

FILED  
NOV 15, 2012  
Court of Appeals  
Division III  
State of Washington

No. 30824-3-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TORRY ANTON MARQUART,

Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT  
Honorable Cameron Mitchell, Judge

---

BRIEF OF APPELLANT

---

SUSAN MARIE GASCH  
WSBA No. 16485  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....6

    1. The encounter between Mr. Marquart and the police officers rose to an unconstitutional seizure prior to arrest in violation of U.S. Const. amend. 4 and WA Const. art. 1, § 7, requiring suppression of drugs found to be in his constructive possession....6

        a. The investigatory stop was unlawful in absence of particularized suspicion.....6

        b. The police officers’ contact with Mr. Marquart constituted a seizure because a reasonable person in his position would not have believed he was free to leave.....9

        c. Because the officers acknowledged that they lacked reasonable suspicion to support the seizure, the trial court should have suppressed the evidence.....14

    2. The implied finding that Mr. Marquart has the current or future ability to pay Legal Financial Obligations is not supported in the record and the order based upon it requiring immediate commencement of payment must be stricken from the Judgment and Sentence.....15

        a. Relevant statutory authority.....16

        b. There is insufficient evidence to support the trial court's implied finding that Mr. Marquart has the present or future ability to pay legal financial obligations.....16

        c. The remedy is to strike the order for immediate repayment based upon the unsupported finding.....19

D. CONCLUSION.....20

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Florida v. Bostick</u> , 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).....	10
<u>Fuller v. Oregon</u> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....	15
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	7
<u>United States v. Mendenhall</u> , 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d. 497 (1980).....	13
<u>Nordstrom Credit, Inc. v. Dep't of Revenue</u> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	17
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	6, 10
<u>State v. Baldwin</u> , 63 Wn. App. 303, 818 P.2d 1116 837 P.2d 646 (1991).....	17, 18, 19
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511 (2011)...	17, 18, 19, 20
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	17
<u>State v. Crane</u> , 105 Wn. App. 301, 19 P.3d 1100 (2001), <i>overruled on other grounds by State v. O'Neill</i> , 148 Wn. 2d 564, 62 P.3d 489 (2003).....	12, 13, 14
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	15, 16, 17
<u>State v. Ellwood</u> , 52 Wn. App. 70, 757 P.2d 547 (1988).....	9
<u>State v. Gleason</u> , 70 Wn. App. 13, 851 P.2d 731 (1993).....	11, 12, 13, 14
<u>State v. Harrington</u> , 167 Wn.2d 656, 222 P.3d 92 (2009).....	10, 12, 13
<u>State v. Jones</u> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	10

<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	7
<u>State v. Martinez</u> , 135 Wn. App. 174, 143 P.3d 855 (2006).....	7, 8, 9
<u>State v. O’Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	6, 10, 12
<u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004).....	10, 11
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	15
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000).....	7
<u>State v. Soto-Garcia</u> , 68 Wn. App. 20, 841 P.2d 1271 (1992).....	11
<u>State v. Thorn</u> , 129 Wn.2d 347, 917 P.2d 108 (1996) <i>overruled on other grounds by State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	6
<b>S</b> <u>tate v. Young</u> , 135 Wn.2d 498, 957 P.2d 681 (1998).....	10, 13

**Constitutional Provisions and Statutes**

U.S. Const. amend. 4.....	1, 6, 9
Const. art. 1 § 7.....	1, 6, 9, 10
RCW 9.94A.030(30).....	16
RCW 9.94A.760.....	16
RCW 9.94A.760(1).....	16
RCW 9.94A.760(2).....	15
RCW 10.01.160.....	16, 17
RCW 10.01.160(1).....	16
RCW 10.01.160(2).....	16
RCW 10.01.160(3).....	15, 16
RCW 70.48.130.....	16

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying the defense motion to suppress evidence.

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

*Issues Pertaining to Assignments of Error*

1. Whether the encounter between Mr. Marquart and the police officers rose to an unconstitutional seizure prior to arrest in violation of U.S. Const. amend. 4 and WA Const., art. 1, § 7, requiring suppression of drugs found to be in his constructive possession.

2. Whether the implied finding that Mr. Marquart has the current or future ability to pay Legal Financial Obligations is clearly erroneous because it is not supported in the record.

**B. STATEMENT OF THE CASE**

On February 16, 2012, about 4:00 a.m., Kennewick Police Officer Jason Kiel was patrolling on a quiet shift and decided to roll through the parking lot of a place known to have “issues” happen, the Blue Bridge Motel, to check license plates for stolen cars and wanted subjects. 4/19/12 RP 30. Officer Jason Harrington was working the same area, and at some

point they parked next to each other on the south end of the motel.

4/19/12 RP 8–10. Having found a car whose registered owner had a felony warrant, Officer Kiel asked in the office but no one was registered under the name Cherie White. 4/19/12 RP 31; CP 14.

While backing up, Officer Kiel noticed two men duck into a motel breezeway and go immediately out of sight, which he thought was kind of odd. He radioed Officer Harrington that it looked to him like as soon as they saw him the two men darted down a breezeway. 4/19/12 RP 32. Officer Harrington began moving and pulled up into another parking area of the motel once he saw the two males walking towards him on a sidewalk of the highway, located off the motel property. 4/19/12 RP 10, 17–18. The sidewalk is elevated above the level of the parking lot, and separated by a 20 foot planted flower bed area. 4/19/12 RP 11; CP 15.

Torry Anton Marquart was one of the two males walking on the sidewalk. 4/23/12 RP 80. Even though he had no reason to detain Mr. Marquart or the other male and did not suspect them of committing a crime, Officer Harrington got out of his police car and from his distance of 20 to 30 feet below them called out to the men asking if they would be willing to talk to him. 4/19/12 RP 11; CP 15.

Officer Kiel arrived at this area of the motel within one to two minutes, just as Marquart and his friend were walking down the embankment. 4/19/12 RP 32. By the time he got out of the patrol car, the two men were sitting on the wall bordering the planted area. 4/19/12 RP 33; CP 15. The officers were in uniform and driving marked patrol cars. 4/19/12 RP 17, 40. Officer Harrington asked the men if they were staying at the motel and told them police were in the area looking for a wanted female. When asked if they knew her, both men said they did not. 4/19/12 RP 12.

Officer Kiel stood as a cover officer a little ways back from where Officer Harrington was speaking to the two men, to watch what was going on. 4/19/12 RP 33; CP 15. As the encounter progressed, one of the men identified himself as Mr. Marquart verbally to Officer Harrington and upon further request gave his identification card to the other officer. 4/19/12 RP 33; CP 15. One of the two officers ran a warrant check on Mr. Marquart. 4/19/12 RP 12, 33. Both officers asked questions, including what the men were doing, what they were doing there at that time of the morning, where Mr. Marquart was staying, etc. 4/19/12 RP 13–14, 34. In response to the repeated questions from both officers, Mr. Marquart said that he had been living at the motel in Room 158 for a week, and that he was living with

Russell Foster. 4/19/12 RP 13–14. Officer Harrington went to his car to run a warrant check on Foster, while Officer Kiel watched over the men. 4/19/12 RP 13–14, 34. Mr. Marquart felt compelled to cooperate with the officers and answer their questions. 4/19/12 RP 47.

While waiting in his car for information on Foster, Officer Harrington received back information that Mr. Marquart had outstanding warrants. Mr. Marquart was arrested and placed in handcuffs. 4/19/12 RP 14, 35. Police subsequently located methamphetamine in Room 158, and Mr. Marquart was charged with unlawful possession of a controlled substance. CP 1, 15.

Mr. Marquart moved to suppress the evidence because it was obtained pursuant to an unlawful seizure. CP 4–7. After hearing testimony of Officers Harrington and Kiel and the argument of counsel, the trial court denied the motion to suppress. 4/19/12 RP 7–74.

Mr. Marquart was convicted after a bench trial of constructive possession of a controlled substance. CP 15, 17–19. The court imposed a mid-standard range term of confinement of 18 months. CP 22, 25. The court imposed legal financial obligations totaling \$3,560. CP 23–24, 31.

At sentencing, the court made no inquiry into Mr. Marquart's financial resources and the nature of imposing LFOs. 4/23/12 RP 93–96.

As part of the Judgment and Sentence, the court made the following pertinent findings:

**¶ 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 ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753 [sic].<sup>1</sup>

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753)

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

CP 23 (bolding and capitalization in original).

**¶ 4.1** ... All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$\_\_\_\_\_ per month commencing \_\_\_\_\_. RCW 9.94A.760.

The defendant shall pay up to \$50.00 per month to be taken from any income the defendant earns while in the custody of the Department of Corrections. This money is to be applied towards legal financial obligations. ESB 5990.

CP 24–25.

This appeal followed. CP 32.

## C. ARGUMENT

**1. The encounter between Mr. Marquart and the police officers rose to an unconstitutional seizure prior to arrest in violation of U.S. Const. amend. 4 and WA Const. art. 1, § 7, requiring suppression of drugs found to be in his constructive possession.**

Whether police have seized a person is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). “ ‘The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference,’ but ‘the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.’ ” Id. (quoting State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), *overruled on other grounds by State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)).

Under the circumstances here, Mr. Marquart was not free to simply walk away and there were no legally cognizable grounds to stop him.

a. The investigatory stop was unlawful in absence of particularized suspicion. A warrantless search is unreasonable under both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution, unless the search falls within one or more

---

<sup>1</sup> The subject matter of this statute is restitution.

specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). One such exception is a *Terry*<sup>2</sup> stop. To justify a *Terry* stop under the state and federal constitutions, an officer must have a suspicion of a particular crime connected to the particular person, rather than a mere generalized suspicion that the person detained may have been up to no good. State v. Martinez, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006). The officer must have an “articulable suspicion,” meaning “a substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). He must possess “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

State v. Martinez is instructive. In Martinez, the defendant was seen by officers in an area known for high crime and vehicle prowls. The contact occurred just after midnight after police saw Martinez “walking briskly and looking nervous”, in the shadows and away from an area where several cars were parked. 135 Wn. App. at 177. He was unknown to the officers when they stopped him for questioning. Martinez, 135 Wn. App. at 177–78. The defendant admitted that he did not live in the apartment

---

<sup>2</sup> Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

complex where he was located. Id. After asking the defendant to sit down, he was searched, and the officers found a container of methamphetamine. Id. at 178. On appeal, the defendant argued that the officer lacked the particularized suspicion necessary to stop him. Id. at 178. This Court agreed, holding that in order to stop a suspect, officers must have some suspicion of a particular crime or a particular person and a connection between the two. Martinez, 135 Wn. App. at 182.

Reversing Martinez’ conviction following the trial court’s denial of his suppression motion, this Court noted:

... The police may not stop and question citizens on the street simply because they are unknown to the police or look suspicious, or because their ‘ ‘purpose for being abroad is not readily evident.’ ’

The problem here is not with the officer's suspicion; the problem is with the absence of a *particularized* suspicion. That is, there must be some suspicion of a particular crime or a particular person, and some connection between the two. General suspicions that Mr. Martinez may have been up to no good are not enough to warrant the stop here.

Martinez, 135 Wn. App. at 181-82 (citations omitted; emphasis in original).

Here, Officers Harrington and Kiel were patrolling this parking lot because of past problems, not in response to a crime in progress report. They had no description or other information linking Mr. Marquart or his

male friend to any disturbance that evening or, for that matter, at any time. They did not know Mr. Marquart or his companion. General suspicions that the two men may have been up to no good simply because they appeared to dart away upon seeing Officer Kiel is not sufficient to warrant a *Terry* stop. Martinez, 135 Wn. App. at 182.

Furthermore, the police were at the motel looking for a wanted female named Cherie White because her car happened to be in the parking lot. By the time they made contact with Mr. Marquart, police knew Cherie White was not registered at the hotel. Even if one assumes it was reasonable to ask two males who just happened to be present on the motel grounds at 4:00 a.m. if they might know her, once Mr. Marquart and his companion responded that they did *not* know Cherie White, any reason for further intrusion vanished where police suspicions were summarily dispelled. The outstanding warrant was discovered as a result of an illegal detention, and all evidence obtained as a result must be suppressed. State v. Ellwood, 52 Wn. App. 70, 74–75, 757 P.2d 547 (1988).

b. The police officers' contact with Mr. Marquart constituted a seizure because a reasonable person in his position would not have believed he was free to leave. Article I, section 7 of the state constitution grants greater protection to individual privacy rights than the Fourth Amendment.

*See, e.g.,* State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). This extends to protection of private affairs from unreasonable search and seizure. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009).

Pursuant to article I, section 7 seizure occurs when “considering all the circumstances, an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer’s use of force or display of authority.” Rankin, 151 Wn.2d at 695 (citing O’Neill, 148 Wn.2d at 574). The question is “whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter. Armenta, 134 Wn.2d at 11 (quoting Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). The defendant has the burden of proving that a seizure occurred. O’Neill, 148 Wn.2d at 574. The standard is “a purely objective one, looking to the actions of the law enforcement officer ... .” State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

It was 4:00 in the morning, no one else was on the street and a uniformed officer stopped his patrol car for the express purpose of

contacting Mr. Marquart and his companion. A second uniformed officer pulled up and stood nearby. After ascertaining the men knew nothing about the wanted female police were seeking, the officers repeatedly asked where Mr. Marquart lived, what he was doing there at that time of morning, requested identification, and one officer stepped away to run a warrant check while the other policeman stood watch and continued questioning. A reasonable person would not have felt free to decline these requests and leave. *See State v. Soto-Garcia*, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992) (contact constituted a seizure because a “reasonable person would not have felt free to decline the police officer’s requests that he provide information regarding his activities”).

Here the state argued, and the trial court concluded, that the officers’ contact with Mr. Marquart was a social contact, and not a seizure. 4/19/12 RP 50–54, 64–74; CP 16. “[A] police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting that information necessary to perform that function has not ‘seized’ the citizen.” *State v. Gleason*, 70 Wn. App. 13, 16, 851 P.2d 731 (1993). The appropriate inquiry is whether the officer either uses force or displays authority in a way that would cause a reasonable person to feel compelled to continue the contact. *Rankin*, 151 Wn.2d at 695. In

State v. Harrington, the Washington Supreme Court clarified the limitation of a “social contact”. There, the court held that, viewed cumulatively, a series of police actions that constitute a progressive intrusion into a person’s private affairs are an unlawful seizure, even where the actions may separately pass constitutional muster. Harrington, 167 Wn.2d at 669–70. “Even where an initial contact does not amount to a seizure, it may ‘mature’ or ‘transform’ into a seizure if the officer’s actions ultimately create a situation where the individual no longer feels free to leave.” State v. Crane, 105 Wn. App. 301, 309–10, 19 P.3d 1100 (2001), *overruled on other grounds by* State v. O’Neill, 148 Wn. 2d 564, 62 P.3d 489 (2003). The totality of circumstances here supports the conclusion that the degree of intrusion by the officers rose above a mere social contact.

State v. Gleason is instructive. There, this Court found a seizure where two officers approached a person leaving an apartment complex known for drug activity. As in this case, the officers knew that the general area was a high-crime neighborhood, but did not have any individualized suspicion with respect to the pedestrian. 70 Wn. App. at 18. Similar to this case, one of the officers stopped the car, got out, approached Mr. Gleason from behind and called out, “ ‘[C]an I talk to you a minute?’ ” Id. at 17 (alteration in original). Certainly Officer Harrington’s tone in calling

up a request over an embankment of 20 feet required more force than a simple face-to-face encounter. In addition, as in this case, in Gleason and Harrington two officers were present, creating more of an environment of investigation. Gleason, 70 Wn. App. At 17; Harrington, 167 Wn.2d at 665; Young, 135 Wn.2d at 512 (the “ ‘threatening presence of several officers’ ” is likely to result in a seizure (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d. 497 (1980)).

State v. Crane is also instructive. There, a police officer stopped Mr. Crane and two companions as they approached Mr. Crane’s brother’s house. 105 Wn. App. at 304. He asked a series of questions very similar to the questions the officers asked here . Id. at 311–13. Division Two of this court found that a seizure occurred—a reasonable person would not have felt free to leave—when the officer was holding the identification and running a records check. Id. Here, the record is a bit unclear as to which of the two officers called in the first warrant check (regarding Mr. Marquart) and whether the physical identification card was held by police while the check was run. Regardless, the warrant check was made *after* the officers had determined that Mr. Marquart and his companion had no knowledge of the wanted female they were seeking. If this truly had been just a social contact, there was no need to run a records check once the

officers' investigative suspicions regarding the wanted female were satisfied.

Here, Mr. Marquart and his companion had left the motel property and were walking along the side of the highway. An officer called out from below, asking them to come and talk to him. The two men had to descend twenty feet from the highway to speak to the two uniformed officers with their patrol cars in sight below. Once they determined that the men had no knowledge of the wanted female they were looking for, the police continued to ask questions. By this time and in this physical location, a reasonable person in Mr. Marquart's position would have believed he was *not* free to disregard the officers and go about his business. *See e.g. Gleason*, 70 Wn. App. at 17. While Officer Harrington's first questions may not have amounted to a seizure, the subsequent events transformed the situation into one in which Mr. Marquart objectively would no longer have felt free to leave.

c. Because the officers acknowledged that they lacked reasonable suspicion to support the seizure, the trial court should have suppressed the evidence. Once a court has determined that a seizure has occurred, the evidence thereby obtained must be suppressed if the seizure was not supported by reasonable suspicion. *Crane*, 105 Wn. App. at 313; *Gleason*,

70 Wn. App. at 17. All “evidence obtained as a result of an unlawful seizure is inadmissible.” State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Here, the officers freely admitted they did not suspect Mr. Marquart of any criminal activity before seizing him. Below, the State did not contend that reasonable suspicion supported the stop, only that there was no stop at all. As discussed *infra*, that argument fails. Because police lacked authority of law to seize Mr. Marquart, the trial court should have suppressed the evidence. The ruling of the trial court should be reversed and the conviction dismissed.

**2. The implied finding that Mr. Marquart has the current or future ability to pay Legal Financial Obligations is not supported in the record and the order based upon it requiring immediate commencement of payment 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) (emphasis added).

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 implied finding that Mr. Marquart 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 made an implied finding that Mr. Marquart has the present ability or likely future ability to pay legal financial obligations ("LFOs") and ordered that payment of the LFOs begin immediately in a monthly amount of up to \$50. CP 23–25 at ¶¶ 2.5, 4.1. 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 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.

In boilerplate language, the Judgment and Sentence states 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.” However, the record does not show that the trial court inquired *at all* into Mr. Marquart’s financial resources and/or took into account the nature of the burden of imposing LFOs on him. *See 4/23/12 RP 93–96*. While the court did not make an express finding of present ability to pay, the finding is implied because the court ordered that Mr. Marquart pay towards LFOs beginning immediately and in a monthly amount of up to

\$50. CP 23–25 at ¶¶ 2.5, 4.1. The implied finding is unsupported in the record and therefore clearly erroneous.

c. The remedy is to strike the order for immediate repayment based upon the unsupported finding. 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 clearly erroneous. Without the requisite finding, the order based upon it requiring immediate commencement of monthly payments of up to \$50 must be stricken from the Judgment and Sentence. *See Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

The reversal of the implied finding in the judgment and sentence and striking of the order requiring immediate commencement of monthly payments simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Marquart 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 implied finding that Mr. Marquart has or will have the ability to pay the LFOs when and if the State attempts to collect them, the finding is clearly erroneous. The language based upon it which requires commencement of immediate monthly payments must therefore be stricken from the judgment and sentence. *See Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

**D. CONCLUSION**

For the reasons stated, the trial court's denial of the motion to suppress should be reversed and the conviction dismissed or in the alternative, the language requiring immediate commencement of monthly payments towards the legal financial obligations should be stricken from the Judgment and Sentence.

Respectfully submitted on November 15, 2012.

---

s/Susan Marie Gasch, WSBA #16485  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 15, 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:

Torry Anton Marquart (#854370)  
Coyote Ridge Corrections Center  
P. O. Box 769  
Connell WA 99326-0769

**E-mail: prosecuting@co.benton.wa.us**  
Andrew Kelvin Miller  
Benton County Prosecutors Office  
7122 W. Okanogan Place, Bldg. A  
Kennewick WA 99336-2359

---

s/Susan Marie Gasch, WSBA #16485