

No. 47235-0-II

Pierce County #14-1-03898-6

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY EDWARDS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Philip Sorenson, Plea and Sentencing Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to conduct the required inquiry into Mr. Edwards' individual financial circumstances and likely ability to pay prior to imposing discretionary legal financial obligations and terms and this Court should exercise its discretion to address the issue under State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).
2. Appellant assigns error to the "boilerplate," pre-printed finding 2.5 in the judgment and sentence, which provides:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's part, 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 ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 30-31.

3. Counsel was prejudicially ineffective in failing to object to the imposition of discretionary legal financial obligations without proper consideration of his client's actual ability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mr. Edwards, who is indigent, was ordered to pay discretionary legal financial obligations without any consideration on the record of his actual financial situation, indigence, employment prospects, employment history and other relevant factors as required under RCW 10.01.160(1) and the Washington Supreme Court's decision in Blazina.

1. Should this Court exercise its discretion and order remand under Blazina where the same error occurred here and the same systemic and other problems with our state's LFO scheme are the same here as in Blazina?
2. Is there insufficient evidence to support a "boilerplate" finding of ability to pay where the sentencing court engaged in no discussion on the issue and the defendant was indigent?

3. Was counsel prejudicially ineffective in failing to raise or address this issue below?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Anthony Edwards was charged by information in Pierce County Superior Court with stalking and two counts of felony domestic violence court order violation, all charged as domestic violence offenses and with the aggravating factor that Mr. Edwards was on community custody at the time the offenses were committed. CP 1-2; RCW 9A.46.110; RCW 9.94A.535(3)(f); RCW 26.50.110(5).

On February 11, 2015, Edwards entered guilty pleas to an amended information charging only the two domestic violence court order violations and deleting the aggravating factor. CP 12-21; RP 1-4.¹ The Honorable Judge Philip Sorensen accepted the pleas and ordered Edwards to serve a total sentence at the bottom of the standard range. CP 25-38; RP 5-12.

Mr. Edwards appealed and this pleading follows. CP 39.

2. Facts relevant to issues on appeal

Mr. Edwards is indigent. CP 42-43. The prosecution filed an amended information reducing the charges, to which Edwards entered his guilty pleas. CP 9-12. In the Statement of Defendant on Plea of Guilty the prosecution set forth its planned recommendation for sentencing, which

¹The verbatim report of proceedings consists of five volumes, which will be referred to as follows:

October 28, 2014, as "1RP;"
November 12, 2014, as "2RP;"
December 1, 2014, as "3RP;"
December 15, 2014, as "4RP;"
February 11, 2015, as "RP."

included 41 months in custody and \$500 in costs for attorney's fees for Mr. Edwards' public defender. CP 12-21. The prosecutor also filed a statement explaining the amending of the information, in which he declared that Mr. Edwards had agreed to serve a low-end standard-range sentence. CP 11.

In accepting the pleas, Judge Sorensen told Edwards that there were "costs" associated with pleading guilty to crimes, including a DNA draw fee, a \$200 court fee and a victim's fund fee of \$500. RP 6. The judge also said, "[t]he public defender's office is entitled to some reimbursement, up to \$500 in this case, for Mr. Smith's services," referring to defense counsel. RP 6.

The judge agreed with the parties' suggested 41 months for the sentence, then ordered legal financial obligations including \$400 for attorney fees for the public defender. RP 12.

D. ARGUMENT

THIS COURT SHOULD REVERSE AND REMAND FOR RESENTENCING BECAUSE THE LOWER COURT DID NOT MAKE THE REQUIRED INQUIRY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS ON THE INDIGENT APPELLANT AND THE CONCERNS RAISED BY OUR HIGHEST COURT IN BLAZINA ARE PRESENT HERE; IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE

The sentencing court erred in imposing the \$400 in discretionary legal financial obligations without conducting the required inquiry under RCW 10.01.160(1). Further, this Court should remand for resentencing with instructions for the trial court to engage in the analysis set forth by the Supreme Court subsequently in State v. Blazina, supra, because this case presents the very same policy concerns which compelled our highest court

to act in that case, even absent objection below. Finally, if this Court finds that the issue was waived by counsel's unprofessional failures below, reversal and remand for resentencing is required with new counsel.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

The 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.

In Blazina, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 182 Wn.2d at 831-32. In one case, the sentencing court ordered a \$500 crime victim penalty assessment, a \$200 filing fee, a \$100 DNA fee, \$1,500 for assigned counsel and restitution to be determined "by later order." Id. The other sentencing court ordered the same fees except only \$400 for appointed counsel and an additional \$2,087.87 in extradition costs. Id.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. The prosecution first argued that the issue was not "ripe for review" until the state tried to enforce collection of the amounts imposed. 182 Wn.2d at

833 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court, a conclusion of “ripeness” with which the concurring justice seemed to agree. Id.

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court “**shall not**” order costs without making an “individualized inquiry” into the defendant’s individual financial situation and their current and future ability to pay, and that the trial court “**shall**” take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” in determining the amount and method for paying the costs. 182 Wn.2d at 834-35 (emphasis in original). And the Court found that, in this context, the word “shall” is imperative. Id.

Further, the Court agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. It then rejected the a “boilerplate” clause, preprinted on the judgment and sentence, as sufficient:

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

182 Wn.2d at 837-38.

The Blazina majority gave sentencing courts guidance on making

the determination of “ability to pay,” referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance and other relevant questions, specific to that particular defendant. Id.

The Blazina majority held that, in crafting RCW 10.01.160(3) the Legislature “intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.; see also, 182 Wn.2d at 840-41 (Fairhurst, J., concurring). Further, the majority believed that the trial judge’s failure to consider the defendants’ ability to pay in the consolidated cases on review in Blazina was “unique to these defendants’ circumstances.” Blazina, 182 Wn.2d at 833. The Court therefore believed that the failure of a sentencing court to properly consider the defendant’s present and future ability to pay was an error not expected to “taint sentencing for similar crimes in the future,” unlike the errors in Ford. Id.

But the majority nevertheless decided to reach the issue. While stopping short of faulting lower appellate courts for declining to exercise their discretion to do so thus far, the Blazina Court held 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.” 182 Wn.2d at 834. The Court chronicled national recognition of “problems associated with LFO’s imposed against indigent defendants,” including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious,

societal problems “caused by inequitable LFO systems.” Id. One of the proposed reforms the Court mentioned was a requirement “that courts must determine a person’s ability to pay before the court imposes LFOs.” Id.

The Court then noted the flaws in our own state’s LFO system and the system’s “problematic consequences.” Id. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford \$25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 836-37. This increased involvement “inhibits reentry,” the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other “reentry difficulties increase the chances of recidivism.” Id.

Finally, the Blazina majority pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain

types of cases, or when defendants go to trial, or when they are male or Latino. Id. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

The concurrence in Blazina agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 182 Wn.2d at 839. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), “to promote justice and facilitate the decision of cases on the merits.” Id. The concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error “because of the widespread problems” with the LFO system as applied to indigents “as stated in the majority.” Id. And she also would have reached the error, because “[t]he consequences of the State’s LFO system are concerning, and addressing where courts are falling short of the statute will promote justice.” Id.

In this case, Mr. Edwards was not asked about his personal financial situation before the court imposed the \$400 in discretionary costs for appointed counsel. See RP 1-12. On the judgment and sentence, the same pre-printed clause which was found insufficient in Blazina was marked. CP 30-31. The boilerplate judgment and sentence also required that payments will be “commencing immediately,” and that Edwards “shall report to the clerk’s office within 24 hours of the entry of the judgment and sentence to set up a payment plan” unless the court set a different rate. Id. Mr. Edwards was ordered to provide financial and other information to set up payments and to herself pay any costs of “services to

collect unpaid legal financial obligations per contract or statute.” CP 31-32.

Just like the defendants in Blazina, Mr. Edwards is indigent. Just like those defendants, he is already subject to 12% interest, compounding right now. And just as in Blazina, here, there was no consideration of whether he has any present or future likelihood of having any hope of paying, despite the fact that he will be in prison for some time and despite the requirements of RCW 10.01.160 as noted in Blazina.

Further, just as in Blazina, the only findings on Mr. Edwards’ “ability to pay” were the insufficient pre-printed “boilerplate” findings, entered without consideration of his individual circumstances.

Thus, Mr. Edwards is in the same situation as the defendants in the consolidated cases in Blazina. He is already suffering the impacts of the unfair and unjust system our Supreme Court has now condemned and will continue to be impacted by that unless this Court follows Blazina and orders resentencing. The resentencing court should be ordered to consider Mr. Edwards’ “individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay,” on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

Pursuant to RAP 1.2(a), this Court is tasked with interpreting the rules and exercising its discretion in order to serve the ends of justice. Blazina was a watershed in our state. Every single justice on our highest court agreed that our state’s system of imposing legal financial obligations is so unfair, improperly enforced and debilitating to the possibility of any

rehabilitation for indigents that the justices unanimously agreed to take the extremely unusual step of addressing the issue for the first time on appeal, even though they agreed it was non-constitutional error.

In so doing, the Blazina Court took a courageous step towards working to ensure that poor people convicted of crimes are not permanently marginalized as a sub-class of our society, never able to climb out from the ever-deepening hole of legal debt even if, as the Blazina Court noted, those people make full minimum payments for *years*.

For our highest state court to so rule sends a very clear message. While it was not error or an abuse of discretion for lower appellate courts to fail to take action prior to Blazina, the import of Blazina is that our highest Court intends to ensure that the injustices in our LFO system are redressed. For this Court to decline to do so after the Blazina decision would not only perpetuate the same injustices our high Court has just condemned but amount to a significant unfairness, rising to the level of a due process violation.

In the alternative, reversal and remand for resentencing in light of Blazina is required because Mr. Edwards was deprived of effective assistance of appointed counsel at sentencing. Both the state and federal constitutions guarantee that a person who cannot afford counsel is appointed counsel to assist her, and that appointed counsel provides effective assistance. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); see State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Cary v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 483 (2006);

Sixth Amend.; Art. 1, § 22. Counsel is ineffective when, despite a strong presumption of competence, his performance falls below an objective standard of reasonableness and that deficiency causes prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), dissapproved of in part and on other grounds by, State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015).

Here, even if the Court does not choose to exercise its discretion to grant Edwards relief from the discretionary legal financial obligations imposed without consideration of his individual ability to pay, relief should be granted based on counsel's ineffectiveness in failing to raise the issue below. This Court's decision declining to address the improper imposition of legal financial obligations for the first time on appeal in Blazina was issued on May 21, 2013. State v. Blazina, 174 Wn. App. 906, 301 P.3d 493 (2013), remanded, 182 Wn.2d 827 (2015). In that case, this Court declared that it would not address a failure of the trial court to make the required findings regarding individual ability to pay when a defendant does not object to the boilerplate finding of ability to pay below. 174 Wn. App. at 911.

The sentencing in this case occurred well after that time, in February of 2015. And before that sentencing, this Court again held that it would not address the issue for the first time on appeal, giving counsel notice of the need to object below. See State v. Halverson, 176 Wn. App. 972, 309 P.3d 795 (2013), review denied, 179 Wn.2d 1016 (2014). Yet counsel here sat mute and never raised Edwards' inability to pay. As a result, counsel's client has been ordered to pay discretionary costs he

cannot afford, at exorbitant credit rates and terms, effective from the date of sentencing, even though he is indigent, in custody and was and is represented by appointed counsel because of his poverty. Counsel's unprofessional failure to be aware of the state of current law prejudiced his client, and reversal should be granted on that basis even if this Court does not choose to exercise its discretion under Blazina.

E. CONCLUSION

The Blazina decision represents a fundamental recognition by our highest court that the system under which appellant was ordered to pay LFOs is flawed and unjust. The concerns shared by all of the justices on the Supreme Court in Blazina apply equally here as to the defendants in the two separate cases consolidated in Blazina. This Court should grant Mr. Edwards the same relief as the defendants in Blazina and should order reversal and remand for resentencing with instructions for the trial court to give full and fair consideration to Edwards' individual financial circumstances and present and future ability to pay before imposition of any LFOs. In the alternative, the Court should grant relief based on counsel's ineffectiveness on the issue.

DATED this 10th day of February, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Pierce County Prosecutor's Office, pepateccf@co.pierce.wa.us, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Anthony Edwards, DOC364928, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 10th day of February, 2016.

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