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Division III  
State of Washington  
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37151-4-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ANDREW RICE, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. If the defendant has an adequate remedy at the point the superior court clerk attempts to collect the mandatory DUI fine, should this Court exercise its discretion not to hear Rice's argument under RAP 2.5(a), because he failed to address his financial circumstance or assert indigency in the court below?

2. Did the superior court err when it ordered the defendant to pay the Public Safety Assessment fees, the Criminal Justice Funding Penalty, and the criminal conviction fee if the legislature authorized only district and municipal courts to impose these penalties, assessments and fees?

3. If the record is silent as to whether Rice petitioned the superior court regarding his inability to pay the alcohol violator fee as required by RCW 46.61.5054(1)(b), is the trial court's order requiring the defendant pay the \$250 fee a final order under RAP 2.2(a)(1), from which Rice can appeal?

## **II. STATEMENT OF THE CASE**

Andrew Rice was charged in superior court with attempt to elude, resisting arrest, and driving while under the influence. CP 80-82.

*Substantive Facts.*

On May 26, 2018, Michael Novak was at his place of employment, an entertainment club, in Spokane Valley. RP 74. Novak observed Rice inside the business and believed Rice was intoxicated. RP 76-77. Rice slurred his words and was extremely angry. RP 77. Rice exited the business, got into his vehicle, left the parking lot, and drove away in the wrong direction on Sprague Avenue, a one-way street. RP 78. Novak called 911. RP 78.

Spokane County Deputy Sheriff Samuel Turner, who was in uniform and driving a marked patrol car equipped with emergency lights and siren, was near the 10600 block of University in the Spokane Valley. RP 81, 85-86. Turner observed Rice's vehicle traveling in the wrong direction toward his patrol car. RP 86. Turner activated his emergency lights, which caused Rice to pull into a parking lot. RP 87-88. Turner and Rice made eye contact; then, Rice accelerated out of the parking lot, drove across five lanes of traffic on Sprague Avenue and into a parking lot while travelling approximately 40-miles-per hour. RP 89-90. Turner began pursuit. RP 89. There was pedestrian traffic in the area. RP 90-91. After Rice left the parking lot, Turner attempted a P.I.T.<sup>1</sup> maneuver, which was

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<sup>1</sup> A P.I.T. maneuver is designed to disable a suspect vehicle by having contact with a patrol vehicle. RP 92-93.

unsuccessful as Rice then sideswiped Turner's patrol car and drove away. RP 93. Ultimately, the pursuit ended when a different deputy employed a second P.I.T maneuver which disabled Rice's vehicle on North Raymond Road. RP 93-95, 105.

Upon contact with deputies, Rice was defiant and had to be forcibly removed from his vehicle. RP 101-02, 126. He had watery, glassy eyes, slurred speech, an "overwhelming" smell of alcohol, and poor coordination. RP 104, 126. Rice was ultimately transported to the jail where his blood was drawn by a jail nurse pursuant to a search warrant. RP 165-67. Washington State Patrol Toxicologist Brian Capron received and tested Rice's blood samples; Rice had .16 grams of ethanol or alcohol per 100ml of blood plus or minus .014 at the time of testing. RP 132, 140, 146, 155, 169.

The jury found Rice guilty of the attempt to elude and DUI, but acquitted him of the resisting arrest. RP 235-36; CP 112, 114-15. The jury also returned a special verdict finding Rice had a .15 or higher blood alcohol level within two hours of driving. RP 236.

### **III. ARGUMENT**

Rice challenges the fine, fee, penalty and assessments imposed by the superior court related to his DUI conviction claiming all are either discretionary or not authorized in superior court. At the time of sentencing, neither defense counsel nor the defendant asked the court to waive any fines,

fee, assessments, or penalty associated with the DUI conviction or to make a financial determination with respect to the defendant's ability to pay. RP 248-50, 252-53. The trial court ordered Rice pay a total of \$1,195.50 in DUI fines, costs and assessments. CP 142; RP 255.

*Standard of Review.*

An appellate court reviews de novo a trial court's interpretation and application of a statute, including legal financial obligations. *State v. Ramirez*, 191 Wn.2d 732, 740, 426 P.3d 714 (2018); *State v. Stone*, 165 Wn. App. 796, 806, 268 P.3d 226 (2012). Otherwise, appellate courts review a decision whether to impose LFOs for abuse of discretion. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991), *amended*, 837 P.2d 646 (1992).

A summary of the trial court's presumed calculation of the statutory mandatory minimum fine, fee, penalty and assessments, with a blood alcohol level at or above 0.15, is as follows:

- Minimum fine (RCW 46.61.5055(1)(b)(ii)) = \$500
  - Public Safety and Education Assessment (PSEA) (RCW 3.62.090)(1) = \$350 (70% of 500)
  - Additional PSEA (RCW 3.62.090(2)) = \$35 (50% of 70)
  - Criminal Conviction Fee (RCW 3.62.085) = \$43
  - Criminal Justice Funding Penalty (RCW 46.64.055) = \$50
  - Alcohol Violator's Fee (RCW 46.61.5054) = \$250
- TOTAL = \$1,228.

**A. THIS COURT SHOULD DECLINE TO REVIEW THE DEFENDANT’S CLAIM REGARDING THE IMPOSITION OF THE MANDATORY DUI FINE BECAUSE IT WAS NOT PRESERVED IN THE TRIAL COURT. THE DEFENDANT HAS AN ADEQUATE REMEDY AT THE POINT THE SUPERIOR COURT ATTEMPTS TO COLLECT THE FINE.**

RCW 46.61.5055(1) states, in pertinent part:

Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has no prior offense within seven years shall be punished as follows:

...

(b) Penalty for alcohol concentration at least 0.15. In the case of a person whose alcohol concentration was at least 0.15, ...

...

(ii) By a fine of not less than five hundred dollars nor more than five thousand dollars. Five hundred dollars of the fine may not be suspended unless the court finds the offender to be indigent.

RCW 46.61.5055(1) plainly uses the term “shall.” The term “shall” in a statute “imposes a mandatory requirement unless a contrary legislative intent is apparent.” *State v. Martin*, 137 Wn.2d 149, 154, 969 P.2d 450 (1999). Nothing in the language of RCW 46.61.5055(1) indicates anything other than a mandatory legislative intent for the sentencing court to impose a minimum \$500 DUI fine. The sole exception is where the trial court finds the defendant to be indigent. RCW 46.61.5055(1)(b)(ii). The statute is silent as to when this determination is to be made.

RCW 10.01.160(3) permits the imposition of discretionary legal financial obligations only if the offender has the current or likely future

ability to pay. The ability-to-pay inquiry only applies to discretionary legal financial obligations, not mandatory obligations. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *see e.g. State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992) (victim penalty assessment fees are mandatory notwithstanding defendant's ability to pay); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (victim assessment, filing fee, and DNA collection fee are mandatory obligations not subject to defendant's ability to pay).

In *Blazina*, the defendants argued for the first time on appeal that the trial judge failed to consider their ability to pay discretionary LFOs under RCW 10.01.160(3). The Supreme Court noted that trial judges have a statutory obligation to consider RCW 10.01.160(3) at sentencing and make an individualized determination of the defendant's ability to pay *discretionary* LFOs. *Id.* at 837. To that end, the Supreme Court ruled that appellate courts retain discretion whether or not to consider the issue initially on appeal. *Id.*

Here, Rice did not demand the superior court engage in any individualized inquiry into his ability to pay the mandatory DUI fine. *See* RP 247-53. This case is analogous to *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013), where the trial court imposed \$800 in LFOs, all

of them mandatory, other than potentially the “court costs” assessment of \$200. There this Court stated:

Given the likelihood that the \$200 imposed in costs was a mandatory fee and the ample protection for Mr. Kuster’s constitutional rights that exist if and when the State takes action to collect the LFOs, we decline to consider this assignment of error further.

*Id.* at 426.

In that regard, RCW 9.94A.760(5) authorizes the county clerk “to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.” The Constitution does not require an inquiry into ability to pay at the time of sentencing. Instead the relevant time is the point of collection and when sanctions are sought for nonpayment.” *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). “It is at the point of enforced collection ..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency.” *Curry*, 118 Wn.2d 911 (internal quotations omitted). In the present case, there is nothing in the record to indicate any enforcement action has been taken by the clerk’s office.

This Court should not exercise its discretion to hear the issue related to the mandatory DUI fine considering the defendant’s failure to address

this issue with the trial court. Rice certainly has a remedy if he is indigent at the point the clerk of court attempts to collect the fine.

**B. THIS COURT SHOULD REMAND TO THE TRIAL COURT TO STRIKE THE PUBLIC SAFETY AND EDUCATION ASSESSMENT, CRIMINAL JUSTICE FUNDING PENALTY AND THE CRIMINAL CONVICTION FEE AS SUCH COSTS ARE APPLICABLE ONLY IN DISTRICT AND MUNICIPAL COURTS.**

1. Public Safety and Education Assessment.

RCW 3.62.090(1) states:

There shall be assessed and collected in addition to any fines, forfeitures, or penalties assessed, other than for parking infractions, by all courts organized under Title 3<sup>2</sup> or 35 RCW<sup>3</sup> a public safety and education assessment equal to seventy percent of such fines, forfeitures, or penalties, which shall be remitted as provided in chapters 3.46, 3.50, 3.62, and 35.20 RCW. The assessment required by this section shall not be suspended or waived by the court.

Here, the plain language of the statute requires district courts and municipal courts impose the public safety and education assessment in all applicable cases. However, Rice was convicted in superior court. Superior courts have original jurisdiction “in all criminal cases amounting to felony”

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<sup>2</sup> RCW 3.02.010 and RCW 3.30.030 state a Title 3 court is a court of limited jurisdiction which are referred to as district courts.

<sup>3</sup> See RCW 3.50.020 stating that the municipal courts shall have exclusive original jurisdiction over traffic infractions arising under city ordinances and exclusive original criminal jurisdiction of all violations of city ordinances duly adopted by the city. RCW 3.50.010 and RCW 35.20.010 authorizes a city or town to provide for a municipal court. RCW 35.20.250 confers concurrent jurisdiction with superior court and district court.

and “in all cases of misdemeanor not otherwise provided for by law.” Const., art. IV, § 6; RCW 2.08.010. District and municipal courts, on the other hand, have concurrent jurisdiction with the superior court over all misdemeanors and gross misdemeanors. *See* RCW 3.66.060; RCW 35.20.250. Notwithstanding, the statute unambiguously makes clear that the legislature intended the fee be imposed only in district or municipal court. The trial court erred by imposing the \$350 assessment for a superior court conviction.

2. Additional Public Safety and Education Assessment.

RCW 3.62.090(2) states:

There shall be assessed and collected in addition to any fines, forfeitures, or penalties assessed, other than for parking infractions and for fines levied under RCW 46.61.5055, and in addition to the public safety and education assessment required under subsection (1) of this section, by all courts organized under Title 3 or 35 RCW, an additional public safety and education assessment equal to fifty percent of the public safety and education assessment required under subsection (1) of this section, which shall be remitted to the state treasurer and deposited as provided in RCW 43.08.250. The additional assessment required by this subsection shall not be suspended or waived by the court.

As stated above, the assessment fee of \$35 is only applicable if a defendant is convicted of a DUI related offense in district or municipal court. The trial court erred by imposing it for a conviction in superior court.

3. Criminal Justice Funding Penalty.

RCW 46.64.055(1) provides:

(1) In addition to any other penalties imposed for conviction of a violation of this [Title 3. District Courts – Courts of Limited Jurisdiction] that is a misdemeanor, gross misdemeanor, or felony, the court shall impose an additional penalty of fifty dollars. The court may not reduce, waive, or suspend the additional penalty unless the court finds the offender to be indigent.

Here, the plain language of the statute allows only district courts and municipal courts to impose a criminal justice funding penalty of \$50 in all applicable cases. The trial court erred by imposing this penalty in superior court.

4. Criminal Conviction fee.

RCW 3.62.085 states, in pertinent part:

Upon conviction or a plea of guilty in any court organized under [Title 3. District Courts – Courts of Limited Jurisdiction] or Title 35 RCW, a defendant in a criminal case is liable for a fee of forty-three dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

Here, the plain language of the statute requires only district courts and municipal courts impose a conviction fee of \$43 in all applicable cases. The trial court erred by imposing the conviction fee pursuant to a superior court conviction.

This Court should remand to the superior court to strike the above assessments, penalty and fee from the judgment and sentence and a recalculation of the LFOs. 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 TRIAL COURT'S ORDER REQUIRING THE DEFENDANT TO PAY THE ALCOHOL VIOLATOR FEE IS NOT APPEALABLE AS A FINAL ORDER UNDER RAP 2.2(A)(1).**

RCW 46.61.5054(1)(a) and (b) state, in pertinent part:

(1)(a) In addition to penalties set forth in RCW 46.61.5051 through 46.61.5053 until September 1, 1995, and RCW 46.61.5055 thereafter, a two hundred fifty dollar fee shall be assessed to a person who is either convicted, sentenced to a lesser charge, or given deferred prosecution, as a result of an arrest for violating RCW 46.61.502, 46.61.504, 46.61.520, or 46.61.522.

(b) Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay.

RAP 2.2(a)(1) allows for direct appeal as a matter of right of the "final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs." A final judgment is one that settles all the issues in a case. *In re Det. of Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999), *as amended on denial of reconsideration* (Dec. 22, 1999).

In the instant case, Rice is precluded from appealing the alcohol violator fee imposed under RCW 46.61.5054(1)(a), and as contained in the judgment and sentence, because it is not a final order under RAP 2.2(a)(1); the fee is conditional and subject to suspension or waiver under

RCW 46.61.5054(1)(b) only after Rice files a verified petition with the superior court.<sup>4</sup> The record does not contain any indication that Rice has petitioned the superior court to suspend all or part of the alcohol violator's fee. Since the defendant has not filed the necessary paperwork with the superior court as a condition precedent for the superior court to review his financial circumstances regarding the alcohol violator fee, the alleged error is not appealable.

Nor is there any reason to grant discretionary review. This Court may grant discretionary review under RAP 2.3(a) and (b). However, Rice's claim does not meet the criteria set forth in RAP 2.3(b). Rice has not shown that the trial court has committed any obvious error or probable error, departed from the usual course of judicial proceedings, or certified or found that the parties have stipulated that the order involves a controlling question of law needing clarification.

#### **IV. CONCLUSION**

This Court should exercise its discretion and refuse to hear Rice's argument regarding the mandatory DUI fine (\$500) as he failed to preserve

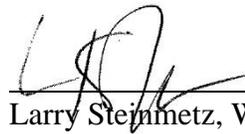
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<sup>4</sup> See e.g. *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), as amended (Dec. 14, 2009) (an order denying a request to terminate LFOs was not final because it was conditional and the court could modify the obligations at any time). Similarly, here, the amount of payment can be changed only after Rice files a verified petition with the superior court.

any alleged error under RAP 2.5(a). In addition, this Court should remand to the trial court to strike the Public Safety and Education Assessment fees (\$385 for both assessments), the Criminal Justice Funding Penalty (\$50), and the criminal conviction fee (\$43) from the judgment and sentence. Finally, the alcohol violator fee (\$250) is not appealable under RAP 2.2(a)(1) as a final order because the defendant has not fulfilled his obligation to file a verified petition with the superior court requesting suspension or waiver of the fee based upon his financial circumstances.

Dated this 7 day of April, 2020.

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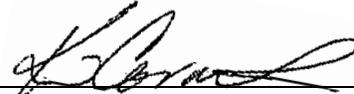
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I certify under penalty of perjury under the laws of the State of Washington, that on April 7, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
andrea@2arrows.net

4/7/2020  
(Date)

Spokane, WA  
(Place)

  
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(Signature)

**SPOKANE COUNTY PROSECUTOR**

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