

**NO. 32799-0-III**  
**STATE OF WASHINGTON**  
**COURT OF APPEALS - DIVISION III**

FILED  
JUNE 17, 2015  
Court of Appeals  
Division III  
State of Washington

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JUAN MANUAL REYES**

**Appellant.**

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**APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

**SHAWN P. SANT**  
**Prosecuting Attorney**



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## A. ISSUES

1. **THE APPELLANT WAS SENTENCED TO A TERM OF THIRTY-SIX (36) MONTHS OF COMMUNITY CUSTODY FOR THE CRIME OF ROBBERY IN THE FIRST DEGREE. DID THE TRIAL COURT COMMIT ERROR BY IMPOSING THIS LENGTH OF COMMUNITY CUSTODY FOR A CRIME THAT IS CLASSIFIED AS A “SERIOUS” RATHER THAN A “SERIOUS VIOLENT” CRIME?**
2. **DOES THE TRIAL COURT HAVE THE AUTHORITY TO ORDER THE APPELLANT TO PAY THE INVESTIGATOR FEES AS PART OF HIS COURT COSTS AS IMPOSED AT SENTENCING?**

## B. STATEMENT OF THE CASE

### **1. PROCEDURAL HISTORY**

Appellant, Juan Manual Reyes, was charged by an Information filed March 4, 2014, with the felony crime of Robbery in the First Degree, RCW 9A.56.190 and 9A.56.200(1)(a)(ii), a class “A” felony. (CP 6). The Appellant was arraigned on March 11, 2014 (CP 11) and was found guilty by jury verdict on August 21, 2014 of the crime charged. (CP 51). The Appellant was sentenced on September 30, 2014 by the Honorable Vic L. VanderSchoor

to 40 months of incarceration and filed a notice of appeal on  
The same date. (CP 62).

## **2. FACTS**

Respondent accepts and relies upon the Appellant's statement of facts and requests it be incorporated within Respondent's brief. The respondent asks the court to consider the additional facts as follows. The trial court indicated at the time of sentencing, "Criminal history includes possession of controlled substance October of 13. Victim assessment of \$500, court costs total \$579.99, attorney fees \$700, court-appointed defense expert \$489.18, fine of \$500, DNA fee \$100, DNA testing pursuant to paragraph 4.2." (RP 9/30/14; page 160, lines 12-18). The trial court did review a signed affidavit from Appellant regarding his finances to support his request for a court-appointed attorney to assist in his appeal." (RP 9/30/14; page 163).

## **C. ARGUMENT**

- 1. THE TRIAL COURT INCORRECTLY IMPOSED THIRTY-SIX MONTHS COMMUNITY CUSTODY FOR THE CRIME OF ROBBERY IN THE FIRST DEGREE.**

The Respondent agrees the correct term of community custody to be imposed at sentencing for the crime of Robbery in the First Degree is eighteen (18) months. The matter should be remanded to the sentencing court to correct this one error in the Judgment and Sentence.

**2. THE TRIAL COURT PROPERLY IMPOSED THE INVESTIGATOR FEES EXPENDED FOR THE APPELLANT'S DEFENSE AS A PART OF COURT COSTS.**

The trial court imposed defense costs in the amount of \$489.18 for the cost of the defense investigator assigned to the matter at defendant's request.

“Whenever a person is convicted in superior court, the court may order the payment of legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.” RCW 9.94A.760(1)

The finding of the court concerning the defendant's ability to pay has no impact on the defendant's rights, it does not need to be reviewed by the appellate court. By statute, the victim penalty assessment and biological sample fee

may be collected without any finding concerning the defendant's ability to pay. The sole issue in this case, raised for the first time on appeal, concerns the collection of \$489.18 in legal financial obligations. Appellant challenges the trial court's finding that he is responsible for court appointed defense expert and other defense costs in the amount of \$489.18.

The imposition of non-mandatory legal financial obligations, such as court costs and recoupment for appointed counsel, requires the sentencing court to consider the defendant's financial resources. RCW 10.01.160(3). However, formal findings are not required. *State v. Baldwin*, 63 Wn.App. at 310. The record at sentencing must merely be sufficient to review whether the trial court considered the financial resources of the defendant and the nature of the burden that would be imposed by the financial obligations. *State v. Bertrand*, 165 Wn.App. 393, 404, 267 P.3d 511 (2011).

The Supreme Court held the statutory provisions as set out in RCW 10.01.160 satisfy constitutional

requirements. The court rejected any requirement for specific findings regarding a defendant's ability to pay.

According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

*Curry*, 118 Wn.2d at 916.

*Curry* went on to consider the validity of victim penalty assessments. Unlike RCW 10.01.160, the statute on victim assessments does not contain any provision for consideration of indigency. The court nonetheless held that the statute was constitutionally valid:

[T]here are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants. Under [former] RCW 9.94A.200, a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. . . .thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

*Curry*, 118 Wn.2d at 918 (citations omitted).

Under *Curry*, neither the imposition nor the collection of the victim penalty assessment depends on a prior showing of ability to pay. Rather, the proper time for consideration of indigency is at a sanctions hearing. If the lack of payment is not willful, sanctions may not include incarceration. The statutes governing the biological sample is substantially identical to that governing the victim assessment, so the same reasoning should apply to those fees as well.

In *Baldwin*, Division One applied the holding of *Curry*. The trial court had imposed \$85.00 in court costs and \$500.00 for recoupment of attorney fees. With regard to the \$85.00 in court costs, the court held that *Curry* was dispositive as to their validity. *Baldwin*, 63 Wn.App. at 308-09. The \$500.00 attorney fee assessment, however, implicated the defendant's constitutional right to counsel. The court still held that the assessment was valid without a specific finding of ability to pay. Under RCW 10.01.160, the court was required to consider the defendant's financial resources. The record showed that the court had done so.

Consequently, the imposition of the \$500.00 assessment was not an abuse of discretion. *Baldwin*, 63 Wn.App. at 311-12.

In *Bertrand*, division Two purported to apply the court's holding in *Baldwin*, but its analysis is murky. The trial court in *Bertrand* imposed \$4,304.00 in "legal financial obligations." The opinion does not specify the nature of these "obligations." The record indicated that the defendant was disabled. There was apparently no other information in the record concerning the defendant's ability to pay. *Bertrand*, 165 Wn.App. at 398.

Division Two analyzed this situation as follows:

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 us 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. *Baldwin*, 63 Wn.App. at 312. . . The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court's finding that [the defendant] has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding was clearly erroneous.

*Bertrand*, 165 Wn.App. at 617.

In following this analysis, Division Two appears to have applied *Bertrand* out of context. The quoted language from *Baldwin* is based on RCW 10.01.160, which governs imposition of court costs. *Baldwin* applied this requirement to attorney fees as well. *Id.* At 310. In *Bertrand*, however, the court applied this analysis to “legal financial obligations,” without specifying their nature.

If the obligations at issue consisted solely of court costs and attorney fees, the court was correct. RCW 10.01.160(4) requires a trial court to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” If, however, the holding of *Bertrand* is extended beyond this context, it is wrong. Statutes involving other kinds of legal financial obligations do not usually contain similar requirements. In particular, there is no such requirement in the statutes governing biological samples.

After the *Bertrand* court overturned the finding concerning ability to pay, it went on to consider the

appropriate remedy. It cited the following language from

*Baldwin*:

[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation. The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship.] Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time.

*Bertrand*, 165 Wn.App. at 405, quoting *Baldwin*, 63 Wn.App. at 310-11. Based on this language, the *Bertrand* court concluded:

Although the trial court ordered [the defendant] to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding [of ability to pay] forecloses the ability of the Department of Corrections to begin collecting LFOs from *Bertrand* until after a future determination of her ability to pay. Thus, because *Bertrand* can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

*Bertrand*, 165 Wn.App. 393 at 405.

This conclusion mis-states the analysis of *Baldwin*. That case discussed two ways in which a defendant's ability to pay is considered at the time of collection. First, the defendant may petition for a remission of costs. *Baldwin*, 63

Wn.App. at 310-11; see *Curry*, 118 Wn.2d at 917-18 (discussing safeguards for indigent defendants who fail to pay crime victim assessments).

Both of these remedies, however, require an affirmative showing by the defendant. At a violation hearing, the defendant bears the burden of showing that his failure to pay was not willful. *State v. Woodward*, 116 Wn.App. 697, 703-04, 67 P.3d 530 (2003). Similarly, a petition for remission of costs should be granted only on an affirmative showing of manifest hardship. RCW 10.01.160. thus, contrary to what *Bertrand* says, nothing in *Baldwin* requires an affirmation showing of ability to pay before financial obligations can be collected.

Any such holding would essentially negate the Supreme Court's analysis in *Curry*. There, the court held that both court costs and the victim penalty assessment could be imposed without any specific finding of the defendant's ability to pay. *Curry*, 1218 Wn.2d at 916-17. Under *Bertrand*, however, the obligations cannot be collected without such a finding. What purpose is served by

imposing legal financial obligations if nothing can be done to collect them?

In short, the trial court's finding concerning ability to pay is, in the context of this case, of no legal significance. That finding has no impact on either the court's ability to impose the obligations or the Clerk's ability to collect them. If the defendant is unable to pay after he is released, he can seek modification of the payment schedule. His ability to do so is not affected by the finding in the judgment and sentence. Since the finding has no effect, no purpose would be served by striking it.

The imposition of costs for a defense investigator is purely discretionary with the court pursuant to RCW 10.01.160(1). There has been no argument that the imposition of the investigator costs were arbitrary in any way and thus should be affirmed.

#### D. CONCLUSION

For the reasons stated above, the provision of the judgment and sentence dealing with legal financial obligations should be affirmed. The State agrees that the Appellant's

community custody term was incorrect and the matter should be remanded for entry of the correct term of eighteen months.

Dated this 16th day of June, 2015.

Respectfully submitted,

SHAWN P. SANT  
Prosecuting Attorney

By: 

David W. Corkrum,  
WSBA #13699  
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON     )  
  ) SS.  
County of Franklin        )

COMES NOW Abigail Iracheta being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 16th day of June, 2015, a copy of the foregoing was delivered to opposing counsel,

Dennis Morgan, [nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com) by email per agreement of the parties pursuant to GR30(b)(4).

A handwritten signature in black ink, appearing to read "Dennis Morgan", written over a horizontal line.

Signed and sworn to before me this 16th day of June, 2015.

A handwritten signature in black ink, appearing to read "Deborah J. Ford", written over a horizontal line.

Notary Public in and for  
the State of Washington,  
residing at Kennewick  
My appointment expires:  
May 19, 2018