

NO. 44739-8

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANDREW MICHAEL FLORES,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it denied the defendant's motion to terminate his legal-financial obligations because his petition and supporting information proved no present or future ability to pay.

Issues Pertaining to Assignment of Error

Does a trial court err if it denies a defendant's motion to terminate legal-financial obligations when the defendant has proved no present or future ability to pay?

STATEMENT OF THE CASE

On October 19, 2000, Judge Roger Bennett of the Clark County Superior Court sentenced the defendant under the Persistent Offender Act to two concurrent terms of life in prison without the possibility of release following his conviction on two counts of second degree child molestation. CP 5-18. The sentence included imposition of \$1,120.50 in legal-financial obligations as follows:

\$110.00	Criminal filing fee
500.00	Victim Assessment
500.00	Fine
10.50	Sheriff service fees

CP 8.

Although paragraph 4.7 of the Judgment and Sentence also stated "To Be Set" on the amount for restitution, apparently no subsequent order was ever entered imposing any judgment for restitution. CP 1-84.

Following imposition of this sentence the defendant appealed and made the following three arguments: (1) that imposition of a life sentence without the possibility of release under the persistent offender act violated his constitutional rights to be free of cruel and unusual punishment and equal protection, (2) that he was denied his constitutional right to effective assistance of counsel, and (3) that the trial court erred when it imposed a sentencing condition prohibiting contact with minors. CP 19-32. By opinion

entered November 1, 2002, the Court of Appeals rejected each of these arguments and affirmed the defendant's convictions and sentence. *Id.*

The defendant thereafter filed a Personal Restraint Petition alleging that he was entitled to a new trial on three bases: (1) that his trial attorney's failure to investigate and interview witnesses denied him effective assistance of counsel, (2) that the trial court applied the wrong legal standard in evaluating his post-trial claim of new evidence, (3) that a different judge should have heard his Motion for a New Trial, (4) that the trial court abused its discretion when it appointed an attorney with an alcohol impairment to represent him, and (5) that cumulative error denied him his right to a fair trial. CP 33. On July 29, 2004, this court ruled against each of the defendant's arguments and entered an Order Dismissing Petition. CP 33-34.

In February of 2012, the defendant prepared and filed a "Motion to Terminate Legal Financial Obligations with Affidavit in Support," seeking the termination of legal financial obligations in this case and two older Clark County cause numbers. CP 55-59. The defendant also filed an "Affidavit in Support of Motion to Modify and/or Terminate Legal Financial Obligations" and a Motion for Order of Indigency. CP 60-62. Apparently the pleadings did not include the Superior Court Cause Number for this case in the heading of each document and the Superior Court Clerk did not file them in this case. CP 37-38. However, the state appended each of these pleadings along with

a copy of the original judgment and sentence to its response to the defendant's motion. CP 37-70. The court thereafter addressed the substance of defendant's arguments, which were as follows:

(1) that under RCW 10.01.160(3) the trial court erred when it initially imposed legal financial obligations because the defendant was indigent at the time and there was no evidence in the record to support a conclusion that he had the capacity to pay;

(2) that under RCW 10.01.160(4) the defendant did not have the current ability to pay and there was no possibility that he would in the future have the ability to pay; and

(3) that the judgment for legal-financial obligations is void because more than 10 years have passed since the imposition of those obligations without the state petitioning the court to extend the judgment.

CP 55-59.

The state responded to these claims by arguing that since the defendant had failed to allege that the state was currently seeking to enforce the judgment, his claims for relief were not yet ripe under the decisions in *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511 (2011) and *State v. Baldwin*, 63 Wn.App. 303, 818 P.3d 1116 (1991). CP 37-40. Ultimately the trial court agreed with the state's argument, denied the relief requested, and entered the following order:

THIS MATTER came before the court on the defendant's "Motion to Terminate Legal Financial Obligations" for cause number 0-01-1-36-2 (sic) and 9-0-1004070-4 (sic) filed with the Clark County Superior Court Clerk's Office on March 15, 2012.

The defendant has failed to allege or provide evidence that Clark County is attempting or seeking enforcement/collection action on this obligations. As such, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's request to terminate legal financial obligations for Clark County Cause Number 00-1-01036-2 is DENIED.

CP 79 (capitalization in original).

The defendant filed timely notice of appeal from this order. CP 84.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO TERMINATE HIS LEGAL-FINANCIAL OBLIGATIONS BECAUSE THE DEFENDANT MET THE CRITERIA FOR RELIEF SET IN RCW 10.01.160(4).

Under RCW 10.01.160(4), a defendant who has been ordered to pay costs "may at any time" petition the court for remission of those costs if he or she presents proof that payment will impose a manifest hardship on the defendant or the defendant's immediate family. Subsection (4) of this statute states as follows:

(4) 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 or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(4).

In the case at bar the defendant filed a petition to remit his remaining legal-financial obligations under this statute and supported it with his own affidavit stating the extent of his total financial assets (\$7.06 in his prison account) and that he has no present or future ability to pay his legal financial obligations given the fact that he is serving two sentences of life without the possibility of release. CP 61-62. In addition, in his petition the defendant set out the facts that the enforcement of his legal-financial obligations places an

undue burden on him and his family. CP 55-56. Although this latter factual claim is stated as part of his petition, it also functions as a claim under oath because the defendant signed this pleading under penalty of perjury pursuant to a claim that the factual assertions were true. CP 59.

In this case the state responded to the defendant's petition by arguing that under the decisions in *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511 (2011) and *State v. Baldwin*, 63 Wn.App. 303, 818 P.2d 1116 (1991), the defendant's request was not "ripe" because he had failed to allege that the Department of Corrections was currently enforcing or attempting to enforce this judgment. The state argued:

Although his affidavit speaks of his lack of money at this time, it doesn't allege that the State is seeking to enforce collection. Moreover, he has not served the State with any documentation showing the State is seeking to enforce collection.

CP 39.

The court denied the defendant's requested relief upon this basis, holding as follows:

The defendant has failed to allege or provide evidence that Clark County is attempting or seeking enforcement/collection action on this obligation. As such, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's request to terminate legal financial obligations for Clark County Cause Number 00-1-01036-2 is DENIED.

CP 79 (capitalization in original).

Appellant's response to the state's argument and to the court's holding is twofold: (1) the state's factual argument is disingenuous at best because the state is uniquely positioned to know that the Department of Corrections is currently deducting money from the defendant's prison account for the payment of legal financial obligations, even if the Defendant's petition and affirmation failed to adequately set out this fact, and (2) to the extent that the two cited cases do actually stand for the proposition the state and court claimed they are incorrect and violate the intent of the legislature expressed in the plain language of RCW 10.01.160(4). The following addresses these two arguments.

Under RPC 3.3(a) an attorney has a duty of candor toward any tribunal in front of which the attorney appears. This rule states:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

RPC 3.3(a).

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Note 2 to this section of the Rules of Professional Conduct states the following about the duty of candor:

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

RPC 3.3 note 2.

To be certain, appellant herein does not claim that the state violated the letter of this rule. The prosecutor did not claim that the Department of Corrections was not collecting legal-financial obligations from the defendant in prison. Rather, the state simply argued that the defendant had failed to adequately allege this fact. On its face this argument usually carries great force given our adversarial system and the fact that the defendant had the burden of proving the facts necessary for relief under RCW 10.01.160(4). However, appellant does argue that the state has violated the spirit of the rule requiring candor in this unique set of facts in which (1) the defendant is in prison and appearing *pro se*, (2) DOC is collecting legal-financial obligations against the defendant while in prison, and (3) the state is uniquely situated to

easily determine whether or not DOC is collecting legal-financial obligations.

Appellant's second argument is that to the extent *Bertrand* and *Baldwin* make current enforcement a prerequisite for application of RCW 10.01.160(4), they misinterpret the plain language of the statute and violate the intent of the legislature. In *Bertrand*, the court stated as follows concerning the enforcement of legal-financial obligations and the right to seek remission of that judgment:

We next address whether Bertrand's challenge to the imposition of LFOs is ripe for our review. *Baldwin* holds that "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." *Baldwin*, 63 Wn.App. at 310, 818 P.2d 1116, 837 P.2d 646 (citing *State v. Curry*, 62 Wn.App. 676, 680, 814 P.2d 1252 (1991)) (emphasis added). The *Baldwin* court further noted:

The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time.

Baldwin, 63 Wn.App. at 310--11 (footnote omitted).

The problem with the decision in *Baldwin* is that it fails to take into account the plain language of the statute here at issue, which is the fourth section of RCW 10.01.160. Once again, this section states:

(4) 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 or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due ***will impose manifest hardship***

on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.01.160(4) (emphasis added).

Under the rules of statutory interpretation, the court's "primary duty in interpreting any statute is to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). In fulfilling this duty, the court looks first to the language of the statute itself. *Id.* When the plain language and ordinary meaning are unambiguous, the courts "will not construe the statute otherwise." *State v. J.P.* 149 Wn.2d at 450.

The plain language of the statute here in question does not require a defendant to wait until the state seeks to enforce legal-financial obligations before the defendant is entitled to seek redress under RCW 10.01.160(4). First, in this statute the legislature states that a defendant "may at any time" file the petition. There is no ambiguity in this language. In spite of the legislature's clear statement, the courts in *Baldwin* and *Bertrand* apparently thought better of the legislature's decision and rewrote that statute from "may at any time" to "may only once the state seeks to enforce the obligation."

In addition, *Baldwin* and *Bertrand*'s effect or rewriting the statute also has the effect of changing another part of the statute. In subsection (4), the legislature has stated that "[i]f it appears to the satisfaction of the court that

payment of the amount due *will impose manifest hardship* on the defendant or the defendant's immediate family," then the court has discretion to modify or terminate the obligation. (emphasis added). By using the phrase "will impose" instead of "does impose" or "is imposing," the legislature has clearly indicated the desire to allow a defendant to seek redress before the state begins enforcement. If the legislature had wanted to limit the application of RCW 10.01.160(4) to only those instances in which the state is currently enforcing the judgment, then the legislature could easily have so stated. However, the legislature did not do so and the court's decision to add this requirement improperly rewrote the statute.

Part of the error in the case at bar was the trial court's failure to recognize that in *Baldwin* the court was addressing the constitutionality of imposing and enforcing costs upon a defendant without the current ability to pay. In essence, the *Baldwin* court held that the imposition of legal financial obligations upon a person without the current ability to pay was not unconstitutional if there was a mechanism for the defendant to challenge the obligation at the time it was enforced. By contrast, in the case at bar, the issue before the court was the application of the criteria set in RCW 10.01.160 as it was written by the legislature. As written, there is no requirement of current enforcement. Thus, since the defendant met the criteria listed in the statute, the trial court erred when it denied the

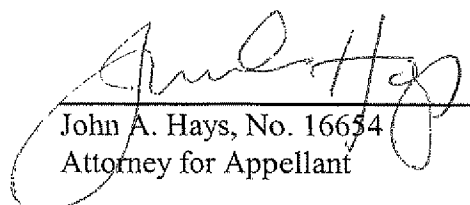
defendant's request for relief.

CONCLUSION

The trial court abused its discretion when it denied the defendant's request for relief under RCW 10.01.160(4). As a result, this court should remand the case to the trial court with instructions to grant the relief requested.

DATED this 21st day of August, 2013.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 10.01.160

Costs – What constitutes – Payment by Defendant – Procedure – Remission – Medical or Mental Health Treatment or Services

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(3) The court shall not order a defendant to pay costs unless the

defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) 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 or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

(5) Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant's competency to stand trial as provided in RCW 10.77.060, this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units. This section shall not prevent the secretary of the department of social and health services or other governmental units from imposing liability and seeking reimbursement from a defendant committed to an appropriate facility as provided in RCW 10.77.084 while criminal proceedings are stayed. This section shall also not prevent governmental units from imposing liability on defendants for costs related to providing medical or mental health treatment while the defendant is in the governmental unit's custody. Medical or mental health treatment and services a defendant receives at a state hospital or other facility are not a cost of prosecution and shall be recoverable under RCW 10.77.250 and 70.48.130, chapter 43.20B RCW, and any other applicable statute.

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

STATE OF WASHINGTON,
Respondent,

vs.

ANDREW MICHAEL FLORES,
Appellant.

NO. 44739-8-II

AFFIRMATION OF
OF SERVICE


Donna Baker states the following under penalty of perjury under the laws of Washington State. On August 21st,2013, I personally placed the United States Mail and/or e-filed the following documents to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

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Dated this 21st day of August, 2013, at Longview, Washington.



Donna Baker
Legal Assistant to John A. Hays
Attorney at Law

HAYS LAW OFFICE

August 21, 2013 - 1:46 PM

Transmittal Letter

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Case Name: State vs Andrew Michael Flores

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Response to Personal Restraint Petition

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Petition for Review (PRV)

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Comments:

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