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Division III
State of Washington
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36287-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RAYMOND CHANEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

Certain legal financial obligation provisions in the judgment and sentence are not authorized because Chaney is indigent.

II. ISSUES PRESENTED

1. Is the defendant barred from raising an unpreserved claim under RAP 2.5?
2. Can the \$200 filing fee be imposed on defendants if they are found to be indigent at the time of sentencing, even if found to have the future ability to pay?
3. Should the judgment and sentence be modified to indicate interest is not to accrue on non-restitution legal financial obligations?

III. STATEMENT OF THE CASE

On June 25, 2018, the defendant was found guilty of attempting to elude a police vehicle, with a special finding it endangered one or more persons other than the defendant or pursuing officer under RCW 9.94A.834. CP 81-83.

During sentencing, Travis Kubik spoke on behalf of defendant, stating:

Raymond is like a brother to me. He helped me out, and now I'm at the point where I'm -- he's going to be part owner of a multi-million-dollar business called KC Buggies. We've actually got a patent right now and it's actually going on its way to getting everything taken care of. It's actually a big

business and it's going to be -- he's actually a part owner of it.

RP 419.

The defendant also made comments to indicate that he would be employable and have the financial means to pay financial obligations after his release.

THE DEFENDANT: ... I've also completed many things ... My job skills, to help me find a job when I get out, which might be a while, ..., which is all the classes that they offer there besides the ...it's intensive development that you can't do unless you're sentenced. That's the only program I haven't done.

I've got certificates that for all the programs I've completed.

RP 422.

THE DEFENDANT: I also got a carpenter's degree. Trying to get into the carpentry union, if I'm able to when I get out. Just trying everything I possibly can.

RP 424.

In considering the imposition of the filing fee, the court reasoned:

THE COURT: So in addition ..., I am going to impose the legal financial obligations. I am a little concerned about the \$200 fee as you have a friend here indicating you're going to be very rich from a company. I don't have anything else to indicate that you won't be, so at this point in time, I'm going to impose a \$200 filing fee as well, and *cannot make a finding of indigency based upon what the Court was presented with today.*

RP 431 (emphasis added).

The court sentenced the defendant and imposed the \$200 filing on August 7, 2018. CP 109-23. The defendant did not object. RP 431-34. The judgment and sentence indicated that the “financial obligations imposed in this judgment shall bear interest from the date of judgment until payment in full.” CP 118.

On August 8, 2017, the superior court signed an Order of Indigency for appellate review. CP 131.

IV. ARGUMENT

A. DEFENDANT’S CLAIM IS BARRED UNDER RAP 2.5 BECAUSE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL.

In this case, the new statute limiting the levying of the \$200 filing fee on those who are indigent (RCW 36.18.020(2)(h)¹) was already in effect at the time of the defendant’s sentencing.

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not

¹ Note that RCW 10.101.010(3) also includes “indigent” defendants as persons who are “(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.” There is nothing in this record to indicate under which subsection the defendant fell when appointed public defense counsel.

first raised at trial. *Id.* at 749. This principle is embodied in Washington under RAP 2.5. The rule is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials

whenever they can ‘identify a constitutional issue not litigated below.’”
State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). The issue raised here is not constitutionally based.

Additionally, this Court should not accept review of this claim based upon an undeveloped record. As in *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016), the issue now raised by Defendant was not preserved or developed in the trial court with supporting facts that would enable this Court to properly review the claim. In *Stoddard*, this Court emphasized:

We consider whether the record on appeal is sufficient to review Gary Stoddard’s constitutional arguments. Stoddard’s contentions assume his poverty. Nevertheless, the record contains no information, other than Stoddard’s statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a criminal charge’s defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard’s due process argument.

Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the \$100 DNA collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

Id. at 228-29.

The defendant does not show the court committed a manifest constitutional error at the time of sentencing. The court heard that the defendant was part owner of a potential multi-million-dollar business,

RP 419; he had received several certificates to help his job skills, RP 422; and had a carpenter's degree, RP 424. In light of the evidence, the court could not find the defendant indigent at the time of sentencing. RP 431. There was nothing in the record to indicate whether the defendant's public defense counsel was assigned under subsections (a) through (c), instead of (d) of RCW 10.101.010. In the absence of an objection, there is no manifest constitutional error, and, upon the record presented at sentencing, the court did not err in imposing the \$200 filing fee.

Therefore, policy and RAP 2.5 do not favor consideration of the belatedly-raised legal financial obligations issue.

B. IF THIS COURT EXERCISES ITS DISCRETION TO REVIEW THE DEFENDANT'S CLAIM, THE \$200 FILING FEE MAY BE STRICKEN.

In 2018, House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit courts from imposing the \$200 filing fee on indigent defendants as defined in RCW 10.101.010(3)(a) through (c). Laws of 2018, ch. 269, § 17(2)(h). As of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee on defendants who are indigent. Laws of 2018, ch. 269, § 17; Laws of 2018, pg. ii, "Effective Date of Laws"; RCW 36.18.020.

Where a defendant is indigent *at the time of sentencing*, for purposes of affording the cost of an appeal, the defendant's past and future ability to

pay apparently has no bearing on whether this fee could be imposed. RCW 36.18.020.² The defendant was found indigent the day after sentencing for appeal purposes. However, it does not appear there were any changes in the defendant's financial circumstances from August 8, 2019, other than having been sentenced to 41 months in prison.

Therefore, assuming the defendant were to have been found indigent pursuant to under RCW 10.101.010(a) through (c) at sentencing, it would be appropriate to strike the \$200 filing fee. This may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (a ministerial correction does not require a defendant's presence).

C. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO CORRECT THE BOILERPLATE LANGUAGE REGARDING INTEREST.

As of June 7, 2018, trial courts are prohibited from imposing interest on any non-restitution legal financial obligations. Laws of 2018, ch. 269, § 1; Laws of 2018, pg. ii, "Effective Date of Laws"; RCW 10.82.090. However, the judgment and sentence in this case states: "The financial obligations imposed in this judgment shall bear interest from the date of

² The statute is very temporal and mandatory in its application. Here, the court found the defendant would be able to pay the fee. This "finding" was not objected to at sentencing, and is not assigned error on appeal.

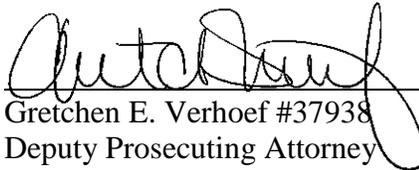
judgment until payment in full.” CP 118. This language should be corrected to indicate only restitution obligations can bear interest.

V. CONCLUSION

Should this Court review the issue, and determine that based on this record the defendant was indigent at the time of sentencing, it should remand the case for the ministerial correction to strike the \$200 filing fee. The judgment should be amended to provide that interest may only accrue on the restitution portion of the legal financial obligations.

Dated this 29 day of May, 2019.

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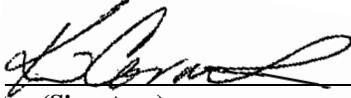
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 29, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Maureen Cyr
wapofficemail@washapp.org

5/29/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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