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Court of Appeals
Division III
State of Washington

No. 31964-4-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ALBERTO CARDENAS-PADILLA,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Salvatore F. Cozza, Superior Court Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....3

The directive to pay 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.....3

a. The directive to pay-must be stricken.....4

b. The imposition of discretionary costs of \$200 must also be stricken.....7

D. CONCLUSION.....10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....	4
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	6
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	6, 8, 9

<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	3, 6, 7, 9
<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492, <i>review granted</i> , 178 Wn.2d 1010, 311 P.3d 27 (2013).....	3, 4, 9
<i>State v. Bower</i> , 64 Wn. App. 808, 827 P.2d 308 (1992).....	3
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	6
<i>State v. Calvin</i> , 316 P.3d 496, 508 (Wash. Ct. App. 2013).....	4
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	4, 5, 8
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	3
<i>State v. Duncan</i> , No. 29916-3-III, 2014 WL 1225910, at *2-6 (Wash. Ct. App. March 25, 2014), petition for review filed April 24, 2014.....	3
<i>State v. Kuster</i> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	9
<i>State v. Quintanilla</i> , 178 Wn. App. 173, 313 P.3d 493, 497 (2013).....	4

Statutes

RCW 10.01.160.....	3, 5, 7, 8
RCW 10.01.160(1).....	4
RCW 10.01.160(2).....	5
RCW 10.01.160(3).....	4, 5, 8, 9
RCW 9.94A.760(1).....	4
RCW 9.94A.760(2).....	4
RCW 36.18.020(2)(h).....	9

A. ASSIGNMENTS OF ERROR

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

2. The trial court erred by imposing discretionary costs.

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. Did the trial court abuse its discretion in imposing discretionary costs where it did not take Mr. Cardenas-Padilla's financial resources into account, nor consider the burden it would impose on him, as required by RCW 10.01.160?

B. STATEMENT OF THE CASE

The jury found Mr. Cardenas-Padilla guilty of two counts of violation of a no-contact order and not guilty of a third alleged violation of a no-contact order. CP 144-146. At sentencing, the trial court imposed discretionary costs of \$200 and mandatory costs of \$600, for a total Legal Financial Obligation (LFO) of \$800. CP 167; 9/4/13 RP 341. The court

made no express finding that he had the present or future ability to pay the LFOs. CP 164; 9/4/13 RP 340–41. The Judgment and Sentence contains the following language:

2.5 Legal Financial Obligations/Restitution. 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.

...

CP 164.

The court did not inquire into Mr. Cardenas-Padilla’s financial resources, and the nature of the burden that payment of LFOs would impose. 9/4/13 RP 340–41. The court ordered him to make monthly payments of “not less than \$25 per month commencing [September 5, 2014]”. CP 168.

Mr. Cardenas-Padilla appealed. CP 174–75.

C. ARGUMENT

The directive to pay 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.

Although Mr. Cardenas-Padilla did not make these arguments below, illegal or erroneous sentences may be challenged for the first time on appeal.¹ *See 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) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal); *State v. Bower*, 64 Wn. App. 808, 810, 827 P.2d 308 (1992) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492, *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013) (declining

¹ Mr. Cardenas-Padilla is aware that this Court recently issued an opinion holding that this issue may not be challenged for the first time on appeal. *See State v. Duncan*, No. 29916-3-III, 2014 WL 1225910, at *2-6 (Wash. Ct. App. March 25, 2014), petition for review filed April 24, 2014. However, whether this issue can be raised for the first time on appeal is now pending before the Washington Supreme Court in *State v. Blazina*, No. 89028-5, consolidated with *State v. Paige-Colter*, No. 89109-5. The cases were scheduled for oral argument February 11, 2014. Therefore, Mr. Cardenas-Padilla raises this issue in order to preserve his argument, should the Washington Supreme Court overrule this Court's opinion in *Duncan*.

to consider the challenge for the first time on appeal); *State v. Calvin*, 316 P.3d 496, 508 (Wash. Ct. App. 2013) (declining to consider the challenge for the first time on appeal); *State v. Quintanilla*, 178 Wn. App. 173, 313 P.3d 493, 497 (2013) (acknowledging *State v. Blazina*, but also discussing the merits of the LFO issue raised by the defendant).

a. The directive to pay-must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. Cardenas-Padilla 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.

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 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 implied finding that Mr. Cardenas-Padilla has the present and future ability to pay legal financial obligations. The trial court considered Mr. Cardenas-Padilla's “present and future ability to pay legal financial obligations” but made no express finding that he had the present or future ability to pay those LFOs. CP 164. The finding, however, is implied

because the court ultimately ordered Mr. Cardenas-Padilla to make monthly payments of no less than \$25 per month, beginning a year after the date of sentencing. CP 168.

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.

Here, the record does not show that the trial court took into account Mr. Cardenas-Padilla'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. To the contrary, the trial court found him indigent for purposes of pursuing this appeal. *See* Order of Indigency on file. The implied finding that he has the present or future ability to pay LFOs that is implicit in the directive to make monthly payments of no less than \$25 beginning on a date certain in the future 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.").

b. The imposition of discretionary costs of \$200 must also be stricken. Because the record does not reveal that the trial court took Mr. Cardenas-Padilla'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. *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:

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).

Here, the court ordered Mr. Cardenas-Padilla to pay a total Legal Financial Obligation (LFO) of \$800. After considering only his “present

and future ability to pay legal financial obligations” (in boilerplate language), the court imposed discretionary costs of \$200. CP 167; 9/4/13 RP 341. 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. at 911 n.3. However, the \$200 in court costs imposed here was not labeled as a 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).

At a minimum, the imposition of discretionary costs represents an implied finding that Mr. Cardenas-Padilla is or will be able to pay them. However, the record reveals no balancing by the court through inquiry into Mr. Cardenas-Padilla’s financial resources and the nature of the burden that payment of LFOs would impose on him. 9/4/13 RP 340–41.

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 the discretionary costs of \$200. *See Bertrand*, 165 Wn. App. at 405.

D. CONCLUSION

For the reasons stated, the matter should be remanded to strike the implied finding of present and future ability to pay Legal Financial Obligations by removing the directive to make monthly payments, and to strike the imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted on May 19, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 19, 2014, 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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