Supreme Court No. 90758-7
COA No. 71962-9-I



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN EDWARD TURNER,

Petitioner.

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# PETITION FOR REVIEW

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

A. IDENTITY OF PETITIONER/DECISION BELOW

Brian Edward Turner requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Turner, No. 71962-9-I, filed August 11, 2014. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

The trial court ordered Mr. Turner to pay discretionary costs following his criminal conviction, without inquiring into his financial condition or his present or future ability to pay the LFOs. Did the trial court violate RCW 10.01.160(3), which prohibits a court from imposing LFOs "unless the defendant is or will be able to pay them"?

C. STATEMENT OF THE CASE

Following a jury trial, Mr. Turner was convicted of one count of unlawful possession of a stolen vehicle and one count of making or possessing motor vehicle theft tools. CP 1-2, 23-24.

At sentencing, the State asked the court to impose $1,500 in court costs, as recoupment for the cost of court-appointed counsel. RP 114. Defense counsel objected, stating that Mr. Turner was indigent. RP 114. Without inquiring into Mr. Turner's present or future ability to pay the costs, or his actual financial condition, the court imposed

$1,000 in costs for court-appointed counsel. RP 117; CP 30. The judgment and sentence included the following boilerplate finding:

> The court has considered the total amount owing, the defendant's 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 ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 29.

Mr. Turner appealed, arguing the trial court's boilerplate finding, and the imposition of non-mandatory costs, must be stricken because the record does not support the finding that Mr. Turner had the ability to pay the LFOs. The Court of Appeals affirmed, holding the issue was not ripe for review because the State has not sought to collect the costs. Slip Op. at 10-11.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

**This Court should grant review because the trial court's LFO order is not authorized by statute and the challenge is ripe for review**[1]

*1. The LFO order is not authorized by statute*

RCW 9.94A.760 permits the trial court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the court to order an offender to pay LFOs, but only if the court has first considered his individual financial circumstances and concluded he had the ability, or future ability, to pay. The record here does not show the trial court in fact considered Mr. Turner's ability or future ability to pay before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous.

The record shows the trial court failed to comply with the statutory requirements set forth in RCW 10.01.160(3). RCW 10.01.160(3) provides:

> 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

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[1] A similar issue is currently pending in this Court in State v. Blazina, No. 89028-5.

> the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). The trial court was without authority to impose LFOs as a condition of Mr. Turner's sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

Despite Mr. Turner's objection at sentencing, the record does not establish the trial court actually took into account Mr. Turner's financial resources and the nature of the payment burden or made an

individualized determination regarding his ability to pay. The State did not provide evidence establishing Mr. Turner's ability to pay or ask the court to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.[2] RP 117. The trial court made no inquiry into Mr. Turner's financial resources, debts, or employability. There was no specific evidence before the trial court regarding Mr. Turner's past employment or his future employment prospects. There was no discussion at the sentencing hearing regarding his financial circumstances. RP 117.

The only part of the record that even remotely suggests the trial court complied with RCW 10.01.160(3) is the boilerplate finding in the judgment and sentence. CP 29. But this finding does not establish compliance with RCW 10.01.160(3)'s requirements.

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of necessary facts); Hardman

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[2] It is the State's burden to prove the defendant's ability or likely future ability to pay. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

v. Barnhart, 362 F.3d 676, 679 (10th Cir. 2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

In sum, the record fails to establish the trial court actually took into account Mr. Turner's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Thus, this Court should grant review, reverse the Court of Appeals, and vacate the order.

*2. The challenge is ripe for review*

The Court of Appeals' conclusion that the issue is not ripe for review because the State has not yet attempted to collect the costs is erroneous because it fails to distinguish between an LFO challenge based on financial hardship grounds (arguably not ripe) and a challenge attacking the legality of the order based on statutory non-compliance (ripe).

Although there is a line of cases that hold the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, these cases are distinguishable because they address challenges based on an assertion of financial hardship or on procedural

due process principles that arise in regard to collection.[3] By contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to comply with RCW 10.01.160(3). This issue is ripe for review.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further financial development, and the challenged action is final. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order.

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[3] See, e.g., Lundy, 176 Wn. App. at 109 (holding "any challenge to the order requiring payment of legal financial obligations *on hardship grounds* is not yet ripe for review" until the State attempts to collect) (emphasis added); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant's constitutional challenge to the LFO violation process was not ripe for review until the State attempted to enforce the LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant's constitutional objection to LFO order based on fact of his indigence was not ripe until State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to LFO order on financial hardship grounds was when State enforces the order).

Thus, Mr. Turner meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010).

Second, no further factual development is necessary. As explained already, Mr. Turner is challenging the trial court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue are fully developed.

Although this Court, in Valencia, 169 Wn.2d at 789, previously suggested in *dicta* that LFO challenges require further factual development, Valencia does not apply here. Valencia involved a constitutional challenge to a sentencing condition regarding pornography. In assessing the second prong of the ripeness test, the Court compared Valencia's challenge to the court-ordered proscription on pornography with a hypothetical challenge to an LFO order. The Court suggested the former did not require further factual development to support review, while the latter did.

It appears, however, that the Court's hypothetical LFO challenge was predicated upon the notion that the order would be challenged on factual financial hardship grounds, rather than on statutory non-compliance grounds. For example, the Court stated:

> [LFO orders] are not ripe for review until the State attempts to enforce them because their validity depends

> on the particular circumstances of the attempted enforcement.

Id. at 789. This statement certainly may be true if the offender is challenged the validity of the LFO order asserting current financial hardship. But this statement is not accurate if an offender is challenging the legal validity of the LFO order based on non-compliance with RCW 10.01.160.

Either the sentencing court complied with the statute or it did not. If it did not, the order is not valid, regardless of the particular circumstances of attempted future enforcement. This demonstrates Valencia likely never contemplated the issues raise in this case and, therefore, is distinguishable. As explained, no further factual development is needed here, and the second prong of the ripeness test is met.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other

words, while the defendant's obligation to pay off LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final. Thus, the third prong of the ripeness test is met.

Next, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is liable for that debt which begins accruing interest immediately. RCW 10.82.090.

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. Lundy, 176 Wn. App. at 106. The defendant is not required to disprove this. See, e.g., State v. Ford,

137 Wn.2d 472, 482, 973 P.2d 472 (1999) (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains on the State.

Second, an offender who is left to fight his erroneously ordered LFOs through the remission process will have to do so without appointed counsel. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, will have to litigate the issue *pro se*.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will

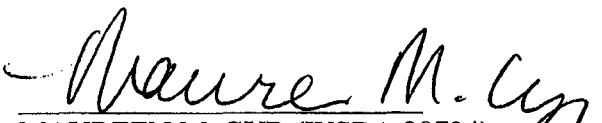
likely never be able to pay. See State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration in the first place and not rely on the remission process to remedy errors.

For these reasons, Mr. Turner's challenge to the legal validity of the LFO order is ripe.

E. CONCLUSION

For the reasons given, this Court should grant review, reverse the Court of Appeals, and vacate the LFO order.

Respectfully submitted this 8th day of September, 2014.



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# APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, Respondent, v. BRIAN EDWARD TURNER, Appellant. | ) | No. 71962-9-I<br>DIVISION ONE<br>UNPUBLISHED OPINION<br>FILED: August 11, 2014 |



SCHINDLER, J. — A jury convicted Brian Edward Turner of unlawful possession of a stolen motor vehicle and possession of motor vehicle theft tools. Turner argues insufficient evidence supports the convictions. Turner also contends the State failed to prove his criminal history for purposes of calculating his offender score, and the record does not support the court's finding that he had the ability to pay court costs. We affirm.

FACTS

On November 18, 2012, Rindel Caba reported to police that his white two-door 1991 Honda Civic was stolen.

On December 13, as Lakewood Police Lieutenant Chris Lawler was driving northbound, he noticed a Honda in the southbound lane. Lieutenant Lawler said the car was going "pretty quick" and did not come to a complete stop at the intersection. Lieutenant Lawler also testified that the woman sitting in the passenger seat looked at

him with a "surprised look" as the car drove past. Lieutenant Lawler ran the license plate number of the vehicle. The number matched the license plate number for the stolen Honda. Lieutenant Lawler immediately drove in the direction the Honda had been traveling.

Three minutes later, Lieutenant Lawler found the vehicle parked in front of an apartment complex with the engine running. The woman was still sitting in the front passenger seat and no one else was in the car. Lieutenant Lawler saw a man, later identified as Brian Edward Turner, emerge from a breezeway to the apartment units and walk toward the vehicle. Turner was carrying a red backpack and several bottles of what appeared to be alcohol. Turner placed the backpack and bottles in the car behind the driver's seat. As Turner "was preparing to get into the driver seat," Lieutenant Lawler arrested him. When Lieutenant Lawler looked inside the car, he saw that the steering column was severely damaged, and observed a flat-blade screwdriver lying on the front passenger-side floor.

The State charged Turner with unlawful possession of a stolen vehicle and making or possessing motor vehicle theft tools.

Rindel Caba, the owner of the stolen vehicle, and Lieutenant Lawler testified at trial. The defense theory at trial was that Turner did not know the vehicle was stolen and he was never in actual or constructive possession of the Honda or of the screwdriver.

Caba testified that after his stolen vehicle was recovered, the steering column cover was broken off and there was tape around the steering column "like they broke it off to get into the rest of the ignition." Caba testified that the ignition control switch and

heater climate control were also damaged, and there were scratches by the radio and on the steering column cover. Caba said the bag of men's clothing and the screwdriver found in the car did not belong to him. Caba testified that he did not know Turner and did not give him permission to drive his car.

Lieutenant Lawler testified that he saw other people around the apartment complex, including a maintenance worker and a man walking out of the breezeway "a little bit behind [Turner]" who "appeared to be unrelated." Lieutenant Lawler testified that when he arrested Turner, the other man turned and went in the other direction away from the car. Lieutenant Lawler did not see the other man go near the stolen vehicle or put any items in the car.

Lieutenant Lawler testified that Turner appeared to be about to get into the car when he arrested him:

> It looked like [Turner] had finished putting what it was behind the seat and was preparing to get into the driver seat almost like he was going to raise his leg to get in there. I thought he was getting into the car and I didn't want to let him get in the car.

Lieutenant Lawler testified that the car's steering column "was severely damaged." Lieutenant Lawler stated that a flat-blade screwdriver, like the one he saw in the vehicle, "can be used to move the mechanism under the column to start the car." Lieutenant Lawler testified that neither Turner nor the female passenger had keys to the car, a bill of sale, or registration or title for the vehicle.

At the end of the State's case, the defense made a motion to dismiss, arguing the State did not prove beyond a reasonable doubt that Turner possessed the car or the screwdriver or that he knew the car was stolen. The court denied the motion. The defense did not present any witnesses.

The jury found Turner guilty of unlawful possession of a stolen vehicle and possession of motor vehicle theft tools. The court sentenced Turner to 15 months confinement and ordered Turner to pay legal financial obligations, including fees for a court-appointed attorney of $1,000 and a criminal filing fee of $200.

ANALYSIS

Sufficiency of the Evidence

Turner contends he is entitled to dismissal because the evidence does not support the convictions for unlawful possession of a stolen motor vehicle and possessing motor vehicle theft tools.

The State must prove each essential element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). In deciding whether sufficient evidence supports a conviction, we must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. Salinas, 119 Wn.2d at 201. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201. We defer to the trier of fact on "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Turner asserts there was insufficient evidence to convict him of possession of a stolen motor vehicle because the State only proved he was in proximity to the car, not that he had actual or constructive "possession" of the vehicle or that he knew the car was stolen.

"A person is guilty of possession of a stolen vehicle if he . . . possesses . . . a stolen motor vehicle." RCW 9A.56.068(1). Knowledge that the property was wrongfully appropriated is an essential element of the crime of possession of stolen property. State v. Hatch, 4 Wn. App. 691, 693, 483 P.2d 864 (1971). "Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the [property] or over the premises where the [property] was found." State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). "Actual possession means that the goods are in the personal custody of the person charged with possession." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Close proximity alone is not enough to establish constructive possession; other facts must enable the trier of fact to infer dominion and control. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). No single factor is dispositive in determining dominion and control. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). Rather, the totality of the circumstances must be considered. Collins, 76 Wn. App. at 501. A rational trier of fact could infer that a defendant had constructive possession of stolen property if the defendant had control over the premises where the property was found. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). A vehicle is a "premises" for purpose of this inquiry. Turner, 103 Wn. App. at 521.

Mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen, but possession coupled with slight corroborative evidence is sufficient to prove guilty knowledge. State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); State v. Womble, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). Corroborative evidence includes damage to the vehicle and the absence of a plausible explanation for legitimate possession. State v. L.A., 82 Wn. App. 275, 276, 918 P.2d 173 (1996); Womble, 93 Wn. App. at 604.

Viewed in the light most favorable to the State, a rational trier of fact could find that Turner possessed the vehicle. Lieutenant Lawler testified that he observed someone driving the car with a female passenger. Three minutes later, Lieutenant Lawler saw the same car parked in front of an apartment complex with the engine running, and watched Turner walk out of the breezeway leading to the apartments carrying a backpack and bottles and place those items in the car behind the driver's seat. Lieutenant Lawler testified that Turner appeared to be about to get into the driver's seat when he arrested him.

Viewing the evidence in the light most favorable to the State, there was also evidence that Turner knew the car was stolen. Lieutenant Lawler and the owner of the car testified that the ignition control switch was disabled, the heater controls were damaged, and the steering column cover was broken off. There was no key and Lieutenant Lawler testified that the screwdriver found on the floor of the car was likely used to start the vehicle.

Turner also argues there was insufficient evidence to convict him of possession of a motor vehicle theft tool because the State did not prove he possessed the

screwdriver found inside the stolen vehicle with the intent to use the tool "in the commission of motor vehicle theft." RCW 9A.56.063(1).

RCW 9A.56.063 provides, in pertinent part:

> (1) Any person who makes or mends, or causes to be made or mended, uses, or has in his or her possession any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of having motor vehicle theft tools.
>
> (2) For the purposes of this section, motor vehicle theft tool includes . . . any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft, or knowing that the same is intended to be so used.

Viewed in the light most favorable to the State, sufficient evidence supports the conclusion that Turner possessed the screwdriver as a motor vehicle theft tool. Lieutenant Lawler testified that the screwdriver was on the front passenger-side floor within reach of someone sitting in the driver's seat. No keys were found in the vehicle, and there was damage to the car's ignition and steering column. Lieutenant Lawler testified that flat-blade screwdrivers like the one he found in the car are commonly used to start stolen vehicles by using the blade to move the mechanism under the steering column.

Offender Score

In the alternative, Turner argues he is entitled to resentencing because the State did not prove his criminal history for purposes of calculating the offender score.

We review a sentencing court's calculation of an offender score de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). "[I]llegal or erroneous sentences

may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

At sentencing, the State bears the burden of proving a defendant's prior criminal history by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction. State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The best evidence of a prior conviction is a certified copy of the judgment. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). "This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence." Mendoza, 165 Wn.2d at 920. A defendant's "mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgement." Hunley, 175 Wn.2d at 912. But when defense counsel affirmatively acknowledges a defendant's criminal history, the court is entitled to rely on such acknowledgement. Bergstrom, 162 Wn.2d at 97-98.

Turner contends the facts in this case are indistinguishable from Hunley. We disagree. In Hunley, the State presented a written summary of its understanding of the defendant's criminal history. Hunley, 175 Wn.2d at 905. The State did not present any documentation of the alleged offenses. Hunley, 175 Wn.2d at 905. The defendant "neither disputed nor affirmatively agreed with the prosecutor summary." Hunley, 175 Wn.2d at 905. The trial court relied on the summary and on the failure of the defendant to challenge the offender score or sentence at the trial court. Hunley, 175 Wn.2d at 905. On appeal, the Washington State Supreme Court held that "to treat the defendant's failure to object to such assertions or allegations as an acknowledgment of

the criminal history" and "to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations of prior convictions" violates due process. Hunley, 175 Wn.2d at 915.

Here, unlike in Hunley, the court relied on the defense attorney's affirmative acknowledgement of Turner's criminal history. At sentencing, the State presented a "STIPULATION ON PRIOR RECORD AND OFFENDER SCORE" with a list of Turner's prior convictions.[1] But neither Turner nor his attorney signed the stipulation. The prosecutor proposed rescheduling the sentencing to allow the State to present certified copies of the prior convictions:

> I would [point] out that the stipulation of prior offense that I've handed forward is not signed by the defendant or his attorney. [Defense counsel] said that it's her desire not to sign it. I suggested that we set this over so I can bring in the certified copies to the Court. However, we'll defer to the Court with how you want to proceed.

The court then asked the defense attorney whether "there [is] something wrong that you're aware of[ ]on his prior record or the offender score?" In response, the attorney stated, "No, not that I'm aware of, Your Honor." The attorney also told the court, "We're waiving any right to appeal it if it's wrong." The court ruled that it was "going to accept the stipulation. We don't actually have a stipulation, but I'm going to accept the prior record and offender score."

The facts in this case are more like Bergstrom. In Bergstrom, the defense attorney agreed to the State's calculation of the offender score and criminal history. Bergstrom, 162 Wn.2d at 90. But the defendant objected, arguing that some of his crimes were the same criminal conduct. Bergstrom, 162 Wn.2d at 90-91. The sentencing court addressed Bergstrom's argument and rejected it. Bergstrom, 162

[1] Emphasis in original.

Wn.2d at 91-92. The Supreme Court held that although the sentencing court was entitled to rely on defense counsel's agreement to the offender score and criminal history, because the court considered and ruled on Bergstrom's pro se argument, the court erred in failing to hold an evidentiary hearing and require the State to produce evidence in support of the offender score. Bergstrom, 162 Wn.2d at 97.

There is no evidence in the record that Turner objected to the State's summary of his criminal history. Because the sentencing court was entitled to rely on the defense attorney's affirmative acknowledgment of Turner's criminal history, we affirm Turner's sentence.

Legal Financial Obligations

Turner also challenges the imposition of the $200 filing fee and the $1,000 in court-appointed attorney fees and defense costs, arguing the record does not support finding that he had the ability to pay.[2]

The $200 filing fee is statutorily mandated under RCW 36.18.020(2)(h) and must be imposed regardless of the defendant's ability to pay. State v. Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). As to imposition of court-appointed attorney fees and defense costs, the State contends that the issue is not ripe for review because the State has not sought to collect the costs. We agree with the State.

Imposition of court-appointed attorney fees and defense costs is discretionary. RCW 10.01.160(1), (2). If a court imposes discretionary legal financial obligations (LFOs), the court must consider the defendant's present or likely future ability to pay. RCW 10.01.160(3); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). The

[2] Turner does not challenge the imposition of the mandatory $500 crime victim fee or the mandatory $100 DNA (deoxyribonucleic acid) database fee.

defendant may petition the court at any time for remission or modification of the payments on the basis of manifest hardship. RCW 10.01.160(4); State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991). "Because this determination is clearly somewhat 'speculative,' the time to examine a defendant's ability to pay is when the government seeks to collect the obligation." State v. Smits, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). Nothing in the record reflects that the State has attempted to collect LFOs from Turner or expects Turner to begin repayment of his obligations. Turner may challenge the trial court's imposition of LFOs when the government seeks to collect them.

We affirm.

WE CONCUR:

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☒ respondent Thomas Roberts, DPA
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Pierce County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 8, 2014

# WASHINGTON APPELLATE PROJECT

## September 08, 2014 - 4:41 PM

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Trial Court County: ____ - Superior Court # ____

## The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ○ 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.

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A copy of this document has been emailed to the following addresses:

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