

68062-5

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NO. 68062-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ERIC CARMICHAEL,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

AMY R. MECKLING  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUE PRESENTED**

1. A sentencing court is not required to consider the defendant's ability to pay when imposing mandatory financial obligations. At sentencing, the court imposed only mandatory financial obligations. Because the court's finding on the judgment and sentence regarding Carmichael's ability to pay was irrelevant and has no practical effect on his sentence, is remand to strike the finding unnecessary?

**B. STATEMENT OF THE CASE**

Following a jury trial, Carmichael was convicted of first degree unlawful possession of a firearm, first degree possessing stolen property and possession of methamphetamine. CP 330-332, 457. The court sentenced Carmichael to a total standard range sentence of 116 months incarceration. CP 460. The court imposed the mandatory \$500 victim penalty assessment, and the mandatory \$100 DNA collection fee. CP 459. Carmichael appealed. CP 456.

**C. ARGUMENT**

Carmichael does not challenge the sentencing court's imposition of \$600 in mandatory legal financial obligations. See Brf. of Appellant at 3, n. 2. Rather, he asks this Court to remand his case for the sole purpose of striking language from his judgment

and sentence that refers to his present and future ability to pay.

Brf. of Appellant at 3-4.

However, the sentencing court was not required to take into account Carmichael's ability to pay when imposing the mandatory monetary obligations that it did. Carmichael's financial circumstances become relevant only at the time that the State attempts to collect on his obligation. Because the language Carmichael complains of has no practical effect on his sentence, this Court cannot offer him any meaningful relief. There is no need to remand this case to strike irrelevant and inconsequential language from the judgment and sentence. Carmichael's sentence should be affirmed.

**1. THE SENTENCING COURT WAS NOT REQUIRED TO CONSIDER CARMICHAEL'S FINANCIAL RESOURCES WHEN IT IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS.**

When sentencing a defendant for a felony, the court must impose a mandatory \$500 victim penalty assessment ("VPA"). RCW 7.68.035(1)(a). The defendant's ability to pay is irrelevant. State v. Curry, 62 Wn. App. 676, 683, 814 P.2d 1252 (1991) affirmed, 118 Wn.2d 911, 829 P.2d 166 (1992).

The time to examine the defendant's ability to pay is when the State seeks to collect the financial obligation. State v. Smits, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). A defendant is not an "aggrieved party" until the State seeks to enforce the payment of the financial obligations. Smits, 152 Wn. App. at 525; State v. Mahone, 98 Wn. App. 342, 347-48, 989 P.2d 583 (1999) (citing State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997)).

Before being incarcerated for failing to pay a legal financial obligation, a defendant must be given an opportunity to show that he has not willfully failed to pay. RCW 9.94A.6333. A defendant may petition the court at any time to remit or modify legal financial obligations due to hardship. RCW 10.01.160(4). Because adequate safeguards exist to prevent indigent defendants from being incarcerated for failing to pay, imposition of the mandatory VPA raises no constitutional concern. State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992); State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008).

Like the VPA, felony sentences must include a DNA collection fee of \$100, without regard for the defendant's individual

financial circumstances. RCW 43.43.7541; see also State v. Brewster, 158 Wn. App. 856, 218 P.3d 249 (2009) and State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009) (2008 amendments to RCW 43.43.7541, making the collection fee mandatory regardless of ability to pay, apply to all sentencing hearings that occur after the effective date of the amendment).

To the contrary, imposition of non-mandatory legal financial obligations, such as court costs and recoupment for appointed counsel, requires the sentencing court to consider the defendant's financial resources. RCW 10.01.160(3). Even so, formal findings are not required. Baldwin, 63 Wn. App. at 310.

As to non-mandatory costs imposed pursuant to RCW 10.01.160, the inquiry required at sentencing relates solely to the defendant's future ability to pay, and is necessarily speculative. Baldwin, 63 Wn. App. at 310. Thus, the record at sentencing must merely be sufficient to review whether the trial court considered the financial resources of the defendant, and the nature of the burden that would be imposed by the financial obligations. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (citing Baldwin, 63 Wn. App. at 312).

Here, the court was under no obligation to consider Carmichael's financial resources when it imposed the mandatory victim penalty assessment and mandatory DNA collection fee. See Curry, 62 Wn. App. at 683; RCW 7.68.035; RCW 43.43.7541. Because the court imposed only the mandatory VPA and DNA collection fee, any finding that it made regarding Carmichael's present or likely future ability to pay was unnecessary and irrelevant.

**2. BECAUSE THE SENTENCING COURT IMPOSED ONLY MANDATORY LEGAL FINANCIAL OBLIGATIONS, THIS COURT CANNOT OFFER CARMICHAEL ANY MEANINGFUL RELIEF ON REMAND.**

Carmichael rightly does not challenge the court's imposition of mandatory legal financial obligations. Because the State has not yet sought to enforce payment, the court's imposition of the mandatory legal financial obligations is not ripe for review.

Bertrand, 165 Wn. App. at 405.

Instead, Carmichael argues that the court's finding that he has the "present or likely future ability to pay" must be stricken

because it is not supported by the record.<sup>1</sup> However, that finding was wholly irrelevant to the mandatory financial obligation imposed. It has no practical effect on Carmichael's sentence and striking it would serve no purpose. Because this Court cannot offer Carmichael any meaningful relief, remand is unnecessary.

A case is moot when the court cannot provide meaningful relief. State v. Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). A moot appeal should generally be dismissed. Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

Although moot, the court may choose to address a case if it involves matters of continuing and substantial public interest. Hart v. Department of Social and Health Services, 111 Wn.2d 445, 759 P.2d 1206 (1988). When deciding whether a matter is of continuing and substantial public interest, the focus is on three factors: (1) whether the issue is of a public or private nature, (2) whether a determination of the issues is desirable to provide future guidance, and (3) whether the issue is likely to recur. Hart, 111 Wn.2d at 448; Sorenson, 80 Wn.2d at 558.

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<sup>1</sup> Carmichael appears to apply his argument to both the \$500 VPA and the \$100 DNA fee. However, the language that he disputes appears *after* the court's imposition of the VPA; it precedes only the imposition of the DNA collection fee. CP 98. Therefore, Carmichael's argument must be limited to the \$100 DNA collection fee.

Washington courts have invoked the continuing and substantial public interest exception to hear cases involving matters of constitutional interpretation, validity and interpretation of statutes and regulations, and important issues likely to arise in the future. Hart, 111 Wn.2d at 449. Cases that are limited to their facts, and that will be of little use or guidance to others, do not fall within the substantial public interest exception. Id. at 451.

A finding regarding Carmichael's ability to pay mandatory costs was not necessary at the time of sentencing. RCW 43.43.7541. The question of his financial resources becomes relevant only at the time the State seeks to enforce collection of the obligation. Baldwin, 63 Wn. App. at 310. As a result, the language in the judgment and sentence that Carmichael complains of has no practical effect. At the time the State seeks to enforce the obligation, the court will be required to give Carmichael the opportunity to show that he does not have the ability to pay. RCW 9.94A.6333(2). Nonwillful violations are treated more leniently than those that are willful, and Carmichael would not be incarcerated for his inability to pay. Id.; see also Curry, 118 Wn.2d at 918.

Because the only relevant finding regarding Carmichael's ability to pay the imposed mandatory costs must be made at the

time of enforcement, the boilerplate finding on the judgment and sentence is irrelevant. This Court is incapable of providing Carmichael with any meaningful remedy and should dismiss his moot appeal.

Moreover, Carmichael's appeal does not involve any matter of continuing or substantial public interest. The first factor—whether the issue is of a public or private nature—argues against this Court considering the merits of Carmichael's case. The argument he raises is personal to him; it relates only to the specific facts of his case and, under those facts, whether or not there was an adequate basis for the court's finding. Therefore, an analysis of the first factor suggests that this Court should refuse to address Carmichael's moot appeal.

The second factor, whether a decision on the issue would provide future guidance to others, similarly suggests that this Court should decline to remand Carmichael's case to strike the language he complains of. Since Carmichael raises a fact-specific inquiry relating to the record surrounding his financial circumstances, this case will not provide future guidance to courts, defense attorneys, prosecutors, or anyone else.

Finally, a review of the third factor, whether the issue is likely to recur, does not support remand. Even if the exact same scenario reoccurs, any harm would be equally non-existent. Therefore, the issue raised by Carmichael does not involve a matter of continuing and substantial public interest, and the court should dismiss his appeal.

Carmichael largely relies on Bertrand and Baldwin in support of his argument that remand is necessary. However, the financial obligations imposed in those cases consisted of non-mandatory costs. Bertrand, 165 Wn. App. at 398; Baldwin, 63 Wn. App. at 306. Thus, an inquiry into the defendant's financial circumstances was required pursuant to RCW 10.01.160; if the record lacked evidence to support a finding of ability to pay, the defendant was entitled to have such a finding stricken. Bertrand, 165 Wn. App. at 404-05. Such is not the case here, where the court imposed only mandatory obligations.

**D. CONCLUSION**

For the reasons outlined above, this Court should affirm Carmichael's sentence, as remanding to strike irrelevant and inconsequential language would serve no purpose.

DATED this 8 day of August, 2012.

Respectfully submitted,

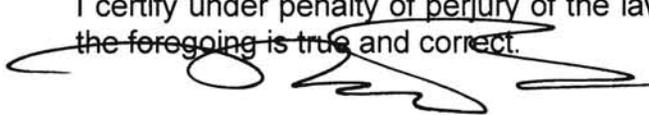
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By   
AMY R. MECKLING, WSBA #28274  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ERIC CARMICHAEL, Cause No. 68062-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
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Name  
Done in Seattle, Washington

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Date