

FILED

JAN 30, 2014

Court of Appeals
Division III
State of Washington

No. 31700-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

COLE L. HEALY,
Defendant/Appellant.

APPEAL FROM THE PEND OREILLE COUNTY SUPERIOR COURT
Honorable Allen C. Nielson, Judge

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

- A. Whether the trial court's finding that the defendant had the ability or likely future ability to pay discretionary legal financial obligations was clearly erroneous.**
- B. Whether the trial court erred in imposing a sentencing condition prohibiting obstructing behavior.**

II. STATEMENT OF THE CASE

Correctional Sergeant Stephen Higgins, Pend Oreille County Sheriff's Office, overheard loud talking in the cell next to his office at the jail facility. 5/20/13 RP 25–27. As he opened the door, the defendant, Cole Healy, jumped off a bunk bed and threw an un-connecting overhead punch at a fellow cell mate. 5/20/13 RP 27–28. Sgt. Higgins stepped between the two, saying “Stop”, and put his hand on Mr. Healy's chest when he

appeared to try another contact. 5/20/13 RP 28. Mr. Healy stepped slightly back, while knocking or pushing the officer's hand off, and then backed away as the officer said, "Don't". 5/20/13 RP 28-29.

A jury found Mr. Healy guilty of third degree assault against a law enforcement officer, as charged. CP 1, 73; 5/20/13 RP 85. The trial court imposed a low-end standard range sentence of three months confinement. CP 78; 5/20/13 RP 96.

The court imposed discretionary costs of \$300 and mandatory costs of \$800, for a total Legal Financial Obligation ("LFO") of \$1,100. CP 80-81 at ¶ 4.3. The trial court made no express finding that Mr. Healy had the present or future ability to pay the LFO's. CP 76-84; 5/20/13 RP 88-102.

The Judgment and Sentence contains the following language: 3

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's 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. ...

CP 78.

The trial court did discuss with Mr. Healy his current homeless status, his desire to get a Washington ID, and leave the area. 5/20/13 RP 98–99. The Court further noted Mr. Healy's young age and lack of serious criminal history, and that this was an indication that he could change his life and move his life in a different direction. 5/20/13 RP 98. The trial court ordered Mr. Healy to make monthly payments of not less than \$25, commencing upon release from custody. CP 81 at ¶ 4.3; 5/20/13 RP 101. Mr. Healy made no objection to the imposition of the discretionary legal financial obligations. 5/20/13 RP 101.

As a condition of sentence, the court prohibited Mr. Healy from engaging in "obstructing behavior". CP 80. The trial court indicated "I've just added "no obstructing behavior." That's kind of redundant, actually, but the idea would be to discourage any further behavior problems with law enforcement". 5/20/13 RP 101.

This appeal followed. CP 87–96.

III. STANDARD OF REVIEW

Neither RCW 10.01.160 “nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay discretionary court costs.” *State v. Curry*, 118 Wn.2d at 916 (1992). But if an unnecessary finding is made, perhaps through inclusion of boilerplate language in the judgment and sentence, the appeals court reviews it under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. at 404 n.13 (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

Appellate courts will apply an abuse of discretion standard of review when looking at whether a condition of community custody is void for vagueness. *State v. Bahl*, 164 Wn.2d 739 (2008).

IV. ARGUMENT

- a. **The trial court's finding that the defendant had the ability or likely future ability to pay discretionary legal financial obligations was not clearly erroneous.**

Neither RCW 10.01.160 “nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay discretionary court costs.” *State v. Curry*, 118 Wn.2d at 916 (1992). But if an unnecessary finding is made, perhaps through inclusion of boilerplate language in the judgment and sentence, the appeals court review it under the clearly erroneous standard. *Bertrand*, 165 Wn. App. at 404 n.13 (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

For mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. For victim restitution, victim

assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. These mandatory obligations are constitutional so long as there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants. *State v. Lundy*, 176 Wn. App. 96 at 105 (2013).

Unlike mandatory obligations, if a court intends on imposing discretionary legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay. The salient features of a constitutionally permissible costs and fees structure must meet the following requirements: (1) repayment must not be mandatory; (2) repayment may be imposed only on convicted defendants; (3) repayment may only be ordered if the defendant is or will be able to pay; (4) the financial resources of the defendant must be taken into account; (5) a repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end; (6) the convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; (7) the convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment. *State v. Lundy*, 176 Wn. App.

96 at 105 (2013)(citing *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992)).

The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one. *See State v. Baldwin*, 63 Wn. App. at 311.

In *Baldwin*, for instance, this burden was met by a single sentence in a presentence report that the defendant did not object to.

The presentence report contained the following statement, “Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense.” Baldwin made no objection to this assertion at the time of sentencing. ... [I]nformation contained in the presentence report may be used by the court if the defendant does not object to that information. *State v. Southerland*, 43 Wn. App. 246, 250, 716 P.2d 933 (1986). Therefore, when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied.

Moreover, where a defendant does not object at sentencing to the trial court's imposition of legal financial obligations on the grounds that

there is no likelihood that his indigency—if present at the time of sentencing—will end, the trial court has no indication that imposition of legal financial obligations may violate *Curry*. In addition, because the defendant retains the ability to move the court for modification of the legal financial obligation on hardship grounds, RCW 10.01.160(4), the trial court does not violate *Curry* by imposing legal financial obligations at sentencing. *State v. Lundy*, 176 Wn. App. 96 at 106 (2013)(citing *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992)).

Here, as in *Lundy*, the defendant did not object to the imposition of legal financial obligations on the grounds that there is no likelihood that his indigency will end. In fact the trial court at sentencing engaged in a conversation with the defendant wherein the defendant indicated that while at the time he was looking at being homeless, that he was working to get an ID and move from the area. RP 99. This is indicative that while the defendant was in a state of indigency at the time of sentencing that this condition would improve upon release from custody, getting an ID, and seeking employment elsewhere. The court in facts notes that based on the defendant's age and his minimal amount of criminal history that he could change his life and take it in a different direction. RP 98. The factors and inquiry noted in the record supports the finding that he would have the future ability to pay legal financial obligations.

The defendant in *Bertrand* presented this court with a markedly different situation. In *Bertrand*, the record did not just reveal that the trial court failed to consider whether the defendant could pay legal financial obligations but, to the contrary, showed that “in light of Bertrand's disability, her ability to pay [legal financial obligations] now or in the near future is arguably in question.” 165 Wn. App. at 404 n.15. Essentially, the obligation in *Bertrand*—an obligation set to be imposed while the defendant was still incarcerated—potentially violated the fifth factor of the *Curry* test: “A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.” 9 118 Wn.2d at 915 (emphasis added) (quoting *Eisenman*, 62 Wn. App. at 644 n.10).

The appellant court in *Lundy* noted that several recent cases mistakenly read the fifth *Curry* requirement—that a repayment obligation may not be imposed if it appears from the record there is no likelihood the defendant's indigency will end—as equivalent to the statement that “a repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations.” But these statements set clearly different standards and are not equivalent.

Moreover, where a defendant does not object at sentencing to the trial court's imposition of legal financial obligations on the grounds that there is no likelihood that his indigency—if present at the time of sentencing—will end, the trial court has no indication that imposition of legal financial obligations may violate *Curry*. In addition, because the defendant retains the ability to move the court for modification of the legal financial obligation on hardship grounds, RCW 10.01.160(4), the trial court does not violate *Curry* by imposing legal financial obligations at sentencing. *State v. Lundy*, 176 Wn. App. 96 at 106 (2013)(citing *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992)).

Although the trial court at sentencing did not specifically address the appellant's future ability to pay \$1,100 in legal financial obligations, including less than \$300 in discretionary court costs and fees, there is nothing in the record suggesting that the appellant's indigency (if present) would extend indefinitely. Because a showing of indigence is the defendant's burden, the record suggests that the appellant will have the ability to pay these fees in the future. This is decidedly different than the situation in *Bertrand*. Instead, the appellant's situation more closely approximates that of the defendants in *Lundy* and *Baldwin*. As such the directive to pay is also proper.

Therefore, the trial court's finding of ability to pay was not clearly erroneous, and the Court should affirm the decision of the trial court.

b. Whether the trial court abused its discretion in imposing a sentencing condition prohibiting obstructing behavior.

While the appellant proposes myriad of circumstances wherein the defendant's non-criminal "obstructing" behavior could constitute a violation of community custody by an "inventive" probation officer, the court was clear on the record and Mr. Healy has fair notice of what constitutes a violation. A community custody condition 'is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" *Sanchez Valencia*, 148 Wn. App. at 321 (quoting *Eze*, 111 Wn.2d at 27).

Here, the court was clear on the record that Mr. Healy was not to obstruct law enforcement. RP 101. This is clearly distinguishable from *State v. Sanchez Valencia*, 169 Wn.2d 782 (2010), based on the fact that drug paraphernalia as used in that case encompassed a far wider range of daily items, and had a far more likely basis for misapplication than the someone hyperbolic examples of "obstructing" provided by appellant.

Based on the nature of the conviction, Assault Third Degree against a law enforcement officer, and the clear record that this obstructing behavior was in relation to law enforcement, the court did not abuse its discretion when it made "no obstructing behavior" a condition of the sentence.


If the condition as written does not, in the opinion of the Court, provide Mr. Healy with adequate notice despite the clerk record at sentencing, the State would be happy to amend the sentence to reflect "no obstructing law enforcement" as stated at sentencing.

V. CONCLUSION

For the foregoing reasons, the conditions of the defendant's sentence should be affirmed.

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

Signed this 30 day of January 2014, at Newport, Washington.


Jeremy T. Schmidt, WSBA # 40863
Deputy Prosecuting Attorney

Certificate of Mailing

I, do hereby certify and declare under penalty of perjury of the laws of the State of Washington that on this date I deposited in the United States Post Office in the City of Newport, Pend Oreille County, Washington a properly stamped and addressed envelope(s) directed to:

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Containing a true and correct copy of:

Respondent's Brief

January 30, 2014 Newport WA
Date and Place


Tricia Shanholtzer