

**NO. 47491-3-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**BRIAN NICHOLAS WEST,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR

The Honorable Judge F. Mark McCauley, Judge

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**BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to enter written findings of fact and conclusions of law pursuant to CrR 6.1(d) after hearing the non-jury trial.

2. The trial court abused its discretion when, without giving any consideration to Mr. West's financial situation, it entered a finding that Mr. West had the present and future ability to pay discretionary legal financial obligations (LFOs).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it failed to enter written findings of fact and conclusions of law pursuant to CrR 6.1(d) after hearing the non-jury trial?

2. Did the trial court abuse its discretion when it left boilerplate language on the judgment and sentence finding Mr. West had the present and future ability to pay LFOs and imposed discretionary LFOs but never actually gave consideration to whether Mr. West had the ability to pay them?

C. STATEMENT OF THE CASE

The state charged Brian West with a single count of Residential Burglary. CP 1. Preliminarily, the court reviewed Mr. West's Indigency Screening Form. Supplemental Designation of Clerk's Papers, Indigency

Screening Form (sub. nom. 5). On the form, Mr. West indicated he had no job, no income, no vehicle, and received food stamps. The court found he was indigent and authorized the appointment of defense counsel “at no expense.” Supp. DCP, Indigency Screening Form. The court appointed counsel. Supp. DCP, Order Re Lawyer (sub. nom. 6).

Mr. West waived his right to a jury trial and the case was tried to the bench. RPI<sup>1</sup> 3-4; CP 3: RPI 6-75. The court heard the following testimony.

Marliene Larson lives alone in a house in Aberdeen. RPI 40-41. Inside the house, shower curtains hang in the place of traditional doors. *Id.* at 42. As she was waking up one morning, she saw a shadow through a shower curtain and called out, “Whose there?” *Id.* at 42. A person responded “Roger.” *Id.* Ms. Larson, who moves rather slowly, got out of bed and saw the back of a person as they left her house. The person was wearing a black hoodie. *Id.* She followed the person outside and watched as they left. *Id.* at 42-43. The person was carrying a blue ladder ball set<sup>2</sup> from her basement. *Id.* at 43-44. She called the police and told them the direction of the

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<sup>1</sup> There are three volumes of verbatim report of proceedings for this appeal:  
Vol. I – hearing dates March 2, March 23, and April 7, 2015  
Vol. II – hearing date March 9, 2015  
Vol. III – hearing April 20, 2015

<sup>2</sup> No one explained what a blue ladder ball set is and the lack of explanation caused some confusion. RPI 74.

intruder's travel. She assumed the person was not in a car as she did not hear a car. Id.

Aberdeen Police Officer Ronald Morella responded to the call by driving to the area where a person running in the described direction might be. RPI 10. Within minutes he saw a man walking briskly near an apartment building 8-10 blocks from Ms. Larson's house. Id. at 11. Officer Morella noticed dirt on the man's back giving him an impression that maybe the man had run through brush. Id. at 13. He stopped the man, later identified as Brian West. Id. at 12, 14. The man had a box under one arm and a bundle of soft clothing under the other arm. Id. at 12.

Mr. West told Officer Morella his name was Chris and that he had been at some apartments. RPI 14. West did not recall a specific apartment number and did not offer the name of the friend he had been visiting. Id. at 15. He told Officer Morella he got the wood box at Grays Harbor Swap and Shop the day before. Id. at 15. The soft bundle of clothing turned out to be three jackets. Id. at 15.

Officer Morella had Mr. West sit on the curb. RPI 16. He felt Mr. West's back and it seemed wet as if from perspiration. RPI 16. Mr. West attributed the moisture to sliding on his back after he fell on a hill by the apartments. RPI 16. Mr. West had a loaded BB pistol in the waistband of his pants. RPI 17.

Sergeant Keith Dale drove Ms. Larson to see Mr. West in hope that she could identify him as the person in her house. RPI 34. She could not identify Mr. West as the person but she did recognize both the wood box and a Helly Hansen black rain jacket from Mr. West's bundle of clothes as her property. RP I 22-23, 46. Both items had been outside on her porch. RPI 46-47.

The door to Ms. Larson's house did not lock but was secured with a bungee cord. RPI 49. During the burglary investigation the bungee cord, now cut, was found near the entry to the house. Id. at 35, 49. In looking through her house, Ms. Larson noted the blue ladder set was missing from her basement. Id. at 49, 51.

Mr. West testified and denied going to Ms. Larson's home. RPI 57. Instead, he said he bought the jacket and the wood box outside a nearby apartment building a few minutes before being stopped. Id. at 56. He knew the seller, Chuck Miller, from the street. Id. He was unaware of any permanent address or phone number for Miller. Id. at 57. He was at the apartment building visiting Chase Richards. He gave the police Richards's name during the initial investigation. RP 59. He had not mentioned Chuck Miller. He initially said his name was Chris because he was scared by the false burglary accusation. Id. at 59.

The prosecutor asked Mr. West about various items he had on his person: head lamps, a crescent wrench, defensive spray, screw drivers, BB pistol, and a fuse tester. RPI 61-62. All the items, he explained, were necessary because his mode of transportation was a bike and because he “fished on a vessel.” Id. Mr. West acknowledged having a 2010 burglary conviction and a 2014 theft conviction. Id at 58.

The court decided the state’s witnesses were more credible than Mr. West and found him guilty as charged. RPI 74-75.

At sentencing, Mr. West’s criminal history included the two convictions mentioned at trial plus Communication with a Minor for Immoral Purposes (2012) (amended from Rape of a Child in the Third Degree), and Possession of Drug Paraphernalia (2015). CP 5. He was also being sentenced for a recent conviction for Failure to Resister as a Sex Offender. RPIII 2, 5-6. The court imposed a 20-month high end sentence plus 12 additional months of community custody. CP 5-7; RPIII 6. The court also ordered him to pay supervision fees while on community custody. CP 7.

There was no mention or discussion of Mr. West’s financial means and his current and future ability to pay discretionary legal financial obligations (LFOs). RP Sentencing 2-10. The court imposed discretionary

LFOs of \$200 of unspecified “court costs” and \$575 for court appointed counsel. CP 8.

The judgement and sentence included this boilerplate language at section 2.5

Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant’s present and future ability to pay the legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. (RCW 10.01.160).

The motion and order of indigency approving the appointment of appellate counsel and appeal at public expense shows that Mr. West is unemployed, has not income, no cash, no savings, no checking account, no vehicle, and no assets. Supp. DCP, Motion and Declaration for Order Authorizing the Defendant to Seek Review at Public Expense and Providing for Appointment of Attorney on Appeal (sub. nom. 34).

To date, the trial court has not entered written findings of fact and conclusions of law on the non-jury trial.

This appeal follows. CP 13.

D. ARGUMENT

1. THE COURT'S FAILURE TO COMPLY WITH CrR 6.1(d) REQUIRES REMAND FOR ENTRY OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A trial court sitting as the trier of fact must enter written findings of fact and conclusions of law:

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

CrR 6.1(d); *accord State v. Head*, 136 Wn.2d 619, 622-26, 964 P.2d 1187 (1998). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. See *State v. Vailencour*, 81 Wn. App. 372, 378, 914 P.2d 767 (1996).

“Without comprehensive, specific written findings the appellate court cannot properly review the trial court’s resolution of the disputed facts and its application of the law to those facts.” *State v. Greco*, 57 Wn. App. 196, 204, 787 P.2d 940 (1990). The court’s oral findings are not binding and cannot replace written findings and conclusions. *Head*, 136 Wn.2d at 622; *State v. Hescocock*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to

interpret oral rulings. *Head*, 136 Wn.2d at 624. Thus the proper remedy is to vacate the judgment and sentence and remand to the trial court for entry of written findings and conclusions. *Id.* at 624-26; *State v. Denison*, 78 Wn. App. 566, 572, 897 P.2d 437 (1995).

The trial court failed to enter written findings and conclusion after the bench trial. In finding Mr. West guilty, the court said, in essence, it did not believe Mr. West's testimony and it could come up with various scenarios to explain inconsistencies in the evidence. RPI 74-75. CrR 6.1(d) specifically requires the findings and conclusions to be "separately stated."

Although remand is the typical remedy, the *Head* court recognized the possibility that reversal may be appropriate when the individual can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. *Head*, 136 Wn.2d at 624-25. Mr. West therefore requests this court remand for entry of written findings of fact and conclusions of law, and reserves the right to offer further argument depending on the content of any written findings. *Id.* at 625-26.

2. THE TRIAL COURT’S USE OF BOILERPLATE LANGUAGE ON THE JUDGMENT AND SENTENCE IS NOT AN ADEQUATE SUBSTITUTE FOR THE ACTUAL USE OF DISCRETION IN DETERMINING WHETHER MR. WEST HAD THE PRESENT AND FUTURE ABILITY TO PAY LFOs.

The trial court failed to make an individualized inquiry into Mr. West’s present and future ability to pay discretionary LFOs. RPIII 2-10. In doing so, the court exceeded its statutory authority and the discretionary portions of the order should be vacated.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. Here the court imposed discretionary costs of unspecified \$200 “court costs” and \$575.00 for court-appointed attorney.<sup>3</sup> CP 8; RCW 10.01.160(1); RCW 10.01.160(2); RCW 10.01.190; *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); *State v. Smits*, 152 Wn. App. 514, 521-22, 216 P.3d 1097 (2009) (recognizing court costs are discretionary). However, 10.01.160(3) forbids imposing discretionary LFOs unless “the defendant is or will be able to pay them.” In determining LFOs, courts “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).

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<sup>3</sup> The court also imposed the mandatory \$500 victim assessment.

Prior to the sentencing in Mr. West’s case, the Washington Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015).<sup>4</sup> LFOs accrue at a 12% interest rate so that even those “who pay \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” *Id.* This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” *Blazina*, 182 Wn.2d at 836-37. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” *Blazina*, 182 Wn.2d at 837.

The court in *Blazina* thus held that RCW 10.01.160(3) requires trial courts to first consider an individual’s current and future ability to pay discretionary LFOs before imposing them. *Blazina*, 182 Wn.2d at 837-39. This requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” *Blazina*, 182 Wn.2d at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the defendant’s current

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<sup>4</sup> The *Blazina* opinion was issued on March 12, 2015.

and future ability to pay.” *Id.* The court should consider such factors as length of incarceration and other debts, including restitution. *Id.*

The court in *Blazina* further directed courts to look at GR 34 for guidance. *Blazina*, 182 Wn.2d at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. *Id.* For example, courts must find a person indigent if he or she receives assistance from a needs-based program such as social security or food stamps. *Id.* If the individual qualifies as indigent, then “courts should seriously question the person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Blazina*, 182 Wn.2d at 834.

At sentencing, the court failed to make an individualized inquiry into Mr. West’s current and future ability to pay the \$775 in LFOs it imposed. RPIII 2-10, CP 8. Instead, the court merely included erroneous boilerplate language on the judgment and sentence that it had considered Mr. West’s ability to pay.

Although the general rule under RAP 2.5(a) is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise

sentencing challenges for the first time on appeal); *see also*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody should be challenged for the first time on appeal). Specifically, the court had held a defendant may challenge, for the first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

Here the court failed to comply with the statute by not making the requisite ability-to-pay inquiry. The Indigency Screening Form put the court on notice that Mr. West had no job, no cash, no savings, and relied on public assistance, in the form of food stamps, to survive. The court was also aware Mr. West has six criminal convictions to include a sex offense that requires sex offender registration. This background does not make him an attractive job candidate for most employers. Although Mr. West indicated on the Indigency Screening Form that he had no debt, it is difficult to imagine a poor person with five prior convictions not owing a mountain of mandatory and discretionary LFO debt to the courts of origin, namely Grays Harbor County and Aberdeen Municipal Court. As Mr. West was being sentenced on the current offense in Grays Harbor County, it would have been easy to have the county clerk and municipal court clerk run a quick debt assessment on Mr. West's prior convictions. Even after sentencing Mr. West, the court

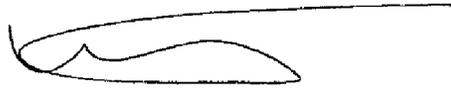
agreed he remained indigent because it authorized an appeal at public expense. See Supp. DCP, Motion and Declaration for Order Authorizing the Defendant to Seek Review at Public Expense and Providing for Appointment of Attorney on Appeal.

The state will likely ask this court to decline review of the erroneous LFO order. The *Blazina* court held that the Court of Appeals “properly exercised its discretion to decline review” under RAP 2.5(a). *Blazina*, 182 Wn.2d at 834. The court nevertheless concluded 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 the case.” *Id.* Asking this court to decline review would essentially ask this court to ignore the serious consequences of LFOs. This court should instead confront the issue head on by vacating Mr. West’s discretionary LFOs and remanding for resentencing.

#### E. CONCLUSION

This court should vacate the judgment and sentence and remand to the trial court for (1) entry of written findings and conclusions of law on the non-jury trial and (2) to consider Mr. West’s ability to pay discretionary LFOs.

Respectfully submitted this 28th day of February 2016.

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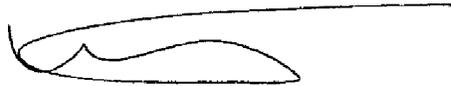
LISA E. TABBUT/WSBA #21344  
Attorney for Brian Nicholas West

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant with: (1) Katherine Svoboda, Grays Harbor County Prosecutor's Office at ksvoboda@co.grays-harbor.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Brian Nicholas West/DOC# 358860, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

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

Signed February 28, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Brian Nicholas West

**LISA E TABBUT LAW OFFICE**

**February 28, 2016 - 1:58 PM**

**Transmittal Letter**

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