

FILED
September 25, 2015
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33552-6-III

STATE OF WASHINGTON, Respondent,

v.

MAGDELANO CRUZ TELLEZ, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Magdelano Cruz Tellez was convicted of violating a protective order following a stipulated facts trial. The trial court's inquiry into his ability to pay legal financial obligations consisted solely of an inquiry into his employment history, and did not consider his assets, liabilities, or any other aspects of his financial circumstances. Immediately after finding Cruz Tellez able to pay legal financial obligations, the trial court found him indigent for purposes of pursuing an appeal. Because the trial court's inquiry was insufficient to satisfy the requirements of *State v. Blazina* and there is insufficient evidence in the record to support a determination of ability to pay, the trial court erred in imposing court costs and legal financial obligations.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in imposing legal financial obligations.

ASSIGNMENT OF ERROR 2: Trial counsel was ineffective for failing to object to the imposition of legal financial obligations.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is mere inquiry into ability to obtain employment adequate to satisfy the requirements of *State v. Blazina*?

ISSUE 2: Can *Blazina* error be raised for the first time on appeal?

ISSUE 3: Is trial counsel's performance ineffective when trial counsel fails to adequately investigate a defendant's financial circumstances or object to imposition of legal financial obligations at sentencing?

ISSUE 4: Was trial counsel's deficient performance prejudicial?

IV. STATEMENT OF THE CASE

Magdaleno Cruz Tellez was convicted of violating a protective order following a stipulated facts trial. CP 13-15. At sentencing, the trial court inquired whether Cruz Tellez was employed at the time of the offense, and Cruz Tellez indicated he had been driving a forklift. RP 10. Cruz Tellez further indicated that he had the ability to obtain employment and nothing else precluded him from being able to pay legal financial obligations. RP 10. The trial court did not conduct any inquiry into Cruz Tellez's assets, liabilities, or other factors affecting his ability to pay, and counsel did not object. Information from the Judicial Information System database shows that Cruz Tellez's LFOs in the present case have

ballooned to 1,597.97 and he has a total outstanding LFO balance from 12 separate causes of \$13,719.97. Appendix 1.

The trial court imposed legal financial obligations totaling \$1,460.00, including a \$500 victim assessment, a \$100 domestic violence penalty assessment, and \$860 court costs. CP 19-20. Immediately afterward, in considering Cruz Tellez's motion for an order of indigency for appeal, the trial court asked whether his financial situation had improved since counsel had been appointed to represent him. Cruz Tellez responded that it had not due to his incarceration, and the trial court found that he continued to be indigent. RP 11.

Cruz Tellez now appeals. CP 24.

V. ARGUMENT

The issue presented on appeal is whether the trial court conducted an adequate inquiry as required by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) and, if not, whether defense counsel rendered ineffective assistance of counsel in failing to object to the imposition of discretionary legal financial obligations.

A. An inadequate inquiry under *Blazina* can be raised for the first time on review under RAP 2.5(a)(2) because insufficient facts support the finding of ability to pay.

RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges “failure to establish facts upon which relief can be granted.” The exception “is fitting inasmuch as ‘[a]ppeal is the first time sufficiency of evidence may realistically be raised.’” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)). RAP 2.5(a)(2) has been applied to review of remedies imposed following a substantive trial, including a party’s entitlement to attorney fees. *Stedman v. Cooper*, 172 Wn. App. 9, 24-25, 292 P.3d 764 (2012).

Stedman is directly analogous to the imposition of legal financial obligations following a guilty plea when there is no stipulation as to the defendant’s ability to pay. Where, as here, insufficient facts support the trial court’s determination that the defendant has the likely ability to pay LFOs, the statutory requirements to impose LFOs under RCW 10.01.160 are not met. Likewise, in *Stedman*, insufficient facts supported the imposition of attorney fees because they failed to show the requirements

of RCW 7.06.060 were met. As in *Stedman*, review should be granted here.

- B. The trial court's nominal inquiry fails to satisfy the requirements of *Blazina* that it consider "the financial resources of the defendant and the nature of the burden that payment of costs will impose."

The *Blazina* Court responded to national attention given to the burdens associated with imposing unpayable legal financial obligations on indigent defendants, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." 182 Wn.2d at 835. Under Washington's system, unpaid obligations accrue interest at 12% per annum and can be subject to collection fees, creating the perverse outcome that impoverished defendants who pay only \$25 per month toward their obligations will, on average, owe more after ten years than at the time of the initial assessment. *Id.* at 836. As a result, unpaid financial obligations can become a burden on gaining (and keeping) employment, housing, credit rating, and increases the chances of recidivism. *Id.* at 837.

In response to these unanticipated and unintended effects, the *Blazina* Court reaffirmed the trial court's statutory duty to conduct an individualized inquiry into the defendant's current and future ability to

pay, considering factors “such as incarceration and a defendant’s other debts, including restitution.” *Id.* at 838. Moreover, the *Blazina* Court specifically the indigency standard established in GR 34 and noted, “if someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

In the present case, the nominal inquiry conducted by the trial court fails to satisfy the requirements of *Blazina* because it inquired only into whether he was able to work for wages in the future, without considering his living expenses, whether he supports dependents, the effect of his pretrial incarceration on his debt burden, the outstanding legal financial obligations of \$12,122.00 already existing at the time of sentencing, the impact of accruing interest on the rate of repayment, or any factor whatsoever related to Cruz Tellez’s debts and liabilities. The inquiry failed specifically to address the factors specifically identified by the *Blazina* Court as mandatory, namely, the effect of incarceration and the defendant’s other debts. *Blazina*, 182 Wn.2d at 838. As such, the inquiry is inadequate to satisfy the minimum requirements identified by the *Blazina* Court.

Moreover, the trial court’s finding that Cruz Tellez had the ability to pay legal financial obligations was undermined immediately by the trial

court's finding that he was indigent for purposes of pursuing an appeal. Noting that Cruz Tellez's financial circumstances had not improved since the inception of the case, and that he had been incarcerated during its pendency, the trial court found that Cruz Tellez met the standards for indigency literally seconds after imposing discretionary legal financial obligations. Considering the *Blazina* Court's advisement that court should seriously question whether individuals who meet the GR 34 standards of indigency are able to pay legal financial obligations, this juxtaposition should have given the trial court pause.

C. Trial counsel's failure to object to imposition of discretionary legal financial obligations constitutes ineffective assistance of counsel.

Division 2 of the Court of Appeals has noted that failing to object to legal financial obligations may constitute deficient performance by trial counsel. *State v. Lyle*, __ Wn. App. __, 335 P.3d 327 (2015). However, the *Lyle* court declined to reverse the sentence on the grounds that the record did not reflect additional debt that would allow an evaluation of his ability to pay by the appellate court. *Id.* at 329-30.

The present case shows the existence of significant additional debt that Cruz Tellez already owes to Washington Courts. Appendix I. While the record reflects that Cruz Tellez could probably obtain employment as a

forklift operator, there is no evidence from which the trial court could make a reasonably mathematical estimate of his likely income or the rate of repayment his finances could reasonably bear.

The *Blazina* Court itself, notably, acknowledged that under RCW 10.01.160(3), the obligation to conduct an individualized inquiry rests with the trial court. 182 Wn.2d at 839. This structure suggests that to the extent the State wishes the court to impose discretionary legal financial obligations, the State carries the burden of production to demonstrate to the court that the defendant will be able to pay them. In an analogous setting, the imposition of sentence, the trial court is required to impose a sentence within the standard range established for the offense. RCW 9.94A.505. There, the Washington Supreme Court has held that the burden of proving prior criminal history necessary to calculate the offender score rests with the State and cannot be shifted to the defendant without violating his right to due process. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

Where the State fails to meet its evidentiary burden, no strategic reason exists to justify the failure to object. *See, e.g., State v. Lopez*, 107 Wn. App. 270, 27 P.3d 237 (2001). Under these circumstances, counsel's failure to object cannot be attributed to legitimate trial strategy because no

possible advantage inures to the defendant. *Id.* at 277. Here, where the inquiry is nominal, failed to address significant legal financial obligations already owed by the defendant, and ultimately disregarded two of the obligatory factors recognized in *Blazina* – the effect of incarceration and the existence of other debt – failing to hold the State and the trial court to their obligations provides not even the promise of a benefit to Cruz Tellez. The court should hold that failing to object to an inadequate *Blazina* inquiry constitutes deficient performance, and under the facts of this case, prejudicial in light of Cruz Tellez’s ongoing indigency and substantial debt.

VI. CONCLUSION

For the foregoing reasons, Cruz Tellez respectfully requests that the court REVERSE his sentence and REMAND the case to strike the finding of ability to pay legal financial obligations and resentence him accordingly.

RESPECTFULLY SUBMITTED this 25th day of September,
2015.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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Kennewick, WA 99362

Magdelano Cruz Tellez
c/o Benton County Jail
7320 W. Quinault
Kennewick, WA 99336

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 25th day of September, 2015 in Walla Walla,
Washington.


Breanna Eng

APPENDIX

1 – LFO Balances

D0091I Top of list

DN2000PI

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DN2002MI Defendant Case History (DCH) STATEWIDE COURT DB2P PUB 1 of 3
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 Name: CRUZ TELLEZ, MAGDALENO NmCd: IN 121 99744

<More CONFIDENTIAL--NOT FOR RELEASE

True Name: CRUZ TELLEZ, MAGDALENO IN 121 99744 22 Cases
 AKA's: CRUZ, MAGDALENO; TELLEZ, MAGDALENO CRUZ 2 Aliases

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Name: CRUZ TELLEZ, MAGDALENO NmCd: IN 121 99744

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-	-	J00130825	BCS	IT	BCC		SPEEDING 11 MPH OVER LIMIT NO VALID OPER LICENSE WITH	A		732.00
-	-	J00515558	BCS	CT	BCC		DWLS 1ST DEGREE			
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 Name: CRUZ TELLEZ, MAGDALENO NmCd: IN 121 99744

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True Name: CRUZ TELLEZ, MAGDALENO IN 121 99744 22 Cases
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S	N	Case	LEA	Ty	Crt	Loc	Short Title	Next Hearing	C	Balance
-	-	J00131142	BCS	IT	BCC		FLD STOP/YIELD ENTERING ART		A	412.00
-	-	J00524218	WSP	CT	BCC		DUI			
-	-						DRIVING WHILE SUSPENDED 3RD			
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-	-						RESIDENTIAL BURGLARY UNLAWF			

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