

NO. 46013-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY LYNN TATRO, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority when it imposed a discretionary court cost in the absence of evidence that Mr. Tatro possessed the present or future ability to pay.

2. In the absence of substantial evidence, the trial court erred in entering findings 2.4 and 4.3 of the Judgment and Sentence purporting to find Mr. Tatro had the present or future ability to pay discretionary costs imposed by the court.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A trial court must determine whether a defendant has the means to pay legal financial obligations before imposing discretionary costs. Here, there was no evidence Mr. Tatro possessed the present or future ability to pay the cost yet the trial court determined he had the ability to pay. Was the trial court's determination clearly erroneous?

C. STATEMENT OF THE CASE

Mr. Tatro waived his right to a jury trial. CP 3; RP 2/3/14 at 14. After hearing the evidence, the court found Mr. Tatro guilty of Theft of a Motor Vehicle as charged.¹ CP 1-2; RP 2/12/14 at 103. The court entered the following written findings and facts in support of its verdict.

¹ RCW 9A.56.063

FINDINGS OF FACT

1. On November 22, 2013, Nicholas Phillabaum was the owner of a Pontiac Grand Prix motor vehicle. He drove that motor vehicle to Aberdeen, Grays Harbor County, Washington to the residence of his friend, Krista Bradshaw. He parked the motor vehicle behind the house and went inside.
2. Once inside he met, for the first time, the defendant and Amanda Ross, who were at the Bradshaw residence. Ms. Bradshaw was asleep on the couch. He visited with the defendant and Ms. Ross for a period of time.
3. The defendant asked to borrow Mr. Phillabaum's motor vehicle to run an errand to get food for them and perhaps, to get medication for Ms. Bradshaw. The defendant was given the car keys, went out of the residence to the car, drove away, and never returned. Neither Ms. Ross, Ms. Bradshaw nor Mr. Phillabaum heard from or saw the defendant after he left with the motor vehicle. The agreement between the defendant and Mr. Phillabaum was that the defendant would take the vehicle to run errands and to return.
4. The defendant was arrested by Aberdeen police for this offense on December 4, 2013, on West First Street in Aberdeen. Attempts to locate Mr. Phillabaum's motor vehicle in the area of the arrest were unsuccessful.
5. On January 4, 2014, the Quinault Tribal Police located Mr. Phillabaum's car, abandoned, in the village of Taholah which is about 45 miles north of Aberdeen. They inventoried the motor vehicle. Mr. Phillabaum's wallet containing his identification and credit cards was missing as was a semiautomatic pistol that had been in the vehicle. Other personal property items belonging to Mr. Phillabaum, including a spare magazine for the pistol and his welding gear were found in the vehicle.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter herein.

2. The defendant initially had the motor vehicle in his possession pursuant to the arrangement between himself and the defendant.[sic] The defendant did subsequently exert authorized control over the vehicle in that he did withhold and appropriate the vehicle to his own use.
3. The defendant acted with intent to deprive.
4. These events occurred in Grays Harbor County, Washington.
5. The court finds each of these conclusions of law beyond a reasonable doubt.

CP 4-6.

Mr. Tatro agreed to the prosecutor's offender score calculation. RP 2/23/14 at 15. The court sentenced Mr. Tatro to 50 months which was within the standard range. CP 8-9; RP 2/24/14 at 20. The court also imposed a \$900 discretionary fee against Mr. Tatro for appointed counsel. CP 10. In imposing the fee, the court did not give any consideration on the record to Mr. Tatro's present or future ability to pay costs. At section 2.4 of the Judgment and Sentence, someone put a check before the paragraph which reads:

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. (RCW 10.01.160).

CP 9.

Mr. Tatro appeals all portions of his judgment and sentence. CP 15-16.

D. ARGUMENT

THE FINDING THAT MR. TATRO HAD THE PRESENT OR FUTURE ABILITY TO PAY A THE DISCRETIONARY COST IS WITHOUT SUPPORT.

1. The court must inquire about the defendant's ability to pay before imposing discretionary costs.

The allowance and recovery of costs is entirely statutory. *State v. Nolan*, 98 Wn. App. 75, 78-79, 988 P.2d 473 (1999).² Unlike mandatory obligations, if a court intends to impose discretionary legal financial obligations (LFOs) as a sentencing condition, such as court costs and fees, it must consider the defendant's present or likely future ability to pay. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).³

While the court need not make a formal finding that the defendant has or will have the ability to pay, *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); *State v. Baldwin*, 63 Wn. App. 303, 312, 8118 P.2d

² Mr. Tatro did not object at the time the court imposed the cost but he may still raise the issue for the first time on appeal. *See State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal). In addition, whether a defendant may raise the imposition of discretionary costs for the first time on appeal is pending before the Supreme Court in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013). *Blazina* was argued on February 11, 2014, and a decision is pending.

³ Mr. Tatro does not challenge imposition of the following mandatory legal financial obligations: the \$500 victim penalty assessment pursuant to RCW 7.68.035; the mandatory court costs pursuant to RCW 36.18.020(2)(h) and RCW 10.46.190; and the \$100 DNA collections fee pursuant to RCW 43.43.7541.

1116 (1991), where the court makes such a finding, the record must support it. *State v. Bertrand*, 165 Wn. App. 393, 403-05, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). The appellate court reviews the trial court's determination of the defendant's financial resources to pay for clear error. *Bertrand*, 165 Wn. App. at 404 n. 13.

“A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a definite and firm conviction that a mistake has been committed.” *Lundy*, 176 Wn. App. at 105 (internal quotation marks omitted), quoting *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007).

Here the trial court imposed the discretionary court-appointed counsel fee and purported to make a finding that Mr. Tatro had, or would have, the financial ability to pay it. See Judgment and Sentence sections 2.4 and 4.3. There is nothing in the record to support this finding.

2. The trial court failed to consider Mr. Tatro's ability to pay the cost.

The trial court may order a defendant to pay court fees as here pursuant to RCW 10.01.160. But,

[t]he 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.

In *Bertrand*, the appellate court held that in order to uphold a finding of ability to pay on appeal, the record must be “sufficient for us to review whether “the trial court judge took into account the financial resources of the defendant and the nature of the burden’ imposed by LFOs.” *Bertrand*, 165 Wn. App. at 404, quoting *Baldwin*, 63 Wn. App. at 312. In *Bertrand*, the defendant had disabilities that may have reduced or possibly eliminated her future ability to pay LFOs, however the trial court ordered the defendant to pay the LFOs within 60 days of the judgment and sentence even while still incarcerated. *Bertrand*, 165 Wn. App. 404 n. 15. The record failed to show that the trial court took into account Bertrand’s financial resources and the nature of the burden on imposing LFOs on her. In fact, the record before the appellate court contained no evidence to support the trial court’s finding that Bertrand had the present or future ability to pay LFOs. Accordingly, the Court of Appeals held that the trial court’s judgment and sentence finding was clearly erroneous. *Bertrand*, 165 Wn. App. at 404.

In this case, there was no evidence presented regarding Mr. Tatro’s employment history. There was no evidence at all of his present or future employment prospects. At sentencing, the trial court did not make any inquiry into Mr. Tatro’s resources or employability. The State did not even argue there was evidence to support the finding.

Ultimately, the trial court's finding is not supported. The record fails to show that the trial court took Mr. Tatro's financial resources and ability to pay into account. The trial court erred in imposing the \$900 discretionary court-appointed attorney fee. This Court should remand to the trial court to strike the finding of ability to pay and the discretionary fee.

3. The issue is ripe.

Although Mr. Tatro challenges this trial court's finding that he had the current or future ability to pay LFOs, he does not challenge the trial court's decision to impose the discretionary fee. Generally, "challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." *Lundy*, 174 Wn. App. at 108 (emphasis omitted), quoting *Baldwin*, 63 Wn. App. at 310.

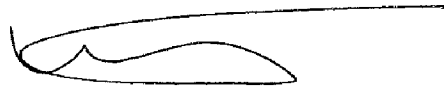
Because the State has not yet attempted to collect Mr. Tatro's LFOs, any claim to the trial court's imposition of the LFOs at this time would not be ripe. *Lundy*, 174 Wn. App. at 108.

More importantly here, because a party can challenge a finding of fact at any time, Mr. Tatro's challenge to the trial court's finding of an ability to pay is properly before this Court. *Lundy*, 174 Wn. App. at 1065 n. 6.

E. CONCLUSION

For the reasons stated, Mr. Tatro asks this Court to remand for the trial court to strike the finding of an ability to pay the \$900 discretionary fee for court-appointed counsel.

Respectfully submitted this 29th day of September, 2014.



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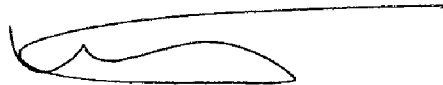
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Opening Brief with: (1) Gerald Fuller, Grays Harbor County Prosecutor's Office at gfuller@co.grays-harbor.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Ricky Lynn Tatro, Jr./DOC# 815387, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 29, 2014, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Ricky Lynn Tatro, Jr.

COWLITZ COUNTY ASSIGNED COUNSEL

September 29, 2014 - 11:43 AM

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