

NO. 46470-5-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KIMBERLY S. LELAND,

Appellant.

RESPONDENT'S BRIEF

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I. REPLY TO ASSIGNMENTS OF ERROR

- A. The State concedes the defendant was erroneously convicted of two counts of taking a motor vehicle in violation of double jeopardy.
- B. The defendant cannot raise the imposition of legal financial obligations for the first time on appeal.
- C. The trial court did not err in imposing legal financial obligations on the defendant.
- D. Defense counsel was not ineffective for failing to object to the trial court's imposition of legal financial obligations.

II. STATEMENT OF THE CASE

The State agrees with the factual and procedural history as set forth by the Defendant.

III. ARGUMENT

**A. THE STATE CONCEDES THE DEFENDANT WAS
ERRONEOUSLY CONVICTED OF TWO COUNTS
OF TAKING A MOTOR VEHICLE.**

The State concedes the defendant was erroneously convicted of two counts of taking a motor vehicle, in violation of double jeopardy. Though the crimes the defendant was convicted of happened on two different days, they equate to one unit of prosecution. As such, the State agrees that this Court should reverse and dismiss the second count of taking a motor vehicle because it violates double jeopardy.

B. THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS PROPER.

- 1. The defendant waived her right to object to the imposition of legal financial obligations by failing to object to their imposition at the time of sentencing; therefore, the court should not consider this issue.**

The general rule for appellate disposition of issues not raised in the trial court is that appellate courts will not entertain them. RAP 2.5; *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)). Appellate courts can also refuse to address a RAP 2.5(a) issue sua sponte. *Id.*; *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). In fact, this Court has previously declined to review the imposition of legal financial obligations when raised for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (“Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.”). Because the defendant in this case failed to object to the imposition of LFOs at sentencing, this Court should not review the trial court’s imposition of LFOs.

In *State v. Duncan*, the defendant challenged for the first time on appeal the trial court’s finding that he had the current or future ability to pay

legal financial obligations, arguing that the record did not support the trial court's findings that he had the ability to pay. 180 Wn. App. 245, 247, 327 P.3d 699 (2014). In that case, the only evidence that the trial court considered the defendant's ability to pay was boilerplate language on the judgment and sentence. *Id.* at 253. The boilerplate language at issue was:

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 has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

Id. at 251. The Court in that case held that ability to pay LFOs is not an issue that defendants overlook; rather, it is one that they reasonably waive because it is "unhelpful for a defendant to portray himself as irretrievably indigent at the time of sentencing." *Id.* at 250. Because defendants typically choose to refrain from suggesting at sentencing that they will remain indigent, Division Three of this Court found that defendants waive the issue of imposition of LFOs at sentencing, rather than overlooking it. Therefore, this Court refused to address the issue when raised for the first time on appeal.

This case is directly on point with *Duncan*. Because the defendant did not object to the imposition of LFOs at sentencing, this court should not consider the issue.

2. Even if the objection was not waived, the imposition of legal financial obligations was proper.

Because the defendant in this case did not object at sentencing, she bears the burden of demonstrating that she can raise this issue for the first time on appeal by showing that the sentencing court exceeded its statutory authority in assessing the LFOs. That is not shown here. In order to appeal based on the court's failure to follow a procedural requirement, the appellant must show that "the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so." *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). There is no requirement that a court enter formal specific findings regarding a defendant's ability to pay before legal financial obligations are imposed, either in the SRA or in the constitution. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013); *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). "The imposition of fines is within the trial court's discretion...Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and

would further burden an already overworked court system.” *Curry*, 118 Wn. 2d at 916. Because there is no requirement that formal findings be entered, the imposition of LFOs by the trial court was not improper.

However, if this Court finds the imposition was improper, the remedy is to remand so the trial court may make the record required. *State v. Bertrand*, 165 Wn. App. 393, 406, 237 P.3d 511 (2011).

3. The defendant was not denied effective assistance of counsel when her 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*, 446 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 *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. at 250. Division Three of this Court took it as fact that many defendants do not make an effort at sentencing 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

The defendant’s convictions for Taking a Motor Vehicle without Permission should be affirmed, as double jeopardy was not violated. This Court should not consider the issue of LFOs, as the defendant failed to object at the trial court level, precluding review on appeal.

Respectfully submitted this 27th day of February, 2015.



Aila R. Wallace, WSBA #46898
Attorney for the State

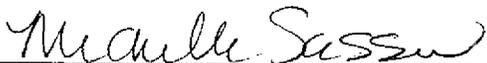
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Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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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 ~~February~~ ^{March} 2, 2015.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 02, 2015 - 2:22 PM

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