

FILED
Oct 23, 2012
Court of Appeals
Division III
State of Washington

NO. 306500-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JAMES C. CARTER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-01313-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

James Carter was convicted of Unlawful Possession of a Controlled Substance: Heroin, after a Stipulated Facts Trial on February 15, 2012. (CP 36; 37). As part of his sentence, certain court costs, fees, and fines were assessed against him. (CP 40). There was a \$500.00 penalty, mandated by RCW 7.68.035, a fine in the sum of \$2,000.00, authorized by RCW 9A.20.021, a \$100.00 Felony DNA collection fee, per RCW 43.43.7541, a \$200.00 filing fee, \$60.00 sheriff's service fee, \$600.00 for attorney's fees, giving rise to a total sum of \$3,460.00. (CP 40, 47). Mr. Carter now appeals this assessment, arguing insufficient facts supported the finding of his ability to pay.

II. ARGUMENT

1. MR. CARTER WAIVED HIS RIGHT TO APPEAL THE COST BILL.

In order to raise an issue on appeal, the general rule is that an individual must have allowed the trial court a chance to correct that error, whether through an objection at the time, or a motion for a new trial. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 638 (1979). The reason for this rule is to prevent a defendant from going before a finder of fact in circumstances he finds acceptable, receiving a verdict he does not approve of, and then attack the trial court's judgment for an error it could have corrected. *Id.* Such attempts to game the system are disfavored, and heavily frowned upon. RAP 2.5 lays out when an Appellate Court must ignore this rule, due to the grave concerns underlying each: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). No allegation

has been made that Judge Matheson's court lacked jurisdiction, or that there were insufficient facts to justify the conviction of the defendant. The defendant alleges no constitutional violations.

The defendant's brief does mention that seeking to collect funds from indigent defendants is a violation of the Equal Protection Clause. The State agrees with this conclusion, believing it well documented in case law. *E.g., State v. Zeigenfuss* 118 Wn. App. 110, 112, 74 P.3d 1205 (2003). However, the State is not currently attempting to collect any funds from the defendant. The defendant is not at risk of any penalty or sanction, and as such, there is no constitutional violation at the moment. The case law is quite clear that it is not the assessment of the legal financial obligations against an indigent defendant that is the constitutional violation, but the levying of sanctions, whether

in the form of additional fines or jail time, as a result of his not paying.

Mr. Carter did not object to the Order for costs at sentencing. The defendant cannot claim that he was unaware of the Cost Bill, or that he was given no chance to object. (RP 32-33). The defendant has waived his objections, and under RAP 2.5, this Court should dismiss his appeal.

2. THE DEFENDAT'S ARGUMENT ABOUT THE AWARD OF COSTS IS NOT RIPE.

Any argument about the defendant's indigent status cannot be considered ripe. Mr. Carter is not facing the attempts of Benton County to collect at the current time. The defendant suffers no injury from the imposition of costs and fees until he leaves the penitentiary, and the State begins attempting to collect from him. As such, only then would Mr. Carter be entitled to a protest about his indigent status. The Court has stated as such: "If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault

of his own, to repay, the statute allows for remission of the costs award." *State v. Blank*, 131 Wn.2d. 230, 253, 930 P.2d 1213 (1997).

State v. Zeigenfuss, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) is illustrative. In *Zeigenfuss*, an inmate protested the Department of Corrections procedure for imposing sanctions upon those who fail to pay their Legal Financial Obligations. *Id.* at 112. The Court stated, in answer to her claims:

Zeigenfuss has not failed to pay the VPA, nor has she been incarcerated or otherwise sanctioned for violating the terms of her community custody. As yet, therefore, she has suffered no harm, and her challenge to the constitutionality of the process in DOC community custody violation hearings is premature.

Id. Mr. Carter has suffered no harm as a result of the imposition of costs. When the State attempts to collect from him, he will be given a chance to be heard, and make arguments about his ability to pay. The Court has made it clear: "There is no reason at this time to deny the

State's cost request based upon speculation about future circumstances." *State v. Blank*, 131 Wn. App. at 253. Mr. Carter's Judgment and Sentence, Finding 2.5 "ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS," simply indicates that the court believes the defendant may be able to pay his Legal Financial Obligations. (CP 40). When the State attempts to collect the legal financial obligations, the defendant will have the opportunity to claim indigence, and the court will be able to make a determination based upon the best possible evidence.

Another illustrative case is *State v. Crook*. 146 Wn. App. 24, 189 P.3d 811 (2008). There, Mr. Crook appealed an order denying his motion to alleviate him of his financial obligations. *Id.* at 26. The Courts response was: "Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a

defendant's indigent status at the time of sentencing does not bar an award of costs." *Id.*

Finally, *State v. Wimbs*, 68 Wn. App. 673, 847 P.2d 8 (1993) clearly shows what consideration, if any, is necessary before the imposition of costs. In *Wimbs*, the only funds of the defendant considered consist of \$108.00 held by the Yakima police department, all of which was dispersed to the State, in order to pay Mr. Wimbs cost bill, which left \$575.50 of the original \$683.50 cost bill. *Id.* at 680-681. In the Courts words: "The court's order also finds that Mr. Wimbs has the ability to pay. The record contains no evidence of Mr. Wimbs' ability to pay the remaining \$575.50." *Id.* The Court upheld the imposition of fines and costs, agreeing with the lower court. *Id.*

3. THE DEFENDANT IS NOT AN "AGGRIEVED PARTY" PER RAP 3.1.

Mr. Carter is not an aggrieved party. "We have defined 'aggrieved party' as one whose personal right or pecuniary interests have been

affected." *State v. Taylor*, 150 Wn.2d 599, 604, 80 p.3D 605 (2003). The Courts of this State have stated that an individual against whom costs have been assessed, but on which no actions have been taken, is not aggrieved for the purposes of RAP 3.1. *State v. Smits*, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009). The reasons for this are apparent. No pecuniary interests have been impacted by the simple fact that the State has assessed costs against Mr. Carter. If and when the State attempts to collect upon Mr. Carter's Legal Financial Obligations, he will then be an aggrieved party, and able to petition the court for protection from collection orders.

The simple assessment of costs is not enough to convert a party without a grievance to an aggrieved party. While Mr. Carter may not like the fact that costs have been assessed against him, "An aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result." *State v.*

Taylor, 150 Wn.2d at 604. The only point at which Mr. Carter may challenge the collection of costs is when the State attempts to collect from him, despite his status as an indigent.

4. THE DEFENDANT IS LIKELY TO HAVE THE CAPACITY TO REPAY HIS LEGAL FINANCIAL OBLIGATIONS.

Mr. Carter is indigent at the moment. This does not preclude the assessment of costs under RCW 9.94A.753 or RCW 10.01.160. Both RCW 10.01.160 and RCW 9.94A.753 ask the court to look to the defendant's current and future ability to pay. The court did exactly that in Finding 2.5:

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 ability or likely future ability to pay the legal financial obligations imposed herein.

(CP at 40). Mr. Carter may not be able to pay at the current point in time, but the court had confidence that Mr. Carter would be able to.

The burden to show that the trial court had insufficient facts before it to make a finding lies entirely on the defendant. *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 939-940, 845 p.2D 1331 (1993). Mr. Carter claims that the court had no evidence whatsoever before it demonstrating the possibility of a future ability to pay. The State disagrees.

Mr. Carter has demonstrated financial resources to the court on no less than two separate occasions, posting two bonds in the total of \$5,000.00. (CP 48; RP 33-34). The defendant has demonstrated the ability to muster that much money, when the alternative is being placed in jail. While in jail, Mr. Carter will earn such money as he may. During his stay in jail, he will be provided with food and lodging, and various methods of earning money. RCW 72.09.015(15) provides an express definition of indigency in this circumstance:

'[I]ndigency' mean[s] an inmate who has less than a ten-dollar balance of

disposable income in his or her institutional account on the day a request is made to utilize funds and during the thirty days previous to the request.

The deductions in prison are statutorily barred from reducing the inmate below the level of indigency, under the scheme constructed for such in RCW 72.09.111. If, upon being released, the continuing burden of Legal Financial Obligations should prove too much for Mr. Carter's earning potential, then he may petition the court to alleviate or do away with them, at that time. At the very least, for the period of time when the State has the obligation to prevent Mr. Carter of falling beneath indigent status, any excess funds should be capable of flowing to the State to recoup the costs of trying Mr. Carter.

Once Mr. Carter exits prison, his ability to pay may be curtailed. The unemployment rate among ex-convicts is far higher than that of the general population, ranging between estimates of

30-50%. Stephen C. Richards, et. al., *After Crime and Punishment: Pathways to Offender Reintegration*, 205-206 (2004). However, the fact remains that sufficiently motivated ex-convicts can find gainful employment. Mr. Carter will be given the chance while in the Department of Corrections to gain skills necessary for employment. If Mr. Carter exits prison and is unable to find employment, then the court will relieve him of his obligation to pay at that time.

The court had sufficient evidence before it to make Finding 2.5. The defendant cites no evidence showing that the court was in error when it decided that he was capable of meeting his legal financial obligations. As such, he has failed to meet his burden.

IV. CONCLUSION

The defendant's appeal of his Legal Financial Obligations is untimely. The time to request the alleviation of Legal Financial

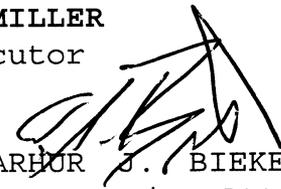
Obligations is when the State attempts to collect on them. Furthermore, the defendant is likely to be able to pay. Between the opportunities the State provides inmates, and the demonstrations Mr. Carter has made of his financial resources, the court had sufficient evidence to support finding 2.5. As such, the court's ruling should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of
October 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

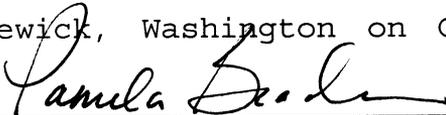
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