

NO. 331474  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

FILED  
OCT 19, 2015  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON  
PLAINTIFF/RESPONDENT,

V.

CHRISTIAN KWAKU GYAMFI  
DEFENDANT/APPELLANT

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BRIEF OF RESPONDENT

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KARL F. SLOAN  
Prosecuting Attorney  
237 4th Avenue N.  
P.O. Box 1130  
Okanogan County, Washington

509-422-7280 Phone  
509-422-7290 Fax

Branden E. Platter  
WSBA #46333  
Deputy Prosecuting Attorney

**TABLE OF CONTENTS**

STATEMENT OF THE CASE.....1

ARGUMENT.....3

    A. Imposition of combined term of confinement and community custody exceeding statutory maximum.....3

    B. Order that the sentence run consecutive to any DOC sentence...3

    C. Imposition of discretionary legal financial obligations and ineffective assistance of counsel.....6

CONCLUSION.....11

**TABLE OF AUTHORITIES**

Table of Cases

*State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).....6

*State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012).....3

*State v. Duncan*, 180 Wn.App. 245, 253, 327 P.3d 699 (Div.3 2014).....6

*State v. Henderson*, 114 Wn.2d 867, 792 P.2d 514 (1990).....7

*State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995).....8

*State v. Poston*, 138 Wn.App. 898, 158 P.3d 1286 (Div.1 2007).....7, 8

*State v. Roberts*, 76 Wn.App. 290, 292, 884 P.2d 628 (Div.3 1994)..... 4

*State v. Winborne*, 167 Wn.App. 320, 273 P.3d 454 (Div.3 2012).....3

Other Authority

RCW 26.50.110(5).....3

RCW 9A.20.021(c).....3

RCW 9.94A.589(3).....3, 4

RCW 9.94A.633.....3, 4

RCW 9.94A.737.....3, 4

## **STATEMENT OF THE CASE**

The defendant/Appellant, Christian Kwaku Gyamfi, was charge in Okanogan County Superior Court 14-1-00281-3 with Violation of a No Contact Order, Third or Subsequent Conviction, Domestic Violence. [CP 98-99]. On November 12, 2014, Christian Kwaku Gyamfi entered a Statement of Defendant on Plea of Guilty to Violation of a No Contact Order, Third or Subsequent Conviction, Domestic Violence. [CP 41-50]. This guilty plea was entered pursuant to a Plea Agreement entered at the same time. [CP 51-56].

Appellant's scoring criminal history included seven prior convictions for Violation of a No Contact Order, Domestic Violence and Appellant was on community custody at the time of this crime. [CP 53, 29]. Appellant's offender score was therefore a "9" making his sentence range 60-60 months. [CP 29, 53].

Pursuant to the plea agreement, the State recommended, and Appellant agreed to, an exceptional low sentence of 48 months, \$1,210.50 in legal financial obligations (LFOs), 12 months community custody, burned jury assessment, and no criminal law violations. [CP 54, RP 40:4-14]. This recommendation was agreed by Appellant. [RP 44:19-21].

Based on Appellant's criminal history, specifically his history of similar offenses, the trial court imposed the presumptive sentence of 60

months, rather than follow the recommended sentence. [RP 51:19-53:13, CP 30]. The court imposed the agreed LFOs of \$1,210.50. [RP 53:15-16, CP 32]. These included the \$500 Crime Victim Assessment, \$100 Domestic Violence Assessment, \$200 Criminal Filing Fee, \$20.50 Sheriff Fee, \$250 Court Appointed Attorney Fee, \$100 DNA Fee, and \$40 Booking Fee. [CP 32]. The court also imposed a jury assessment of \$1,455.04. [RP 53:18, CP 32]. The jury assessment was later amended down to the statutory amount of \$250. [CP 21-23]. The court imposed 12 months of community custody. [CP 31, RP 53:20].

When Appellant was arrested for this current charge, he also had an active Department of Corrections (DOC) warrant. [RP 59:14-15, CP 95]. Due to this, the State requested the sentence run consecutive with any DOC imposed sanction if any had been imposed; the trial court agreed. [RP 59:13-23]. The sentence was ordered to run consecutive to any DOC sentence. [CP 30].

Appellant now appeals the imposition of a combined term of confinement and community custody exceeding the statutory maximum for the crime, the order that the sentence run consecutive to any DOC imposed sentence, and the imposition of discretionary costs.

## ARGUMENT

### A. Imposition of combined term of confinement and community custody exceeding statutory maximum.

Respondent agrees that the trial court erred when it imposed a prison term of 60 months and a community custody term of 12 months as the combined total term exceeds the statutory maximum for the crime of felony Violation of a Domestic Violence No Contact Order. RCW 26.50.110(5) (felony violation of a No Contact Order is a C Felony); RCW 9A.20.021(c) (maximum sentence for a C Felony is five years); *State v. Winborne*, 167 Wn.App. 320, 273 P.3d 454 (Div.3 2012); *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012). Respondent requests this case be remanded to the trial court for resentencing and amendment of the term of community custody.

### B. Order that the sentence run consecutive to any DOC sentence.

The trial court had authority to order that the sentence run consecutive with any DOC imposed sentence. The Judgement and Sentence orders that the sentence run “consecutively with any DOC sentence” citing RCW 9.94A.589(3). [CP 30].

DOC sanctions are authorized under RCW 9.94A.633 and RCW 9.94A.737. Under RCW 9.94A.633, “an offender who violates any condition or requirement of a sentence may be sanctioned by... the

department with up to thirty days' confinement as provided in RCW 9.94A.737." RCW 9.94A.737 merely sets out the process by which DOC must follow to impose such a sanction. Therefore, a DOC imposed sanction is imposed under DOC's community custody authority for the prior crime; thus such sanctions are part of the sentence of the crimes for which the community custody was ordered.

RCW 9.94A.589(3) gives the court the authority to order that a sentence run consecutive or concurrent to subsequent crimes when the person is not "under sentence for a felony" at the time they committed the current crimes. However, when a defendant commits a crime while on community custody, they are deemed to be "under sentence" for the purpose of RCW 9.94A.589. *State v. Roberts*, 76 Wn.App. 290, 292, 884 P.2d 628 (Div.3 1994). The *Roberts* court clearly stated:

[The defendant] had earned his early release and was under community supervision, subject to further confinement for violation of his sentence conditions, when he committed the current offense. We discern no logical reason for differentiating between a person under community supervision vis-à-vis his being "under sentence of felony" and the similar status of a parolee. Determinate sentences under the SRA include terms of community supervision as well as terms of total or partial confinement. A person under community supervision is clearly "under sentence of felony...."

Therefore, the presumption, regardless of RCW 9.94A.589(3) is that the current sentence would run consecutive to any DOC imposed sanction under the defendant's prior imposed community custody.

When the trial court imposed the sentence to run consecutive to any DOC imposed sanction, the court was ordering that, because the defendant was on community custody at the time of this crime [CP 29], if DOC imposed any sanctions within that previously imposed community custody, this sentence would run consecutive to that sanction. That was squarely within the trial court's authority and the trial court did not abuse its authority.

As appellant points out, the State was unaware at the time of sentencing if DOC had imposed any sanctions, but the State was aware that the defendant had been arrested on a DOC warrant at the time of the commission of the crime he was being sentence for. [RP 59:14-15, CP 95]. If no DOC sanction had been imposed, that portion of the Judgement and Sentence would be inapplicable and would be harmless. If DOC had imposed a sanction, the presumption would be that the current sentence run consecutive and the trial court had such authority to order it.

C. Imposition of discretionary legal financial obligations and ineffective assistance of counsel.

The issue of a defendant's ability to pay is not an issue that the court need address on appeal if it was not raised at the trial court level. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) ("Unpreserved LFO errors do not command review as a matter of right..."). "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *Id.* Therefore, Respondent contends that this Court need not consider the trial court's imposition of legal financial obligations in this case.

Furthermore, Appellant fails to consider that the sentence in this case was due to a *plea agreement*, not due to contested or argued sentencing. While Respondent agrees that *Blazina* requires a court to make an inquiry into a defendant's present and future ability to pay LFOs, "ability to pay LFOs is not an issue that defendants overlook-it is one that they reasonably waive..." *State v. Duncan*, 180 Wn.App. 245, 253, 327 P.3d 699 (Div.3 2014) review granted *State v. Duncan*, 183 Wn.2d 1013 (2015). *Blazina* involved a sentence after a jury conviction and presumably a sentencing hearing, not in accordance with an agreed plea agreement as in Appellant's case. Therefore, the defendant in *Blazina* did not "agree" necessarily to the imposition of LFOs, even if he did not

object to them. However, it must be recognized that when a sentence is entered pursuant to a plea agreement, we are in a different realm than that of *Blazina*. LFOs, if contained as a term of the plea agreement, are an agreed upon term and the defendant has waived any argument to their imposition.

Furthermore, Appellant is barred from attacking the imposition of these legal financial obligations under the invited error doctrine. *State v. Henderson*, 114 Wn.2d 867, 792 P.2d 514 (1990). By knowingly, intelligently and voluntarily entering into this plea agreement, Appellant agreed to pay the legal financial obligations; and because the LFOs now being challenged are “discretionary,” they are certainly within the statutory authority of the trial court to impose so Appellant may not now attack them on appeal.

Additionally, the imposition of \$1,210.50 LFOs is an actual specific term of Appellant’s plea agreement. In *State v. Poston*, 138 Wn.App. 898, 158 P.3d 1286 (Div.1 2007), the defendant entered into a plea agreement where the State agreed not to file additional charges and he accepted a joint recommendation of an exceptional sentence of 180 months. The defendant later appealed the exceptional sentence, asserting he did not stipulate to facts that would need to be found by a jury to support the exceptional sentence. *Id.* at 902. In addition to holding that

the defendant's stipulation to the exceptional sentence alone is sufficient to justify such a sentence, the Division 1 court also held that the defendant could not attack a specific provision of the plea agreement without attacking the entire agreement. *Id.* at 909. "Poston's stipulation to the exceptional sentence is indivisible from his plea agreement. Because he does not challenge his plea agreement, he cannot challenge his stipulation to the exceptional sentence." *Id.*

For the foregoing reasons, this Court should decline to consider this issue on appeal. By entering into the plea agreement with an agreed recommendation of \$1,210.50 LFOs plus jury costs, the defendant waived the issue of his present or future ability to pay legal financial obligations and this Court should not now consider it on appeal. He agreed to pay those obligations and he cannot now attack that specific provision alone without attacking the entire plea agreement.

Appellant also argues ineffective assistance of counsel due to defense counsel's failure to object to the imposition of discretionary legal financial obligations at the time of sentencing. However, as just mentioned, this sentence was pursuant to a plea agreement, therefore, defense counsel was not permitted to object to the imposition of any legal financial obligations so failure to do so cannot be considered ineffective.

In order to show ineffective assistance of counsel, Appellant must show

(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995).

"Courts engage in a strong presumption counsel's representation was effective." *Id.* at 335. "The defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *Id.* at 338.

The defendant entered into a plea agreement whereby he agreed to plead guilty to one count of violation of a domestic violence no contact order. [CP 51]. The sentence agreed between the State and Appellant was 48 months in prison, \$1,210.50 legal financial obligations, 12 months community custody, and jury costs. [CP 54].

Per the plea agreement, the defendant also accepted and agreed to the sentence recommended by the State. Section 1.8 of the Plea Agreement states that "The Defendant understands that the Defendant is in violation of this plea agreement if the defendant... (9) defendant argues

against or below the agreed sentencing recommendation.” [CP 54]. Any argument against this agreed recommendation by either the defendant or defense counsel would constitute a breach of the plea agreement.

Therefore, the defendant, by entering this plea, agreed to pay the legal financial obligations, including discretionary fees and the jury costs.

Appellant cannot claim that defense counsel was deficient by *abiding by the plea agreement*. Such an argument is absurd. In fact, had defense counsel objected to the imposition of discretionary legal financial obligations at the time of sentencing, the defendant would have been *more* prejudiced. To make such an objection would have constituted a breach of the plea agreement by defense counsel and the State would then be permitted to revoke the plea agreement.

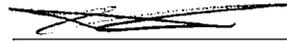
Defense counsel can surely not be considered ineffective for not making an objection that would have, in fact, violated Appellant’s plea agreement. Appellant agreed to pay the legal financial obligations under the plea agreement, he therefore waived any argument regarding ability to pay and cannot now challenge the imposition of those legal financial obligations on appeal, either directly or by claiming ineffective assistance of counsel.

## CONCLUSION

The State agrees that this case should be remanded to the trial court to amend the period of community custody. However, the trial court was within its authority to order that the sentence run consecutive to any DOC imposed sanction. Furthermore, because the LFOs were entered pursuant to a plea agreement, this court should not consider the issue of discretionary LFOs on appeal and should find that defense counsel was not ineffective.

Dated this 16 day of October, 2015

Respectfully Submitted:



Branden E. Platter, WSBA#46333  
Deputy Prosecuting Attorney  
Okanogan County, Washington

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent )  
vs. )  
 )  
Christian Kwaku Gyamfi )  
Defendant/Appellant )  
\_\_\_\_\_ )

COA No. 331474

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 19th day of October, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Respondent's brief to:

Christian Kwaku Gyamfi  
#853400  
PO Box 769  
Connell, WA 99362

Having obtained prior permission, I also served Kristina M. Nichols at Wa.Appeals@gmail.com by email using Division III's e-service feature.

Dated this 19th day of October, 2015.



\_\_\_\_\_  
Shauna Field, Legal Assistant  
Okanogan County Prosecuting Attorney's Office  
PO Box 1130  
Okanogan, WA 98840