

NO. 74206-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE SANCHEZ-RUIZ,

Appellant.

FILED
Apr 15, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable David Needy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority when it imposed a discretionary legal financial obligation (LFO) without making an individualized inquiry into appellant's current and future ability to pay.

Issues Pertaining to Assignment of Error

1. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed a discretionary LFO without first considering appellant's current and future ability to pay?

2. Was appellant's trial counsel ineffective for failing to object to imposition of the discretionary LFO?

B. STATEMENT OF THE CASE

The Skagit County Prosecutor's Office charged Jose Sanchez-Ruiz with one count of Assault in the Second Degree (domestic violence) and one count of Harassment. CP 10-11. The named victim for both charges was his wife, Josefina Ortiz. CP 1-2, 10-11. A jury convicted Sanchez-Ruiz of Assault and acquitted him of Harassment. CP 71-72. On a special verdict form, jurors found that Sanchez-Ruiz and Ortiz were members of the same family or household at the time of the assault. CP 69. They also found that the assault occurred within sight and sound of the couple's minor children. CP 70.

At sentencing, defense counsel explained that Sanchez-Ruiz was indigent. He had been a migrant worker, but was no longer working and had no source of income. RP¹ 166.

The Honorable Dave Needy imposed a standard range 9-month sentence. CP 51; RP 162. In addition to imposing mandatory LFOs, Judge Needy also imposed one non-mandatory LFO: a \$100.00 domestic violence penalty under RCW 10.99.080. CP 52-53. In doing so, Judge Needy did not meaningfully consider Sanchez-Ruiz's ability to pay. See RP 161-166. Judge Needy simply indicated he was imposing "standard legal financial obligations." RP 162. Moreover, the judgment merely contains the following preprinted, boilerplate language:

2.5 LEGAL FINANCIAL OBLIGATIONS/ RESTITUTION. 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. (RCW 10.01.160) The court finds: [x] That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 50. Judge Needy also ordered that the LFOs would bear interest until paid. CP 54.

¹ "RP" refers to the verbatim report of proceedings for October 2, 5, 6, 7, 22, and 29, 2015.

Sanchez-Ruiz timely filed his Notice of Appeal, and he was declared indigent, meaning he “cannot contribute anything toward the costs of appellate review.” CP 66-67.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER SANCHEZ-RUIZ’S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING A DISCRETIONARY LEGAL FINANCIAL OBLIGATION.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless “the defendant is or will be able to pay them.” In determining LFOs, courts “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).

The trial court imposed three mandatory LFOs: a \$500 crime victim penalty assessment, a \$200 criminal filing fee, and a \$100 biological sample fee. CP 52-53; RCW 7.68.035(1)(a) (penalty assessment “shall be imposed”); RCW 36.18.020(2)(h) (upon conviction, “an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.”); RCW 43.43.7541 (every sentence “must include a fee of one hundred dollars” for collection of biological

samples); State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013) (identifying these LFOs as mandatory).

The court also imposed a \$100 domestic violence penalty under RCW 10.99.080. This statute's permissive language reveals it to be a discretionary LFO. See RCW 10.99.080(1) (courts "may impose a penalty assessment not to exceed one hundred dollars" for a crime involving domestic violence) (emphasis added). Similarly, the statute's suggestion that judges seek victims' input regarding this penalty reveals its discretionary nature:

When determining whether to impose a penalty assessment under this section, judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution.²

RCW 10.99.080(5) (emphasis added).

Sanchez-Ruiz is unemployed, has no source of income, and was so impoverished that he could not contribute anything financially toward his appeal. Yet, Judge Needy failed to make an individualized inquiry into his present and future ability to pay before imposing the

² There is no indication in the record that Judge Needy sought Ortiz's input on this subject.

discretionary domestic violence penalty. In doing so, he exceeded his statutory authority, and this LFO should be vacated.

The Washington Supreme Court recently recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. at 837.

The Blazina court thus held that RCW 10.01.160(3) requires trial courts to first consider an individual’s current and future ability to pay before imposing discretionary LFOs. Id. at 837-39. This requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” Id. at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the

defendant's current and future ability to pay." Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court further directed courts to look to GR 34 for guidance. Id. at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. Id. For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then "courts should seriously question that person's ability to pay LFOs." Id. at 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

At sentencing, Judge Needy failed to make an individualized inquiry into Sanchez-Ruiz's current or future ability to pay LFOs. Instead, he relied on boilerplate language in the judgment. See CP 50. Blazina holds this is insufficient to justify a discretionary LFO. 182 Wn.2d at 838. This Court should accordingly vacate the discretionary LFO and remand for resentencing. Id. at 839.

In response, the State may ask this Court to decline review of the erroneous LFO order in the absence of an objection to that LFO. The Blazina court held that the Court of Appeals "properly exercised

its discretion to decline review” under RAP 2.5(a). 182 Wn.2d at 834. The court nevertheless concluded that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Id. Asking this Court to decline review would essentially ask this Court to ignore the serious consequences of LFOs. This Court should instead confront the issue head on by vacating Sanchez-Ruiz’s discretionary LFO and remanding for resentencing.

A second reason this Court should review the issue is that, assuming it is otherwise waived, Sanchez-Ruiz was denied his right to the effective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney’s performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Deficient

performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Id. at 705-06.

Counsel's failure to object to the discretionary LFO fell below the standard expected for effective representation. Counsel clearly understood Sanchez-Ruiz's dire financial situation because she pointed out that Sanchez-Ruiz was not working and had no income. See RP 166. There was no reasonable strategy for not insisting that the judge comply with the requirements of RCW 10.01.160(3) regarding discretionary financial liabilities. See, e.g., State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel's failure in this regard constitutes deficient performance.

Counsel's failure to object to the discretionary LFO was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time

securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. Id. at 836-37. Furthermore, in any remission hearing to set aside LFOs, Sanchez-Ruiz will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160 (4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Sanchez-Ruiz incurs no possible benefit from LFOs. Given his indigency (as established by undersigned counsel's appointment on appeal) there is a substantial likelihood the trial court would have waived all discretionary LFOs had it properly considered his current and future ability to pay. Indeed, the court imposed no other discretionary LFOs beyond the one – the domestic violence penalty – requested by the State. See CP 52-53. Sanchez-Ruiz's constitutional right to effective assistance of counsel was violated. Therefore, this Court should also vacate this discretionary LFO on this alternative basis.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

As noted above, the trial court found Sanchez-Ruiz to be indigent and entitled to appointment of appellate counsel at public expense. If Sanchez-Ruiz does not prevail on appeal, he asks that

no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, ___ P.3d ___, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

As discussed above, trial courts must make individualized findings of current and future ability to pay before they impose LFOs. Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Sanchez-Ruiz’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Without a basis to determine that Sanchez-Ruiz has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

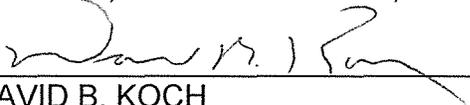
D. CONCLUSION

This Court should vacate the domestic violence penalty.

DATED this 15th day of April, 2016.

Respectfully submitted,

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