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FEBRUARY 3, 2015
Court of Appeals
Division III
State of Washington

NO. 32467-2-III

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

STATE OF WASHINGTON, RESPONDENT

v.

PATRICK E. PEARSON, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable Evan E. Sperline

No. 14-1-00023-8

Brief of Respondent

GARTH DANO
Prosecuting Attorney

By
CHAD JENKS
Deputy Prosecuting Attorney
WSBA # 43736

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 794-2011

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

1. Whether defendant failed to preserve his claim regarding his ability to pay LFOs for appellate review when he did not object to the imposition of costs at his sentencing hearing and does not demonstrate that his claim may be raised under RAP 2.5(a)?

2. Whether the issue regarding defendant's ability to pay LFOs is ripe for review when the State has not sought enforcement of costs, and the examination of a defendant's ability to pay LFOs is done at the time of enforcement?

3. Whether the record supported imposition of LFOs where defendant was only 41 years old and had potential for full-time work?

B. STATEMENT OF THE CASE.

On April 10, 2014 a jury found Patrick Elliot Pearson (defendant) guilty of burglary in the second degree. CP 24. The trial court sentenced defendant on May 6, 2014 to 60 months of confinement. CP 72–76. Included in that sentence was a legal financial obligation (LFO) of \$1,606.72. CP 78–79. On that same date, defendant filed a Notice of

Appeal to this Court. CP 92. Defendant filed his appeal brief on December 6, 2014.

C. ARGUMENT.

1. THE ISSUE OF DEFENDANT'S ABILITY TO PAY LFOs IS NOT PROPERLY BEFORE THE COURT AS DEFENDANT DID NOT OBJECT TO THE IMPOSITION OF COSTS BELOW AND DOES NOT DEMONSTRATE THAT HIS CLAIM MAY BE RAISED UNDER RAP 2.5(a).

The sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). 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 must also impose restitution whenever the defendant is convicted of an offense that results in injury to any person or damage to or loss of property. RCW 9.94A.753(5).

- a. Defendant failed to preserve the issue for appellate review by not objecting to the imposition of costs at his sentencing hearing.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); Rules of Appellate Procedure (RAP) 2.5(a). For the first time on appeal, defendant raises the issue of his ability to pay his LFOs. Defendant did not object to the imposition of LFOs at his sentencing hearing.¹ RP 38–50.² Because defendant did not object at any time to the imposition of LFOs or the court’s finding that he had the ability to pay, the issue is not preserved for appellate review. As defendant did not properly preserve this issue for

¹ Though not explicitly noted as an objection, defendant did express some uncertainty about having to pay restitution for the dog’s boarding fee. RP 42. The court indicated in its judgment that restitution was limited to the \$156.72 amount that only reflected the damage to the door and lock, and to which defendant expressly agreed, as reflected in the Judgment and Sentence. RP 44; CP 79.

² The verbatim report of proceedings referenced in this response brief consists of pretrial and sentencing proceedings that occurred before the Honorable Evan E. Sperline on March 31, 2014, April 7, 10, 14, and 21, 2014, and May 6 and 12, 2014. The proceedings on these dates are consecutively paginated in one volume.

appellate review, this Court should refuse to review his claim. *See Riley*, 121 Wn.2d at 31.

- b. Defendant does not demonstrate this claim may be reviewed under RAP 2.5(a).

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. RAP 2.5(a).

In this case, defendant 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. Defendant made no objection to the imposition of LFO's. RP 45. Therefore, defendant did not properly preserve this issue for appeal. For these reasons, the court should not consider this matter because the issue is not properly before the court.

2. THE ISSUE REGARDING DEFENDANT'S ABILITY TO PAY LFOs IS NOT RIPE FOR REVIEW WHEN THE STATE HAS NOT SOUGHT ENFORCEMENT, AND THE EXAMINATION OF A DEFENDANT'S ABILITY TO PAY LFOs IS DONE AT THE TIME OF ENFORCEMENT.

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).

As previously mentioned, constitutional safeguards exist within the statute to prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160. 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).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *State v. Smits*, 152 Wn. App. 514, 523–24, 216 P.3d 1097 (2009) (citing *Baldwin*, 63 Wn. App. at 310–11). 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, 703–04, 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, defendant challenges the court's imposition of LFOs claiming it erred in when it found defendant had the present or future ability to pay costs. The State has not sought enforcement of the costs; therefore, 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. Defendant's challenge to the court costs is premature.

3. THE RECORD SUPPORTS THE IMPOSITION OF LFOs.

Finally, defendant argues that the trial court erred when it concluded that he had the present or future ability to pay restitution and other LFOs. Formal findings of fact are not required as a predicate for imposing financial obligations on a defendant. *Baldwin*, 63 Wn. App. at 312.

The defendant relies on *Bertrand* for the proposition that the record does not contain evidence that demonstrates the defendant's present or future ability to pay LFOs. Appellant's Br. at 9–11 (citing *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011)). The Court in *Bertrand* found error in the trial court's finding that Bertrand had the present or future ability to pay LFOs because she was disabled and the record contained no evidence to support its finding. *Bertrand*, 165 Wn. App. at 404.

This case is distinguishable from *Bertrand* because the record shows that defendant has the present and future ability to pay his LFOs and does not show that defendant is disabled. Among other things, the record shows that defendant had potential full-time work not only “definitely through the summer, but potentially beyond that,” according to defendant himself. RP 42. He was close to getting his driver's license for

the first time in ten years after he obtained SR-22 insurance. RP 42. The record also shows that defendant is only 41 years old. RP 41. Furthermore, unlike *Bertrand* where the record showed that the defendant was disabled, there is nothing in the record here to suggest that defendant cannot pay his LFOs.

The court should affirm the trial court's imposition of LFOs because in conjunction with statutory authority which compels the court to impose LFOs, the court properly found that defendant has the present and future ability to pay LFOs. There is sufficient evidence in the record for the court to determine that defendant has the ability to pay his LFOs because he appeared to be an able-bodied, 41-year-old person.

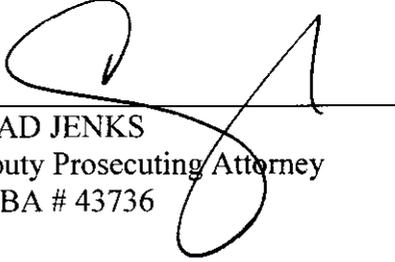
D. CONCLUSION.

Defendant failed to preserve his right to appeal the imposition of the LFOs when he failed to object at the sentencing hearing. Furthermore, the issue is not ripe for review because there is no evidence the State has sought collection of the LFOs. Finally, the sentencing court had sufficient evidence on the record to determine that defendant had the ability to pay the LFOs in this case because defendant, who was only 41 years old at the time of sentencing, stated to the court that he had potential full-time work.

For these reasons, the State respectfully requests this Court to affirm defendant's sentence and to deny defendant's appeal.

DATED: February 2, 2015

GARTH DANO
Grant County
Prosecuting Attorney



CHAD JENKS
Deputy Prosecuting Attorney
WSBA # 43736

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32467-2-III
)	
vs.)	
)	
PATRICK E. PEARSON,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

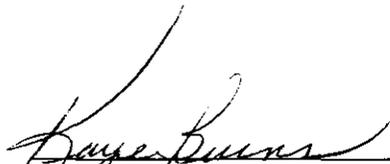
That on this day I served a copy of the Brief of Respondent in this matter by e-mail on David N. Gasch, Attorney for Appellant, receipt confirmed, pursuant to the parties' agreement:

David N. Gasch
Gasch Law Firm
gaschlaw@msn.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Patrick E. Pearson - #841425
PO Box 769
Connell WA 99326

Dated: February 3, 2015.



Kaye Burns