

**NO. 46216-8-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DONALD HOWARD MCELFISH,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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**I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

1. McElfish waived his right to object to the imposition of LFO by failing to object at sentencing.
2. The trial court did not err by when it entered all of McElfish's LFOs.
3. Defense counsel was no ineffective for not objecting to the imposition of the LFOs.

**II. STATEMENT OF THE CASE**

The State does not contest the Statement of the Case as presented by McElfish.

**III. ARGUMENT**

**A. McElfish waived his right to object to the imposition of legal financial obligations by failing to object to their imposition below.**

McElfish alleges that the trial court erred by finding that he has the ability either in the present or future to pay legal financial obligations, premised largely upon the court's alleged failure to consider his ability to pay at the time of sentencing under RCW 10.01.160(3). McElfish bears the burden of demonstrating he can raise this issue for the first time on appeal. "A defendant who makes no objection to the imposition of

discretionary LFOs at sentencing is not automatically entitled to review.”  
*State v. Blazina*, No. 89028-5 (filed March 12, 2015).

“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue sua sponte. *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

RAP 2.5(a) gives three exceptions that allow an appeal as a matter of right. Like in *Blazina*, McElfish does not argue an exception to RAP 2.5, he argues that the McElfish’s sentence was an erroneous sentence that may be challenged for the first time on appeal, citing *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999). However, the Washington Supreme Court holds that the exception found in *State v. Ford* does not apply because “[u]npreserved LFO errors do not command review as a matter of right under *Ford* and its progeny.”

Here, McElfish did not object to the imposition of LFO at sentencing, therefore the court should exercise its discretion and decline to reach the merits.

**B. Even if the court considers the issue properly before the court, the court did not err when it entered all of the LFOs.**

The court reviews the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991), 837 P.2d 646 (1992). “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 County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

“The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one.” *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). Indeed, “a trial court is prohibited from imposing legal financial obligations only when it appears from the record that there is no likelihood that the defendant's indigency will end.” *Id.* at 99, 308 P.3d

755. In *State v. Duncan*, the court considered the reasons in which a defendant may not want to tell the court he will never be employable nor have the ability to pay his LFOs. 180 Wn. App. 245, 250, 327 P.3d 699 (2014). “But having come to the conclusion that ability to pay LFOs is not an issue that defendants overlook—it is one that they reasonably waive—we view this as precisely the sort of issue we should decline to consider for the first time on appeal.” *Id.* at 253. Here we have a “boilerplate” finding that the court considered McElfish’s present and future ability to pay. Regardless, many of the LFOs do not have an exception for indigency.

For example, the court in this case imposed a \$500.00 victim assessment penalty. CP 76. Under RCW 7.68.035(1)(a), this assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigency. Similarly, pursuant to RCW 43.43.7454(1), a \$100.00 biological sample fee must be included in every sentence for which a biological sample must be taken. This includes every case in which a person is convicted of a felony. *Id.* Again, there is no exception for indigent defendants.

**C. McElfish was not denied effective assistance of counsel when his trial counsel did not object to the imposition of LFOs.**

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Deficient performance "is not shown by matters that go to trial strategy or tactics." *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Here, as discussed in *State v. Duncan*, there may in fact be a strategic reason to not object to the imposition of LFOs. "It is unhelpful

for a defendant to portray himself as irretrievably indigent at the time of sentencing.” 180 Wn. App. 245, 250, 327 P.3d 699 (2014). Division Three of this Court took it as fact that at sentencing many defendants do not make an effort to suggest to the court that they are, and will remain, unproductive. *Id.* Therefore, the defendant here cannot show that no legitimate strategic or tactical reasons supported the failure to object to imposition of LFOs, and ineffective assistance of counsel is not shown.

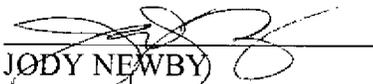
**IV. CONCLUSION**

For the above stated reasons, the convictions should be affirmed.

Respectfully submitted this 18 day of March.

RYAN JURVAKAINEN  
Prosecuting Attorney

By:

  
\_\_\_\_\_  
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## **Appendix A**

### **RAP 2.5 Circumstances Which May Affect Scope of Review**

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. 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. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

## CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 19<sup>th</sup>, 2015.



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Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**March 19, 2015 - 11:05 AM**

## Transmittal Letter

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