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King County Prosecutor  
Appellate Unit

67938-4

NO. 67938-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

NELSON SELLERS,

Appellant.

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

The Honorable Steven Gonzalez, Judge

BRIEF OF APPELLANT

REBECCA WOLD BOUCHEY  
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## TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE .....	1
D. ARGUMENT .....	4
1. THE TRIAL COURT ERRED WHEN IT FOUND WITHOUT EVIDENCE THAT SELLERS HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS .....	4
E. CONCLUSION.....	6

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Baldwin</u> , 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991) .....	4
<u>State v. Bertrand</u> , 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) .....	4, 5
<u>State v. Ford</u> , 137 Wn.2d 472, 477, 973 P.2d 452 (1999) .....	4
<u>State v. Grayson</u> , 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) .....	4

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it found Sellers had the current or future ability to pay legal financial obligations. CP 55 (Section 4.2)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it found, absent an inquiry into the appellant's individual circumstances, that he has the current or future ability to pay LFOs?

C. STATEMENT OF THE CASE

On September 2, 2011, Nelson Sellers was charged by amended information with Unlawful Possession of a Firearm in the First Degree and Possession of a Controlled Substance, cocaine, with intent to manufacture or deliver. CP 9-10.

Sellers brought several pretrial motions, including a CrR 3.6 and 3.5 motions to suppress evidence and statements. CP 11-14; 1RP 22-76.<sup>1</sup> Both motions were denied. CP 83-87; 85-87.

At trial, the State's witnesses, all police officers, testified that when executing a search warrant of the house Sellers lived in, they found an unloaded rifle inside a fireplace, which was covered with cardboard and plastic, and a small amount of cocaine. 1RP 143, 153, 2RP 21, 98. There was also testimony that Sellers dropped a small bundle of cocaine after his arrest. 2RP 12.

Two of the police witnesses testified that Sellers told them they might find a rifle in the fireplace and that a woman had placed it there. 2RP 67-68. Sellers denied making that statement. 3RP 73.

Sellers also denied knowing there was a rifle in the fireplace. 3RP 66. Another resident of the house testified that he placed the rifle in the fireplace after receiving it from a woman and that he did not tell Sellers it was there. 3RP 15-16.

The parties stipulated to Sellers' prior serious offense conviction. 2RP 127.

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<sup>1</sup> For purposes of this brief, 1RP refers to the transcript for December 10 and 12; 2RP refers to the transcript for October 13; and 3RP refers to the transcript for October 17 through October 20.

The jury returned verdicts of guilty on possession of a firearm in the first degree and guilty on the lesser included offense of simple possession of cocaine. 3RP 167-8.

The court imposed standard range sentence of 15 months on count one and 6 months on count two, with 15 months of community custody under the DOSA option. 3RP 184-86; CP 56. The court also imposed \$600 of legal financial obligations. CP 55.

Although there was no discussion of Sellers' financial circumstances, the judgment and sentence made a written "finding," which was pre-printed on the sentencing form: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 55 (Section 4.2).

On November 14, 2011, Sellers filed a notice of appeal. The motion for order of indigency states that Sellers is unemployed with no sources of income and substantial debt for medical expenses. Supp. CP, Motion for Indigency, 5-6. Sellers was found to be indigent on appeal.

## D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FOUND WITHOUT EVIDENCE THAT SELLERS HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04. This error may be raised for the first time on appeal. Bertrand, at 394.

While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). Such error may be raised for the first time on appeal. See

Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" that Sellers had the present or future ability to pay his LFOs. And given the lack of income and the outstanding medical bills declared in the declaration supporting the order of indigency, and Sellers' advanced age and ill-health, the record suggests the opposite is true.

Accordingly, the court's finding that Sellers had the present or future ability to pay LFOs was clearly erroneous and should be stricken. See Bertrand, 165 Wn. App. at 405. Before the State can collect LFOs in this case, moreover, there must be a properly supported, individualized judicial determination that Sellers has the ability to pay.

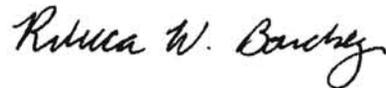
E. CONCLUSION

For the reasons stated above, the trial court's finding that Sellers had the present or future ability to pay LFOs was clearly erroneous and must be stricken.

DATED: May 3, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Rebecca W. Bouchey".

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STATE OF WASHINGTON, DSHS,

Respondent,

v.

NELSON SELLERS,

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COA NO. 67938-4-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF MAY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NELSON SELLERS  
DOC NO. 911202  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF MAY, 2012.

x Patrick Mayovsky

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