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FILED
March 11, 2016
Court of Appeals
Division I
State of Washington

NO. 73953-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHAD WHITNEY,

Appellant.

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

The Honorable Michael E. Rickert, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Pages
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	5
1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN WHITNEY’S BAIL JUMPING CONVICTION.	5
2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER WHITNEY’S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LFOs.	9
3. APPEAL COSTS SHOULD NOT BE IMPOSED.	15
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	15
<u>State v. Adamy</u> 151 Wn. App. 583, 213 P.3d 627 (2009).....	14
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	10, 11, 12, 14, 15, 16
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	5
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	7, 9
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	14
<u>State v. Mahone</u> 98 Wn. App. 342, 989 P.2d 583 (1999).....	15
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003).....	13
<u>State v. Sinclair</u> ___ P.3d ___, 2016 WL 393719 (filed January 27, 2016).....	15
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997) <u>cert. denied</u> 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).....	13
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	13

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 5

Jackson v. Virginia
443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 5

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 13

RULES, STATUTES AND OTHER AUTHORITIES

RAP 2.5..... 12

RAP 14..... 15

RCW 9.94A.760 9, 10

RCW 9A.176.170 8

RCW 9A.76.170 6

RCW 10.01.160..... 1, 9, 11, 14, 15

RCW 10.46.190..... 9

RCW 10.73.160..... 15

RCW 36.18.016..... 9

RCW 43.43.690..... 10

A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's conviction for bail jumping.

2. The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant's current and future ability to pay.

Issues Pertaining to Assignments of Error

1. An essential element of bail jumping is that the defendant was "released by court order" before failing to appear. At appellant's trial, the State failed to produce a release order or prove that one existed. Should appellant's conviction be reversed for lack of sufficient evidence?

2. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering appellant's current and future ability to pay?

3. Was appellant's trial counsel ineffective for failing to object to imposition of the discretionary LFOs?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Skagit County Prosecutor's Office charged Chad Whitney with: (count 1) possession of a controlled substance (methamphetamine); (count 2) identify theft in the second degree; and (count 3) bail jumping. CP 86-87.

A jury convicted Whitney on counts 1 and 3 and acquitted him on count 2. CP 88-90. The Honorable Michael Rickert imposed concurrent standard range sentences of 24 months for possession of a controlled substance and 33 months for bail jumping. CP 56.

Just as Whitney was found to be indigent for purposes of trial, he also was declared indigent for appeal. Supp. CP ____ (sub no. 109, Order of Indigency); Supp. CP ____ (sub no. 106, Motion for Order of Indigency). Despite this, in addition to imposing mandatory LFOs, Judge Rickert also ordered Whitney to pay non-mandatory LFOs. CP 57; 3RP 17-18.

2. Substantive Facts

On the evening of September 12, 2012, Mount Vernon Police Officers Paul Shaddy and David Deach responded to a call

reporting a noise disturbance. 2RP¹ 10-11, 45-46. According to the caller, someone was working on a vehicle, revving the engine loudly, and racing it up and down the street. 2RP 11, 42, 46.

Officers arrived in the area and spotted an individual working under the hood of his truck. 2RP 14, 46. According to officers, they asked the individual for his name and he identified himself as "Corey Whitney." 2RP 14-15, 46. Officers also asked if Whitney had any photo identification, and Whitney said he did inside his residence. 2RP 16. Officers ran the name "Corey Whitney" through dispatch and discovered several outstanding warrants. Whitney was placed under arrest. 2RP 17-18, 46-48.

In a search incident to arrest, officers located a glass smoking pipe with white residue in Whitney's rear pants pocket. They also found a capped syringe. 2RP 18-20, 48-49. On the drive to Skagit County Jail, Whitney indicated his name was "Chad Whitney" and that Cory Whitney is his brother.² 2RP 21-22, 51. An officer confirmed through a photo on file that the man in his patrol car was Chad Whitney. 2RP 22-23. Dispatch ran Chad

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – February 25, 2015 and June 12, 2015; 2RP – March 9, 2015; 3RP – March 10, 2015.

Whitney's name and determined that he also had outstanding warrants. 2RP 22. The white residue on the pipe subsequently tested positive for the presence of methamphetamine. 2RP 59.

The State's unsuccessful identify theft charge was based on officers' allegations that Whitney had provided his brother's name. CP 87.

The bail jumping charge stemmed from Whitney's failure to appear for an omnibus hearing on September 20, 2013. CP 87. In support of this charge, the prosecution merely submitted five documents from the court file. 2RP 33-36. The first is a copy of the original information in the case charging Whitney with possession of methamphetamine. 2RP 33-34; exhibit 11. The second is an agreed order, filed September 5, 2013, requiring Whitney's presence at the next hearing in the case, scheduled for September 20, 2013. 2RP 34-35; exhibit 12. The third is a copy of the clerk's minutes from September 20, which indicate Whitney did not appear. 2RP 34; exhibit 13. The fourth is a copy of an order, dated September 20, directing the clerk to issue a bench warrant for Whitney's arrest. 2RP 35; exhibit 14. And the fifth is a copy of

² Whitney denied providing officers with his brother's name. He testified that he and his brother look alike and officers had assumed he was his brother until he corrected them on way to the jail. 2RP 67-68.

the resulting bench warrant issued that same day. 2RP 35-36; exhibit 15.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN WHITNEY'S BAIL JUMPING CONVICTION.

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Under Washington law:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1).

Whitney's jury was instructed that, generally:

A person commits the crime of bail jumping when he fails to appear as required after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court order.

CP 34.

Although one can commit this crime either "having been released by court order" or "admitted to bail," prosecutors proceeded only on the theory Whitney had been released by court order. The "to convict" instruction from his trial provides:

To convict the defendant of the crime of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the September 20, 2013, the defendant failed to appear before a court;
- (2) That the defendant was charged with possession of a controlled substance, Methamphetamine;
- (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
- (4) That any of these acts occurred in the State of Washington.

CP 35. Thus, the State was required to prove Whitney's release by court order. See State v. Hickman, 135 Wn.2d 97, 99, 102, 954 P.2d 900 (1998) (under law of the case doctrine, the "to convict" instruction defines the State's proof requirements where neither party objects to that instruction); 2RP 85-88 (no objection to instruction, which State proposed).

Proof of element (3) – specifically, proof that Whitney "had been released by court order" – is missing in this case. None of the exhibits concerning Whitney's absence from the September 20, 2013, omnibus hearing are release orders. See exhibits 11-15. Moreover, the only prosecution witness to discuss these exhibits (Officer Paul Shaddy) did not provide any information having to do with the circumstances of Whitney's release from custody. See 2RP 10-43.

Indeed, Whitney himself was the only individual to mention the circumstances of his release. When asked about why he missed court on September 20, Whitney responded:

Well, I missed court because, at the time I had warrants, and I had more than one warrant. So I had more than one court date. And when I got booked into the jail here, and they gave me all my court dates after I got PR'd. I simply – I just missed court. I mean, I got PR'd. I didn't get bailed out. I didn't get to post bail or nothing. I didn't even know how I could

be charged with a bail jumping for missing court. And missing court was a honest mistake. Like I just mistracked the day.

I'm not saying, you know, that -- I smoke methamphetamine and I'm guilty of having a meth pipe. But in my warrants I was arrested on, I'm not guilty of any theft, and I'm not guilty of bail-jumping. I just missed court, and they assumed I was my brother.

2RP 69.

Defense counsel noted that Whitney said he did not post bail, and Whitney responded, "None. I had already promised to reappear. They put out people all the time because the jail is packed." 2RP 69-70.

Ultimately, the circumstances under which Whitney was released from jail are not apparent, although his testimony implies he may have been released directly from jail without having to post any bond. Whatever the circumstances, however, the State failed to prove an element beyond a reasonable doubt. Although the State produced the September 15 order requiring Whitney's presence at the September 20 hearing, it produced no document or testimony establishing that Whitney's release on the methamphetamine charge was by court order. Indeed, RCW 9A.176.170(1), which also refers to the release of defendants

“admitted to bail,” establishes that not all releases occur pursuant to a court order.

Because the State failed to establish an essential element of bail jumping, Whitney’s conviction for that offense must be dismissed with prejudice. See Hickman, 135 Wn.2d at 103 (dismissal with prejudice proper remedy for failure of proof).

2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER WHITNEY’S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LFOs.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless “the defendant is or will be able to pay them.” In determining LFOs, courts “shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

The trial court imposed several discretionary LFOs. The court imposed a \$250.00 jury demand fee. CP 57; RCW 36.18.016(3)(b) (“Upon conviction in criminal cases a jury demand charge of . . . two hundred fifty dollars for a jury of twelve *may be imposed* as costs under RCW 10.46.190.” (emphasis added)). It imposed a \$100.00 obligation for “Drug enforcement fund to

SCIDEU.” CP 57 (merely citing RCW 9.94A.760). And it imposed a \$100.00 crime lab fee. CP 57; RCW 43.43.690(1) (authorizing waiver of fee if person does not have ability to pay).

Whitney is currently serving a 33-month sentence in the Department of Corrections. He was declared indigent for purposes of trial and appeal, and there is no indication he has any significant assets or prospects for employment. Judge Rickert failed to make an individualized inquiry into his present and future ability to pay before imposing the discretionary LFOs. In doing so, he exceeded his statutory authority, and these LFOs should be vacated.

The Washington Supreme Court recently recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836; 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. “The court’s long-term involvement in defendants’ lives inhibits reentry” and

“these reentry difficulties increase the chances of recidivism.” Id. at 837.

The Blazina court thus held that RCW 10.01.160(3) requires trial courts to first consider an individual’s current and future ability to pay before imposing discretionary LFOs. Id. at 837-39. This requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” Id. at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court further directed courts to look to GR 34 for guidance. Id. at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then “courts should seriously question that person’s ability to pay LFOs.” Id. at 839. Only by conducting such a “case-by-case analysis” may courts “arrive at an

LFO order appropriate to the individual defendant's circumstances.”
Id. at 834.

At sentencing, Judge Rickert failed to make an individualized inquiry into Whitney's current or future ability to pay LFOs. Instead, he checked a box next to boilerplate language in the judgment indicating that Whitney has the current or future ability to pay LFOs. See CP 55. Judge Rickert also found, based on nothing beyond the prosecutor's request that he find, that “Mr. Whitney is able bodied and able to pay the legal financial obligations.” 3RP 17-18. Blazina holds this is insufficient to justify a discretionary LFO. 182 Wn.2d at 838. This Court should accordingly vacate the discretionary LFOs and remand for resentencing. Id. at 839.

In response, the State may ask this court to decline review of the erroneous LFO order in the absence of an objection. The Blazina court held that the Court of Appeals “properly exercised its discretion to decline review” under RAP 2.5(a). 182 Wn.2d at 834. The court nevertheless concluded that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Id. Asking this court to decline review would essentially ask this court to ignore the serious consequences of LFOs. This court should

instead confront the issue head on by vacating Whitney's discretionary LFOs and remanding for resentencing.

A second reason this Court should review the issue is that, assuming it is otherwise waived, Whitney was denied his right to the effective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). Prejudice occurs when there is a reasonable probability the outcome would have

been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not insisting that the judge comply with the requirements of RCW 10.01.160(3) regarding discretionary financial liabilities. See, e.g., State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel's failure in this regard constitutes deficient performance.

Counsel's failure to object to discretionary LFOs was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in a remission hearing to set aside LFOs, Whitney will bear the burden of proving manifest hardship, and he will have to

do so without appointed counsel. RCW 10.01.160 (4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Whitney incurs no possible benefit from LFOs. Given his indigency (as established by undersigned counsel's appointment on appeal) there is a substantial likelihood the trial court would have waived all discretionary LFOs had it properly considered his current and future ability to pay. Whitney's constitutional right to effective assistance of counsel was violated. Therefore, this court should vacate the discretionary LFOs on this alternative basis.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Whitney to be indigent and entitled to appointment of appellate counsel at public expense. If Whitney does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, ___ P.3d ___, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus,

this Court has ample discretion to deny the State's request for costs.

As discussed above, trial courts must make individualized findings of current and future ability to pay before they impose LFOs. Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Whitney's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Without a basis to determine that Whitney has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

The State failed to produce an order of release. Whitney's conviction for bail jumping should be vacated.

This Court also should vacate the discretionary LFOs and remand for proper consideration of Whitney's financial circumstances.

Finally, even if Whitney is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the State ask for them.

DATED this 11th day of March, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 73953-1-I
)	
CHAD WHITNEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHAD WHITNEY
DOC NO. 331226
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH 2016.

X *Patrick Mayovsky*