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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34835-1-III

STATE OF WASHINGTON, Respondent,

v.

CHRISTINO S. RENION, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Following convictions on three counts of felony violation of a protective order, the trial court sentenced Christino Renion to a term of 48 months' incarceration based upon an offender score of "7." In calculating the score, the trial court erroneously counted as one point each Renion's three prior misdemeanor convictions for violating a protective order that also served as the predicate offenses for the felony convictions. The trial court also imposed discretionary legal financial obligations as well as costs of incarceration up to \$500, despite failing to conduct an adequate inquiry into Renion's ability to pay discretionary costs. These errors require reversal and resentencing.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in including Renion's misdemeanor convictions in his offender score when those convictions served as the predicate offenses that elevated the current offenses from misdemeanors to felonies.

ASSIGNMENT OF ERROR 2: The trial court failed to conduct an adequate inquiry into Renion's ability to pay discretionary legal financial obligations before imposing them.

ASSIGNMENT OF ERROR 3: The trial court's finding that Renion has the ability to pay discretionary legal financial obligations is clearly erroneous.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Does the doctrine of *expressio unius est exclusio alterius* apply to interpreting RCW 9.94A.525?

ISSUE 2: Reading RCW 9.94A.525 as a whole, did the legislature intend to include those misdemeanor offenses that comprise the predicate offenses to elevate a protection order violation to a felony to be included in the offender score?

ISSUE 3: When the trial court does not inquire into the defendant's debts or other property or the effects of incarceration, but merely inquires into the defendant's prior work history, is the inquiry inadequate to support the imposition of discretionary legal financial obligations?

ISSUE 4: Was the trial court's finding that Renion had the ability to pay discretionary legal financial obligations clearly erroneous when the inquiry revealed that the defendant had no accounts or property and worked as a prep cook?

IV. STATEMENT OF THE CASE

The State charged Christino Renion with three counts of felony violation of a protective order against his former girlfriend. CP 13-14, RP 38. The charges arose from allegations that he texted the former girlfriend on three separate days. RP 49-53. At trial, the State introduced evidence of Renion's three prior misdemeanor convictions for violating a protection order arising from two separate cause numbers. RP 87-92, CP 254, 271, Supp. CP 320. The jury convicted Renion as charged. RP 146, CP 248-53.

Before sentencing, Renion filed a sentencing memorandum arguing that the misdemeanor offenses that serves as predicates to the felony conviction should not be included in his offender score. CP 265-66. The sentencing court agreed, and sentenced Renion to 29 months' imprisonment based on a score of 4. CP 271-72, RP 177. The court conducted a brief inquiry into Renion's ability to pay legal financial obligations as follows:

THE COURT: Mr. Renion, have you been employed before? Had you been holding down a job, sir?

MR. RENION: Yes, sir.

THE COURT: And what were you doing?

MR. RENION: I was a fry cook or a prep cook.

THE COURT: A what? I'm sorry.

MS. DALAN: A prep cook.

THE COURT: A cook. Okay. So you've got skills as a cook?

MR. RENION: Yes, sir.

THE COURT: When you get out, do you think you'll be able to resume your cooking at restaurants?

MR. RENION: Maybe.

THE COURT: Maybe. But it's a skill set you can take and offer to various restaurants that might want to hire you as a cook?

MR. RENION: Yes, sir.

THE COURT: Okay. I'm asking you some questions for legal purposes and not to embarrass you. Do you have any assets set aside, any bank accounts with any sums of money in them, sir?

MR. RENION: No, sir.

THE COURT: Okay. Do you own any real property or vehicles that you might have any equity in, sir?

MR. RENION: No.

RP 178-79. Renion also informed the court that he had two minor children. RP 174. The trial court did not inquire into Renion's debts, such as support obligations or financial obligations arising from his other convictions. Nevertheless, the trial court imposed discretionary LFOs including a \$400 attorney fee recoupment, a \$250 jury fee, a \$100 warrant

fee, a \$100 domestic violence assessment, and costs of incarceration up to \$500. CP 274. Renion did not object.

Subsequently, the State moved for reconsideration of the score and the court granted the motion, resentencing Renion based upon an offender score of “7” that included all of the predicate offenses in his offender score. CP 301, Supp. CP 320. Finding grounds for an exceptional downward sentence, the court imposed 48 months incarceration along with 12 months community custody. CP 321, RP (Resentencing) 22. The court did not conduct any further inquiry into Renion’s ability to pay discretionary financial obligations and reimposed the same discretionary assessments. Supp. CP 323, RP (Resentencing) 23. Again, Renion did not object.

Renion now appeals and was found indigent by the court for that purpose. CP 287, 290. He has also completed a Report as to Continued Indigency that shows substantial personal debt including child support arrears, credit card debt, and other debt; a GED only; and 24 months of part-time employment as a prep cook that earned him \$100 per week. *Appendix, Report as to Continued Indigency.*

V. ARGUMENT

A. Under the doctrine of *expressio unius est exclusio alterius*, the predicate misdemeanor offenses that elevate a protective order violation to a felony should not be included in the offender score.

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.

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

Renion was charged and convicted under RCW 26.50.110(5), which establishes criminal penalties for violation of a domestic violence restraining order and provides that a violation is a class C felony if the

defendant has been convicted on two previous occasions for violating a domestic violence restraining order, whether against the same person or a different person. Otherwise, violating a domestic violence order is a misdemeanor offense. RCW 26.50.110(1)(a). In the present case, Renion had three prior misdemeanor convictions for violating a restraining order arising from two cause numbers. Supp. CP 320. These were the same predicate offenses that the State used at trial to establish that Renion's current violation was a felony. RP 87-92, CP 254.

RCW 9.94A.525 sets forth the rules for calculating the offender score. Under that statute, in scoring a felony domestic violence offense, prior adult convictions for repetitive domestic violence offenses are scored as one point each, except for certain felony prior offenses that are scored as two points each. RCW 9.94A.525(21). The statute, however, is silent as to the predicate misdemeanor convictions that elevate the current conviction to a felony.

The silence as to the predicate convictions stands in sharp contrast to a separate provision of the same statute that governs the scoring of felony driving under the influence. Like felony violation of a protection order, a DUI is elevated to a felony when the defendant has four previous

convictions for DUI within 10 years. RCW 46.61.5055(4). But in scoring a felony DUI, the statute specifically states,

If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), **all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)) shall always be included in the offender score.** All other convictions of the defendant shall be scored according to this section.

RCW 9.94A.525(2)(e) (emphasis added). Thus, unlike the instructions for scoring a felony protection order violation, the felony DUI scoring rules specifically provide for inclusion of the predicate convictions in the offender score.

That one statutory provision expressly provides for the inclusion of predicate offenses in the offender score while another, similar statutory provision is silent on including predicate offenses raises a question as to the Legislature's intent. Under the doctrine of *expressio unius est exclusio alterius*, "[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the

legislature.” *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343 (2003) (quoting *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)). When the Legislature states its intent to impose certain penalties under certain statutes, its silence as to those penalties in other statutes may be inferred to mean that the legislature did not intend those penalties where it did not say so. *See State v. Flores*, 194 Wn. App. 29, 36, 374 P.3d 222 (2016) (rejecting State’s argument that punishment for misdemeanor school disturbance included any sanction other than a fine where the statute did not provide for any penalty besides a fine). This rule arises because “the silence of the Legislature is telling and must be given effect.” *In re Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (internal quotations omitted).

Here, the Legislature created two similar felony violations that only become felonies by virtue of proving a certain number of predicate misdemeanor offenses. As to the felony DUI offense, the Legislature specifically provided that the predicate offenses should be included in calculating the offender score. As to the felony protection order violation, the Legislature was silent on scoring the predicate offenses. Under the doctrine of *expressio unius est exclusio alterius*, its silence should be deemed intentional, reflecting its purpose to exclude the predicate misdemeanor offenses in calculating the offender score.

Because the sentencing court here imposed a sentence based upon a score that included the predicate offenses proven at trial, the sentence is not consistent with the Legislative intent set forth in RCW 9.94A.525(21). Accordingly, the sentence should be reversed and the case remanded for resentencing based upon a corrected offender score that excludes the predicate misdemeanors.

B. The imposition of discretionary LFOs was erroneous.

The trial court imposed multiple discretionary financial obligations on Renion, including jury and warrant fees, attorney fees, and costs of incarceration up to \$500. Because it did so without adequate consideration of Renion's ability to pay them, and because its determination that Renion could pay them is clearly erroneous based upon the record presented, the assessments should be reversed.

1. The trial court's inquiry into Renion's ability to pay was inadequate under *Blazina* when it did not consider the effects of incarceration or the existence of other debt.

In *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015), the Washington Supreme Court confronted the burdens associated with imposing unpayable legal financial obligations on indigent defendants,

including “increased difficulty in reentering society, the doubtful recoument of money by the government, and inequities in administration.” 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, and 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 Renion's prior employment history and assets. 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.

Moreover, before resentencing, the trial court had already found Renion indigent for purposes of appeal. CP 287. Considering the *Blazina* Court's advisement that court should seriously question whether individuals who meet the GR 34 standards of indigency are able to pay legal financial obligations, this juxtaposition should have given the trial court pause.

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 Renion'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.

Moreover, the inadequate inquiry was prejudicial under the record presented in this case. By his account, Renion owes as much as \$47,000 in outstanding debt, yet has not earned more than \$100 per week in the past two years. Appendix, *Report as to Continued Indigency*. He is already 42 years old and has no education besides a GED; his support obligations will continue to accrue during his time in prison; and his employment prospects, already marginal, will not be improved when he enters the job market with a felony conviction and a recent prison term.

2. The trial court's finding that Renion had the ability to pay discretionary LFOs was clearly erroneous when the record showed that he had no property and only prior employment as a prep cook.

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). To evaluate whether the finding is clearly erroneous, the record must be sufficient to show that the trial court took into account the defendant's financial resources and the burden imposed by the assessment.

Id at 404. When evidence in the record supports the finding of ability to pay based upon an adequate *Blazina* inquiry, reversal of the cost imposition is inappropriate. *See State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Where, as here, the record does not reflect an inquiry into the defendant's debts, the record cannot be said to be sufficient to demonstrate the defendant has the ability to pay based upon the minimal inquiry requirements imposed under *Blazina*.

The record here does not demonstrate any consideration of Renion's debt burden, which is substantial. As such, any finding that he has the ability to pay additional discretionary financial obligations is clearly erroneous because it is not based upon full consideration of the necessary factors under *Blazina*. Moreover, under the record presented, Renion has neither the assets nor the likely employment prospects to pay the discretionary assessments imposed following his release from prison. Accordingly, the discretionary LFOs should be vacated.

C. Renion requests that the court exercise its discretion not to impose costs of appeal.

Renion was found to lack sufficient funds to prosecute an appeal and was found indigent for that purpose by the trial court. CP 287. The presumption of indigence continues throughout review. RAP 15.2(f).

The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016). This is because appellate cost assessments contribute to the "broken LFO systems" identified in *Blazina*, 182 Wn.2d 827, by creating the same problems – difficulty re-entering society, doubtful collection, and inequities in administration. *Sinclair*, 192 Wn. App. at 391. The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Here, Renion was found to be indigent for appeal purposes. His completed Report as to Continued Indigency is attached hereto, as required under this court's General Order issued on June 10, 2016, and amply demonstrates that Renion lacks the ability to pay costs of appeal. Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs in the event Renion does not prevail on appeal.

VI. CONCLUSION

For the foregoing reasons, Renion respectfully requests that the court REVERSE his sentence and REMAND the case for resentencing as provided herein.

RESPECTFULLY SUBMITTED this 20 day of March, 2017.

A handwritten signature in black ink, appearing to read "Andrea Burkhardt", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

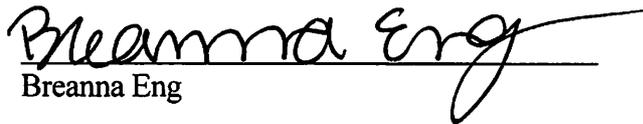
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Codee Lynn McDaniel
Yakima County Prosecutor's Office
128 N. 2nd St Rm 233
Yakima, WA 98901

Christino S. Renion, DOC # 718523
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

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

Signed this 20 day of March, 2017 in Walla Walla, Washington.


Breanna Eng

APPENDIX

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, Christino Revion certify as follows:

1. That I own:

- a. No real property
- b. Real property valued at \$_____.
- c. Real property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

2. That I own:

- a. No personal property other than my personal effects
- b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at \$_____.
- c. Personal property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

3. That I have the following income:

- a. No income from any source.
- b. Income from employment: \$_____ per month.
- b. Income of \$_____ per month from the following public benefits:

- Basic Food (SNAP) SSI Medicaid Pregnant Women Assistance Benefits
- Poverty-Related Veterans' Benefits Temporary Assistance for Needy Families
- Refugee Settlement Benefits Aged, Blind or Disabled Assistance Program
- Other: _____

4. That I have:

<input type="checkbox"/> a. The following debts outstanding:	Approximate amount owed:
Credit cards, personal loans, or other installment debt:	\$ <u>8000</u>
Legal financial obligations (LFOs):	\$ <u>10000</u>
Medical care debt:	\$ <u>N/A</u>
Child support arrears:	\$ <u>4000</u>
Other debt:	\$ <u>25000</u>

Approximate total monthly debt payments:

\$?

() b. No debts.

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State:
\$?

7. That I am 42 years of age at the time of this declaration.

8. That the highest level of education I have completed is: GED

9. That I have held the following jobs over the past 3 years:

Employer/job title	Hours per week	Pay per week	Months at job
PREP COOK	12	100	24

10. That I have received the following job training over the past three years: PREP COOK

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: NERVE DAMAGE IN MY LEG

12. That I am financially responsible for the following dependents (children, spouse, parent, etc.):
NA

I, CHRIS REWIR, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

12-5-16
Date and Place

Chris Rewir
Signature of (Defendant) (Respondent) (Petitioner)