

FILED
DEC 08, 2015
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32839-2-III

STATE OF WASHINGTON, Respondent,

v.

JOSHUA JAMES CLARK, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

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I. INTRODUCTION

The trial court continued Clark's trial beyond the deadline to bring him to trial under CrR 3.3 based on court congestion, but failed to make a record of the congestion or the court's attempts to remedy it. The trial court also imposed legal financial obligations totaling over \$2,000.00 without conducting an inquiry into Clark's ability to pay them, when Clark was already carrying an outstanding LFO balance in excess of \$46,000. Based on these errors, Clark requests that the judgment be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court violated Clark's speedy trial rights under CrR 3.3 when it continued his trial outside the allowable time for trial over his objection without a showing of efforts to address courtroom congestion.

ASSIGNMENT OF ERROR 2: The trial court violated RCW 10.01.160(3) by imposing discretionary legal financial obligations without conducting an individualized inquiry into his ability to pay them.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the trial court make an adequate record of congestion as required under *Kenyon* before continuing Clark's trial outside the time for trial? NO.

ISSUE 2: Did the trial court conduct an individualized inquiry into Clark's ability to pay legal financial obligations? NO.

ISSUE 3: Can Clark raise the issue of an inadequate *Blazina* inquiry for the first time on appeal? YES.

IV. STATEMENT OF THE CASE

Joshua Clark was charged with attempting to elude a police vehicle and possessing methamphetamine. CP 66-69. Before trial, he did not appear for a readiness hearing, and a warrant was issued and served. RP (Pretrial Hearings)¹ at 31. Based on his next appearance in court, his speedy trial deadline was determined to be August 15, 2014. RP (Pretrial Hearings) at 33. The trial court set his trial for July 24, 2015 and a

¹ The VRP consists of five non-consecutively paginated volumes entitled "Various Pretrial Hearings," "Evidentiary Hearing," "Status Hearing," "Jury Trial," and "Sentencing Hearing." This brief will reference each volume by title and page number.

readiness hearing on July 21, 2014, together with trial in a separate cause.

RP (Pretrial Hearings) at 32.

The trial court then reset Clark's trial in both cases to August 14, 2014, one day before the speedy trial deadline. RP (Pretrial Hearings) at 37. At the readiness hearing on August 11, 2014, the prosecuting attorney elected to proceed to trial on the other cause and the trial court continued the eluding trial. RP (Pretrial Hearings) at 39-40. The other trial was only estimated to last one day. RP (Pretrial Hearings) at 39. Clark objected to the continuance and the trial court advised,

I would indicate to Mr. Clark that there's only one courtroom, one judge and we'll only be calling one jury, so-- . . .

If there's any concern at all, it would be a violation of the Court Rules, and there are exceptions to the Court Rules, one of which is that there's not availability of a courtroom . . . The Court would make that particular finding. We'll set the matter for the 28th of August.

RP (Pretrial Hearings) 40-41.

The jury convicted Clark of both charges and the trial court imposed a high-end standard range sentence. CP 25-27, 46. Without conducting any inquiry into Clark's ability to pay legal financial obligations, the trial court imposed a total of \$2,145.41 in LFO's, all

except \$600 of which were discretionary. CP 48; RP (Sentencing Hearing) 271-76. Clark now appeals. CP 64.

V. ARGUMENT

A. The trial erred in continuing Clark's trial beyond the deadline established under the speedy trial rule when it failed to make an adequate record of its efforts to alleviate courtroom congestion.

Criminal Rule 3.3 quantifies the defendant's rights to a speedy trial and establishes the methods by which the time for trial is calculated. Under the rule, a trial court may continue a trial beyond the current expiration date if it finds the continuance is required in the administration of justice and no party will be prejudiced. CrR 3.3(f)(2). Failure to comply with the rule's dictates requires dismissal with prejudice. CrR 3.3(h).

Here, the trial court continued Clark's trial beyond the speedy trial deadline based upon its contention that unavailability of a courtroom established an exception to the speedy trial rule. RP (Pretrial Hearings) at 41. But the court did not make a record of any efforts to alleviate trial congestion.

Unavailability of a courtroom is synonymous with courtroom congestion, which is not good cause for a continuance. *State v. Kenyon*, 167 Wn.2d 130, 137, 216 P.3d 1024 (2009). Before granting a continuance due to courtroom congestion, the trial court must make a record of the congestion, including the number of courtrooms available, efforts to secure visiting judges, and similar factors. *Id.* (citing *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 738 (2005)). The trial court is required to take action to alleviate courtroom congestion. *Kenyon*, 167 Wn.2d at 137.

Here, the trial court stated that only one courtroom, one judge and one jury were available. RP (Pretrial hearings) at 40-41. It is unclear why, knowing that only one trial could proceed at one time, the trial court would have continued two trials to the same date when that date was the last date for trial on both. RP (Pretrial hearings) at 37. Moreover, having created the condition of congestion, the trial court made no record of any efforts to actually conduct more than one trial on the same day, such as securing additional courtroom space from a district or municipal court facility, calling both cases for trial and recessing one until the other concluded, or simply scheduling the trials on different days. Rather, the trial court scheduled both trials knowing that both could not be

accommodated. This conflicts with the trial court's duty to alleviate congestion. *Kenyon*, 167 Wn.2d at 137.

Because the conflict in scheduling two trials on the same day in a county with one courtroom was not unforeseeable, and because the trial court did not make a record that the conflict was unavoidable, good cause does not support the continuance. *See Kenyon*, 167 Wn.2d at 136-37. Accordingly, because Clark's trial commenced beyond the limits established under the speedy trial rule over his objection, the case must be dismissed with prejudice. CrR 3.3(h).

B. The trial court erred in imposing discretionary LFOs without conducting an individualized inquiry into Clark's ability to pay them.

In March 2015, the Washington Supreme Court decided *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), in which it held that to comply with RCW 10.01.160, trial courts must conduct an individualized inquiry into the defendant's ability to pay legal financial obligations (LFOs) before imposing them. Under *Blazina*, entry of a sentence with boilerplate language is insufficient; the record must demonstrate that the court considered "the financial resources of the defendant and the nature of the burden that payment of costs will impose," including the defendant's incarceration and other debts. *Id.* at 838. The *Blazina* Court

further recognized that if a defendant meets the GR 34 standard for indigency, “courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

Notably, the *Blazina* Court did not criticize the Court of Appeals’ decision declining discretionary review of the issue when no objection to the imposition of LFOs were raised below. 182 Wn.2d at 834. Here, no objection to the LFOs was raised at sentencing. However, because review is appropriate under RAP 2.5(a)(2), this court should decide the issue.

RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges “failure to establish facts upon which relief can be granted.” The exception “is fitting inasmuch as ‘[a]ppeal is the first time sufficiency of evidence may realistically be raised.’” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)). RAP 2.5(a)(2) has been applied to review of remedies imposed following a substantive trial, including a party’s entitlement to attorney fees. *Stedman v. Cooper*, 172 Wn. App. 9, 24-25, 292 P.3d 764 (2012). *Stedman* is directly analogous to the imposition of LFOs following a guilty plea when there is no stipulation as to the defendant’s ability to pay. Where, as here, insufficient facts support the trial court’s determination that the defendant

has the likely ability to pay LFOs, the statutory requirements to impose LFOs under RCW 10.01.160 are not met. Likewise, in *Stedman*, insufficient facts supported the imposition of attorney fees because they failed to show the requirements of RCW 7.06.060 were met. As in *Stedman*, review should be granted here.

Moreover, failure to object to imposition of LFOs without an adequate factual record of the defendant's ability to pay may constitute ineffective assistance of counsel. *State v. Lyle*, __ Wn. App. __, 355 P.3d 327 (July 10, 2015). In light of the *Blazina* Court's caution to trial courts that when a defendant satisfies the GR 34 indigency standard, that defendant's ability to pay LFOs should be seriously questioned, it is likely that a timely objection in the present case would have reached a different result since Clark remained indigent throughout the proceedings. RP (Pretrial Hearings) at 20, CP 64-65. Moreover, had counsel or the court reviewed Clark's information in the statewide Judicial Information System, it would have shown he already carried a balance of \$46,036.80 in unpaid LFOs, exclusive of the LFOs imposed here. Appendix A.

Applying the standard set forth in *Blazina*, the trial court plainly failed to conduct the required individualized determination into Clark's circumstances in evaluating his likely future ability to pay discretionary

LFOs, such as attorney fees, fines, a court and medical costs. CP 44. Instead, the trial court did not, apparently, consider Clark's ability to pay at all when imposing LFOs. Although defense counsel did not object, conducting the inquiry is ultimately the trial court's statutory obligation, which it failed to carry out. *See* RCW 10.01.160(3).

Because there are insufficient facts in the record supporting the imposition of LFOs, review should be granted under RAP 2.5(a)(2) and the case should be remanded for the discretionary LFOs to be stricken from the judgment and sentence.

VI. CONCLUSION

For the foregoing reasons, Clark respectfully requests that the Court reverse the judgment and sentence and dismiss the case with prejudice under CrR 3.3(h); or, in the alternative, remand the case for resentencing with an appropriate *Blazina* inquiry.

RESPECTFULLY SUBMITTED this 24 day of December, 2015.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Steven Michael Clem
Douglas Prosecuting Attorney
PO Box 360
Waterville, WA 98858

Joshua J. Clark, DOC #852518
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 8th day of December, 2015 in Walla Walla,
Washington.


Breanna Eng

APPENDIX

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[REDACTED]

S	N	Case	LEA	Ty	Crt	Loc	Short Title	Next Hearing	C	Balance
-		3Z0984883	DCS	IT	DOD		OP MOT VEH W/OUT INSURANCE NO VALID OPER LICENSE WITH DEFT TAIL LIGHTS, STOPLIGHT		A	1276.00
-		3Z0406671	DCS	IT	DOD		OP MOT VEH W/OUT INSURANCE DEFECTIVE EXHAUST, 1ST OFFE OPER/POSSESS VEH W/O REGIST		A	860.00
-		3Z0406670	DCS	CT	DOD		NO VALID OPER LICENSE W/OUT		A	1251.50
-		I00064390	WPD	IT	CHD		NO VALID OPER LICENSE WITH FLD SIGNAL STOPS/TURNS-UNSA		A	726.00
-		I00064390	WPD	IT	WVB		NO VALID OPER LICENSE WITH			

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-	I00064390	WPD IT	WVB	FLD SIGNAL STOPS/TURNS-UNSA			
-	I00066073	WPD IT	CHD	VIOLATING LAWS WHILE RIDING		A	155.00
-	I00066073	WPD IT	WVB	VIOLATING LAWS WHILE RIDING			
-	C12-00005	DPA CN	DOD	SEX OFFEND/NON FELON FAIL T		A	1193.00
-	C00020825	CHS CN	CHD	SEX OFFEND/NON FELON FAIL T			
-	4535A	CPR CN	CHD	BAIL JUMPING-MISD/GROSS MIS		A	493.00
-	C00068135	WPD CN	CHD	RESISTING ARREST		A	393.00
-	C00020824	CHS CN	CHD	SEX OFF/NON FELON/KIDNAP-FA		A	443.00
-	C10-00010	EWC CT	EWM	RECKLESS DRIVING			3399.00

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-		C10-00010	EWC	CT	EWM		RESISTING ARREST			3399.00
-		C00007953	EWP	CN	EWM		MAKE FALSE STTMENT TO PUB S		A	1460.00
-		C08-00005	DPA	CN	DOD		RESISTING ARREST			
-		C00019639	DPA	CN	DOD		SEX OFFEND/NON FELON FAIL R		A	3243.00
-		C00018471	CHS	CN	CHD		ASSAULT 4TH DEGREE			
-		C07-00011	EWC	CT	EWM		POSS STOLEN PROPERTY 3RD		A	593.00
-							DWLS 3RD DEGREE		A	893.00
-							OBSTRUCT LAW ENFORCEMENT OF			
-		1916	CPR	CN	CHD		PROTECTION ORDER VIOLATION			
-		C00019671	CHS	CN	CHD		NO CONTACT ORDER VIOLATION		A	493.00

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-	-	C00013547	CHS	CN	CHD		NO CONTACT ORDER VIOLATION		A	293.00
-	-	C00061153	WPD	CN	CHD		ASSAULT - DOMESTIC VIOLENCE			
-	-	C00060238	WPD	CN	CHD		ASSAULT - DOMESTIC VIOLENCE		A	393.00
-	-						DISORDERLY CONDUCT			
-	-	C00059427	WPD	CN	CHD		THREATS TO DO HARM		A	250.00
-	-	C00056642	WPD	CN	CHD		RESISTING ARREST			
-	-	C00439137	WSP	CT	GRD		DUI			
-	-						DWLS 3RD DEGREE			
-	-	C00338860	WSP	CT	DOD		DWLS 3RD DEGREE			
-	-	I00010940	EWP	IT	EWM		DEFECTIVE BRAKES		A	134.00

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-	-	100010861	EWP	IT	EWM		OPERATION W/O HEADLIGHTS WH			
-	-	14-1-00111-1	S1	S09			POSSESSION OF STOLEN VEHICL			6498.62
-	-	13-1-00200-4	S1	S09			ATTEMPTING ELUDE POLICE VEH			2375.18
-	-						ATTEMPTING ELUDE POLICE VEH			
-	-	14-1-00006-9	S1	S09			CONT SUB-POSSESS NO PRESCRI			
-	-						RESIDENTIAL BURGLARY UNLAWF			
-	-	08-1-00040-4	S1	S09			THEFT-1 OVER \$5K (NOT FIREA			
-	-						NON-CHARGE			
-	-	08-1-00089-4	S1	S04			CONTROLLED SUBSTANCE VIOLAT			3322.11
-	-	07-1-00165-5	S1	S04			SEX OFF/NON FELON/KIDNAP-FA			2874.72

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-		06-1-00612-8	S1		S04		SEX OFFEND/NON FELON-FAIL R			
-		06-1-00157-6	S1		S04		POSSESS STOLEN PROPERTY 2ND			
-		06-1-00116-9	S1		S04		SEX OFFEND/NON FELON-NO REG			2687.54
-		05-1-00358-9	S1		S04		PROTECTION ORDER VIOLATION			3263.85
-							PROTECTION ORDER VIOLATION			
-							SEX OFFEND/NON FELON-NO REG			
-							RESIDENTIAL BURGLARY			
-							CRIMINAL TRESPASS 1ST DEGRE			
-							INTIMIDATING A WITNESS			
-		05-1-00077-6	S1		S04		SEX OFFEND/NON FELON-NO REG		1	3014.16

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-	-	04-1-00597-4	S1	S04			COMM W/MINOR-IMMORAL PURPOS		1	3292.74
-	-	03-1-00035-4	S1	S04			ATTMPT ELUDE PURSUING POLIC		1	6896.43
-	-	02-8-00006-8	S8	S04			DRVNG INTOX/UNDER INFLNC DR TAKING VEHICLE W/O PERMISSI RESIDENTIAL BURGLARY UNLAWF		1	55.31
-	-	00-8-00038-0	S8	S04			THEFT-2 (NOT FIREARM)		1	55.32
-	-	99-8-00631-0	S8	S04			ASSAULT 4TH DEGREE		N	154.80
-	-	99-8-00005-2	S8	S04			THEFT-2 (NOT FIREARM) ANIMAL CRUELTY IN FIRST DEG ASSAULT 4TH DEGREE		1	55.32

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S N Case	LEA Ty	Crt Loc	Short Title	Next Hearing	C	Balance
99-8-00005-2	S8 S04		ASSAULT 4TH DEGREE OBSTRUCT LAW ENFORCEMENT OF		1	55.32
98-8-00244-8	S8 S04		ASSAULT 4TH DEGREE THEFT-3 RESISTING ARREST		N	188.06
98-8-00062-3	S8 S04		ASSAULT 4TH DEGREE		1	50.32
97-8-00681-0	S8 S04		NON-CHARGE			
97-8-00679-8	S8 S04		NON-CHARGE			
97-8-00163-2	S8 S09		THEFT-3			
97-8-00180-2	S8 S09		VEHICLE PROWLING-2 GROSS MI		1	

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97-8-00180-2	S8	S09	VEHICLE PROWLING-2 GROSS MI VEHICLE PROWLING-2 GROSS MI THEFT-2 (NOT FIREARM)		1	
97-8-00141-1	S8	S09	NON-CHARGE			
97-8-00130-6	S8	S09	ASSAULT 4TH DEGREE		1	
97-8-00082-7	S8	S24	CONT SUBST VIO A: MFG/DELVR			
97-8-00066-1	S8	S09	NON-CHARGE		1	
97-8-00078-9	S8	S24	MALICIOUS MISCHIEF 3RD DEGR RESISTING ARREST			

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- 96-8-00266-5	S8	S09	THEFT-3 RESISTING ARREST			
- 96-8-00177-4	S8	S09	ASSAULT 4TH DEGREE ASSAULT 4TH DEGREE			

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