No. 33198-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CARLOS VALDEZ,

Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
HONORABLE M. SCOTT WOLFRAM

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

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

2. The trial court erred when it ordered Mr. Valdez to pay a $100 DNA-collection fee.

3. The trial court erred by failing to comply with CrR 7.8(c) when it summarily denied Mr. Valdez's motion to withdraw his guilty plea.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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 Mr. Valdez' current and future ability to pay before imposing LFOs?

2. Does the mandatory $100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?

3. Did the lower court err in ruling on the merits and dismissing Mr. Valdez's motion to withdraw his guilty plea without complying with the requirements of CrR 7.8(c)(2) and (3)?

C. STATEMENT OF THE CASE

In December 2014, Mr. Valdez pled guilty to second degree murder. He was sentenced on February 2, 2015. RP 1-3, 17; CP 26-32. At sentencing the Court imposed discretionary costs of $5981.60 and mandatory costs of $5699.01[1], for a total Legal Financial Obligation (LFO) of $11,680.61. CP 28. The Judgment and Sentence contained the following language:

> ¶ 2.4 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) 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 specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP 27.

The Court did not inquire into Mr. Valdez's financial resources or consider the burden payment of LFOs would impose on him. RP 17. The Court ordered Mr. Valdez to begin making payments of $50 per month 90 days after his release from custody. RP 17; CP 28-29. The Court also ordered DNA testing. CP 31.

[1] $500 Victim Assessment, $100 DNA fee, and $5099.01 restitution. CP 28. The $200 in court costs imposed herein was not labeled as the criminal filing fee by the trial court, and therefore, it cannot be considered as mandatory. *See State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013).

On February 12, 2015, Mr. Valdez filed a motion to withdraw his guilty plea based upon a manifest injustice. CP 40-42. The superior court ruled on the merits and summarily denied the motion without a hearing and with only the prosecutor present in the courtroom. RP 20; CP 64. The Court stated only, "I have had an opportunity to review the file and the State's briefing and memorandum on that matter. And his [sic] motion is denied." *Id.* The court made no finding on whether the motion was timely. *Id*.

This appeal followed. CP 45-47.

D. ARGUMENT

Issue No. 1. 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.

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

Mr. Valdez 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 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. Valdez'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. Valdez 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. Valdez has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for 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 that the trial court has "considered" Mr. Valdez' past, present or future ability to pay legal financial obligations and "specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein." CP 27. 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 2.4 of the judgment and sentence, the record does not show the trial court took into account Mr. Valdez' financial resources and the potential burden of imposing LFOs on him. RP 17. Nevertheless, the Court ordered Mr. Valdez to begin making payments of $50 per month 90 days after his release from custody. RP 17; CP 28-29.

The boilerplate finding that Mr. Valdez has the past, present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Valdez ' current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

Issue No. 2. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208,

216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Id.* at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen,* 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.* Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test "is not a toothless one." *Mathews v. DeCastro,* 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional."

DeYounq v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541[2]. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have

[2] RCW 43.43.7541 provides:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, ___ Wn.2d ___, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the $100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the fee is paid only after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works

against another important State interest – reducing recidivism. See, *Blazina*, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Valdez' indigent status, the order to pay the $100 DNA collection fee should be vacated.

Issue No. 3. The lower court acted without authority in ruling on the merits and dismissing Mr. Valdez' motion to withdraw his guilty plea without complying with the requirements of CrR 7.8(c)(2) and (3).

CrR 4.2(f) provides that a motion to withdraw a guilty plea made after judgment shall be governed by CrR 7.8. CrR 7.8(c)(2) provides that a superior court may only rule on the merits of a motion when the motion is timely filed and either (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved without a factual hearing. *State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666

(2008). If any of the prerequisites are not met, the motion must be transferred to the Court of Appeals as a personal restraint petition. CrR 7.8(c)(2); *Smith*, 144 Wn. App. at 863.

Under CrR 7.8(c), the Supreme Court has set out a specific procedure for the initial consideration of Motions for Relief from Judgment. It states:

> (1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.
>
> (2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.
>
> (3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c).

Under the plain language of this rule, a superior court does not have authority to rule on the merits of a CrR 7.8 motion unless it first finds the motion is timely and either (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved

without a factual hearing. If either a substantial showing is made or there needs to be an evidentiary hearing, the superior court must conduct a show cause hearing to allow the opposing party to respond. CrR 7.8(c)(3). If these prerequisites are not met, i.e., the motion is timely but a defendant fails to make a substantial showing or the court concludes there is no need for a factual hearing, the superior court is only authorized to transfer the timely petition to the appellate court for consideration as a personal restraint petition. *Smith*, 144 Wn. App. at 863.

This Court reviews a ruling on a CrR 7.8 motion for abuse of discretion. *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997). A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). An abuse of discretion occurs where the court bases its decision on an incorrect legal standard. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Here, the trial court did not find that the motion was timely filed, that Mr. Valdez made a substantial showing that he was entitled to relief, or that the motion could not be resolved without a factual hearing.

Nevertheless, the trial court denied Mr. Valdez' motion to withdraw his guilty plea on the merits. Under CrR 7.8(c)(2), the trial court did not have the authority to decide the motion on the merits. Accordingly, the trial court erred. The case should be remanded to the superior court so that Mr. Valdez' motion can be considered after application of the correct legal standard. *Smith*, 144 Wn. App. at 864.

Should the State argue this Court should simply convert Mr. Valdez' motion to a personal restraint petition and consider it on the merits, that is not the proper remedy. In *Smith*, Division II held a defendant is entitled to both notice and an opportunity to object before a superior court transfers his motion to the Court of Appeals as a personal restraint petition. *Smith*, 144 Wn. App. at 864. This is because conversion of the motion to a personal restraint petition "could infringe on his right to choose whether he wanted to pursue a personal restraint petition because be would then be subject to the successive petition rule in RCW 10.73.140 as a result of our conversion of the motion." *Id*. Therefore, this Court should remand the matter to the superior court for proper consideration of Mr. Valdez' motion under CrR 7.8.

E. CONCLUSION

For the reasons stated, the superior court's order denying the motion to withdraw the guilty plea should be vacated and the matter remanded to the superior court for consideration in compliance with CrR 7.8. On remand, the superior court should make an individualized inquiry into Mr. Valdez's current and future ability to pay before imposing LFOs, and the order to pay the $100 DNA collection fee should be vacated.

Respectfully submitted, July 17, 2015,

_____

s/David N. Gasch, WSBA #18270
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on July 17, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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