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SUPREME COURT NO. 89028-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS BLAZINA,

Petitioner.

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

The Honorable Edmund Murphy, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUES

1. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations (LFOs) as part of appellant's sentence, thus, making the LFO order erroneous and challengeable for the first time on appeal?

2. Is appellant's challenge to the validity of the LFO order ripe for review?

3. Is the remedy to remand for resentencing?

B. SUPPLEMENTAL STATEMENT OF THE CASE

On May 7, 2008, the Pierce County prosecutor charged appellant Nicholas Blazina with one count of second degree assault. CP 1-2. On June 24, 2011, a jury found him guilty as charged. CP 22. Blazina was sentenced to 20 months incarceration and was ordered to pay legal costs in the amount of \$3,387.87, which included discretionary costs of \$400 for appointed counsel and \$2,087.87 for extradition. CP 30.

In the Judgment and Sentence, the trial court entered the following boilerplate language:

2.5 ABILITY TO PAY LEGAL FINCINCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including 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.

CP 29. There was no check-box for the trial court to mark on the pre-printed sentencing form, and the trial court made no contemporaneous statements at sentencing regarding Blazina's ability to pay. CP 29; RP 525-26.

Blazina challenged the imposition of the LFOs for the first time on appeal, arguing the trial court erred when it imposed the LFOs without first considering his ability or likely future ability to pay. Brief of Appellant (BOA) at 11-14; Reply Brief of Appellant (RBOA) at 1-3. The State argued the issue could not be raised for the first time on appeal and was not ripe for review. Brief of Respondent (BOR) at 7.

Division II concluded Blazina had waived the issue by not objecting below; however, it also recognized it had previously reviewed the same issue when raised for the first time on appeal and attempted to factually distinguish the cases. State v. Blazina, 174 Wn. App. 906, 911-12, 301 P.3d 492 (2013) (citing State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011)).

C. SUPPLEMENTAL ARGUMENT

I. THE TRIAL COURT'S FAILURE TO CONSIDER BLAZINA'S ABILITY TO PAY BEFORE IMPOSING LFOs CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

RCW 9.94A.760 permits the court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. The record here does not show the trial court in fact considered Blazina's ability or future ability before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous and the validity of the order may be challenged for the first time on appeal.

1. The Legal Validity of the LFO Order May Be Challenged For The First Time On Appeal As An Erroneous Sentencing Condition.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise

sentencing challenges for the first time on appeal); see also, State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). Specifically, this Court has held a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).¹

In Moen, this Court held that a timeliness challenge to a restitution order could be raised for the first time on appeal. It looked at the authorizing statute, which set forth a mandatory 60-day limit, and the record, which showed the trial court did not comply with that statutory directive. Specifically rejecting a waiver argument, this Court explained:

We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.9A.142(1) had

¹ See also, State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); In re Personal Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining “sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional”); State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

passed as a waiver of that timeliness requirement; it was invalid when entered.

Id. at 541 (emphasis added). This Court concluded the restitution was not ordered in compliance with the authorizing statute and, therefore, the validity of the order could be challenged for the first time on appeal. Id. at 543-48.

The record shows the trial court failed to comply with the statutory requirements set forth in RCW 10.01.160(3). Blazina may therefore challenge the trial court's LFO order for the first time on appeal.

In response, the State may ask this Court to take the same approach as did Division I in State v. Calvin, ___ Wn. App. ___, 302 P.3d 509 (2013), motion for reconsideration granted (October 24, 2013).² There, Division I had originally held Calvin could challenge his LFO order for the first time on appeal, but later reversed course. However, the reasoning supporting Division I's course change in Calvin does not apply here.

Calvin's appeal involved a challenge to the factual basis supporting the trial court's LFO order, i.e. whether there was insufficient evidence to support the trial court's decision that he had the ability to pay LFOs. State v. Calvin, 302 P.3d at 521. By contrast, Blazina asserts the

² At the time of the filing of this brief, the amended decision was not available on Westlaw. Accordingly, the court's order granting reconsideration is attached as an appendix.

trial court failed to undertake the statutorily required factual analysis required under RCW 10.01.160.

The factual nature of Calvin's argument drives Division I's waiver analysis. Specifically, Division I states, "the imposition of costs under [RCW 10.01.160] is a factual matter 'within the trial court's discretion,'" and "[f]ailure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal." Appendix at 3 (citations omitted). Having framed the issue as a sufficiency challenge, rather than a legal one, Calvin goes on to cite this Court's holdings in In re Personal Restraint of Goodwin³ and In re Personal Restraint of Shale,⁴ for the proposition that "[F]ailure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal." Appendix at 3.

Unlike Calvin, Blazina's challenge does not involve discretionary acts of the trial court. As discussed in detail below, compliance with the statutory directives of RCW 10.01.160 is not discretionary. Furthermore, the issue raised by Blazina is legal, not factual. See, State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010) (explaining whether the trial court

³ 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002).

⁴ 160 Wn.2d 489, 494-95, 158 p.3d 588 (2007).

exceeds its statutory authority is an issue of law).⁵ Thus, Calvin's waiver analysis is not on point.

The issue raised in this case is analogous to that raised in Moen, not Calvin. Thus, if the record shows the trial court did not comply with RCW 10.01.160(3)'s mandatory requirements, the issue is reviewable for the first time on appeal

2. Because The Sentencing Court Did Not Comply With RCW 10.01.160(3), Blazina May Challenge the LFO Order For The First Time on Appeal.

RCW 10.01.160(3) provides:

[t]he 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) (emphasis added). The word "shall" means the requirement is mandatory.⁶ State v. Claypool, 111 Wn. App. 473, 475–

⁵ As shown below, the substantive facts only become part of the equation when this Court considers remedy.

⁶ Comparatively, RCW 9.94A.753 (a statute which addresses restitution) merely provides:

The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(emphasis added).

76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Blazina's sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); Bertrand, 165 Wn. App. at 403-04. If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Blazina's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Blazina's ability to pay or ask it to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.⁷ RP 516. The trial court made no inquiry into

⁷ It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, ___ Wn. App. ___, 308 P.3d 755, 760 (2013)

Blazina's financial resources, debts, or employability. There was no specific evidence before the trial court regarding Blazina's past employment outside his confinement in prison or his future employment prospects. There was no discussion at the sentencing hearing regarding Blazina's financial circumstances. RP 515-528

The only part of the record that even remotely suggests the trial court complied with RCW 10.01.160(3) is the boilerplate finding in the Judgment and Sentence. CP 29. However, this finding does not establish compliance with RCW 10.01.160(3)'s requirements.

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir.2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

The Judgment and sentence form used in Blazina's case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. CP 29. Rather, every time one of these forms is used, there

is a pre-formatted conclusion the trial court followed the requirements of RCW 10.01.160(3) – regardless of what actually transpired. This type of finding therefore cannot reliably establish the trial court complied with RCW 10.01.160(3).

In sum, the record fails to establish the trial court actually took into account Blazina’s financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should permit Blazina to challenge the legal validity of the LFO order for first time on appeal, and it should vacate the order.

II. APPELLANT’S CHALLENGE TO THE LFO ORDER IS RIPE FOR REVIEW.

Alternatively, the State may argue (as it did previously)⁸ that the issue raised herein is not ripe for review because the State has not yet attempted to collect the costs. This argument should be rejected, however, because it fails to distinguish between a LFO challenge based on financial hardship grounds (arguably not ripe) and a challenge attacking the legality of the order based on statutory non-compliance (ripe).

Although there is a line of cases that holds the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, these cases address challenges based on an assertion of

⁸ BOR at 10-11.

financial hardship or on procedural due process principles that arise in regard to collection.⁹ By contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to comply with RCW 10.01.160(3). As shown below, this issue is ripe for review.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Bahl, 164 Wn.2d at 751. Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, as discussed above, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. As such, Blazina meets the first prong of the ripeness

⁹ See, e.g., Lundy, ___ Wn. App. ___, 308 P.3d 755, 761-62 (holding “any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review” until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant’s constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant’s constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

test. State v. Valencia 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above, Blazina is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Although this Court, in Valencia 169 Wn.2d at 789, previously suggested LFO challenges require further factual development, Valencia does not apply here. Valencia involved a constitutional challenge to a sentencing condition regarding pornography. In assessing the second prong of the ripeness test, this Court compared Valencia's challenge to the court-ordered proscription on pornography with a hypothetical challenge to a LFO order. This Court suggested the former did not require further factual development to support review, while the latter did.

It appears, however, that this Court's hypothetical LFO challenge was predicated upon the notion that the order would be challenged on factual financial hardship grounds, rather than on statutory non-compliance grounds. For example, this Court stated:

[LFO orders] are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.

Id. at 789. This statement certainly may be true if the offender is challenging the validity of the LFO order asserting current financial hardship. However, this statement is not accurate if an offender is challenging the legal validity of the LFO order based on non-compliance with RCW 10.01.160.

Either the sentencing court complied with the statute prior to imposing the order, or it did not. If it did not, the order is not valid, regardless of the particular circumstances of attempted enforcement. This demonstrates Valencia likely never contemplated the issue raised herein and, therefore, is distinguishable. As explained above, no further factual development is needed here, and the second prong of the ripeness test is met.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other words, while the defendant's obligation to pay off LFOs that have been ordered may be

“conditional,” the original sentencing order imposing LFOs is final.¹⁰ As such, the third prong of the ripeness test is met.

Next, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at a 12% rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from

¹⁰ Division I previously concluded a trial court’s LFO order is “conditional,” as opposed to final, because the defendant may seek remission or modification at any time (State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009)). However, it did so in the context of reviewing a denial of the defendant’s motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4). Thus, Division I’s analysis was focused on the defendant’s conditional obligation to pay rather than on the legal validity of the initial sentencing order. Id.

the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).¹¹

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. Lundy, __ Wn. App. __, 308 P.3d at 760. The defendant is not required to disprove this. See, e.g. Ford, 137 Wn. App. at 482 (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant

¹¹ This report can be found at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains on the State.

Second, an offender who is left to fight his erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Id. at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge his or her debt with the help of counsel and before the financial burden grows so overwhelming the person just gives up.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration in the first place and not rely on the remission process to remedy errors.

For the reasons stated above, this Court should hold Blazina's challenge to the legal validity of the LFO is ripe.

III. BECAUSE THE RECORD DOES NOT EXPRESSLY DEMONSTRATE THE SENTENCING COURT WOULD HAVE IMPOSED THE LFOs HAD IT UNDERTAKEN THE REQUIRED CONSIDERATIONS, THE REMEDY IS REMAND.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy unless the record clearly indicates the court would have imposed the same

condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)).

The record does not expressly demonstrate the trial court would have found the evidence sufficiently established Blazina's ability to pay the LFOs. When arguing to the contrary, the State – which did not offer any evidence of its own – cited primarily to the defendant's statements at the sentencing hearing. BOR at 9. It pointed out Blazina was of average intelligence and graduated from high school with a football scholarship in 2001. Id. However, the State left out the fact that Blazina also informed the sentencing court he had lost that scholarship and many other opportunities due to his extreme alcohol abuse. RP 521. Hearing this, the trial court recognized, despite Blazina's sobriety while incarcerated, he faced a "day-to-day" struggle ahead in maintaining his sobriety once released. 5RP 25.

Importantly, the State failed to point to any evidence establishing Blazina's past employment or future prospects. BOR at 9. Indeed, the only evidence that remotely suggests employability is the fact that Blazina had completed an adult tutoring education class. RP 523. However, Blazina's ability to tutor in an Alabama prison does not establish his employability as a tutor outside the prison context, especially given his felony conviction record. As the trial court recognized, due to his criminal

history, Blazina will have extra “baggage” to carry as he attempts to move forward. RP 525.

Blazina’s statements at the sentencing hearing reveal his “baggage” may also include overcoming emotional trauma resulting from the abuse and violence he has personally endured and witnessed while in the Alabama prison system. RP 522, 524. Trauma is known to negatively impact one’s employability. See, e.g., Bryan A. Liang, PTSD In Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation And Legal Representation Through Legislative Reform, 22 *Stan. L. & Pol’y Rev.* 177, 187 (2011) (explaining unemployability is very common with PTSD patients because PTSD symptoms themselves cause impairment in social and occupational functioning).

Finally, the record shows Blazina did not proceed with retained counsel but relied on appointed counsel (CP 30), indicating a lack of personal resources. Additionally, Blazina was facing an unusually hefty restitution order (\$47,145.69) at the time of sentencing, thus imposing upon him a financial burden that certainly could be seen as compromising his ability to pay discretionary costs. RP 516

Based on the foregoing, it cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if it had actually taken into account Blazina’s individualized financial

circumstances. As such, the remedy is remand for resentencing. Parker,
132 Wn.2d at 192-93.

D. CONCLUSION

For the reasons stated above, this Court should permit Blazina to
challenge the legal validity of the LFO order for the first time on appeal,
vacate the order, and remand for resentencing.

DATED this 1st day of November, 2013.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	No. 67627-0-1
Respondent,)	
)	ORDER GRANTING
v.)	RESPONDENT'S MOTION
)	FOR RECONSIDERATION
DONALD L. CALVIN)	AND AMENDING OPINION
)	
Appellant.)	
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The respondent, State of Washington, filed a motion for reconsideration. The appellant, Donald Calvin, has filed an answer. A panel of the court has determined that the motion should be granted, and the published opinion filed May 28, 2013 shall be amended. Now, therefore, it is hereby

ORDERED that the motion is granted; it is further

ORDERED that the published opinion filed May 28, 2013 be amended as follows:

DELETE the last two sentences of the first paragraph on page 1 that read:

We affirm his convictions. Because there is no evidence to support the trial court's finding that Calvin has the ability to pay court costs and the record does not otherwise show that the trial court considered Calvin's financial resources, we remand for the trial court to strike the finding and the imposition of court costs.

REPLACE those sentences with the following sentence:

We affirm.

No. 67627-0-1/2

DELETE section V. Legal Financial Obligations, which begins on page 20 and ends on page 22, in its entirety.

REPLACE that section with the following:

V. Legal Financial Obligations

The trial court ordered Calvin to pay a total of \$1,300 in legal financial obligations (LFOs), including \$450 in court costs. It also entered a boilerplate finding stating that had the ability to pay LFOs:

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.

Calvin challenges the imposition of \$450 in court costs, arguing that the boilerplate finding is not supported by evidence, and that the trial court was required to determine whether he had the ability to pay before ordering the payment of costs. The State argues that Calvin did not preserve this issue for review and cannot raise it for the first time on appeal. We agree with the State.

Under RCW 10.01.160(3), "[t]he 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." Our Supreme Court has made several things clear about this

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statute. First, the sentencing court's consideration of the defendant's ability to pay is not constitutionally required. State v. Blank, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997) ("the Constitution does not require an inquiry into ability to pay at the time of sentencing"). Accordingly, the issue raised by Calvin is not one of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a).

Second, the imposition of costs under this statute is a factual matter "within the trial court's discretion." State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002); In re Pers. Restraint of Shale, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). Calvin's failure to object below thus precludes review.

Third, "[n]either the statute nor the constitution requires a sentencing court to enter formal, specific findings" regarding a defendant's ability to pay. Curry, 118 Wn.2d at 916. The boilerplate finding is therefore unnecessary surplusage. If a challenge to the court's discretion were properly before us, striking the boilerplate finding would not require reversal of the court's discretionary decision unless the record affirmatively showed that the defendant had an *inability* to pay both at present and in the future.

Finally, even if the finding were properly before us for review, we would conclude that it is not clearly erroneous.¹ Calvin testified to his high school

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education, some technical training, and his past employment as a carpenter, including a brief time in the union. Calvin also had retained, not appointed, counsel at trial. These facts are sufficient to support the challenged finding under the clearly erroneous standard.

Calvin also challenges the imposition of a \$250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the court even take a defendant's financial resources into account before imposing a fine, let alone enter findings. Calvin has not articulated any basis for striking the fine.

¹ We review the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646, 837 P.2d 646 (1991). "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.'" Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

DELETE the first paragraph on page 24 with reads:

We affirm Calvin's convictions and remand for the trial court to strike the finding that Calvin has the present or future ability to pay LFOs and the imposition of \$450 in court costs.

No. 67627-0-1/5

REPLACE that paragraph with the following paragraph:

We affirm.

DATED this 12th day of October, 2013.

WE CONCUR:

Spencer, A.C.

Appelwick, J.

Grosse, J.

FILED
COURT OF APPEALS DIV.
STATE OF WASHINGTON
2013 OCT 22 PM 4:01

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From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, November 01, 2013 3:30 PM
To: 'Patrick Mayovsky'
Cc: pcpatcecf@co.pierce.wa.us
Subject: RE: State v. Nicholas Blazina, No. 89025-5 / Supplemental Brief of Petitioner

Rec'd 11-1-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Patrick Mayovsky [mailto:MayovskyP@nwattorney.net]
Sent: Friday, November 01, 2013 3:25 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: pcpatcecf@co.pierce.wa.us
Subject: State v. Nicholas Blazina, No. 89025-5 / Supplemental Brief of Petitioner

Attached for filing today is a supplemental brief of petitioner for the case referenced below.

State v. Nicholas Blazina

No. 89025-5

Supplemental Brief of Petitioner

Filed By:
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