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NO. 89028-5

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS BLAZINA, PETITIONER

Review of Court of Appeals # 42728-1-II;
Appeal from the Superior Court of Pierce County
No. 08-1-02197-3

# SUPPLEMENTAL BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

ORIGINAL

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A. ISSUES PERTAINING TO THE REVIEW AS ACCEPTED BY THE COURT.

1. Whether the Court of Appeals abused its discretion, under RAP 2.5, in declining to review the issue of imposition of legal financial obligations, where the defendant did not preserve the issue for appeal?

2. Whether the issue of imposition of legal financial obligations is ripe for review where the State has yet to set a payment schedule or sought to collect the debt?

3. Whether the trial court complied with RCW 10.01.160(3) when, before imposing the financial obligations, it considered the defendant's ability to pay?

4. Whether, based upon all the information in the record, the trial court committed clear error in finding that the defendant has the ability or likely future ability to pay the legal financial obligations ordered?

B. STATEMENT OF THE CASE.

1. Procedure

On May 7, 2008, the Pierce County Prosecuting Attorney's Office (State) charged Nicholas Blazina, defendant, with one count of second

degree assault. CP 1. This case was not brought to trial until June 2011 due to the defendant's incarceration in Alabama. RP 6.

This case was assigned for trial to the Honorable Judge Edmund Murphy, and trial began on June 14, 2011. RP 142. After hearing all of the evidence, a jury found the defendant guilty as charged on October 4, 2011. RP 499. The defendant was sentenced to 20 months in custody with 371 days of credit for time served prior to sentencing. CP 33. He was also ordered to pay $47,145.69 in restitution as well as $3,387.87 in other legal financial obligations (LFOs). CP 31.

The Court of Appeals affirmed the conviction and sentence. ***State v. Blazina***, 174 Wn. App. 906, 301 P. 3d 492 (2013). Shortly thereafter, Division I of the Court of Appeals decided ***State v. Calvin***, - Wn. App.-, 302 P. 3d 509 (2013), the result of which differed from ***Blazina***. This Court accepted review.

2. Facts

Around 9 p.m. on May 1, 2008, the defendant arrived with friends at Qz Restaurant and Lounge in Graham, WA to meet with other friends. RP 181-184; RP 212- 214; RP 369.

Around the same time, an unrelated group of people arrived at the bar. RP 263. This group included the victim, Keith Ainsworth, and his

friends. RP 260. Both groups consumed food and alcohol as the night progressed. RP 265.

Around midnight, as people from both groups were leaving the bar, the defendant assaulted the victim, Ainsworth, without provocation as the two crossed paths on the dance floor. RP 190; RP 298. Ainsworth immediately fell to the ground where he lay bleeding and unconscious. *Id.*

The victim was taken to Madigan Hospital where he was treated for a fractured jaw, lacerated tongue, and four broken teeth. RP 274-275. He regained consciousness three days later at Harborview Medical Center. RP 275. He had no recollection about the night. RP 260. As a result of the assault, he was out of work for a month and underwent six or seven surgeries. RP 276.

## C. ARGUMENT.

### 1. THE TRIAL COURT DID NOT ERR IN ORDERING THE DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS WHEN THE ISSUE IS NEITHER PRESERVED FOR APPEAL NOR RIPE FOR REVIEW.

#### a. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to

establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In ***Blazina***, 174 Wn. App. at 911, Division II of the Court of Appeals declined to review the LFO issue for the first time on appeal. *See also*, ***State v. Lundy***, -Wn. App.-, 308 P.3d 755, 763 (2013); ***State v. Ralph***, 175 Wn. App. 814, 827, 308 P.3d 729 (2013) (Johanson, A.C.J., concurring in both cases). In ***Calvin***, *supra*, Division I decided to exercise its discretion differently. Neither Court erred in choosing to grant or deny review of the issue.

In this case, the defendant did not claim any of the three circumstances listed under RAP 2.5(a) in which an issue could be raised for the first time on appeal. The defendant made no objection to the imposition of LFO's. RP 256. Therefore, the defendant did not properly preserve this issue for appeal. The Court of Appeals did not abuse its discretion in declining to review the issue substantively.

b. <u>The issue is not ripe for review.</u>

Trial courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(4):

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* ***State v. Blank***, 131 Wn.2d 230, 930 P.2d 1213 (1997); ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of

whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d 230, 241–242.

Here, the judgment and sentence recites that the court considered or, in the language of the statute, "took account" of, the defendant's present and likely future financial resources:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay future legal financial obligations, including the defendant's financial resources and the likelihood that that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 29[1]. That recitation satisfied the prerequisites for imposing discretionary financial obligations.

The "boilerplate" finding of ability to pay on the Judgment and Sentence is likely an effort to standardize compliance with RCW 10.01.160(3) and ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992). As

[1] The second sentence is not contained in the corresponding paragraph in the standard Judgment and Sentence form produced by the Office of Administrator of the Courts. *See* CrR 7.2(d); WPF CR 840400 P, ¶ 2.5. (This form may be viewed or downloaded at www.courts.wa.gov/forms)

the Court of Appeals observed in ***Calvin***, 302 P. 3d at 521, and ***Lundy***, 308 P. 3d at 760, it is unnecessary under the statute. Because it is unnecessary, its inclusion creates confusion and should probably be removed from the form judgment and sentence. *See* ***Lundy***, at 760, n. 7.

Confusion and caution by the trial courts stems from the language in RCW 10.01.160(3). The first sentence says that the court "shall not" order costs "unless the defendant *is* or *will be able* to pay them" (emphasis added). While ***Curry***, at 916 and numerous cases following have stated that the court need not enter specific findings, trial courts are left to ask themselves how to order costs without "finding" that the defendant can or will be able to pay. RCW 10.01.160(4) permits a defendant to seek relief from payment, based upon financial hardship. However RCW 10.01.160(3) would seem to bar the order in the first place, absent a finding.

In ***Lundy***, the Court notes that this confusion also stems from a misreading of the fifth factor in ***Curry***, 118 Wn.2d at 915: "A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end." Division II points out that ***Curry*** does *not* say that "a repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations." 308 Wn. App. at 760, n.9.

Although the trial court also "found" that the defendant had the present or likely future ability to pay the financial obligations, that conclusion or finding is immaterial and does not warrant relief even if it is not supported by the record. *See* ***State v. Caldera***, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

The defendant has the burden to show indigence. *See* RCW 10.01.020; ***Lundy***, 308 Wn. App. at 759, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia,*** 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. Here, the State has not attempted to collect legal financial obligations from the defendant nor established when he is expected to begin repayment of these obligations. *See* CP 31. The State

has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. *See* ***Lundy***, 308 P. 3d at 761.

The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature. The challenge to the order requiring payment of legal financial obligations is not ripe for review.

c. The trial court did not err in ordering the defendant to pay legal financial obligations.

Where the issue is considered substantively, Divisions I and II do not really differ on the application of the law. The trial court in ***Blazina***, and Division I in ***Calvin***, reach different results, but on different facts and evidence.

Different components of defendant's financial obligations require separate analysis because some LFO's are mandatory and some are discretionary. ***State v. Baldwin,*** 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); ***State v. Curry,*** 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992). The sentencing court's determination of a defendant's resources and

ability to pay legal financial obligations is reviewed under the clearly erroneous standard. ***Baldwin***, 63 Wn. App. at 312. However, the decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. ***Baldwin***, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against burden of his obligation before imposing attorney fees. *Id.*; *see also* ***State v. Wimbs***, 68 Wn. App. 673, 847 P.2d 8 (1993), *rev'd on other grounds by*, ***State v. McGee***, 122 Wn.2d 783, 864 P.2d 912 (1993).

Pursuant to RCW 10.01.160, the court may require defendants to pay *court costs* and other assessments associated with bringing the case to trial. The statute includes constitutional safeguards:

> (1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.
>
> ...
>
> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(1), (4).

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

Since ***Blazina*** was decided, Division II of the Court of Appeals has published another case discussing the same LFO issue: ***State v. Lundy***, - Wn. App.-, 308 P.3d 755 (2013).

As in ***Lundy***, the defendant in the present case does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. *See* RCW 9.94A.505, RCW 9.94A.753(4) and (5); ***Lundy***, at 759. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g.*, ***State v. Kuster***, 175 Wn. App. 420, 306 P.3d 1022 (2013). Therefore, in the present case, the review ultimately concerns the

discretionary amounts of $400 in defense counsel recoupment, and $2087.87 extradition fees.

Here, the defendant argued that the trial court erred when it concluded that he had the present or future ability to pay mandatory and discretionary LFOs. The defendant relied on ***Bertrand*** for the proposition that the record does not contain evidence that demonstrates the defendant's present or future ability to pay LFOs. COA Brief of Appellant 12, citing ***State v. Bertrand,*** 165 Wn. App. 393, 405, 267 P.3d 511 (2011). The Court in ***Bertrand*** found error in the trial court's finding that Bertrand had the present or future ability to pay LFOs because she was disabled and the record contained no evidence to support its finding.

Division I of the Court of Appeals does not actually conflict with Division II in applying the law in these cases. Recently, in ***State v. Parmelee,*** 172 Wn. App. 899, 917, 292 P.3d 799 (2013), the defendant argued that the trial court erred by imposing non-mandatory legal financial obligations without finding that he had any ability to pay. Division I rejected this argument, holding that the court's discretionary LFO order did not require findings (citing ***Curry***, 118 Wn.2d at 916) and that the issue of ability to pay would be considered when the State tried to collect (citing ***Blank***, 131 Wn.2d at 242). *Id.*, at 918.

The holding in ***Calvin*** that the trial court's ruling was "clearly erroneous" when the trial court found that an unemployed carpenter could likely pay the LFO's in the future depends on facts and evidence. While the factual conclusion is open to debate, the Court relied upon ***Baldwin*** and ***Curry*** for the legal principles involved. ***Calvin***, 302 P.3d at 521. In ***Calvin***, the Court correctly noted that the trial court need not make a finding, but only take the defendant's financial resources "into account." *Id.*

In factual contrast, in the present case, the record shows that the defendant has the present and future ability to pay his LFOs. Unlike ***Bertrand***, the record shows that the defendant is able-bodied. Among other things, the record shows that the defendant graduated from Fife High School in 2001 and is of average intelligence. RP 365; RP 521. The defendant received a football scholarship to attend college. While serving a sentence in Alabama, he earned certificates for completing a substance abuse program and tutoring in adult education classes. RP 521; RP 523. The defendant is only 29 years old, has many friends and family, and has no children to support. RP 523-524. At sentencing, he expressed a desire to start his life over in a positive manner after release from prison. RP 523. According to a letter to the court from the defendant, he aspired to do post-graduate work in psychology, with the goal of becoming a counselor or social worker to inmates. CP 48.

This Court should affirm the trial court's imposition of LFOs because in conjunction with statutory authority which compels the court to impose LFOs, the court properly found that the defendant has the present or future ability to pay LFOs. There was ample evidence in the record for the court to determine that the defendant has the ability to pay his LFOs. The record shows that the defendant is educated, demonstrates potential, and is supported by many friends and family. Therefore, with sufficient evidence in the record of the defendant's present and future ability to pay costs, the court properly balanced the defendant's ability to pay against burden of his obligations before it imposed LFOs. The defendant fails to demonstrate that the trial court's order was "clearly erroneous."

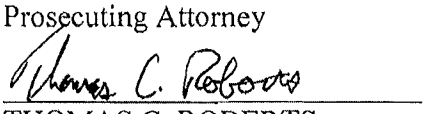
D. CONCLUSION.

***State v. Blazina*** and ***State v. Calvin*** do not really conflict in terms of the law. ***Blazina*** is correctly decided and should be affirmed. Although these cases do not conflict, they, and subsequent cases like ***Lundy***, illustrate the confusion in the trial courts regarding full compliance with RCW 10.01.160(3) and ***State v. Curry***. The State respectfully requests that

the Court affirm the judgment in ***Blazina*** and provide guidance regarding the meaning and application of RCW 10.01.160(3) [for the lower courts].

DATED: October 31, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB #17442

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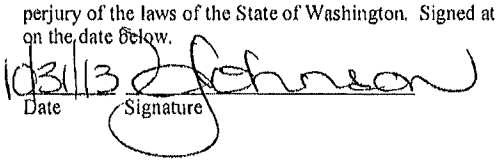

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Thomas C. Roberts, WSB No. 17442
(253)798-4932
trobert@co.pierce.wa.us

Attached is the State's Supplemental Brief