

FILED
July 28, 2014
Court of Appeals
Division III
State of Washington

NO. 32196-7-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ERNIE ANDREW SMITH, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable John D. Knodell, Judge

No. 12-1-00653-1

BRIEF OF RESPONDENT

D. Angus Lee
Prosecuting Attorney

By
STEVEN P. JOHNSON, JR.
Deputy Prosecuting Attorney
WSBA # 43313

GRANT COUNTY PROSECUTOR'S OFFICE
P.O. BOX 37
Ephrata, WA 98823-0037
(509) 754-2011

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

Did the trial court abuse its discretion in ordering the defendant to pay costs when the issue is neither preserved for appeal nor ripe for review and the record supported a finding that Smith had the ability to pay LFOs?

B. STATEMENT OF THE CASE.

On December 3, 2012, the Grant County Prosecutor's Office filed an information in Cause No. 12-1-00653-1, charging ERNIE ANDREW SMITH with one count of attempting to elude a police vehicle and one count of driving while license revoked in the first degree. CP 1-2. After hearing all of the evidence, a jury found Smith guilty of both counts. 2RP 171-176. The trial court sentenced Smith on January 14, 2014 to 17 months on Count 1 and 364 days with 184 days suspended on Count 2, to be served consecutively. 1RP¹ 61-62; CP 51, 56. The trial court also ordered Smith to pay \$1,050 in total financial obligations, consisting of \$700 in mandatory costs and \$350 in discretionary costs. 1RP 61, CP 53-

¹ There are two (2) verbatim reports of proceedings. 1RP refers to the transcripts from Kenneth Beck, 2RP refers to the transcripts from Tom Bartunek.

54. Smith stated, “I will be able to pay off – all the – all the legal financial obligations.” IRP 69.

According to Smith’s declaration of indigency, signed January 6, 2014, he does not receive welfare, SSI, or disability benefits, but receives \$350 (presumably per month) in food stamps and medical coupons. CP 71-75. In his declaration, Smith states his 15 year-old son depends on him for support, although Smith’s son does not live with him and Smith provides no information regarding the amount of support he pays each month; Smith claims no other dependents. CP 73.

C. ARGUMENT

1. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In this case, Smith does not claim any of the three circumstances listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal. The defendant made no objection to the imposition of LFO’s.

1RP 61. Therefore, the defendant did not properly preserve this issue for appeal.

The Washington Court of Appeals, Division II recently decided this issue. In *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), Blazina argued that the trial court's finding that he had the future ability to pay his LFOs was in error and that the record did not support the "boilerplate finding... because there was no discussion on the record and no documentary evidence presented to support it." Blazina challenged the same fees in question here and did not object to the finding, made at sentencing, that he had the current or likely future ability to pay. *Id.* The court distinguished that case from *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), on grounds that Bertrand had disabilities which might affect that finding, while nothing in Blazina's case would similarly affect that finding. Because Blazina did not object during sentencing and there was no claim of a particularized reason Blazina could not pay financial obligations, the court refused to let him raise the issue for the first time on appeal. *Id.*

Smith's reliance on *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996), is also clearly erroneous. Smith attempts to analogize his case with *Moen* by overstating the Court's holding. Br. of Appellant at 5. The Court held that Moen could raise the issue of the trial court's failure to

adhere to the 60-day limit to impose restitution because the trial court lacked the statutory authority to impose restitution once the time limit passed. *Moen*, 129 Wn.2d at 547-48. In so holding, the Court distinguished the time limit for imposing restitution from other errors not preserved for appeal, stating, “[Th]e purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error.” *Id.* at 547. Unlike a timely objection to LFOs, where the trial court would have the opportunity to correct any error, once the 60-day limit to impose restitution lapses, “All that is involved is a court ruling the restitution order invalid because the timeliness requirement has not been met. Whether the trial court or the appellate court makes that determination is a distinction with little difference, once the time period has passed.” *Id.*

Smith has no disability or other particularized reason he cannot pay financial obligations in the future. In fact, he is able-bodied and will have no one to support in a few years. He did not object to this amount during his sentencing. He also stated on the record that he would be able to pay all of the imposed LFOs. For these reasons, the court should not consider this matter because the issue is not properly before the court.

2. *The issue is not ripe for review.*

The courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3).

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(1)(2). The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

A court order establishing legal financial obligations alone does not curtail the liberty of a defendant. *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009), citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Id.*

Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. *State v. Woodward*, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. The State has not sought enforcement of the costs. Therefore, Smith's liberty has not been curtailed and the determination as to whether the trial court erred is not ripe for adjudication. The time to challenge the costs is at the time the State seeks to collect them because while the defendant may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature.

3. *The trial court did not err in ordering the defendant to pay legal financial obligations.*

Different components of defendant's financial obligations require separate analysis. *State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991).

While the sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard, the decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. *Baldwin*, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against the burden of his obligation before imposing attorney fees. *Id.*

Pursuant to RCW 10.01.160, the court may require defendants to pay *court costs* and other assessments associated with bringing the case to trial. The statute also includes the following constitutional safeguards:

- (1) A sentencing court may impose repayment of court costs only if it determines that the defendant is or will be able to pay, and
- (2) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs.

RCW 10.01.160(1)(2).

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

Here, Smith argues that the record is insufficient to determine whether the trial court would have imposed LFOs. This argument is only regarding \$350 of the \$1050 imposed, as Smith implicitly concedes that the other \$700 of imposed LFOs were mandatory. Br. of Appellant at 21. Smith claims that the remedy for the insufficiency of the record is remand, but only cites an inapposite case, *State v. Parker*, 132 Wn.2d 182, 937 P.2d 575 (1997), as supporting authority. The Court in *Parker* held that it was unclear that the trial court incorrectly calculated the standard range sentence for Parker and the record was insufficient to determine that the trial court would have imposed an identical sentence if it had calculated the standard range correctly. *Parker*, 132 Wn.2d at 192-93. The Court in *Parker* makes no mention of LFOs or any standard of review regarding insufficiency of the record for determining LFOs.

Division Two was faced with a similar situation to the present case in *Lundy*. The trial court did not discuss Lundy's future ability to pay LFOs before sentencing. *Lundy*, 176 Wn. App. at 107. Still, the court held that there was nothing in the record that established Lundy's indigency was permanent; Lundy did not claim a disability, would be 40 years-old when released, and claimed a desire to become a productive citizen. *Id.* at 107-08. The court held this record was sufficient to affirm Lundy's sentence. *Id.* at 108.

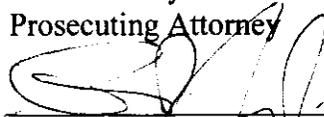
The present case is much more similar to *Lundy* because in conjunction with statutory authority which compels the court to impose LFOs, the court properly found that the defendant has the present and future ability to pay LFOs. Smith provided no information that he will not be able to earn money in the future. CP 71-75. The evidence during trial also demonstrated that Smith is able-bodied and of sound mind; the record shows that the defendant ran away from police and was able to communicate clearly with law enforcement. 2RP 83, 87. Smith even stated that he would be able to pay the LFOs. 1RP 69. Therefore, this Court should affirm the trial court's imposition of LFOs

D. CONCLUSION

For the foregoing reasons, the State asks this court to affirm the judgment and sentence below.

DATED: July 28, 2014

D. ANGUS LEE
Grant County
Prosecuting Attorney



STEVEN P. JOHNSON, JR.
Deputy Prosecuting Attorney
WSBA # 43313