trying to retrieve Jones's belongings. 2RP 49. Lopez was armed with both the bat and the knife, and when Jones reached for his walking stick, Lopez knocked it to the ground. 2RP 49-50. Jones then walked up the stairs while Lopez backed up. 2RP 50. Lopez poked him with the bat. 2RP 50, 52, 69. Police arrived once he and Lopez had left the stairs. 2RP 51. Jones denied any assaultive behavior directed at Lopez. 2RP 50-51, 53. And if it appeared he was ready to fight, it was out of necessity to defend himself. 2RP 53.

During closing arguments, the State urged jurors to find that Jones had committed residential burglary by unlawfully entering and remaining inside Gomez's dwelling with the intent to commit a crime –

the alleged assault of Gomez. 2RP 80-92. The defense conceded a trespass, which jurors were instructed on as a lesser-included offense of residential burglary, but argued that the State had failed to demonstrate Jones's intent to commit a crime (much less the commission of an assault). 2RP 92-105; CP 23-24.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER JONES'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATION.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "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).

The trial court imposed three mandatory LFOs: a \$500 crime victim penalty assessment, a \$200 criminal filing fee, and a \$100 DNA collection fee. CP 53; RCW 7.68.035(1)(a) (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (upon conviction, "an adult defendant in a criminal case shall be liable for a fee of two hundred dollars."); RCW 43.43.7541 (every sentence

“must include a fee of one hundred dollars” for collection of biological samples); State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) (identifying these LFOs as mandatory).

Judge Swisher also imposed three discretionary LFOs. He imposed a \$305 “sheriff service fee” and a \$143 “jury demand fee.” CP 53; RCW 10.01.160(1)-(2) (costs associated with prosecuting the defendant “may be imposed” and jury fees “may be included”); State v. Hathaway, 161 Wn. App. 634, 652, 251 P.3d 253 (2011) (recognizing discretionary nature of jury fee). And, citing RCW 9.94A.760, Judge Swisher imposed an additional \$143 for “court appointed defense expert and other defense costs.” CP 53; RCW 9.94A.760 (“the court may order the payment of a legal financial obligation”).

Jones is indigent, homeless, and there is no indication he has any steady or significant income source. Yet, Judge Swisher failed to make an individualized inquiry into his present and future ability to pay before imposing three discretionary LFOs. In doing so, he exceeded his statutory authority, and these LFOs should be vacated.

The Washington Supreme Court recently recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680

(2015). LFOs accrue at a 12 percent interest rate so that even those “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. at 837.

The Blazina court thus held that RCW 10.01.160(3) requires trial courts to first consider an individual’s current and future ability to pay before imposing discretionary LFOs. Id. at 837-39. This requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” Id. at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court further directed courts to look to GR 34 for guidance. Id. at 838. This rule allows a person to obtain a waiver of

filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then “courts should seriously question that person’s ability to pay LFOs.” Id. at 839. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. at 834.

At sentencing, Judge Swisher failed to make an individualized inquiry into Jones’s current or future ability to pay LFOs. Instead, he relied on boilerplate language in the judgment indicating that any able-bodied adult has the current or future ability to pay LFOs. See CP 52. Blazina holds this is insufficient to justify discretionary LFOs. 182 Wn.2d at 838. This Court should accordingly vacate the discretionary LFOs and remand for resentencing. Id. at 839.

In response, the State may ask this Court to decline review of the erroneous LFO order in the absence of an objection below. The Blazina court held that the Court of Appeals “properly exercised its discretion to decline review” under RAP 2.5(a). 182 Wn.2d at 834. The court nevertheless concluded that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Id. Asking

this Court to decline review would essentially ask this Court to ignore the serious consequences of LFOs. This Court should instead confront the issue head on by vacating Jones's discretionary LFOs and remanding for resentencing.

A second reason this Court should review the issue is that, assuming it is otherwise waived, Jones was denied his right to the effective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to the discretionary LFOs fell below the standard expected for effective representation. Counsel must have understood Jones's dire financial situation because counsel knew he was homeless and qualified for indigent defense services. There was no reasonable strategy for not insisting that the judge comply with the requirements of RCW 10.01.160(3) regarding discretionary financial liabilities. See, e.g., State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel's failure in this regard constitutes deficient performance.

Counsel's failure to object to the discretionary LFOs was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in any remission hearing to set aside LFOs, Jones will bear the burden of proving manifest hardship, and he will have to do

so without appointed counsel. RCW 10.01.160 (4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Jones incurs no possible benefit from LFOs. Given his indigency, there is a substantial likelihood Judge Swisher would have waived all discretionary LFOs had he properly considered Jones's current and future ability to pay. Indeed, Judge Swisher waived the fine in this case and waived the cost of appointed counsel. 1RP 108; CP 53.

Jones's constitutional right to effective assistance of counsel was violated. This Court should also vacate the discretionary LFOs on this alternative basis.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Jones to be indigent and entitled to appointment of our office's services at public expense. Moreover, Jones is serving a seven-year prison sentence. CP 56. His prospects for paying appellate costs are dismal. Therefore, if Jones does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

As discussed above, trial courts must make individualized findings of current and future ability to pay before they impose LFOs. Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Jones’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Without a basis to determine that Jones has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

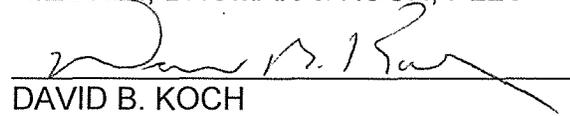
D. CONCLUSION

This Court should vacate the discretionary LFOs.

DATED this 26th day of April, 2016.

Respectfully submitted,

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State v. Derrick Jones

No. 33829-1-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 26th day of April, 2016, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 26th day of April, 2016.

x  _____