

No. 46227-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DANIEL BERTLING,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-04512-7
The Honorable Frank Cuthbertson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The trial court erred in finding that Michael Bertling had the present or future ability to pay discretionary legal financial obligations.

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations as part of Michael Bertling's sentence, where there was no evidence that he has the present or future ability to pay? (Assignment of Error 1)
2. Can Michael Bertling's challenge to the validity of the legal financial obligation order be raised for the first time on appeal? (Assignment of Error 1)
3. Is Michael Bertling's challenge to the validity of the legal financial obligation order ripe for review? (Assignment of Error 1)

III. STATEMENT OF THE CASE

The State charged Michael Daniel Bertling by Information with one count of failure to register as a sex offender and alleged that he had previously been convicted of failure to register as a sex offender on two or more previous occasions (RCW 9A.44.130, .132). (CP 1)

Bertling pleaded guilty as charged. (CP 7-16; RP 5) In his written Statement of Defendant on Plea of Guilty, he acknowledged that “[b]etween 10/1/13 and 11/23/13, in Pierce County, WA, I failed to register as required by law, after having been convicted of a felony sex offense that requires me to register.” (CP 15) Bertling also stipulated to his criminal history, which included two washed-out convictions for failure to register as a sex offender. (CP 17-18; RP 6) The trial court imposed a standard range sentence of 12 months plus one day, and imposed both mandatory and discretionary legal financial obligations. (RP 10; CP 23-24, 25)

IV. ARGUMENT & AUTHORITIES

- A. THE RECORD FAILS TO ESTABLISH THAT THE TRIAL COURT ACTUALLY TOOK INTO ACCOUNT BERTLING’S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LFOs.

At sentencing, the State asked the trial court to impose standard mandatory legal financial obligations (LFOs) and \$400.00 in non-mandatory defense costs. (RP 5) Bertling’s counsel told the court that Bertling was indigent, and asked the court not to order Bertling to pay defense costs so that he could more quickly get back on his feet financially. (RP 8) The trial court ordered Bertling to pay legal costs in the amount of \$1,200.00, which included discretionary

costs of \$400.00 for appointed counsel and defense costs. (RP 10; CP 23-24)

The Judgment and Sentence includes the following boilerplate language:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 23)

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

[t]he 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) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Bertling's sentence if it

did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination that he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Bertling's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Bertling's ability to pay, nor did it ask the court to make a determination under RCW 10.01.160, when it asked that LFOs be imposed.¹ (RP 5) And the trial court made no further inquiry into Bertling's financial

¹ It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

resources, debts, or employability. There was no specific evidence before the trial court regarding Bertling's past employment or his future educational opportunities or employment prospects.

The boilerplate finding in section 2.5 of the Judgment and Sentence does not establish compliance with RCW 10.01.160(3)'s requirements. Such a boilerplate finding is insufficient to show the trial court actually gave independent thought and consideration to the facts of Bertling's case. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). The Judgment and Sentence form used in Bertling's case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not even include a checkbox to register even minimal individualized judicial consideration. (CP 23) Rather, every time one of these forms is used, there is a pre-formatted conclusion that the trial court followed the requirements of RCW 10.01.160(3), regardless of what actually transpired. This type of finding therefore cannot reliably establish that the trial court complied with RCW 10.01.160(3). And the trial court made no contemporaneous statements at sentencing regarding Bertling's ability to pay. (RP 10)

In sum, the record fails to establish the trial court actually took into account Bertling's financial circumstances before imposing

LFOs, and therefore did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy unless the record clearly indicates the court would have imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). The record in this case does not expressly demonstrate the trial court would have found sufficient evidence of Bertling's ability to pay the LFOs. At sentencing, the State failed to point to any evidence establishing Bertling's past or future educational and employment prospects. And Bertling was subsequently found indigent for the purposes of appeal. (CP 34-36)

It cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if it had actually taken into account Bertling's individual financial circumstances. As such, the remedy is remand for resentencing. Parker, 132 Wn.2d at 192-93.

B. BERTLING'S CHALLENGE TO THE LFO ORDER CAN BE RAISED FOR THE FIRST TIME ON APPEAL AND IS RIPE FOR REVIEW.

This Court recently held, in State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), that the defendant's failure to object at sentencing to a boilerplate finding of ability to pay LFOs precluded him from raising a challenge for the first time on appeal.² The holding was in error, however, because Washington courts have repeatedly held that a defendant may challenge sentencing rulings for the first time on appeal when the ruling in question is in violation of statutory requirements. See e.g. State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) ("when a sentencing court acts without statutory authority in imposing a sentence, the error can be addressed for the first time on appeal"); State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999). Like other sentencing requirements in Washington, the authority to order a defendant in a criminal case to pay LFOs is wholly statutory. See Curry, 118 Wn.2d 918; RCW 9.94A.760.

There is also a line of cases that holds that a challenge to an LFO order is not "ripe for review" until the prosecution tries to enforce

² Our State Supreme Court has granted review of the Blazina decision. 178 Wn. 2d 1010, 311 P.3d 27 (2013).

it.³ But our State Supreme Court has rejected the idea that challenges to sentencing conditions are not “ripe” where, as here, the issues are primarily legal, do not require further factual development, and involve a final decision of the trial court. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the potential hardship to the parties of withholding court consideration. Bahl, 164 Wn.2d at 751.

First, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. Second, no further factual development is necessary. As explained above, Bertling is challenging the sentencing court’s failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully

³ See, e.g., Lundy, 176 Wn. App. at 108-09 (holding “any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review” until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant’s constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant’s constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

developed.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other words, while the defendant's obligation to complete payment of LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final.⁴ Accordingly, all three prongs of the ripeness test are met.

Also, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non-payment may subject him to arrest. RCW 10.01.180. Additionally,

⁴ Division 1 previously concluded a trial court's LFO order is "conditional," as opposed to final, because the defendant may seek remission or modification at any time. State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009). However, it did so in the context of reviewing a denial of the defendant's motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4). Thus, Division I's analysis was focused on the defendant's conditional obligation to pay rather than on the legal validity of the initial sentencing order. Smits, 152 Wn. App. at 523.

upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at an unconscionably high 12% interest rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnaring some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).⁵

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error

⁵ This report can be found at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). The defendant is not required to disprove this. See, e.g. Ford, 137 Wn. App. at 482 (stating the defendant is "not obligated to disprove the State's position" at sentencing where the State has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains with the State.

Second, an offender who is left to fight his erroneously ordered LFOs through the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to

retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See Legal Financial Obligations in Washington State at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Legal Financial Obligations in Washington State at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge his or her debt with the help of counsel and before the financial burden grows to overwhelming proportions.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that may otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of

an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration when imposing LFOs in the first place and not rely on the remission process to remedy errors.

For all these reasons, this Court should hold Bertling's challenge to the legal validity of the LFO order *can* be raised for the first time on appeal and *is* ripe for review.

V. CONCLUSION

The trial court's failure to comply with the sentencing statute when it imposed discretionary LFOs constitutes a sentencing error that may be challenged for the first time on direct appeal, and is ripe for review. Because the record fails to establish that the trial court did in fact consider Bertling's ability to pay before imposing discretionary LFOs, Bertling's case should be remanded for resentencing.

DATED: September 15, 2014



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CERTIFICATE OF MAILING

I certify that on 09/15/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael D. Bertling, DOC# 773387, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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