

NO. 47249-0-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PATRICK NEWMAN,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Did the appellant waive his right to appeal the imposition of his legal financial obligations when he did not object to the imposition of his legal financial obligations at time of sentencing?
2. Was the appellant's trial attorney ineffective for failing to object to the imposition of the appellant's legal financial obligations at time of sentencing?

II. SHORT ANSWERS

1. Yes. The appellant waived his right to appeal the imposition of his legal financial obligations because he did not object to the imposition of his legal financial obligations at time of sentencing.
2. No. The appellant's trial attorney was not ineffective for failing to object to the imposition of the appellant's legal financial obligations at time of sentencing.

III. FACTS

The Cowlitz County prosecutor charged the appellant with one count of possession of Heroin. CP 1-5. The first jury trial for the appellant's case resulted in a hung jury and the trial court declaring a mistrial. 1RP 181.

On January 27, 2015, the Honorable Gary Bashor, Cowlitz County Superior Court Judge, presided over the appellant's second jury trial. 2RP 3-127. On January 27, 2015, the jury found the appellant guilty of possession of Heroin. 2RP 126.

On January 27, 2015, the Honorable Gary Bashor sentenced the appellant to a first time offender sentence. 2RP 126-133. On February 9, 2015, judgment was entered in the case. During entry of the judgment, the appellant's trial attorney asked the court to strike the thousand dollar drug fee because the appellant "might not be working a whole bunch soon." 2RP at 136. The court inquired if the appellant was currently working and the appellant indicated he was currently working. The court struck the drug fee and imposed discretionary legal financial obligations. The appellant did not object to the imposition of his discretionary legal financial obligations. 2RP 136-137. The appellant now appeals the imposition of his discretionary legal financial obligations.

IV. ARGUMENT

1. THE APPELLANT WAIVED HIS RIGHT TO APPEAL THE IMPOSITION OF HIS LEGAL FINANCIAL OBLIGATIONS BECAUSE HE DID NOT OBJECT TO THE IMPOSITION OF HIS LEGAL FINANCIAL OBLIGATIONS AT TIME OF SENTENCING.

For the first time on appeal, the appellant challenges the trial court's imposition of his legal financial obligations. In State v. Blazina,

344 P.3d 680 (2015), the court held that it is not error for a Court of Appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *Id.* at 682. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Id.* at 684. The decision to review is discretionary on the reviewing court under RAP 2.5. *Id.* at 681.

This court should continue to apply the court's decision in *State v. Blazina*, 174 Wn. App. 906, 911 (2013). In *Blazina*, the appellant did not object to the trial court's imposition of legal financial obligations and appellate court declined to allow him to raise it for the first time on appeal. *Id.* at 911-912. This is supported by this court's holding in *State v. Lyle*, 355 P.3d 327 (2015). "Our decision in *Blazina*, issued before *Lyle*'s March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal." *Id.* at 329.

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685 (1988). In the present case, the appellant was sentenced on January 27, 2015, and discretionary legal financial obligations were imposed on February 9, 2015, well after the decision in *State v. Blazina*. The

appellant did not object to the imposition of his legal financial obligations at the time of sentencing. Therefore, the State respectfully requests this court not review the appellant's claim.

2. THE APPELLANT'S TRIAL ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF THE APPELLANT'S LEGAL FINANCIAL OBLIGATIONS AT TIME OF SENTENCING.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693 (1984) and State v. McFarland, 127 Wash.2d 322, 335 (1995). An appellant must show both deficient performance and resulting prejudice to prevail in an ineffective assistance claim. State v. McNeal, 145 Wash.2d 352, 362 (2002). To establish deficient performance, an appellant must show that his attorney's performance fell below an objective standard of reasonableness. Id. To establish prejudice, an appellant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. Id.

In the Lyle case, the defendant argued "that defense counsel provided ineffective assistance of counsel by failing to challenge the LFOs." Lyle, 355 P.2d at 329. The court noted that "Lyle presented some evidence relevant to his financial situation during the sentencing hearing. But this information was presented in the context of Lyle's request for an

exceptional sentence downward, not to provide evidence related to Lyle's current or future ability to pay. These facts suggest that Lyle may be disabled but that he was able to do at least some work as evidenced by the fact he had been working for several months before the sentencing." Id. at 329. The court found that "Lyle must establish prejudice on this record and the record is not sufficient for us to determine whether there is a reasonable probability that the trial court's decision would have been different, his ineffective assistance of counsel claim fails." Id. at 329-330.

Like the Lyle case, the appellant has not shown how he was prejudiced by his trial attorney's failure to object to the imposition of his legal financial obligations. The record indicates the appellant was working when the trial court imposed his legal financial obligations. There is no evidence to reasonably show that the trial court's decision would have been different had his trial attorney objected to the imposition of the legal financial obligations. Therefore, the court should deny the appellant's claim of ineffective assistance of counsel.

V. CONCLUSION

The appellant's appeal should be denied because he did not object to the imposition of his legal financial obligations at the time of sentencing and has not shown how he was prejudiced by his trial attorney's failure to

object to the legal financial obligations at time of sentencing. The appellant's conviction should be affirmed.

Respectfully submitted this 28 day of September, 2015.

RYAN JURVAKAINEN
COWLITZ COUNTY PROSECUTING
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By:



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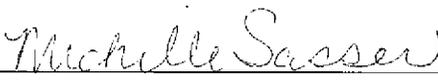
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 28th 2015.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 28, 2015 - 2:21 PM

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