

NO. 47226-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL MA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman, Judge

No. 14-1-01726-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the issue of the trial court's imposition of mandatory legal financial obligations (LFOs) properly before this court where the issue was not preserved at trial?

2. Did the trial court properly impose LFOs as part of defendant's sentence when the only fines and costs included were mandated by statute, the trial court lacked discretion to waive them, and the mandatory LFOs are constitutional?

B. STATEMENT OF THE CASE.

On May 6, 2014, the Pierce County Prosecutor's Office (state) charged Michael Ma (defendant) with one count of residential burglary. CP 1. Defendant called one witness during trial (6RP 435) but did not testify himself. 6RP 473. On December 4, 2014, a jury found defendant guilty of the count as charged. CP 45.

On December 19, 2014, defendant came before the trial court requesting he be allowed to travel to Oregon prior to sentencing because he had a job lined up with a friend working for a drywall company. 9RP 569.

At sentencing on January 23, 2015, the trial court imposed a standard range sentence of four months confinement with credit for 84 days already served. CP 54-55. The trial court ordered defendant to pay

mandatory legal financial obligations (LFOs) consisting of \$200 criminal filing fee, \$100 DNA database fee, and \$500 crime victim assessment for a total of \$800 in mandatory LFOs. CP 53-54. Defendant did not object to the court's imposition of the mandatory LFOs. 10RP 584.

Defendant filed a timely notice of appeal. CP 61.

C. ARGUMENT.

1. THIS COURT SHOULD DECLINE TO REVIEW DEFENDANT'S CHALLENGE TO THE IMPOSITION OF MANDATORY LEGAL FINANCIAL OBLIGATIONS BECAUSE THE ISSUE WAS NOT PROPERLY PRESERVED FOR APPEAL.

An appellate court may generally refuse to review any issue not raised in the trial court. RAP 2.5(a). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013). However, the appellate court may grant discretionary review of the following claimed errors for the first time on appeal: 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. RAP 2.5(a); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Defendants sentenced after May 21, 2013, have notice that failing to object to the imposition of LFOs waives the ability to do so on appeal.

State v. Lyle, 188 Wn. App. 848, 852, 355 P.3d 327 (2015) (citing *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013)).

Defendant in this case was sentenced on January 23, 2015, a little over a year and a half after this court's decision in *Blazina* put him on notice that failure to object to LFOs precludes a defendant from challenging them on appeal. CP 53-54; 10RP 584. Defendant made no objection during trial or sentencing to the imposition of LFOs. 10RP 579-84. Although the State Supreme Court exercised its RAP 2.5 discretion to review Blazina's similarly unpreserved objection, it did so to correct what it perceived to be a systemic problem of statewide importance. The perceived problem was corrected by its *Blazina* decision. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Therefore, this court should decline to use its discretion and decline to review the issue in the present case.

2. EVEN IF THE COURT WERE TO REACH THE ISSUE, DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LFOs SHOULD BE REJECTED BECAUSE THE LFOs ARE MANDATORY, THE TRIAL COURT DID NOT HAVE DISCRETION TO WAIVE THEM, AND DEFENDANT HAS FAILED TO SHOW THEY ARE UNCONSTITUTIONAL.

a. The LFOs at issue are mandated by statute; the trial court did not have discretion to waive them.

In reviewing a trial court's imposition of LFOs, it is important to distinguish those LFOs that are mandatory from those that are

discretionary. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The legislature has deprived courts of the discretion to consider a defendant's ability to pay when imposing mandatory LFOs. *Id.* Use of the word "shall" operates to create a duty rather than confer discretion. *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)).

In the present case, all of the LFOs that were imposed on defendant are mandatory. The first mandatory LFO defendant incurred is a \$500 crime victim penalty assessment pursuant to RCW 7.68.035 which provides in pertinent part, "there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars..."

The second mandatory LFO defendant incurred was a \$100 DNA database fee pursuant to RCW 43.43.7541 which provides in pertinent part, "[e]very sentence imposed for a crime specified in RCW 43.43.754¹ must include a fee of one hundred dollars."

The third mandatory LFO defendant incurred was a \$200 filing fee pursuant to RCW 36.18.020(2)(h) which provides in pertinent part, "[c]lerks of superior courts shall collect the following fees for their official

¹ RCW 43.43.754 provides that a biological sample must be collected for DNA identification analysis from every adult or juvenile convicted of a felony.

services: Upon conviction or plea of guilty...an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.”

The above named statutes mandating the LFOs at issue use the word “shall” or “must” thus, conferring a duty on the trial court to impose them. As a result, the appellate courts in Washington have repeatedly held that the trial courts have no discretion in the decision to impose them. *See State v. Curry*, 118 Wn. App. 676, *aff’d* 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (holding the victim penalty assessment is mandatory and that “no provision is made in the statute to waive the penalty for indigent defendants.”); *See also State v. Bergen*, 186 Wn. App. 21, 30 344 P.3d 1251 (2015) (holding the victim assessment, DNA collection fee, and criminal filing fee are “each required irrespective of the defendant’s ability to pay.”); *See also State v. Clark*, __ Wn. App. __, *4-5 P.3d __ (No. 32928-9-III) (Nov. 19, 2015) (holding victim assessments, DNA fees, and criminal filing fees are all mandatory fees which operate “without the court’s discretion by legislative design.”); *See also State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984) (“We are likewise not persuaded that the Legislature intended a discretionary application. The use of the word “shall” creates an imperative obligation unless a different legislative intent can be discerned.”).

The mandatory LFOs in the present case are mandatory fines for which the trial court lacks discretion to waive; therefore, this court should reject defendant’s challenge to the properly imposed mandatory LFOs.

b. Defendant fails to show the mandatory LFOs are unconstitutional.

The Washington Supreme Court has already upheld the constitutionality of Washington statutes providing for payment of mandatory costs as applied to indigent defendants in *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). In that case, the Court recognized that it is fundamentally unfair to imprison indigent defendants solely because of their inability to pay court-ordered fines, and held that there were sufficient safeguards in the sentencing scheme to prevent the imprisonment of indigent defendants. *Curry*, 118 Wn.2d at 918. Agreeing with Division I of the Court of Appeals, the Supreme Court discussed how:

[u]nder RCW 9.94A.200², a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*. RCW 7.21.010(1)(b). Thus, no defendant will be incarcerated for his or her inability to pay the assessment unless the violation is willful.

Curry, 118 Wn.2d at 918 (emphasis in original).

While *Curry* discussed the mandatory crime victim penalty assessment fee, this principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW

² Recodified as § 9.94A.634 in 2001, and later recodified as § 9.94B.040 in 2008.

43.43.7541 and the filing fee required by RCW 36.18.020. *See State v. Lundy*, 176 Wn. App. 96, 103-03, 308 P.3d 755 (2013); *See also State v. Kuster*, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013); *See also State v. Thompson*, 153 Wn. App. 325, 336-337, 223 P.3d 1165 (2009).

Although RCW 9.94A.200 has been recodified (more than once), the same safeguards against imprisonment of indigent defendants discussed in *Curry* remain in effect today. *See* RCW 9.94B.040; *See also* RCW 7.21.010(1)(b). As a result, the mandatory LFOs in the present case do not violate substantive due process as applied to indigent defendants.

Defendant attempts to use the Supreme Court's recent decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), to argue that imposition of mandatory LFOs upon indigent defendants at sentencing without inquiring into the defendant's ability to pay violates substantive due process. *Blazina* held that RCW 10.01.160(3) necessitates that prior to imposing discretionary legal financial obligations upon a defendant, the court must conduct an individualized inquiry into the defendant's ability to pay. *Blazina*, 182 Wn.2d 837-38.

However, the ruling in *Blazina* is distinguishable from the present case for two reasons. First, the *Blazina* holding is based on statutory construction and related to whether the trial court violated RCW 10.01.160, not the Constitution as alleged in the present case. Second, *Blazina* discussed the failure to inquire into the ability to pay before imposing discretionary LFOs, not mandatory ones like the LFOs at issue

in the present case. *See Blazina*, 182 Wn.2d at 837-38 (“Blazina and Paige-Colter argue that, in order to impose *discretionary* LFOs under RCW 10.01.160(3), the sentencing judge must consider the defendant’s individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay.... We agree.”) (emphasis added). Thus, *Blazina*’s holding is inapplicable to and has no bearing on defendant’s claim of a constitutional violation of substantive due process in the present case.

The *Blazina* decision has no impact on and does not change the principle articulated in *Curry* that mandatory LFOs are constitutional so long as there are sufficient safeguards to prevent imprisonment of indigent defendants. Defendant fails to show the mandatory LFOs required by statute violate substantive due process as applied to indigent defendants.

Defendant also relies on civil common law and GR 34 to argue that a person of indigent status may seek a waiver of filing fees or surcharges. *See Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013) (holding fees imposed on indigent litigants which affect the right to access justice invalid in a civil case where the litigant was seeking to obtain a parenting plan.); *See also James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027 (1972) (holding invalid a state statute allowing the State to recover legal defense fees for indigent defendants in subsequent civil proceedings.)

However, this reliance is misplaced. First, GR 34 specifically pertains to civil matters. “Waiver of court and clerk’s fees and charges in

civil matters on the basis of indigency.” GR 34. Civil rules shall not be “imported as a limitation to the sentencing authority granted by the legislature to criminal courts.” *State v. Ewing*, 102 Wn. App. 349, 354, 7 P.3d 835 (2000).

GR 34 concerns civil filing fees and surcharges which may act as a barrier to entry to the judicial system. The payment of these fees and surcharges is a condition precedent for a litigant’s ability to secure access to judicial relief. This is distinguished from criminal mandatory LFOs which are imposed on defendants who have been convicted and have already been afforded protections in the judicial system.

Second, the issues in those cases are distinguished from the issues in the present case. The issue in *Jafar* was whether GR 34 granted courts discretion to waive all, some, or none of the fees for indigent litigants. The court, in holding that courts did not have discretion and that courts must waive all of the fees for indigent litigants, relied on public policy prescribing consistent results for similarly situated individuals. Here, the LFOs at issue are mandatory; the court specifically lacks discretion to reduce or waive some or all of the fees. Inconsistent results and disparate treatment that was a concern to the court in *Jafar* are not an issue with mandatory LFOs.

Likewise, the comparison to *James* is also misplaced. The issue in *James* concerns the State’s ability to bring a civil lawsuit to recoup legal defense fees against defendants both acquitted and convicted, unlike the

mandatory LFOs at issue in the present case. This subjected indigent defendants to garnishments and consequences with less protection than those defendants that hire their own counsel. *James*, 407 U.S. at 136-7; 139. The inequality of protections that concerned the court in *James* is not present in the case at hand. Safeguards are built in to protect an indigent defendant in Washington state from excessive garnishment and imprisonment. See RCW 9.94A.7603; *Curry*, 118 Wn.2d at 918.

Furthermore, defendant's claim that indigent defendants are regularly imprisoned because they are "too poor to pay" LFOs is misleading. Brief of the App. 16. *The Assessment and Consequences of Legal Financial Obligations in Washington State* report cited by defendant interviewed several defendants who *believed* that they were jailed for their inability to pay. However, the report contacted DOC who stated that defendants were not incarcerated for failure to pay unless it was accompanied by other violations of the conditions of supervision or defendant's failure to make payments was found to be willful. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 50; 52 Note 63 (2008). Defendant's characterization of the 2008 report that many defendants are incarcerated for inability to pay LFOs is incorrect and unsupported.

A feature of mandatory LFOs is that the court lacks discretion to reduce or remove them, thus removing concern that indigent defendants

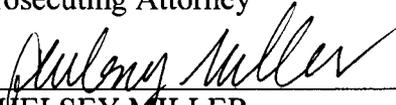
receive inconsistent or disparate treatment. Further, safeguards are in place as noted in *Curry* to protect indigent defendants from imprisonment or otherwise unconstitutional ramifications. Defendant has failed to show the imposition of mandatory LFOs is unconstitutional; therefore, the court should reject defendant's challenge to the imposition of mandatory LFOs.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court to affirm the order below.

DATED: November 30, 2015.

MARK LINDQUIST
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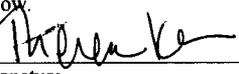
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