

NO. 46907-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK WILMER,

Appellant.

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

The Honorable John R. Hickman, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant had the current and future ability to pay legal financial obligations (LFOs).

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

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

Issues Pertaining to Assignments of Error

1. 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, making the LFO order erroneous?

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

B. STATEMENT OF THE CASE

The State charged Mark Wilmer with second degree assault. CP 1-2. The State alleged Wilmer recklessly inflicted substantial bodily harm when he intentionally assaulted his wife, Sharde Baumann. CP 1.

Baumann testified she and Wilmer got in a fight on April 23, 2014, and it became physical. RP 67-70. She claimed Wilmer hit and kicked her

several times. RP 71-73, 119. Medical testimony established Baumann suffered a broken nose, a bruised lung, a bruised heart, and three fractured lumbar transverse processes, which are small bones that connect the vertebrae to nearby muscles. RP 178-80, 229-33. Baumann was transported to the hospital by ambulance and spent four days there. RP 81-82, 235.

The jury found Wilmer guilty.¹ CP 33. The court sentenced Wilmer to 55 months confinement. CP 71-75. The court imposed \$2,300 in LFOs. CP 74; RP 352. The court did not consider Wilmer's ability to pay at the sentencing hearing. See RP 351-55. The court nevertheless entered the following boilerplate finding:

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 72. The court also imposed restitution for Baumann's medical bills, to be determined at a later hearing. RP 349; CP 74. This timely appeal followed. CP 66.

¹ The State also charged Wilmer with misdemeanor harassment (physical damage). CP 1-2. The jury deadlocked on this count, and the State later dismissed it with prejudice. CP 37, 85-87; RP 327, 338-39.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER WILMER'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS.

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 four mandatory LFOs: \$500 crime victim assessment, \$100 DNA database fee, \$200 criminal filing fee, and restitution. CP 73-74; State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The court also imposed \$1,500 in discretionary court-appointed attorney fees and defense costs. RCW 10.01.160(1), (2); State v. Smits, 152 Wn. App. 514, 521-22, 216 P.3d 1097 (2009) (recognizing courts costs are discretionary). The trial court failed to make an individualized inquiry into Wilmer's present and future ability to pay before it imposed these discretionary LFOs. In doing so, the court exceeded its statutory authority, and the discretionary LFO order 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, the court failed to make an individualized inquiry into Wilmer’s current or future ability to pay \$1,500 in discretionary LFOs. RP 352. For instance, the court imposed restitution for Baumann’s medical bills, which were likely extensive given her injuries, ambulance ride, and four-day hospital stay. CP 74; RP 81-85, 178-80, 229-35, 349, 352. But the court did not consider the burden of this additional debt. CP 74; RP 352. Wilmer also qualified as indigent, reporting zero savings, real estate, or other assets. CP 90-97. He further reported receiving \$720 a month in social security before incarceration, also qualifying him as indigent under GR 34. Id. Again, however, the court did not consider Wilmer’s indigent status. CP 74; RP 352.

Despite all these reasons to waive discretionary LFOs, the trial court entered a boilerplate finding that Wilmer “has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 72. Blazina holds this is insufficient to justify discretionary LFOs. 182 Wn.2d at

838. This court should accordingly vacate the LFO order and remand for resentencing. Id. at 839.

The State may ask this court to decline review of the erroneous LFO order. 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 Wilmer’s discretionary LFOs and remanding for resentencing.

2. WILMER’S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

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). 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 the discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court to comply with the requirements of RCW 10.01.160(3). 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 simply failed to object. Such neglect 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, Wilmer 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. Wilmer incurs no possible benefit from LFOs. Given Wilmer's indigency and restitution debt, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Wilmer's current and future ability to pay. Wilmer's constitutional right to effective assistance of counsel was violated. Therefore, this court should also vacate the LFO order and remand for resentencing on this alternative basis.

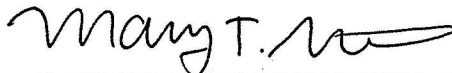
D. CONCLUSION

This court should vacate the LFO order and remand for resentencing.

DATED this 30th day of June, 2015.

Respectfully submitted,

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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 30TH DAY OF JUNE 2015, 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] MARK WILMER
DOC NO. 855697
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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