

68645-3

68645-3

NO. 68645-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE LEMASSON,

Appellant.

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COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JIM ROGERS

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

AMY 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

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	3
1. THE SENTENCING COURT'S FINDING CONCERNING LEMASSON'S ABILITY TO PAY MANDATORY LEGAL FINANCIAL OBLIGATIONS HAS NO IMPACT ON HIS RIGHTS AND NEED NOT BE REVIEWED .....	4
a. Mandatory Financial Obligations .....	5
2. THE SENTENCING COURT PROPERLY CONSIDERED LEMASSON'S FINANCIAL RESOURCES AND THE BURDEN THAT THE NON-MANDATORY COURT COSTS WOULD IMPOSE .....	7
a. Non-Mandatory Financial Obligations .....	7
3. THERE IS NO REQUIREMENT OF AN INDIVIDUALIZED JUDICIAL DETERMINATION THAT LEMASSON HAS THE ABILITY TO PAY PRIOR TO COLLECTION OF HIS LEGAL FINANCIAL OBLIGATIONS .....	11
D. <u>CONCLUSION</u> .....	18

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Baldwin, 63 Wn. App. 303,  
818 P.2d 1116 (1991).... 4, 7, 8, 10, 12, 13, 14, 15, 16, 17

State v. Bertrand, 165 Wn. App. 393,  
267 P.3d 511 (2011)..... 8, 11, 12, 14, 15, 16, 17

State v. Brewster, 158 Wn. App. 856,  
218 P.3d 249 (2009).....5

State v. Curry, 118 Wn.2d 911,  
829 P.2d 166 (1992)..... 12, 13, 17, 18

State v. Thompson, 153 Wn. App. 325,  
223 P.3d 1165 (2009).....5

State v. Woodward, 116 Wn. App. 697,  
67 P.3d 530 (2003)..... 17

Statutes

Washington State:

Former RCW 9.94A.200..... 12

RCW 7.68.035..... 5, 15

RCW 9.94A.760 ..... 5, 6

RCW 10.01.160..... 7, 12, 13, 14, 15, 17

RCW 43.43.754..... 5

RCW 43.43.7541..... 5, 15

**A. ISSUES PRESENTED**

1. The sentencing court imposed a mandatory \$500 victim penalty assessment and a mandatory \$100 DNA collection fee. The judgment and sentence included a finding that said, "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." No consideration of a defendant's individual financial circumstances is necessary prior to the imposition of the victim penalty assessment or DNA collection fee. Is LeMasson entitled to review of the inconsequential factual finding as it pertains to the mandatory financial obligations imposed?

2. The sentencing court also imposed \$465 in discretionary court costs. In order to impose court costs, the court must take into account the financial resources of the defendant and the nature of the burden that they will impose. No factual finding is required. Did the court properly consider LeMasson's financial circumstances and the burden that the \$465 in court costs would impose?

3. Our state supreme court has held that no affirmative showing of ability to pay must be made prior to the collection of

legal financial obligations. At any future violation hearing for failure to pay, LeMasson will have the opportunity to affirmatively show that such failure was non-willful. Additionally, LeMasson can also seek remission of costs upon an affirmative showing of manifest hardship. Is LeMasson entitled to an individualized judicial determination that he has the ability to pay prior to collection of his legal financial obligations?

**B. STATEMENT OF THE CASE**

Following a jury trial, Appellant LeMasson was convicted of possession of heroin with intent to deliver in King County Superior Court. CP 29, 36. On August 5, 2011, LeMasson was sentenced to 13 months of incarceration and 12 months of community custody. CP 39. He was ordered to pay a mandatory victim penalty assessment of \$500, a mandatory DNA collection fee of \$100, and non-mandatory court costs in the amount of \$465. CP 38.

The judgment and sentence contains language which reads, "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 38. LeMasson appealed. CP 45-47.

**C. ARGUMENT**

This case concerns the imposition of \$1065 in legal financial obligations. LeMasson challenges the trial court's finding that he "has the present or likely future ability to pay" those obligations. LeMasson's challenge to that finding as it pertains to mandatory financial obligations need not be considered by this Court because it has no impact on his rights or obligations. It impacts neither the court's ability to impose the obligations nor the State's ability to collect them. If LeMasson is unable to pay, he can seek modification of the payment schedule. His ability to do so is not affected by the finding in the judgment and sentence.

Additionally, with respect to the non-mandatory court costs, the court was only required to take into account LeMasson's financial resources and the burden that the court costs would impose. No factual finding was necessary. Nonetheless, the record adequately supports the court's finding, and supports that the court properly considered LeMasson's financial resources and the burden of imposing court costs. LeMasson's sentence should be affirmed.

Finally, LeMasson's claim that there is a requirement of a "properly supported, individualized judicial determination" that he

has the ability to pay his legal financial obligations prior to their collection is inaccurate. Sufficient safeguards exist such that LeMasson will not be incarcerated for a non-willful failure to pay, and he has the opportunity to petition the court for remission of the costs should he experience manifest hardship.

**1. THE SENTENCING COURT'S FINDING CONCERNING LEMASSON'S ABILITY TO PAY MANDATORY LEGAL FINANCIAL OBLIGATIONS HAS NO IMPACT ON HIS RIGHTS AND NEED NOT BE REVIEWED.**

LeMasson claims that the sentencing court erred when it found that he has the current or future ability to pay legal financial obligations. Brf. of Appellant at 1. However, the sentencing court was under no obligation to consider LeMasson's ability to pay the *mandatory* victim penalty assessment or the *mandatory* DNA collection fee. Therefore, the factual finding is inconsequential and it need not be reviewed by this Court.

LeMasson's argument treats "legal financial obligations" as a homogeneous category. This assumption is incorrect. "[D]ifferent components of the financial obligations imposed on a defendant, such as attorney fees, court costs, and victim penalty assessments, require separate analysis." State v. Baldwin, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991). It is therefore necessary to examine

the specific statutory provisions governing the financial obligations that were imposed in the present case.

a. Mandatory Financial Obligations.

Here, the court imposed a \$500 victim penalty assessment. CP 38. Under RCW 7.68.035(1)(a), this assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigent defendants.

The court also imposed a \$100 DNA collection fee. Under RCW 43.43.7541, this fee must be included in every sentence for a crime for which a biological sample must be collected. This includes every case in which a person is convicted of a felony. RCW 43.43.754(1)(a). Again, there is no exception for indigent defendants. See 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).

Once these obligations have been imposed, collection is governed by RCW 9.94A.760. The sentencing court should "set a sum that the offender is required to pay on a monthly basis towards

satisfying the legal financial obligations.” RCW 9.94A.760(1). The Department of Corrections (DOC) is authorized to collect these amounts during the period of supervision. RCW 9.94A.760(8). “[T]he department may make a recommendation to the court that the offender’s monthly payment schedule be modified so as to reflect a change in financial circumstances.” To determine the appropriateness of the payment schedule, DOC may require the defendant to provide information under oath concerning his assets and earning capabilities. RCW 9.94A.760(7)(a).

These statutes do not require a showing of ability to pay before the court may collect legal financial obligations. Rather, RCW 9.94A.760(8) authorizes DOC to collect the monthly payment amount set by the court. This does not mean that the defendant’s ability to pay is irrelevant. Rather, his financial situation may be a basis for modifying the monthly amount. RCW 9.94A.760(7)(a).

In sum, the sentencing court was under no obligation to consider LeMasson’s financial resources when it imposed the mandatory victim penalty assessment and mandatory DNA collection fee. The finding regarding LeMasson’s present or likely future ability to pay was unnecessary and irrelevant. This Court

need not review language in the judgment and sentence that has no impact on LeMasson 's rights.

**2. THE SENTENCING COURT PROPERLY CONSIDERED LEMASSON'S FINANCIAL RESOURCES AND THE BURDEN THAT THE NON-MANDATORY COURT COSTS WOULD IMPOSE.**

Like mandatory financial obligations, factual findings are not required before imposing *non-mandatory* court costs. However, the sentencing court was required to "take account of the financial resources of the defendant and the nature and burden that payment of costs will impose." The record reflects that the sentencing court did just that. The finding LeMasson complains of is adequately supported by the record.

a. Non-Mandatory Financial Obligations.

Imposition of court costs, which are non-mandatory, requires the sentencing court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3). Formal findings are not required. Baldwin, 63 Wn. App. at 310. 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).

Thus, the court was only required to “take into account” LeMasson’s financial resources and the burden that the court costs would impose. It was not required to make factual findings.

The court considered LeMasson’s financial resources and the burden of the court costs before imposing them. At sentencing, the State asked the court to impose a \$1,000 fine, the court costs, and costs of incarceration. 8/5/11 RP 5. Additionally, the State asked for the mandatory victim penalty assessment and DNA fee to be imposed. Id.

LeMasson asked the court to waive “the monetary penalties.” 8/5/11 RP 13. His attorney told the court that LeMasson was indigent, had “minimal resources,” and that his services were paid for by LeMasson’s family. 8/5/11 RP 13-14.

After hearing this information from the parties, the court imposed the mandatory financial penalties. CP 38; 8/5/11 RP 17, 19. The court chose to waive the \$1000 fine and costs of incarceration, but elected to impose \$465 in discretionary court costs. CP 38; 8/5/11 RP 17, 19.

Therefore, the court did just what it was required to do: it heard from LeMasson about his financial resources and the nature of the burden the legal financial obligations imposed. It considered what it was required to consider before imposing \$465 in court costs.

Moreover, in addition to the record at sentencing, the court had before it information from the trial. LeMasson is 32 years old. CP 5. It is evident from the testimony at trial that he was in good physical condition. According to the testimony, LeMasson jumped over a guardrail down into a wooded area to flee from police. 7/7/11 RP at 69, 71-72. This occurred right at the city limits between Bothell and Woodinville. 7/7/11 RP 69; 7/11/11 RP 69.

LeMasson managed to avoid detection in the area, which was described as a ravine with a creek in the bottom of it. 7/7/11 RP 74. The creek connected to a slough that traveled south from Woodinville to Kirkland and Redmond. Id. LeMasson's mother gave a statement to the police that indicated that after the incident LeMasson told her that "he swam down the creek all the way into Kirkland." Ex. 44.<sup>1</sup>

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<sup>1</sup> At trial, she denied that LeMasson had told her that, and said instead that "one of Jose's friends told me that he was swimming somewhere and someone picked him up." 7/11/11 RP 104.

At the time of his arrest, LeMasson had \$880 in his wallet. 7/5/11 RP 53. Furthermore, LeMasson's mother told the police that LeMasson had admitted to her that he had lost \$1000 in cash during the eluding incident.<sup>2</sup> Ex. 44. Thus, the record supports that the defendant had money.

Finally, LeMasson's family had the resources to hire private counsel to represent him in these criminal proceedings. 8/5/11 RP at 13. The court was entitled to consider all of LeMasson's resources (including family members' willingness to assist him) when considering the nature and the burden that \$465 in court costs would impose.

In short, the sentencing court's finding that LeMasson had the present or likely future ability to pay \$465 is adequately supported by the record.

In Baldwin, the pre-sentence report described the defendant as "employable." This information "establish[ed] a factual basis for the defendant's future ability to pay." Baldwin, 63 Wn. App. at 311. Similarly in the present case, information that LeMasson is young

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<sup>2</sup> At trial, Ms. LeMasson testified that "somebody else" told her that LeMasson had lost his wallet. 7/11/11 RP 88.

and in good physical condition supports the inference that he is employable and has the ability to pay \$465 after release.

To the contrary, the record in Bertrand contained no information about the defendant's ability to pay. In fact, there was evidence that the defendant was disabled. Bertrand, 165 Wn. App. at 403. Here, the record contains adequate information about LeMasson's ability to pay court costs.

Considering the record as a whole, the trial court's finding of ability to pay is not clearly erroneous. The factual finding, although unnecessary, was proper.

**3. THERE IS NO REQUIREMENT OF AN INDIVIDUALIZED JUDICIAL DETERMINATION THAT LEMASSON HAS THE ABILITY TO PAY PRIOR TO COLLECTION OF HIS LEGAL FINANCIAL OBLIGATIONS.**

LeMasson primarily argues that the court's factual finding is erroneous. However, in just one sentence at the conclusion of his brief he claims that "before the State can collect LFOs, there must be a properly supported, individualized judicial determination that LeMasson has the ability to pay." Brf. of Appellant at 4. He is wrong.

In arguing that a finding of ability to pay is required before *collection*, the defendant relies on Division Two's decision in

Bertrand. That decision must be examined in light of the prior cases on which it was based: the Supreme Court's decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and this Court's decision in Baldwin.

In Curry, the Supreme Court differentiated between two different types of legal financial obligations: court costs and the victim penalty assessment. While the statute on victim assessments does not contain any provision for consideration of indigency, Curry nonetheless held that the statute was constitutionally valid:

[T]here are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants. Under [former] RCW 9.94A.200, a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. . . Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

Curry, 118 Wn.2d at 918 (citations omitted).

The statute governing the DNA collection sample is substantially identical to that governing the victim assessment, so the same reasoning should apply to those fees as well.

Court costs are governed by RCW 10.01.160. That statute precludes imposition of costs “unless the defendant is or will be able to pay them.” RCW 10.01.160(3). The statute further provides for remission of costs or modification of the method of payment on a showing that payment would impose manifest hardship on the defendant or his immediate family. RCW 10.01.160(4). Curry held that these statutory provisions satisfied constitutional requirements. The court rejected any requirement for specific findings regarding a defendant's ability to pay.

According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

Curry, 118 Wn.2d at 916.

In Baldwin, this Court applied the holding of Curry. There, the trial court had imposed \$85 in court costs and \$500 for an attorney fee assessment. Baldwin, 63 Wn. App. at 306. With regard to the \$85 in court costs, this court held that Curry was dispositive as to their validity. Id. at 309. The \$500 attorney fee

assessment, however, implicated the defendant's constitutional right to counsel. Further analysis was therefore necessary. Id. at 309. Ultimately however, this Court held that the attorney fee assessment was valid without a specific finding of ability to pay. Id. at 311. Under RCW 10.01.160, the court was required to consider Baldwin's financial resources. The record showed that the court had done so. The pre-sentence report indicated that the defendant was employable. Consequently, the imposition of the \$500 attorney fee assessment was not an abuse of discretion. Baldwin, 63 Wn. App. at 311-12.

In Bertrand, Division Two purported to apply this Court's holding in Baldwin, but its analysis is murky. There, the trial court imposed \$4,304 in "legal financial obligations." Bertrand, 165 Wn. App. at 398. The opinion does not specify the nature of these "obligations." The record indicated that the defendant was disabled. Id. at 403. There was apparently no other information in the record concerning the defendant's ability to pay. Id. at 398.

The Bertrand court analyzed this situation as follows:

Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, 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 under the clearly erroneous standard. Baldwin, 63 Wn. App. at 312. . . The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court's finding ... that [the defendant] has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding ... was clearly erroneous.

Bertrand, 165 Wn. App. at 404.

Thus, Division Two appears to have applied Bertrand out of context. The quoted language from Baldwin is based on RCW 10.01.160, which governs imposition of court costs. Baldwin applied this requirement to attorney fees as well. Baldwin, 63 Wn. App. at 310.

In Bertrand, however, the court applied this analysis to “legal financial obligations” without specifying their nature. If the obligations at issue consisted solely of court costs and attorney fees, the court was correct. If, however, the holding of Bertrand is extended beyond the context of non-mandatory fees, it is wrong. There is no requirement to consider the defendant’s financial circumstances in the statutes governing victim penalty assessments or biological samples. See RCW 7.68.035; RCW 43.43.7541.

After the Bertrand court overturned the finding concerning the defendant's ability to pay, it went on to consider the appropriate remedy. It cited the following language from Baldwin:

[T]he meaningful time to examine the defendant's ability to pay is *when the government seeks to collect the obligation*. . . The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship.] Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time*.

Bertrand, 165 Wn. App. at 405 (quoting Baldwin, 63 Wn. App. at 310-11 (Bertrand court's emphasis)). Based on this language, the Bertrand court concluded:

Although the trial court ordered [the defendant] to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding [of ability to pay] forecloses the ability of the Department of Corrections to begin collecting LFOs from Bertrand until after a future determination of her ability to pay. Thus, because Bertrand can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

Bertrand, 165 Wn. App. 393 at 405.

This conclusion misstates the analysis of Baldwin. Baldwin discussed two ways in which a defendant's ability to pay is considered at the time of collection. First, the defendant cannot be incarcerated for non-willful failure to pay. Second, the defendant

may petition for a remission of costs. Baldwin, 63 Wn. App. at 310-11; see Curry, 118 Wn.2d at 917-18 (discussing safeguards for indigent defendants who fail to pay crime victim assessments).

Both of these remedies, however, require an affirmative showing by the defendant. At a violation hearing, the defendant bears the burden of showing that his failure to pay was not willful. State v. Woodward, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). Similarly, a petition for remission of costs should be granted only on an affirmative showing of manifest hardship. RCW 10.01.160. Thus, contrary to what Bertrand says, nothing in Baldwin requires an affirmative showing of ability to pay before financial obligations can be collected.

Any such holding would essentially negate the Supreme Court's analysis in Curry. There, the court held that both court costs and the victim penalty assessment could be imposed without any specific finding of the defendant's ability to pay. Curry, 118 Wn.2d at 916-17. Under Bertrand, however, the obligations cannot be *collected* without such a finding. What purpose is served by imposing legal financial obligations if nothing can be done to collect them?

**D. CONCLUSION**

In sum, the trial court's finding concerning ability to pay mandatory legal financial obligations is of no significance. The finding has no impact on either the court's ability to impose the obligations or the State's ability to collect them. If LeMasson is unable to pay after he is released, he can seek modification of the payment schedule. His ability to do so is not affected by the finding in the judgment and sentence. Since the finding has no effect, this Court need not review it in the context of mandatory costs.

With respect to the non-mandatory costs, the sentencing court considered the defendant's financial resources and the burden that the court costs would impose. Although a factual finding was unnecessary, the record adequately supports the court's finding.

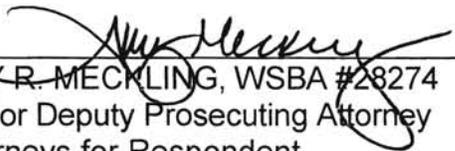
Finally, LeMasson's claim that an individualized finding of his ability to pay is required to be made prior to collection is contrary to the supreme court's decision in Curry, and is inaccurate. At any future violation hearing for failure to pay, LeMasson will have the opportunity to affirmatively show that his failure was non-willful. Additionally, LeMasson can also seek remission of costs upon an affirmative showing of manifest hardship. Such safeguards render

the statutes at issue constitutionally adequate. The judgment and sentence should be affirmed.

DATED this 29<sup>th</sup> day of October, 2012.

Respectfully submitted,

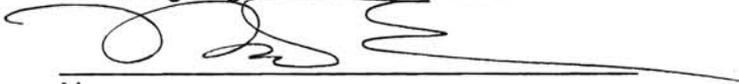
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

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 Christopher Gibson, 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. JOSE LEMASSON, Cause No. 68645-3-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

10-29-12  
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Date

Done in Seattle, Washington