

FILED

DEC 03 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31620-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLAYTON M. COTTER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....2

 A. THERE WAS NO ERROR IN THE COURTS
 CALCULATION OF THE OFFENDER SCORE.....2

 B. THE DEFENDANT MAY NOT RAISE THIS
 ISSUE FOR THE FIRST TIME ON APPEAL3

CONCLUSION.....7

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE CADWALLADER, 155 Wn.2d 867,
123 P.3d 456 (2005)..... 2

STATE V. BALDWIN, 63 Wn. App. 303,
818 P.2d 1116 (1991) *amended by*,
837 P.2d 646 (1992)..... 7

STATE V. BERTRAND, 165 Wn. App. 393,
267 P.3d 511 (2011), *review denied* 175 Wn.2d 1014,
287 P.3d 10 (2012)..... 4, 6

STATE V. BLAZINA, 174 Wn. App. 906,
301 P.3d 492, *review granted*,
178 Wn.2d 101, 311 P.3d 27 (2013)..... 5

STATE V. FORD, 137 Wn.2d 472,
973 P.2d 452 (1999)..... 2

FEDERAL CASES

U.S. V. HUTCHINGS, 757 F.2d 11 (2d Cir.), *cert. denied*,
472 U.S. 1031, 105 S. Ct. 3511, 87 L. Ed. 2d 640 (1985)..... 5

UNITED STATES V. PAGAN, 785 F.2d 378 (2d Cir.), *cert. denied*,
479 U.S. 1017, 107 S. Ct. 667, 93 L. Ed. 2d 719 (1986)..... 5

COURT RULES

RAP 2.5..... 4

RAP 2.5(a) 4

RAP 2.5(a)(3)..... 4

I.

ASSIGNMENTS OF ERROR

1. The trial court erred in calculating Mr. Cotter's offender score in violation of RCW 9.94A.525(5)(a)(i).
2. The record does not support the implied finding that Mr. Cotter has the current or future ability to pay Legal Financial Obligations.
3. The trial court erred by imposing discretionary costs.

II.

ISSUES

1. Was the defendant's offender score miscalculated?
2. Does the record reflect that the defendant has the present and future ability to pay LFOs?
3. Did the trial court make any errors in imposing costs?

III.

STATEMENT OF THE CASE

The defendant was found guilty by jury on April 2, 2013, of Second Degree Assault. CP 184. The defendant filed this appeal with Division III of the Court of Appeals on April 19, 2013.

The only issues raised on appeal involve offender score calculations and Legal Financial Obligations (LFOs).

IV.

ARGUMENT

A. THERE WAS NO ERROR IN THE COURTS CALCULATION OF THE OFFENDER SCORE.

The defendant asserts that the trial court erred in calculating his offender score. The defendant believes that the court's error stems from three juvenile priors which the defendant insists should have been counted as one.

The defendant asserts that the State is required to "...establish on the record the existence and the classification of convictions...." This is a rather broad interpretation of *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999), which the defendant uses to support his statement. Actually, *Ford* was dealing with out-of-state convictions, both their existence and the comparison to Washington law. There were no out-of-state convictions involved in this case.

"A sentencing court may rely on a stipulation or acknowledgment of prior convictions without further proof." *In re Cadwallader*, 155 Wn.2d 867, 873, 123 P.3d 456 (2005). The defendant does not mention to this court that he signed a document containing and agreeing to his criminal history. CP 179-180. This document was mentioned by the sentencing court at the outset of sentencing:

“We have an understanding of defendant’s criminal history signed off on.”
RP 710.

Later the court stated: “I have in front of me a criminal history understanding signed by the parties. You calculate then his criminal history as a two?” RP 713. The defendant never questions the possibility of his prior crimes being counted as “1” under a same criminal conduct analysis. CP 184-195. The criminal history to which the defendant agreed lists his prior juvenile crimes separately. CP 179-180.

The defendant let the sentencing court proceed with an agreed criminal history. It is only now, on appeal, that the defendant raises criminal history issues. The State maintains that the defendant waived his right to raise this issue on appeal as he did not raise the issue at a time when the sentencing court could have fixed any alleged flaws.

**B. THE DEFENDANT MAY NOT RAISE THIS ISSUE FOR
THE FIRST TIME ON APPEAL.**

The defendant argues that the trial court erred in finding that he has the present and future abilities to pay LFOs. The defendant claims there is no factual support for the court’s findings. That is incorrect. Additionally, the defendant made no objection at sentencing.

RAP 2.5 provides that this court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). The only arguably applicable exception to the general rule would be RAP 2.5(a)(3), a manifest error affecting a constitutional right.

The defendant cannot show a constitutional violation as the court's holding has had no effect on the defendant. The court ordered that the defendant begin making payments of \$25 per month within two months of being released. RP 724. Since the defendant had 11 more months to serve, any payments would not become payable until 12 months in the future. RP 724. The court also advised the defendant what to do if he could not make a payment. RP 724.

This issue does not meet the requirements of RAP 2.5 and should be rejected.

The defendant cites to *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011), *review denied* 175 Wn.2d 1014, 287 P.3d 10 (2012), as support for this court accepting his LFO arguments in spite of his failure to object at sentencing. *Bertrand* is clearly inapplicable here as the trial court in *Bertrand* found a present and future ability to pay despite the fact that the defendant was disabled. *Bertrand, supra* at 404 fn 15. The court in *Bertrand* accepted review of the LFO issue because the sentencing was clearly in error. Such is not the case here.

Division II of the Court of Appeals has held that a failure to raise LFO issues at the trial level precludes appellate court review. *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492, *review granted*, 178 Wn.2d 101, 311 P.3d 27 (2013).

Thus, Division I and Division II have taken different approaches to cases in which a defendant fails to object to any of his LFO orders. Ultimately, even if the court decides to review the issue to which there was no objection, the particular case may lead to a finding that the issue is not ripe. Washington State has adopted the rationale of *United States v. Pagan*, 785 F.2d 378, 381-82 (2d Cir.), *cert. denied*, 479 U.S. 1017, 107 S. Ct. 667, 93 L. Ed. 2d 719 (1986) (*internal quotation marks omitted*) (*quoting U.S. v. Hutchings*, 757 F.2d 11, 14-15 (2d Cir.), *cert. denied*, 472 U.S. 1031, 105 S. Ct. 3511, 87 L. Ed. 2d 640 (1985)). The court in *Pagan* stated: “Constitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments “at a time when [the defendant is] unable, through no fault of his own, to comply.”

According to his defense counsel, the defendant in this case is 22 years of age. RP 719. The defendant has lived in Spokane his entire life. RP 719. The defendant’s entire family lives in Spokane. RP 719. The defendant had just begun working doing construction when he was arrested. RP 719. The defendant has a child which presumably will need financial support as well.

From the record it can be inferred that a 22-year-old person who had been working, could find work again. There was no indication in the record that the defendant has any permanent health problems.

The defendant claims that the trial court found the defendant indigent for purposes of this appeal. This is clearly “reaching” as the courts routinely make this finding so the defendant’s don’t have to pay appellate filing fees. By making the argument regarding indigency being proved by the trial court’s finding for the purpose of filing an appeal, the defendant has opened an issue with broad manifestations. The State formerly was mostly silent on pre-sentencing indigency issues. If defendant’s wish to use the trial court’s finding as a “sword,” the State will be forced to counter that situation by raising financial arguments at arraignment (regarding the appointment of a public defender) and at other points in the judicial process. There will need to be indigency hearings in nearly every case, solely to prevent defendants from using indigency arguments against the State. Since living arrangements, employment status, etc. can change quickly, the use of indigency hearings will be required solely to prevent the sort of argument being raised in this case. The burden will be upon the defendant to prove that he or she is actually indigent.

As noted by the defendant on appeal, [a] trial court is not required to enter formal findings of fact about a defendant's present or future ability to pay LFOs at the time of sentencing. *State v. Bertrand*, 165 Wn. App. at 404 (citing

State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991) amended by,
837 P.2d 646 (1992).

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the trial court's decisions on criminal history and LFOs be affirmed.

Dated this 3rd day of December, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent