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Court of Appeals
Division III
State of Washington
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No. 35708-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN SMITH,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR THE COUNTY OF
COLUMBIA

Hon. G. Scott Marinella, Judge *Pro Tem*

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The State concedes that medical expenses authorized by RCW 70.48.130 are not properly characterized as “restitution,” but this Court should remand for correction rather than vacate the amount *in toto*.
- B. The trial court did not err in imposing discretionary legal financial obligations, because it did consider the Defendant’s present and future abilities to pay legal financial obligations.
- C. The State concedes that the dates of offenses should be corrected on the judgment and sentence.
- D. The State does not intend to seek costs on appeal.

II. STATEMENT OF FACTS

The State stipulates that the factual statement in the Defendant/Appellant’s memorandum is true and correct, and offers the following additional facts in support of its argument herein:

Upon request for clarification of legal financial obligations imposed by the trial court, the trial judge observed that he had reviewed information relating to Mr. Smith’s earnings. RP 72:24-25. The court acknowledged that Mr. Smith would be earning “zero” dollars for the near

future, but also recognized that the Department of Corrections would potentially offer the Defendant paid work. RP 73:2-3. The court noted, however, that the Defendant would be serving a lengthy sentence, and that even though jobs in prison pay “pennies on the dollar,” the length of time incarcerated meant that he would be earning some money which could be used to pay legal financial obligations. RP 73:3-7. Having considered this information, the court indicated an unwillingness to “zero out” the discretionary legal financial obligations. RP 73:7-8. The Court imposed a total of \$730.00 in mandatory costs, and \$1416.03 in discretionary costs. CP 80-81. There was no objection at the sentencing hearing to the imposition of these legal financial obligations. RP 74-76.

III. ARGUMENT

A. The Remedy for Mischaracterizing Medical Expenses as “Restitution” Should Be Remand and Correction, Not a Total Striking of the Amount.

The Defendant has correctly pointed out that the medical expenses in this matter are not directly caused by the crimes for which the Defendant was convicted, and that listing those medical expenses as “restitution” in the Judgment and Sentence herein is error; however, the State respectfully submits that the remedy for that error should not be a wholesale striking of the medical expenses, but a remand for correction.

The medical expenses a defendant incurs while in custody awaiting resolution of his/her case are recoverable by the State pursuant to RCW 70.48.130.

The cases cited by the Defense all involve restitution that was ordered as restitution; not restitution that was incorrectly characterized. Thus, their precedential value for the circumstances present here are minimal.

Washington Rule of Appellate Procedure 12.2 governs disposition on review by appellate courts. “Appellate court[s] may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.” RAP 12.2. When this Court issues the mandate, the action taken or decision made therein governs all subsequent proceedings in the action. *Id.* The trial court may hear and decide other case issues so long as such issues do not challenge those already decided by this Court.

RCW 70.48.130 governs medical and health care for inmates and payment therefor. Columbia County is required to pay for all necessary and emergency medical care for its inmates. RCW 70.48.130(2). Columbia County “ . . . may obtain reimbursement from the confined person for the cost of health care services” RCW 70.48.130(5). “As part of a judgment and sentence, the courts are authorized to order

defendants to repay all or part of the medical costs incurred by [Columbia County] or [medical care] provider during confinement.” Id.

Here, the Court should remand the matter of medical costs incurred by the County for the care of Smith, for the trial court to properly identify the basis for the award.

This Court should not foreclose the trial court’s statutory authority to order Smith to repay all or part of the medical costs incurred by the County on his behalf. This Court should remand the matter to the trial court for correct identification of the imposition of reimbursement for medical costs. “[T]he legislature expressly stated that it intended medical costs ‘to be the responsibility of the defendant’s insurers and ultimately the defendant based on their ability to pay.’” *State v. Leonard*, 184 Wn.2d 505, 508, 358 P.3d 1167 (2015), *citing*, LAWS OF 2008, CH. 318, §1.

B. This Court Should Consider the Issue of Legal Financial Obligations; The Trial Court Did Not Err in Assessing Legal Financial Obligations after Considering the Defendant’s Present and Future Ability to Pay.

A trial court has an obligation to decide whether or not to impose legal financial obligations in a criminal case, and that decision must be made only after a full consideration of the particular facts of each defendant’s case. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). A trial judge errs by failing to making an individualized inquiry of

a defendant's present and future ability to pay LFOs. *Id.* Of course, the determination of a *future* ability to pay requires a court to predict the future, which even this learned Court is (probably) unable to do.

Of course, there are some *mandatory* legal financial obligations that a trial court must impose; these are to be distinguished from the *discretionary* legal financial obligations that a court may impose. *State v. Sorrell*, 2 Wn. App. 2d 156, 173, 408 P.3d 1100 (2018). The law requires that trial courts impose a victim assessment, restitution, a filing fee, and a DNA fee for first-time felons. *Id.* Any other LFO is considered discretionary. *Id.*

1. This Court May Decline to Address the Issue of Legal Financial Obligations as the Defendant did not Preserve any Alleged Error.

“A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.” *Blazina*, 182 Wn.2d at 832. Rather, an appellate court's discretion to hear unpreserved error under RAP 2.5(a) extends to alleged error relating to discretionary LFOs. *State v. Gonzales-Gonzales*, 193 Wn. App. 683, 692, 370 P.3d 989 (2016), *citing*, *Blazina*, 182 Wn.2d at 834-35. A reviewing appellate court may “make its own decision to accept discretionary review of LFO errors.” *Id.* at 693, *citing*, *Blazina*, 182 Wn.2d at 835.

In the case at Bar, the Defendant has had the benefit of being informed of *Blazina* and its progeny for well over two years—it is arguably one of the most talked-about precedents in recent memory among criminal practitioners. Despite this, the Defendant did not object to the legal financial obligations imposed at sentencing in this matter. Waiver of the objection should be attributed to the Defendant, and resentencing should not take place on this issue.

2. The Trial Court *did* Make an Individualized Finding after Consideration of the Defendant’s Ability to Pay.

There is no requirement that the consideration of a defendant’s ability to pay always end in the same result of no discretionary LFOs; indeed, the *Blazina* court noted that courts should not create “one-size-fits-all” financial judgments against defendants, but that each case must be decided on its own circumstances. *Blazina*, 182 Wn.2d at 834. At the very heart of *Blazina*’s holdings is the idea that courts must not simply be a rubber stamp of “boilerplate” language without a real finding supported by thought and reason. *Blazina*, 182 Wn.2d at 838. Recent cases supporting uniform vacation of all legal financial obligations for certain defendants are, in fact, a new breed of on-size-fits-all boilerplate that demands that a

trial court may not impose legal financial obligations no matter what the court determines at sentencing as to a defendant's ability to earn money.

The questions then in the present case are: did the trial court *consider* Mr. Smith's ability to pay prior to imposing legal financial obligations? Did the trial court put thought, reason, and ultimately discretion into the order of legal financial obligations? The answer, from a careful analysis of the record, is yes.

The trial court here did make an inquiry of Mr. Smith. RP 72:24-73:8. Mr. Smith provided information to the Court regarding his ability to earn, and the trial court also made findings based on its experience and knowledge—the court admitted that currently the defendant had no income, as he was in custody awaiting resolution of the case; however, the court also acknowledged that employment for pay was available for the defendant as an inmate of DOC¹, that the defendant would be incarcerated for a long period of time, and therefore the Defendant had a real possibility of making sufficient money to pay the LFOs involved here². RP

¹ Mr. Smith was formerly employed as a DOC corrections officer, making him perhaps more likely to be considered trustworthy for a wide array of DOC inmate employment—it is simply unknown at the present time what type of pay structure may be available to him.

² The total of discretionary LFOs entered in this case is \$1,416.03; assuming that Mr. Smith is able to make even \$100 per month in the DOC system, that figure could be satisfied in **15 months**, given his lack of personal cost for housing, medical care, meals, etc. No interest will accrue after June, 2018. RCW 10.82.090. The Defendant, if he makes regular payments, may petition the court for remission of any interest that accrued

72:24-74:12. The court noted the weighing it had performed of not only the amounts and ability of Mr. Smith to find employment, but also its view of the fundamental fairness of the LFOs imposed. *Id.*

In short, the sentencing court herein *did* make an individualized consideration of Mr. Smith's circumstances, ability to pay, and the fairness of the sentence; the problem is that Mr. Smith disagrees with the court's discretion, not that the court did not utilize the appropriate procedures to exercise that discretion. The Court should not disturb the sentencing court's decision on legal financial obligations.

C. The State Concedes that the Dates of Offense Should be Corrected on the Defendant's Judgment and Sentence.

Owing to a scrivener's error by the State in the Judgment and Sentence herein, the incorrect dates of the offense were entered. The State stipulates that this matter should be remanded to correct those dates. There is no reason this could not be done by agreed order rather than a complete new sentencing hearing.

D. The State Does Not Request Costs of Appeal.

Given the State's admission to its own part in errors committed herein, it would be unjust to seek costs from Mr. Smith at this time;

prior to June, 2018, and indeed any other discretionary LFOs not paid off. RCW 10.01.160.

however, the State would like to make it known that it would have been willing to correct these errors through agreed orders if contacted prior to appeal, thus whittling down the work of all parties herein; the State remains willing to discuss such agreements in future cases.

IV. CONCLUSION

Based upon the authorities cited and the reasons aforesaid, the Respondent State respectfully requests that this Court:

1. Remand this matter to the trial court for correction only of the dates of the offenses and the characterization of the medical cost reimbursement ordered herein; and
2. Leave undisturbed the imposition of discretionary costs by the trial court, as those costs were imposed following a full and fair consideration by the court after balancing all the equities involved.

RESPECTFULLY SUBMITTED this 1st day of August, 2018.



C. DALE SLACK, WSBA #38397
Deputy Prosecuting Attorney

Certificate of Service

I, C. DALE SLACK, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of the Brief of Respondent to be filed via the Court's electronic filing system, and that electronic copies were forwarded to the following parties in interest:

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SIGNED this 1st day of August, 2018, at Dayton, Columbia County,
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Transmittal Information

Filed with Court: Court of Appeals Division III
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