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Division III
State of Washington
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No. 35378-8-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JEREMY DANIEL BENNETT,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Gayle M. Harthcock, Judge

BRIEF OF APPELLANT - AMENDED

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....7

 1. The trial court erred when it imposed a legal financial obligation the legislature has not authorized.....7

 a. The \$900 “drug court fine” is not authorized as a “cost” under RCW 10.01.160.....7

 b. The \$900 “drug court fine” is not otherwise authorized as a “legal financial obligation” under RCW 9.94A.760.....10

 2. The imposition of discretionary legal financial obligations should be stricken because Mr. Bennett lacks the ability to pay.....12

 a. The finding that Mr. Bennett has the current or future means to pay costs of incarceration is not supported in the record and should be stricken.....12

 b. This Court should reverse and remand with instructions to strike the discretionary legal financial obligations..... 14

 3. The court exceeded its statutory authority by imposing a no-contact order with an operative length of ten years.....17

 a. The court exceeded its statutory authority under chapter 10.99 RCW by imposing a post-conviction no-contact order for a duration that exceeds the length of the five-year sentence imposed.....18

b. The court exceeded its statutory authority under chapter 9.94A RCW by imposing a no contact order for a duration that exceeds the five-year maximum penalty for felony violation of a no-contact order, a class C felony.....	19
4. Appeal costs should not be awarded.....	20
D. CONCLUSION.....	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405</i> , 129 Wn. App. 832, 120 P.3d 616, 634 (2005) rev'd in part sub nom. <i>Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	16
<i>In re Pers. Restraint of Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010).....	20
<i>In re Postsentence Review of Leach</i> , 161 Wn.2d 180, 163 P.3d 782 (2007).....	18
<i>Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 160 Wn. App. 250, 255 P.3d 696, 701 (2011).....	16

<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	20
<i>State v. Armstrong</i> , 91 Wn. App. 635, 959 P.2d 1128 (1998).....	18
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)..... <i>passim</i> , 2, 13, 14, 15, 16, 17, 21, 22	
<i>State v. Granath</i> , 200 Wn. App. 26, 401 P.3d 405, <i>review granted</i> , 189 Wn.2d 1009 (2017).....	19
<i>State v. Grant</i> , 196 Wn. App. 644, 385 P.3d 184 (2016).....	21
<i>State v. Hunter</i> , 102 Wn. App. 630, 9 P3d 872 (2000).....	12
<i>State v. Leonard</i> , 184 Wn.2d 505, 358 P.3d 1167, 1168 (2015).....	12, 14
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007).....	18
<i>State v. Mulcare</i> , 189 Wash. 625, 66 P.2d 360 (1937).....	7
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	21
<i>State v. Parsley</i> , 73 Wn. App. 666, 870 P.2d 1030 (1994).....	20
<i>State v. Schultz</i> , 146 Wn.2d 540, 48 P.3d 301 (2002).....	18
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612, <i>rev. denied</i> , 185 Wn.2d 1034 (2016).....	21, 22
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	7

Statutes

Laws of 2015, ch. 292.....	9
Laws of 2015, ch. 292, section 11.....	10
Former RCW 2.28.170.....	9
Chapter 2.30 RCW.....	9
RCW 2.30.060.....	9
Chapter 9.94A RCW.....	2, 19
RCW 9.94A.030(10).....	20
RCW 9.94A.030(31).....	11
RCW 9.94A.505(9).....	20
RCW 9.94A.760.....	10
RCW 9.94A.760(1).....	10, 11
RCW 9.94A.760(2).....	13
RCW 9A.20.021(1)(c).....	20
RCW 10.01.160.....	1, 7
RCW 10.01.160(1).....	8
RCW 10.01.160(2).....	9
RCW 10.01.160(3).....	16
Chapter 10.05 RCW.....	9
RCW 10.05 <i>et. seq.</i>	9

RCW 10.73.160(1).....	23
Chapter 10.99 RCW.....	2, 18, 19
RCW 10.99.040(2)(a).....	18
RCW 10.99.040(3).....	18
RCW 10.99.050(1).....	18, 19
RCW 70.48.130.....	13
RCW 70.48.130(5).....	13

Court Rules

GR 34.....	13
RAP 2.5(a).....	14
RAP 14.2.....	23
RAP 15.2(f).....	22

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it imposed a legal-financial obligation the legislature has not authorized.

2. The trial court erred by entering Finding of Fact Paragraph 2.7 because the record does not support the boilerplate finding Mr. Bennett “is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” (Judgment and Sentence, CP 34).

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

4. The court erred by imposing costs of incarceration.

5. The court erred by imposing a no-contact order of ten years duration.

Issues Pertaining to Assignments of Error

1. Does a trial court err if it imposes legal-financial obligations the legislature has not authorized?

2. 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. Bennett was impoverished but nevertheless imposed LFOs including of the costs of incarceration without inquiry into his inability to pay such costs. Should this Court remand with instructions to strike the discretionary LFO?

3. Does a court exceed its statutory authority under chapter 10.99 RCW by imposing a post-conviction no-contact order that exceeds the five-year sentence?

4. Does a court exceed its statutory authority under chapter 9.94A RCW by imposing a no contact order that exceeds the five-year maximum penalty for felony violation of a no-contact order, a class C felony?

B. STATEMENT OF THE CASE

By information filed December 16, 2016, the Yakima County Prosecutor charged the defendant Jeremy Daniel Bennett with one count of felony violation of a protection order – domestic violence. CP 3. The charge arose when he was seen that day in the company of a close friend, Mary Elizabeth Purves, who was the protected party of a current domestic violence no-contact order. Mr. Bennett had previously been convicted two times of having prohibited contact with Purves. CP 2, 3. The court thereafter appointed counsel for the indigent defendant. *See* CP 4.

On March 14, 2017, Mr. Bennett entered into a drug court contract with the prosecutor whereby he agreed to attend drug court, successfully complete treatment, give up his right to trial and the right to the presentation of evidence should he be revoked from the agreement, and acknowledged that his arrest for any new law violation could serve as the basis for termination from the drug court. CP 14–17. If random screening tests showed prohibited drug usage, Mr. Bennett agreed to pay the cost of any “second opinion” test he requested. CP 15, paragraph 12. He also agreed to a number of other requirements, including the following:

I understand there is a Drug Court fee of **\$900.00** payable to Yakima County Superior Court at the County Clerk's Office, Room 323, which I must pay in full in order to successfully complete and graduate from Drug Court. If I am terminated from Drug Court, the amount of the Drug Court fee owing at the time of termination remains payable to the Court. If I agree to voluntarily withdraw at any time from Drug Court, the fee owing at the time of my withdrawal remains payable to the Court. Payments will begin no later than entry into Phase 2 of the Drug Court. The Drug Court Payment Plan is one option available to me to pay this fee.

CP 14, paragraph 1. Also on March 14, 2017, Mr. Bennett signed off on an order authorizing the Clerk of the Superior Court to “accept \$900.00 from the Defendant as a drug court fee.” CP 19.

In return, the Yakima County Prosecutor agreed to dismiss the charge upon the defendant's graduation from the program. CP 11, paragraph 6.

On April 18, 2017, Mr. Bennett failed to appear for Drug Court and a bench warrant was issued. CP 23. After his arrest, Mr. Bennett's Drug Court participation was revoked and original counsel was re-appointed due to his continued indigency. RP 27. The parties proceeded to a bench trial on the police reports as agreed to in the Drug Court agreement. RP 3–8; CP 12, paragraph 9.

The court reviewed the police reports and found Mr. Bennett guilty of felony violation of a no-contact order. RP 3–4. Mr. Bennett's standard range was 60–60 months. CP 34. The court sentenced Mr. Bennett to the standard range even though defense counsel asked for a mitigated sentence on the basis the victim was walking down the street with him and was therefore a willing participant in the crime. RP 4–6. The court did not order community custody or probation. RP 6; CP 35, paragraph 4.B.2.

With respect to legal financial obligations (LFOs), defense counsel noted Mr. Bennett was homeless at the time of the arrest according to the police reports, and approximately one year before the arrest was employed as a construction worker in Idaho at minimum wage. She asked the court

to reduce any non-mandatory fines after taking into account Mr. Bennett's past earning history and the fact that he'd been sentenced to five years in prison. RP 6–7. The court asked Mr. Bennett whether he had any money with which to pay LFOs at this time. RP 7. Mr. Bennett responded, “No, I don't.” *Id.* The court continued, stating as follows:

All right. And he'll be serving some significant time, so as a result I'm going to make a finding of current indigency – future inability to pay as well, so – totals [] \$1,700. Cap the costs of incarceration at \$350. ...

RP 7.

The court imposed the following LFOs:

500	Crime Penalty Assessment ... (RCW 7.68.035)
200	Criminal filing fee
600	Court appointed attorney recoupment (RCW 9.94A.760)
100	DNA collection fee ... (RCW 43.43.7541)
400	Domestic Violence Assessment (RCW 10.99.080)
<u>900</u>	Drug Court Fine
2,400	TOTAL
1,700	TOTAL

CP 37.

Even though recognizing Mr. Bennett was impoverished, the court imposed \$800 in mandatory legal financial obligations and \$900 as a drug court “fine” and non-mandatory costs of incarceration.¹ RP 7; CP 37, paragraphs 4.D.3 and 4.D.4.² Even though the court acknowledged Mr. Bennett had no current or future ability to pay, the Judgment and Sentence

¹ The court capped the costs of incarceration at \$350. RP 7; CP 37.

contains a boilerplate finding that Mr. Bennett “is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” RP 7; CP 34, paragraph 2.7. Mr. Bennett did not object to the imposition of the drug court “fine” or costs of incarceration. The court ordered Mr. Bennett to pay the LFOs in full within 180 or 270 days after his release. CP 37, paragraph 4.D.7.

The court did not order any community custody and the Judgment and Sentence form does not contain a specific condition prohibiting contact with any person. CP 33–40 *passim*. The court issued a separate no-contact order. The order form was captioned as a post-conviction domestic violence no-contact order and stated it was issued under chapter 10.99 RCW. CP 41–42. The order directed Mr. Bennett not to have contact with Mary Purves. CP 41; RP 8. The order warned, “Violation of the provisions of this order ... is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest” CP 41.

The order form includes space for an expiration date to be inserted:

4. This no-contact order expires on _____. Five years from today if no date is entered.

² Although costs of incarceration were discussed at sentencing, the box is not “checked” as applicable. RP 7; CP 37.

CP 41. Hand-written into the space is “6/19/2027.” *Id.* The no-contact order is thus set to expire ten years from the June 19, 2017 date of sentencing.

Mr. Bennett timely appealed. CP 47. The court found him indigent for the purposes of appeal. CP 49–51.

C. ARGUMENT

1. The trial court erred when it imposed a legal financial obligation the legislature has not authorized.

In Washington the establishment of penalties for crimes is solely a legislative function. See *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937).

a. The \$900 “drug court fine” is not authorized as a “cost” under RCW 10.01.160.

One of the terms a trial court may impose against a defendant is "costs" as authorized under RCW 10.01.160. The first section of this statute states:

1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

RCW 10.01.160(1).

The second section of this statute includes language concerning the imposition of costs involved in certain treatment programs:

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision other than a pretrial electronic alcohol monitoring program, drug monitoring program, or 24/7 sobriety program may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per

day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

RCW 10.01.160(2).

Under this statute the only costs a court may impose are those (1) "specially incurred by the state in prosecuting the defendant", (2) those costs "in administering the deferred prosecution program under chapter 10.05 RCW³" and (3) costs of pretrial supervision." The trial court's imposition of \$900 as a "drug court fine" is not included in those costs authorized under RCW 10.01.160(2).

RCW 2.30.060 provides for the continued authorization of pre-existing therapeutic courts including the drug court established in former RCW 2.28.170.⁴ Chapter 2.30 RCW, Therapeutic Courts, Laws of 2015, ch. 292 (effective July 24, 2015), does not have any provisions for

³ RCW 10.05 *et seq.* allows for the deferred prosecution of misdemeanors in district court.

assessing fees to drug court participants that may be added to legal financial obligations in the event of revocation or termination from the program. Counsel has been unable to find any other statute authorizing the imposition of this cost. Because this “drug court fine” has not been authorized by the legislature, the trial court erred when it imposed this legal financial obligation.

b. The \$900 “drug court fine” is not otherwise authorized as a “legal financial obligation” under RCW 9.94A.760.

Under RCW 9.94A.760(1) the Legislature has generally authorized the courts to impose " legal financial obligations" as part of a felony sentence. This provision states:

1) Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. On the same order, the court is also to set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation. If the court fails to set the offender monthly payment amount, the department shall set the amount if the department has active supervision of the offender, otherwise the county clerk shall set the amount. Upon receipt of an offender's monthly payment, restitution shall be paid prior to any payments of other monetary obligations. After restitution is satisfied, the county clerk shall distribute the payment

⁴ Repealed by Laws of 2015, ch. 292, section 11, effective July 24, 2015.

proportionally among all other fines, costs, and assessments imposed, unless otherwise ordered by the court.

RCW 9.94A.760(1).

The term " legal financial obligation" as it is used in this statute is a term of art and is specifically defined in RCW 9.94A.030(31) as follows:

(31) 'Legal financial obligation' means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68. 035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in. the conviction, subject to RCW 38.52.430.

RCW 9.94A.030(31).

In the case at bar the court imposed \$900 as a drug court fine. The trial court did not indicate any statutory authority under which it was imposing the "fine." The drug court documents signed by Mr. Bennett refer to the \$900 amount as a drug court fee, and similarly lack citation to a statute authorizing assessment of the fee. Under RCW 9.94A.030(31) there is no authorization for the imposition of a "drug court fine" or "drug

court fee.” The trial court exceeded its authority when it imposed this financial obligation.

While it is true there is authorization for the imposition of fines or assessments payable to interlocal drug funds, any contribution to a drug fund must meet a two part test: (1) the defendant must have been convicted of a " drug-related crime," and (2) the costs imposed must be commensurate with or related to the costs of the investigation. *State v. Hunter*, 102 Wn. App. 630, 640, 9 P3d 872 (2000). In this case Mr. Bennett was not convicted of a "drug-related crime." Nor is there evidence in the record that the costs imposed were commensurate with or related to the costs of *any* investigation. The trial court erred when it imposed a “drug court fine” upon Mr. Bennett’s conviction of felony violation of a no-contact order.

2. The imposition of discretionary legal financial obligations should be stricken because Mr. Bennett lacks the ability to pay.

a. The finding that Mr. Bennett has the current or future means to pay costs of incarceration is 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 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 limited inquiry at the sentencing hearing. The court was aware Mr. Bennett was currently homeless and his past earning history was at minimum wage level. The court acknowledged he would be serving a significant sentence, and made specific findings of Mr. Bennett's current indigency and future inability to pay. Even though recognizing Mr. Bennett was impoverished, the court imposed a \$900 drug court fine/fee and also imposed costs of incarceration, with no discussion of Mr. Bennett's ability to pay these costs. RP 7; CP 37. Further, the court ordered Mr. Bennett to pay the LFOs **in full** within 180 or 270 days after his release—an enormous and daunting task even for an unincarcerated debtor. CP 37, paragraph 4.D.7.

Even though the court recognized Mr. Bennett had no current or future ability to pay, the Judgment and Sentence contains a boilerplate finding that Mr. Bennett “is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” RP 7; CP 34, paragraph 2.7. The judgment and sentence form also contains only a boilerplate finding of ability to pay the costs of incarceration, 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. Bennett’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. Bennett's June 19, 2017, sentencing occurred **two years and three months** after the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts to make the appropriate ability to pay inquiry on the record. The court below did not inquire. Mr. Bennett 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. Bennett's extreme indigence, this Court should remand with instructions to strike the unauthorized drug court fine/fee and discretionary legal financial obligations, strike the boilerplate finding that Mr. Bennett 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.

3. The court exceeded its statutory authority by imposing a no-contact order with an operative length of ten years.

Although Mr. Bennett did not object below, in general, a defendant does not waive a challenge to the legality of sentencing conditions by failing to object. *State v. Armstrong*, 91 Wn. App. 635, 638, 959 P.2d 1128 (1998). A trial court's sentencing authority is limited to that expressly found in the statutes. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

a. The court exceeded its statutory authority under chapter 10.99 RCW by imposing a post-conviction no-contact order for a duration that exceeds the length of the five-year sentence imposed.

Chapter 10.99 RCW authorizes trial courts to enter no-contact orders at various stages in a domestic violence prosecution: when a person charged or arrested is released “before arraignment or trial,” RCW 10.99.040(2)(a); at arraignment, RCW 10.99.040(3); and, as here, at sentencing after conviction if the defendant’s contact with the victim is to be restricted as a sentencing condition, RCW 10.99.050(1). *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002).

RCW 10.99.050(1) provides:

(1) When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with

the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim.

The legislature has not stated a specific time limit of months or years for the validity of a post-conviction no-contact order issued under the authority of RCW 10.99.050(1). A domestic violence no-contact order issued as a condition of a criminal sentence under RCW 10.99.050(1) must be limited in duration to the length of the sentence imposed. *State v. Granath*, 200 Wn. App. 26, 37–38, 401 P.3d 405, *review granted*, 189 Wn.2d 1009 (2017).

This post-conviction no-contact order was issued under chapter 10.99 RCW. CP 42. It sets the expiration date as 10 years from the June 19, 2017 date of sentencing. CP 41. The court sentenced Mr. Bennett to five years of confinement. CP 35. Because the length of the no-contact order exceeds the five year sentence imposed by the court for Mr. Bennett's crime, the matter must be remanded for resentencing.

b. The court exceeded its statutory authority under chapter 9.94A RCW by imposing a no contact order for a duration that exceeds the five-year maximum penalty for felony violation of a no-contact order, a class C felony.

Based on his criminal history, Mr. Bennett's offender score resulted in a standard range of 60-60 months. CP 34. Because the five year sentence imposed is equal to the statutory maximum punishment

allowed for Mr. Bennett's crime, the following alternative argument also supports the conclusion the court exceeded its statutory authority.

RCW 9.94A.505(9) permits a court to enforce crime-related prohibitions as part of any sentence. A "crime-related prohibition" is a court order "prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). A no-contact order is a crime-related prohibition. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010). The statutory maximum for Mr. Bennett's underlying offense, a class C felony, is five years. RCW 9A.20.021(1)(c). In this particular case, therefore, the maximum operative length of a no-contact order imposed pursuant to RCW 9.94A.505(9) is five years. *See Rainey*, 168 Wn.2d at 375 (noting that the maximum operative length of a no-contact order is the statutory maximum for the defendant's crime); *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007); *State v. Parsley*, 73 Wn. App. 666, 669, 870 P.2d 1030 (1994). Because the length of the no-contact order exceeds the five year statutory maximum for Mr. Bennett's crime, the matter must be remanded for resentencing.

4. 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. Bennett was nearly twenty-eight years old⁵ when the court imposed a term of sixty months in prison. CP 35. He was receiving food stamps at the time of his arrest. CP 45. The court appointed trial counsel due to Mr. Bennett’s indigency. CP 44; *see* CP 27. The court waived some discretionary costs and noted, “he’ll be serving some significant time, so as a result I’m going to make a finding of current indigency – future inability to pay as well.” RP 7. The Judicial Information System indicates the current LFO balances on the prior convictions shown in Mr. Bennett’s criminal history (CP 34) total \$17,663.72.⁶ The sentencing court also found Mr. Bennett remained indigent for purposes of this appeal and was entitled to appointment of counsel and costs of review at public expense. CP 49–51.

In light of Mr. Bennett’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

⁵ Mr. Bennett’s date of birth is July 15, 1989. CP 33.

[he] is no longer indigent,”⁷ this court should exercise its discretion to waive appellate costs.⁸ RCW 10.73.160(1).

D. CONCLUSION

For the reasons stated, the matter should be remanded with instructions to vacate the drug court costs as unauthorized, strike the discretionary legal financial obligations, strike the boilerplate finding that Mr. Bennett has the ability to pay, strike the requirement of repayment of the remaining LFOs in full within 180 or 270 days after his release, and reduce the length of the no-contact order to five years. Alternatively, should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on February 2, 2018.

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⁶ Defendant’s Case History (DCH), last accessed on the Judicial Information System (JIS) on January 22, 2018.

⁷ *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).

⁸ Appellate counsel anticipates filing a report as to Mr. Bennett’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 February 2, 2018, 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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Comments:

An amended opening brief is being filed, together with a motion for permission to file it.

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