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November 23, 2015
Court of Appeals
Division III
State of Washington

NO. 33552-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MAGDALENO CRUZ TELLEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 15-1-00379-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

 A. The trial court did not err in concluding the defendant had the present and future ability to pay his legal financial obligations.1

 B. Trial counsel’s failure to object to the imposition of discretionary legal financial obligations did not violate the defendant’s right to effective assistance of counsel.1

II. STATEMENT OF FACTS1

III. ARGUMENT2

 A. A review under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay.....2

 B. The trial court sufficiently inquired into the defendant’s present and future ability to pay.4

 C. Trial counsel’s failure to object to the imposition of discretionary legal financial obligations did not violate the defendant’s right to effective assistance of counsel.10

IV. CONCLUSION.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

Mukilteo Ret. Apts., LLC v. Mukilteo Investors LP, 176 Wn. App. 244, 310 P.3d 814 (2013).....3

Plein v. Lackey, 149 Wn.2d 214, 67 P.3d 1061 (2003)2

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005).....3

Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007).....6

State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991).....6, 7, 9

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011).....7, 9

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....2-4, 7-9, 11

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992).....5

State v. Curry, 62 Wn. App. 676, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992).....5

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011)10

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).....3

State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (2013)5

State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013)5, 7

State v. Lyle, 188 Wn. App. 848, 355 P.3d 327 (2015)4, 11

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....11

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)11

State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009).....5

Wenatchee Sportsmen Ass'n v. Chelan Cnty., 141 Wn.2d 169, 4 P.2d 123
(2000).....6

UNITED STATES SUPREME COURT CASES

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674
(1984).....10, 12

WASHINGTON STATUTES

RCW 7.68.035(1).....5
RCW 10.01.1607
RCW 10.01.160(3).....6, 8
RCW 36.18.020(2)(h)5
RCW 43.43.75415

REGULATIONS AND COURT RULES

RAP 2.5(a)2, 4
RAP 2.5(a)(2).....2, 3

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. **The trial court did not err in concluding the defendant had the present and future ability to pay his legal financial obligations.**
- B. **Trial counsel's failure to object to the imposition of discretionary legal financial obligations did not violate the defendant's right to effective assistance of counsel.**

II. STATEMENT OF FACTS

On April 7, 2015, officers were dispatched to a report of an order violation in Kennewick, Washington. CP 4. A no contact order was in effect, stemming from a pending assault charge, prohibiting the defendant, Magdaleno Cruz Tellez, from coming within two hundred and fifty (250) feet of Blanca Navarete or her residence. CP 4, 17. The defendant was convicted of violating a protective order following a stipulated facts trial. CP 13-15. At sentencing, the trial court inquired whether the defendant was employed at the time of the offense, and the defendant indicated he had been driving a forklift. Report of Proceedings 06/19/2015 ("RP") at 10. The defendant further indicated that he had the opportunity to return to work. *Id.* The trial court then asked the defendant, "Is there any other reason why you would not be able to pay legal-financial obligations associated with this judgment and sentence?" to which the defendant responded, "No." *Id.*

The trial court imposed legal financial obligations totaling \$1,460.00, including a \$500 victim assessment, a \$100 domestic violence penalty assessment, and \$860 court costs. CP 19-20, 23; RP at 10.

III. ARGUMENT

The issues presented in the case are whether the trial court conducted an adequate inquiry for the imposition of discretionary legal financial obligations, and whether defense counsel rendered ineffective assistance of counsel in failing to object to the imposition of discretionary legal financial obligations.

A. A review under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay.

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

The defendant contends an inadequate inquiry under *Blazina* can be raised for the first time on review under RAP 2.5(a)(2) because insufficient facts support the finding of ability to pay; however, a review under RAP 2.5(a) is not appropriate because sufficient facts on the record

support a finding of ability to pay. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

A defendant who makes no objection to the imposition of discretionary legal financial obligations (“LFOs”) at sentencing is not automatically entitled to review. *Blazina*, 182 Wn.2d at 832. RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges “failure to establish facts upon which relief can be granted.” The exception applies where the proof of particular facts at trial is required to sustain a claim. *Mukilteo Ret. Apts., LLC v. Mukilteo Investors LP*, 176 Wn. App. 244, 246, 310 P.3d 814 (2013). This exception “is fitting inasmuch as ‘[a]ppeal is the first time sufficiency of evidence may realistically be raised.’” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)).

The Court in *Blazina* noted that some challenges raised for the first time on appeal are appropriate because the error, if permitted to stand, would create inconsistent sentences for the same crime and because some defendants would receive unjust punishment simply because his or her attorney failed to object. *Blazina*, 182 Wn.2d at 834. However, allowing challenges to discretionary LFO orders would not promote sentencing uniformity in the same way. *Id.* The Court held that the sentencing court

must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on particular facts of the defendant's case. *Id.*

Following the *Blazina* decision, in *State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015), the Court determined that Lyle's failure to challenge the trial court's imposition of LFOs at his sentencing precluded him from raising the issue on appeal. *Lyle*, 188 Wn. App. at 852.

Lyle is directly analogous to the present case. Here, not only did the defendant fail to challenge the trial court's imposition of LFOs at his sentencing, he indicated that there was no reason precluding him from paying his legal financial obligations. RP at 10. While the appellate court has the discretion to review the matter, the trial court properly considered the defendant's current and future ability to pay his LFOs. The trial court's findings are supported by substantial evidence in the record; therefore, a review under RAP 2.5(a) is not appropriate.

B. The trial court sufficiently inquired into the defendant's present and future ability to pay.

The defendant does not distinguish between the mandatory and discretionary LFOs imposed by the trial court. This is an important distinction because for mandatory LFOs, the legislature has divested courts of the discretion to consider a defendant's ability to pay when

imposing these obligations. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). For victim restitution, victim assessments, DNA fees, and criminal filing fees, the defendant's ability to pay should not be taken into account. *Id.*; *see, e.g., State v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013). Mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants." *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992).

[A] victim assessment of \$500 is required by RCW 7.68.035(1), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. *See State v. Curry*, 62 Wash.App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wash.2d 911, 829 P.2d 166 (1992); *State v. Thompson*, 153 Wash.App. 325, 336, 223 P.3d 1165 (2009).

Lundy, 176 Wn. App. at 103.

Unlike mandatory obligations, if a trial court intends on imposing discretionary legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay. *Id.*

Here, the defendant requests the Court reverse his sentence and remand the case to strike the ability to pay legal financial obligations. The trial court imposed legal financial obligations, including a \$500 victim

assessment, a \$100 domestic violence penalty assessment, and \$860 in court costs. CP 19-20, 23; RP at 10. The victim assessment and domestic violence assessment are mandatory, regardless of the defendant's ability to pay. Therefore, at issue is whether the trial court properly inquired into the defendant's present and future ability to pay the \$860 in court costs.

Under RCW 10.01.160(3), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. However, the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering the payment of court costs. *Id.*

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. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.2d 123 (2000)).

In *Baldwin*, the Court determined that the burden imposed by RCW 10.01.160 was met by a single sentence in a presentence report that the defendant did not object to. *Baldwin*, 63 Wn. App. at 311. The presentence report contained the following statement, “Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense.” *Id.* *Baldwin* made no objection to this assertion at the time of sentencing. *Id.* Therefore, the Court determined that when the presentencing report establishes a factual basis for the defendant’s future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied. *Id.* at 312.

In *State v. Bertrand*, the record revealed that the trial court failed to consider when the defendant could pay legal financial obligations and also showed that “in light of Bertrand’s disability, her ability to pay [legal financial obligations] now or in the near future is arguably in question.” *State v. Bertrand*, 165 Wn. App. 393, 404 n.15, 267 P.3d 511 (2011). Therefore, under *Bertrand*, a repayment obligation may not be imposed “if it appears there is no likelihood the defendant’s indigency will end.” *Lundy*, 176 Wn. App. at 106.

In *State v. Blazina*, the Supreme Court of Washington ruled that trial courts must hold an on-record hearing where the judge must inquire

into a defendant's current and future ability to pay before imposing discretionary LFOs. *Blazina*, 182 Wn.2d at 838. When making the inquiry, trial courts must also consider other factors such as incarceration, as well as defendant's other debts, including restitution. *Id.* at 839.

The *Blazina* Court also determined RCW 10.01.160(3) requires the trial court to "do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Id.* at 838. Instead "[t]he record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Id.* This inquiry includes consideration of factors such as the defendant's financial resources, incarceration, and other debts, including restitution. *Id.*

In the present case, the only discretionary legal financial obligation imposed in this case was \$860 in court costs. CP 19-20, 23; RP at 10. Contrary to the defendant's assertions, evidence in the record supports the trial court's finding that he had the present and future ability to pay these fees. RP at 10. In addition, the trial court asked the defendant whether there was any other reason he would not be able to pay the LFOs, and the defendant stated there was not. *Id.*

During sentencing, the defendant told the trial court that he had been driving a forklift. RP at 10. He further indicated that he had the

opportunity to return to work. *Id.* The trial court then asked the defendant, “Is there any other reason why you would not be able to pay legal-financial obligations associated with this judgment and sentence?” to which the defendant responded, “No.” *Id.* This colloquy allowed the defendant to reveal any other debts that would prevent him from paying his legal financial obligations. Unlike the defendant in *Bertrand*, the defendant has no known disabilities that preclude the possibility of him working in the future. *Bertrand*, 165 Wn. App. at 404 n.15.

Moreover, there is nothing in the record to suggest that the defendant’s indigency would extend indefinitely. Unlike the situation in *Bertrand* where the evidence suggested that there was no likelihood that the disabled defendant could begin payment of legal financial obligations within 60 days of entry of the judgment and sentence while still incarcerated, the situation here more closely approximates that of the defendant in *Baldwin*.

The trial court’s inquiry addressed the factors specifically identified by the *Blazina* Court as mandatory. As such, this Court should affirm the trial court’s imposition of the legal financial obligations.

C. Trial counsel's failure to object to the imposition of discretionary legal financial obligations did not violate the defendant's right to effective assistance of counsel.

Defense argues that trial counsel's failure to object to the imposition of discretionary legal financial obligations was a violation of his right to effective assistance of counsel. However, because the defendant indicated he had the present and future ability to pay the fines, counsel did not violate the defendant's right to effective assistance of counsel.

Ineffective assistance of counsel claims are reviewed de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland*, 466 U.S. at 685-86. To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

- (1) [D]efense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

In *Lyle*, the defendant's trial counsel did not challenge the LFOs based on Lyle's current or future ability to pay. *Lyle*, 188 Wn. App. at 853. The Court noted that because the sentencing hearing was after the *Blazina* decision, counsel should have been aware that to preserve any issue related to the LFOs, he was required to object. *Id.* Thus, counsel was deficient by failing to object. *Id.* However, the Court examined whether the deficient performance was prejudicial. *Id.* Lyle presented some evidence relevant to his financial situation during the sentencing hearing, but it was not provided as evidence to show Lyle's present or future ability to pay. *Id.* The facts presented suggested that Lyle may be disabled, but that he was able to do at least some work as evidenced by the fact that he had been working for several months before sentencing. *Id.* The Court ruled that Lyle's ineffective assistance of counsel claim failed because he did not establish prejudice. *Id.* at 853-54.

In the present case, the defendant has failed to show both deficient performance and resulting prejudice. Trial counsel did not challenge the discretionary LFOs because the defendant indicated to the trial court that he had the present and future ability to pay the costs. Additionally, the trial court asked the defendant, "Is there any other reason why you would not

be able to pay legal-financial obligations associated with this judgment and sentence?” to which the defendant responded, “No.” RP at 10.

Therefore, because the defendant indicated he had the present and future ability to pay, trial counsel’s failure to object to the imposition of discretionary LFOs did not violate the defendant’s right to effective assistance of counsel.

If this Court determines trial counsel was deficient, the defendant must also show that defense counsel’s deficient representation prejudiced the defendant in such a way that except for counsel’s unprofessional errors, the result of the proceeding would have been different.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary sufficiency, that the judge or jury acted according to the law. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, contentiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694-95.

Here, the defendant has failed to show that defense counsel’s deficient representation prejudiced the defendant. Trial counsel was not ineffective for failing to object to the imposition of the discretionary legal financial obligations because the defendant indicated he had a present and future ability to pay the court costs. RP at 10. Had trial counsel objected to

the imposition of the discretionary LFOs, the trial court would have still found, by the defendant's own admission, that he had the present and future ability to pay; therefore, the result of the proceeding would not have been different.

The court should hold that failing to object to the imposition of LFOs did not constitute ineffective assistance of counsel.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's finding of the defendant's ability to pay legal financial obligations.

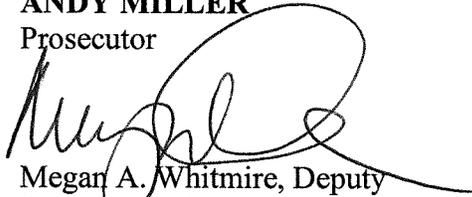
RESPECTFULLY SUBMITTED this 20th day of November, 2015.



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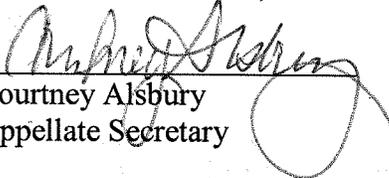
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on November 23, 2015.



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