

FILED  
May 19, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73863-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GRIFFIN HOWLAND,

Appellant.

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

The Honorable Bruce I Weiss, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE SENTENCING COURT WAS OBLIGATED TO CONSIDER HOWLAND'S ABILITY TO PAY BEFORE IMPOSING THE DISCRETIONARY LEGAL FINANCIAL OBLIGATION.

The State argues that Judge Weiss was not obligated to consider Howland's financial circumstances because the domestic violence penalty is not a "cost" under RCW 10.01.160(3) and therefore does not fall within the requirements of that statute or State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). BOR, at 5-6.

Cost or not, the penalty is an LFO. See RCW 9.94A.030(31) (defining LFO as including any financial obligation resulting from a felony conviction). And even if a discretionary LFO fell outside RCW 10.01.160(3), that statute does not stand in isolation in requiring an individualized inquiry into a defendant's ability to pay. For example, RCW 9.94A.760(2) expressly ties the costs of incarceration to a finding that the defendant has the ability to pay those costs.<sup>1</sup> And, under the language of RCW 43.43.690(1), the

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<sup>1</sup> RCW 9.94A.760(2) provides, "If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay . . . .").

court may suspend payment of a crime laboratory analysis fee based on the defendant's inability to pay.<sup>2</sup>

Similarly, RCW 10.99.080(1) – indicating courts “may” impose a domestic violence penalty – ties the court’s discretion to the defendant’s ability to pay in subsection (5):

When determining whether to impose a penalty assessment under this section, judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution.

RCW 10.99.080(5)(emphasis added).

Under this statute, while judges are *encouraged* to seek financial information from the victim or victim’s representatives, this encouragement is simply part of the process “in assessing the ability of the convicted offender to pay the penalty.” In other words, the statute assumes an assessment of a defendant’s ability to pay with or without the inquiry but encourages the inquiry. Yet that required assessment never occurred for Howland.

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<sup>2</sup> RCW 43.43.690(1) provides, “Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.”

The State asks this Court not to reach this issue, arguing that defense counsel did not object to the domestic violence penalty below. BOR, at 4-5. While counsel did not identify the penalty by name, she did ask Judge Weiss to waive all non-mandatory financial penalties. 2RP 5. And the domestic violence penalty is quite clearly non-mandatory. Moreover, even in the total absence of an objection, the Supreme Court has consistently chosen to exercise its discretion and remand for proper consideration of a defendant's ability to pay LFOs. See State v. Duncan, \_\_\_ P.3d \_\_\_, 2016 WL 1696698, at \*2-\*3 (filed April 28, 2016) (citing Blazina and cases since).

If, however, defense counsel otherwise waived the issue below, she was ineffective. See Brief of Appellant, at 7-9. In response to that fact, the State argues that, even with a specific objection to the court's failure to assess Howland's ability to pay, the court would have imposed the domestic violence penalty. BOR, at 8-9. But this is belied by the fact that Judge Weiss imposed no other discretionary financial obligations save this one. See 2RP 3; CP 18. The State's argument regarding what Judge Weiss might have done with a more precise objection rests on mere speculation without a meaningful inquiry into Howland's larger financial picture.

The State also argues that counsel's failure to insist that Judge Weiss examine Howland's ability to pay was tactical because counsel wanted the court to view Howland as capable and hardworking. BOR, at 9. If that were the strategy, it is difficult to explain defense counsel's focus at sentencing on the fact Howland had recently lost his job, that he was no longer eligible for a license in his line of work, and that – because of his inability to work – the court should waive all non-mandatory financial penalties. See 2RP 4-5. Assuming counsel waived a challenge to the domestic violence penalty, there was no legitimate strategy behind that waiver. See also Duncan, at \*1 (rejecting Court of Appeals analysis that the defense “reasonably waives,” rather than overlooks, a client's ability to pay).

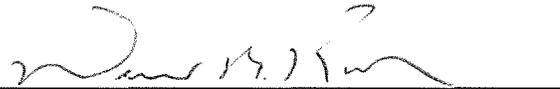
B. CONCLUSION

Howland respectfully asks this Court to vacate the domestic violence penalty and remand for proper consideration of his financial circumstances.

DATED this 19<sup>th</sup> day of May, 2016.

Respectfully Submitted,

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