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Jul 24, 2014

Court of Appeals

Division III

State of Washington

32112-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN T. HAMRE

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE SALVATORE F. COZZA, SPOKANE SUPERIOR
COURT JUDGE

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

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

II. ISSUES PRESENTED

- A. Can the defendant raise these issues for the first time on appeal?
- B. Has the defendant established that this case is ripe for review 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.

V. ARGUMENT

- A. THE DEFENDANT MAY NOT RAISE THESE ISSUES FOR THE FIRST TIME ON APPEAL.

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 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.

B. DEFENDANT HAS NOT BEEN REQUIRED TO MAKE PAYMENTS, THEREFORE THIS ISSUE IS NOT RIPE FOR REVIEW

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 at sentencing 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.’” *Pagan, supra*, at 381.

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*, 165 Wn.App. 393, 404, 267 P.3d 511 (2011) (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)).

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). The defendant was ordered to pay \$25.00 per month starting on September 15, 2014. RP 133. As of the date of this brief, that date has not arrived and this case is therefore not ripe for review.

V. CONCLUSION

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

Dated this 24 day of July, 2014.

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DIVISION III

STATE OF WASHINGTON,)
)
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)
 v.)
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JOHN T. HAMRE,)
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)
 Appellant,)
)

NO. 32112-6-III
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 24, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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and mailed a copy to:

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7/24/14 Spokane, WA Kim Cornelius
(Date) (Place) (Signature)