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Oct 27, 2015

Court of Appeals

Division III

State of Washington

33553-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH M. WONCH, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FERRY COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing discretionary court costs without inquiring into Mr. Wonch's ability to pay.
2. Appointed counsel's failure to challenge imposition of costs after the Supreme Court decided *Blazina* constituted ineffective assistance.

B. ISSUES

1. A trial court imposed discretionary court costs at sentencing in 2012. No evidence was presented to the court as to the defendant's ability to pay costs. Did the court abuse its discretion?
2. The sentence was vacated on other grounds and the matter was remanded for resentencing about six weeks after *Blazina* was decided. Appointed counsel failed to challenge imposition of costs. Did this failure constitute ineffective assistance under the Sixth Amendment and Const. Art. I, § 22?

C. STATEMENT OF THE CASE

In 2011 the State charged Joseph Wonch with residential burglary, 17 counts of theft of a firearm, second degree theft possession of methamphetamine, possession of marijuana while armed with a firearm, possession of oxycodone while armed with a firearm, 16 counts of second degree unlawful possession of a firearm while armed with a firearm, unlawful possession of a dangerous weapon, driving under the influence, and driving with a suspended license. (CP 1-70) Mr. Wonch's criminal history consisted of two prior convictions for manufacture of marijuana, in 2003 and 2004. (CP 85) In February 2012, Mr. Wonch agreed to plead guilty to possession of methamphetamine and oxycodone, RCW 69.50.4013, and second degree unlawful possession of a firearm, with the understanding the prosecutor would recommended dismissal of the remaining charges, imposition of various costs, and an increased standard range based on classifying the drug offenses from schedule I to schedule III. (CP 77, 81) He acknowledged the judge could impose an exceptional sentence if the parties "stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act." (CP 77)

Under RCW 69.50.4013, possession of a controlled substance is a Class C felony, the maximum sentence for which is five years. RCW 9A.20.020(c). The court nevertheless determined the maximum sentence for these offenses to be 120 months, made no written finding respecting the stipulation to an exceptional sentence, made no finding respecting the defendant's ability to pay costs, and in February 2012 imposed concurrent sentences for a total of 84 months' (seven years') confinement, 12 months' community custody, and costs including the fees for the court appointed attorney (\$500) and a crime lab fee of \$100. (CP 86, 88)

Four months later, the sentence was amended to include the requisite finding for an exceptional sentence. (CP 95-96) Mr. Wonch appealed the amended sentence and denial of his motion challenging, *inter alia*, the sentencing provision that the standard range for the drug convictions was 68 to 104 months. (CP 103-116) In December 2013, this court found Mr. Wonch had stipulated to the exceptional sentence and the issue of his ability to pay legal financial obligations could not be raised for the first time on appeal. (CP 118) In January 2014 the matter was remanded to correct a scrivener's error in the written findings misstating the statutory seriousness level of the drug offenses. (CP 117) No action was taken in the trial court pursuant to this mandate.

In November 2014 Mr. Wonch filed a personal restraint petition challenging the length of his sentence, the State responded in March 2015 conceding error, and in April this court entered an agreed Order Vacating Judgment and Sentence, and Remanding to Superior Court for Resentencing. (CP 140) The trial court appointed counsel to represent Mr. Wonch at few days before the resentencing hearing, which was held May 29. (RP 8) Counsel stated he was only asking the court to enter concurrent five-year sentences. (RP 3) The deputy prosecutor advised the court that at that time Mr. Wonch had served the 84 months sentence. (RP 3) The court entered judgment and concurrent sentences totaling five years' incarceration, omitted community custody, and imposed costs including the fees for the court appointed attorney (\$500) and a crime lab fee of \$100. (CP 126-28)

D. ARGUMENT

1. IMPOSITION OF DISCRETIONARY COSTS WAS ERROR.

The imposition of legal financial obligations (LFOs) is governed by statute:

(3) 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.

In *State v. Blazina*, the Supreme Court recognized serious defects in the state's system of imposing costs and fees on indigent defendants in criminal cases. 182 Wn.2d 827, 344 P.3d 680 (2015). Looking at the situation involving imposition of legal financial obligations at the trial court level, the *Blazina* majority chronicled national recognition of "problems associated with LFOs imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." 182 Wn.2d at 835.

RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

182 Wn.2d at 839. To determine the amount and method for paying the 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.* (emphasis added). In short, the superior court must conduct on the record an individualized inquiry into an indigent defendant's current and

future ability to pay in light of all relevant factors including nondiscretionary legal financial obligations, his other debts, and the factors for determining indigency status under GR 34.¹ 182 Wn.2d at 838.

The record does not reflect that the sentencing judge made any inquiry into Mr. Wonch's ability to pay any LFOs, including the likelihood that his ability to work had recently resulted in any employment or was likely to do so in the near future; what level of income such employment had generated or was likely to generate; and whether he had

¹ GR 34 provides in relevant part:

- (3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that:
 - (A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:
 - (i) Federal Temporary Assistance for Needy Families (TANF);
 - (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
 - (iii) Federal Supplemental Security Income (SSI);
 - (iv) Federal poverty-related veteran's benefits; or
 - (v) Food Stamp Program (FSP); or
 - (B) his or her household income is at or below 125 percent of the federal poverty guideline; or
 - (C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or
 - (D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.
- (4) An individual represented by a QLSP, or an attorney working in conjunction with a QLSP that has screened and found the individual eligible for services, is presumptively deemed indigent when a declaration from counsel verifies representation and states that the individual was screened and found eligible for services.

significant current debts. The State presented no evidence of Mr. Wonch's financial resources. The imposition of court costs in this case does not comply with statutory requirements. The remedy is remand to the trial court for a new sentencing hearing for inquiry into defendant's ability to pay. 182 Wn.2d at 839.

While an appellate court may refuse to review any claim of error which was not raised in the trial court, RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. 182 Wn.2d at 839. In *Blazina* the court opined that each appellate court must make its own decision to accept discretionary review. *Id.* But the court stated that national and local cries for reform of broken LFO systems demand that it exercise its RAP 2.5(a) discretion. *Id.* This court should agree and reach the merits of the issue in the present case.

2. FAILURE TO CHALLENGE THE IMPOSITION
OF COSTS WAS INEFFECTIVE ASSISTANCE
OF COUNSEL.

The federal and state constitutions guarantee effective assistance of counsel. *See* U.S. Const. amend. VI; Washington Const. Art. I, § 22. To prove ineffective assistance of counsel, appellant must show that his counsel's deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420–21, 114 P.3d 607 (2005). Counsel's

performance is deficient when it falls below an objective standard of reasonableness. *State v. Varga*, 151 Wn.2d 179, 198, 86 P.3d 139 (2004). Prejudice occurs when, but for deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); see *State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015).

Following the decision in *Blazina*, appointed counsel's failure to object to the imposition of discretionary costs is deficient performance. See *Lyle*, 355 P.3d at 329. Mr. Wonch was represented by appointed counsel following his arrest in 2011. This fact supports the inference he was unlikely to have had an ability to pay costs prior to incarceration. At the time of resentencing, Mr. Wonch remained incarcerated. In light of these facts, there exists a reasonable probability that the court would have found Mr. Wonch lacked the ability to pay discretionary costs. The imposition of these costs was prejudicial.

Mr. Wonch received ineffective assistance of counsel at resentencing when his appointed lawyer failed to object to the imposition of discretionary costs.

E. CONCLUSION

This matter should be remanded to the trial court for an inquiry into Mr. Wonch's ability to pay court costs.

Dated this 27th day of October, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33553-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
JOSEPH M. WONCH,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on October 27, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on October 27, 2015, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on October 27, 2015.


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