

No. 43753-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS COLE,

Appellant.

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

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BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. The sentencing court erred and exceeded its statutory authority by imposing a term of community custody of “the longer of” the “period of earned early release” or “0-36 months, not to exceed statutory max.”

2. The sentencing court erred in ordering Mr. Cole to pay discretionary fees and costs and in finding he had the ability to pay these non-mandatory legal financial obligations.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In 2009 the legislature amended the statutes governing community custody to require courts to impose fixed terms of community custody. The sentencing court here used a procedure consistent with an older version of the statute, sentencing Mr. Cole to “the longer of” the “period of earned early release” or “0-36 months ... not to exceed statutory max.” Must the sentence be reversed and remanded for imposition of a fixed term of community custody under the current statute?

2. Courts may not impose costs on defendants unless they have a present or future ability to pay. Here, the court imposed attorney costs upon Mr. Cole, even though the evidence showed he was unemployed and homeless. Did the sentencing court err in ordering Mr. Cole to pay the costs of court-appointed counsel, and in finding he had the ability to pay?

### C. STATEMENT OF THE CASE

Thomas Cole was convicted of failure to register as a sex offender following a bench trial. CP 8-15. In November of 2011, Mr. Cole registered as “transient,” but in December he slept on a friend’s couch and registered that address. His friend moved out of the apartment on December 30, and Mr. Cole became transient again but did not register his change of circumstances within three days as required. 7/2/12 RP 44-56, 62-63, 81-82. The trial court thus found him guilty, but noted, “it’s kind of unfortunate Mr. Cole suffers from homelessness because he’s unemployed.” 7/2/12 RP 137; CP 8-15.

The court sentenced Mr. Cole to 17 months of confinement and imposed community custody for “the longer of” the “period of earned early release” or “0-36 months ... not to exceed statutory max.” CP 28-29. The court ordered him to pay not only the mandatory victim penalty assessment of \$500 and mandatory DNA fee of \$100, but also \$500 in “court-appointed attorney fees and defense costs.” The preprinted judgment and sentence states, “The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 26.

#### D. ARGUMENT

**1. The sentencing court erred in imposing an indeterminate range of community custody because the statute requires a fixed term.**

The court sentenced Mr. Cole to community custody for “the longer of” the “period of earned early release” or “0-36 months ... not to exceed statutory max.” CP 28-29. This was improper. The correct term of community custody is a fixed term of three years. RCW 9.94A.701(1)(a).

The court probably relied on an outdated version of the statute.

Former RCW 9.94A.715 (2006) provided for a variable term of community custody. Under the former statute, a sentencing court was required to sentence an offender ... “to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer.”

*State v. Franklin*, 172 Wn.2d 831, 835, 263 P.3d 585 (2011). But in 2009 the legislature “remov[ed] the language ... permitting variable terms of community custody. In its place, the legislature added new language requiring sentencing courts to impose fixed terms of 36, 18, or 12 months of community custody, depending on the type of offense.” *Id.* at 836 (internal citations omitted). “Under the amended statute, a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine

the precise length of community custody at the time of sentencing.” *Id.* (citing RCW 9.94A.701). Furthermore, adding a notation ordering the Department of Corrections to ensure that the total sentence does not exceed the statutory maximum is a procedure which “no longer complies with statutory requirements.” *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). This Court should reverse the sentence and remand for imposition of a fixed term of community custody consistent with RCW 9.94A.701.

**2. Because Mr. Cole is unemployed and homeless, the sentencing court erred in imposing discretionary costs and fees and in finding Mr. Cole has the ability to pay.**

The sentencing court imposed legal financial obligations (“LFOs”) totaling \$1,100. CP 26. Although the \$100 DNA fee and \$500 Victim Penalty Assessment (“VPA”) are mandatory, it was improper for the court to impose \$500 in attorney fees and defense costs given Mr. Cole lacks the present and future ability to pay.

Courts may not require an indigent defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court *must* consider the financial resources of the defendant before imposing costs. *Id.* This requirement is both constitutional and statutory. *Id.* A trial court’s findings of fact must be supported by substantial

evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

The sentencing court erred in imposing attorney costs and fees upon Mr. Cole because substantial evidence does not support a finding that he has or will have the ability to pay. On the contrary, all evidence showed Mr. Cole was unemployed and homeless, and that is why it was difficult for him to comply with the registration requirement. 7/2/12 RP 137. Because of his indigence, he qualified for and continues to qualify for court-appointed counsel. CP 26.

This case stands in contrast to others in which this Court has affirmed the imposition of costs. In *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because the Presentence Report “establishe[d] a factual basis for the defendant’s future ability to pay.” *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991). But unlike the defendant in *Richardson*, Mr. Cole is not employed. And unlike in *Baldwin*, the record in this case indicated a *lack* of ability to pay. Thus, this Court should strike the discretionary costs and fees imposed. At a minimum, the finding of ability to pay should be



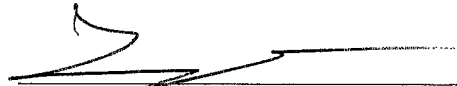
stricken. *State v. Bertrand*, 165 Wn. App. 393, 404-05, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012).

E. CONCLUSION

For the reasons set forth above, Mr. Cole respectfully requests that this Court reverse his sentence and remand for imposition of a fixed term of community custody and waiver of all discretionary costs and fees.

DATED this 24th day of January, 2013.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorney for Appellant

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	)	
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THOMAS COLE,	)	
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APPELLANT.	)	

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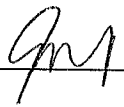
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**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JANUARY, 2013.

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