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February 19, 2013

Court of Appeals  
Division III  
State of Washington

No. 31060-4-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

HAROLD ALBERT WILLEY,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable Gregory D. Sypolt, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

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

*Issue Pertaining to Assignment of Error*

Should the implied finding that Mr. Willey 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?

**B. STATEMENT OF THE CASE**

Harold Albert Willey was convicted by a jury of second degree burglary and attempt to elude a police vehicle, as charged. CP 3, 61–62. Trevor Holmes, the resident tenant of rural property north of Spokane, arrived home to find a person unknown to him—Mr. Willey—loading garbage containing copper pipe as well as some other recyclable scraps from the garage into his truck. Mr. Willey testified a third person’s information directing him to pick up available scrap metal there must have been mistaken, and he unloaded the materials as requested. After pursuit by Holmes and two deputy officers with the Spokane County Sheriff’s Office, Mr. Willey was arrested. 6/25/12 RP 32–77; 6/26/13 RP 12–32.

At sentencing the court imposed concurrent low-end standard range sentences, for a total term of confinement of 51 months. CP 72–73. The

court also ordered a total amount of Legal Financial Obligations (“LFOs”) of \$600. CP 75. The court made no express finding that Mr. Willey had the present or future ability to pay the LFOs. 8/3/12 RP 82–87; *see* CP 72 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the Court:

**¶ 2.5 Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's 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.

CP 72. The court made no inquiry into Mr. Willey’s financial resources and the nature of the burden that payment of LFOs would impose. 8/3/12 RP 82–87. The court ordered that Mr. Willey begin making monthly payments on the LFOs commencing one year from the date of sentencing. CP 76 at ¶ 4.3.

This appeal followed. CP 83–84.

## C. ARGUMENT

**The implied finding that Mr. Willey 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 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.”<sup>1</sup> 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 implied finding that Mr. Willey has the present and 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 considered Mr. Willey's "present and future ability to pay legal financial obligations" but made no express finding that Mr. Willey had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid "commencing" in one year's time *after* it considered "the total amount owing, the defendant's 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." CP 72 at ¶ 2.5; CP 76 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)

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<sup>1</sup> It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. *See* RCW 13.40.192.

(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.

Here, the record does not show that the trial court took into account Mr. Willey's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding in ¶¶ 2.5 and 4.3 that Mr. Willey has the present or future ability to pay LFOs. The record instead supports the opposite

conclusion. While the court apparently took into account defense counsel's request to put the beginning date out a year because "[Mr. Willey] will be in custody for quite some time", there is nothing in the record to support an implied finding that Mr. Willey would have the ability to begin payments one year into the future. The implied finding that Mr. Willey has the present or future ability to pay LFOs that is implicit in the directive to make payments commencing at a date certain is not supported in the record. It is clearly erroneous and the directive 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. 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.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion

or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

Mr. Willey is not challenging *imposition* of the LFOs; rather, the trial court made the implied finding that he has the present and future ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to

begin collecting LFOs from Mr. Willey 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).

#### **D. CONCLUSION**

The matter should be remanded to strike the implied finding of present and future ability to pay legal financial obligations from the Judgment and Sentence.

Respectfully submitted on February 19, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 19, 2013, 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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