

FILED
Jun 27, 2012
Court of Appeals
Division III
State of Washington

No. 30614-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MICHAEL DAVID THOMPSON,
Defendant/Appellant.

APPEAL FROM THE WHITMAN COUNTY SUPERIOR COURT
Honorable David Frazier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The record does not support the finding that Mr. Thompson has the present ability to pay costs of incarceration.

2. The record does not support any finding that Mr. Thompson has the current or future ability to pay legal financial obligations, including restitution and costs of incarceration.

Issue Pertaining to Assignments of Error

Should the finding that Mr. Thompson has the present ability to pay costs of incarceration and any implied finding that he has the current or future ability to pay legal financial obligations, including restitution and costs of incarceration, be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?

B. STATEMENT OF THE CASE

Michael David Thompson was convicted by a jury of first degree robbery. CP 91. As part of the Judgment and Sentence, the court found that Mr. Thompson “has the present means to pay costs of incarceration” but did not order Mr. Thompson to pay costs of incarceration. CP 97 at ¶ 2.5; see CP 100 at ¶ 4.3. The court imposed a total amount of LFOs of \$4,849.40, of which \$2,549.40 was designated as restitution owed to the victim, Larry Hood. CP 1, 99. The court made no finding that Mr.

Thompson had the present or future ability to pay Legal Financial Obligations (“LFOs”). *See* CP 97 at ¶ 2.5.

The court may no inquiry into Mr. Thompson’s financial resources and the nature of imposing LFOs. RP 236–251.

This appeal followed. CP 107–08.

C. ARGUMENT

The finding and implied findings that Mr. Thompson has the current or future ability to pay legal financial obligations including restitution and costs of incarceration are 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). In determining the amount of restitution, the court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have. RCW 9.94A.753.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” A court-ordered legal financial obligation may include the costs of incarceration (prison and/or county jail) and medical care incurred in a county jail. RCW 9.94A.760; RCW 10.01.160; RCW 70.48.130; *see also* RCW 9.94A.030(30).

b. There is insufficient evidence to support the trial court's finding that Mr. Thompson had the present means to pay costs of incarceration and any implied findings that he has the present or future ability to pay legal financial obligations including restitution and costs of incarceration. 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. Thompson had the present means to pay costs of incarceration. The court ordered that he pay LFOs including restitution. The court made no express finding that Mr. Thompson had the present or likely future ability to pay those LFOs, including costs of incarceration and restitution. However, the finding is implied where the court ordered that all payments on the LFOs be paid, "commencing immediately." CP 100 at ¶ 4.3. 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. Thompson’s financial resources and the nature of the burden of imposing LFOs on him, including the costs of incarceration and restitution. In fact, the record contains no evidence to support the trial court's finding in ¶ 2.5 that Mr. Thompson has the present means to pay costs of incarceration or its implied findings that he has the present or future ability to pay LFOs of any nature. The findings—express or implied—are 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 findings. Bertrand is clear: where there is no evidence to support the trial court's findings regarding ability and means to pay, the findings must be stricken. As to costs of incarceration, the State may argue that the issue is somehow "moot" because it appears no costs of incarceration were imposed in this case. However, Mr. Thompson does not challenge the *imposition* of costs of incarceration. Rather, the trial court made a specific finding that he has the means to pay costs of incarceration and, since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. 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 and its implied finding of means and ability to pay LFOs including costs of incarceration and restitution simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Thompson 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 (citing court adding emphasis and omitting footnote).

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

D. CONCLUSION

For the reasons stated, the findings of ability to pay legal financial obligations including costs of incarceration and restitution should be stricken from the Judgment and Sentence.

Respectfully submitted on June 27, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 27, 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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