

FILED

OCT 21, 2013

Court of Appeals
Division III
State of Washington

No. 31583-5-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MICHEAL LYNN LONG, JR.
Defendant/Appellant.

APPEAL FROM THE CHELAN COUNTY SUPERIOR COURT
Honorable T. W. Small, 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
----	---------------------------	---

Issues pertaining to assignments of error:

1. Sometime between early June and July 6th, Mr. Espinosa’s car was stolen. Between July 6th and July 8th, appellant had been observed driving that car. He was eventually charged with, and pled guilty to, possession of a stolen vehicle occurring between July 6th and July 8th. The State did not allege that appellant stole the car and did not offer any evidence that the damage to the car occurred between July 6th and July 8th. Where the state could not prove that the loss was directly attributable to the charged offense, did the trial court err in imposing restitution for damage to the car?.....2-3

2. Should the directive to pay legal financial obligations based on a finding of current or future ability to pay be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record?.....3

3. Does a trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Mr. Long’s financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?.....3

B.	STATEMENT OF THE CASE.....	3
----	----------------------------	---

C.	ARGUMENT.....	8
	1. The court exceeded its authority in imposing restitution for damages not causally related to the charged offense.....	8
	2. The directive to pay based Legal Financial Obligations based on an unsupported finding of ability to pay, and the discretionary costs imposed without compliance with RCW 10.01.160, should be stricken from the Judgment and Sentence.....	16
	a. The finding of ability to pay and the directive to pay monthly payments must be stricken.....	17
	b. The imposition of discretionary court costs of \$550 must also be stricken.....	21
D.	CONCLUSION.....	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bearden v. Georgia</u> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	17
<u>Fuller v. Oregon</u> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)....	17
<u>Nordstrom Credit, Inc. v. Dep't of Revenue</u> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	19
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	8
<u>State v. Angulo</u> , 657, 893 P.2d 662 (1995).....	11
<u>State v. Ashley</u> , 40 Wn. App. 877, 700 P.2d 1207 (1985).....	9
<u>State v. Baldwin</u> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	19, 22, 23
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	16, 19, 20
<u>State v. Blazina</u> , 174 Wn. App. 906, 301 P.3d 492 (2013), <i>rev. granted</i> (Wash. Oct. 2, 2013).....	16
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	19
<u>State v. Bunner</u> , 86 Wn. App. 158, 936 P.2d 419 (1997).....	10
<u>State v. Calvin</u> , 302 P.3d 509 (Wash. Ct. App. 2013).....	16, 20, 22, 23
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	17, 18, 22
<u>State v. Davison</u> , 116 Wn.2d 917, 809 P.2d 1374 (1991).....	8
<u>State v. Dedonado</u> , 99 Wn. App. 251, 991 P.2d 1216 (2000).11, 13, 14, 15	
<u>State v. Fleming</u> , 75 Wn. App. 270, 877 P.2d 243 (1994).....	8

<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	16
<u>State v. Harrington</u> , 56 Wn. App. 176, 782 P.2d 1101 (1989).....	13
<u>State v. Hartwell</u> , 38 Wn. App. 135, 684 P.2d 778 (1984).....	9
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192, 211 (2005) abrogated by <u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....	11
<u>State v. Kisor</u> , 68 Wn. App. 610, 844 P.2d 1038, <i>rev. denied</i> , 121 Wn.2d 1023, 854 P.2d 1084 (1993).....	8, 10
<u>State v. Lewis</u> , 57 Wn. App. 921, 791 P.2d 250 (1990).....	8
<u>State v. Lohr</u> , 164 Wn. App. 414, 263 P.3d 1287 (2011).....	20–21
<u>State v. Mark</u> , 36 Wn. App. 428, 675 P.2d 1250 (1984).....	8, 10
<u>State v. Mead</u> , 67 Wn. App. 846, 836 P.2d 57 (1992).....	9, 10
<u>State v. Miszak</u> , 69 Wn. App. 426, 848 P.2d 1329 (1993).....	9
<u>State v. Raleigh</u> , 50 Wn. App. 248, 748 P.2d 267, <i>rev. denied</i> , 110 Wn.2d 1017 (1988).....	9
<u>State v. Schelin</u> , 147 Wn.2d 562, 55 P.3d 632 (2002).....	21
<u>State v. Souza</u> , 60 Wn. App. 534, 805 P.2d 237, <i>recon. denied</i> , <i>rev. denied</i> , 116 Wn.2d 1026 (1991).....	21
<u>State v. Tetterts</u> , 81 Wn. App. 478, 914 P.2d 784 (1996).....	12
<u>State v. Tindal</u> , 50 Wn. App. 401, 748 P.2d 695 (1988).....	9
<u>State v. Vinyard</u> , 50 Wn. App. 888, 751 P.2d 339 (1988).....	10, 11
<u>State v. Woods</u> , 90 Wn. App. 904, 953 P.2d 834, <i>rev. denied</i> , 136 Wn.2d 1021, 969 P.2d 1064 (1998).....	10, 11, 12

Statutes

RCW 9.94A.530(2).....10, 11

RCW 9.94A.760.....5

RCW 9.94A.760(1).....18

RCW 9.94A.760(2).....17

RCW 10.01.160.....16, 18, 21, 22

RCW 10.01.160(1).....18

RCW 10.01.160(2).....18

RCW 10.01.160(3).....17, 18, 22, 23

Other Resources

Black's Law Dictionary 738 (8th ed.2004).....11

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 5: “The court reviewed and finds that the police reports, which are adopted herein, provide the factual basis to establish a causal connection between the Defendant’s possession of the stolen vehicle and the damages to the vehicle so that restitution is appropriate.” (CP 158)

2. The trial court erred in entering Finding of Fact 6: “The court reviewed and finds that the Amended Restitution Report, which is adopted herein, provides the undisputed factual basis for valuation of damages and loss.” (CP 158)

3. The trial court erred in entering Conclusion of Law 2: “The underlying facts in the police reports establish a causal connection between the Defendant’s possession of the stolen vehicle and the damages done to the vehicle so that restitution is appropriate.” (CP 159)

4. The trial court erred in entering Conclusion of Law 3: “ ‘But for’ the Defendant’s possession of the stolen vehicle, the damages would not have occurred to the vehicle.” (CP 159)

5. The trial court erred in entering Conclusion of Law 4: “The only evidence of valuation for damages and loss in this case was provided in the Amended Restitution Report.” (CP 159)

6. The trial court erred in entering Conclusion of Law 5:

“Therefore, as valuation was undisputed, the court concludes that the damages and loss in the Amended Restitution Report were both reasonable and easily ascertainable.” (CP 159)

7. The trial court erred in ordering restitution be paid to Adrian Espinosa (\$500.00) and Country Preferred Insurance Company (\$11,219.35). Order Setting Restitution at CP 155; Conclusion of Law 6 at CP 159; Judgment and Sentence at CP 87 ¶ 4.3.

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

9. The trial court erred by imposing discretionary costs.

Issues Pertaining to Assignments of Error

1. Sometime between early June and July 6th, Mr. Espinosa’s car was stolen. Between July 6th and July 8th, appellant had been observed driving that car. He was eventually charged with, and pled guilty to, possession of a stolen vehicle occurring between July 6th and July 8th. The State did not allege that appellant stole the car and did not offer any evidence that the damage to the car occurred between July 6th and July 8th. Where the state could not prove that the loss was directly attributable to

the charged offense, did the trial court err in imposing restitution for damage to the car?

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

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

B. STATEMENT OF THE CASE

By amended information, the Chelan County Prosecutor's Office charged the defendant, Michael Lynn Long, Jr., with possession of a stolen vehicle as well as two additional counts that are unrelated and not germane to this appeal. CP 5-6, 7-9.¹ The amended information identified the date of Long's possession as "between the 6th day of July, 2012, and the 8th day of July, 2012."

¹ The two additional charges were Count II – Bail Jumping and Count III – Possessing Stolen Property in the Second Degree. Both charges arose from incidents occurring on dates different from the incident date at issue in this appeal. CP 8-9.

Long pleaded guilty to the three counts. 10/8/12 RP 10. With respect to the possession of a stolen vehicle charge, the Statement of Defendant on Plea of Guilty provided:

On or between July 6 and July 8, 2012, in Chelan County, WA, I knowingly and unlawfully possessed a stolen vehicle belonging to Adrian Espinoza.

CP 80 at ¶ 11; *see also* 10/8/12 RP 11. Long did not agree to pay restitution on any additional uncharged offenses. *See* CP 73–81.

At sentencing, the court followed the recommendation of the plea agreement. It imposed total confinement—under the prison-based drug offender sentencing alternative—of 25 months and an equal period of community custody. CP 85. The court ordered mandatory costs of \$800 and discretionary costs of \$550, for a total amount of Legal Financial Obligations (“LFOs”) of \$1,350.00. CP 86–87 at ¶ 4.3. The court made no inquiry into Long’s financial resources and the nature of the burden that payment of LFOs would impose. 10/8/12 RP 12–23. As part of the Judgment and Sentence, however, the court made the following pertinent finding:

¶ 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:

[X] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753 [sic].²

...

CP 84. The court ordered Long to make monthly payments of \$25 on the LFOs, “commencing immediately if able to earn a wage at D[epartment] O[f] C[orrections], then monthly upon release from custody”. CP 87 at ¶ 4.3. The amount of restitution was to be determined at a later date. CP 87.

At a contested restitution hearing before the Honorable T. W. Small, the State sought \$11,719.35 for damage to the car, with all but \$500 to be paid to Country Preferred Insurance Company. *See* CP 158.

The State did not put on any witnesses. The court considered the Amended Restitution Report (CP 98–118), the Defendant’s Brief in Response to State’s Restitution Request (CP 119–24), the State’s Brief on Restitution and its attached police reports (CP 125–54) including the Affidavit of Brian Miller (4/4/13 RP 26; CP 1–4), and the “records and pleading in the file to date.” CP 157.

The police reports including the Affidavit of Officer Brian Miller and the Amended Restitution Report established the following. The victim,

² The Judgment and Sentence at ¶ 2.5 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

Adrian Espinoza, left his 2005 white Dodge Neon at a Town Dodge dealership in early June 2012 for diagnosis and repair of electrical problems. CP 1, 103. While a replacement for its power control module was sent to Seattle for reprogramming, the car was left inoperable in the dealership's outdoor lot. On July 6, the victim received the reprogrammed module and took it to the dealership for installation. There, he discovered the car was gone and reported it stolen. CP 103.

Police investigation showed a witness had driven Long up north on July 6 or 7 to pick up the car, and that Long had been seen driving the car between July 6 and July 8. CP 2-3, 135, 137, 141, 149. The car was recovered on July 8. It had several altered ignition wires, a door handle that was broken/possibly drilled, a missing VIN on the dashboard, a missing stereo, and the hood had a missing part and was now painted white. The recovered automobile also had an intact ignition lock, a bag and other personal items not belonging to the victim, some stolen license plates, and a newly replaced battery. CP 1-2, 103, 135, 141. The insurance company claimed damages of \$11,719.35, consisting of \$500 deductible paid by their insured victim Espinoza, and \$11, 219.35 as reimbursement for monies paid out on a "total loss settlement" with their insured. CP 102.

Defense counsel reminded the court there was no evidence to determine when—during the period of early June to the sighting of Long driving the car on July 6—the car had been stolen. Thus the State had not proved that “but for” Long’s possession the damages had occurred. Defense counsel also challenged the nature and amount of damages as impermissibly speculative where, e.g., the vehicle was inoperable while sitting in the dealer lot but was operable when found in Long’s possession. 4/4/13 RP 26–28. The court dismissed the lack of causation argument “because, for all we know, the car was on the lot on July 5th [the day before Long was first seen driving it]”, and ruled the “but for” test had been met by a preponderance of the evidence. 4/4/13 RP 29–30. The court reluctantly agreed with the State that since Long hadn’t provided any contrary valuation, the insurance company’s estimation of damages was undisputed and should stand. 4/4/13 RP 29–30.

The court entered written findings of fact and conclusions of law regarding restitution, and ordered restitution to be paid as requested by the State. CP 155–56, 157–160.

This appeal followed. CP 161–64.

C. ARGUMENT

1. The court exceeded its authority in imposing restitution for damages not causally related to the charged offense.³

A sentencing court's authority to order restitution is purely statutory and, where so authorized, the sentencing court has discretion to determine the amount of restitution. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991); State v. Lewis, 57 Wn. App. 921, 923, 791 P.2d 250 (1990); State v. Kisor, 68 Wn. App. 610, 619, 844 P.2d 1038, *rev. denied*, 121 Wn.2d 1023, 854 P.2d 1084 (1993) (citing State v. Mark, 36 Wn. App. 428, 433, 675 P.2d 1250 (1984)). The exercise of such discretion is reversible only where it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Kisor, 68 Wn. App. at 619 (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The court's power to impose restitution is limited by the offense charged: "[I]f the loss or damage arises out of an earlier, uncharged crime, there can be no causal relationship between the offense charged and the loss resulting from the earlier crime." State v. Fleming, 75 Wn. App. 270, 272, 877 P.2d 243 (1994). Moreover, "[r]estitution cannot be imposed

³ Assignment of Error Nos. 1 through 7.

based on the defendant's 'general scheme' or acts 'connected with' the crime charged, when those acts are not part of the charge." State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993); State v. Tindal, 50 Wn. App. 401, 403, 748 P.2d 695 (1988) ("Restitution may not be based on acts connected with the crime charged when those acts are not part of the charge."); State v. Ashley, 40 Wn. App. 877, 878–79, 700 P.2d 1207 (1985) (courts are authorized to order restitution only "for losses or damage resulting from the precise offense charged").

Restitution also cannot be imposed where a victim's loss is caused by conduct that occurs prior to the charged offense. State v. Hartwell, 38 Wn. App. 135, 684 P.2d 778 (1984); *see also* State v. Mead, 67 Wn. App. 846, 836 P.2d 57 (1992) (where defendant pled guilty to possession of stolen property, court erred in imposing restitution for damage occurring during burglary in which property was taken); State v. Raleigh, 50 Wn. App. 248, 253–54, 748 P.2d 267 (trial court erred by imposing restitution for a string of burglaries, where defendant only pled guilty to one incident), *rev. denied*, 110 Wn.2d 1017 (1988).

In determining any sentence, including restitution, the sentencing court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time

of sentencing. State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834, *rev. denied*, 136 Wn.2d 1021, 969 P.2d 1064 (1998). Where a defendant disputes material facts for purposes of restitution, the sentencing court must either not consider those facts or grant an evidentiary hearing where the State must prove the restitution amount by a preponderance of the evidence. Woods, 90 Wn. App. at 907; RCW 9.94A.530(2)⁴.

Restitution does not need to be proven with specific accuracy. Kisor, 68 Wn. App. at 619 (*citing Mark*, 36 Wn. App. at 434). Evidence is sufficient if it meets due process requirements by affording a reasonable basis for estimating loss and represents “substantial credible evidence” which “does not subject the trier of fact to mere speculation or conjecture.” Kisor, 68 Wn. App. at 619. However, restitution must be based on a causal connection between the crime and the victim's damages. State v. Bunner, 86 Wn. App. 158, 160, 936 P.2d 419 (1997) (*citing State v. Vinyard*, 50 Wn. App. 888, 891, 751 P.2d 339 (1988) and Mead, 67 Wn. App. at 491 (1992)).

⁴ RCW 9.94A.530(2) provides in relevant part: “In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports... . Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. ...”.

The standard of review for determining the existence of statutory authority is *de novo*. State v. Angulo, 657, 660, 893 P.2d 662 (1995). Only after determining the court had authority to order restitution, does the appellate court review the order for abuse of discretion. *See Vinyard*, 50 Wn. App. at 891. Where, as here, the court orders restitution for losses not causally related to the offense or fails to follow the statutory requirements, the court “exceeds its statutory authority” and reversal is required. Id.

Here, the causal connection between Long’s actions and the damages was an issue of material fact and was disputed. Thus, an evidentiary hearing was required to determine when the vehicle was stolen and when the damages occurred and whether the items claimed as damages were properly attributed to Long’s actions. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000) (referring to Woods, 90 Wn. App. at 907 and RCW 9.94A.530(2)); State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192, 211 (2005) abrogated by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (in the restitution context, this should be “[a] hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented. Black's Law Dictionary 738 (8th ed.2004).”).

Long pleaded guilty to a charge of possession of stolen vehicle, an offense that occurred between July 6 and July 8. He did not agree to pay restitution for uncharged behavior. As noted by defense counsel, there was no evidence to establish when the car had been stolen. On July 6, the owner reported that the car was stolen after he'd arrived at the dealership lot and found it gone. The only evidence presented at the restitution hearing indicated that the car had been left by the owner in the dealership's outdoor lot since early June. No witnesses from the car dealership testified, and the State presented no evidence to establish when the car had been stolen from the lot. The trial court's sole remark as to this issue—"because, for all we know, the car was on the lot on July 5th,"⁵—was dismissive of a material fact relevant to the issue of causal connection. An evidentiary hearing was required.

Similarly, the State presented no evidence to establish the claimed damage occurred while the car was in Long's possession. *See State v. Tettters*, 81 Wn. App. 478, 914 P.2d 784 (1996) (not reasonable to infer that juvenile offender was responsible for items missing from a stolen car merely because he was later found in possession of the car): *Woods*, *supra*

⁵ 4/4/13 RP 29.

(defendant who pleaded guilty to possession of a stolen vehicle not liable for items missing from the vehicle).

This case is distinguishable from State v. Harrington, 56 Wn. App. 176, 782 P.2d 1101 (1989), in which the court upheld the trial court's inference from evidence of the defendant's possession of the stolen vehicle that the defendant caused the damage. In that case, although the defendant denied damaging the vehicle, he admitted that he was in sole possession of the vehicle from the moment he stole it to the time he was apprehended 13 days later. Harrington, 56 Wn. App. 178. Since it was undisputed that the damage occurred while the defendant was in illegal possession of the vehicle, the court held that the damage to the car was a foreseeable result of the illegal possession. The link between the defendant's conduct and the damage was sufficient to authorize restitution. Id. at 180.

Here, on the other hand, because there was no evidence that Long was in possession of the car when it was damaged, the link between the charged crime and the victim's loss is based entirely upon speculation and Long's "failure" to prove that he did not cause the damage. The defendant at a restitution hearing, however, has no such burden. Dedonado, 99 Wn. App. at 255 ("The State did not meet its burden of proving the restitution

amounts here by a preponderance of the evidence because the documentation it provided did not establish a causal connection between Dedonado's actions and the damages."").

Furthermore, a causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged by the person convicted. Dedonado, 99 Wn. App. at 257. In Dedonado, a causal connection was not established where the State relied solely on a mechanic's estimate to prove the damages to the van. Id. Here, defense counsel questioned the nature of the damages as well as valuations of the damage claim submitted by the insurance company. The court itself acknowledged the roughly \$12,000 valuation of a 2005 Dodge Neon seemed high (4/4/13 RP 28–29). There was also an obvious disparity between the minor types of damages mentioned in the police reports and the insurance company's claim that it must be reimbursed for a total loss settlement made with its insured. When recovered on July 8, the car had several altered ignition wires, a door handle that was broken/possibly drilled, a missing VIN on the dashboard, a missing stereo, and the hood had a missing part and was now painted white. The recovered automobile also had an intact ignition lock, a bag and other personal items that did not belong to the victim, some stolen

license plates and a newly replaced battery. CP 1–2, 103, 135, 141; compare with Amended Restitution Report at CP 102. These naked observations of “damage” or extra items found in the car were not supported by evidence to substantiate how they might result in a “total loss settlement” by the insurer. For example, the victim did not testify or submit a sworn statement as to the condition of the car before it was stolen (or damaged), or its condition after being stolen (or damaged), or that as a result of the crime the car required being designated as a total loss. The State did not meet its burden of proving the restitution amounts here by a preponderance of the evidence because the documentation it provided did not establish a causal connection between Long’s actions and the damages.

In summary, at the restitution hearing the State presented no evidence that Long had been in possession of the car from the time it was stolen or that he was in possession when the vehicle was damaged. The evidence was insufficient to establish the necessary causal connection between Long’s crime and the victim’s loss. Restitution is an integral part of sentencing, and it is the State’s obligation to establish the amount of restitution. Dedonado, 99 Wn. App. at 257. The court ordered restitution based upon evidence that did not establish a causal connection between

Long's action and the damages. Entry of the order was an abuse of discretion.

The State in this case failed to establish the required causal connection between the crime of possession of stolen property and the damage to the stolen car. Accordingly, the trial court lacked authority to impose the restitution award. The restitution award must be vacated.

2. The directive to pay based Legal Financial Obligations based on an unsupported finding of ability to pay, and the discretionary costs imposed without compliance with RCW 10.01.160, should be stricken from the Judgment and Sentence.⁶

Although Mr. Long did not make these arguments below, illegal or erroneous sentences may be challenged for the first time on appeal. *See State v. Calvin*, 302 P.3d 509, 521 fn.2 (Wash. Ct. App. 2013) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); *see also State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492 (2013), *rev. granted* (Wash. Oct. 2, 2013) (declining to consider

the challenge for the first time on appeal, where the trial court did not set a date for the defendant to begin paying his financial obligations).

a. The finding of ability to pay and the directive to pay monthly payments must be stricken. There is insufficient evidence to support the trial court's finding that Long has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken from the Judgment and Sentence. For purposes of this argument, Long 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. Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

⁶ Assignment of Error Nos. 8 and 9.

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).

In Curry, our Supreme Court concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific formal 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.” Curry, 118 Wn.2d at 916. However, the Curry court recognized that both RCW 10.01.160 and the federal constitution require consideration of the ability to pay. Id. at 915-16.

Here, there is insufficient evidence to support the trial court's express finding that Long has the present and future ability to pay legal financial obligations. CP 84 at § 2.5.

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.” Bertrand, 165 Wn. App. at 404 n.13 (quoting 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. at 404 (quoting Baldwin, 63 Wn. App. at 312) (internal citation omitted). A finding that is unsupported in the record must

be stricken. Bertrand, 165 Wn. App. at 405; *see also Calvin*, 302 P.3d at 522.

Here, the record does not show that the trial court took into account Long'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 express finding that he has the present or future ability to pay LFOs. To the contrary, the trial court found him indigent for purposes of pursuing this appeal (on file; SCOMIS sub-number 58, filed 4/17/13). The finding is simply not supported in the record. The finding is clearly erroneous and the directive to make monthly payments must be stricken from the Judgment and Sentence. *See Bertrand*, 165 Wn. App. at 405 (reversing the trial court's finding of the defendant's ability to pay LFOs, and stating that this reversal "forecloses the ability of the Department of Corrections to begin collecting LFOs from [the defendant] until after a future determination of her ability to pay."); *see also Calvin*, 302 P.3d at 522 (striking the trial court's ability to pay finding).

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. Compare 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), with 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 \$550 must also be stricken. Because the record does not reveal that the trial court took Long’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 court 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. Id. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. Id.

The trial court may order a defendant to pay court costs pursuant to RCW 10.01.160. However,

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 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 statutory provision does not require the trial court to enter formal, specific findings. *See* Curry, 118 Wn.2d at 916). But, in the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *See* Calvin, 302 P.3d at 521–22.

Here, the court ordered Long to pay discretionary costs of \$550 in court costs, as well as \$800 in mandatory fees, for a total LFO in the

amount of \$1,350. CP 84, 86–87 at ¶ 4.3. After considering Long’s “present and future ability to pay legal financial obligations” (in boilerplate language), the court imposed discretionary costs of \$550 in court costs. CP 84, 86–87. The court made an express finding that Long is or will be able to pay them. CP 84. However, the record reveals no balancing done by the court through inquiry into Long’s financial resources and the nature of the burden that payment of LFOs would impose on him. 10/8/12 RP 12–23. Further, there was no evidence of Long’s past, present or future employment, nor an inquiry into his resources or employability. *See Calvin*, 302 P.3d at 521. The trial court neither inquired into Long’s financial resources nor weighed how imposition of discretionary costs might realistically impact his situation.

The trial court’s imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) is an abuse of discretion. *See Baldwin*, 63 Wn. App. at 312 (stating this standard of review). The remedy is to strike the imposition of discretionary costs. *See Calvin*, 302 P.3d at 522.

D. CONCLUSION

For the reasons stated, the matter should be remanded to strike the restitution order in its entirety. The matter should also be remanded to strike the express finding of present and future ability to pay Legal Financial Obligations and remove the directive to make monthly payments, and to strike imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted on October 21, 2013.

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

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 21, 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:

Michael Lynn Long, Jr. (#332012)
Coyote Ridge Corrections Center
P. O. Box 769
Connell WA 99326-0769

E-mail:
prosecuting.attorney@co.chelan.wa.us
Douglas Shae
Prosecuting Attorney
P.O. Box 2596
Wenatchee, WA 98807-2596

s/Susan Marie Gasch, WSBA #16485