

No. 34805-9-III

**IN THE COURT OF APPEALS**  
**FOR THE STATE OF WASHINGTON**  
**DIVISION III**

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

DENNIS GERALD LOWE,  
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable Michael McCarthy, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by entering Finding of Fact Paragraph 2.7 because the record does not support the boilerplate finding Mr. Lowe “is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” (Judgment and Sentence, CP 131).

2. The imposition of legal financial obligations is improper because Mr. Lowe lacks the ability to pay.

3. The court erred by imposing costs of incarceration and medical care.

*Issue Pertaining to Assignments of Error*

RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court recently emphasized that “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the trial court recognized Mr. Lowe was impoverished but nevertheless imposed LFOs consisting of costs of incarceration and medical care without inquiry into his inability to pay such costs. Should this Court remand with instructions to strike the discretionary LFOs?

**B. STATEMENT OF THE CASE**

Dennis Gerald Lowe was found sitting in the passenger seat of a stolen truck idling in a driveway. He was charged with possession of a stolen motor vehicle as principal or accomplice. Clerk's Papers (CP) 8. The information was amended after pre-trial motions to add one count of second degree taking of a motor vehicle without permission. CP 72.<sup>1</sup> The matter was tried to a jury. Report of Proceedings (RP)<sup>2</sup> at 6–165.

Sales manager Scott Ferguson saw a vehicle being driven that looked like a distinctive 1986 Toyota flatbed truck stolen the week before from AC Auto Sales in Union Gap, Washington. A tinge of the green color was visible under its new non-factory white paint job. He called 9-1-1 and followed the truck. Police arrived within minutes and were directed to the truck, which had been parked in a private driveway. . RP 7–9, 12, 15, 18–20, 25, 87.

Ferguson identified it as the stolen truck. The steering column's ignition switch was damaged or missing, power wires were cut, a vice grip

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<sup>1</sup> The information was amended again after Mr. Lowe failed to appear at the first date set for sentencing to add one count of bail jumping. CP 120–22. The count was dismissed prior to sentencing without prejudice. CP 124.

<sup>2</sup> Court Reporter Joan Anderson's transcription of the main trial proceedings is found in one volume and will be referred to as "RP \_\_\_." Transcriptionist Amy Brittingham transcribed pretrial matters and sentencing, which will be referred to by date, e.g. "10/13/2016 RP \_\_\_."

that hadn't been there before the truck was stolen was hanging on the handle, and the license plate had been changed. RP 10–11, 13, 16.

Detective Ryan Yates of Yakima Police Department's (YPD) auto theft unit described alternative ways of starting a vehicle without a key and testified the cut wires and pliers seen in pictures of the recovered truck were consistent with hot wiring. RP 31, 33–36, 40.

When police approached, Mr. Lowe was sitting in the passenger seat and the engine was running. RP 72, 88–89. Mr. Lowe told YPD Detective Castillo his son had been driving and was in back of the residence contacting a friend, and Mr. Lowe didn't know if the truck was stolen. After dispatch confirmed the truck was stolen, police arrested Mr. Lowe and his son who had come out from the back. RP 89, 97–98.

The State called the son, James Skahan-Lowe, as a witness. He'd previously pled guilty to his part in this case of possession of a stolen motor vehicle, and had prior convictions for possession of stolen property. RP 53. The son testified that on that day, he'd driven the truck to his friend's house and then planned to take his passenger father, Mr. Lowe, to the casino. RP 53. He'd bought the truck several days before from a friend named "Coyote" whom he'd known about a month, and paid three cords of wood worth \$175 per cord for it, plus \$200 cash, and still owed

some money. RP 54–56, 62. He knew the truck was stolen, finished painting the white color over the original green, changed out the license plate, and had to hotwire it to start the engine. RP 55–59, 65.

When the son arrived to pick Mr. Lowe up that morning, he told his grandfather, Burt Lowe, he bought it with the cords of wood and still owed money. RP 55. At the time, the son didn't live with Mr. Lowe or his grandfather. RP 108, 112, 118. The son tried to hide starting the engine by hotwiring it because he didn't want to get into trouble by having Mr. Lowe or his grandfather know it was stolen. RP 57–58. The son felt he hid it from Mr. Lowe because it's a small truck, he's a pretty big dude, and it was easy to put his knee up holding the wires. RP 57. The son testified Mr. Lowe didn't know the truck was stolen. RP 56, 66.

The witness didn't deny telling the prosecutor and Det. Yates the prior day that the license plate had already been changed when he got the truck. RP 58. He didn't deny that when he was interviewed at the scene, he made some different statements. Yes, he told YPD Detective Kerrick Ward Mr. Lowe bought the truck from Patrick Whitefoot but it wasn't true. RP 59–60. He didn't recall saying it was Mr. Lowe who picked him up that morning, and remembered saying he had asked Mr. Lowe and/or his grandfather whether the purchase of the truck was legitimate and his

father assured him it was—but it was all made up so that he wouldn't get in trouble. RP 60–61. The witness remembered saying he knew Patrick Whitefoot and Coyote went into Union Gap and stole the truck (RP 63), and that he didn't have enough money to buy the truck and Mr. Lowe agreed to help him make the purchase. RP 64–65. The witness said the truth was what he was saying in court today. RP 61–62.

After the son's testimony, the State called Det. Ward as a witness. The court requested a sidebar. RP 67. The State thereafter conducted direct examination of Det. Ward. RP 69–79.

At the scene, Det. Ward spoke to Mr. Lowe and his son alternately in an effort to compare stories. RP 74. His conversation with Mr. Lowe was recorded on YPD's in-car camera system, which is commonly referred to as COBAN. RP 73–74. A COBAN recording of one of the conversations was admitted as Exhibit 5 and portions of it were played [but not transcribed by the court reporter] for the jury. RP 75–78.

Det. Yates testified that, although possible, it would be hard to hide hotwiring a 1986 Toyota truck from someone else in the truck. The bench seat makes for kind of tight quarters, and even if wires, etc., were already set up, it would probably take 15 to 20 seconds to accomplish it. RP 80–81.

The grandfather testified he was outside when his grandson drove the truck into their driveway. RP 105–06. When the grandson said he’d purchased it but didn’t have a bill of sale or a signed title, his grandfather told him to return it and get his money back. RP 108. Mr. Lowe was not present at this conversation because he was in the house. RP 109. The grandfather said his grandson drove when he and Mr. Lowe left together that day, but he was inside and didn’t actually see them leave. RP 104–05, 109–11.

Mr. Lowe testified he was in the shower when his son arrived, and later came outside. RP 112–13. He didn’t help his son purchase the truck, didn’t ever drive it, and the one time he rode in it was on this day. RP 113–14. Mr. Lowe knew of one car his son had previously stolen. RP 118. Mr. Lowe denied any knowledge the truck was stolen. RP 116.

As he got in Mr. Lowe noticed the truck had no seatbelts and “something going on there” with the wires hanging out, and the son explained he bought the truck as is. RP 117, 119. Mr. Lowe didn’t see his son hotwire the truck but guessed he had a little system. RP 116, 119, 122. “He reached down there by the column or something and the truck started. It was very fast ... like, seconds.” RP 122–23.

The “to convict” instruction for possession of a stolen vehicle required the jury to find beyond a reasonable doubt that the defendant acted as an accomplice in retaining, possessing or concealing the vehicle, and knew it had been stolen. Instruction No. 5, at CP 81. Similarly, the “to convict” instruction for second degree taking a motor vehicle without permission required the jury to find the defendant voluntarily rode in or upon an automobile, knowing it had been stolen. Instruction No. 11, at CP 87.

The jury found Mr. Lowe not guilty of possession of a stolen motor vehicle, and guilty of second degree taking a motor vehicle without permission. CP 96, 97. The court imposed 29 months confinement (high end of the standard range based on an offender score of nine). 10/13/2016 RP 64; CP 131. The court struck the proposed criminal filing fee and court-appointed attorney fee recoupment, and capped costs of incarceration, stating:

And that’s based upon my recollection of testimony, and it may have been in the pretrial or the 3.5 hearing or perhaps during the [] trial that Mr. Lowe doesn’t have any significant employment history and [] so, I don’t think he’s going to be in a position – and also, looking at his criminal history, he probably owes many, many thousands of dollars on [] these prior convictions and I [] don’t think that there’s any prospect that he’s going to pay any money back.

10/13/2016 RP 64–65; CP 132. Even though recognizing Mr. Lowe was impoverished, the court imposed \$4,100 in restitution and mandatory legal financial obligations but also imposed costs of incarceration<sup>3</sup> and medical care, with no discussion of Mr. Lowe’s ability to pay. 10/13/2016 RP 64–65; CP 132–33. The Judgment and Sentence contained a boilerplate finding that Mr. Lowe “is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 131, ¶ 2.7. Mr. Lowe did not object to the imposition of the LFOs. The court ordered Mr. Lowe to pay the LFOs in full within 180 or 270 days after his release. CP 133, ¶ 4.D.7.

Mr. Lowe timely appealed. CP 142.

## C. ARGUMENT

### 1. The imposition of discretionary legal financial obligations should be stricken because Mr. Lowe lacks the ability to pay.

a. The findings that Mr. Lowe has the current or future means to pay costs of incarceration and medical care are not supported in the record and should be stricken.

Costs of incarceration and medical care are discretionary legal financial obligations. *State v. Leonard*, 184 Wn.2d 505, 507, 358 P.3d

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<sup>3</sup> The court capped the costs of incarceration at \$250. CP 133.

1167, 1168 (2015). The statutes allowing imposition of these categories of costs require individualized inquiries regarding the ability to pay. *Id.*, citing RCW 9.94A.760(2), RCW 70.48.130, RCW 70.48.130(5). Although courts have little guidance regarding what counts as an "individualized inquiry," *Blazina* makes clear, at a minimum, the sentencing court "must consider important factors ... such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay," and "should also look to the comment in court rule GR 34 for guidance." *Blazina*, 182 Wn.2d at 838.

Here, the record reflects no such inquiry at the sentencing hearing. Even though recognizing Mr. Lowe was impoverished, the court imposed \$4,100 in restitution and mandatory legal financial obligations but also imposed costs of incarceration and medical care, with no discussion of Mr. Lowe's ability to pay these costs. 10/13/2016 RP 64–65; CP 132–33. Further, the court ordered Mr. Lowe to pay the LFOs **in full** within 180 or 270 days after his release—an enormous and daunting task even for an unincarcerated debtor. The judgment and sentence form contains only boilerplate findings of ability to pay the costs of incarceration and medical care, which the Washington State Supreme Court in *Blazina* held to be inadequate. *Leonard*, 184 Wn.2d at 508. The matter should be remanded

to the superior court to strike these discretionary legal financial obligations or, at the very least, to conduct a meaningful inquiry consistent with the requirements of *Blazina*. *Id.*

b. This Court should reverse and remand with instructions to strike the discretionary legal financial obligations.

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. *Blazina* mandated consideration of ability to pay before imposing LFOs and held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits ... .” *Blazina*, 182 Wn.2d at 835. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 182 Wn.2d at 835–37. Availability of a statutory remission process down the

road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry or, more compelling, from this court’s recognition that given the evidence and the trial court’s acts in waiving non-boilerplate discretionary costs, a new sentencing hearing would very likely change the discretionary LFO result.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. The court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 182 Wn.2d at 837–38; see also *Bellevue John Does 1-11 v. Bellevue Sch.*

*Dist. #405*, 129 Wn. App. 832, 867–68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Lowe’s case regardless of his failure to object. *See, Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”)(citations omitted)).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d at 837. Mr. Lowe’s October 13, 2016, sentencing occurred **one year and seven months** after the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts to make the appropriate inquiry to pay inquiry on the record. The court below did not inquire. Mr. Lowe respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the

unpreserved error and accept review. *Blazina*, 182 Wn.2d at 841

(FAIRHURST, J. (concurring in the result)).

In sum, because *Blazina* clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record demonstrates Mr. Lowe's extreme indigence, this Court should remand with instructions to strike the discretionary legal financial obligations, strike the boilerplate finding that Mr. Lowe has the ability to pay, and strike the requirement of repayment of the remaining LFOs in full within 180 or 270 days after his release.

## **2 Appeal costs should not be awarded.**

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

*Blazina*, 182 Wn.2d at 838. Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192

Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. Lowe was fifty-two years old<sup>4</sup> when the court imposed a term of twenty-nine months in prison. CP 131. When initial charges were filed in early 2016, the court found Mr. Lowe indigent and appointed counsel base on representations he received public assistance (food stamps) and had not worked since 2015. CP 8, 154. At sentencing, Mr. Lowe was

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<sup>4</sup> Mr. Lowe’s date of birth is February 23, 1964. CP 154.

ordered to pay \$3,500 in restitution. CP 133. The court waived most discretionary costs “based upon my recollection ... that Mr. Lowe doesn’t have any significant employment history ... and so, I don’t think he’s going to be in a position – and also, looking at his criminal history, he probably owes many, many thousands of dollars on – on these prior convictions and I – I don’t think that there’s any prospect that he’s going to pay any money back.” 10/13/16 RP 64–65. The Judicial Information System indicates the current LFO balances on the prior convictions total \$5,365.<sup>5</sup> The sentencing court also found Mr. Lowe remained indigent for purposes of this appeal and was entitled to appointment of counsel and costs of review at public expense. CP 140–41; 10/13/16 RP 65.

In light of Mr. Lowe’s indigent status, and the presumption under RAP 15.2(f), that he remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent,”<sup>6</sup> this court should exercise its discretion to waive appellate costs.<sup>7</sup> RCW 10.73.160(1).

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<sup>5</sup> Defendant’s Case History (DCH), last accessed on the Judicial Information System (JIS) on July 6, 2017.

<sup>6</sup> *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

**D. CONCLUSION**

For the reasons stated, the matter should be remanded with instructions to strike the discretionary legal financial obligations, strike the boilerplate finding that Mr. Lowe has the ability to pay, and strike the requirement of repayment of the remaining LFOs in full within 180 or 270 days after his release. Alternatively, should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on July 31, 2017.

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<sup>7</sup> Appellate counsel anticipates filing a report as to Mr. Lowe's continued indigency no later than 60 days following the filing of this brief.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 31, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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**GASCH LAW OFFICE**

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