

70265-3

70265-3

NO. 70265-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BEE THOW SAYKAO,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE KIMBERLEY PROCHNAU

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. When calculating an offender score, a sentencing court must apply a same criminal conduct analysis to determine whether a defendant's multiple prior adult convictions, sentenced to be served concurrently, should be counted as one offense or as separate offenses. Saykao's prior adult offenses included 2006 convictions for second-degree burglary and second-degree malicious mischief, sentenced on the same date under the same King County cause number. The sentences were ordered to be served concurrently. Should the matter be remanded for the sentencing court to determine whether Saykao's 2006 burglary and malicious mischief convictions should be counted as one offense or as separate offenses?

2. In section 4.1 of the judgment and sentence, the court imposed mandatory financial assessments totaling \$600. In section 4.2 of the judgment and sentence, the court imposed nothing, waiving all non-mandatory financial assessments. On appeal, Saykao challenges boilerplate language contained in section 4.2 relating to a defendant's ability to pay non-mandatory fees, which were not assessed in his case. Is Saykao entitled to relief based on a finding that was not made in his case?

**B. STATEMENT OF THE CASE**

Appellant Saykao was charged in the King County Superior Court with first-degree assault with a deadly weapon enhancement for stabbing another man at a bus stop in downtown Seattle. CP 1-4. Saykao proved to be an extremely difficult client to the various defense attorneys appointed to represent him over the course of the case. 3RP 3-5; 4RP 4-9; 5RP 27-28.<sup>1</sup> He successfully discharged three attorneys, and ultimately demanded to represent himself. 1RP 4-5; 2RP 3-8; 5RP 31. Saykao later attempted to withdraw his *pro se* status, and demanded that he be provided yet another attorney. 7RP 9. The trial court denied the motion, stating:

Mr. Saykao has established that he will fight with and ultimately demand the firing of every lawyer ever assigned to him just as he has done from the beginning. He waived his right to counsel. That's a final decision. He was told that.

7RP 10.

The case ultimately proceeded to trial on September 10, 2012 in front of the Honorable Judge Prochnau. The jury found Saykao guilty of second-degree assault, with no deadly weapon enhancement. CP 108.

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<sup>1</sup> The State adopts Saykao's designation of the verbatim report of proceedings.

On September 26, 2012, Saykao was sentenced to a total of 26 months in custody and 18 months of community custody. CP 112-13. Saykao had four prior adult felony convictions, including first-degree theft and second-degree assault in 2003, and second-degree burglary and second-degree malicious mischief in 2006. CP 115. At sentencing, Saykao argued to the court that his first-degree theft and assault convictions in 2003 should count only as one point, apparently believing they were a single charge. 20RP 5-7, 10. He appeared to concede that he had been convicted of burglary and malicious mischief in 2006. 20RP 9. Because Saykao's prior assault conviction counted as two points,<sup>2</sup> the court found that his offender score was "5," and that his standard range was 22-29 months. CP 110; 20RP 12-13.

The sentencing court also imposed a mandatory \$500 victim penalty assessment and a mandatory \$100 DNA collection fee. CP 111; 20RP 15, 17. Saykao appeals.

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<sup>2</sup> RCW 9.94A.525(8); RCW 9.94A.030(54)(a)(viii).

**C. ARGUMENT**

**1. WHEN CALCULATING SAYKAO'S OFFENDER SCORE, THE TRIAL COURT WAS REQUIRED TO DETERMINE WHETHER HIS 2006 CONVICTIONS, SENTENCED TO RUN CONCURRENTLY, CONSTITUTED THE SAME CRIMINAL CONDUCT.**

The sentencing court calculates an offender's standard sentencing range based on the offender's other current offenses and prior convictions. RCW 9.94A.589(1)(a). Where a defendant has multiple prior convictions, they are presumptively scored separately. RCW 9.94A.525(5)(a). There are exceptions. First, if two or more prior offenses were previously found to encompass the "same criminal conduct," they are thereafter counted as one offense. RCW 9.94A.525(5)(a)(i).

Additionally, if multiple prior adult convictions were sentenced to be served concurrently, the current sentencing court must determine whether those convictions "shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)[.]" RCW 9.94A.525(5)(a)(i).

This determination is required.<sup>3</sup> See State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995) (interpreting a prior version of the statute). The sentencing court may presume that the prior offenses are not the same criminal conduct if the sentences were imposed on separate dates, in separate jurisdictions, or in separate charging documents. RCW 9.94A.525(5)(a)(i).

“Same criminal conduct” refers to two or more crimes requiring the same criminal intent, committed at the same time and place, and involving the same victim. RCW 9.94A.589(1)(a); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The definition of “same criminal conduct” is to be construed narrowly so that most crimes are not considered the same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999);

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<sup>3</sup> Of course, a defendant can always stipulate that the crimes are separate criminal conduct, thus relieving the court from the burden of making such a determination. Generally speaking, a criminal defendant does not waive a challenge to the miscalculation of an offender score by failing to object in the sentencing court. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). However, because the issue of “same criminal conduct” involves an analysis of the facts surrounding the crimes, and requires an exercise of the sentencing court’s discretion, waiver is possible. Goodwin, 146 Wn.2d at 874. Specifically, a defendant who stipulates to an offender score that includes his prior convictions as counting separately waives the right to present argument on appeal that the court should have conducted a same criminal conduct analysis. State v. Hickman, 116 Wn. App. 902, 907-08, 68 P.3d 1156 (2003) (citing Goodwin, 146 Wn.2d at 875). Although Saykao appears to have made some concessions with respect to his 2006 convictions, his statements are simply too ambiguous to support a waiver argument. See 20RP.

State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If any one of the three elements is missing, the offenses are not the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

With respect to his 2006 burglary and malicious mischief convictions, Saykao contends that the trial court did not follow the statutory directive to determine whether the offenses constituted the same criminal conduct. He points to the fact that the sentences were ordered to be served concurrently. Brf. of Appellant at 6.

The State concedes that the plain language of RCW 9.94A.525(5)(a)(1) required the sentencing court to conduct a same criminal conduct analysis to determine whether Saykao's prior burglary conviction and prior malicious mischief conviction should be counted as one offense or as separate offenses. State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008), abrogated on other grounds, State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013). The matter should be remanded for such a determination.

**2. THE SENTENCING COURT DID NOT ERR WHEN IT IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS.**

Saykao challenges boilerplate language in section 4.2 of the judgment and sentence, regarding a defendant's "present or likely future ability to pay the financial obligations imposed." He argues that this language amounts to a "finding" that was clearly erroneous and should be stricken. Brf. of App. at 9. However, the court made no such finding, as it did not impose any financial obligations under section 4.2 of the judgment and sentence. Rather, the court *waived* all non-mandatory financial assessments in section 4.2, specifically "because the defendant lacks the present and future ability to pay them." CP 111; 20RP 15. Saykao's challenge to his sentence lacks merit.

Moreover, any such finding as it *might* pertain to the mandatory financial obligations imposed in section 4.1 of the judgment and sentence has no impact on Saykao's rights or obligations. It impacts neither the court's ability to impose the obligations, nor the State's ability to collect them. If Saykao 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.

Finally, Saykao’s conclusory, one-sentence 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 Saykao 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.

a. Saykao Challenges Surplusage On The Judgment And Sentence That Has No Application To His Case.

Sections 4.1 and 4.2 of the judgment and sentence clearly divide financial assessments into two distinct groups: (1) Restitution and *mandatory* assessments, and (2) *non-mandatory*, “other” financial obligations. CP 111. These two

distinct categories are listed in separate sections of the judgment and sentence:

**4.1 RESTITUTION, VICTIM ASSESSMENT, AND DNA FEE:**

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_ m.
  - Date to be set.
  - Defendant waives right to be present at future restitution hearing(s).
  - Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment in the amount of \$500 (RCW 7.68.035 - mandatory).  
Defendant shall pay DNA collection fee in the amount of \$100 (RCW 43.43.7541 - mandatory).

**4.2 OTHER FINANCIAL OBLIGATIONS:** 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. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a)  \$ \_\_\_\_\_, Court costs (RCW 9.94A.030, RCW 10.01.160);  Court costs are waived;
- (b)  \$ \_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030);  Recoupment is waived;
- (c)  \$ \_\_\_\_\_, Fine;  \$1,000, Fine for VUCSA  \$2,000, Fine for subsequent VUCSA (RCW 69.50.430);  VUCSA fine waived;
- (d)  \$ \_\_\_\_\_, King County Interlocal Drug Fund (RCW 9.94A.030);  Drug Fund payment is waived;
- (e)  \$ \_\_\_\_\_, \$100 State Crime Laboratory Fee (RCW 43.43.690);  Laboratory fee waived;
- (f)  \$ \_\_\_\_\_, Incarceration costs (RCW 9.94A.760(2));  Incarceration costs waived;
- (g)  \$ \_\_\_\_\_, Other costs for: \_\_\_\_\_.

CP 111.

The "finding" that Saykao challenges, that "the defendant has the present or future ability to pay," appears in section 4.2, and relates solely to the imposition of non-mandatory assessments, which were not imposed against Saykao. No such "finding" appears in section 4.1, where the mandatory assessments were imposed. Indeed, the sentencing court specifically waived the

non-mandatory assessments in section 4.2 “because the defendant lacks the present and future ability to pay them.” CP 111.

Because no financial assessments were imposed under section 4.2, the language Saykao challenges has no applicability to his sentence. Relief is unwarranted.

b. The Language Saykao Complains Of Has No Impact On His Rights And Need Not Be Reviewed.

Moreover, even if this Court were to adopt Saykao’s strained interpretation of the judgment and sentence (that the boilerplate language of section 4.2 applies to the obligations imposed in section 4.1), the sentencing court was under no obligation to consider Saykao’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.

“[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). Findings regarding a defendant’s ability to pay are not required prior to the imposition of

mandatory assessments, as they are required to be imposed regardless of a defendant's financial circumstances. State v. Lundy, \_\_\_ Wn. App. \_\_\_, 308 P.3d 755, 758-59 ( 2013). See also RCW 7.68.035(1)(a); State v. Williams, 65 Wn. App. 456, 460-61, 828 P.2d 1158 (1992) (imposition of victim penalty assessment is mandatory and requires no consideration of a defendant's financial circumstances); RCW 43.43.7541; State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009) (imposition of DNA collection fee mandatory).

Unlike mandatory assessments, imposition of *non-mandatory* assessments 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).

Saykao claims that, “[W]here the trial court enters a finding, it must be supported by evidence.” Brf. of Appellant at 9. In support of his claim, Saykao cites Baldwin and Bertrand, *supra*, and State v. Calvin, \_\_\_ Wn. App. \_\_\_, 302 P.3d 509 (2013). None of those cases support his argument that an unnecessary and inconsequential “finding” merits appellate review.

First, Baldwin and Calvin are inapposite because in both, the court imposed non-mandatory financial obligations, not simply the mandatory assessments at issue here. Baldwin, 63 Wn. App. at 309 (court costs and recoupment of attorney fees); Calvin, 302 P.3d at 521-22 (court costs).

Second, in Bertrand, Division Two purported to apply this Court’s holding in Baldwin, but its analysis is murky. The trial court had imposed \$4,304 in “legal financial obligations.” Bertrand, 165 Wn. App. at 398. The opinion does not specify the nature of these “obligations.” *See Lundy*, 308 P.3d at 760 fn. 8 (“We note that the *Bertrand* decision failed to distinguish between mandatory and discretionary costs.”). The record indicated that the defendant was disabled. Bertrand, 165 Wn. App. 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 Baldwin 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. As outlined above, there is no requirement to consider the defendant's financial circumstances in the statutes governing victim penalty assessments or biological samples.

Here, the sentencing court was under no obligation to consider Saykao's financial resources when it imposed the *mandatory* victim penalty assessment and *mandatory* DNA collection fee in section 4.1 of the judgment and sentence. Thus, even in the unlikely scenario that this Court reads section 4.2 of the judgment and sentence to apply to the financial obligations imposed under section 4.1, the language regarding 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 Saykao's rights.

- c. There Is No Requirement Of An Individualized Judicial Determination That Saykao Has The Ability To Pay Prior to Collection Of His Legal Financial Obligations.

Finally, in just one sentence, Saykao conclusively claims that “before the State can collect even mandatory legal financial obligations, there must be a properly supported, individualized judicial determination that Saykao has the ability to pay.” Brf. of

App. at 9. Saykao makes no persuasive argument to support this conclusion, and he is wrong at any rate.

In arguing that a finding of ability to pay is required before *collection*, Saykao relies solely on a footnote in Bertrand. But 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 attorney fee recoupment. 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 recoupment, however, implicated the defendant's constitutional right to counsel. Further analysis was therefore necessary. Id. at 309. Ultimately, this Court held that imposing recoupment of attorney fees 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.

Purporting to rely on Baldwin, Bertrand addressed the appropriate "remedy" for the trial court's lack of factual support for its finding of ability to pay:

[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? Saykao's one-sentence claim that there must be a finding of ability to pay prior to collection of his legal financial obligations is meritless.

**D. CONCLUSION**

For the above-stated reasons, the matter should be remanded to the superior court for a determination as to whether Saykao's 2006 prior convictions for burglary and malicious mischief

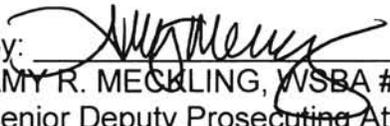
should be counted as one offense or as separate offenses.

However, this Court should reject Saykao's arguments relating to his legal financial obligations.

DATED this 15 day of October, 2013.

Respectfully submitted,

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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 Winkler, 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. BEE THOW SAYKAO, Cause No. 70265-3 -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.

Dated this 15 day of October, 2013

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

\_\_\_\_\_  
Name  
Done in Seattle, Washington