

NO. 71323-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MASON-WEBB,

Appellant.

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COURT OF APPEALS
DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Prior to imposing discretionary court costs, RCW 10.01.160(3) requires a sentencing court to determine that the defendant can or will be able to pay them. No factual finding is required. The sentencing court imposed \$465 in discretionary court costs, and indicated on the judgment and sentence that it had considered Mason-Webb's financial resources, and concluded that he had the present or likely future ability to pay the costs. Mason-Webb did not object. Is Mason-Webb precluded from challenging the court's factual finding regarding ability to pay discretionary court costs for the first time in this appeal? If this Court reaches the merits of his claim, does the record support the sentencing court's unnecessary factual finding that Mason-Webb had the present or likely future ability to pay?

B. STATEMENT OF THE CASE

Following a jury trial, Appellant Mason-Webb was convicted of first-degree escape in the King County Superior Court. CP 38; 11/18/13 RP 56. On December 3, 2013, the court sentenced Mason-Webb to a standard range sentence of 33 months of incarceration. CP 40, 42. In addition to \$600 of mandatory legal financial obligations, the sentencing court ordered Mason-Webb to pay discretionary court costs in the amount

of \$465. CP 41. Section 4.2 of the judgment and sentence 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 41. Mason-Webb did not object to either the factual finding or the imposition of the costs. See 12/3/13 RP. He now appeals.

C. ARGUMENT

1. **MASON-WEBB HAS FAILED TO PRESERVE A CHALLENGE TO THE COURT’S FACTUAL FINDING REGARDING HIS ABILITY TO PAY.**

Mason-Webb argues that the record does not support the sentencing court’s factual finding that he has the present or likely future ability to pay court costs of \$465.¹ However, Mason-Webb did not object to the court’s factual finding below. Thus, he has failed to preserve the issue for appeal, and this Court should refuse to consider it.

¹ Mason-Webb assigned error to the sentencing court’s *imposition* of court costs. Brf. of Appellant at 1. However, his briefing states, “Although Mr. Mason-Webb challenges the 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 those costs,*” and “[b]ecause the State has not yet attempted to collect Mr. Mason-Webb’s LFOs, *any challenge to the trial court’s imposition of the LFOs at this time would not be ripe.*” Brf. of Appellant at 6. Based on the entirety of Mason-Webb’s briefing, it appears that he contends that the record does not support the court’s unnecessary factual finding of ability to pay. See Brf. of Appellant at 6 (“This Court should remand to the trial court to strike the finding of ability to pay.”)

Generally, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage the efficient use of judicial resources: where an objection would have given the trial court an opportunity to address any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

This Court has applied the general rule to a defendant's failure to challenge the sentencing court's factual finding of ability to pay discretionary legal financial obligations. State v. Calvin, __ Wn. App. __, 316 P.3d 496 (2013); State v. Duncan, 180 Wn. App. 245, 327 P.3d 699 (2014); State v. Blazina, 174 Wn. App. 906, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013).²

Mason-Webb did not object to the sentencing court's factual finding that he had the present or likely future ability to pay. See 12/3/13 RP. Thus, he has failed to preserve this claim on appeal. Citing State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), Mason-Webb argues that the common law exception to RAP 2.5 for erroneous sentences allows him to raise this claim for the first time on appeal. However, unless and until

² Mason-Webb correctly notes that this issue is pending before the State Supreme Court in Blazina.

they are overruled, Calvin, Duncan, and Blazina preclude this Court from considering Mason-Webb's claim.³ This Court should affirm his sentence.

2. THE SENTENCING COURT PROPERLY DETERMINED THAT MASON-WEBB HAD THE PRESENT OR LIKELY FUTURE ABILITY TO PAY \$465 IN COURT COSTS.

Even if this Court decides to reach the merits of Mason-Webb's argument, it should conclude that the sentencing court properly considered Mason-Webb's financial resources and the nature of the burden that would be imposed by the financial obligations, and properly concluded that he has the present or likely future ability to pay.

A sentencing court is prohibited from imposing discretionary court costs *only* when it finds that the defendant will *never* be able to pay them. See RCW 10.01.160(3) ("The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them."). In making the decision to impose discretionary legal financial obligations, the sentencing

³ Mason-Webb's argument that the imposition of costs is a "sentencing error" that can be raised for the first time on appeal fails regardless. The imposition of costs relies on a factual consideration of the defendant's present or future ability to pay. See RCW 10.01.160(3) ("The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them."). It is well-settled that a defendant can agree to facts underlying his sentence, even if erroneous. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002). Because the defendant's "ability to pay" involves an analysis of facts, and requires exercise of the sentencing court's discretion, the defendant's failure to object precludes him from raising the issue for the first time on appeal. Calvin, 316 P.3d at 507-08.

court is only required to consider the defendant's ability to pay; no factual finding is required. State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991). 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).

Although no factual finding was required here, "if an unnecessary finding is made, perhaps through the inclusion of boilerplate language in the judgment and sentence, we review it under the clearly erroneous standard." State v. Lundy, 176 Wn. App. 96, 105, 308 P.3d 755 (2013). A finding is "clearly erroneous" when all of the evidence leads to the definite and firm conclusion that a mistake has been made. Id. Here, the court's finding that Mason-Webb had the present or likely future ability to pay, although unnecessary, was not clearly erroneous.

First, the facts of the crime itself, which were before the sentencing court, support the court's finding of ability to pay. At the time of the offense, Mason-Webb was participating in work release, and had been granted a pass to apply for a job at Freight Systems in Kent, WA. 11/14/13 RP 56, 82. Clearly, Mason-Webb was able to work. Secondly, at sentencing, Mason-Webb's attorney told the court that Mason-Webb:

[is] very hard-working and he did a lot of legal research on this case. I've spent a lot of time discussing the case with him. He was doing well in work release for awhile. He was trying to build – *he was trying to find employment so he could have stability in the community upon his release. And I think that he has a great chance of success* if he applies himself and can stay away from drugs.

12/3/13 RP 5. Mason-Webb asked the court for a sentence at the low-end of the standard range based on assurances that he had been “doing well,” that he was a hard worker who had great potential for success if he applied himself and stayed away from drugs – conditions he sought to convince the court he could accomplish.

In short, the sentencing court’s finding that Mason-Webb had the present or likely future ability to pay \$465 is adequately supported by the record; this court cannot “definitely and firmly” conclude that a mistake was made. Mason-Webb’s claim should be rejected, even if this Court chooses to consider it for the first time in this appeal.

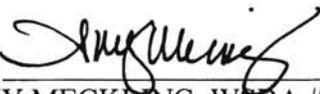
D. CONCLUSION

For the above-stated reasons, this Court should refuse to reach the merits of Mason-Webb’s claim because he failed to object below. In the event this Court considers the claim, it should conclude that the sentencing court properly found that he had the present or likely future ability to pay \$465 in court costs.

DATED this 22nd day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

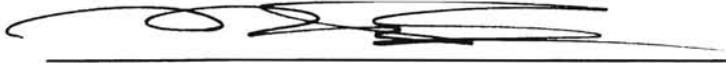
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. JOSHUA MASON-WEBB**, Cause No. 71323-0-1, in the Court of Appeals, Division One, for the State of Washington.

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



Name
Done in Seattle, Washington

10-22-14
Date

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