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January 14, 2016
Court of Appeals
Division I
State of Washington

No. 73840-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

D.R.A.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

The juvenile court erred in imposing legal financial obligations (LFOs) on Ms. A. without inquiring into her ability to pay them, and in light of her demonstrated indigency.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and the Supreme Court recently emphasized that “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the juvenile court recognized that Ms. A. was impoverished but nonetheless imposed LFOs. Should this Court reverse the LFO order and remand with instructions to strike LFOs?

C. STATEMENT OF THE CASE

In June 2015, 16-year-old D.R.A. entered an Alford¹ plea to one count of second degree robbery and one count of possession of a stolen vehicle. CP 34-40; 6/05/15RP 15. The charges arose out of an alleged carjacking incident involving Ms. A. and two co-respondents.

6/05/15RP 17-19. Ms. A. maintained she was not guilty of the charges

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

but pled guilty anyway because there was a substantial likelihood she would be found guilty at trial and she wanted to take advantage of the State's offer. CP 39; 6/05/15RP 15.

In the disposition order, the court ordered Ms. A. to pay the following LFOs: \$100 crime victim penalty assessment and \$400 statutory mandatory minimum. CP 18. Ms. A. objected to imposition of the LFOs, arguing she had no job, no work history, and no significant assets and was therefore unable to pay. CP 27-33; 6/05/15RP 39. Indeed, Ms. A.'s indigency is established in the record. Pursuant to orders of indigency, Ms. A. was represented by court-appointed counsel at trial and is represented by court-appointed counsel on appeal. Nonetheless, the court overruled Ms. A.'s objection, reasoning it was obligated to impose these non-discretionary LFOs notwithstanding Ms. A.'s inability to pay. 6/05/15RP 39.

A restitution hearing was held at a later date. In support of the restitution request, the State submitted documentation showing that the stolen vehicle suffered significant damage requiring repairs. CP 24-26. The victim's insurer stated that the repairs to the vehicle totaled \$5,273.92. CP 24-26.

As with the other LFOs imposed, Ms. A. objected to the State's request for restitution, arguing she did not have the ability to pay.

7/22/15RP 7-8, 12-14.

The court overruled the objection and entered an order that states: "Court denies motion at this time and finds that any individual inquiry is not yet ripe before the Court." CP 57.

The court entered a restitution order requiring Ms. A. to pay one-third of the total amount of restitution requested, for a total of \$1,757.93. CP 59.

Ms. A. filed a notice of appeal challenging the imposition of LFOs. CP 61.

D. ARGUMENT

The legal financial obligations should be stricken because Ms. A. lacks the ability to pay.

- 1. The imposition of LFOs on an impoverished defendant is improper under the relevant statutes and court rules, and violates constitutional principles of due process and equal protection.*

The Legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized that "a trial court has a statutory obligation to make an

individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." Id. at 835.

Generally, LFOs accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. Id. at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." Id. at 837. All of these problems lead to increased recidivism. Id.

The State may argue that the court properly imposed these costs without regard to Ms. A.'s poverty because the statutes in question use the word "shall" or "must." See RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 13.40.190(1)(a) (court "shall require" respondent to pay restitution to any person who suffered loss or damage as a result of offense); State v. Lundy, 176 Wn. App. 96, 102-03, 308

P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); Blazina, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of LFOs upon those who can pay, and require that they not be ordered for indigent defendants.

Moreover, the Legislature made explicitly clear its intent that a juvenile offender *not* be ordered to pay restitution to an insurance company "if the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution to the insurance provider." RCW 13.40.190(1)(g).

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed an argument that the VPA was *unconstitutional*. Id. at 917-18. The court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for

indigent defendants.” Id. at 917 (citation omitted). That portion of the opinion is arguable *dictum* because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes Curry to the extent they are inconsistent. The court in Blazina repeatedly described its holding as applying to “LFOs,” not just to a particular cost. See Blazina, 182 Wn.2d at 830 (“we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.”); id. at 839 (“We hold that 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.”). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited one of the LFOs Ms. A. challenges here: the Victim Penalty Assessment. Id. at 831 (discussing defendant Blazina); id. at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney’s fees), and defendant Blazina had only two (attorney’s fees and extradition costs). See id. If the court were limiting its holding to a minority of the LFOs imposed

on these defendants, it presumably would have made such a limitation clear.

GR 34, which was adopted at the end of 2010, also supports Ms. A.'s position. That rule provides, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. Id. at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay \$50 within 90 days. Id. at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. Id. This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. See RCW 36.18.020.

The court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. Id. at 527-30. If

courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. Id. at 528. A contrary reading “would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees.” Id. at 529. Given Jafar’s indigence, the court said, “We fail to understand how, as a practical matter, Jafar could make the \$50 payment now, within 90 days, or ever.” Id. That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those that others endure. See Blazina, 182 Wn.2d at 837.

Although GR 34 and Jafar deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in Blazina, and urged trial courts in criminal cases to reference that rule when determining ability to pay. Blazina, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. See James v. Strange, 407 U.S. 128, 92 S. Ct.

2027, 32 L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from arbitrary disparate handling of the “criminal filing fee” across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. See Jafar, 177 Wn.2d at 528-29 (noting that “principles of due process or equal protection” guided the court’s analysis and recognizing that failure to require waiver of fees for indigent litigants “could lead to inconsistent results and disparate treatment of similarly situated individuals”). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. Cf. Saenz v. Roe, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under Fuller v. Oregon, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. See id. Thus, under Fuller, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the court in Blank rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). The Blank court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. Id. at 241. Unfortunately, this assumption has not borne out. As indicated in significant studies post-dating Blank, indigent defendants in Washington are regularly

imprisoned because they are too poor to pay LFOs. See Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).² In other words, the risk of unconstitutional imprisonment for poverty is very real—certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. See Jafar, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay \$50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. See Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Ms. A. concedes that the government has a legitimate interest in collecting the costs at issue. But imposing costs and fees on

² Available at:
https://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

impoverished people like Ms. A. is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” Blazina, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the Legislature’s stated goals of encouraging rehabilitation and preventing recidivism. See Blazina, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

2. *This Court should reverse the juvenile court’s order denying the motion to eliminate or reduce LFOs, and remand with instructions to strike LFOs.*

Because Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record demonstrates Ms. A.’s indigence, this Court should reverse the juvenile court’s order denying the motion to reduce or eliminate LFOs, and remand with instructions to strike LFOs.

F. CONCLUSION

This Court should reverse the juvenile court's order denying the motion to reduce or eliminate LFOs, and remand with instructions to strike LFOs.

Respectfully submitted this 14th day of January, 2016.

/s/ Maureen M. Cyr

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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DIVISION ONE**

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Respondent,)	
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v.)	
)	
D.R.A.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
[PAOJuvenileFiling@kingcounty.gov]	(X)	AGREED E-SERVICE
APPELLATE UNIT		VIA COA PORTAL
KING COUNTY COURTHOUSE		
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] D.R.A.	(X)	U.S. MAIL
RIDGEVIEW GROUP HOME	()	HAND DELIVERY
1726 JEROME AVE	()	AGREED E-SERVICE
YAKIMA, WA 98902		VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JANUARY, 2016.

X _____



Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711