No. 32722-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ALEXANDER J. COMO, JR.,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding in its written Findings of Fact and Conclusions of Law, "The defendant's statements were made freely and voluntarily, and should be admitted under CrR 3.5." CP 4.

2. The trial court erred in admitting Mr. Como's confession to Detective Goodwater.

3. The record does not support the finding Mr. Como has the current or future ability to pay the imposed legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Como's confession to the police involuntary and thus inadmissible because it was made as a result of an implied promise by the detective that Mr. Como would not get into any trouble so long as the sexual intercourse with the 13-year-old victim was consensual?

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

C. STATEMENT OF THE CASE

Alexander Como was convicted of second degree rape of a child for having sexual intercourse with C.D., a 13-year-old girl. CP 1, 17, 22.

Mr. Como, who was 25 at the time, went to the Walla Walla Police Department on February 8, 2014, and asked to speak with Detective Marcus Goodwater. CP 3. Mr. Como discussed his concerns about an 18-year-old male being involved in a romantic relationship with C.D. CP 3; RP 78. The detective suspected Mr. Como himself had been involved in a sexual relationship with the young girl prior to this interview and inquired about that relationship. CP 3; RP 14. Mr. Como denied any sexual relationship with C.D. until the detective employed a ruse, at which point Mr. Como admitted to a consensual sexual relationship with C.D. CP 3-4; RP 12.

At the CrR 3.5 hearing the detective testified the ruse he used was claiming to have DNA evidence of sexual contact that he did not actually have. CP 4; RP 12. However, at trial the detective admitted on cross examination that during the interview and prior to Mr. Como's confession, the detective told Mr. Como he understood Mr. Como and C.D. had a romantic relationship, that the relationship was consensual, and that he, the detective, was not interested in getting Mr. Como into any trouble. RP 79-80. Detective Goodwater also referred to C.D. as a beautiful woman who wore revealing clothes. RP 79.

At sentencing the Court imposed discretionary costs of $2378.65 and mandatory costs of $800[1], for a total Legal Financial Obligation (LFO) of $3178.65. CP 60-61. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760) The court has considered 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 specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein

CP 60.

Mr. Como informed the Court that he had physical problems and was unable to work. RP 149, 153. The Court did not inquire further into Mr. Como's financial resources or consider the burden payment of LFOs would impose on him. RP 153. The Court ordered LFO payments of $50 per month to begin 90 days after his release from custody. CP 61.

This appeal followed. CP 77. The trial court signed and entered the Order of Indigency for this appeal. RP 153-54

[1] $500 Victim Assessment, $200 criminal filing and $100 DNA fee. CP 60-61.

D. ARGUMENT

1. Mr. Como's confession to the police was involuntary and thus inadmissible because it was made as a result of an implied promise by the detective that Mr. Como would not get into any trouble so long as the sexual intercourse with the 13-year-old victim was consensual.[2]

Mr. Como maintains that his confession was coerced in violation of his right not to incriminate himself. The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Article I, section 9 of the Washington State Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection provided by the state provision is coextensive with that provided by the Fifth Amendment. *State v. Unga*, 165 Wash. 2d 95, 100, 196 P.3d 645 (2008).

Because the Fifth Amendment protects a person from being compelled to give evidence against himself or herself, the question whether admission of a confession constituted a violation of the Fifth Amendment does not depend solely on whether the confession was voluntary, rather, "coercive police activity is a necessary predicate to the

[2] Assignments of Error Nos. 1 And 2.

finding that a confession is not 'voluntary.' " *Unga*, 165 Wash. 2d at 101 (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)). Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant's ability to resist the pressure are important. *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir.2005).

The totality-of-the-circumstances test specifically applies to determine whether a confession was coerced by any express or implied promise or by the exertion of any improper influence. *State v. Broadaway*, 133 Wash.2d 118, 132, 942 P.2d 363 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Officials cannot extract a confession "by any sort of threats or violence, nor ... by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976).

Whether any promise has been made must be determined and, if one was made, the court must then apply the totality of the circumstances test and determine whether the defendant's will was overborne by the promise, i.e., there must be a direct causal relationship between the promise and the confession. *Unga*, 165 Wash. 2d at 101-02 (internal

citations omitted). This causal connection is not merely "but for" causation; the court does "not ask whether the confession would have been made in the absence of the interrogation." *Unga*, 165 Wash. 2d at 102 (citing *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir.1986)). "If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action." *Id*. (citing *United States v. Guerrero*, 847 F.2d 1363, 1366 n. 1 (9th Cir.1988)).

A suspect's decision to confess must be a product of his or her own balancing of competing considerations for the confession to be voluntary. *Id*. (internal citation omitted); accord *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir.1993); *United States v. Durham*, 741 F.Supp. 498, 504 (D.Del.1990). "The question ... [is] whether [the interrogating officer's] statements were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." *Id*. (citing *Miller*, 796 F.2d at 605); see *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir.1995) ("the proper test is whether the interrogator resorted to tactics that in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise

inculpate himself"), vacated on other grounds, 517 U.S. 1231, 116 S.Ct. 1873, 135 L.Ed.2d 169 (1996), adhered to on remand, 124 F.3d 205 (7th Cir.1997).

Misrepresenting the legal consequences of a suspect's statements to the point that the suspect could not make a knowing and intelligent decision, goes beyond misrepresenting evidence simply as a ruse. In *Moore v. Czerniak,* police informed the suspect that if he confessed to accidentally killing the victim, the charges against him would be dropped, or, more likely, reduced from murder to a lesser offense. *Moore v. Czerniak,* 574 F.3d 1092, 1103, n. 10 (9th Cir.2009) rev'd and remanded on other grounds sub nom. *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011). The Ninth Circuit concluded this "implied promise" was "sufficiently compelling to overbear [the defendant's] will." 534 F.3d at1139, n. 10. (citing *Guerrero,* 847 F.2d at 1366; see *Haynes v. Washington,* 373 U.S. 503, 513-14, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

Here, the detective misrepresented the legal consequences of Mr. Como's statements to the point that he could not make a knowing and intelligent decision. The detective emphasized he understood Mr. Como and C.D. had a romantic relationship, that the relationship was consensual, and that he, the detective, was not interested in getting Mr. Como into any

trouble. RP 79-80. Detective Goodwater also referred to C.D. as a beautiful woman who wore revealing clothes. RP 79[3]. The implied promise to Mr. Como was, "You won't get in trouble for having sex with this beautiful woman as long as it was consensual." This promise is a complete misrepresentation of the legal consequences of having sex with a 13-year-old girl.

Mr. Como did not confess to having sexual relations with C.D. until after this misrepresentation, together with the detective claiming to have DNA evidence that he did not actually have.[4] Therefore, since the implied false promise of no legal repercussions for consensual sex was sufficiently compelling to overbear Mr. Como's will, his confession was involuntary and should have been suppressed. *Unga*, *Moore*, supra.

[3] The State may argue that since this evidence was only elicited at trial and not at the 3.5 hearing, it should not be considered. However, on appeal, appellate courts examine the entire record that was before the trial court. *State v. Brousseau*, 172 Wash. 2d 331, 340, 259 P.3d 209 (2011).

[4] The false DNA claim alone does not necessarily render the confession involuntary. See *State v. Burkins*, 94 Wash. App. 677, 696, 973 P.2d 15, 27 (1999).

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.[5]

a. *This court should exercise its discretion and accept review*.

Mr. Como did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, __Wn.2d__, 344 P.3d 680, 683 (March 12, 2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d

[5] Assignment of Error No. 3.

at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d

199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Como's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.")(citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Como respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Mr. Como has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendnat had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by

the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id*. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id*.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id*. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id*. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty

guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id*.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement the the trial court has "considered" Mr. Como's present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App.

393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Como's financial resources and the potential burden of imposing LFOs on him. Mr. Como informed the Court that he had physical problems and was unable to work. RP 149, 153. Yet the Court did not inquire further into Mr. Como's financial resources or consider the burden payment of LFOs would impose on him. RP 153. Despite finding him indigent for this appeal, the Court ordered LFO payments of $50 per month to begin 90 days after his release from custody. CP 61; RP 153-54

Since the boilerplate finding that Mr. Como has the present or future ability to pay LFOs is simply not supported by the record, the matter

should be remanded for the sentencing court to make an individualized inquiry into Mr. Como 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

E. CONCLUSION

For the reasons stated, the convictions should be reversed or in the alternative, the case should be remanded to make an individualized inquiry into Mr. Como's current and future ability to pay before imposing LFOs.

Respectfully submitted April 24, 2015,

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s/David N. Gasch
Attorney for Appellant
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on April 24, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Alexander J. Como Jr.
#374586
PO Box 769
Connell, WA 99326

E-mail: tchen@co.franklin.wa.us
Teresa Chen
Special Deputy Prosecuting Attorney

_____

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com