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NO. 35442-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHELLE BROOKS,

Appellant.

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

The Honorable John Hotchkiss, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering discretionary legal financial obligations (LFO)s after finding appellant could pay only a monthly fee that was insufficient to cover the accrued monthly interest.

2. Appellant received ineffective assistance of counsel when counsel failed to challenge the imposition of discretionary LFOs.

3. The trial court erred when it imposed a discretionary witness fee, mistakenly believing it was a mandatory LFO.

Issues Pertaining to Assignments of Error

1. The Washington Supreme Court and this Court have admonished trial courts against imposing discretionary LFOs when the defendant can pay only a miniscule monthly LFO payment that will not even touch the judgement principle. In this case, the trial court ordered \$12,144.79 in LFOs. This includes \$1,040.80 in discretionary fees. The debt bears 12% interest annually. The trial court did not find that appellant could eventually pay the total judgment including interest. In fact, it concluded appellant could only afford to pay \$25 dollars a month. This is far less than the monthly accrued interest amount of \$121.44. Hence, her debt will

continue to grow at an alarmingly fast rate despite the monthly payments. Did the trial court err in ordering discretionary LFOs?

2. Trial counsel failed to challenge the trial court's imposition of discretionary LFOs even though appellant could afford only to pay an amount that was far less than the accrued monthly interest, and there was no finding that she could eventually pay the total judgment plus interest. Given that the trial court was already aware of appellant's dismal financial situation and limited prospects for future employment due to the nature of her conviction (theft from employer), there was no legitimate tactical reason to explain why defense counsel did not object to discretionary LFOs. Was appellant denied effective assistance of counsel?

3. The Washington Supreme Court recognizes that witness fees are a discretionary LFO. At sentencing, both the State and trial court operated under the mistaken belief that the witness fee was mandatory. The trial court imposed this LFO as part of appellant's sentence. Was the trial court's failure to exercise discretion an abuse of discretion?

B. STATEMENT OF THE CASE

1. Procedural Facts

On November 4, 2014, the Douglas County prosecutor charged

appellant Michelle Brooks with one count of theft in the first degree. CP 1-2. After a bench trial, she was found guilty. CP 11-15. With an offender score of zero, her standard range was 0-90 days. CP 18. The trial court sentenced her to 25 days electronic monitoring. CP 19. She filed a timely notice of appeal and was determined to be indigent. CP 26-34, 39-43.

2. Relevant Substantive Facts

Brooks was the municipal clerk/treasurer for the City of Rock Island. She was convicted of first degree theft via the overpayment to herself of \$6,415.99 in vacation time. RP 16-23. After the theft allegations went public, she found it difficult to obtain employment even though she was 42 years old and had no other felony criminal history. RP 315-16, 319. The trial court observed "...Ms. Brooks will be punished significantly just as a result of the nature of the crime in her efforts to get employment in the future." RP 315. At the time of conviction, Brooks' financial situation was indeed bleak. RP 316-19, 323. She was raising a child with no career and while attempting to go to school. RP 318-19. She had no more savings or retirement to draw on, was forced to reside in her father's house, and owed over \$30,000 in undischarged debts. RP 316-19; CP 40.

Despite Brooks' financial circumstances, the trial court imposed the same LFOs it "generally" imposes. RP 324. Those are as follows:

Victim's Assessment	\$500
Criminal Filing Fee	\$200
Witness costs	\$340.80
Fine	\$500
DNA Collection Fee	\$100

CP 20. In addition to this, Brooks was ordered to pay \$10,503.99 in restitution (this included investigation costs on top of the theft amount). CP 37-38. After Brooks informed the court she could only pay \$25 a month, it ordered this as the monthly payment rate. RP 323; CP 20. The trial court warned Brooks to pay more if possible, because "the interest eats you up." CP 323.

C. ARGUMENT

- I. THE TRIAL COURT ERRED IN ORDERING DISCRETIONARY LFOS AFTER FINDING APPELLANT COULD PAY ONLY A MONTHLY FEE THAT WAS INSUFFICIENT TO COVER THE ACCRUED MONTHLY INTEREST.

The Washington Supreme Court has lamented the sad fact that Washington's broken LFO system often disables an offender from successfully returning to society as a productive and stable citizen. City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016); State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Blazina and Wakefield signify a departure from the jurisprudential

view of LFOs as a means of punishment and from the appellate practice of avoiding review under the constructs of ripeness and waiver. Id. Indeed, this Court has read those decisions as commanding that “financial obligations must no longer behave as an obsessed and possessed Police Inspector Javert shadowing the offender for the rest of his or her life.” State v. Sorrell, ___ Wn. App. ___, 408 P.3d 1100, 1104 (2018).

Both the Washington Supreme Court and this Court have noted the particularly pernicious effect of the 12% interest rate applied to outstanding LFO on a defendant’s ability to pay off LFOs and rehabilitate. Wakefield, 186 Wn.2d at 607; Blazina, 182 Wn.2d at 836; Sorrell, 408 Wn. App. at 1110-11. Both courts have admonished sentencing courts against imposing discretionary LFOs where the defendant can only pay miniscule monthly payments that will not even touch the judgement principle and, thus, result in ever-growing debt. Wakefield, 186 Wn.2d at 607; Sorrell, 408 Wn. App. at 1110-11. They have stated that unless the trial court finds that it likely that a defendant will ultimately be able to pay their LFO amount, it is “unjustly punitive” to impose payments that will only cause the LFO amount to increase. Id. In an unpublished opinion, this Court recently ordered the trial court

to strike discretionary LFOs from the sentencing order where the trial court (1) failed to find the defendant could pay the total judgement including the interest and (2) ordered such a miniscule monthly payment that it was insufficient to pay the accrued monthly interest. State v. Davis, 200 Wn. App. 1053 (2017) (unpublished opinion cited pursuant to GR 14.1). Davis was ordered to pay \$1,650 in LFOs, which included the following discretionary LFOs: \$250 jury demand fee, \$500 fee for court appointed attorney, and \$100 crime laboratory fee. Id. at *1. The trial court asked Davis what she could afford to pay and set the monthly payment at \$25 dollars. Id.

A month later, the trial court held a hearing to address witness fees and Davis' inability to meet the physical demands of work crew. Id. at *2. At that time, Davis said she could not afford the to pay LFOs because she was living off \$960 per month in disability income. Id. The trial court did not impose the witness fee and reduced Davis' LFO payments to \$15 a month but left the other discretionary LFOs in place. Id.

On appeal, Davis argued the trial court failed to sufficiently consider her present or future ability to pay before imposing discretionary LFOs. Id. at *4. This Court observed that even

though the trial court reduced the monthly payments and did not impose witness fees, it never explicitly found Davis could eventually pay the total judgment including interest. Id. Citing Wakefield, it observed the court had unjustly imposed discretionary fees when the only monthly payments Davis could afford would not cover the monthly accrued interest. Id. This Court calculated the accrued monthly interest as \$16.50. Id. Because the trial court had found Davis could only pay \$15 dollars a month and that amount was insufficient to pay the interest on the judgment, this Court concluded the trial court erred in imposing any discretionary LFOs. Id. It remanded for the trial court to strike those LFOs. Id. Just as in Davis, the trial court erred in imposing discretionary LFOs after concluding Brooks could not pay more than \$25 dollars a month. The trial court had notice of Brooks' grim financial situation.¹ The trial court also had information before it that Brooks was raising a child, had no residence of her own and was living in her father's house, and had no more savings or retirement. RP 16-

¹ Defense counsel informed the court that since Brooks was accused (which was several years before trial), she found it extremely difficult to get a job. RP 316. Although Brooks was too emotional to address the trial court directly during sentencing, she asked her father to address the court. RP 316-17. Her father explained her bleak financial situation. RP 318-19.

19. It knew she was facing a significant amount in mandatory fees.² It concluded Brooks could only afford \$25 a month toward the judgement. It knew there was a 12 percent interest rate. Tellingly, the trial court warned that if Brooks paid only \$25 a month, the interest would “eat [her] up.”³ RP 324.

Despite all the information before the trial court that indicated Brooks’ bleak financial status and prospects, however, it still piled on discretionary LFOs. It appears it did so as a mere matter of routine. For when defense counsel asked what costs the court had imposed, the trial court responded: “Generally I impose the \$500 CVC, a \$500 fine, \$100 DNA collection fee and \$200 filing fee.”⁴ RP 325 (emphasis added). Given this, it is unclear whether the trial court ever considered Brooks’ individual circumstances or instead merely routinely imposed the same LFOs it always orders.

² Although the restitution order was not in place yet, from the evidence produced at trial, the trial court understood Brooks would have to pay mandatory restitution in excess of \$10,000. RP 175, 216 and CP 3-8. It also knew she was required to pay \$800 in other mandatory fees. State v. Vanhollebeke, 197 Wn. App. 66, 76, 387 P.3d 1103, 1108 (2016).

³ Indeed, this is true because the monthly accrued interest on this debt is \$121.44.

⁴ After the prosecutor reminded the trial court about the witness fee (which the prosecutor had wrongly told the court was mandatory), the court added that to the fees imposed. RP 314, 325.

Regardless, the record does not show the type of on-the-record inquiry called for in Blazina and described by this Court in Sorrell. Sorrell, 408 Wn. App. at 1110 (explaining that a Blazina inquiry minimally requires the court to evaluate the defendant's financial resources, incarceration status, and other debts including restitution).

Instead, the record shows the trial court never explicitly found Brooks would eventually be able to pay the total judgment including interest. It shows that the trial court ordered discretionary LFOs even after finding Brooks could only afford a monthly payment of \$25 – an amount that is not enough to pay the accrued monthly interest on the judgment. The imposition of discretionary fees under these circumstances was unjustly punitive, and it was error for the trial court to include these LFOs as a condition of sentence. Wakefield, 186 Wn.2d at 607; Davis, 200 Wn. App. 1053. Hence, this Court should remand for the trial court to strike all discretionary fees.

In response, the State may claim that Brooks failed to preserve this issue for review. However, this Court should reject that argument for three reasons. First, a recent decision by this Court calls into question the continued application of the waiver

doctrine as a means for avoiding appellate review of unjust LFO orders. Sorrell, 408 P.3d at 1104 (citing Blazina and Wakefield).

This Court explained:

When the defendant failed to object [to the imposition of discretionary LFOs] before the superior court, this court formally refused to entertain the assignment of error on appeal for various reasons.

Sorrell, 408 Wn. App. at 1110 (emphasis added). The use of the term “formally” suggests this Court will no longer apply the waiver doctrine to deny review of wrongly imposed LFOs.

Second, even if the waiver doctrine still may be applied – it does not apply here given the circumstances of the case. The questionability of Brooks’ ability to pay discretionary LFOs was sufficiently raised to have triggered the trial court’s responsibility to conduct an on-the-record Blazina inquiry. As explained above, the trial court understood Brooks’ employment prospects were poor due to the nature of her conviction. It also had notice of Brooks’ financial hardships. Additionally, the trial court rejected the State’s proposal that she pay \$50 a month, concluding Brooks could only pay \$25 dollars a month. RP 323. While Brooks did not directly ask the court to waive the discretionary LFOs, the question of her ability to pay was sufficiently placed before the trial court. Thus, the

record is sufficient to have preserved a Blazina challenge.

Finally, the specific issue of whether Brooks' monthly payments met the accrued monthly interest was placed squarely before the trial court. The trial court was aware that Brooks LFOs (including restitution) would exceed \$12,000. It was aware that a 12 percent rate of interest would begin accruing immediately. It found that Brooks was only able to pay \$25 a month. It acknowledged that a \$25 payment per month was not enough to keep Brooks from being "eaten up" by interest. Under these circumstances, it cannot be said that the issue of unjust punishment through the imposition of discretionary LFOs was waived.

In sum, the trial court erred in ordering discretionary LFOs without first finding appellant had the ability to eventually pay the principle and interest. It also erred in ordering discretionary LFOs after finding appellant could only pay a monthly amount that was not even close to meeting the accrued monthly interest on the judgement. Consequently, this Court should remand for the trial court to strike all discretionary LFOs.

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CHALLENGE THE IMPOSITION OF DISCRETIONARY LFOs.

Brooks was denied effective assistance of counsel when defense counsel, John Cowley, failed to directly object to the imposition of discretionary LFOs.⁵ As explained below, there was no legitimate tactical reason given the particular circumstances of this case. Instead, it appears that the failure to object was the result of Mr. Cowley's incompetence.

A defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. She is denied this right when her attorney's conduct: (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

"Counsel ... has a duty to bring to bear such skill and knowledge

⁵ For reasons explained above, appellant believes that the waiver doctrine does not apply to LFO cases such as this. If that so, then this Court need not decide whether appellant received ineffective assistance of counsel due to counsel's failure to explicitly object to discretionary LFOs.

as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688. The unreasonable failure to research and apply relevant statutes and case law without any tactical purpose constitutes deficient performance. In re Pers. Restraint of Yung-Cheng Tsai, 183 Wash.2d 91, 102, 351 P.3d 138 (2015). Here, Mr. Crowley’s failure to object to the imposition of discretionary fees and ask for a Blazina inquiry was unreasonable and without tactical purpose.

In Sorrell, this Court explained that its prior decisions suggested defendants tactically omitted an objection to discretionary LFOs in the hope that the trial court would consider him or her a financially responsible and productive member of society. Sorrell, 408 P.3d at 1110 (citing State v. Duncan, 180 Wn. App. 245, 253, 327 P.3d 699 (2014)). Sorrell appears to step back from that suggestion or at least raise a skeptical eyebrow. Fortunately, this Court need not sort that out here, however, because – on this this record – it cannot be said that Brooks gained any tactical advantage by defense counsel’s silence.

The trial court already understood that Brooks was experiencing significant money problems, was facing a very uncertain financial future due to limited employment prospects and

was liable for over \$11,000 in mandatory LFOs. Moreover, Brooks frankly told the Court she could not pay the \$50 monthly payment the State suggested and needed a lower payment amount. Given that the Court already understood Brooks' financial dilemma, it made no sense for defense counsel to tactically stay silent while the court imposed discretionary LFOs without a full Blazina inquiry. Instead, the record strongly suggests Mr. Crowley was simply inept in his representation of Ms. Brooks as it pertained to LFOs.

Not only does the record show counsel's deficient performance, but it also establishes prejudice. Under Strickland, prejudice is established if there is a reasonable probability that the outcome would have been different but for the attorney's conduct. Strickland, 466 U.S. at 693. Importantly, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id. at 693. A reasonable probability exists if counsel's deficient performance merely undermines confidence in the outcome. Id. at 634.

Here, there is a reasonable probability that had defense counsel made any effort to challenge the imposition of discretionary LFOs and cited such cases as Blazina and Wakefield, the trial court would have followed the Supreme Court's directives in those cases

and would not have imposed discretionary LFOs. This is evidenced by the fact the court recognized not only Brooks' limited job prospects, but the debilitating nature of the twelve percent interest accruing. It is also evidenced by the fact the court imposed only \$25 a month instead of the \$50 requested by the state. As such, counsel's failure to object and explicitly ask for a Blazina inquiry undermines any confidence in the trial court's imposition of discretionary LFOs.

In sum, counsel provided deficient representation when he failed to object to the imposition of discretionary LFOs. Under the facts of this case, this failure cannot be characterized as a legitimate tactical move. Moreover, there is a reasonable probability that, had an objection been made, the trial court would have conducted a Blazina inquiry and would not have unjustly imposed discretionary LFOs. Hence, this Court should find Brooks received ineffective assistance and remand for a new LFO hearing with competent counsel.

III. THE TRIAL COURT FAILED TO RECOGNIZE AND EXERCISE ITS DISCRETION WHEN IT ORDERED BROOKS TO PAY A WITNESS FEE, MISTAKENLY BELIEVING THIS WAS A MANDATORY LFO.

The Washington Supreme Court has specifically recognized witness fees are a discretionary LFO. In re Flippo, 185 Wn.2d 1032, 380 P.3d 413 (2016) (ruling granting review). The trial court “mandatorily” imposed a \$340.80 witness fee, not understanding it was a discretionary fee. RP 314, 324; CP 20. Hence, it failed to recognize and exercise its discretion when imposing the witness fee. This constitutes an abuse of discretion. See, State v. Grayson, 154 Wn.2d 333, 335-36 111 P.3d 1183 (2005) (failure to exercise is discretion is an abuse of discretion); State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (same). This Court, therefore, should remand for the trial court to strike the witness fee.

D. CONCLUSION

For reasons stated above, this Court should find the trial court erred in ordering discretionary LFOs and remand for the trial court to strike those. Alternatively, this Court should find appellant was denied effective assistance of counsel and remand for a new LFO hearing where Brooks may be represented by competent counsel. This Court should also find the trial court abused its discretion when it ordered Brooks pay witness fees as a mandatory LFO.

Dated this 20th day of February, 2018.

Respectfully submitted

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