

NO. 46028-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIELLE GRAVES,

Appellant.

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

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. At the sentencing hearing, contrary to RCW 10.10.160(3), the trial court imposed non-mandatory legal financial obligations without considering Ms. Graves's financial resources and the burden payment of costs would impose on her.

2. In the absence of substantial evidence, the trial court erred in entering finding 2.5 of the Judgment and Sentence purporting to find Ms. Graves had the present or future ability to pay discretionary legal financial obligations imposed by the court.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A sentencing court shall not order a defendant to pay non-mandatory legal financial obligations unless the defendant can or will be able to pay them. In determining the amount and method of payment of non-mandatory legal financial obligations, the court must take account of the financial resources of the defendant, and the nature of the burden that payment of costs will impose on the defendant. Did the trial court err in imposing non-mandatory legal financial obligations on Ms. Graves when it failed to make any inquiry into Ms. Graves's individual financial circumstance?

C. STATEMENT OF THE CASE

Ms. Graves was tried on an amended information charging delivery of methamphetamine within 1,000 feet of a school bus stop.¹ CP 5-6. Delivery of Methamphetamine is a Class B felony.²

Ms. Graves stipulated at trial that the substance the police received from informant Dale Nease after he was in Ms. Graves's house was methamphetamine, and that her house was located within 1,000 feet of a school bus stop. CP 3; RP 2A 257. The only issue at trial was whether informant Mr. Nease received the methamphetamine from Ms. Graves. RP 2B 372-416.

A jury found Ms. Graves guilty as charged. CP 7, 8; RP 2B 422.

There was no discussion or inquiry into Ms. Graves's financial situation at sentencing. RP 2B 437-81.

In the Judgment and Sentence, the trial court entered the following boilerplate language:

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood 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. RCW 9.94A.753.

CP 12.

¹RCW 69.50.401(1); RCW 69.50.401(2)(b); RCW 69.50.435(1)(c)

²RCW 69.50.401(2)(b)

Ms. Graves appeals all portions of her Judgment and Sentence. CP
23.

D. ARGUMENT

THE TRIAL COURT COMMITTED A REVERSIBLE
SENTENCING ERROR WHEN IT FAILED TO CONSIDER MS.
GRAVES'S ABILITY TO PAY AS REQUIRED BY STATUTE.³

A trial court may impose costs “authorized by law” when sentencing an offender for a felony. RCW 9.94A.760. However, the sentencing court must consider an individual’s financial circumstances and conclude that she has the ability or likely future ability to pay before imposing legal financial obligations (LFOs). RCW 10.01.160(3).

The court adopted boilerplate findings in the Judgment and Sentence addressing Ms. Graves’s ability to pay:

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood 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. RCW 9.94A.753.

³ On February 11, 2014, the Washington Supreme Court heard oral argument in *State v. Blazina*, Supreme Court No. 89028-5, which was consolidated with *State v. Colter*, Supreme Court No. 89109-5. The Supreme Court opinion in *Blazina* will likely be dispositive here. In its ruling, this Court acknowledged that it had previously allowed an appellant to raise imposition of legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013). However, this Court held that RAP 2.5(a) did not compel it to allow the issue to be raised in every case and declined to allow Mr. Blazina to raise imposition of LFOs for the first time on appeal.

CP 12.

The record here established that the court did not make any inquiry into Ms. Graves's finances and, thus, did not make any individualized determination regarding Ms. Graves's financial circumstances before it imposed LFOs. RP 2B 437-81. The sentencing court imposed the following LFOs: \$500 victim assessment, \$200 criminal filing fee, \$250 jury demand fee, \$150 incarceration fee, \$825 court appointed attorney fee, \$500 drug enforcement fund fee, \$100 crime lab fee, and \$100 DNA fee.⁴ CP 13. Because consideration of a defendant's financial resources is statutorily required as a condition precedent to imposing LFOs, the trial court's imposition of LFOs was erroneous and the validity of the order may be raised for the first time on appeal.

1. A defendant may raise the issue of imposition of legal financial obligations for the first time on appeal.

Although the general rule under RAP 2.5(a) is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999); see also *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678

⁴ Ms. Graves does not challenge imposition of the following mandatory legal financial obligations: the \$500 victim penalty assessment pursuant to RCW 7.68.035; the criminal filing fee pursuant to RCW 36.18.020(2)(h); the jury demand fee pursuant to RCW 10.46.190; and the \$100 DNA collection fee pursuant to RCW 43.43.7541.

(2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). A defendant may challenge for the first time on appeal the imposition of a criminal penalty on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

RCW 10.01.160(3) provides:

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.

The word “shall” establishes that the requirement is mandatory.

State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002), *review denied*, 148 Wn.2d 1004 (2003). Before imposing discretionary LFOs, the sentencing court has an affirmative duty to make an inquiry into the defendant’s individual situation to determine her ability to pay. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). Therefore, the trial court was without authority to impose LFOs as a condition of Mr. Graves’s sentence because it did not first take into account her financial resource and the burden of payments.

While formal findings supporting the trial court’s decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the

defendant's individualized financial circumstances and made an individualized determination that she has the ability or likely future ability to pay. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). Here, the record did not establish that the trial court considered Ms. Graves's financial resources at any point. The trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The boilerplate finding in the Judgment and Sentence does not establish compliance with the requirements of RCW 10.01.160(3). CP 12. A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. *See e.g., In re Dependency of K.N.J.*, 171 Wn.2d 568, 580-81, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); *Hardman v. Barnhart*, 362 F.3d 676, 679 (10th Cir. 2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

The Judgment and Sentence used in Ms. Graves's case contained a pre-formatted conclusion that she had the ability to pay LFOs. CP 12. It

does not allow the court to check a box if this finding applies and thus signifies no individualized judicial consideration. CP 12. Rather, there is a conclusion that the court has complied with RCW 10.01.160(3) that will be made every time the form is used regardless of what actually transpired and whether the trial court actually considered a defendant's financial resources. This type of finding cannot reliably establish that the trial court complied with RCW 10.01.160(3).

2. The challenge to the imposition of legal financial obligations is ripe for review.

This case involves a direct challenge to the legal validity of the LFO orders on the grounds that the trial court failed to comply with RCW 10.01.160(3). Thus it is distinguishable from the line of cases that establish that the time to challenge LFOs is after the State seeks to enforce them; these cases address challenges based on an assertion of financial hardship or procedural due process principles that arise in the collection of LFOs.⁵

⁵ See, e.g., *Lundy*, 176 Wn. App. at 109 (any challenge to the order requiring payment of legal financial obligations on hardship grounds is not ripe for review until the State attempts to collect); *State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003), review denied, 151 Wn.2d 1016 (2004) (determining defendant's constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce); *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (defendant's constitutional objection to the LFO order based on the facts of his indigence was not ripe until the State sought to enforce the order); *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Bahl*, 164 Wn.2d at 751. The legal validity of an LFO order based on non-compliance with RCW 10.01.160(3) is primarily a legal issue. The issue of whether the trial court failed to comply with the statute will not be changed by time or future circumstances. As such, it requires no further factual development. LFOs become enforceable at the time the judgment is rendered and begin to accrue interest immediately. RCW 10.82.090; CP 14. The challenged action is final because the original sentencing order imposing LFOs is final. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing the debt in the first place does not change. Therefore, the imposition of LFOs is ripe for review.

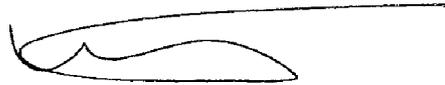
3. Remand for resentencing is the proper remedy.

Because the imposition of LFOs without inquiring into Ms. Graves's ability to pay constitutes a sentencing error, this Court should vacate the order imposing LFOs and remand for resentencing.

E. CONCLUSION

The court's lack of compliance with RCW 10.01.160(3) necessitates remand for resentencing.

Respectfully submitted this 29th day of September, 2014.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut", written over a horizontal line.

LISA E. TABBUT/WSBA #21344
Attorney for Danielle Graves

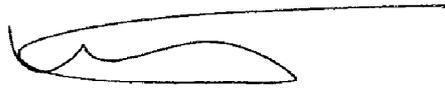
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Susan I. Baur, Cowlitz County Prosecutor's Office, at baur@s@o.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Danielle Graves/DOC# 888253 Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 29, 2014, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Danielle Graves

COWLITZ COUNTY ASSIGNED COUNSEL

September 29, 2014 - 2:21 PM

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