

FILED
JULY 10, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)
)
Respondent,) No. 325431
)
vs.)
) SUPPLEMENTAL BRIEFING
JAMES FURR,)
)
Appellant.)
)
)
)
_____)

1. IDENTITY OF MOVING PARTY

As directed by the court, the State of Washington, respondent, submits this supplemental briefing regarding State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

2. ISSUE RAISED

Does the Supreme Court's recent decision, in State v. Blazina, support the appellant's argument that the trial court did not make an individualized inquiry into the appellant's current and future ability to pay before in imposing LFOs (LFOs) consistent with RCW 10.01.160 (3)?

3. **SHORT ANSWER: NO**

The Supreme Court's recent decision, in *Blazina*, does not support the appellant's argument because the trial court made an individualized inquiry into the appellant's current and future ability to pay before imposing LFOs as required under RCW 10.01.160 (3).

4. **LAW**

RCW 10.01.160 (3) provides that "(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 (emphasis added)."

Subsection (4) provides that "(a) defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170."

In *Blazina*, the State Supreme Court ruled that a trial court, in imposing LFOs at sentencing, must inquire into a defendant's current or future ability to pay based on the particular facts of the defendant's case. In making this inquiry, the trial court must consider such important factors as incarceration, other debts, and restitution. The trial court must also look to General Rule (GR) 24 for guidance in the event there is evidence the defendant qualifies as "indigent." *Blazina* at 838.

In *Blazina*, the record did not reflect that the trial court considered the defendant's ability to pay before imposing LFOs. *Blazina* at 830. Prior to addressing the issue of the trial court's duty in imposing LFOs, the court held that a defendant who makes no objection to the imposition of LFOs under RCW 10.01.160 (3) at sentencing is not automatically entitled to review. The court held that Rule of Appellate Procedure 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. *Blazina* at 832-835.

4. ARGUMENT

In this case, the appellant did not object to the trial court imposing LFOs at sentencing. To the contrary, the record supports that the trial court made an individualized inquiry into the appellant's current and future ability to pay before imposing LFOs as required under RCW

10.01.160 (3). And the appellant agreed that he could make payment. RP 590-594.

First, the trial court inquired of the state about “the extent of restitution -- \$755.89? So there will be no further issue with restitution?” The State responded affirmatively. RP 590.

The trial court then ordered total LFOs in the amount of \$2,705.81 to be paid “at \$100 per month commencing one month after you are released from incarceration.” RP 593. The judgment and sentence reflects the same. Under section 4.3, the trial court actually wrote on the judgement and sentence what she had just told the appellant. CP 58.

The trial court then surmised that it did not “know what your (inaudible) will be at that point,” obviously referring to the appellant’s financial situation and ability to pay. The appellant then asked the trial court: “... if I’m too old or too weak and my (inaudible) I don’t have to pay it, right?” RP 593.

“Right” answered the trial court. RP 594

The conversation continued:

APPELLANT: Don’t have to worry about going back to jail again, do I?

TRIAL COURT: Right now there’s no reason to think that there’s anything –

APPELLANT: Yes. You're right maam.

TRIAL COURT: (W)e will cross that bridge when you come to it. Right now you are able-bodied and strong and intelligent.

APPELLANT: I don't know about intelligent, -- strong --

TRIAL COURT: When you are released from incarceration then -- certainly see what your employment --

APPELLANT: Ok . . . cause I'd rather work. I always worked

TRIAL COURT: Cross that bridge when we come to it. RP 594.

Clearly, the record reflects that the trial court made findings with regard to the appellant's *current and future* ability to pay costs. In not ordering the appellant to begin making payments until he was released from prison, the trial court invariably took into account that the appellant has no *current* ability to make payments because he will be incarcerated.

In then ordering the appellant to make payments *after* his release, the trial court did not have any evidence to suggest that the appellant's *future* ability to make payments was impaired. Therefore, the trial court's findings are consistent with the express language of RCW 10.01.160(3).

The appellant provided the facts for the court to order future payments. The appellant acknowledged "I'd rather work. I always worked." When the appellant expressed concern about being "too old or too weak" upon his release, the trial court acknowledged that the appellant may not have to pay the LFOs. But the trial court pointed out that the issue of the appellant's ability to pay was premature because "(r)ight now

you are able-bodied and strong and intelligent.” The appellant responded that he was strong, just not intelligent. RP 594.

Therefore, in keeping with RCW 10.01.160(3) and *Blazina*, the trial court took into account the appellant’s period of incarceration, restitution, and ability to pay.

As previously argued in Respondent’s Brief, the trial court did not need to inquire about the appellant’s indigent status because his meals, housing, clothing, and health care needs are all met by the Washington State Department of Corrections. Therefore, per *Blazina*, there was no basis for the trial court to consider GR 34 for guidance.

The statutory basis for the holding in Blazina is thus absent in this case. To the extent that the appellant has the present ability to pay, he should be so ordered. If the costs create financial hardship, upon his release, he can seek remission under RCW 10.01.160 (4) which is exactly what the trial court advised the appellant when it told him, in response to his concerns about his ability to pay: “We will cross that bridge when you come to it.” RP 594.

The appellant’s argument, in his supplemental brief, that the “(a)vailability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly

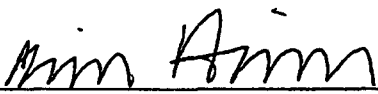
imposed at the outset,” is basically an invitation to eliminate LFOs which is a slap in the face to the mentally incapacitated victim the appellant was convicted of raping and flies in the face of the appellant’s own statement that he would “rather work” than not pay.

5. CONCLUSION

Therefore, in the absence of any objection by the appellant to the court’s imposition of LFOs at sentencing, the respondent State of Washington respectfully asks this court to exercise its discretion and not accept review, particularly when the record supports that the trial court comported with RCW 10.01.160 (3) and *Blazina*.

Submitted this 10 day of July 2015

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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|----------------------|---|---------------------------------|
| State of Washington, |) | |
| |) | Court of Appeals No. 325431-III |
| Respondent. |) | |
| |) | AFFIDAVIT OF SERVICE |
| JAMES FURR, |) | |
| Appellant. |) | |
| _____ |) | |

STATE OF WASHINGTON)
) ss.
 County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 10^h day of July, 2015, affiant an electronic copy directed to:

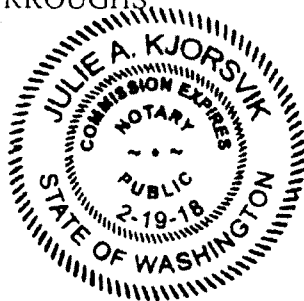
| | |
|---------------------|------------------|
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| Court of Appeals | gaschlaw@msn.com |
| Division III | |
| 500 N. Cedar Street | |
| Spokane, WA 99210 | |

containing copies of the following documents:

- (1) Affidavit of Service
- (2) Supplemental Briefing

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 10th day of July, 2015, by
THERESA BURROUGHS



Julie A. Kjorsvik
 NOTARY PUBLIC in and for the
 State of Washington.
 My Appointment Expires: 2/19/18