No. 48780-2-II

Court of Appeals, Div. II,
of the State of Washington

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**State of Washington,**

Respondent,

**v.**

**Benjamin R. Krogness,**

Appellant.

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# Brief of Appellant

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## 1. Introduction

Benjamin Krogness pled guilty to possession and delivery of heroin. He qualified for, and received, a Drug Offender Sentencing Alternative. Without any inquiry into Krogness's present or future ability to pay legal financial obligations, the trial court imposed discretionary LFOs, including fines, recoupment of appointed attorney's fees, and costs of incarceration. This Court should remand for a proper inquiry under *State v. Blazina* and related cases.

## 2. Assignments of Error

**Assignments of Error**

1. The trial court erred in imposing discretionary LFOs as part of Krogness's sentence without making a particularized inquiry into Krogness's present and future ability to pay.

**Issues Pertaining to Assignments of Error**

1. The Washington Supreme Court has made it clear that discretionary LFOs cannot be imposed unless the court, after a particularized inquiry into the defendant's present and future ability to pay, finds that the defendant will have the ability to pay. The trial court did not make any inquiry. Should the case be remanded for an inquiry into Krogness's ability to pay discretionary LFOs? (assignment of error #1)

## 3. Statement of the Case

Benjamin Krogness was charged with possession and deliver of heroin and possession of methamphetamine. CP 6-7. He agreed to plead guilty to the heroin charges in exchange for the prosecutor's recommendation to grant a Drug Offender Sentencing Alternative on the heroin charges and to dismiss the methamphetamine charge. CP 9-12, 16-17; RP, June 3, 2015, at 7-8.

Krogness disputed the offender score calculated by the State for purposes of sentencing. CP 10, 29 (signed criminal history only "as to form"); RP, June 3, 2015, at 2; RP, July 1, 2015, at 3-4. Krogness argued that three prior felonies "washed out" under RCW 9.94A.525(c), resulting in an offender score of 3. *See* RP, June 3, 2015, at 2; RP, July 1, 2015, at 11-14; Exs. 7, 8. The State argued that Krogness was held in at least partial confinement pursuant to a felony on August 29, 2007, within five years of the prior sentencing (January 3, 2003) and within five years of a subsequent crime (October 28, 2009), and therefore the prior felonies did not "wash out" under the statute. *See* RP, July 1, 2015, at 7-8; Exs. 4-6.

The trial court found that on August 29, 2007, Krogness was in the Lewis County Jail when he was served with a warrant for failure to appear on one of his prior felonies. RP, July 1, 2015, at 16. After hearing further argument on whether

service of the warrant resulted in partial confinement pursuant to a felony for purposes of the statute, the trial court ruled as follows:

> So what it comes down to is if I go with an offender score of three, then we're talking about a midpoint of 20 months, which in my estimation is not sufficient time to justify a prison DOSA. So what Mr. Krogness is looking at is he is either looking at an offender score of six, and half the midpoint of the standard range, which is 60 to 120 and a prison DOSA. So I suppose it comes down to how badly does Mr. Krogness want the prison DOSA.
>
> …
>
> Well, my decision is that the offender score is six. And I'll go along with the prison DOSA 45 in, 45 out, because he needs the treatment. …
>
> So my conclusion is that [the State]'s argument carries the day and those priors do not wash…

RP, July 1, 2015, at 20-21.

The trial court imposed discretionary legal financial obligations on Krogness, including $600 in appointed attorney fees, costs of incarceration, and a $2,000 fine for the drug crimes. CP 32-33, 35. The trial court did not make any specific inquiry into Krogness's finances or his present or future ability to pay legal financial obligations. Without any inquiry, the trial court stated, "I'm finding that he has the ability to work and earn money and make periodic payments, $25 a month starting 60 days." RP, July 1, 2015, at 22:21-23.

## 4. Argument

### 4.1 The trial court erred in imposing discretionary LFOs without first inquiring into Krogness's present and future ability to pay.

In an ever-growing string of decisions, the Washington Supreme Court has universally reversed the imposition of discretionary legal financial obligations ("LFOs") when the record does not reflect that the trial court has conducted "an individualized inquiry into the defendant's present and future ability to pay such obligations, as required by RCW 10.01.160. *See, e.g., State v. Marks*, 185 Wn.2d 143, 145, 368 P.3d 485 (2016); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Even where the defendant has failed to object in the trial court, the appellate courts have consistently exercised discretion to address the issue and remand for the required inquiry. *See State v. Duncan*, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016).

The principals of *Blazina* and *Duncan* apply equally to imposition of costs of incarceration and of the drug fine without an individualized inquiry into Krogness's ability to pay. Costs of incarceration are discretionary under RCW 9.94A.760(2) ("If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration"). The supreme court has

held that imposition of costs of incarceration, like appointed attorney's fees, "must be based on an individualized inquiry into the defendant's current and future ability to pay that is reflected in the record, consistent with the requirements of *Blazina*." *State v. Leonard*, 184 Wn.2d 505, 508, 358 P.3d 1167 (2015).

Imposition of the drug fine under RCW 69.50.430(2) was also dependent on an inquiry into Krogness's ability to pay. The statute allows the court to suspend the drug fine if it finds the defendant to be indigent:

> On a second or subsequent conviction for violation of any of the laws listed in subsection (1) of this section, the adult offender must be fined two thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the adult offender to be indigent, this additional fine may not be suspended or deferred by the court.

RCW 69.50.430(2). This framework—a mandatory fine that can be waived if the defendant is indigent—is operatively no different from a discretionary LFO that is imposed when the defendant is not indigent. Both require an inquiry into the defendant's financial status. In either case, the result of that inquiry determines the outcome: if the defendant does not have the ability to pay, the LFO should not be imposed.

Here, the trial court failed to conduct any inquiry into Krogness's ability to pay these discretionary LFOs. The trial court's decision was couched in the same sort of conclusory,

boilerplate language found inadequate in *Blazina*, 182 Wn.2d at 838. *See* CP 32-33 ("The court has considered the total amount owing, the defendant's 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 defendant has the present means to pay costs of incarceration.")

Apart from the boilerplate language, there is no record that the court ever actually considered or inquired into "the defendant's financial resources" or his "present and future ability to pay legal financial obligations." *See* RP, July 1, 2016, at 21-23. The court simply stated, without inquiry or analysis, "I'm finding that he has the ability to work and earn money and make periodic payments, $25 a month starting 60 days." RP, July 1, 2015, at 22:21-23. This is insufficient to support imposition of discretionary LFOs under *Blazina*, *Leonard*, *Duncan*, and a growing list of other cases on the issue. This Court should reverse the imposition of these discretionary LFOs and remand to the trial court for the necessary inquiry into Krogness's ability to pay.

## 5. Conclusion

The trial court imposed $600 in appointed attorney fees, costs of incarceration, and a $2,000 fine for the drug crimes.

CP 32-33, 35. The attorney fees fall squarely under *Blazina*. The costs of incarceration fall under *Leonard*. The drug fines should be treated the same way. Because the trial court failed to make the required inquiry into Krogness's ability to pay, these discretionary LFOs should be reversed and the case remanded to the trial court for the proper inquiry.

Respectfully submitted this 8th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 8, 2016, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 8th day of September, 2016.

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## September 08, 2016 - 10:11 AM

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