NO. 47491-3-II

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

STATE OF WASHINGTON,
Respondent,

v.

BRIAN NICHOLAS WEST,
Appellant.

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

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: E.C. Jany
ERIN C. JANY
Deputy Prosecuting Attorney
WSBA #43071

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

TABLE

Table of Contents

I. RESPONSE TO ASSIGNMENT OF ERROR.....1

A. Did the trial court err when it failed to enter written findings of fact and conclusions of law at the conclusion of a bench trial?.....1-2

B. Did the trial court abuse its discretion in determining Mr. West's present and future ability to pay legal financial obligations?.....2-5

II. CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

State v. Bahl, 164 Wn.2d 739, 743-45, 193 P.3d 678 (2008) 3

State v. Blazina, 182 Wn.2d 827, 831, 344 P.3d 680 (2015) 2, 3, 4

State v. Davis, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *cert. denied*, __ U.S. __, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013)) 3

State v. Ford, 137 Wn.2d 472, 478, 973 P.2d 452 (1999) 3

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). 1, 2

State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014). 3

State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966) 1

State v. Mendoza, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009) 3

State v. Paine, 69 Wn.App 873, 884, 850 P.2d 1369 (1993) 3

State v. Royal, 122 Wn.2d 413, 423, 858 P.2d (1993) 1

Statutes

CrR 6.1(d) 1

RAP 2.5(a) 2

I. RESPONSE TO ASSIGNMENTS OF ERROR

A. Did the court err by not entering findings of fact and conclusions of law at the conclusion of a bench trial?

Yes. CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial, which was not done in this case.

The purpose of CrR 6.1(d)'s requirement of written finds of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. *Id.* (quoting *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgement." *Id.* The proper remedy is remand for entry of written findings and conclusions. *Id.*

While reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions, the burden of proving any such prejudice would be on the defendant. *Id.* at 623-24 (quoting *State v. Royal*, 122 Wn.2d 413, 423, 858 P.2d (1993)). Furthermore, prejudice will not be inferred from

delay in entry of written findings of fact and conclusions of law. *Id.* at 625.

The State, therefore, concedes that the court erred by not entering findings of fact and conclusions of law at the conclusion of the bench trial in this case and acknowledges that the case must be remanded for entry of written findings and conclusions. There is neither evidence nor any argument by the appellant that he has been prejudiced by the court's failure to enter findings of fact and conclusions of law so remand is the proper remedy rather than dismissal in this case.

B. Did the trial court abuse its discretion in determining Mr. West's present and future ability to pay legal financial obligations?

No. Mr. West did not object to the imposition of legal financial obligations, therefore, he waived this claim of error.

A defendant who makes no objection to the imposition of discretionary legal financial obligations at sentencing is not automatically entitled review. *State v. Blazina*, 182 Wn.2d 827, 831, 344 P.3d 680 (2015). It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." *Id.* and RAP 2.5 (a). This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an

opportunity to respond. *Id.* at 833 (quoting *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *cert. denied*, __ U.S. __, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013)). While illegal or erroneous sentences may be challenged for the first time on appeal under limited circumstances, unpreserved legal financial obligation error do not command review as a matter of right under the current case law. *Id.* and see also *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999) and *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

In *State v. Blazina*, the Supreme Court of Washington held that errors in calculating offender scores and the imposition of vague community custody are the type of errors that may be challenged for the first time on appeal because those issues cause widely varying sentences for the same crime and allow some defendants to receive unjust punishment simply because his or her attorney failed to object. *Id.* at 833-34 (quoting *State v. Paine*, 69 Wn.App 873, 884, 850 P.2d 1369 (1993); *State v. Mendoza*, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009); *Ford*, 137 Wn.2d at 475-78; *State v. Bahl*, 164 Wn.2d 739, 743-45, 193 P.3d 678 (2008)). The Court was very clear that those issues created a narrow category of exceptions for challenging a sentencing error for the first time on appeal. *Id.* at 834. The Court

specifically stated that allowing challenges to discretionary legal financial obligations would not promote sentencing uniformity in the same way as would issues related to offender score calculations and vague community custody and that the Court of Appeals properly exercised its discretion to decline review. *Id.*

In the case at hand, there was no challenge or preservation of error made by defense when the legal financial obligations were ordered. Therefore, Mr. West waived this claim of error and he cannot now raise this issue on appeal. While it appears the trial court made limited inquiry into Mr. West's financial situation, the trial court is intimately familiar with Mr. West given the number of prior criminal cases he has had before the court. As such, the court is well versed in his background, his history, both personal and criminal, his issues, and his abilities. Additionally, although his appellant attorney now argues that because he is a sex offender, he is unable to find work, the fact that Mr. West has criminal history is no excuse for Mr. West to simply sit back and remain unemployed for the remainder of his life.

Mr. West is an able-bodied and unhindered young man without debt or dependents who was only 28 years old at the time of his sentence. To argue that a person who is unemployed at the time of

coming into custody and who has limited ability to find employment due to his or her criminal record should not be responsible for paying toward court costs would essentially mean that legal financial obligations could never be ordered as this would apply to the majority of defendants. There is nothing in the record that differentiates Mr. West from any other person who has been convicted of a crime. While Mr. West has apparently chosen to not work or to financially support himself through other means aside from burglarizing the homes of others and theft, Mr. West does have the ability to become employed upon his release, should he choose to do so.

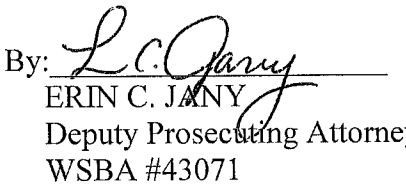
The legal financial obligations ordered in this case are minimal and well within the means of Mr. West to make payments toward those court costs. Therefore, the court did not error in ordering legal financial obligations in this case and Mr. West should remain responsible for making payments toward those costs, which have not yet been enforced. Further, even in considering the defendant's ability to pay and the court's inquiry as argued above, the issue is moot because Mr. West did not raise the issue with the trial court. As such, Mr. West did not preserve the issue for review and is barred from challenging the alleged error now.

II. CONCLUSION

For the reasons above, the State respectfully asks that the Court to affirm the verdict and the sentence imposed by the trial court, including the imposition of legal financial obligations, and remand for the sole purpose of entering written findings of fact and conclusions of law.

DATED this 12th day of July, 2016.

Respectfully Submitted,

By: 
ERIN C. JANY
Deputy Prosecuting Attorney
WSBA #43071

GRAYS HARBOR COUNTY PROSECUTOR

July 12, 2016 - 10:41 AM

Transmittal Letter

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