

NO. 42786-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KEVAN VANSYCKLE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko, Judge

No. 09-1-02885-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court properly impose a community custody condition prohibiting defendant from accessing the internet? 1

 2. Did the defendant preserve for appeal the issue concerning legal financial obligations? 1

 3. Did the trial court properly impose legal financial obligations? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT..... 6

 1. THE TRIAL COURT PROPERLY IMPOSED COMMUNITY CUSTODY CONDITIONS..... 6

 2. DEFENDANT DID NOT PRESERVE FOR APPEAL ANY ISSUES CONCERNING LEGAL FINANCIAL OBLIGATIONS 12

 3. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS 15

D. CONCLUSION..... 21

Table of Authorities

State Cases

<i>State v. Bahl</i> , 164 Wn.2d 739, 753, 193 P.3d 678 (2008).....	8
<i>State v. Baldwin</i> , 63 Wn. App. 303, 312, 818 P.2d 1116, 1120 (1991).....	15, 19
<i>State v. Bertrand</i> , 165 Wn. App. 393, 401, 267 P.3d 511 (2011).....	13, 14, 17, 18
<i>State v. Curry</i> , 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992).....	17
<i>State v. Curry</i> , 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991) .	16, 19
<i>State v. Eisenman</i> , 62 Wn. App. 640, 810 P.2d 55 (1991)	16
<i>State v. Ford</i> , 137 Wn.2d 472, 477, 973 P.2d 452 (1999).....	13
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011)	12
<i>State v. Gray</i> , 174 Wn.2d 920, 280 P.3d 1110 (2012).....	20
<i>State v. Lynn</i> , 67 Wn. App. 339, 345, 835 P.2d 251 (1992)	12
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	13
<i>State v. O’Cain</i> , 144 Wn. App. 772, 184 P.3d 1262 (2008).....	10, 11
<i>State v. Riley</i> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)	12
<i>State v. Smits</i> , 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009).....	18
<i>State v. Suttle</i> , 61 Wn. App. 703, 812 P.2d.....	16
<i>State v. Thompson</i> , 153 Wn. App. 325, 336, 223 P.3d 1165, 1170 (2009).....	20
<i>State v. Zimmer</i> , 146 Wn. App. 405, 190 P.3d 121 (2008).....	10, 11

Statutes

RCW 10.01.160 15, 16, 17, 18

RCW 36.18.020(h)..... 20

RCW 43.43.754(1)..... 19

RCW 43.43.7541 19

RCW 7.68.035 19

RCW 7.68.035(1)(a) 19

RCW 9.94A.030(30)..... 20

RCW 9.94A.501..... 7

RCW 9.94A.700..... 9

RCW 9.94A.704..... 6, 7, 8, 11

RCW 9.94A.704(10)(c) 11

RCW 9.94A.704(10)(c)(i)-(iii) 11

RCW 9.94A.704(11)..... 7, 8

RCW 9.94A.704(2)(a) 7, 9

RCW 9.94A.704(3)-(5)..... 7

RCW 9.94A.753(7)..... 20

RCW 9.94A.760(1)..... 20

Rules and Regulations

RAP 2.5(a) 12, 13

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly impose a community custody condition prohibiting defendant from accessing the internet?
2. Did the defendant preserve for appeal the issue concerning legal financial obligations?
3. Did the trial court properly impose legal financial obligations?

B. STATEMENT OF THE CASE.

1. Procedure

On June 11, 2009, the Pierce County Prosecutor's Office charged KEVAN M. VANSYCKLE with one count of rape of a child in the first degree, and three counts of child molestation in the first degree. CP 1. On September 19, 2011, the information amended count one to rape of a child in the first degree, or in the alternative, child molestation in the first degree. CP 59-61.

The defendant waived his right to jury trial. CP 10. Bench trial proceeded before the Honorable Susan Serko on September 6, 2011. 1 RP 1. The defendant stipulated that he had been previously convicted of two counts of child molestation, and one count of indecent exposure as a juvenile. CP 97-99.

The court found the defendant guilty of three counts of child molestation in the first degree, but not for one count of child molestation

in the first degree. CP 239-240. Defendant's offender score is 9+. CP 103. On November 8, 2011, defendant was sentenced to the high end of the standard range of 198 months. CP 100-115. The defendant was sentenced to community custody for life. CP 100-115. One of defendant's conditions for community custody prohibits him from accessing the internet at any location without court approval. CP 100-115; CP 96. Defendant is also prohibited from joining or perusing any public social websites (Face book, MySpace, etc.). CP 96. Defendant filed a timely notice of appeal. CP 121.

2. Facts

During trial, M.D. was 11 years old and attending Evergreen Elementary School. RP 171- 172. M.D. lives with her mother Denay DeLateur, and her mother's boyfriend, Walter Robinson. RP 172. Mr. Robinson has three biological children: defendant, Lori Robinson, and Wesley Robinson. 2 RP 275.

Defendant had been previously in Maple Lane, a juvenile detention center. CP 225 (Finding X). Mr. Robinson and Ms. DeLateur had visited defendant at least a few times while defendant was incarcerated. 2 RP 279-280; 3 RP 380. Ms. DeLateur was aware that defendant had been in Maple Lane for touching "two little kids." 3 RP 380. Shortly after being released from Maple Lane, defendant went to visit Mr. Robinson's home. CP 226 (Finding XIV).

M.D. met the defendant when she was seven or eight years old. 2 RP 282. M.D. was introduced to the defendant as her brother. 2 RP 283. The first night that M.D. met defendant, he spent the night in the living room. 2 RP 199. After M.D.'s parents went to bed, the defendant went on the computer to chat with people on MySpace, and asked M.D. to come over to him. 2 RP 200, 2 RP 203. Defendant had M.D. sit on the armrest of the chair, unzipped her pants, put his hand inside her underwear and touched her vaginal area and bottom. 2 RP 202; CP 228-229 (Finding XXVI(a)-(f)). Defendant told M.D. that he would stop if she said "no." 2 RP 203. M.D. said "no." 2 RP 203.

M.D. and the defendant then played a board game. 2 RP 204. During the game, defendant touched M.D. in the vaginal area again over her clothes when she had to stretch to move her board piece. 2 RP 204-205, CP 230 (Finding XXVIII).

That same night, M.D. slept on the floor in Ms. DeLateur's room. 2 RP 206. Defendant went into Ms. DeLateur's room, while Ms. DeLateur was still sleeping, woke M.D. up and asked her "do you want me to do that again?" 2 RP 207.

A second incident occurred when defendant visited with his girlfriend, Dana Wilcuts. CP 231 (Finding XXXII). On this occasion, M.D. was playing chase with defendant when they wound up in M.D.'s bedroom. 2 RP 213. The defendant touched M.D. on her vaginal area with

his hand. CP 231 (XXXIII(a)). Defendant laid M.D. on the floor, grabbed her hand, and had her touch his penis. 2 RP 215.

A third incident occurred when M.D. was doing her homework in her bedroom, and defendant went into M.D.'s room by himself. CP 232 (XXXIV(a)). The defendant once again touched her vaginal area over her clothes while she was on the floor. 2 RP 220-221. The defendant continued to touch M.D. on her vaginal area for more than a minute. CP 232 (XXXIC(c)).

M.D. testified that defendant touched her in the "wrong places" every time he came over. 2 RP 222-223.

M.D. told Ms. DeLateur that the defendant had been touching her in the "wrong places." 2 RP 186. M.D. showed her mother with dolls that the defendant had touched her "private parts," which are parts used for "going to the bathroom, and her butt." 2 RP 190-191.

The day after telling Ms. DeLateur about defendant's touching, M.D. wrote a note to her school counselor, Ellen Tesoro-Gill, about the defendant touching her in the "wrong places." 2 RP 192, 5 RP 733. When Ms. Tesoro-Gill met with M.D., she said that defendant had been touching her "private parts" and pointed to her vaginal area. 5 RP 735-736. Ms. Tesoro-Gill then reported the incident to the sheriff. 5 RP 738.

Cornelia Thomas is a child forensic interviewer. 1 RP 103. Ms. Thomas interviewed M.C. at Evergreen Elementary school in regard to the reported incident. 1 RP 128. Ms. Cornelia stated that during the

interview, M.C. was pointing at her vaginal area when she was referring to the “wrong place.” 3 RP 340.

Anna Watson, a mental health therapist has seen M.D. twice for therapy. 5 RP 681; 5 RP 689. Ms. Watson read M.D.’s trauma narrative, M.D.’s story of what happened. 5 RP 707-709, 5 RP 721.

Danielle Ford testified that she lived next door to defendant’s grandmother. When her son, D.F. was four years old, defendant showed his penis to D.F. 5 RP 772. D.F. further elaborated that the defendant had him touch defendant’s genital area with his hand. 5 RP 776. D.F. also testified to the incident. 5 RP 780-794.

Stephanie Beach was a counselor assistant at the Juvenile Rehabilitation Administration. 8 RP 1150. Ms. Beach testified that she called defendant’s home, but his mother said that defendant was at Mr. Robinson’s house for Christmas and that he was returning that day. 8 RP 1151.

Thomas Bottjer, a private practice polygraph examiner gave defendant a polygraph on April 24, 2009, and asked defendant about his sexual history. 8 RP 1172. The defendant said that he had engaged in sexual contact with his seventeen year old step sister, Ms. Beckham, twice. 8 RP 1172.

Brian Judd is a licensed psychologist who treated defendant. 8 RP 1176. Dr. Judd testified that he would not have approved for Ms. Wilcuts,

defendant's girlfriend, to be a chaperone for defendant because she was only 16 years old at the time the incident occurred. 8 RP 1187.

David Umu was defendant's parole counselor from the period of August 2008 to October 2008. 8 RP 1192. Defendant was required to obtain permission for traveling outside of the county. 8 RP 1193. Mr. Umu never gave defendant permission to travel to see Mr. Robinson, or to have contact with a minor. 8 RP 1193.

Compton Pierre was defendant's parole counselor starting in December 2007. 8 RP 1203. Mr. Pierre had never received information regarding defendant's visits to Mr. Robinson. 8 RP 1212.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY IMPOSED
COMMUNITY CUSTODY CONDITIONS.

Defendant alleges that the trial court improperly imposed the community custody condition prohibiting access to the internet without prior approval from the court. Brief of Appellant 5, CP 116-118 (condition 25).

The trial court properly imposed community custody conditions because RCW 9.94A.704 authorizes Department of Corrections (DOC) and, by operation, Community Corrections Officer (CCO) to impose specific conditions and requirements on a person under its control, such as

requiring participation in rehabilitative programs, obeying laws, and taking affirmative conduct. *See* RCW 9.94A.704(3)-(5). In addition, RCW 9.94A.704(2)(a) instructs the department to place whatever conditions on the defendant that it deems to protect public safety: “the department shall assess the offender’s risk of re-offense and may establish and modify additional conditions of community custody based upon the risk of community safety.”

The legislature enacted RCW 9.94A.704, on August 1, 2009, which states “Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department, subject to RCW 9.94A.501.” Although this statute was enacted after the defendant’s offense range of December 7, 2007, and May 15, 2009, the Legislature intended to have this act apply to *all* sentences imposed or reimposed on or after August 1, 2009, for any crimes committed prior to August 1, 2009, to the extent such application is constitutionally permissible.

(2) Sections 6 through 58 of this act also apply to all sentences imposed or reimposed on or after August 1, 2009, for crimes committed prior to August 1, 2009, to the extent that such application is constitutionally permissible.”

See Application—2008 c 231 §§ 6-58(2).

The statute gives the DOC power in setting, modifying, and enforcing conditions of community custody in a “quasi-judicial function.” *See* RCW 9.94A.704(11). The statute specifically grants the department

power in setting, modifying, and enforcing conditions of community custody in a “quasi-judicial function.” See RCW 9.94A.704(11).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed only if manifestly unreasonable. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). The trial court did not abuse its discretion because the court imposed community custody conditions pursuant to RCW 9.94A.704.

The court properly imposed conditions as recommended by DOC to prohibit the defendant’s access to the internet and social media websites to protect the community. DOC prepared an extensive pre-sentence investigation (PSI), which included a risk assessment. Dr. David Fenstermaker’s report indicated that defendant appeared to meet the statutory requirements for a *civil commitment referral* based upon the following: committing a sexually violent offense, suffering from a congenital or acquired mental abnormality or personality disorder which makes defendant likely to engage in predatory acts of sexual violence if not confined in a secure facility, diagnosed with Pedophilia; sexually attracted to both genders, has committed sexual assaults towards at least sixteen males and females, etc. CP 83.

The PSI report contains a Psychosexual Evaluation completed by Sue Batson, M.A. who found that defendant “must be viewed as a high-risk to commit other sexual offenses in the future. It is especially important to note that defendant acknowledged committing at least 6 new

offense crimes after he was adjudicated on the instant offense.” CP 83. Defendant has also engaged in unreported viewing of pornography on multiple occasions, unreported use of alcohol on multiple occasions, and unreported sexual contact with his step sister. CP 83-84. Defendant has “reported masturbatory fantasies of both touching prepubescent children, and raping a handcuffed peer aged female[s].” CP 83.

Given the defendant’s high-risk of endangering the community, the conclusion of the evaluation was that “recommended conditions in Appendix H will enable the DOC to effectively monitor and supervise defendant in the community. Intervention applied to these areas would assist in reducing potential risk to community safety.” CP 86. Therefore, the DOC was well within its statutory authority to impose this condition. RCW 9.94A.704(2)(a).

The defendant is arguing that according to RCW 9.94A.700, courts are restricted from imposing a stringent set of conditions. The defendant is also assuming that he was restricted access from the internet because it is a crime-related condition. However, the Legislature has clearly intended to allow the DOC more flexibility over imposing conditions when dealing with people who are a danger to the community. High-risk defendants, such as this one, is the reason why the Legislature enacted RCW 9.94A.704(2)(a). The Legislature has tasked DOC with protecting the community. Different conditions may be needed for different individuals.

In addition, this case is significantly distinguishable from *Zimmer* and *O’Cain* as cited by defendant. *State v. Zimmer*, 146 Wn. App. 405, 190 P.3d 121 (2008); *State v. O’Cain*, 144 Wn. App. 772, 184 P.3d 1262 (2008).

In *Zimmer*, defendant was convicted of two counts of methamphetamine and the court imposed a community custody condition on defendant banning the use of cell phones or data storage devices. *Zimmer*, 146 Wn. App. at 408. The court held in this case that the absolute ban of cell phones was an abuse of discretion because there was nothing in the record to support this condition. *Id.* at 412.

In *O’Cain*, defendant was convicted of second degree rape. *O’Cain*, 144 Wn. App. at 774. 15-year-old A.M. was walking out with Elexis Nesbit. Nesbit met with the defendant and defendant told Nesbit he wanted to talk to A.M. alone. *Id.* at 773. Defendant then grabbed A.M., raped A.M., took her cell phone, and ran away. *Id.* 773-774. Defendant challenged the condition of community custody prohibiting him from unapproved internet access. *Id.* The court held that there was no evidence that defendant accessed the internet before the rape or that internet use contributed in anyway to the crime. *Id.* at 775. However, the court stated that this holding did not preclude control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation. *Id.* at 775.

In contrast, the condition imposed in this case is on a sex offender with an *extensive* prior history of child sex offenses. *Zimmer* was not a sex offender case at all, and there was an *absolute* ban on cell phones. In this case, the defendant has not been absolutely banned from using the computer, he merely needs permission from the court. In addition, unlike defendant in this case, there are no facts to suggest that a pre-sentence investigation was done on either defendants in *Zimmer*, or *O'Cain*, and there were no facts suggesting that either defendants were a high-risk danger to the community.

RCW 9.94A.704(10)(c) also permits an offender to request an administrative hearing regarding the conditions imposed. Defendant may use the hearing to appeal or clarify conditions imposed. The condition remains in effect unless the hearing examiner finds that it is not reasonably related to any of the following: crime of conviction, offender's risk of re-offending, or the safety of the community. *See* RCW 9.94A.704(10)(c)(i)-(iii).

It is unknown if the defendant has sought relief under this provision regarding any of the conditions that have been imposed on him. Presumably, DOC is acting within RCW 9.94A.704. The conditions imposed by the court are authorized by RCW 9.94A.704. Defendant does not argue or demonstrate that the DOC or a CCO have acted beyond their statutory authority, nor that defendant has requested relief authorized by

the statute. The defendant's request for relief from this Court would also seem premature.

2. DEFENDANT DID NOT PRESERVE FOR APPEAL ANY ISSUES CONCERNING LEGAL FINANCIAL OBLIGATIONS.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). However, RAP 2.5(a) provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.* The defendant does not claim any of the three conditions listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal; in fact, defendant cannot meet any of the requirements of RAP 2.5(a).

In determining whether a defendant may raise an issue for the first time on appeal under RAP 2.5(a), the court must first make a cursory determination as to whether the alleged error even suggests a constitutional issue. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If it does, the court must then determine if the error is manifest; that is, if the asserted error had practical and identifiable consequences in the trial of the case. *Id.* at 345. *See also State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (holding that an appellant must show that he or

she incurred actual prejudice in order to demonstrate that a constitutional error is manifest). Once the appellant has demonstrated that the error is both constitutional and manifest, the burden shifts to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011). Furthermore, when the record does not contain the facts necessary to adjudicate a claimed error, “no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In the present case, defendant failed to object to the Legal Financial Obligations (LFOs) imposed during sentencing. Because there is no record of defendant’s inability to pay LFOs, the defendant has not suffered prejudice and the claimed error cannot be manifest. *State v. McFarland*, 127 Wn.2d 322, 333. Therefore, defendant’s new claim must be otherwise justified under RAP 2.5(a) or under case law.

Defendant briefly cites to *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), and *State v. Bertrand*, 165 Wn. App. 393, 395, 297 P.3d 511 (2011). However, the court in *Ford* arrived at a more specific conclusion, that “illegal or erroneous sentences may be challenged for the first time on appeal.” *Id.* at 477. The court in *Ford* based this conclusion upon a careful analysis of seven cases, none of which address the issue of imposition of LFOs. *Id.* at 477. *Ford* itself fails to mention LFOs and

instead addressed the proper calculation of an offender score involving out of state convictions alleging that this error may be raised for the first time on appeal. Further, the court in *Bertrand* found that the issue could be reviewed under the clearly erroneous standard. *Bertrand*, 165 Wn. App. at 404. In addition, the defendant in *Bertrand* had disabilities. *Id.* at 404.

In contrast, there is nothing in the record in the instant case that shows this finding to be clearly erroneous. There is nothing in the record to suggest defendant had any kind of disability that could affect his future ability to pay. The defendant is currently only 23 years old. CP 225 (Finding III). In addition, there are facts in the record to illustrate that defendant has skills to maintain a job such as, working on cars, or using a pressure washer. 2 RP 296; 3 RP 396. The court could not make a prediction on the defendant's future ability to pay during the time of sentencing. Therefore, the record does not support that the LFOs imposed were clearly erroneous.

Defendant failed to object in the trial court to the court's finding concerning his ability to pay his LFOs. Defendant also presented no evidence at the trial court concerning the court's finding. Defendant argues that because he is currently unemployed, owns no real estate, no stocks or bonds, he does not have the present or future ability to pay. Supplemental Brief of Appellant 3. However, as noted above, the record

indicates that defendant is an able bodied, healthy, 23 year old, and the court cannot predict the future abilities of the defendant. Therefore, the issue raised by defendant is not properly before this Court for review.

3. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS.

The sole issue in this case, raised for the first time on appeal, concerns the collection of \$3,284.41 in LFOs. Supplemental Brief of Appellant 1. Defendant argues that the trial court must have evidence to show that defendant has the present or future ability to pay his LFOs. Brief of Appellant 3. However, this challenge should not be considered because it has no impact on defendant's rights or obligations.

a. The trial court did not err in making finding 2.5.

The Appellate Court reviews a sentencing court's determination of a defendant's resources and ability to pay under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 1120 (1991) (reasoning that the erroneous standard applies because defendant's ability to pay and financial status are essentially factual findings). Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial pursuant to RCW 10.01.160.

This statute contains the following constitutional safeguards:

(1) A sentencing court may impose repayment of court costs *only if it determines that the defendant is or will be able to pay*, and

(2) A defendant who has been ordered to pay costs and who *is not in contumacious default* in the payment thereof may at any time petition the sentencing court for remission of the payment of costs.

RCW 10.01.160 (emphasis added). In light of such safeguards, the judiciary is not required to provide the added protection of formal findings to support the assessment of court costs. *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991). (See also *State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55 (1991); *State v. Suttle*, 61 Wn. App. 703, 812 P.2d 119 (1991) (in both cases, financial obligations were upheld in the absence of formal findings of fact).

In the present case, the court found that defendant was able to pay his LFOs. Finding 2.5 of defendant's judgment and sentence states that:

The court has considered the total amount owing, the defend's [sic] 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 likely future ability to pay the legal financial obligations imposed herein.

CP 104.

The defendant argues that, under *Bertrand*, “a sentencing court must consider the individual defendant’s financial resources and the burden of imposing such obligations on him.” Supplemental Appellants Brief at 2, citing *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). However, *Bertrand* is distinguishable. The court in *Bertrand* did not address whether defendant’s LFOs were mandatory. Furthermore, the court found that the defendant may have been unable to pay her LFOs, especially in light of her disability. *Id.* at 404. In the instant case, there is no indication that the defendant suffers from any disability or has an inability to pay his LFOs.

It appears that the defendant wants this Court to impose upon the sentencing judge a requirement to entertain a colloquy with each defendant regarding his or her ability to pay LFOs. However, the statutory language of RCW 10.01.160 and case law clearly establish that no formal findings are required. See *State v. Curry*, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992) (concluding that the Court of Appeals was correct in holding that RCW 10.01.160 does not impose the additional requirement of formal findings regarding a defendant’s present or future ability to pay LFOs). Moreover, because the time to determine a defendant’s ability to pay is when the government seeks collection, the trial court could not have

erred in failing to consider defendant's ability to pay at sentencing. *State v. Smits*, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009).

Even if formal findings were required, the trial court's finding 2.5 of defendant's judgment and sentence states for the record that the court has considered defendant's ability to pay. Should this Court reverse finding 2.5 on the basis that the record does not support it, it would create precedent that essentially requires formal findings regarding a defendant's ability to pay LFOs, which is contrary to previously established case law. The court may use finding 2.5 in defendant's judgment and sentence to determine that the trial court took defendant's financial resources and ability to work into account. The sentencing judge found that the defendant had the likely ability to pay his LFOs.

Formal findings are not required to support the sentencing judge's decision in determining court costs. The facts in this case are clearly distinguishable from the facts in *Bertrand*. The trial court properly imposed LFOs upon defendant. The court is required to impose mandatory costs, and may impose discretionary costs according to the statute. In addition, RCW 10.01.160 provides safeguards for defendant to petition the court for future remission of his LFOs. The trial court did not err.

b. The trial lawfully imposed legal financial obligations.

There are different components of a defendant's financial obligation which require a separate analysis because each raises its own distinct problems. *State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116, 1120 (1991); *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991).

The \$500 victim penalty assessment fee is mandatory per RCW 7.68.035. Under RCW 7.68.035(1)(a), this assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigent defendants. See *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991) (finding that “. . . imposition of the VPA [victim penalty assessment] is mandatory and requires no consideration of a defendant's ability to pay.”). The trial court did not err in imposing this mandatory fee.

Defendant's \$100 DNA database fee is also mandatory per RCW 43.43.754(1) & RCW 43.43.7541, which states that this fee must be included in every sentence for a crime for which a biological sample must be collected. This includes every case for which a person is convicted of a felony. RCW 43.43.754(1). Similarly to the victim assessment fee, there is no exception for indigent defendants. *State v. Thompson*, 153 Wn.

App. 325, 336, 223 P.3d 1165, 1170 (2009) (finding that “In 2008, the legislature passed an amendment to make the fee mandatory regardless of hardship.”). The trial court did not err in imposing this fee.

Defendant’s \$200 criminal filing fee is also mandatory per RCW 36.18.020(h), which states that upon conviction, a defendant in a criminal case shall be liable for a fee of two hundred dollars. The statute is clear. The trial court did not err in imposing the fee.

The court also properly imposed the \$2000 DAC recoupment fee. RCW 9.94A.030(30). Although, the DAC recoupment fee is discretionary, courts are given the authority to impose court-appointed attorney’s fees. *See* RCW 9.94A.760(1), RCW 9.94A.030(30). Neither defendant nor his attorney objected to the imposition of this fee.


The court’s imposition of the \$484.41 restitution for crime victim compensation is mandatory. “A court’s authority to order restitution is derived solely from statute.” *State v. Gray*, 174 Wn.2d 920, 280 P.3d 1110 (2012); *See* RCW 9.94A.753(7). “The court shall order restitution in all cases where the victim is entitled to benefits under the crime victims’ compensation act, chapter 7.68 RCW.” RCW 9.94A.753(7). Neither defendant, nor his attorney, objected to the imposition of this fee. The court properly imposed LFOs upon the defendant after conviction.

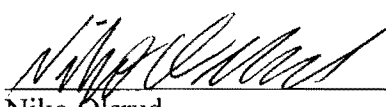
D. CONCLUSION.

The State respectfully requests the Court to affirm the defendant's sentence. The State also respectfully requests the Court to affirm the trial court's finding as the imposition of LFOs.

DATED: December 26, 2012.

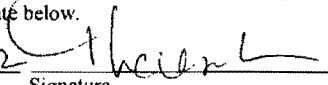
MARK LINDQUIST
Pierce County
Prosecuting Attorney


THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442


Niko Olsrud
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-1.MI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-26-12 
Date Signature

PIERCE COUNTY PROSECUTOR

December 26, 2012 - 2:46 PM

Transmittal Letter

Document Uploaded: 427869-Respondent's Brief.pdf

Case Name: St. v. VanSyckle

Court of Appeals Case Number: 42786-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:
steadj@nwattorney.net