

FILED

DEC 26, 2013

Court of Appeals
Division III
State of Washington

No. 31648-3-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CHARLOTTE DELENE BERGEN,
Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
Honorable Michael S. Mitchell, Judge Pro Tem - Sentencing hearing
Honorable M. Scott Wolfram, Judge - Motion hearing

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....6

 1. The sentencing court did not have statutory or inherent authority to impose a period of incarceration once the residential DOSA sentence had been granted.....6

 The appeal of this issue is not moot and review is otherwise appropriate.....13

 2. 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.....17

 a. The finding of ability to pay and the directive to pay monthly payments must be stricken.....17

 b. The imposition of discretionary costs of \$2,662.30 must also be stricken.....22

D. CONCLUSION.....24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	18
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)....	18
<i>City of Yakima v. Mollett</i> , 115 Wn. App. 604, 63 P.3d 177 (2003).....	16
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001)...	7
<i>In re Dependency of A.K.</i> , 162 Wn.2d 632, 174 P.3d 11 (2007).....	12
<i>In re Hayes</i> , 93 Wn.2d 228, 608 P.2d 635 (1980) (Rosellini, J. dissenting).....	10
<i>In re Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976).....	11
<i>In re Marriage of Irwin</i> , 64 Wn. App. 38, 822 P.2d 797 (1992).....	13
<i>In re Pers. Restraint of Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	7
<i>In re Pers. Restraint of Mines</i> , 146 Wn.2d 279, 45 P.3d 535 (2002).....	14
<i>In re Pers. Restraint of Myers</i> , 105 Wn.2d 257, 714 P.2d 303 (1986).....	16
<i>Ladenburg v. Campbell</i> , 56 Wn. App. 701, 784 P.2d 1306 (1990).....	11
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	19
<i>State ex rel. Lundin v. Superior Court</i> , 102 Wash. 600, 174 P. 473 (1918).....	11, 12
<i>State v. Ammons</i> , 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).....	7

<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	19, 20, 22, 24
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011)....	17, 19, 20, 21
<i>State v. Bird</i> , 95 Wn.2d 83, 622 P.2d 1262 (1980).....	11
<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492 (2013), <i>rev. granted</i> (Wash. Oct. 2, 2013).....	3, 17
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	19
<i>State v. Bryan</i> , 93 Wn.2d 177, 606 P.2d 1228 (1980).....	6
<i>State v. Calvin</i> , ___ Wn. App. ___, 302 P.3d 509 (2013)..	17, 20, 21, 23, 24
<i>State v. Clark</i> , 91 Wn. App. 581, 958 P.2d 1028 (1998).....	16
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	18, 19, 23
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	17
<i>State v. G.A.H.</i> , 133 Wn. App. 567, 137 P.3d 66 (2006).....	13, 14
<i>State v. Hale</i> , 94 Wn. App. 46, 971 P.2d 88 (1999).....	7, 10, 16
<i>State v. Harkness</i> , 145 Wn. App. 678, 186 P.3d 1182 (2008).....	9, 10
<i>State v. Kuster</i> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	3
<i>State v. Lohr</i> , 164 Wn. App. 414, 263 P.3d 1287 (2011).....	21, 22
<i>State v. Monday</i> , 85 Wn.2d 906, 540 P.2d 416 (1975).....	7
<i>State v. Mulcare</i> , 189 Wn. 625, 66 P.2d 360 (1937).....	7, 11, 12
<i>State v. Murray</i> , 118 Wn. App. 518, 77 P.3d 1188 (2003).....	9–10, 17
<i>State v. Peterson</i> , 145 Wn. App. 672, 186 P.3d 1179 (2008), <i>aff'd</i> , 168 Wn.2d 763, 230 P.3d 588 (2010).....	14

<i>State v. Salazar</i> , 170 Wn. App. 486, 291 P.3d 255, 258-59 (2012).....	12
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	16
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002).....	21
<i>State v. Shove</i> , 113 Wn.2d 83, 776 P.2d 132 (1989).....	10
<i>State v. Souza</i> , 60 Wn. App. 534, 805 P.2d 237, <i>recon. denied</i> , <i>rev. denied</i> , 116 Wn.2d 1026 (1991).....	21–22
<i>Westerman v. Cary</i> , 125 Wn.2d 277, 892 P.2d 1067 (1994).....	13

Statutes

RCW 9.94A <i>et seq.</i>	10
RCW 9.94A.030(5).....	6, 8
RCW 9.94A.660.....	7, 9, 13
RCW 9.94A.660(3).....	8
RCW 9.94A.660(6).....	9
RCW 9.94A.660(7)(a).....	13
RCW 9.94A.664(1).....	6, 8, 9
RCW 9.94A.703.....	9
RCW 9.94A.704.....	9
RCW 9.94A.737.....	9

RCW 9.94A.760(1).....	18
RCW 9.94A.760(2).....	18
RCW 10.01.160.....	17, 19, 22
RCW 10.01.160(1).....	18
RCW 10.01.160(2).....	18
RCW 10.01.160(3).....	18, 23, 24
RCW 36.18.020(2)(h).....	3
RCW 69.50.430(1).....	3

Other Resources

20 Am.Jur.2d <i>Courts</i> § 78 (1965).....	11
20 Am.Jur.2d <i>Courts</i> § 79 (1965).....	11

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Conclusion of Law 1 at CP 57:

That the Defendant can cite no case that prohibits the Court from continuing the Defendant's detention until such time as the Defendant can enter the treatment facility. Chapter 9.94A RCW does not prohibit the Court from ordering the continued detention pending an opening at the treatment facility.

2. The trial court erred in entering Conclusion of Law 2 at CP 57:

The Court has inherent authority to detain the Defendant from April 18, 2013 [date of entry of the Judgment and Sentence] until such time as she enters the residential facility [alteration added].

3. The sentencing court erred by continuing detention pending admission to a residential treatment facility.

4. The post-sentencing court erred by denying the defense motion for immediate release to community custody.

5. The record does not support the express finding that Ms. Bergen has the current or future ability to pay Legal Financial Obligations.

6. The trial court erred by imposing discretionary costs.

Issues Pertaining to Assignments of Error

1. Does a sentencing court exceed its statutory authority by continuing detention pending admission to a residential treatment facility?

2. Does a sentencing court lack inherent authority to continue detention pending admission to a residential treatment facility?

3. The issue of continued detention is not moot and should be decided by this court.

4. Should the directive to pay legal financial obligations based on an express 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?

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

B. STATEMENT OF THE CASE

On March 18, 2013, the defendant, Charlotte Delene Bergen, pled guilty as charged to one count of possession of methamphetamine, before the Honorable John W. Lohrman. CP 29; 3/18/13 RP 3–8.

One month later, Ms. Bergen was sentenced by the Honorable Michael S. Mitchell, Judge pro tem. CP 38; 4/18/13 RP 9–18. The court made a finding that Ms. Bergen has a chemical dependency that contributed to the offense. CP 30. Ms. Bergen has six prior felony convictions from 1995 to 2004, for possession of (5), or delivery of (1), drugs and a seventh conviction for possession of drugs in 2010. CP 31.

The court imposed discretionary costs of \$2,662.30¹ and mandatory costs of \$700², for a total Legal Financial Obligation (“LFO”) of \$3,362.30. CP 32–33 at ¶ 4.1. The trial court made an express finding that Ms. Bergen has the “ability or likely future ability” to pay the LFOs. CP 32 at ¶ 2.5.

The court did not inquire into Ms. Bergen’s financial resources, and the nature of the burden that payment of LFOs would impose. 4/18/13 RP 9–18. The trial court ordered Ms. Bergen to make monthly payments of not less than \$50, to begin shortly after the six months of expected treatment (outlined below). CP 33; 4/18/13 RP 13–14.

As requested by the parties, the court waived a standard range sentence of confinement and imposed 24 months' community custody in the form of a residential treatment-based drug offender sentencing

¹ \$200 court costs (A \$200 criminal filing fee imposed under RCW 36.18.020(2)(h) is mandatory, not discretionary. *See, e.g., State v. Blazina*, 174 Wn. App. 906, 911 n.3, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013). The \$200 in court costs imposed here was not labeled as the criminal filing fee by the trial court, and therefore, it cannot be considered as such. *See State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013)); \$187.30 sheriff fees including booking fee; \$775 fees for court-appointed attorney; \$500 drug enforcement fund, and \$1,000 VUCSA fine (RCW 69.50.430(1) provides that every person convicted of an applicable felony drug conviction “shall be fined \$1,000 ... “[u]nless the court finds the person to be indigent”. Ms. Bergen was found indigent for purposes of this appeal). CP 32–33.

² \$500 victim assessment, \$100 crime lab fee, \$100 DNA biological sample fee. CP 32–33.

alternative (DOSAs) sentence. CP 35; 4/18/13 RP 9–13. The sentence was conditioned on Ms. Bergen's entering and remaining in a certified residential chemical dependency treatment program for six months. CP 35.

Ms. Bergen had been in jail 59 days. CP 56, Finding of Fact 2; 4/18/13 RP 12. Now that she was sentenced to community custody, counsel did not know whether Ms. Bergen should be released from the jail pending entry into treatment.

MR. MAKUS [defense attorney]: One other matter has come up, Your Honor, and I don't have an answer. And that is DOC finding a bed date for her. And then either they provide transportation or she makes her own arrangements for transportation. But the question is what happens between now and the bed date? Is she kept in jail or is she out free? That has come up before and I was going to research the issue and I have not. And I don't know what the State's position on it would be in her particular case.

DOC, [the] last time we got in an argument about this, DOC was going to look it up, and there was sometimes they let them go free and sometimes they make them stay in, keep them in.

Couldn't find any authority. I haven't done that research myself. So I guess if the State resists allowing her to go free pending her bed date, then maybe we need to research that. The practicalities are if we let her go free she could go back to the drugs. On the other hand, the liberty interest is you just can't say well, if I was to let you free you would use drugs so you need to be incarcerated. It's kind of that situation. And I don't have an answer for the Court, although I should.

MR. GOLDEN [prosecutor]: That's pretty much exactly what I was going to say. The risk is to get out and relapse just before treatment, that doesn't do a whole lot of good. But maybe

I'm not understanding the exact sentence either. Sentenced to six months in treatment, or is it six months in some type of incarceration where she would get credit obviously for the time that she has been in?

4/18/13 RP 15–16.

The judge pro tem noted that being held in jail for a few days was a “different position” than being incarcerated for three months while waiting to enter treatment. The court asked the parties to check with Department of Corrections on a tentative available “bed date” (acceptance into treatment). In the meantime, the court ordered Ms. Bergen to be detained in jail. 4/18/13 RP 16–18.

Four days later, a hearing was held before the Honorable M. Scott Wolfram on defense counsel’s motion for Ms. Bergen’s immediate release to community custody. CP 40–41; 4/22/13 RP 1–5. The estimated “bed date” for Ms. Bergen’s entry into a treatment program was two months away, but more likely it would be sooner.³ Counsel noted the sentence under a residential DOSA consists of 24 months of community custody conditioned on the offender’s entering and completing a treatment program, and “community custody” does not include indeterminate incarceration pending a “bed date”. Counsel further argued it violates the

³ At hearing, a representative of DOC said Ms. Bergen’s bed date was currently June 13, 2013, but she was “very confident we’ll be able to get her in sooner than that.” 4/22/13 RP 4.

state constitution to lock citizens up preemptively because of the fear that if you let them go free, they will use drugs. RCW 9.94A.664(1); RCW 9.94A.030(5); CP 40–41; 4/22/13 RP 2–3, 5. The court, parties and DOC representative agreed the statute authorizing a residential DOSA sentence is silent as to whether an offender can or cannot be incarcerated pending admission into a treatment facility. 4/22/13 RP 3–5.

Nevertheless, the court denied the motion and ordered Ms. Bergen to remain incarcerated from “entry of the Judgment and Sentence ... until such time as she enters the residential treatment facility.” CP 57, Conclusion of Law 2.

[THE COURT]: I think because [the authorizing statute] is really silent, the Court has discretion. And I’m sure if I have screwed this up, the Court of Appeals will tell me; but at this point I’m going to continue [keeping] her in [jail].

4/22/13 RP 5 [alterations added].

This appeal followed. CP 58–59.

C. ARGUMENT

1. The sentencing court did not have statutory or inherent authority to impose a period of incarceration once the residential DOSA sentence had been granted.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the

power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). Whether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981(SRA) is an issue of law, which we review independently. *State v. Hale*, 94 Wn. App. 46, 54, 971 P.2d 88 (1999). Statutory construction is a question of law and is also reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). The general statute authorizing the superior court to impose a prison-based or a residential Drug Offender Sentencing Alternative sentence is RCW 9.94A.660. By imposing a DOSA sentence, the court necessarily waives imposition of a standard range sentence.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

RCW 9.94A.660(3).

The residential DOSA sentence is as follows:

(1) A sentence for a residential chemical dependency treatment-based alternative shall include a term of community custody equal to one-half the midpoint of the standard sentence range or two years, whichever is greater, conditioned on the offender entering and remaining in residential chemical dependency treatment certified under chapter 70.96A RCW for a period set by the court between three and six months.

RCW 9.94A.664(1). The term “community custody” means “that portion of an offender's sentence of confinement ... imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.” RCW 9.94A.030(5).

The residential DOSA sentence does not contain a provision for indeterminate incarceration pending a bed date. The sentence is, and must

be, two years⁴ of community custody conditioned upon entering and remaining in treatment. Community custody by definition does not include incarceration. While the DOSA statute allows the court and Department of Corrections to impose conditions of sentence⁵, it does not authorize pre-entry incarceration as a “condition” of sentence. The court below had no statutory authority to order Ms. Bergen’s incarceration pending the starting date of treatment.

Nor did the trial court have authority to modify the judgment and sentence to include pre-entry incarceration. “After final judgment and sentencing, the court loses jurisdiction to the DOC.” *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008). This leaves no room for inherent authority to be exercised by the sentencing court. *State v.*

⁴ RCW 9.94A.664(1) specifies that the term will be half the midpoint of the standard range or two years, whichever is greater. The residential DOSA is only available, however, if the midpoint of the standard range is 24 months or less. RCW 9.94A.660(3). Consequently, two years will always be greater than half the midpoint of the standard range.

⁵ RCW 9.94A.660 provides in pertinent part:

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW 9.94A.704 and 9.94A.737.

Murray, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003). A sentence imposed under the SRA may be modified only if it meets statutory requirements relating directly to the modification of sentences. *Harkness*, 145 Wn. App. at 685 (citing *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)). Examples include earned early release time as determined by the DOC, authorized furlough or leave of absence, serious medical issues, clemency or pardon, partial confinement for reestablishment in the community, or reduction in sentence due to prison overpopulation. *Id.* A court commits reversible error when it exceeds its sentencing authority under the SRA. *State v. Hale*, 94 Wn. App. at 53. Here, there was no statutory basis and the court’s imposition of incarceration pending entry into a treatment program exceeded its authority to modify the judgment and sentence.

The court below erroneously concluded it had “inherent authority” to detain Ms. Bergen, but cited no authority allowing it to impose an additional penalty that was not authorized by the DOSA statutes or RCW 9.94A *et seq.* CP 57.

The inherent powers of courts are generally limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction. *In re Hayes*, 93 Wn.2d 228, 608

P.2d 635 (1980) (Rosellini, J. dissenting); 20 Am.Jur.2d *Courts* § 78 (1965). Such powers are strictly procedural in nature and do not confer any substantive authority nor increase the jurisdiction of the court. *Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990).

Courts of this state have been recognized as possessing the power to: compel funding of their own functions; punish for contempt; insure a fair criminal trial; appoint counsel for a criminal defendant; grant bail; review actions of public officials; compel attendance of witnesses and the production of evidence; regulate practice of law; control photography in court; and correct errors in the records. *In re Juvenile Director*, 87 Wn.2d 232, 246, 552 P.2d 163 (1976); 20 Am.Jur.2d *Courts* § 79 (1965).

Washington courts have, however, consistently adhered to the view that the fixing of punishments for criminal offenses is solely a legislative function, subject, of course, to the constitutional limitation on the imposition of cruel and unusual punishment. *State v. Mulcare*, supra; *State ex rel. Lundin v. Superior Court*, 102 Wash. 600, 174 P. 473 (1918); *State v. Bird*, 95 Wn.2d 83, 622 P.2d 1262 (1980). As stated in *Mulcare*:

It is the function of the judicial branch of the government to determine the guilt of persons charged with crimes and to impose the sentence provided by law for the crime of which a particular individual has been found guilty. But the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative

in character and are properly exercised by an administrative body, according to the manner proscribed by the legislature. (Citations omitted).

Mulcare, 189 Wash. at 628–29, 66 P.2d 360.

The execution of a residential treatment-based DOSA sentence is a matter directly related to the punishment and reformation of offenders. Such functions, as stated above, are uniquely within the legislature's domain. See *State ex rel. Lundin v. Superior Court*, supra. In addition, the county's (and DOC's) application of pre-emptive incarceration pending admission into a treatment program to some offenders and not others is arbitrary and, thus, cannot be said to be necessary for the orderly and efficient administration of justice. Here, there were no allegations of contempt.⁶ There was no judicial right to “compel obedience” where the statute expressly provides that the sentence of community custody is contingent upon Ms. Bergen entering and remaining in a treatment

⁶ Even the exercise of inherent contempt power requires due process and a finding that statutory contempt procedures and remedies are inadequate. As discussed in *State v. Salazar*, 170 Wn. App. 486, 492-93, 291 P.3d 255, 258-59 (2012), “We review de novo a trial court's authority to impose sanctions for contempt. *In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007) (plurality opinion). Trial courts may not exercise their inherent contempt power to impose “punitive or remedial sanctions for contempt of court, whether that contempt occurs in or outside of the courtroom,” unless they “specifically find” all statutory contempt procedures and remedies are inadequate. *A.K.*, 162 Wn.2d at 652, 647, 174 P.3d 11. The remedy for the trial court's failure to make such a finding before exercising its inherent contempt power is vacation of the contempt orders entered as a result. *See A.K.*, 162 Wn.2d at 652–53, 174 P.3d 11.”

program. If the contingency is not met, the statute provides adequate remedies of revocation or modification of the alternative sentence.⁷ The legislature has established the sentence. Absent a statutory grant of authority, the superior court lacked inherent authority to order the incarceration challenged on appeal.

The appeal of this issue is not moot and review is otherwise appropriate. A case is moot when a court can no longer provide effective relief. *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). Appeals presenting moot issues are generally dismissed. *State v. G.A.H.*, 133 Wn. App. 567, 573, 137 P.3d 66 (2006).

A case is not moot if the error complained of is capable of repetition yet evades review. *In re Marriage of Irwin*, 64 Wn. App. 38, 60, 822 P.2d 797 (1992). This case is a classic example of the phenomenon. The indeterminate but likely short duration of continued

⁷ RCW 9.94A.660 provides in pertinent part:

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

confinement from entry of Judgment and Sentence to an available bed date ensures an appellant will have been unjustly denied his or her freedom, completed the maximum six months of treatment and be well into his or her two year term of community supervision before an appeal of the pre-emptive incarceration issue can be adjudicated on its merits.

Review is warranted even if this appeal is technically moot. This Court has the power to decide a technically moot case to resolve issues of continuing and substantial public interest. *State v. Peterson*, 145 Wn. App. 672, 675, 186 P.3d 1179 (2008), *aff'd*, 168 Wn.2d 763, 230 P.3d 588 (2010). Courts consider three criteria in determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented; (2) the need for a judicial determination for future guidance of public officers; and (3) the likelihood of future recurrences of the issue. *G.A.H.*, 133 Wn. App. at 573.

The criteria favor review in this case. Most cases in which appellate courts use the exception to the mootness doctrine involve issues of statutory or constitutional interpretation. *In re Pers. Restraint of Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). These types of issues tend to be more public in nature, more likely to arise again, and the decisions helpful to guide public officials. *Mines*, 146 Wn.2d at 285.

This appeal squarely raises statutory interpretation and inherent authority issues as matters of first impression. And because these are matters of first impression, a decision from this Court will provide guidance to trial judges, Department of Corrections, prosecutors, and the defense bar regarding whether a sentencing court has statutory and/or inherent authority to preemptively keep the recipient of a residential DOSA sentence incarcerated until such time as a bed date becomes available.

The record reflects this issue has previously arisen in Walla Walla County, with no meaningful resolution. Defense counsel noted, “I don’t have an answer. But the question is what happens between [sentencing] and the bed date? Is she kept in jail or is she out free? T[his] has come up before ... last time we got in an argument about this, DOC was going to look it up, and there was sometimes they let them go free and sometimes they make them stay in, keep them in. Couldn’t find any authority ... And I don’t have an answer for the Court, although I should.” 4/18/13 RP 15–16. The State and DOC representative also could not provide and answers or authority. 4/18/13 RP 16; 4/22/13 RP 4. The judge pro tem assumed the issue had come up “hundreds of times”, but chose to keep Ms. Bergen in custody while punting the issue to a superior court judge should defense

counsel wish to pursue it further. 4/18/13 RP 17. The judge who heard the motion for immediate release simply concluded it had inherent authority to keep Ms. Bergen incarcerated pending entry into the treatment program, and invited this Court to address the issue. CP 57, Conclusions of Law 1 and 2; 4/22/13 RP 5.

Based on the foregoing, it is also likely this issue will reoccur in Walla Walla County and throughout the state. *Cf. City of Yakima v. Mollett*, 115 Wn. App. 604, 606–07, 63 P.3d 177 (2003) (moot case reviewed due to absence of applicable case law interpreting court rule and corresponding need to provide judicial guidance; problem likely to recur given busy criminal docket). The likelihood of recurrence factor is not limited to the question of whether the appellant herself would be subjected to the same due process violation. Likelihood of recurrence includes whether the issue would recur for *others* in the future. *In re Pers. Restraint of Myers*, 105 Wn.2d 257, 261, 714 P.2d 303 (1986); *State v. Sansone*, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005). Review is warranted.

“But this issue is a matter of continuing public interest, ‘capable of repetition yet easily evading review.’ ” *Hale*, 94 Wn. App. at 52 (quoting *State v. Clark*, 91 Wn. App. 581, 584, 958 P.2d 1028 (1998)). In order to

clarify the sentencing court's authority and to provide future guidance, review is warranted. See *State v. Murray*, 118 Wn. App. at 521.

2. 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.

Mr. Bergen did not make these arguments below. But, illegal or erroneous sentences may be challenged for the first time on appeal. See *State v. Calvin*, ___ Wn. App. ___, 302 P.3d 509, 521 fn 2 (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 Ms. Bergen has the present and future ability to

pay legal financial obligations, and the directive to pay 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. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

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 Ms. Bergen has the present and future ability to pay legal financial obligations. CP 32 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 Ms. Bergen’s financial resources and the nature of the burden of imposing LFOs on her. The record contains no evidence to support the trial court's express finding that she has the present or future ability to pay LFOs. To the contrary, the trial court found her indigent for purposes of pursuing this appeal⁸, and was aware⁹ she was on SSI. 4/18/13 RP 14. The finding is simply not supported in the record. The finding is clearly erroneous and

⁸ On file; SCOMIS sub-number 47, Order of Indigency filed 5/2/13 and sub-number 54, Amended Order of Indigency filed 6/21/13.

⁹ The court intended to set the monthly payment amount at \$100, but reduced it to \$50 when Ms. Bergen indicated she was on SSI and asked to pay the lower amount. 4/18/13 RP 13–14. The court made no independent inquiry into Ms. Bergen’s financial situation.

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 it 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 \$2,662.30 must also be stricken. Because the record does not reveal the trial court took Ms. Bergen’s financial resources into account and considered the burden it would impose on her 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 discretionary costs pursuant to RCW 10.01.160. However,

[t]he 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 Ms. Bergen to pay discretionary costs of \$2,662.30. CP 32–33 at ¶ 4.1. The court made an express finding that Ms. Bergen is or will be able to pay them. CP 32 at ¶ 2.5. However, the record reveals no balancing done by the court through inquiry into Ms. Bergen’s financial resources and the nature of the burden that payment of LFOs would impose on her. 4/18/13 RP 9–18. Further, there was no evidence of Ms. Bergen’s past, present or future employment, nor an inquiry into her resources or employability. See *Calvin*, 302 P.3d at 521. Despite knowing that Ms. Bergen was on SSI, the trial court neither inquired into her financial resources nor weighed how imposition of discretionary costs might realistically impact her situation.

The trial court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was 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, this court should determine the issue of pre-emptive detention is not moot and address its merits, and the Order Detaining¹⁰ should be vacated with directions that the appellant be given future credit for pre-admission incarceration in the event the DOSA sentence is revoked in the future. 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 the imposition of discretionary costs from the Judgment and Sentence. Respectfully submitted on December 26, 2013.

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¹⁰ CP 56-57

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 26, 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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