No. 33417-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSUE MEDINA,

Appellant.

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

The Honorable Judge Richard Bartheld

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Josue Medina was convicted of first-degree unlawful possession of a firearm after an officer removed a weapon from his person during a purported *Terry* stop. Mr. Medina's conviction should be reversed and dismissed, because the officer lacked reasonable suspicion to believe that Mr. Medina had committed or was about to commit a crime. The officer lacked particularized suspicion of a crime and was relying on innocuous facts and generalized accusations that Mr. Medina appeared "high" and had been seen driving a vehicle and an ATV, both of which were never reported stolen.

Alternatively, Mr. Medina should be resentenced, because Mr. Medina's offender score was miscalculated by five points. It is not clear that the court would have imposed the same top of the standard range sentence had the defendant's offender score been correctly calculated.

Finally, resentencing is appropriate to strike the clearly erroneous boilerplate findings on Mr. Medina's ability to pay legal financial obligations and the imposition of discretionary medical care costs. The court's findings were inconsistent with the court's oral ruling and the record, which established that Mr. Medina did not have the ability to pay such discretionary costs.

B. ASSIGNMENTS OF ERROR

1. The court erred by denying Mr. Medina's motion to suppress. Conclusions of Law 3-6. CP 62-63.

2. The court erred by sentencing Mr. Medina based on an incorrect offender score. CP 74.

3. The court erred, and counsel was ineffective for failing to object, when the court entered findings that Mr. Medina had the ability to pay legal financial obligations and imposed discretionary costs for medical care. CP 75-76.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by denying Mr. Medina's motion to suppress because the *Terry* stop was not justified by particularized suspicion of criminal activity.

Issue 2: Whether Mr. Medina should be resentenced, because the court imposed the top of the standard range based on a five-point misunderstanding of the defendant's offender score.

Issue 3: Whether the court erred by requiring Mr. Medina to pay medical care costs while incarcerated, despite having found that the defendant is indigent and unable to pay legal financial obligations.

a. Mr. Medina requests that this Court review the discretionary medical care costs that were imposed, pursuant to RAP 2.5(a).

b. The discretionary medical care costs that were imposed herein are inconsistent with the court's findings and the record on Mr. Medina's ability to pay legal financial obligations.

c. Alternatively, counsel's failure to request that the court strike the court's unsupported LFO findings and medical care costs constituted ineffective assistance.

D. STATEMENT OF THE CASE

In March 2014, Officer Darren Scott responded to a 911-call outside of Sunnyside, Washington. (RP 8) When the officer arrived at the caller's location, the caller, Gabriella Sanchez, informed him that a man had come to her home asking for gas for his truck, which had stopped on the highway in front of her home. (RP 9-10) Ms. Sanchez's husband took gas to the vehicle, but the vehicle still would not start. (RP 11) Ms. Sanchez told the officer that the man then removed a large, green ATV with bed from the back of the truck, loaded some items on the ATV, put what appeared to be a gun in the front of his clothing, and drove southbound on the highway. (RP 11, 13, 42) She said the man returned to reload the ATV and again drove southbound. (RP 13) Ms. Sanchez described the man to the officer as a Hispanic male age 30 to 40, wearing a blue hat, and wearing a blue Seahawks sweatshirt. She told the officer the man appeared "high." (RP 9-10, 14, 48) Ms. Sanchez also showed a picture of the man on her cell phone to the officer, which, from a distance, depicted the man's general build and clothing colors. (RP 15, 40)

Officer Scott inspected the truck at the highway and noticed that the ignition was disassembled so the truck could be started without a key. (RP 12-13, 37) The officer also learned that the vehicle was registered to a 61-year-old man, that the tabs were expired, and that an old license plate

was on the vehicle rather than the updated license plate that had been issued to the vehicle. (RP 12, 14, 34-37) The officer checked the VIN and learned the vehicle had not been reported stolen. (RP 34)

Officer Scott then drove about a half-mile southbound on the highway to a property where he had earlier passed an ATV and saw a man sitting on an ATV in front of a house that he believed fit Ms. Sanchez's description. (RP 15-16) The officer parked at the end of the driveway and approached the man on foot, who initially turned away from the officer. (RP 16-18) Officer Scott noticed that the ATV's ignition was also disassembled. (RP 25) The officer asked if the man needed help with his truck that had broken down, but the man said he did not know anything about any truck and did not know what the officer was talking about. (RP 18, 43) The man refused to provide identification or answer any other questions about how he arrived at the property or if he lived there. (RP 22, 27) When the officer asked to see what sweatshirt the man was wearing under his tight shirt, the man started to pull up his shirt, revealing the bottom of a Seahawks emblem, but then pulled the shirt back down when the officer answered that he was not required to comply with the request. (RP 18-19)

Two women then exited the home and identified the man as Josue Medina. (RP 22-23, 44-45) They said he did not live there. (*Id.*) The

officer suspected Mr. Medina may be on drugs, because he was acting "glitchy," paranoid and jittery. (RP 24) Officer Scott also noticed that Mr. Medina's sweatshirt was hanging heavy with the imprint of what appeared to be a gun in the front pocket, though Mr. Medina denied having a weapon. (RP 21, 25) The officer instructed Mr. Medina to keep his hands on the ATV bars, and the officer called and waited 10 to 15 minutes for backup to arrive before frisking Mr. Medina; Mr. Medina was not cooperating with questions or keeping his hands on the bars. (RP 26, 28-29, 53) When the other officers arrived, they removed a loaded .384 AMT semi-automatic handgun from Mr. Medina's front pocket and also retrieved Mr. Medina's identification. (RP 29-30; CP 48). A background check revealed that Mr. Medina had prior felonies, so Mr. Medina was arrested and charged with first-degree Unlawful Possession of a Firearm (UPF). (RP 30; CP 65) (Exhibit SE-A, Police Reports)

The defendant moved to suppress the gun as the fruit of an unlawful seizure, but the court denied his motion. (RP 58-63; CP 58-64) Mr. Medina then proceeded to a bench trial on stipulated facts, stipulating that the court could consider testimony from the suppression hearing, the police reports, and the certified copies of his prior felony convictions. (RP 85-86, 89; CP 66-69) Mr. Medina waived his right to a jury trial, instead

intending to pursue the suppression issue on appeal. (*Id.*, RP 105; CP 57) The court convicted Mr. Medina as charged. (RP 94-95; CP 71-72, 73-79)

At sentencing, Mr. Medina's offender score was calculated as 14 when the State informed the court that the defendant had 14 prior felonies. (RP 104) Mr. Medina's criminal history included five adult felony convictions and nine juvenile nonviolent felonies. (CP 74) Mr. Medina had also pleaded guilty to two other offenses under a separate cause number (possession of methamphetamine and heroine). (RP 71-77; CP 74) He was sentenced for these offenses and this underlying UPF conviction on the same day. (CP 73-79) This effectively added either one or two points to his offender score for the other current offenses, depending on whether they constituted the same criminal conduct, which the court did not analyze on the record. (CP 74) "[T]aking into consideration [Mr. Medina's] past history…," the court imposed the top of the standard range for this UPF conviction, which was 116 months incarceration. (RP 112-13; CP 75) The lesser sentences for the other current drug offenses were ordered to run concurrently to Mr. Medina's UPF 116-month sentence. (RP 111-13)

The court also inquired into Mr. Medina's financial means and learned that he had not worked for a year-and-a-half, could not afford to support his nine-year-old daughter, and had not been able to pay previous

fines imposed. (RP 108-10) The court found Mr. Medina indigent and waived most legal financial obligations. (RP 110; CP 76, 80-82) But the court did order Mr. Medina to pay the costs of medical care incurred while incarcerated and entered a general finding on the defendant's ability to pay legal financial obligations. (RP 113; CP 75-76)

This appeal timely followed. (CP 83)

E. ARGUMENT

Issue 1: Whether the court erred by denying Mr. Medina's motion to suppress because the *Terry* stop was not justified by particularized suspicion of criminal activity.

The court erred by denying Mr. Medina's motion to suppress. The initial seizure was not justified by particularized suspicion of criminal activity.

Whether a person is unlawfully seized is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662-63, 222 P.3d 92 (2009) (citing *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)). "'The [trial court's] factual findings [are] entitled to great deference' [and reviewed for substantial evidence, while] 'the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.'" *Id*. (internal quotations omitted); *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing *State v. Hill,* 123 Wn.2d 641, 647,

870 P.2d 313 (1994); *State v. Rankin,* 151 Wn.2d 689, 694, 92 P.3d 202 (2004)).

Generally, warrantless searches and seizures are unconstitutional.[1] *State v. Williams*, 148 Wn. App. 678, 683, 201 P.3d 371 (2009); *Gatewood*, 136 Wn.2d at 539 (citing *State v. Ladson,* 138 Wn.2d 343, 349, 979 P.2d 833 (1999)). When a person establishes that he was seized, the State must establish that the seizure was justified by a warrant or one of the "jealously and carefully drawn exceptions" to the warrant requirement. *State v. Gantt*, 163 Wn. App. 133, 257 P.3d 682, 686 (2011) (citing *State v. Young,* 135 Wn.2d 498, 510, 957 P.2d 681 (1998)); *State v. Jackson,* 82 Wn. App. 594, 601–02, 918 P.2d 945 (1996)).

A person is seized when, "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *Rankin,* 151 Wash.2d at 695, 92 P.3d 202 (citing *State v. O'Neill,* 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). *See also Young*, 135 Wn.2d at 512 (seizure occurs where officer displays weapon or uses language or a tone of voice compelling compliance with

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[1] Wash. Const. Art. I, §7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); U.S. Const. Amend. IV (forbidding "unreasonable searches and seizures."); U.S. Const. Amend. XIV (applying Fourth Amendment to the states); *Harrington,* 167 Wn.2d at 663 (internal citations omitted) (explaining, it is well established that "Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment.")

officer requests). Once an officer seizes an individual, no subsequent events or circumstances retroactively justify the seizure. *State v. Flores,* __ Wn. App. __, 351 P.3d 189, 193 (Div. 3, 5/21/2015) (citing *State v. Mendez,* 137 Wash.2d 208, 224, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California,* 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

One exception to the pre-seizure warrant requirement, which is at issue in this case, is the *Terry*[2] investigative stop and protective frisk. In order to justify a *Terry* stop and frisk, the State must show that: (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk was limited to the protective purpose." *State v. Day,* 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). The failure of any of these makes the frisk unlawful and the evidence seized inadmissible. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008).

"A person may be briefly seized, that is, a police officer may make an investigative stop, if articulable suspicion exists that the person has committed, is committing, or is about to commit, a crime." *State v. Johnston,* 38 Wn. App. 793, 798, 690 P.2d 591 (1984) (citing *Terry*, 392 U.S. 1). There must be more than "a mere generalized suspicion that the

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[2] *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

person detained may have been up to no good." *State v. Bliss,* 153 Wn. App. 197, 204, 222 P.3d 107, 110 (2009) (internal citations omitted). "The officer must have an 'articulable suspicion,' meaning 'a substantial possibility that criminal conduct has occurred or is about to occur.'" *Id.* (quoting *State v. Kennedy,* 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). "The officer must be able to identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* (internal citations omitted). Innocuous facts do not justify a stop. *Armenta,* 134 Wn.2d at 13). "In determining whether the officer's suspicion was reasonable, courts look to the totality of the circumstances." *Bliss,* 153 Wn. App. at 204. "The officers' actions must be justified at their inception." *Gatewood*, 163 Wn.2d at 539 (internal citations omitted).

"Startled reactions to seeing the police do not amount to reasonable suspicion." *Gatewood*, 163 Wn.2d at 540 (citing *State v. Henry,* 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for *Terry* stop)). In *State v. Gatewood*, *supra*, the Supreme Court found an alleged *Terry* stop invalid where it was after midnight, a defendant appeared startled to see police drive by, he twisted his body in a manner as if he was trying to conceal something, he jaywalked away from the area after police passed, and he refused to stop when officers circled back and

requested he do so. *Id*. at 537-40. The Court reversed the defendant's conviction based on the unlawful seizure, holding in pertinent part:

> Officers' seizure of Gatewood was premature and not justified by specific, articulable facts indicating criminal activity. Although circling back to investigate Gatewood's furtive movements was proper, the officers did not have reasonable suspicion that he committed or was about to commit a crime. They could have continued to follow Gatewood or engaged in a consensual encounter to further investigate the activity Longley observed in the bus shelter… <u>Since Gatewood did not flee from the officers, it was not necessary to take swift measures</u>…
>
> Officers seized Gatewood to conduct a <u>speculative criminal investigation</u>. Our constitution protects against such warrantless seizures and requires more for a *Terry* stop. Since the initial stop of Gatewood was unlawful, the 'subsequent search and fruits of that search are inadmissible.'

Gatewood, 163 Wn.2d at 541-42 (internal quotations omitted) (emphases added).

Ultimately, to justify the *Terry* stop, "[t]he circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so." *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing *State v. Garcia,* 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)).

Here, Mr. Medina was seized – that is, a reasonable person in his position would not have felt free to leave – at least by the time Officer Scott instructed him to put his hands on the ATV bars, thereby limiting his freedom of movement. (RP 28-29) But at the time of this intrusion, the

officer did not have reasonable suspicion of any particularized criminal activity. The officer may have had generalized suspicions that Mr. Medina was "high" or "up to no good," but this does not justify the warrantless intrusion. *Bliss*, 153 Wn. App. at 204. The officer knew that a Hispanic male of Mr. Medina's general description had apparently run out of gas and was seen with what appeared to be a gun. But mere possession of a gun is not a crime.

The issue is not whether Ms. Sanchez was a reliable informant and whether the officer sufficiently corroborated her tips. The issue is whether anything Ms. Sanchez reported, or that the officer corroborated before seizing the defendant, established a substantial possibility that Mr. Medina had committed a crime. Ms. Sanchez told the officer that the man at her home appeared "high," but she did not provide any description of what she meant by this statement. There were not specific, articulable facts that would support the officer's belief that a crime had occurred under these circumstances. Innocuous facts do not justify a seizure. *Armenta*, 134 Wn.2d at 13. Additionally, "[a]n informant's 'bare conclusion unsupported by any factual foundation' is insufficient to support an investigatory stop." *State v. Howerton*, 187 Wn. App. 357, 368-69, 348 P.3d 781 (2015) (internal quotation omitted).

There must have been "substantial possibility" that criminal conduct had occurred or was about to occur in order to justify Mr. Medina's seizure. *Bliss*, 153 Wn. App. at 204. But the circumstances in this case do not rise to that level of suspicion. Officer Scott indicated he suspected the truck had been stolen. But the officer knew the vehicle was not reported stolen before engaging with Mr. Medina, and nothing in the encounter with Mr. Medina provided any basis for believing the truck was stolen.

Finally, Mr. Medina's lack of cooperation, turning away from the officer, or acting paranoid and fidgety would not support the seizure in this case. It is well settled that a person's nervous reactions to seeing officers do not justify a *Terry* stop. *Gatewood*, 163 Wn.2d at 541-42. The officer was investigating a Hispanic male who had reportedly been seen with a gun and was supposedly driving a truck and ATV (neither of which were reported stolen). The suspect appeared paranoid, fidgety or nervous to the officer. But, like in *Gatewood, supra*, where the defendant appeared nervous and tried to conceal something from officers before walking away, the minimal indicia of criminality in this case cannot support a valid *Terry* stop. There was not reasonable suspicion that Mr. Medina had engaged in or was about to engage in any criminal activity; his seizure was unlawful.

Unlike proper *Terry* stops where officers have had some articulable reason to stop a suspect in order to pursue a criminal investigation,[3] the officer in this case stopped Mr. Medina in order "to conduct a speculative criminal investigation." *Gatewood*, 163 Wn.2d at 541-42. Our constitution protects against the seizure that occurred in this case. Even if a reasonable safety concern justifies a weapons frisk, the evidence remains inadmissible if the initial *Terry* stop was unjustified. *Kennedy*, 107 Wn.2d at 9 ("No [weapons] search can be reasonable if the initial detention is unlawful.") In addition, "*Terry* does not authorize a search for evidence of a crime…" *Day*, 161 Wn.2d at 895. Since the initial stop cannot be justified by articulable suspicion of particularized criminal activity by Mr. Medina, the trial court erred by denying Mr. Medina's motion to suppress. Mr. Medina respectfully urges this Court to reverse his conviction and dismiss due to a lack of lawfully obtained evidence. *State v. Flores*, __ Wn. App. __, 351 P.3d 189, 196 (Div. 3, 5/21/2015) (approving this remedy).

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[3] *See e.g. State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996) (*Terry* stop justified based on suspicion of criminal activity where officers saw defendant carrying a wad of money and apparent baggie of rock cocaine.) *State v. Sweet,* 44 Wn. App. 226, 721 P.2d 560 (1986) (*Terry* stop justified where officers responded to a call about a suspicious truck and found only defendant in area, hiding in bushes and subsequently fleeing at officers' approach). *State v. Adams*, 144 Wn. App. at 104 (officers legitimately stopped defendant driver based on fact that car was reported stolen.) *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (initial stop lawful based on reliable tip of criminal activity from informant.) *Kennedy*, 107 Wn.2d 1 (same as previous); *State v. Sieler,* 95 Wn.2d 43, 621 P.2d 1272 (1980) (same as previous).

Issue 2: Whether Mr. Medina should be resentenced, because the court imposed the top of the standard range based on a five-point misunderstanding of the defendant's offender score.

The State requested a sentence at the top of the standard range based on its understanding of Mr. Medina's offender score being 14 (not counting points for other current offenses, which the court did not analyze for same criminal conduct, presumably given the already relatively high offender score). (RP 104-05) The defendant requested sentencing at the bottom of the standard range. (RP 105) The court agreed with the State that the top of the standard range was appropriate, "taking into consideration your past history." (RP 113) But Mr. Medina's past history and offender score were miscalculated by five points when his juvenile nonviolent felonies were counted as one whole point rather than a half-point each, reducing Mr. Medina's offender score to nine (not counting the other current offenses).

Under these circumstances, Mr. Medina respectfully requests that he be resentenced so that the trial court may reconsider whether it would still impose the top of the standard range in this case. Because the offender score will be reduced by five points to nine (not counting the other two current offenses), it is also important on remand that the trial court conduct a same criminal conduct analysis for these other current drug offenses to reach an accurate total offender score.

A trial court's calculation of a defendant's offender score is reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). An offender may challenge erroneous sentences lacking statutory authority for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.530(1); RCW 9.94A.525. The sentencing court calculates an offender score by adding current offenses and prior convictions and juvenile adjudications. RCW 9.94A.030(11); RCW 9.94A.589(1)(a). "A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses 'encompass the same criminal conduct.'" *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998); *see also* RCW 9.94A.589(1)(a).

Mr. Medina was convicted of first-degree unlawful possession of a firearm, a class B felony and nonviolent offense. *See* RCW 9.41.040(1); RCW 9.94A.030(34), (55); RCW 9A.20.020(1)(b); RCW 9.94A.525(7). For nonviolent offenses, the offender score is generally calculated by

counting “one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and ½ point for each juvenile prior nonviolent felony conviction.” RCW 9.94A.525(7) (emphasis added).

“A correct offender score must be calculated before a presumptive or exceptional sentence is imposed.” *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3dd 1192 (2003). “Remand is necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence.” *Id*. (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

Here, it appears that Mr. Medina’s prior nonviolent juvenile felonies were counted as one whole point each, rather than the required ½ point each. *See* CP 74; RCW 9.94A.525(7). The parties believed that Mr. Medina’s offender score was 14 before counting other current offenses (see RP 104-05), a number that could logically be reached assuming one point each for Mr. Medina’s prior five adult felonies plus one point each for the nine juvenile felonies. However, the juvenile nonviolent felonies should have only counted as half of a point each, thereby reducing Mr. Medina’s offender score by five points.

The record in this case suggests that the trial court imposed the top of the standard range because it was concerned with Mr. Medina’s

criminal history. (RP 113) The court questioned Mr. Medina extensively about his previous offenses, his time in the community, his family and his efforts to remain in the community. (RP 106-111) The court does not appear to have been certain to impose the top of the standard range in this case, but did finally conclude, based on Mr. Medina's high offender score, that the top of the range was appropriate (RP 113). It is not clear from the existing record that the court would have imposed the same maximum standard range sentence had it known that Mr. Medina's offender score is actually five points lower. Therefore, this case is appropriate for resentencing. *See Tili*, 148 Wn.2d at 358 (setting forth this remedy).

Issue 3: Whether the court erred by requiring Mr. Medina to pay medical care costs while incarcerated, despite having found that the defendant is indigent and unable to pay legal financial obligations.

The court found Mr. Medina indigent and waived nearly all legal financial obligations in this case. (RP 113) It commented that Mr. Medina cannot even support his own daughter, let alone pay back costs, fines and assessments. (*Id.*) But then the court included the following boilerplate language in the judgment and sentence:

> 2.7 Financial Ability 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 is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 10.01.160.

> Costs of Medical Care In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines above are paid. RCW 70.48.130.

(CP 75, 76)

a. Mr. Medina requests that this Court review the discretionary medical care costs that were imposed, pursuant to RAP 2.5(a).

As a threshold matter, "[a] defendant who makes no objection to the imposition of discretionary LFOs [legal financial obligations] at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Instead, "RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review." *Id*. at 834-35. Mr. Medina asks this Court to exercise its discretion under RAP 2.5(a) to decide the LFO issue for the first time on appeal. *See id*.

Review of the discretionary medical care costs that were imposed herein under RAP 2.5(a) would be just and proper. The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation

of collection fees when LFOs are not paid on time, defendants' inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834-37. "Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs." *Id*. at 837.

Because the discretionary medical care costs are potentially substantial, and because Mr. Medina is unable to pay these costs presently or in the near future and faces significant difficulties successfully re-entering society with the potentially high financial burden, review of this issue would be appropriate under RAP 2.5(a).

b. The discretionary medical care costs that were imposed herein are inconsistent with the court's findings and the record on Mr. Medina's ability to pay legal financial obligations.

Trial courts may impose medical care costs as a legal financial obligation pursuant to RCW 70.48.130, RCW 9.94A.760(1) and RCW 10.01.160(1), (2). RCW 70.48.130 states in pertinent part:

> (5) The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence, the courts are

> authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.

RCW 70.48.130 (emphasis added to illustrate the discretionary nature, that courts may order reimbursement of medical care costs).

However, "[u]nlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition…it must consider the defendant's present or likely future ability to pay." *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

> The 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.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *Blazina*, 182 Wn.2d at 834. The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id*. at 837-39. This inquiry also requires the court to consider

important factors, such as incarceration and a defendant's other debts, including any restitution. *Id*. at 838-39.

"'[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.'" *Blazina,* 182 Wn.2d at 838 (quoting RCW 10.01.160(3)). "'[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.'" *Id*. (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets "the GR 34 standard of indigency, courts should seriously question that person's ability to pay LFOs." *Id*. at 838-39.

Where a trial court does make a finding that the defendant has the ability to pay, "perhaps through inclusion of boilerplate language in the judgment and sentence," its finding is reviewed under the clearly erroneous standard. *Lundy*, 176 Wn. App. at 105 (citing *State v. Bertrand*, 165 Wn. App, 393, 404 n.13, 267 P.3d 511 (2011)). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Id*. (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *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)).

Here, the court entered a boilerplate finding that it had considered Mr. Medina's ability to pay legal financial obligations and found that he had the present or future ability to pay. (CP 75) This finding was clearly erroneous, considering the record that was made on Mr. Medina's ability to pay, and is inconsistent with the court's oral ruling. The trial court did inquire at length into Mr. Medina's ability to pay (see RP 108-113), but after inquiring, the court specifically found that Mr. Medina was indigent and did not have the present or future ability to pay (RP 110, 113). This oral finding was supported by the record that Mr. Medina had not held a job since 2013, he did not indicate that he had any property of value, Mr. Medina would remain incarcerated for potentially the next 10 years, Mr. Medina had been unable to pay the LFOs imposed in prior cases, and Mr. Medina was unable to financially support his 9-year-old daughter. (RP 108-113)

The court's written boilerplate finding on Mr. Medina's ability to pay is at odds with its oral ruling and is inconsistent with the record. The trial court struck all but $100 of the court costs, and it specifically refused to order Mr. Medina to pay any costs of incarceration. (CP 76) The boilerplate findings on Mr. Medina's ability to pay LFOs, including the

costs of medical care, were clearly erroneous, mistaken, and not supported by substantial evidence in the record. Accordingly, Mr. Medina respectfully requests that this court remand to strike these findings and discretionary medical care costs from his judgment and sentence.

c. Alternatively, counsel's failure to request that the court strike the court's unsupported LFO findings and medical care costs constituted ineffective assistance that warrants remand.

If this Court is not inclined to reverse the clearly erroneous LFO finding and imposition of medical care costs pursuant to its discretionary authority in RAP 2.5, Mr. Medina argues that this Court should remand due to trial counsel's ineffective assistance. Counsel's performance was deficient where he failed to object to the erroneous LFO finding and imposition of discretionary medical care costs, and Mr. Medina suffers those same prejudices identified by *Blazina, supra*, where the debilitative LFOs are imposed on this indigent defendant.

Counsel is ineffective when his performance was deficient and there is a reasonable probability that the error affected the outcome. *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). As set forth above, a sentencing court may order a defendant to pay discretionary LFOs, but only if the trial court first considered, on an individualized basis, the defendant's likely present or future ability to pay.

Blazina, 182 Wn.2d at 834. The court's finding on the defendant's ability to pay must be supported by substantial evidence in the record, else it is clearly erroneous and should be stricken. *Lundy*, 176 Wn. App. at 105 (citing *Bertrand*, 165 Wn. App, at 404 n.13; *Brockob*, 159 Wn.2d at 343.

Counsel neglected to object to the court's unsupported findings on Mr. Medina's ability to pay and imposition of discretionary medical care costs. Mr. Medina was deprived his right to effective assistance by counsel's deficient performance. *See State v. Duncan*, 180 Wn. App. 245, 255, 327 P.3d 699 (2014) (recognizing ineffective assistance of counsel may be "an available course for redress" when defense counsel fails to address an indigent defendant's ability to pay LFOs.) *And see State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know relevant law).

Counsel's failure to object to imposition of discretionary LFOs and the court's unsupported finding was prejudicial in this case. As discussed in *Blazina*, the hardships that can result from the erroneous imposition of LFOs are significant and numerous. *Blazina*, 182 Wn.2d at 834-35. These same concerns outlined in *Blazina* and summarized above highlight the prejudice that resulted to Mr. Medina by the imposition of LFOs in his case, including but not limited to increased difficulty successfully re-entering society. *See also State v. Mahone*, 98 Wn. App. 342, 346, 989

P.2d 583 (1999) (recognizing additional prejudice from erroneously imposed LFOs because an offender is not entitled to publicly funded counsel to later file a motion for remission to set aside LFOs).

There is a reasonable probability the outcome would have been different had counsel properly objected. The court likely would not have entered the erroneous boilerplate findings and imposition of medical care costs, had counsel properly objected. Mr. Medina was prejudiced by this deficient performance. Mr. Medina's constitutional right to effective assistance of counsel was violated and resentencing is proper at this time.

F. CONCLUSION

Based on the foregoing, Mr. Medina requests that this Court reverse his conviction and dismiss. Alternatively, Mr. Medina asks that this Court remand for resentencing with a correct offender score calculation, and remand to strike the unsupported and contrary findings regarding his ability to pay legal financial obligations, including discretionary medical care costs.

Respectfully submitted this 17th day of September, 2015.

/s/ Kristina M. Nichols _________________
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 33417-1-III
vs.	)	No. 14-1-00353-1
	)	
JOSUE CRUZ MEDINA	)	PROOF OF SERVICE
Defendant/Appellant	)	
______________________________	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on September 17, 2015, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Josue Cruz Medina, DOC #775081
Washington Corrections Center
2321 West Dayton Airport Road
PO Box 900
Shelton, WA 98584

Having obtained prior permission from Yakima County Prosecutor's Office, I also served the Respondent by e-mail at appeals@co.yakima.wa.us.

Dated this 17th day of September, 2015.

/s/ Kristina M. Nichols___________
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Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON Plaintiff/Respondent vs. JOSUE CRUZ MEDINA Defendant/Appellant	COA No. 33417-1-III No. 14-1-00353-1 STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, Appellant Josue Medina respectfully offers the following additional authority for the issue of whether the trial court should have included medical care costs in Mr. Medina's legal financial obligations:

> *State v. Leonard*, __Wn.2d __, __ P.3d __, 2015 WL 5916969 *1-2 (Supreme Court No. 90897-4, Opinion Filed 10/8/2015) (holding that "the assessment of costs of incarceration and costs of medical care must be based on an individualized inquiry into the defendant's current and future ability to pay that is reflected in the record, consistent with the requirements of *Blazina.* Here, the record reflects no such inquiry at the sentencing hearing, and the judgment and sentence form contains only boilerplate findings of ability to pay, which this court in *Blazina* held to be inadequate.")

Dated this 12th day of October, 2015.

/s/_Kristina M. Nichols__________
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IN THE COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 33417-1-III
vs.	)	No. 14-1-00353-1
	)	
JOSUE CRUZ MEDINA	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
______________________	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 12, 2015, having obtained prior permission from the Yakima County Prosecutor's Office, I served the attached document by email on the Respondent at appeals@co.yakima.wa.us, using Division III's e-service feature.

Dated this 12th day of October, 2015.

/s/ Kristina M. Nichols___________
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NICHOLS LAW FIRM PLLC

October 12, 2015 - 10:21 AM

Transmittal Letter

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- ☐ Response/Reply to Motion: ____
- ☐ Brief
- ☐ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
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  Hearing Date(s): ________
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☑ Other: Statement of Additional Authorities

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to appeals@co.yakima.wa.us.

Sender Name: Kristina M Nichols - Email: wa.appeals@gmail.com