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Court of Appeals  
Division III  
State of Washington

31964-4-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALBERTO CARDENAS-PADILLA, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE SALVATORE F. COZZA, SPOKANE SUPERIOR  
COURT JUDGE

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BRIEF OF RESPONDENT

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**I. APPELLANT'S ASSIGNMENTS OF ERROR**

- A. The record does not support the implied finding that Mr. Cardenas-Padilla has the current or future ability to pay Legal Financial Obligations.
- B. The trial court erred by imposing discretionary costs.

**II. ISSUES PRESENTED**

- A. Does the record contain facts which could be used by the sentencing court to impose legal financial obligations?
- B. Can the defendant raise these issues for the first time on appeal?
- C. Has the defendant established that this case is ripe for discussion considering that the defendant has not yet been required to make payments?

**III. STATEMENT OF THE CASE**

For the purposes of this appeal the State accepts the defendant's version of the Statement of the Case.

**IV. ARGUMENT**

- A. THE TRIAL COURT HAD ESSENTIAL DATA TO DETERMINE THAT THE DEFENDANT HAD THE ABILITY TO MAKE PAYMENTS ON HIS LFOs.

It is clear from existing case law that the trial court has the discretion to determine the payment of fees and the rate at which LFOs are to be paid. RCW 10.01.160(3). It does not appear from defendant's

briefing that he contests the powers and authority of the trial court to set amounts and pay rates for LFOs.

The defendant only contests an alleged lack of evidence upon which the trial court might base its holdings. An examination of the sentencing record reveals that the court was told by defense counsel that he had received a letter from the defendant's employer that the defendant would be welcomed back if released. RP 331. According to the defendant he received a CDL Class license and is close to getting a GED. RP 338. The sentencing court would be well within its discretion to believe that a person with a CDL Class A license would be employable as a truck driver. There is nothing in the record indicating physical disabilities of any type.

The defendant's arguments can be shown to be incorrect simply by reference to the sentencing transcript. The court's imposition of discretionary fines and costs were clearly supported.

**B. THE DEFENDANT MAY NOT RAISE THESE ISSUES 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. These issues were not raised at the 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 \$25.00 starting September 5, 2014. RP 341.

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), 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 2013 (rev. granted). Because

*Blazina* has been argued and is awaiting the issuance of an opinion, the State suggests that perhaps staying this appeal might be a wise choice.

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.’”

The trial court was 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*, *supra*, at 404 (*citing State v. Baldwin*, 63 Wn.App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991), *review denied*, 175 Wn.2d 1014 (2012)).

C. THIS CASE IS NOT YET RIPE FOR REVIEW

Lastly, the issues being argued by the defendant are not ripe until attempts to collect the fees are undertaken. *State v. Lundy*, 176 Wn.App. 96, 308 P.3d 755 (2013).

V. CONCLUSION

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

Dated this 14<sup>th</sup> day of July, 2014.

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

STATE OF WASHINGTON

Respondent,

v.

ALBERTO CARDENAS-  
PADILLA

Appellant

NO. 31964-4-III

Superior Court No. 13-1-00683-0  
PA# 13-9-47926-0

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 14, 2014, I emailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement to:

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**I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.**

7/14/14

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)