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April 8, 2016
Court of Appeals
Division I
State of Washington

NO. 73863-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

GRIFFIN L. HOWLAND,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. At sentencing for a second degree domestic violence (DV) assault, the court found the defendant indigent. It imposed, among other conditions, a discretionary DV assessment according to the permissive language of RCW 10.99.080. Was it an error for the court to impose the assessment in accordance with the statute which did not mandate an individualized assessment of the defendant's ability to pay?

2. Was defense ineffective when it did not object to the assessment?

II. STATEMENT OF THE CASE

On April 6, 2015, the defendant strangled his then-girlfriend Krista Stevens, his girlfriend. CP 24, 25. He was 25 years old and working full time as an exterminator; she was 17, living at his house. 1 RP 57, 79, 80, 110. During the assault, he dragged her by her hair, threw her to the floor, sat on her, shoved a pair of dirty panties into her mouth, and strangled her. She could not breathe, thought her neck would snap, and feared she would die. 1 RP 88-89, 92.

The State charged the defendant with second degree DV assault. CP 62-63. Following a two-day trial, a jury found the defendant guilty. CP 24, 25.

Sentencing took place on August 5, 2015. Defense asked the court to waive all non-mandatory legal financial obligations (LFOs). The defendant had lost his job and might lose his exterminator's license because of his conviction. Now 26, he had a supportive family and planned to go back to school to be a farrier so he could continue to work at his family's horse farm and business. 2 RP 4-5.

The court found the defendant indigent and imposed no costs under RCW 10.01.160. CP 18. It imposed mandatory LFOs (500 victim penalty assessment, \$100 biological sample fee) and a discretionary \$100 domestic violence fee under RCW 10.99.080. 2 RP 8. The victim had not asked for restitution but the issue was reserved. Id.

III. ARGUMENT

A. THE COURT PROPERLY IMPOSED A DOMESTIC VIOLENCE ASSESSMENT AFTER FINDING THE DEFENDANT INDIGENT.

Superior courts have authority to order a convicted defendant to pay LFOs as part of a sentence. RCW 9.94A.760.

There are different types of LFOs, some mandatory and some discretionary, some time-sensitive. Various statutes describe how and when different LFOs.

For example, court costs are discretionary and cannot be imposed in the absence of an individualized inquiry into the defendant's ability to pay. RCW 10.01.160(3) (court "shall" make individualized inquiry before imposing costs); State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). Restitution must be imposed within 180 days of sentencing. RCW 9.94A.753(1) (court "shall" impose restitution obligation within 180 days). Victim penalty assessments DNA fees are mandated by statutes that do not require individualized findings regarding ability to pay. RCW 7.68.035(a) (victim penalty assessment "shall" be imposed); RCW 43.43.7541 (biological sample fee "must" be included). The

The DV assessment statute is discretionary. RCW 10.99.080(1) (courts "may" impose assessment). Judges are "encouraged" to seek input on findings regarding ability to pay. RCW 10.99.080(5).

1. When The Defendant Failed To Object To The DV Assessment At Trial, He Waived The Issue On Appeal.

Generally a party may not raise an argument on appeal if he did not raise it in the trial court. State v. Stoddard, ___ Wn. App. ___, ¶¶9, 366 P.3d 474 (2016). The rule promotes judicial economy, prevents unfairness to the other party, and insures a complete record of the issue appeal. Id. at ¶¶ 11. Typically a defendant who fails to object to the imposition of discretionary LFOs at sentencing is not entitled to review. Blazina, 182 Wn.2d at 832-33.

In Blazina, the Supreme Court addressed the issue of costs under RCW 10.01.160(3) even though the issue was not raised in the trial court. It addressed the issue because of the “[n]ational and local cries for reform” of the system of imposing LFOs. The court did not suggest that every LFO issues not preserved below could, should, or would be heard on appeal. Instead, it reaffirmed an appellate court’s authority to decline to review an LFO issue not raised in the trial court, particularly if the decision below would not taint similar cases in the future. Id. 834-35.

That reasoning applies in the present case. The DV assessment was not objected to below and will in no way taint

similar cases in the future. Because the defendant did not preserve the error below, it should not be heard now.

2. RCW 10.99.080 Does Not Mandate An Individualized Determination Of Future Ability To Pay Before The Assessment Is Imposed.

Even if the alleged error is heard here, the defendant's argument must fail. What a court must do before imposing different discretionary LFOs is prescribed by statute. The legislature uses different words to show different intentions. Blazina, 182 Wn.2d at 837-38. The word "shall" is presumptively imperative. The costs statute, RCW 10.01.160, uses the word "shall" eight times and the word "may" eleven. The use of the different words shows a legislative intent for the words to have different meanings, "shall" being imperative. Id.

The DV assessment statute also uses both words, "may" twice and "shall" three times. RCW 10.99.080. The imperative "shall" is not used at all in connection with the decision whether to impose the \$100 assessment. The permissive "may" is. Id. Thus, statute does not impose an obligation on the court to make an individualized determination on ability to pay.

The statute does use the word "encourage" when it discusses the judge's exercise of his discretion. RCW

10.99.080(5). Judges are "encouraged to solicit input" from victims and their representatives in assessing a defendant's ability to pay. RCW 10.99.080(5). That is permissive, not imperative.

In the present case, the court properly exercised its discretion and imposed a \$100 domestic violence assessment after hearing about the defendant's financial circumstances. The court found the defendant currently indigent, having lost his job, and did not impose costs. But the court also learned that the defendant was 26 years old, had the support of his family, hoped to go back to school, and could look forward to continuing to work at his family's horse farm and business where he was already helping out. Although the court was not required to make an individualized finding, the court had enough information to do so and appeared to use that information when it crafted its sentence, exercising its discretion by waiving discretionary costs and imposing one discretionary assessment. That was not an abuse of discretion. That was a valid exercise of the court's discretion within the framework of RCW 10.99.080. No error occurred.

B. DEFENSE COUNSEL PROVIDED EFFECTIVE ASSISTANCE WHEN SHE ASKED THE COURT TO WAIVE ALL BUT MANDATORY LFOs.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. Reviewing courts presume strongly that that counsel's representation was effective. State v. McFarland, 128 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show both that his counsel's representation was deficient and that the deficiency prejudiced him. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). The defendant must also show that but for the mistake, there is a reasonable probability that the outcome would have been different. Thomas, 109 Wn.2d at 266. If the defendant fails to satisfy either element of the test, his claim fails. State v. Kylo, 116 Wn.2d 856, 862, 215 P.3d 177 (2009).

If the conduct can be characterized as strategy or tactics, the court will not find ineffective assistance. Kyllo, at 863. Counsel's mistake must have been so serious that, in effect, counsel was not functioning as counsel. Id. A trial court's determination regarding a defendant's ability to pay is reviewed under the clearly erroneous standard. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

In the present case, the defendant cannot show ineffective assistance on either prong because counsel made no mistake and there is no reasonable probability the outcome, had counsel objected, would have been different. Moreover, the decision not to object was tactical.

Defense counsel was not deficient because Blazina did not impose extend to the DV assessment statute which contains no obligation to make an individualized finding regarding ability to pay.

Nor has the defendant shown a reasonable probability that had defense objected the result would have been different. First, had he objected, the objection likely would have been overruled because it was not supported in law. Second, had he objected and had the court made an assessment of the defendant's future ability

to pay, it most probably would have imposed the \$100 DV assessment.

The defendant was only 26 years old and from a supportive family, employable, capable of holding a job for a year, able to return to school, able to become a farrier, and able to work at his family's horse farm business. His prospects for employment for the next four decades were excellent. There is no reasonable probability the court would have decided not to impose the DV assessment.

Finally, defense counsel's sentencing argument was tactical. Defense's sentencing argument was that this was a hardworking man who had been employed consistently and likely would be consistently employed again. He was a capable, hardworking man, a man with a future, anxious to get back to school and back to work. For those reasons, he should receive the minimum sentence and be able to return to his productive life as soon as possible. She did not present him as a person with no prospects and no future. Had she encouraged the judge to make an individualized determination about his financial prospects, she would have been inviting the imposition of more LFOs, not fewer.

The defendant has not shown ineffective assistance. His appeal should be denied and the sentence affirmed.

C. THE COURT SHOULD IMPOSE APPELLATE COSTS.

The authority to recover costs stems from the legislature. State v. Nolan, 141 Wn.2d 620, 627, 8 P.3d 300 (2000). The Rules of Appellate Procedure (RAP) direct courts of appeal to determine costs after filing a decision that terminates review (except for voluntary withdrawals). RAP 14.1(a). The panel of judges deciding the case has discretion to refuse costs in the opinion or order. RAP 14.1(c) and 14.2.

Ability to pay is not the only relevant factor. State v. Sinclair, ___ Wn. App. ___, ___ P.2d ___ (2016) (72102-0-I). The court may consider whether the defendant will have the ability to pay if and when the State attempts to sanction a failure to pay. State v. Blank, 131 Wn.2d 230, 246-47, 930 P.2d 1213 (1997). If a defendant is unable to repay costs in the future, the statute contains a mechanism for relief. Id. at 250.

In the present case, the trial court signed an order of indigence for appellate purposes based on its finding that the defendant had no current ability to pay for an appeal. CP 64-66. That was based on the defendant's statement that he had no

assets, no debts, and no job. CP 67-68. The motion only addressed the defendant's current ability to pay. But the court already had information from the sentencing about the defendant's future ability to pay. The defendant was only 26 years old, had been employed full-time when he assaulted his girlfriend, was going to go back to school, and was looking forward to becoming a part of his family's business.

That information leads to one reasonable conclusion: this particular defendant, although a felon, could look forward to many profitable years of employment as a skilled farrier in his family's business. The defendant already worked at the farm and there is no reason to believe that he could not continue to work there and at other horse farms for decades to come.

The defendant finished his jail sentence on November 14, 2015, and may well be in school and/or employed now. See CP ___ (sub. no. 52, Return of Commitment). There is no reason to believe he is not now working.

The present case is very different from Sinclair where a 66-year-old was sentenced to a minimum of 280 months in custody. ___ Wn. App. at ___. This defendant is not in custody, is employable,

is trainable, and is part of a family that owns its own business where he helps out and can, in the future, be employed as a farrier.

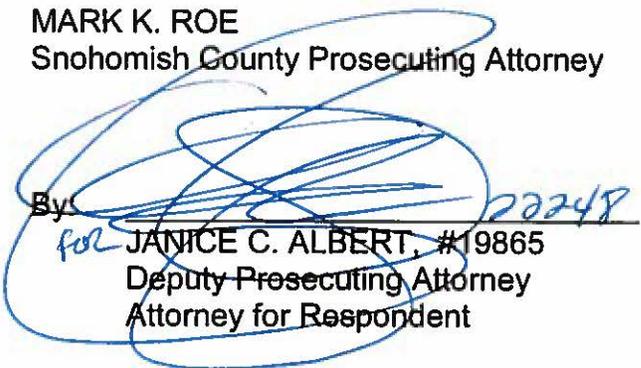
There is no basis on this record to deny the imposition of appellate costs. Appellate costs should be imposed.

IV. CONCLUSION

Based on the foregoing, the court should affirm the imposition of the domestic violence assessment and deny the defendant's request to avoid costs on appeal.

Respectfully submitted on April 6, 2016

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 8th day of April, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and David Koch, Nielsen, Broman & Koch, kochd@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of April, 2016, at the Snohomish County Office.



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