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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

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

NO. 36757-6-III

STATE OF WASHINGTON,
Respondent,

vs.

JUAN OMAR GONZALEZ
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 18-1-00138-01

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The one thousand dollars ordered by the Trial Court was a fine and not a discretionary cost or fee.

II. ISSUES PRESENTED

1. Whether the one thousand dollars ordered by the Trial Court was a fine not a cost or fee

2. Whether the Trial Court can impose a fine without inquiring into the Appellant's ability to pay.

3. Whether this Court should decline review of an unpreserved claim of error.

III. STATEMENT OF THE CASE

Procedural History[1]

On September 11, 2018, the Appellant, Juan Omar Gonzalez, was charged with one count of Unlawful Possession of a Controlled Substance, Methamphetamine.[2]

On April 22, 2019, the charges were amended for a third time to one count of Possession with Intent to Deliver a Controlled Substance, Methamphetamine.[3]

On April 22, 2019, the Appellant waived his right to a jury and proceeded to a stipulated facts bench trial.[4] The Trial Court found

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[1] The Appellant raised only one procedural post-trial issue in this matter, as such, the Respondent has only set forth the applicable procedural history.
[2] CP 8.
[3] CP 143.
[4] RP at 193-95.

the Defendant guilty of Possession of a Controlled Substance with Intent to Deliver, Methamphetamine.[5] The Trial Court sentenced the Defendant to twelve months and a day in prison, mandatory Legal Financial Obligations, one year of community custody and a one thousand dollar fine.[6]

The Respondent, State of Washington, confirmed with the court that it was imposing twelve months and a day prison, twelve months of community custody, and a one thousand dollar fine.[7] The Trial Court corrected the Respondent that the Trial Court was also imposing mandatory legal financial obligations.[8] The Appellant requested the Trial Court to strike the three hundred and fifty dollar court appointed attorney fee, but did not object to the imposition of the one thousand dollar fine.[9] A Felony Judgment and Sentence – Prison was prepared by the Respondent.[10] The Judgment and Sentence imposed a five hundred dollar Victim Assessment, RCW 7.68.035; a one hundred dollar DNA collection fee, RCW 43.43.7541; struck the three hundred and fifty dollar fees for court

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[5] RP at 195.
[6] RP at 200.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] CP 146.

appoint attorney, RCW 9.94A.760; and imposed a one thousand dollar fine on the line listed for "[o]ther fines or costs."[11]

IV. ARGUMENT

1. THE ONE THOUSAND DOLLARS IMPOSED BY THE TRIAL COURT WAS A FINE NOT A DISCRETIONARY COST OR FEE

The Appellant argues that the Trial Court improperly imposed a one thousand dollar discretionary fee[12], the Appellant ignores the clear ruling by the Trial Court. The Judgement and Sentence clearly states that that the Trial Court imposed one thousand dollars in other fines **or** costs.[13] The Appellant argues that this was a one thousand dollar discretionary court cost instead of a fine.[14] However, the Trial Court was explicitly clear in its oral ruling that this was a one thousand dollar fine.[15] "12 months and a day. Mandatory LFOs. One year community custody. **$1000 fine**."[16] The Trial Court's imposition of the one thousand dollars was further memorialized as a fine by the Clerk of the Court in the Court minutes.[17] The Trial Court made it clear that it was only

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[11] *Id. at 6-7.*
[12] Brief of Appellant, at 2.
[13] CP 146 at 7.
[14] Brief of Appellant, at 2-4.
[15] RP at 200.
[16] *Id.* (*emphasis added*).
[17] CP 149.

imposing mandatory legal financial obligation and a one thousand dollar fine and not, as the Appellant argues, discretionary costs and fees. The Trial Court has clear authority to impose a one thousand dollar fine and could have imposed up to twenty thousand dollars in fines.[18]

The Trial Court did, in fact, impose fees, but such obligations were mandatory. The Trial Court imposed a five hundred dollar victim assessment, in accordance with RCW 7.68.035.[19] The Trial Court further imposed a one hundred dollar DNA collect fee, in accordance with RCW 43.43.7541.[20] Both fees are mandatory.[21] These are the only fees imposed by the Trial Court. As fines are not discretionary costs or fees this Court should deny the relief sought by the Appellant.

2. COURT ORDERED FINES DO NOT REQUIRE INQUIRY INTO A DEFENDANT'S ABILITY TO PAY

As set forth above, the one thousand dollars imposed by the Trial Court was a fine not a discretionary fee or cost. Fines are not

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[18] RCW 9.94A.550; RCW 9A.20.021; the Appellant was found guilty of violating RCW 69.50.401(2)(b) a class "B" felony.
[19] CP 146 at 6.
[20] *Id.*
[21] *State v. Hill*, 6 Wn. App. 629, 649, 431 P.3d 1044 (Div. I, 2018).

the same as discretionary fees and costs. "Washington long has recognized fines and costs as representing different obligations."[22]

> The decision to impose a fine pursuant to RCW 9A.20.021 appears to be discretionary with the trial court. However, the fact that imposing a fine under this general statute is a discretionary act **does not** make the fine a discretionary "cost" within the meaning of RCW 10.01.160(3). The definition of "costs" in RCW 10.01.160(2) **does not** include "fines." Accordingly, we hold that a fine is not a court cost subject to the strictures of RCW 10.01.160(3) and the trial court **is not required to conduct an inquiry into the defendant's ability to pay.** Therefore, a previously unchallenged fine is not subject to review initially on appeal.[23]

As the one thousand dollars imposed in this case was a fine, the Trial Court was not required to determine the Appellant's ability to pay before imposing it.[24] The Appellant's argument is unsupported.

The Appellant argues that the Trial Court was required to inquire into the Appellant's ability to pay[25], citing to RCW

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[22] *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (Div. III, 2015).
[23] *Id. at 375-76* (*emphasis added*) (*internal citates omitted*).
[24] Division II of the Court of Appeals agrees with Division III's holding in *Clark*. *See State v. Palmer*, 7 Wn. App.2d 1040, 5 (Div. II, 2019) ("[C]riminal fines are not considered costs that are subject to the statutory requirement that the sentencing court inquire into the defendant's ability to pay before imposing the criminal fine.") (GR 14.1, this decision is unpublished, nonbinding authority, and offered for any persuasive value this court deems appropriate.); *see also State v. Mata*, 1 Wn. App.2d 1063, 8 (Div. III, 2018) (GR 14.1, this decision is unpublished, nonbinding authority, and offered for any persuasive value this court deems appropriate.)
[25] Brief of Appellant at 2-4.

10.01.160(3); *State v Ramirez*[26] and *State v. Blazina*.[27] However, all of authority cited by the Appellant deals with costs, not fines. RCW 10.01.160 specifically deals with an enumerated list of costs. As stated in *Clark*, "[t]he definition of 'costs' in RCW 10.01.160(2) does not include 'fines.'"[28] *Blazina* was specifically dealing with the requirements in RCW 10.01.160[29] "The very next provision of the rule declares that a court 'shall not order a defendant to pay costs unless the defendant is or will be able to pay them' and requires trial judges to conduct inquiries concerning the defendant's financial circumstances. RCW 10.01.160(3). This was the provision at issue in *Blazina*."[30] *Ramirez* looked at the amendment to RCW 10.01.160(3) after *Blazina* and again focused on costs.[31] *Ramirez* did not address fines.

The Appellant goes on to argue that *Smith*[32] further holds that fines must be struck unless an inquiry into the Appellant's ability to pay is done.[33] The Appellant argues that *Smith* deals with

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[26] 191 Wn.2d 732, 739, 426 P.3d 714 (2018).
[27] 182 Wn.2d 827, 839, 344 P.3d 680 (2015).
[28] *Clark*, 191 Wn. App. at 376.
[29] *Id.* at 375.
[30] *Id.*
[31] *Ramirez*, 191 Wn.2d at 739.
[32] *State v. Smith*, 9 Wn. App.2d 122, 442 P.3d 265 (Div. III, 2019).
[33] Brief of Appellant at 3-4.

other fines and costs.[34] However, in the entire *Smith* decision the word "fines" is never used and the concept of fines is never discussed.[35] *Smith* deals with discretionary criminal filing fees, sheriff's fees, court appointed attorney fees, a mandatory domestic violence penalty assessment, and medical costs incurred by *Smith*.[36] None of the fees, assessments, or medical costs in *Smith* are fines. *Smith* is inapplicable here.

None of the authority cited by the Appellant deals with fines. All of the Appellant's authority deal with costs under RCW 10.01.160. RCW 10.01.160 does not deal with fines. *Clark* makes it clear that fines do not fall under RCW 10.01.160 and are not subject to an inquiry into the Appellant's ability to pay.[37] The Court should deny the relief sought by the Appellant.

3. This Court should decline review as an unpreserved claim of error.

This Court should decline review of the Appellant's appeal, as it is unpreserved. "The appellate court may refuse to review any claim of error which was not raised in the trial court."[38] RAP 2.5(a)

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[34] *Id.* at 4.
[35] *Smith*, 9 Wn. App. 2d at 124-130.
[36] *Id.*
[37] *Clark*, 191 Wn. App. at 376.
[38] RAP 2.5(a).

does provide three exceptions to this rule for claims of lack of jurisdiction, a failure to establish facts upon relief can be granted, and a manifest error affecting a constitutional right. However, "a previously unchallenged fine is not subject to review initially on appeal."[39]

The Appellant did not object at sentencing to the imposition of the one thousand dollar fine.[40] The Appellant's failure to object failed to preserve any issue for appeal regarding the fine. It is not subject to initial review on appeal. This Court should decline to review an unpreserved issue regarding this fine.

V. CONCLUSION

The State respectfully requests this Court deny relief sought by the Appellant. The Trial Court clearly imposed a one thousand dollar fine, not a discretionary cost or fee. The Trial Court has clear authority pursuant to RCW 9.94A.550 and RCW 9A.20.021 to impose such a fine. Fines are not costs or fees and are not subject to the requirements of RCW 10.01.160 or *Blazina*. The Trial Court was not required to inquire into the Appellant's ability to pay prior to imposing a fine. The Trial Court did not err. If this Court is unsatisfied

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[39] *Clark*, 191 Wn. App. at 376.
[40] RP 200-01.

with the clarify of the Judgement and Sentence, this Court can order the Trial Court to correct the scrivener's error, instead of remanding this case. This Court should uphold the sentence imposed by the Trial Court.

The State respectfully requests this Court deny the Appellant's appeal.

DATED this 8 day of June, 2020.

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