

No. 32583-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

**FILED**  
**Mar 09, 2015**  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

MARIANO DIAZ-FARIAS,  
Defendant/Appellant.

APPEAL FROM THE ADAMS COUNTY SUPERIOR COURT  
Honorable Steven B. Dixon, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in ordering Diaz-Farias to pay a jury fee in excess of \$250, and court reporter, interpreter and crime lab costs.

2. The record does not support the finding Diaz-Farias has the current or future ability to pay Legal Financial Obligations.

3. The trial court erred by imposing discretionary costs.

*Issues Pertaining to Assignments of Error*

1. Did the trial court err in ordering Diaz-Farias to pay a jury fee in excess of \$250, and court reporter, interpreter and crime lab costs?

2. Should the directive to pay legal financial obligations based on a finding of current or future ability to pay be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record?

3. Did the trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took the defendant's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

## **B. STATEMENT OF THE CASE**

Mariano Diaz-Farais pleaded guilty to an Amended Information charging him with first degree assault. 3/18/14 RP 9; CP 14–15. The plea agreement was reached the day a jury trial was set to begin. 3/18/14 RP 4.

The sentencing court imposed discretionary costs of \$2,965 and mandatory costs of \$800<sup>1</sup>, for a total Legal Financial Obligation (LFO) of \$3,765. CP 36–37. The discretionary costs included \$2,200 imposed *sua sponte* by the court because Diaz-Farais exercised his right not to go to trial and instead enter a plea: “I’m increasing the court costs by -- \$2,200, although that is probably pyrrhic, as they say, in recognition of the court reporter costs, the juror costs and the interpreter costs incurred in anticipation of the trial date which could not be recouped.” 5/27/14 RP 22. The court also imposed a crime lab fee of \$125. CP 37.

In imposing the legal financial obligation, the court made the following boilerplate notation:

**2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** 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.

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<sup>1</sup> \$500 Victim Assessment and fees for criminal filing (\$200) and DNA collection (\$100). CP 36.

CP 34. The trial court did not inquire into Diaz-Farias' financial resources or the nature of the burden payment of LFOs would impose, and ordered Diaz-Farias to make minimum \$10 monthly payments towards the LFOs. 5/27/14 RP 12–23; CP 37.

This appeal followed. CP 47.

### C. ARGUMENT

#### **1. The trial court erred in ordering Diaz-Farias to pay a jury fee in excess of \$250, and court reporter, interpreter and crime lab costs.**

As part of the judgment and sentence the court ordered Diaz-Farias to pay \$2,200 as “the court reporter costs, the juror costs and the interpreter costs incurred in anticipation of the trial date.” 5/27/14 RP 22; CP 36. The court also imposed a crime lab fee of \$125 pursuant to RCW 43.43.690. CP 37.

*Jury fee.* RCW 10.01.160(1) and (2) provide that costs may be imposed on a criminal defendant that are expenses specially incurred by the state in prosecuting and convicting the defendant. A superior court may impose a jury fee up to \$250 for a 12-person jury. *State v. Hathaway*, 161

Wn. App. 634, 653, 250 P.3d 253 (2011); RCW 36.18.016(3)(b). Here, the recoupment for the jury fee must be limited to \$250.

*Court reporter costs.* RCW 10.01.160(1) and (2) provide that costs may be imposed on a criminal defendant, except those costs which represent “expenses inherent in providing a constitutionally guaranteed jury trial” or “expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.” Superior courts are to be courts of record. Const. art. 4, s 11. In Washington’s larger judicial districts, official court reporters must be appointed by the superior court and are paid out of the county’s expense fund. RCW 2.32.180, .210. The legislature has declared that providing such a reporter in each court is “a necessary part of the judicial system of the state of Washington.” RCW 2.32.180.

Smaller counties, such as Adams County, may appoint an official court reporter or a competent stenographer to act pro tempore. RCW 2.32.220, .270. RCW 2.32.200, which defines the duties of a court reporter, illustrates that it is the legislature’s intent that a full report of oral proceedings be taken at the affirmative request of either party or counsel, or at the option of the trial judge.

(U)pon the trial of any cause in any court, if either party to the suit or action, or his or her attorney, request[s] the

services of the official reporter, the presiding judge shall grant such request, or upon his or her own motion such presiding judge may order a full report of the testimony, exceptions taken, and all other oral proceedings . . .

RCW 2.32.200. Adams County Superior Court Local Rule 14, Court Reporting<sup>2</sup>, states that in all criminal cases preliminary matters will be recorded electronically and trials will be reported by a court reporter who will be paid at the county's expense.

Diaz-Farias has a constitutional right to a jury trial. U.S. Const. amendment 6; Const. art. 1, sec 21, 22. The Legislature has declared court reporters are a necessary part of our state's judicial system and will be paid at county expense. The superior court of Adams County has opted to require and provide court reporters during criminal trials, at county

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<sup>2</sup> **LR 14. Court Reporting**, provides as follows:

- A.** Pre-trial and post-trial civil motions and other proceedings will not be recorded by a reporter or by electronic or mechanical recording unless requested by a party to the action, or as directed by the Court.
- B.** Civil trials will be reported only on request of a party to the action, which party shall arrange for a court reporter to be in attendance. The cost of such reporter shall be an expense of the requesting party or parties. On proper request, and then directed by the Court, one-day trials may be electronically recorded. All trials longer than one day shall be reported by a court reporter as hereinabove stated.
- C.** In criminal matters, all pre-trial motions and appearances will be recorded electronically, and the Court will arrange for a court reporter to be in attendance for criminal trials at the expense of Adams County.
- D.** If partial transcriptions are made of the record during proceedings in Superior Court, a copy of such transcription shall be furnished to the Judge.

expense. The sentencing court lacked authority under RCW 10.01.160 to assess court reporter costs against Diaz-Farias.

*Interpreter costs.* RCW 2.43.040(2), which requires the State to bear the costs of a criminal, non-English-speaking defendant's interpreter costs, reads as follows:

*In all legal proceedings in which the non-English-speaking person is a party, or is subpoenaed or summoned by the appointing authority or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings initiated by agencies of government, the cost of providing the interpreter shall be borne by the government initiating the legal proceedings.*

(Emphasis added.)

Here, Diaz-Farias was on trial for assault, which is a criminal proceeding. RCW 9A.36.011(1)(a) and (c). Accordingly, the costs associated with Diaz-Farias' interpreter must be borne by the State and the sentencing court erred in concluding otherwise.

*Crime lab fee.* The court assessed a crime lab fee of \$125 against Diaz-Farias under RCW 43.43.690; CP 37. In part the statute provides:

(1) When a person has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by the state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court shall levy a crime

laboratory analysis fee of one hundred dollars for each offense for which the person was convicted.

RCW 43.43.690.

The interpretation of a statute is a question of law reviewed *de novo*. *State v. Thompson*, 151 Wn.2d 793, 801, 92 P.3d 228 (2004) (citing *State v. Tarabochia*, 150 Wn.2d 59, 63, 74 P.3d 642 (2003)). Generally, trial courts have the authority to impose costs and fees on a convicted defendant. RCW 9.94A.760(1); RCW 10.01.160(1). Trial courts have been given wide latitude in matters related to sentencing under these statutes. *State v. Barnes*, 117 Wn.2d 701, 710, 818 P.2d 1088 (1991). However, an applicable specific statute will supersede a relevant general statute. *See General Tel. Co. of N.W., Inc. v. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985); *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). RCW 43.43.690 is plain on its face and effect must be given to that plain meaning. *State v. Moon*, 124 Wn. App. 190, 195, 100 P.3d 357, 360 (2004) (citations omitted). Finally, statutes authorizing costs are in derogation of common law and should be strictly construed. *Id.* (citations omitted).

Here, nothing in the record supports a conclusion that a crime lab analysis was performed. Pursuant to the plain meaning of RCW 43.43.690, the sentencing court lacked authority to impose a crime lab fee.<sup>3</sup>

**2. The directive to pay based on unsupported findings of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.**

Diaz-Farias did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *Ford*, 137 Wn.2d 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *see also State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014, 287 P.3d 10 (2012) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal); *State v. Bower*, 64 Wn. App. 808, 810, 827 P.2d 308 (1992) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013) (declining to consider the challenge for the first time on appeal); *State v. Calvin*, \_\_\_ Wn. App. \_\_\_, 316 P.3d 496, 507-08 (2013) (declining to consider the challenge for the first time on appeal); *State v.*

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<sup>3</sup> In any event the lab fee would be statutorily limited to \$100.

*Quintanilla*, 178 Wn. App. 493, 313 P.3d 493, 497 (2013) (acknowledging *State v. Blazina*, but also discussing the merits of the LFO issue raised by the defendant).<sup>4</sup>

a. The finding of ability to pay/directive to pay must be stricken.

There is insufficient evidence to support the trial court's implied finding that Diaz-Farias has the present and future ability to pay legal financial obligations and the directive to pay must be stricken. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

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<sup>4</sup> Appellant is aware this Court recently issued an opinion holding that this issue may not be challenged for the first time on appeal. See *State v. Duncan*, No. 29916-3-III, 2014 WL 1225910, at \*2-6 (March 25, 2014). However, this issue is now pending before the Washington Supreme Court in *State v. Blazina*, No. 89028-5, consolidated with *State v. Paige-Colter*, No. 89109-5. Oral argument took place in these cases on February 11, 2014. Consideration of the petition for review filed in *Duncan* (No. 90188-1) has been deferred pending a final determination in *Blazina*. Therefore this issue is raised in order to preserve the argument, should the Washington Supreme Court effectively overrule this Court's opinion in *Duncan*.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “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.” *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” *Id.* at 915-16.

Here, there is insufficient evidence to support the trial court's findings that Diaz-Farias has the present or future ability to pay legal financial obligations. A trial court's findings of fact must be supported by

substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006), citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *Bertrand*, 165 Wn. App. at 517 fn.13, citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” *Bertrand*, 165 Wn. App. at 404 (quoting *Baldwin*, 63 Wn. App. at 312) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. at 405.

The record does not show the trial court took into account Diaz-Farias' financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding that Diaz-Farias has the present or future ability to pay. To the contrary, the trial court found Diaz-Farias indigent for purposes of

pursuing this appeal. CP 49–51. The finding that Diaz-Farias has the present or future ability to pay LFOs is not supported in the record. The finding is clearly erroneous and the finding and the directive to pay must be stricken from the judgment and sentence. *See Bertrand*, 165 Wn. App. at 404-05 (ordering the trial court to strike an unsupported finding of ability to pay).

b. The imposition of discretionary costs of \$2,965 must also be stricken. Because the record does not reveal the trial court took Diaz-Farias' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the judgment and sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin*, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. However:

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.

RCW 10.01.160(3). It is well-established this provision does not require the trial court to enter formal, specific findings. See *Curry*, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404. Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Id.*

Here, the court ordered Diaz-Farias to pay discretionary costs of \$2,965, consisting of a \$140 sheriff service fee, \$500 fine pursuant to RCW 9A.20.021, \$125 crime lab fee and \$2,200 “other court costs” fee. However, the record reveals no balancing by the court through inquiry into Diaz-Farias’ financial resources and the nature of the burden that payment of LFOs would impose on him. Further, there was no evidence of Diaz-Farias’ present or future employment, or an inquiry into his resources or employability.

The trial court’s imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) is an

abuse of discretion. *See Baldwin*, 63 Wn. App. at 312 (stating this standard of review). The imposition of the discretionary costs of \$2,965 should be stricken from the Judgment and Sentence.

**D. CONCLUSION**

For the reasons stated, the matter should be remanded for resentencing to reduce the jury fee and remove court reporter, interpreter and crime lab costs. In the alternative, the trial court should be ordered to strike from the Judgment and Sentence the finding of ability to pay Legal Financial Obligations and the imposition of discretionary costs.

Respectfully submitted on March 8, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 8, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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