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No. 66249-0-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

MASSIMO MURA, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a defendant may raise for the first time on appeal the court's failure to provide a definition for the term "utter" where defendant did not request any such definition below, definitions of elements generally do not present issues of constitutional magnitude, and any alleged error was not manifest because defendant acknowledged he had written and passed the two checks that were the basis for his convictions for unlawful issuance of bank checks.
2. Whether the defendant may raise the issue of the court's failure to consider his ability to pay where the defendant never raised the issue at sentencing nor provided any information that he would not be able to pay the legal financial obligations and where the challenged costs are set forth by statute.
3. Whether the trial court's finding that the defendant had the ability or likely future ability to pay was clearly erroneous where the defendant has at least 5 years to pay the \$2250 in legal financial obligations and the defendant testified at trial that he made \$10,000 a month, did not object to the imposition of costs, and did not present any information regarding his inability to pay at sentencing, although he was represented by a public defender.
4. Whether the court violated defendant's equal protection rights under State v. Barklind by imposing attorney costs where Barklind held that imposing such costs did not violate equal protection as long as it wasn't an undue hardship on defendant and where RCW 10.01.160 permits defendant to seek remission of costs if such costs pose an undue hardship.

C. FACTS

1. Procedural Facts.

On September 1st, 2010, Appellant Massimo Mura was charged with two counts of Unlawful Issuance of Bank Checks, in violation of RCW 9A.56.060 for his actions on or about July 30th and 31st 2010. CP 37-38. Mura was found guilty at trial of both counts and proceeded to sentencing the day after the verdict. CP 18, 21; RP 177-79. It appears sentencing was expedited because Mura had already served about 75 days in jail, on a standard range sentence of 0-90 days, had an ICE hold and was scheduled to be transferred for federal deportation. RP 178. The State recommended 60 days and the restitution amount was agreed. Id. The court imposed the recommended sentence “with the terms and conditions as provided for on the proposed Judgment and Sentence.” RP at 179. The only comments defense counsel made concerned explaining the agreed restitution figure to the judge. RP 178-79.

2. Substantive Facts

On July 30th, 2010 Mura saw a 2003 silver convertible Ford Mustang that he liked at Rairdon Dodge in Bellingham. RP 8-9, 36. Mura told the car salesman that he was from Italy, had recently moved up from Seattle, he was a musician and owned three houses. RP 13, 38. Mura and

the sales manager eventually agreed on a price of \$14,889.97. RP 10.

When Mura started to write a personal check, the manager told him they didn't accept personal checks, but Mura said he had the money, cash, at home. RP 10. The manager agreed to allow Mura to drive the car home, as long as the salesman went to pick up the cash at the house. RP 15.

Unfortunately, the salesman didn't realize that he was supposed to get a cash payment and thought that he was following Mura in order to get a check for payment. RP 40. The salesman picked up the check, one of the two checks that was the basis for his convictions, at a house that Mura said he had recently purchased. RP 41, 43. He brought the check back and put it in the deal folder. Id. When the manager discovered the check bounced, he was mad and told the salesman that they needed to get a cashier's check or the car back. RP 42.

After trying to contact Mura a number of times by phone, the manager finally reached him and Mura told him he would make right on it. The manager told him to bring the car back, but they didn't hear from Mura again. RP 16-17. When the manager and the salesman went back to the house Mura had driven to, Mura was there and the car was there, but Mura wanted to write them another check. RP 18, 46. They said that the only way they could take a check was if they could verify the funds in the

account, but when they spoke with the bank, the Industrial Credit Union, the bank told them the account had been closed. RP 18-19, 46, 48-49. Mura told them he had 3 bank accounts and two with that same bank. RP 18, 47. When they told Mura they couldn't accept a check on a closed account, he said that was okay, he had the cash. RP 19, 49. About 15-20 minutes later, Mura came out of the house and gave the salesman his driver's license and said he was going to the bank to get the cash, and they told him he couldn't do that. RP 20, 50. The manager told him it was no big deal, just to give them the car back, but Mura said no, he had the money and he jumped in the car, backed it up, almost running into the manager and took off. RP 21, 50. The manager and salesman got in their car and tried to follow him, but they lost him at an intersection. RP 21, 51.

They returned to the car dealership and weren't able to contact Mura after that. RP 22-23, 52-53. Another manager at the dealership told them he was able to get a hold of Mura who said he would bring the car back, but never did. RP 22. When the car was eventually recovered, it had been painted red and it was a bad paint job. RP 33, 53, 72-73. It also had the license plates from Mura's Honda on it instead of the original plates. RP 74.

The day after he gave the car dealer the bad check for the Mustang, Mura gave another bad check on the same account to DeWaard and Bode, a furniture dealer in Bellingham, for a 55 inch flat screen 3D television. RP 56-58. Mura filled out a credit application for in-store credit, but the application was declined. RP 59-61. Mura wrote on the application that he earned \$10,000 per month. RP 61. Mura indicated he would just pay by check, and he wrote out another check in the amount of \$3200, drawn on the same ICU account that was closed. RP 58, 62-63.

An employee with Industrial Credit Union testified that Mura had opened one savings and one checking account with the bank on April 24, 2009. RP 88-94. Mura opened the checking account with \$25 and at the end of May 2009, the account had one cent in it. RP 94-96. By the end of June, there was a negative balance on the account, and in August and September a number of checks were returned for insufficient funds. RP 97-98. At the end of September, the account was overdrawn by over \$800, including the bank's fees, and the bank closed the account. RP 98, 103. The bank sent correspondence regarding the status of his account and the insufficient funds checks to Mura at the address he had given them, and it wasn't until September that the correspondence was returned. RP 101-02, 121. Mura's business account and membership with the bank was

terminated in December of 2009. RP 105, 119. Total deposits made to the account from the time it was opened to the time it closed was \$388.50. RP 108. Only one check cleared the account, Mura made 10 ATM withdrawals, and 32 checks were returned for insufficient funds. RP 108-09. Mura's account was inactive from November of 2009 through June 2010. RP 111. The check Mura wrote to the car dealership attempted to clear the bank on August 3rd, 2010 and the one to DeWaard and Bode on August 2nd, 2010. RP 111-14.

When deputies attempted to arrest Mura in a house where they were told he was, Mura did not respond to their attempts to contact him. RP 76-77. They finally got a search warrant and ultimately, around six hours later, found him hiding under the insulation in the attic. RP 77-78.

Mura testified that he wrote the checks in order to buy the car and the television knowing he didn't have sufficient funds in the account. RP 124, 133-34, 143, 153. On cross-examination he testified that he had money in an overseas account and was planning to wire the money, but that he had been in jail. RP 138-39, 142. He claimed that he had \$13,000 at the house in the form of an Italian credit card which only works with certain ATM machines and that he left in order to go to an ATM that would accept his card. RP 140, 149. He admitted that never took the cash

out of the ATM, although he had told the manager he would take care of it, because the manager was being rude and threatening. RP 150. He admitted he kept the car and had switched the plates because the police would figure out otherwise that the car was stolen. RP 151. He admitted he told the salesman he owned the house that they had driven to, but claimed that the owner backed out of the purchase deal. RP 152. He testified that he makes about \$10,000 a month as a professional songwriter, with his own label, and as a professional gambler. RP 153. He asserted that while he knew he wrote the checks without money in the account, he intended to pay for them either with cash or a wire transfer but he didn't have the cash with him at the time. RP 154.

D. ARGUMENT

Mura asserts that the court's failure, *sua sponte*, to give a definition for the term "utter" when he was charged with unlawful issuance of a bank check was manifest error of constitutional magnitude. He asserts that he should be permitted to raise the issue for the first time on appeal, although he acknowledges that ordinarily the failure to further define elements of a crime is not manifest constitutional error. This Court should decline to review this alleged error for the first time on appeal because it relates to a definitional instruction, not an element instruction, and because he cannot

show any prejudice from the failure to further define “utter.” During his testimony Mura conceded that he had written and given the checks to the car dealership and to DeWaard & Bode. As Mura conceded he “uttered” the checks, he cannot assert manifest error of constitutional magnitude in the court’s failure to further define the term.

Mura also asserts that the court exceeded its statutory authority in imposing court costs and attorney fees. Specifically he asserts that the court exceeded its statutory authority when it made the “purported finding” that he had the present or likely future ability to pay, and that that finding was clearly erroneous. He further contests the court’s imposition of certain, “discretionary,” costs without considering his ability to pay. Mura never raised any issue below at sentencing about his ability to pay and never provided the court with information regarding his alleged inability to pay. He therefore cannot assert any issue regarding the court’s imposition of alleged “discretionary” costs because the sentencing court had the statutory authority to impose them.

Moreover, his claim that the court exceeded its statutory authority to impose costs by finding that he had the present or likely future ability to pay truly only relates to whether the court’s finding was erroneous. The court had the statutory authority to impose the costs and needed only to

consider the defendant's ability to pay. Mura waived any issue in the court's consideration or basis for its finding by failing to raise the issue below or providing any basis for the court to make a finding that he did not have an ability to pay the \$2250 in costs. The court did not exceed its statutory authority in imposing the legal financial obligations it did and did not err in finding that he had either the present or likely future ability to pay the \$2250 in costs over a five year period or until the judgment was satisfied.

1. Mura has failed to demonstrate that the court's failure to provide a definition for "utter" was a manifest error of constitutional magnitude.

Mura raises for the first time on appeal the court's failure to define the term "utter" which appeared in the to-convict instruction for unlawful issuance of a bank check. While the WPIC commentary recommends that the term "utter" be defined if used, the failure to provide a definition for the term is not a manifest error of constitutional magnitude, and Mura waived the issue by failing to raise it below. Moreover, Mura has not shown any actual prejudice from the lack of a definition, alleging merely that it was "confusing." There was no confusion as to whether Mura "uttered" the check because he testified that he wrote the checks and gave them to the recipients. Mura's failure to raise this issue below waived it.

Mura asserts that the court should have provided a definition for the term “utter” despite the fact that he did not request any such instruction. A failure to request a jury instruction and/or failure to object to an instruction waives the error regarding the instruction unless the alleged error is a manifest one of constitutional magnitude. RAP 2.5(a); State v. O’Hara, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009). In order to determine whether an alleged error is a manifest error affecting a constitutional right, the reviewing court must determine whether the error implicates a constitutional issue and whether the error was manifest, i.e., whether the error had “practical and identifiable consequences” in the case. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If the error was manifest, the court must address the merits of the constitutional issue, and then, if the error was of constitutional magnitude, the court must determine whether it was harmless error. *Id.* The burden is on the defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

Instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury and permit each party to argue its theory of the case. State v. Castle, 86 Wn.App. 48, 62, 935 P.2d 656,

rev. den., 133 Wn.2d 1014 (1997). When examining the effect of a particular phrase in an instruction, courts must consider the instruction as a whole and in the context of all instructions. *Id.* at 54.

Mura acknowledges that “ordinarily, the failure to further define an element of a crime, beyond listing it in the instructions, is not manifest error of constitutional magnitude for purposes of raising the issue on appeal.” Appellant’s Brief at 6. He contends, however, that the jury instructions as given were confusing and therefore the jury must have been misled by them. *Id.* Failure to provide a definitional instruction that may have been applicable under the facts of a case does not render the instruction an essential element instruction that must be given in every case. State v. Daniels, 87 Wn. App. 149, 156, 940 P.2d 690 (1997), *rev. den.*, 133 Wn.2d 1031 (1998). Failure to provide such an instruction does not constitute a manifest error of constitutional magnitude. *Id.* “As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992).

In State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988), the court clearly held that there was nothing in the constitution that required the

“meanings of particular terms used in an instruction be specifically defined.” Id. at 691. The court specifically differentiated between the technical term rule and the constitutional element requirement, stating: “Failure to give a definitional instruction is not failure to instruct on an essential element.” Id. at 690 (*quoting State v. Tarango*, 734 P.2d 1275, 1282 (N.M. Ct. App. 1987)). It therefore concluded that a defendant may not raise the court’s failure to give a definitional instruction for the first time on appeal. Id. at 691.

The Washington Supreme Court reiterated this holding in State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009): “instructional errors not falling within the scope of RAP 2.5(a), that is not constituting manifest constitutional error – include ... the failure to define individual terms.” Id. at 101. In O’Hara the Court held that the omission of the full statutory definition of “malice” in the self defense instructions did not constitute a manifest error of constitutional magnitude where the jury was instructed on all the elements of the crime. Id. at 107.

Here, Mura was charged with two counts of unlawful issuance of bank checks. In order to prove the offense of unlawful issuance of bank checks, the State must prove that the defendant, with intent to defraud, made, drew, uttered or delivered to another person a bank check knowing

at the time he/she did not have sufficient funds in the account to pay the check. RCW 9A.56.060; *see also*, State v. Ben-Neth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983) (to be convicted of unlawful issuance of bank checks, jury must find that defendant wrote the check with intent to defraud, knowing he had insufficient funds in this account). The to-convict instruction for both counts required the State to prove:

- (1) That on or about the 30th/31st¹ day of July, 2010, acting with intent to defraud, *made, drew or delivered* a check to Rairdon Dodge/DeWaard & Bode;
- (2) That said check or draft was in an amount greater than \$750.00.
- (3) That at the time of such *making, drawing, uttering or delivery*, the defendant knew that he did not have sufficient funds in or credit with the bank or depository to meet the check or draft in full upon its presentation; and
- (4) That any of these acts occurred in the State of Washington.

CP 29, 30 (Instr. Nos. 5, 6) (emphasis added). As noted by Mura, the WPICs recommend that the term “utter” not be used in the element instruction for unlawful issuance of a bank check, and that if it is used, it should be defined. WPIC 73.02, Note on Use. The comments to the WPIC instructions on forgery note that the term “utter” is generally

¹ One instruction stated the 30th day, the other the 31st, and one stated the recipient of the check as Rairdon Dodge, the other DeWaard & Bode.

understood as “puts off as true” and recommends that phrase be used instead of “utter.” WPIC 130.03, Comment. The to-convict instructions for both counts did not include the term “utter” in the first section, but “uttering” was left in the third section of the elements. While it appears it was an oversight that the term was not removed from the third section, the jury could glean its definition from the context of the surrounding terms “making” and “delivery.”

Moreover, in order to show that an error is manifest, the defendant must show that the outcome of the trial would likely have been different but for the alleged error. The defendant must show actual prejudice under RAP 2.5(a)(3) which requires a “plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.” O’Hara, 167 Wn.2d at 99. Here, Mura conceded in his testimony that he had written and passed, *i.e.*, uttered or put off as true, the checks to the car dealership and DeWaard & Bode. RP 124, 133-34. He even admitted that he did so knowing he did not have sufficient funds in his account. RP 124, 143, 154. Defense counsel also acknowledged this in his closing. RP 169-70. The only issue at trial was whether Mura had done so with intent to defraud the car dealer and DeWaard & Bode. RP 168-71. Mura has failed

to show that the court's failure to further define "utter" resulted in actual prejudice to him.

- 2. Mura failed to raise any issue about his ability to pay legal financial obligations at sentencing and therefore has waived his ability to assert the trial court's failure to consider his ability to pay on appeal.**

Mura alleges that the trial court erred in finding that he has either the present ability or likely future ability to pay his legal financial obligations, premised largely upon the court's alleged failure to consider his inability to pay. To the extent that he relies on a statutory basis, RCW 10.01.160, for his argument, he waived the issue by failing to raise it at sentencing. There is nothing in the record to show that Mura does *not* have the ability to pay his legal financial obligations either now or *in the future*, particularly given the length of the time Mura has to satisfy the judgment.

Mura bears the burden of showing that the trial court's alleged error in finding that he has "the ability or likely future ability to pay" based on the court's failure to consider his inability to pay under RCW 10.01.160 is error that he may raise for the first time on appeal. RAP 2.5(a). He asserts he may raise it on appeal because the court exceeded its statutory

authority in imposing costs, citing in a footnote to State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996).

In Moen, the court decided whether an exception to the objection requirement should apply where a sentencing order, specifically a restitution order, exceeded the trial court's statutory authority. *Id.* at 546. In concluding that an exception should apply in the context of an untimely restitution order, the court relied on the rationale that permitting such claims of error for the first time on appeal tended "to bring sentences in conformity and compliance with existing sentencing statutes and avoid[ed] permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection to the trial court." *Id.* at 545 (*quoting State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369, *rev. den.* 122 Wn.2d 1024 (1993)). The court also relied on the fact that under the circumstances in the case an objection would not have permitted the trial court to remedy the error because the trial court would not be able to set restitution in a timely fashion as the time period had already expired. *Id.* at 547.

Here, however, an objection would have permitted the trial court to consider further the defendant's ability to pay. Aside from knowing that a defendant may have qualified for a public defender, a court at sentencing

in most cases is not going to have information regarding a defendant's inability to pay without the defendant providing that information to the court. A judge should not be required to reduce legal financial obligations based merely on speculation about a defendant's inability to pay, particularly given the lengthy time period within which a defendant has to meet the obligations. A timely objection here would have permitted the court to consider whatever additional information Mura now seeks this Court to consider regarding his ability to pay. Mura was required to object or provide the court with information about his inability to pay in order to assert error on appeal.

Mura relies on RCW 10.01.160(3) in asserting that there the trial court exceeded its statutory authority in finding Mura has the ability to pay legal financial obligations. RCW 10.01.160 provides in relevant part:

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. ... Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. ... Costs imposed constitute a judgment

against a defendant and survive a dismissal of the underlying action against the defendant. ...

(3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160 provides the general statutory authority for the court to impose the costs it did. Subsection 3 only requires the court to consider a defendant's ability to pay. If Mura believed that he would be unable to pay the fees and costs the court intended to impose, he had an obligation to inform the court of that and to provide the court with reliable information about his financial resources, so that the court could consider that information in determining whether he could or would have the ability to pay them.

The court did not exceed its statutory authority in imposing costs, and Mura waived any error regarding failure to consider underlying facts in deciding how much to impose in fees and court costs by failing to bring those matters to the court's attention at the time of sentencing.

3. The court's finding that the defendant has the likely future ability to pay legal financial obligations was not clearly erroneous.

Mura alleges that the trial court's finding that he has the present ability or likely future ability to pay the legal financial obligations imposed

was clearly erroneous. He further asserts that the court had the discretion to waive some of the fees, but “appeared to treat the costs and fees as mandatory.” Appellant’s Brief at 11. There is nothing in the record to show that Mura will not have the ability to pay the fees and costs imposed, particularly given the length of the time he has to satisfy the judgment. The costs that Mura otherwise disputes are set forth by statute, Mura never requested that they be waived or suspended, and thus the court did not err in imposing them.

A court’s decision to impose costs or fees is reviewed for abuse of discretion. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). Its finding regarding a defendant’s resources and ability to pay are reviewed under a clearly erroneous standard. *Id.*

Mura asserts that the court erred in imposing court costs and fees that can be waived or suspended by statute and asserts that the court must have imposed them because it believed them to be mandatory. The criminal filing fee and jury demand fee amounts, the fees imposed by the court that Mura alleges are discretionary, are authorized and set by statute. RCW 10.01.160(2); RCW 36.18.020(h); RCW 10.46.190, RCW 36.18.016(b); CP 14-15. While RCW 10.01.160(2) provides that a judge may impose the jury fee, the directive language of RCW 10.46.190

certainly advocates that the fee be imposed: “Every person convicted of a crime ... *shall* be liable to all the costs of the proceeding against him ..., including, when tried by a jury ... a jury fee as provided for in civil actions for which judgment *shall* be rendered and collected.” RCW 10.46.190 (emphasis added). RCW 36.18.020 likewise encourages imposition of the fee: “Upon conviction ... a defendant *shall* be liable for a fee of \$200. RCW 36.18.020(h) (emphasis added). While the court has the discretion not to impose those fees under RCW 10.01.160, the fee statutes advocate their imposition, and it certainly is not an abuse of discretion to impose them particularly where there is nothing in the record to demonstrate a defendant’s inability to pay them over the lengthy time period for payment.

There is nothing in the record to support Mura’s claim that the court imposed the court costs Mura now contests because it believed them to be mandatory. Mura never contested the amounts or their imposition, and never requested the court exercise its discretion not to impose them. The court did not abuse its discretion in imposing the fees and they were statutorily authorized.

Mura asserts that the court’s specific finding that he has the ability to pay the legal financial obligations imposed now or in the future was clearly erroneous. A court need only consider a defendant’s ability to pay

and does not have to make a specific finding regarding a defendant's ability to pay. State v. Curry, 118 Wn.2d, 911, 916, 829 P.2d 166 (1992). The court has jurisdiction over Mura's judgment and sentence for collection of the legal financial obligations until the judgment is satisfied. RCW 9.94A.760(4).

The judgment and sentence reflects that the court made a finding that the Mura "has the ability or likely future ability to pay the legal financial obligations imposed." CP 14 (section 2.5). During trial Mura testified that he made \$10,000 per month as a song writer, musician and gambler. RP 153. He told the DeWaard & Bode salesman that he made \$10,000 per month. RP 61. He also testified that he had other accounts beside the one upon which he wrote the checks, including one in Italy. RP 139, 142. He testified he didn't pay back the car dealer simply because the manager was rude and threatening. RP 150. While his testimony may not have been credible about the amount he made per month, it appeared that he was and is capable of being employed. It is difficult to imagine that Mura would not be able to pay \$2250 in legal financial obligations over the course of even just the next five years, the statutory maximum for his class C felonies. Moreover, there is nothing in the record to support a finding that he does *not* have the ability to pay the costs and fees,

particularly where the court has jurisdiction over his judgment and sentence until the judgment is satisfied.

Mura references the order of indigency as evidence that the court was aware of his inability to pay. While Mura did have a public defender, Mura did not file the motion for the order of indigency he references until a week after sentencing, and as noted in Curry:

[Defendants] argue additionally that the orders of indigency entered for purposes of appeal are sufficient to show that they cannot, in fact, pay the financial obligations imposed. We disagree. The costs involved here are on a different scale than the costs involved in obtaining counsel and mounting an appeal. Moreover, in both cases, recoupment of attorney fees was waived. *It is certainly within the trial court's purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date.*

Curry, 118 Wn.2d at 915 n.2 (emphasis added in italics); Supp CP ___, Sub. Nom. 28. Moreover, a defendant's indigent status at the time of sentencing does not preclude the imposition of court costs, and a defendant's inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *rev. den.*, 165 Wn.2d 1044 (2009); *see also*, State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (the time to address the defendant's ability to pay is at the time the State seeks to enforce collection as court's determination at sentencing is speculative).

The trial court had the authority to impose the fees it did and did not err in finding that Mura had the likely future ability to pay the legal financial obligations it imposed. A defendant's inability to pay is best addressed at the point at which the State seeks to enforce collection, and RCW 10.01.160 (4) provides a means for a defendant to request remission of payment of the costs if in fact the costs pose an undue burden.

4. Mura has failed to demonstrate that the court violated his equal protection rights in imposing attorney costs under RCW 10.01.160.

Mura's alleged violation of his constitutional right to equal protection, rests solely on the case of State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976). Barklind, however, specifically rejected an equal protection challenge to a court's imposition of costs. *Id.* at 819. In doing so, it noted that the court's order required that the payment could not cause undue hardship on the defendant. *Id.* Likewise, here under RCW 10.01.160(4) a defendant may seek remission of his legal financial obligations if paying them would cause undue hardship. RCW 10.01.160(4); Smits, 152 Wn. App. at 522. Moreover, Barklind upheld the constitutionality of Washington's legal financial obligations statute, RCW 10.01.160. Barklind, 87 Wn.2d at 818.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Mura's convictions for unlawful issuance of bank checks. The State further requests that this Court affirm the legal financial obligations imposed in the judgment and sentence.²

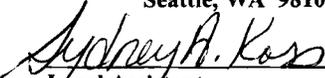
Respectfully submitted this 12th day of July, 2011.


HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Oliver Davis
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101


Legal Assistant

07/12/2011
Date

² Mura requests reversal of the judgment and sentence but if this Court were to find that the trial court committed reversible error regarding imposition of the legal financial obligations, the appropriate remedy would be to remand to the trial court to consider whatever information Mura wishes the court to consider regarding his ability to pay and/or to exercise its discretion. *See, State v. Sims*, ___ Wn.2d ___, 2011 WL 1679202, ¶25 (proper remedy for imposition of unconstitutional sentencing condition was remand to correct the sentencing condition, not resentencing); *State v. Grayson*, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005) (case remanded to court to consider whether defendant was good candidate for sentencing alternative where judge was deemed to have categorically refused to consider the alternative).