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MAY 7, 2015  
Court of Appeals  
Division III  
State of Washington

No. 32659-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSE NIEVES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Judge John D. Knodell

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

The trial court erred by failing to consider the defendant's ability or inability to pay discretionary legal financial obligations (LFOs) before it erroneously made a finding that the defendant had the ability or likely future ability to pay present and later-imposed LFOs. The Appellant invites this Court to consider the issue for the first time on appeal pursuant to RAP 2.5(a), RAP 1.2(a) and *State v. Blazina*, \_\_\_ Wn.2d \_\_\_, 344 P.3d 680 (2015). Alternatively, this Court should remand for resentencing, because Mr. Nieves was denied his constitutional right to effective assistance when defense counsel failed to object to the imposition of present and future discretionary LFOs.

## **B. ASSIGNMENTS OF ERROR**

1. The record does not support the court's finding that it "considered the total amount owing, the defendant's past, 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." FF 2.5., CP 93.
2. The court erred by finding: "That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." FF 2.5, CP 93.
3. The court erred by imposing present discretionary LFOs and also authorizing the imposition of future discretionary LFOs, including appellate costs and other later-imposed LFOs, without considering the defendant's present or future ability to pay. Order 4.3, CP 96-97.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the court's failure to consider the defendant's ability to pay present or future discretionary legal financial obligations, along with an unsupported finding on the same, requires resentencing.

- a. DNA fee discretionary here under the law of the case.
- b. Court must consider defendant's ability to pay
- c. Finding of ability to pay must have support in the record.
- d. The LFO issue should be addressed on its merits in this case for the first time on appeal.

Issue 2: Whether defense counsel's failure to object to the imposition of present and future legal financial obligations, without any consideration of the defendant's present or future ability to pay and based on an unsupported finding of the same, deprived Mr. Nieves of his constitutional right to effective assistance of counsel and requires resentencing.

### **D. STATEMENT OF THE CASE**

On Halloween night of 2010 in Grant County, Washington, Jose Nieves and several other passengers were riding in a vehicle when a law enforcement officer signaled for a traffic stop. (CP 49-50; *State v. Nieves*, 174 Wn. App. 1070 (No. 30340-3-III, Ruling 5/7/2013). Witnesses testified that Mr. Nieves then shot a firearm in the direction of the officer, and the officer stopped pursuing and called for backup. (*Id.*) Witnesses testified that Mr. Nieves threatened to kill anyone who "snitch[ed]" on him. (*Id.*, CP 51) In 2013, this Court affirmed Mr. Nieves' jury convictions for first-degree assault (count 1), intimidating a public servant

(count 2), drive-by shooting (count 3), unlawful possession of a firearm (count 4), firearm enhancements, and the aggravating factor that the assault involved a law enforcement officer. (CP 49, 52-56) This Court reversed and remanded for retrial on three counts of intimidating a witness. (*Id.*; CP 47)

On remand, rather than retrying Mr. Nieves on the three reversed counts, the State elected to dismiss these charges. (1/7/14 RP 10) Mr. Nieves was resentenced at the top of the newly calculated standard range, effectively reducing Mr. Nieves' total confinement from 500 to 327 months. (1/7/14 RP 10-23)

At resentencing, the court then imposed mandatory and discretionary legal financial obligations (LFOs) totaling \$1,023.00.<sup>1</sup> (CP 96-97) The court made the following findings:

The court has considered the total amount owing, the defendant's past, 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 court finds:

That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein

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<sup>1</sup> The court imposed a \$500 victim's assessment fee (RCW 7.68.035), \$200 filing fee (RCW 36.18.020(2)(h)), \$100 DNA fee (RCW 43.43.7541), and other court costs of \$223 (RCW 10.01.160). (CP 96-97) The court did not re-impose the \$500 fee for a court appointed attorney that was initially imposed at the original sentencing (c.f. CP 29, 96; 10/18/11 RP 152), although there is no indication in this record why this fee was not re-imposed and the order states that additional LFOs "may be set by later order of the court" (CP 97).

...The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court...

All payments shall be...commencing immediately...

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

(FF 2.5., CP 93; CP 96-97)

The LFOs above included \$100 for DNA testing even though Mr. Nieves had been previously convicted of a felony in 2010. (CP 92, 96-97)

There was no discussion or evidence presented regarding the defendant's ability to pay LFOs at either his original sentencing in 2011 or his resentencing in January 2014. (*See* 10/18/11 RP 149-52; 1/7/14 RP 10-23) The motion and order of indigency indicated that Mr. Nieves was indigent by reason of "poverty;" Mr. Nieves had no property or income and his average spendable monthly balance at DOC was \$7.19. (CP 114-15, 119-21) He was committed to the Department of Corrections (DOC) on these underlying offenses since at least October 2011. (CP 38-39)

This appeal followed. (CP 111; Comm. Wasson Ruling, 1/12/2015, enlarging time for filing the notice of appeal.)

## E. ARGUMENT

**Issue 1: Whether the court's failure to consider the defendant's ability to pay present or future discretionary legal financial obligations, along with its unsupported finding on the same, requires resentencing in this case.**

The court failed to consider Mr. Nieves' present or future ability to pay LFOs before it imposed discretionary LFOs. Additionally, the court's finding that the defendant had the present or future ability to pay these and other discretionary LFOs that may be later assessed was clearly erroneous; the finding was not supported by any evidence and was not made following an individualized inquiry into the defendant's ability to pay. Mr. Nieves requests that this Court review this issue, strike the discretionary costs, and remand for resentencing pursuant to RAP 2.5(a) (permitting review of certain issues raised for the first time on appeal), RAP 1.2(a) (liberally construing rules to promote justice), and *State v. Blazina*, \_\_ Wn.2d \_\_, 344 P.3d 680 (2015) (exercising its discretion to reach the merits of this same LFO issue under RAP 2.5(a)).

A court may order a defendant to pay legal financial obligations, including costs incurred by the state in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). "Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the

defendant's present or likely future ability to pay." *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original).

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).

- a. DNA fee discretionary here under the law of the case.

As a threshold matter, Mr. Nieves acknowledges that the \$500 victim assessment and \$200 filing fee were mandatory, and the court need not have considered the defendant's ability to pay before imposing these mandatory fees. *Lundy*, 176 Wn. App. at 102-03.

As to the DNA fee, several courts have held that this fee is also mandatory when a defendant has been convicted of a felony. *Lundy*, 176 Wn. App. at 102-03; *State v. Kuster*, 175 Wn. App. 420, 424-25, 306 P.3d 1022 (2013); *State v. Thompson*, 153 Wn. App. 325, 339, 223 P.3d 1165 (2009); *State v. Brewster*, 152 Wn. App. 856, 861, 218 P.3d 249 (2009) (citing RCW 43.43.754(1) ("A biological sample must be collected for purposes of DNA identification analysis from...[e]very adult...convicted of a felony..."); and RCW 43.43.7541 ("Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars)).

The courts above, however, did not address the specific argument that Mr. Nieves raised in his prior appeal in this case: that a court errs by imposing a subsequent DNA fee where the defendant already submitted to DNA testing and was assessed the fee pursuant to a prior conviction. *State v. Nieves*, 174 Wn. App. 1070, \*2, *review denied*, 178 Wn.2d 1022 (2013). As to this particular argument, this Court previously held by unpublished opinion:

RCW 43.43.754(2) is written in permissive language neither requiring, nor prohibiting, courts from ordering a second DNA fee and sample from repeat offenders.

*State v. Nieves*, 174 Wn. App. at \*2 n.4. This Court acknowledged that “If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.” *Id.* (citing RCW 43.43.754(2)). Given this language of the statute, this Court held that second or subsequent DNA fees from repeat offenders is neither required nor prohibited (i.e., this Court effectively held that a subsequent DNA fee was discretionary rather than mandatory). *Id.* at \*2 n.4.

The DNA fee has already been deemed discretionary in this case by prior appeal, and the law of the case doctrine generally precludes re-deciding the same legal issues in a subsequent appeal. *Folsom v. Cnty. of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). “It is also the rule

that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.” *Id.* This Court may apply the law of the case doctrine and maintain its same decision, unless its prior decision was “clearly erroneous and the application of the doctrine would result in manifest injustice.” *Id.* at 264.

In Mr. Nieves’ prior appeal, this Court held that the trial court was neither required to order, nor prohibited from ordering, a second DNA fee. *State v. Nieves*, 174 Wn. App. at \*2 n.4 (citing RCW 43.43.754(2)). In other words, a subsequent DNA fee on Mr. Nieves, a repeat offender, was deemed discretionary. Applying the law of the case doctrine, this Court should maintain its decision that the DNA fee in this case was discretionary. There is no known case law directly on point that has decided whether a DNA fee is mandatory for second or subsequent felony convictions, particularly where the offender’s DNA has already been obtained for the DNA database and repeat samples of the same DNA are unnecessary. Therefore, this Court’s decision in Mr. Nieves’ prior appeal that a subsequent DNA test and fee are discretionary was not clearly erroneous.

Regardless, no manifest injustice would result by maintaining this Court's prior characterization of the DNA fee as discretionary. Mr. Nieves would have already necessarily submitted to DNA testing with the related fee pursuant to his 2010 conviction, and his DNA cannot change. And, the court would still be permitted to order the discretionary fee if it does so pursuant to a proper consideration of Mr. Nieves' ability to pay. Manifest injustice does not result from characterizing the second or subsequent DNA fee as discretionary rather than mandatory.

That being said, it was incumbent on the trial court to consider the defendant's ability to pay this discretionary DNA fee and other discretionary court costs prior to imposing the same.

b. Court must consider defendant's ability to pay

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *Blazina*, \_\_ Wn.2d \_\_, 344 P.3d at 683. The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 683, 685. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including any restitution. *Id.* at 685. 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.* (quoting RCW 10.01.160(3)). The court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, \_\_\_ Wn.2d \_\_\_, 344 P.3d at 685.

Here, there is no indication in the record that the court considered the defendant’s present or future ability to pay before imposing LFOs. The court erred by imposing \$323 of discretionary LFOs and authorizing the imposition of later-assessed discretionary LFOs without conducting the relevant inquiry.

c. Finding of ability to pay must have support in the record.

Next, a trial court must consider the defendant’s ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant’s ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). However, where the trial court does make the unnecessary finding that the defendant has the ability to pay, “perhaps through inclusion of boilerplate language in the judgment and sentence,”

its finding is reviewed under the clearly erroneous standard. *Id.* (citing *State v. Bertrand*, 165 Wn. App, 393, 404 n.13, 267 P.3d 511 (2011)). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Id.* (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *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)).

Here, the court entered an apparently boilerplate finding that it had considered Mr. Nieves’ total amount owing and his ability to pay LFOs. (CP 93) But the record does not reflect that any such consideration was made. Moreover, the court entered the boilerplate finding that the defendant had the ability or likely future ability to pay the legal financial obligations imposed herein. (CP 93) And the court noted that the total LFOs did not include all restitution or LFOs that may be later set by the court, including appellate costs. (CP 97) But the court’s finding that the defendant had the ability to pay both those present and later-imposed LFOs was also not supported by the record. In fact, the record was inconsistent with this finding. Mr. Nieves’ was indigent, he had no personal or real property, his DOC balance was less than \$10, and the

court found that Mr. Nieves was impoverished. Mr. Nieves faced a very lengthy sentence, and the court's boilerplate finding was contrary to the record that was before the trial court.

- d. The LFO issue should be addressed on its merits in this case for the first time on appeal.

RAP 2.5(a) grants appellate courts discretion to review an LFO challenge for the first time on appeal. *Blazina*, \_\_\_ Wn.2d \_\_\_, 344 P.3d at 681, 683. Also, RAP 1.2(a) states that the "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." *Id.* at 686 (J. Fairhurst, Concurring). In *State v. Blazina*, where courts imposed discretionary LFOs without considering defendants' abilities to pay and where boilerplate findings on the ability to pay had been entered, like here, the Supreme Court elected to decide the issue on its merits despite being raised for the first time on appeal. *Id.* at 681, 683, 685. The Supreme Court explained, "Washington's LFO system carries problematic consequences..." for indigent defendants. *Id.* at 684. "National 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 this case." *Id.* at 683.

The *Blazina* Court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful

recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants' inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, \_\_\_ Wn.2d \_\_\_, 344 P.3d at 683-84. "Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs." *Id.* at 684.

The *Blazina* Court held that the record before it did not show that the sentencing judges made the required inquiry into the defendant's ability to pay. *Blazina*, \_\_\_ Wn.2d \_\_\_, 344 P.3d at 685. The Court, thus, exercised its discretion to decide the issue for the first time on appeal and remanded for resentencing. *Id.*

Mr. Nieves requests that this Court exercise its discretion and reach the merits of the LFO error in this case. *See* RAP 2.5(a); RAP 1.2(a); and *Blazina*, \_\_\_ Wn.2d \_\_\_, 344 P.3d at 685. The imposition of LFOs herein offends the various policy considerations noted above and is not supported by any individualized inquiry into Mr. Nieves' circumstances. There is no indication in the records from either the original sentencing or the resentencing that the judge made an

individualized inquiry into Mr. Nieves' present or future ability to pay LFOs. Also, the court's finding that the defendant has the present or future ability to pay is clearly erroneous and unsupported by any evidence in the record. The defendant had been incarcerated since 2011, he had no income or property, his DOC available monthly balance showed only \$7.19 in his account, and the court found that the defendant was indigent by reasons of "poverty." (CP 114-15, 119-21)

Mr. Nieves was 20-years-old when he went to prison for the underlying crimes, and he faces 327 months of confinement. (CP 94) The court ordered that Mr. Nieves' repayment obligation of LFOs commenced immediately at sentencing, including the accumulation of interest that is currently set at the statutory rate of twelve percent. (CP 97) Had the required individualized inquiry been conducted into the defendant's present and future ability to pay, including the burdens mentioned above that are associated with imposing such costs against indigent defendants, which impede the defendant's eventual successful reentry into society, the trial court would likely have declined to impose the discretionary costs against this indigent, impoverished defendant. The trial court's finding that the defendant has the present or future ability to pay the imposed discretionary costs, along with any later imposed LFOs (such as appellate

costs) (CP 97), was clearly erroneous. Justice would be served by now correcting this error on appeal.

In sum, the trial court did not make its requisite consideration, and the evidence did not support the boilerplate finding, that the defendant had the present or future ability to pay discretionary LFOs. Accordingly, Mr. Nieves respectfully requests that this Court strike the erroneous discretionary LFOs and remand for resentencing. *Blazina*, \_\_ Wn.2d \_\_, 344 P.3d at 685 (setting forth this remedy).

**Issue 2: Whether defense counsel's failure to object to the imposition of present and future legal financial obligations, without any consideration of the defendant's present or future ability to pay and based on an unsupported finding of the same, deprived Mr. Nieves of his constitutional right to effective assistance of counsel and requires resentencing.**

Mr. Nieves requests that this Court exercise its discretion to reach the above LFO challenge for the first time on appeal pursuant to RAP 2.5(a) and *Blazina*, \_\_ Wn.2d \_\_, 344 P.3d at 685. Alternatively, Mr. Nieves argues that this Court should remand for resentencing because Mr. Nieves was denied his right to effective assistance of counsel when counsel failed to object to the erroneous imposition of discretionary LFOs.

Counsel is ineffective when his performance was deficient and there is a reasonable probability that the error affected the outcome. *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816

(1987). As set forth above, RCW 10.01.160(3) permits the sentencing court to order a defendant to pay discretionary LFOs, but only if the trial court first considered, on an individualized basis, the defendant's likely present or future ability to pay.

Counsel's failure to object to the discretionary LFOs of \$323<sup>2</sup> and to the court's finding that Mr. Nieves had the present or future ability to also pay later imposed LFOs, including any appellate costs, constituted ineffective representation. The trial court did not make its requisite inquiry into the defendant's present or future ability to pay. And, the court's finding on Mr. Nieves' ability to pay was not supported by evidence. Counsel neglected to object to the court's failure to comply with RCW 10.01.160(3) and to its unsupported finding. Mr. Nieves was deprived his right to effective assistance by counsel's deficient performance. *See State v. Duncan*, 180 Wn. App. 245, 255, 327 P.3d 699 (2014) (recognizing ineffective assistance of counsel may be "an available course for redress" when defense counsel fails to address an indigent defendant's ability to pay LFOs.) *And see State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know relevant law).

Counsel's failure to object to imposition of discretionary LFOs and the court's unsupported finding was prejudicial. As discussed in *Blazina*,

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<sup>2</sup> Total reached by adding the discretionary DNA fee of \$100 and other discretionary court costs of \$223.

the hardships that can result from the erroneous imposition of LFOs are significant and numerous. *Blazina*, \_\_\_ Wn.2d \_\_\_, 344 P.3d at 683-84. These same concerns outlined in issue one above highlight the prejudice that resulted to Mr. Nieves by the imposition of LFOs in his case, including but not limited to increased difficulty successfully re-entering society. *See also State v. Mahone*, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing additional prejudice from erroneously imposed LFOs because an offender is not entitled to publicly funded counsel to later file a motion for remission to set aside LFOs).

There is a reasonable probability the outcome would have been different had counsel properly objected, and Mr. Nieves was prejudiced by the deficient performance. Mr. Nieves' constitutional right to effective assistance of counsel was violated and resentencing is proper at this time.

#### F. **CONCLUSION**

Based on the foregoing, Mr. Nieves respectfully requests that this Court remand for resentencing to strike the discretionary LFOs that were imposed without considering the defendant's ability to pay, and to remove the unsupported finding that Mr. Nieves had the present or likely future ability to pay both present and later-imposed LFOs.

Respectfully submitted this 7<sup>th</sup> day of May 2015.

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 32659-4-III  
vs. ) No. 10-1-00590-3  
)  
JOSE LUIS NIEVES ) PROOF OF SERVICE  
)  
Defendant/Appellant )  
\_\_\_\_\_)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 7, 2015, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I served the Respondent by email with a true and correct copy of the attached document using Division III's e-filing e-service feature: at [kburns@grantcountywa.gov](mailto:kburns@grantcountywa.gov).

Dated this 7<sup>th</sup> day of May, 2015.

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