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Division III
State of Washington
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No. 36007-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

FRANCISCO MANUEL AGUINAGA,

Appellant

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

NO. 17-1-00929-0

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The sentencing court properly engaged the defendant in a colloquy regarding his ability to pay legal financial obligations and the defendant stated he could make those payments.
- B. The State does not take a position on appellate costs.

II. STATEMENT OF FACTS

- A. Substantive Facts—not relevant for appeal, but the State needs to comment on the defendant’s version.**

This Court may wonder after reading the defendant’s statement of facts why the State prosecuted him and how a jury found him guilty. The State hopes this is a fair statement of the evidence.

The victim is Michael Vasquez, whose girlfriend is Allyse Nicholson. RP¹ at 38. Ms. Nicholson had a long-term friend, Sarah Pringle, who was dating the defendant. RP at 58, 81-82. Mr. Vasquez met the defendant in passing about three months before the incident herein. RP at 40.

Unfortunately for the defendant, a couple weeks later Mr. Vasquez’s sister, Bethany, introduced him to a new man in her life: the defendant. RP at 41. Mr. Vasquez told his sister that the defendant was also dating Ms. Pringle, which led to her breaking up with the defendant.

¹ Unless otherwise indicated, “RP” refers to the verbatim report of proceedings from jury trial on 02/01/2018.

RP at 41-42. Additionally unfortunate for the defendant, Mr. Vasquez heard of another woman, Holly, who was romantically involved with the defendant while he was also dating Ms. Pringle. RP at 42.

There were no other contacts between the defendant and Mr. Vasquez. *Id.* At their one meeting, they did not spend a lot of time talking or interacting. RP at 40.

Mr. Vasquez's warnings to his sister and Holly did not sit well with the defendant. RP at 83. Ms. Pringle sent a text message on July 8, 2017, to Ms. Nicholson saying,

So what the fuck? Why am I hearing that Mike [Mr. Vasquez] is still spreading rumors about me? I just got a call saying that I had chlamydia and that Frank cheated on Bethany the whole time with me, which isn't true, and that he is telling Kat and whoever else all this shit. This is the only warning, but Mike is going to get beat on site if he decides to continue being a lying, scathing, bitch-ass piece of shit.

Exhibit 8; RP at 70-72.

Two days later the defendant, Ms. Pringle, and a Stacey Hall were out drinking. RP at 86, 101. The defendant wanted to go to Mr. Vasquez's residence. *Id.* Mr. Hall went as backup "in case Frank [the defendant] gets jumped." RP at 102, 107. The defendant, Mr. Hall, and Ms. Pringle arrived at Mr. Vasquez's apartment complex at about midnight on July 11, 2017. RP at 85-86.

The defendant banged on the apartment door. RP at 43. Mr. Vasquez testified he opened the door a couple of inches and saw the defendant standing there with another man who he had never seen before. RP at 45. The defendant said, "Are you Mike?", and forced the door open. RP at 45-46, 116. Mr. Vasquez fell backward, and the defendant hit him directly in the face. RP at 46.

The defendant said, "This is what I do. . . . I always do this. This is what happens. . . . You need to keep your mouth shut." *Id.* They wrestled on the ground, perhaps for three minutes. RP at 47, 77.

The defendant's version of events at Mr. Vasquez's apartment is dramatically different. He admits going to the apartment without invitation on midnight on a Monday night, July 11, 2017. RP at 122. He admits the apartment was dark, "pitch black." RP at 116. But he claims that Mr. Vasquez immediately kicked him in the groin when he opened the door which caused him to leap back. *Id.* Although a police officer documented injuries on Mr. Vasquez, the defendant claims he never struck him. RP at 26, 116.

Ms. Pringle, Mr. Hall, and the defendant all fled before the police arrived. RP at 31. That was not the only problem with their testimony. Ms. Pringle told the police that neither she, Mr. Hall, or the defendant went to Mr. Vasquez's apartment. RP at 89. Mr. Hall said he was not standing

with the defendant at the door, although he was “essentially backup” for the defendant and both Ms. Nicholson and Mr. Vasquez saw him. RP at 45, 75, 102-03. The police were never able to locate the defendant for an interview, and the defendant stated he had been avoiding the Tri-Cities. RP at 34, 120. The trial judge concluded that the defendant’s “story you told on the stand made precious little sense to me.” RP 02/22/18 at 10.

B. Information in record regarding defendant’s ability to pay legal financial obligations.

The trial court had three pieces of information before sentencing. First, the defendant was able to have a bail bond company post a bond of \$20,000 *before* his arraignment. See Order on Conditions of Release and Bail Bond². Second, he had no other fines from criminal charges or traffic infractions. RP 02/22/18 at 5. Third, he testified he worked in the music business for 15 years. RP at 112.

The Court had the following colloquy with the defendant about legal financial obligations:

The Court: We need to talk about your ability to pay legal financial obligations. Now, when you worked in Spokane, you owned your own business? It’s a music-related business?

Defendant: Yeah. I have—I perform weekly out there. And that’s how I---

Court: Like, you are a deejay?

Defendant: Mm-hmm

Court: Okay. And how much do you make in a year?

² Clerk’s subnumbers 9, 12, and 13, designated on 03/25/2019.

Defendant: I'm not too sure. With my—it depends, because on the record label that I'm on, we do certain yearly tours and stuff like that. So we have yearly/monthly cash outs. And then I get paid weekly in Spokane. I'm able to pay fines.

Court: Okay. All right. Now, Ms. Ajax was appointed to represent you at public expense; was she not?

Defendant: Yeah.

Court: All right. And that was because you didn't have money saved up to hire an attorney? --the several thousand dollars or whatever it takes?

Defendant: Yeah

Court: But you're confident you can come up with between \$50 and \$100 a month?

Defendant: When the whole—when everything started, I was not prepared at all for any of this. I was saving up money for a new lease and a van. And I had to put that all into gas money and hotels and getting bailed out.

Court: Okay. But you're confident that going forward, once you get done with your prison time -- assuming that I think I see some paper work for filing an appeal. No? At any rate, once you're done with this, you're confident you can get back to work and pay between \$50 and \$100 per month?

Defendant: Yes, sir.

RP 02/22/18 at 11-12.

III. ISSUES

- A. Did the trial court properly order the defendant to pay legal financial obligations?
 1. Did the defendant waive contesting the LFOs by agreeing he could pay them?
 2. If the defendant is allowed to raise the issue on appeal, what is the standard on review?

3. Where the defendant was able to post a bond of \$20,000, had a 15-year employment history, said he had been saving money, had no other known debts and said he could pay \$50-100 monthly for his LFOs, did the trial court properly order non-discretionary LFOs?

IV. ARGUMENT

- A. **The trial court properly ordered the defendant to pay non-discretionary legal financial obligations.**
 1. **The defendant should be barred from arguing that he cannot pay LFOs because at sentencing he affirmatively stated he was able to pay non-discretionary LFOs.**

This case presents a different issue than *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and its progeny. In *Blazina*, the defendant did not object to an order to pay non-discretionary LFOs. See *id.* at 831-32. The *Blazina* court stated that “[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.” *Id.* at 832. But, the court held that RCW 10.01.160 (3) requires an individualized inquiry into a defendant’s current and future ability to pay LFOs and, therefore, the matter was remanded to the trial court. *Id.* at 839.

Thereafter, defendants who failed to object to non-discretionary LFOs were allowed to contest those fees. See e.g., *State v. Marks*, 185

Wn.2d 143, 486 n.1, 368 P.3d 485 (2016); *State v. Duncan*, 185 Wn.2d 430, 437, 374 P.3d 83 (2016); *State v. Stoddard*, 192 Wn. App. 222, 224-25, 366 P.3d 474 (2016). Here, the defendant was not just silent, he stated several times that he could make payments on the total non-discretionary fees of \$1,306.68.

In *Stoddard*, a similar thing happened when the defendant agreed to pay as restitution a homicide victim's child support obligation. *Stoddard*, 192 Wn. App. at 225. The *Stoddard* court held the invited error doctrine precluded the defendant from challenging the restitution award.

Here, the defendant when asked about his yearly income responded by saying that he was able to pay fines. RP 02/22/18 at 11. If the sentencing court had asked the defendant if he could pay monthly on his LFOs and if the defendant had said, "I don't know," or "Maybe," or "It depends," this would be a different case. By affirmatively saying he could make monthly payments, the defendant cut off further questions about his yearly income. Under the invited error doctrine, he should not be allowed to complain of the trial court's ruling on appeal.

2. If this Court reviews the substance of the defendant's claim, the standard on review is de novo.

State v. Ramirez, 191 Wn.2d 732, 740-41, 426 P.3d 714 (2018), held that the adequacy of the trial court's individualized inquiry into the

defendant's ability to pay LFOs should be reviewed de novo, which involves a factual and legal component. On the factual side, the record can be examined for supporting evidence. On the legal side, the reviewing court decides whether the trial court's inquiry complied with the requirements of *Blazina*. *Id.* at 740. *Blazina* required the trial court made an individualized inquiry into a defendant's current and future ability to pay, which should include consideration of factors such as incarceration and the defendant's other debts. *Blazina*, 182 Wn.2d at 838.

3. The trial court's colloquy with the defendant was sufficient to make an individualized determination of his ability to pay LFOs.

Three points about the colloquy should be highlighted.

First, compared to the reported cases since *Blazina*, the trial court's colloquy with the defendant was much more elaborate. In *Ramirez*, 191 Wn.2d at 736-37, the trial court did not even ask the defendant any questions, but only asked the prosecutor two questions about LFOs.

Second, the sentencing did not happen in a vacuum. The trial judge heard the trial testimony of the defendant who said he lives in the Diamond Lake area outside of Spokane, and that he has worked steadily for the last 15 years in the music business. RP at 112, 118. The trial judge would have also had access to the fact that the defendant was able to have a bond of \$20,000 posted *before* his arraignment.

Third, the colloquy resulted in significant information. The defendant brought up the fact that he posted bail of \$20,000 and the trial court should have been aware of that. “When the whole—when everything started, I was not prepared at all for any of this. I was saving up money for a new lease and a van. And I had to put that all into gas money and hotels and getting bailed out.” RP 02/22/18 at 12.

It would be difficult to conclude that a person who can afford \$20,000 for bail could not afford \$1,306.68 for LFOs.

The colloquy also revealed that the defendant had an attorney at public expense not because he would fit in the standards in GR 34 (3) (A), (B), (C) or (D), but because he could not pay a retainer to a private attorney of several thousand dollars, particularly after paying for bail. RP 02/22/18 at 12. In other words, the defendant was not receiving public assistance, was not at or below 125 percent of the federal poverty guideline, did not have living expenses that rendered him unable to pay filing fees, and had no other compelling circumstances that made him unable to demonstrate he was unable to pay fees and/or surcharges.

Through the colloquy, the trial judge learned that the defendant had been able to save money in hopes of improving his housing and transportation. He was able to pay for many trips from Spokane to the Tri-Cities, including gas and hotels. RP 02/22/18 at 12.

Also, the defendant had no other court fines. As his attorney said, he had never before had so much as a traffic ticket. The defendant never reported any other outstanding debts. His “Report as to Continued Indigency” dated August 2, 2018, lists no credit card, personal loan, or installment debt and lists only a medical debt of \$4.50. He listed child support arrears of \$2,000, but in Motion and Declaration for Order Authorizing the Defendant to Seek Review at Public Expense, filed with the Benton County Superior Court and dated April 23, 2018, reported no dependents³.

In addition, the total LFOs could be paid off within three years if the defendant paid about \$50 per month. Given all the circumstances, the fact he was saving money, his long work history, the probability that he would be able to resume his music business job, and his lack of debts, the trial court and this Court should assume the defendant could make those payments.

Finally, the defendant said he could make payments on his LFOs. Could the defendant have been overstating his ability to pay the LFOs hoping that his sentence would be lighter? The defendant correctly cites *State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018) for the

³ Clerk’s subnumber 57, designated on 03/25/2019.

proposition that defendants want to appear in their best light at sentencing. Br. of Respondent at 12.

However, the defendant goes on to argue that “[i]t is well documented that a person before a court will try to . . . misrepresent how much money they can give to the court monthly to pay off court debt” and cites *Ramirez* for this proposition. *Id.* *Ramirez* did not say this. In fact, the defendant’s representations in *Ramirez* were not concerning his ability to pay fines, but to counter the prosecutions depiction of him and to focus on his accomplishments to persuade the sentencing judge to give him a lesser sentence. *Ramirez*, 191 Wn.2d at 720-21. A judge should be able to trust the representations made by a defendant concerning their debts, employment prospects, and ability to pay LFOs.

The Court need not address the issue because the defendant’s affirmative statement that he could pay LFOs should be considered invited error. But, looking at all the facts in the record, the trial court had sufficient evidence to conclude the defendant had the future ability to pay LFOs.

B. The State does not take a position on appellate costs.

V. CONCLUSION

The Judgment and Sentence, including the order to pay non-discretionary LFOs, should be affirmed.

RESPECTFULLY SUBMITTED on April 5, 2019.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "T. J. Bloor", written over a horizontal line.

Terry J. Bloor, Deputy

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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was made to the following
parties: ltabbutlaw@gmail.com

Signed at Kennewick, Washington on April 5, 2019.


Demetra Murphy
Appellate Secretary

Appendix

GR 34

General Rules

GR 34

Waiver of Court and Clerk's Fees and Charges in Civil Matters on the Basis of Indigency

(a) Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

(1) The application for such a waiver may be made ex parte in writing or orally, accompanied by a mandatory pattern form created by the Administrative Office of the Courts (AOC) whereby the applicant attests to his or her financial status or, in the case of an individual represented by a qualified legal services provider ("QLSP") or an attorney working in conjunction with a QLSP, a declaration of counsel stating that the individual was screened and found eligible by the QLSP.

(2) The court shall accept an application submitted in person, by mail and where authorized by local court rule not inconsistent with GR 30, electronic filing. The process for presentation of the application shall conform to local court rules and clerk processes not inconsistent with the rules of this court for presenting ex parte orders to the court directly or via the clerk. All applications shall be presented to a judicial officer for consideration in a timely manner and in conformity with the local court's established procedures. There shall be no locally imposed fee for making an application. The applicant or applicant's attorney filing by mail, shall provide the court with a self-addressed stamped envelope for timely return of a conformed copy of the order.

COMMENT

This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); other initial filing charges required by statute (e.g., family court facilitator surcharges established pursuant to RCW 26.12.240; family court service charges established pursuant to RCW 26.12.260; domestic violence prevention surcharges established pursuant to RCW 36.18.016(2)(b)); and other lawfully established fees and surcharges which must be paid as a condition of securing access to judicial relief.

(3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that:

(A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:

- (i) Federal Temporary Assistance for Needy Families (TANF);
- (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
- (iii) Federal Supplemental Security Income (SSI);
- (iv) Federal poverty-related veteran's benefits; or
- (v) Food Stamp Program (FSP); or

(B) his or her household income is at or below 125 percent of the federal poverty guideline; or

(C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or

(D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

(4) An individual represented by a QLSP, or an attorney working in conjunction with a QLSP that has screened and found the individual eligible for services, is presumptively deemed indigent when a declaration from counsel verifies representation and states that the individual was screened

and found eligible for services.

(5) As used in this rule, "qualified legal services provider" means those legal services providers that meet the definition of APR 8(e).

COMMENT

The adoption of this rule is rooted in the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis. Each court is responsible for the proper and impartial administration of justice which includes ensuring that meaningful access to judicial review is available to the poor as well as to those who can afford to pay.

(b) Nothing in this rule shall prohibit or delay action on the underlying petition upon the court's approval of a waiver and presentation of an original petition may accompany the initial fee waiver.

[Adopted effective December 28, 2010.]

BENTON COUNTY PROSECUTOR'S OFFICE

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