

FILED  
June 28, 2012  
Court of Appeals  
Division III  
State of Washington

No. 30548-1-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LOUIS VICTOR KUSTER III,

Defendant/Appellant.

---

Appellant's Brief

---

DAVID N. GASCH  
WSBA No. 18270  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....5

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....5

C. STATEMENT OF THE CASE.....5

D. ARGUMENT.....6

    1. The implied finding that Mr. Kuster has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.....6

        a. Relevant statutory authority.....7

        b. There is insufficient evidence to support the trial court's implied finding that Mr. Kuster has the present or future ability to pay legal financial obligations .....7

        c. The remedy is to strike the unsupported finding.....9

    2. The sentencing condition prohibiting possessing or viewing pornography is unconstitutionally vague.....10

E. CONCLUSION.....14

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....	6
<i>Grayned v. City of Rockford</i> , 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....	11
<i>Kolender v. Lawson</i> , 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).....	11
<i>United States v. Antelope</i> , 395 F.3d 1128 (9th Cir.2005).....	13
<i>United States v. Guagliardo</i> , 278 F.3d 868, (9th Cir.2002).....	13
<i>United States v. Loy</i> , 237 F.3d 251, (3d Cir.2001).....	13
<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	11
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	8
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	11-14
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	8, 9, 10
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	8, 9, 10
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	8
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	6, 7
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	12
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	12
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	13

<i>Foster v. State</i> , 813 N.E.2d 1236 (Ind.Ct.App.2004).....	13
<i>Taylor v. State</i> , 821 So.2d 404 (Fla.Dist.Ct.App.2002).....	13

**Constitutional Provisions**

U.S. Const. First Amendment.....	11
U.S. Const. Fourteenth Amendment .....	10
Washington Constitution, Article 1, § 3.....	10

**Statutes**

RCW 9.94A.760.....	7
RCW 9.94A.760(2).....	6
RCW 10.01.160(1).....	7
RCW 10.01.160(2).....	7
RCW 10.01.160(3).....	6, 7

**A. ASSIGNMENTS OF ERROR**

1. The record does not support the implied finding that Mr. Kuster has the current or future ability to pay Legal Financial Obligations.

2. The trial court erred in imposing a sentencing condition prohibiting possessing or viewing pornography.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should the implied finding that Mr. Kuster has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

2. Is the sentencing condition prohibiting possessing or viewing pornography unconstitutionally vague?

**C. STATEMENT OF THE CASE**

A jury convicted Louis Victor Kuster III of second degree rape. CP 21. At sentencing the court imposed a total amount of LFOs of \$800 plus restitution to be determined at a later date. CP 34-35. The court made no finding that Mr. Kuster had the present or future ability to pay Legal Financial Obligations (“LFOs”). 1/4/12 RP 2-30, CP 31 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the Court:

¶ 2.5 Legal Financial Obligations/Restitution. The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. RCW 10.01.160.

CP 31. The court ordered that all payments on the LFOs be paid, “commencing immediately.” CP 35 at ¶ 4.3a. The court may no inquiry into Mr. Kuster’s financial resources and the nature of imposing LFOs. 1/4/12 RP 2-30.

The trial also court imposed a sentencing condition prohibiting possessing or viewing pornography. CP 27, No. 19.

This appeal followed. CP 42-59.

#### **D. ARGUMENT**

1. The implied finding that Mr. Kuster has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall 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).

b. There is insufficient evidence to support the trial court's implied finding that Mr. Kuster has the present or future ability to pay legal financial obligations. *Curry* concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. *Curry* recognized, however, that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” *Id.* at 915-16.

Here, the court considered Mr. Kuster's past, present, and future ability to pay legal financial obligations (LFO's) but made no express

finding that Mr. Kuster had the present or likely future ability to pay those LFOs. CP 31, at ¶ 2.5. However, the finding is implied because the court ordered that all payments on the LFOs be paid, “commencing immediately” after it considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. CP 31, at ¶ 2.5; CP 35 at ¶ 4.3a.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“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 [the appellate court] 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.”

*Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn.

App. at 312 (bracketed material added) (internal citation omitted). A

finding that is unsupported in the record must be stricken. *Bertrand*, 165

Wn. App. 393, 267 P.3d at 517.

The record here does not show that the trial court took into account Mr. Kuster’s financial resources and the nature of the burden of imposing LFOs on him. In fact, the record contains no evidence to support the trial court's implied finding in ¶ 2.5 that Mr. Kuster has the present or future ability to pay LFOs. The implied finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. *Bertrand* is clear: where there is no evidence to support the trial court’s finding regarding ability and means to pay, the finding must be stricken.

*Bertrand*, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where the court made no inquiry and there is no evidence in the record to support such findings.

The reversal of the trial court's judgment and sentence finding at ¶ 2.5 simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Kuster until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he 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, citing *Baldwin*, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (emphasis in original, footnote omitted).

Since the record does not support the trial court's finding that Mr. Kuster has or will have the ability to pay these LFOs when and if the State attempts to collect them, the implied finding is clearly erroneous and must therefore be stricken from the record. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

2. The sentencing condition prohibiting possessing or viewing pornography is unconstitutionally vague.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that

citizens have fair warning of proscribed conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute is unconstitutionally vague if it "(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). If either of these requirements is not satisfied, the ordinance is unconstitutionally vague. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

When a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). For this reason, courts have held that a stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition. *Id.*

"[I]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on

appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

Accordingly vagueness challenges to conditions of community custody may be raised for the first time on appeal. *Bahl*, 164 Wn.2d at 745, 193 P.3d 678; *State v. Jones*, 118 Wn. App. 199, 204 n. 9, 207-08, 76 P.3d 258 (2003).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *Bahl*, 164 Wn.2d at 753, 193 P.3d 678. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. *Id.*

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. *Bahl*, 164 Wn.2d at 751-52, 193 P.3d 678. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. *Bahl*, 164 Wn.2d at 752, 193 P.3d 678.

In *Bahl*, the Washington Supreme Court concluded that the restriction on accessing or possessing pornographic materials is unconstitutionally vague. *Bahl*, 164 Wn.2d at 758, 193 P.3d 678. The Court noted that many courts have held that sentencing conditions that prohibit access to or possession of pornography are unconstitutionally

vague. *Bahl*, 164 Wn.2d at 754, 193 P.3d 678 ( e.g., *United States v. Antelope*, 395 F.3d 1128, 1141-42 (9th Cir.2005); *Taylor v. State*, 821 So.2d 404 (Fla.Dist.Ct.App.2002); *Foster v. State*, 813 N.E.2d 1236, 1238-39 (Ind.Ct.App.2004); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir.2002)); see also *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005). They have noted that the term "pornography," unlike obscenity, has never been given a precise legal definition, at least insofar as adult pornography is concerned. *Bahl*, 164 Wn.2d at 754, 193 P.3d 678 (citing *United States v. Loy*, 237 F.3d 251, 263 (3d Cir.2001) ("the term 'pornography,' unmoored from any particular statute, has never received a precise legal definition from the Supreme Court or any other federal court of appeals, and remains undefined in the federal code"). In *Loy*, the Third Circuit said, "with regard to 'pornography' rather than 'obscenity,' we do not 'know it when we see it.'" *Loy*, 237 F.3d at 264.

“Pornography,” could include any nude depiction, whether a picture from Playboy Magazine or a photograph of Michelangelo's sculpture of David. See *Bahl*, 164 Wn.2d at 756, 193 P.3d 678. Moreover, who is to decide what constitutes “pornography?” In this case the person making that determination would be Mr. Kuster’s community corrections officer. The fact that a condition provides that a community

corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face the condition does not provide ascertainable standards for enforcement. *Bahl*, 164 Wn.2d at 758, 193 P.3d 678. Therefore, the condition herein is constitutionally vague and should be stricken.

**E. CONCLUSION**

For the reasons stated the implied finding of ability and means to pay legal financial obligations, and the sentencing condition prohibiting possessing or viewing pornography should be stricken from the Judgment and Sentence.

Respectfully submitted June 28, 2012.

---

s/David N. Gasch  
Attorney for Appellant  
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on June 28, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Louis V. Kuster III  
#353875  
PO Box 2049  
Airway Heights WA 99001

**E-mail:** [kowens@spokanecounty.org](mailto:kowens@spokanecounty.org)  
Mark E. Lindsey/Andrew Metts  
Deputy Prosecuting Attorney  
1100 West Mallon Avenue  
Spokane WA 99260-2043

---

s/David N. Gasch, WSBA #18270  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)