NO. 46216-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD McELFISH,

Appellant.

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

The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering appellant to pay legal financial obligations (LFOs) without first taking into consideration his ability to pay. CP 83-85.

2. To the extent the trial court concluded appellant has the ability to pay LFOs, it erred as no such finding is unsupported by the record. CP 83 (Finding 2.5).

3. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

RCW 9.94A.753 and RCW 10.01.160 require the trial court to consider the defendant's present and future ability to pay the amount ordered before imposing discretionary LFOs. The trial court ordered appellant to pay $4935.69 in legal financial obligations, including $819.69 for court-appointed attorney fees. In so ordering, the trial court included generic, pre-formatted language in the Judgment and Sentence stating that it had considered appellant's "present and future ability to pay the legal financial obligations" imposed. CP 83. There is nothing in the record, however, indicating that the trial court ever took into account appellant's financial resources or likely future resources.

1. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations (LFOs) as part of appellant's sentence, thus, making the LFO order erroneous and challengeable for the first time on appeal?

2. Is appellant's challenge to the validity of the LFO order ripe for review?

3. Is the remedy to remand for resentencing?

4. Was appellant's trial attorney ineffective for failing to object to the trial court's imposition of discretionary legal financial obligations?

B. STATEMENT OF THE CASE

A Cowlitz County jury convicted 64-year-old appellant Donald McElfish of attempted second degree rape, first degree kidnapping and second degree assault with sexual motivation. CP 64, 66, 69, 70; 4RP[1] 104-07. The trial court concluded the second degree assault conviction constituted the same criminal conduct as both the kidnapping and attempted rape convictions, and therefore did not impose a sentence for that conviction or count it towards McElfish's offender score for the other

[1] There are four volumes of verbatim report of proceedings reference as follows: **1RP** – March 6 & 11, 2014; **2RP** - March 12, 2014; **3RP** - March 13, 2014; and **4RP** - March 14 & 17, 2014, and April 24, 2014 (sentencing).

two convictions. CP 82, 86; 4RP 117. The court imposed a 96-month for the kidnapping and a minimum term of 100 months for the attempted rape. CP 86; 4RP 117. The court also imposed $4,935.69 in legal financial obligations, including $816.69 for "court appointed attorney" fees. CP 84; 4RP 117

Although there was no discussion of McElfish's financial circumstances, "finding" 2.5 of the judgment and sentence provides:

> **Ability to PayLegal 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 83.

McElfish timely filed his Notice of Appeal. CP 94-107.

C. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO CONSIDER McELFISH'S ABILITY TO PAY BEFORE IMPOSING LFOs CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

RCW 9.94A.760 permits the court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if

the trial court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. The record here does not show the trial court in fact considered McElfish's ability or future ability before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous and the validity of the order may be challenged for the first time on appeal.

a. The Legal Validity of the LFO Order May Be Challenged For The First Time On Appeal As An Erroneous Sentencing Condition.

Although the general rule under RAP 2.5 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 427, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise sentencing challenges for the first time on appeal); see also, State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). Specifically, the Court has held a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the

sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[2]

In Moen, the Court held that a timeliness challenge to a restitution order could be raised for the first time on appeal. It looked at the authorizing statute, which set forth a mandatory 60-day limit, and the record, which showed the trial court did not comply with that statutory directive. Specifically rejecting a waiver argument, the Court explained:

> We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.9A.142(1) had passed as a waiver of that timeliness requirement; it was invalid when entered.

Id. at 541 (emphasis added). The Court concluded the restitution was not ordered in compliance with the authorizing statute and, therefore, the validity of the order could be challenged for the first time on appeal. Id. at 543-48.

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[2] See also, State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); In re Personal Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

The record here shows the trial court failed to comply with the statutory requirements set forth in RCW 10.01.160(3). McElfish may therefore challenge the trial court's LFO order for the first time on appeal.

In State v. Calvin, 176 Wn. App. 1, 302 P.3d 509 (2013), motion for reconsideration granted, 316 P.3d 496 (October 24, 2013), Division One originally held Calvin could challenge his LFO order for the first time on appeal, but later reversed course. The reasoning supporting Division One's course change in Calvin does not apply here.

Calvin's appeal involved a challenge to the factual basis supporting the trial court's LFO order, i.e. whether there was insufficient evidence to support the trial court's decision that he had the ability to pay LFOs. Calvin, 302 P.3d at 521. By contrast, McElfish asserts the trial court failed to undertake the statutorily required factual analysis required under RCW 10.01.160.

The factual nature of Calvin's argument drives Division One's waiver analysis. Specifically, Division One states, "the imposition of costs under [RCW 10.01.160] is a factual matter 'within the trial court's discretion,'" and "[f]ailure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal." Calvin, 316 P.3d at 507. Having framed the issue as a sufficiency challenge, rather than a legal one, Calvin goes on to cite the

Supreme Court's holdings in In re Personal Restraint of Goodwin[3] and In re Personal Restrain of Shale,[4] for the proposition that "failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal." Id.

Unlike Calvin, McElfish's challenge does not involve discretionary acts of the trial court. As discussed in detail below, compliance with the statutory directives of RCW 10.01.160 is not discretionary. Furthermore, the issue raised by McElfish is legal, not factual. See State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010) (explaining whether the trial court exceeds its statutory authority is an issue of law). Thus, Calvin's waiver analysis is not on point. Cf. also, State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, rev. granted, 178 Wn.2d 1010 (2013) (declining to consider an LFO challenge raised for the first time on appeal); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), rev. denied, 175 Wn.2d 1014 (2012) (concluding for the first time on appeal that finding Bertrand had present or future ability to pay LFOs was unsupported by the record and therefore clearly erroneous). The issue raised in this case is analogous to that raised in Moen, not Calvin.

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[3] 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002).

[4] 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007).

More recently, in State v. Duncan, Division Three of this Court noted the discrepancy among the Court of Appeals divisions as to whether LFO's may be challenged for the first time on appeal. 180 Wn. App. 245, 252-53, 327 P.3d 699 (2014). Concluding, there was a "clear potential for abuse," the Court declined to allow Duncan to raise an LFO argument for the first time on appeal. 180 Wn. App. at 255. In so doing, this Court rejected portions of similar arguments made here. 180 Wn. App. at 252-55. Duncan recognized however, the forthcoming Supreme Court opinions in Blazina and State v. Paige-Colter, 175 Wn. App. 1010, 2013 WL 2444604, rev. granted, 178 Wn.2d 1018, 312 P.3d 650 (2013), would ultimately clarify the issue. 180 Wn. App. at 253, 255.[5]

Here the record shows the trial court did not comply with RCW 10.01.160(3)'s mandatory requirements. Thus, the issue should be reviewable for the first time on appeal.

b. Because The Sentencing Court Did Not Comply With RCW 10.01.160(3), McElfish May Challenge the LFO Order For The First Time on Appeal

RCW 10.01.160(3) provides:

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[5] The Duncan court also stated, "In the unusual case of an irretrievably indigent defendant whose lawyer fails to address his or her inability to pay LFOs at sentencing and who is actually prejudiced, a claim of ineffective assistance of counsel is an available course for redress." 180 Wn. App. at 255. Such a claim is presented here, infra.

> [t]he 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.

RCW 10.01.160(3) (emphasis added). The word "shall" means the requirement is mandatory.[6] State v. Claypool, 111 Wn. App. 473, 475–76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of McElfish's sentence if it did not first take into account his financial resources and the individual burdens of payment.

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 individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); Bertrand, 165 Wn. App. at 393. If the record does not show this occurred, the trial court's LFO

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[6] Comparatively, RCW 9.94A.753 (a statute which addresses restitution) merely provides:

> The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(emphasis added).

order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record here does not establish the trial court actually took into account McElfish financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing McElfish's ability to pay or ask it to make a determination under RCW 10.01.160.[7] In fact, the State never requested the imposition of LFOs at all. See 4RP 109-113 (prosecutor's sentence recommendation). The trial court made no inquiry into McElfish's financial resources, debts, or employability before imposing the LFOs.

The only part of the record that even remotely suggests the trial court complied with RCW 10.01.160(3), is the boilerplate "finding" in the judgment and sentence. CP 83. However, this finding does not establish compliance with RCW 10.01.160(3)'s requirements.

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, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave

[7] It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).

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 form used at McElfish's sentencing contained a pre-formatted conclusion that the court had considered the amount of the LFOs ordered and "the defendant's past, present and future ability to pay" LFOs. CP 83. It does not include a checkbox to register even minimal individualized judicial consideration. Rather, every time one of these forms is used, there is a pre-formatted conclusion the trial court followed the requirements of RCW 10.01.160(3) – regardless of what actually transpired. This type of finding therefore cannot reliably establish the trial court complied with RCW 10.01.160(3).

In sum, the record fails to establish the trial court actually took into account McElfish's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should permit McElfish to challenge the legal validity of the LFO order for the first time on appeal, and it should vacate the order.

2. MCELFISH'S CHALLENGE TO THE LFO ORDER IS RIPE FOR REVIEW.

The State may argue the issue raised herein is not ripe for review because the State has not yet attempted to collect the costs. This argument should be rejected, however, because it fails to distinguish between a LFO challenge based on financial hardship grounds (arguably not ripe) and a challenge attacking the legality of the order based on statutory non-compliance (ripe).

Although there is a line of cases that holds the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, these cases address challenges based on an assertion of financial hardship or on procedural due process principles that arise in regard to collection.[8] By contrast, this case involves a direct challenge to

[8] See, e.g., Lundy, 176 Wn. App. at 107-09 (holding "any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review" until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant's constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant's constitutional objection to the LFO order based on the fact 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) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

the legal validity of the order on the ground the trial court failed to comply with RCW 10.01.160(3). As shown below, this issue is ripe for review.

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. Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, as discussed above, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. As such, McElfish meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above, McElfish is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Although the Supreme Court, in Valencia, 169 Wn.2d at 789, previously suggested LFO challenges require further factual development, Valencia does not apply here. Valencia involved a constitutional challenge to a sentencing condition regarding pornography. In assessing

the second prong of the ripeness test, the Court compared Valencia's challenge to the court-ordered proscription on pornography with a hypothetical challenge to a LFO order. The Court suggested the former did not require further factual development to support review, while the latter did.

It appears, however, the Supreme Court's hypothetical LFO challenge was predicated upon the notion that the order would be challenged on factual financial hardship grounds, rather than on statutory non-compliance grounds. For example, the Court stated:

> [LFO orders] are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.

Id. at 789. This statement certainly may be true if the offender is challenging the validity of the LFO order asserting current financial hardship. However, this statement is not accurate if an offender is challenging the legal validity of the LFO order based on non-compliance with RCW 10.01.160.

Either the sentencing court complied with the statute prior to imposing the order, or not. If not, the order is not valid, regardless of the particular circumstances of attempted enforcement. This demonstrates Valencia likely never contemplated the issue raised herein and, therefore,

is distinguishable. As explained above, no further factual development is needed here, and the second prong of the ripeness test is met.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. 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 that debt in the first place is not subject to change. In other words, while the defendant's obligation to pay off LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final.[9] As such, the third prong of the ripeness test is met.

Next, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non-payment may

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[9] Division One previously concluded a trial court's LFO order is "conditional," as opposed to final, because the defendant may seek remission or modification at any time (State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009)). However, it did so in the context of reviewing a denial of the defendant's motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4). Thus, Division One's analysis was focused on the defendant's conditional obligation to pay rather than on the legal validity of the initial sentencing order. Id.

subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at a 12% rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

> ...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).[10]

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately,

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[10] See http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf (copy of report).

reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. Lundy, 176 Wn. App. at106. The defendant is not required to disprove this. See, e.g. Ford, 137 Wn. App. at 482 (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains on the State.

Second, an offender who is left to fight his erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given that McElfish is indigent, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Id. at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge his debt with the help of counsel and before the financial burden grows so overwhelming the person just gives up.

Finally, reviewing the validity of LFO orders on direct appeal rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary

factual consideration in the first place and not rely on the remission process to remedy errors.

For the reasons stated above, this Court should hold McElfish's challenge to the legal validity of the LFO is ripe.

3. BECAUSE THE RECORD DOES NOT EXPRESSLY DEMONSTRATE THE SENTENCING COURT WOULD HAVE IMPOSED THE LFOs HAD IT UNDERTAKEN THE REQUIRED CONSIDERATIONS, THE REMEDY IS REMAND.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy unless the record clearly indicates the court would have imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)).

The record does not expressly demonstrate the trial court would have found the evidence sufficiently established McElfish's ability to pay the LFOs. There was no evidence establishing McElfish's future employment prospects. Indeed, the record shows McElfish qualified for appointed counsel at trial and on appeal, is 64 years old and facing what will likely be a life sentence with no obvious prospect for future gainful employment once he is release, if ever.

Based on the foregoing, it cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if

it had actually taken into account McElfish's individualized financial circumstances. As such, the remedy is remand for resentencing. State v. Parker, 132 Wn.2d 182, 192-93, 937 P.2d 575 (1997).

4. MCELFISH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO THE IMPOSITION OF LFOs.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Thomas, 109 Wn.2d at 225-26 (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). 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). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

McElfish's counsel was ineffective for failing to object to the imposition of discretionary LFOs. Reversal is required because failure to object to the LFOs prejudiced Balao. See Duncan, 2014 WL 1225910 *6

(recognizing ineffective assistance of counsel is "an available course for redress" when defense counsel fails to address a defendant's inability to pay LFOs).

As discussed above, RCW 10.01.160(3) permits the sentencing court to order a defendant to pay LFOs, but only if the trial court has first considered her individual financial circumstances and concluded he has the ability, or likely future ability, to pay. Here, the discretionary LFO costs imposed included $816.69 in court-appointed attorney fees. CP 84; see Blazina, 174 Wn. App. at 911 (recognizing court appointed attorney fees are "discretionary legal financial obligations").

Counsel's failure to object to this discretionary LFO cost fell below the standard expected for effective representation. There was no reasonable trial strategy for not requesting the trial court to comply with the requirements RCW 10.01.160(3). Counsel simply neglected to object to the trial court's failure to comply with the statutory requirements as required by existing case law. See State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

Counsel's failure to object to imposition of discretionary LFO's was also prejudicial. As discussed in the argument above, the hardships that can result from the erroneous imposition of LFOs are numerous. In a remission hearing to set aside the LFOs, McElfish is not only saddled with a burden of proof he would not otherwise have to bear, but he will also have to do so with out appointed legal representation.

There is a reasonable probability the outcome would be different but for defense counsel's conduct. McElfish's constitutional right to effective assistance counsel was violated.

D. CONCLUSION

For the reasons stated above, this Court should permit McElfish to challenge the legal validity of the LFO order, vacate the order, and remand for resentencing.

DATED this 1st day of October 2014.

Respectfully submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 46216-8-II
	)	
DONALD McELFISH,	)	
	)	
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 1ST DAY OF OCTOBER 2014, 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] DONALD McELFISH
DOC NO. 239025
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF OCTOBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

October 01, 2014 - 12:49 PM

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