

FILED
OCT 05, 2012
Court of Appeals
Division III
State of Washington

NO. 30817-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,

v.

THOMAS BROCKMAN, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRANT COUNTY

The Honorable Evan E. Sperline, Judge

BRIEF OF APPELLANT

REBECCA WOLD BOUCHEY
Attorney for Appellant

NIELSEN BROMAN AND KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing legal financial obligations (LFOs) without making a finding that Brockman had the present or future ability to pay.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred by imposing legal financial obligations without making a finding that Brockman had the present or future ability to pay.

B. STATEMENT OF THE CASE

Thomas Brockman was charged with second degree burglary, third degree possession of stolen property and second degree theft. CP 30-31. Following jury trial, Brockman was convicted as charged. CP 46-48. He was sentenced as a first time offender within the standard range. CP 49-66.

The sentencing court imposed \$1000 in Legal Financial obligations (LFOs) as a part of Brockman's sentence. CP 55. These included \$500 for a victim assessment fee, \$200 for court costs, \$200 for court appointed attorney, and \$100 for the DNA

collection database. CP 55. There is no finding, either orally or within the judgment and sentence that Brockman has the present or future ability to pay these LFOs.

This appeal timely follows. CP 67.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY IMPOSING LEGAL FINANCIAL OBLIGATIONS WITHOUT MAKING A FINDING THAT BROCKMAN HAD THE PRESENT OR FUTURE ABILITY TO PAY.

RCW 10.01.160(3) provides that,

The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. 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.

The Courts have held that before entering an order to pay legal financial obligations, LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). This Court reviews the trial court's decision on ability to pay under the "clearly

erroneous” standard. Bertrand, 165 Wn. App. at 403-04. This error may be raised for the first time on appeal. Bertrand, at 394.

While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant’s financial resources and the “nature of the burden” imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court’s failure to exercise discretion in sentencing is reversible error). Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court’s unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

The court below imposed \$1,000 in legal financial obligations on Brockman, including \$200 in court costs and \$200 for a court appointed attorney, in addition to the mandated \$500 crime victim assessment and the \$100 DNA database fee. CP 55. As in Bertrand, there is no evidence here that the sentencing court ever consider the defendant’s financial resources in relation to the legal

financial obligations. No finding was entered regarding Brockman's present or future ability to pay. See 3RP; CP 55.

The record suggests that Brockman had neither the present or future ability to pay, being unemployed and having been found indigent both at trial and on appeal. See 3RP; CP 55, 67. Thus, there is no evidence in this record that Brockman has present or future ability to pay \$1000 in LFOs. Without a finding of his present or future ability to pay, the sentencing court's imposition of costs on Brockman is erroneous. See Bertrand, 165 Wn. App. at 405.

Moreover, in this case, a challenge to the LFOs is ripe. In Bertrand, the Court held that it would strike the court's erroneous finding of a present or future ability to pay, which would prevent the Department of Corrections from collecting the LFOs until a new hearing was held to consider whether the defendant had the present ability to pay. 165 Wn. App. at 405. Thus, the court held that it would not strike the LFO order, because it was not yet ripe until Bertrand's release in the future. 165 Wn. App. at 405.

However, in this case, the challenge to the LFOs is ripe because the imposition of LFOs was, at most, 30 days out from the sentencing hearing. Brockman was ordered by the court to begin payment of the LFOs within 24 hours of release, which, since his

sentence was for 30 days, was in the immediate future. See CP 58. Thus, the court's imposition of LFOs was to begin immediately and the court's findings of "future" ability to pay was not speculative, but an evaluation of the present reality.

Accordingly, the court's order of legal financial obligations in the amount of \$1,000 is clearly erroneous and should be stricken. See Bertrand, 165 Wn. App. at 405. Before the State can collect LFOs in this case, moreover, there must be a properly supported, individualized judicial determination that Brockman has the ability to pay.

D. CONCLUSION

For the reasons stated above, the sentencing court erred in imposing legal financial obligations without first considering whether Brockman had the present or future ability to pay. Therefore, the LFO order must be stricken.

DATED: October 5, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in blue ink that reads "Rebecca W. Bouchey". The signature is written in a cursive style and is positioned above the printed name.

Rebecca Wold Bouchey
WSBA No. 26081
Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Thomas Brockman

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Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 5th day of October, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Grant County Prosecuting Attorney
dlee@co.grant.wa.us
kburns@co.grant.wa.us

Thomas Brockman
4200 Airway Drive #1
Moses Lake, WA 98837

Signed in Seattle, Washington this 5th day of October, 2012.

X *Patrick Mayovsky*