

FILED
July 17, 2013
Court of Appeals
Division III
State of Washington

No. 31353-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CASEY R. ROBERTSON
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Kathleen O'Connor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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

2. The trial court erred by imposing discretionary costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the directive to pay legal financial obligations based on an implied finding of current or future ability to pay them be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record?

2. Does a trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Robertson's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

C. STATEMENT OF THE CASE

Casey Robertson was convicted by a jury of vehicular assault. CP 31. The sentencing court imposed mandatory costs of \$600 and discretionary costs of \$200, for a total amount of Legal Financial Obligations ("LFOs") of \$800. CP 47. The court made no express finding that Robertson had the present or future ability to pay the LFOs. RP 260;

see CP 44 at ¶ 2.5. However, the Judgment and Sentence contained the following boilerplate language:

¶ 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 44.

The Court was informed that Robertson owed \$600 to another court on a prior conviction and had been unable to make those payments.

RP 252. The Court was also informed that Robertson was unemployed.

RP 256. The court made no further inquiry into Robertson's financial resources and the nature of the burden that payment of LFOs would

impose. RP 256-63. The court ordered Robertson to make monthly payments of no less than \$25 beginning August 5, 2013, with interest

accruing beginning December 12, 2012. RP 263, CP 48.

This appeal followed. CP 53-65.

D. ARGUMENT

The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.

Robertson did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. State v. Calvin, No. 67627-0-I, 2013 WL 2325121 at *11 (Wash.Ct.App. May 28, 2013), citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

a. The directive to pay on a date certain must be stricken. There is insufficient evidence to support the trial court's implied finding that Robertson has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken. For purposes of this argument, Robertson is not challenging *imposition* of the LFOs. He is, however, challenging separately the imposition of the discretionary costs. *See* subsection 2.b below.

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.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” 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).

Here, there is insufficient evidence to support the trial court's implied finding that Robertson 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.

In this case the court considered Robertson's "present and future ability to pay legal financial obligations" but made no express finding that he had the present or likely future ability to pay those LFOs. The finding, however, is implied because the court ultimately ordered Robertson to make monthly payments of no less than \$25 beginning August 5, 2013, with interest accruing beginning December 12, 2012. RP 263, CP 48.

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.

Here, the record does not show that the trial court took into account Robertson’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 that he has the present or future ability to pay LFOs. The record instead supports the opposite conclusion: The Court was informed that Robertson owed \$600 to another court on a prior conviction and had been unable to make those payments. RP 252. The Court was also informed that Robertson was unemployed. RP 256. Furthermore, the Court found Robertson indigent for purposes of pursuing this appeal. RP 265.

Therefore, the implied finding that Robertson has the present or future ability to pay LFOs, implicit in the directive to make monthly payments of no less than \$25 beginning August 5, 2013, is simply not supported in the record. Since it is clearly erroneous, the directive must be

stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

This remedy of striking the unsupported finding 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.

b. The imposition of discretionary costs of \$200 must also be stricken. Since the record does not reveal that the trial court took Robertson's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the judgment and sentence.

A 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. Baldwin, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. Id.

Relevant statutory authority. Here, the court ordered Robertson to pay \$500 Victim Assessment, \$100 DNA collection fee, and \$200 in discretionary costs¹, for a total legal financial obligation of \$800. CP 47. The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. But,

The court shall not order 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

¹ \$200 court costs. CP 47; RCW 9.94A.760; RCW 10.01.160.

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). It is well-established that this provision does not require the trial court to enter formal, specific findings. *See Curry*, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404. Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Calvin*, No. 67627-0-I, 2013 WL 2325121 at *11.

Here, after considering Robertson's "present and future ability to pay legal financial obligations" (in boilerplate language), the court imposed discretionary costs of \$200. CP 44, 47. At a minimum the imposition of discretionary costs represents an implied finding that Robertson is or will be able to pay them. However, the record reveals no balancing by the court through inquiry into Robertson's financial resources and the nature of the burden that payment of LFOs would impose on him. RP 252-67. Further, the Court was informed that Robertson owed \$600 to another court on a prior conviction and had been unable to make those payments. RP 252. The Court was also informed that Robertson was

unemployed. RP 256. *See Calvin*, No. 67627–0–I, 2013 WL 2325121 at *11.

In sum, the record reveals that the trial court did not take Robertson’s particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). The implied finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court’s imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay on a date certain *and* the imposition of court costs. *Calvin*, No. 67627–0–I, 2013 WL 2325121 at *12; *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

E. CONCLUSION

For the reasons stated, the matter should be remanded to strike the directive to pay on a date certain *and* the imposition of court costs from the Judgment and Sentence.

Respectfully submitted July 17, 2013,

s/David N. Gasch, WSBA #18270
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on July 17, 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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