

No. 30560-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
June 25, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DANIEL T. STEELMON,

Defendant/Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....4

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....4

C. STATEMENT OF THE CASE.....4

D. ARGUMENT.....5

 The finding that Mr. Steelmon 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.....5

 a. Relevant statutory authority.....5

 b. There is insufficient evidence to support the trial court's finding that Mr. Steelmon had the present or future ability to pay legal financial obligations6

 c. The remedy is to strike the unsupported finding.....8

E. CONCLUSION.....9

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).....	5
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	6
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	7, 8
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	6, 7, 8
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	6
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	5, 6

Statutes

RCW 9.94A.760.....	6
RCW 9.94A.760(2).....	5
RCW 10.01.160(1).....	5
RCW 10.01.160(2).....	5
RCW 10.01.160(3).....	5

A. ASSIGNMENT OF ERROR

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

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Should the finding that Mr. Steelmon 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?

C. STATEMENT OF THE CASE

Daniel Steelmon was convicted by a jury of second degree theft.

CP 19. As part of the Judgment and Sentence, the court made the following pertinent finding:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. 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. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753 [sic].

CP 7 (caps in original)

The Court made no inquiry into Mr. Steelmon's financial resources and the nature of the burden of imposing LFOs. 1/24/12 RP 2-7.

This appeal followed. CP 2-3.

D. ARGUMENT

The finding that Mr. Steelmon 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 finding that Mr. Steelmon had 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 made an express and formal finding that Mr. Steelmon had the present ability or likely future ability to pay legal financial obligations ("LFOs"). CP 7 at ¶ 2.5¹. But, 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

¹ The Judgment and Sentence at ¶ 2.5 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

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. Steelmon'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 finding in ¶ 2.5 that Mr. Steelmon has the present or future ability to pay LFOs. The 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.

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. Steelmon 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. Steelmon has or will have the ability to pay these LFOs when and if the State attempts to collect them, the finding is clearly erroneous and must therefore be stricken from the record. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

E. CONCLUSION

For the reasons stated, the finding of ability and means to pay legal financial obligations should be stricken from the Judgment and Sentence.

Respectfully submitted June 25, 2012,

s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on June 25, 2012 I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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