

67938-4

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NO. 67938-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NELSON SELLERS,

Appellant.

2012 JUL -2 PM 3:21
COURT OF APPEALS
STATE OF WASHINGTON
[Signature]

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZALEZ

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. A sentencing court is not required to consider the defendant's ability to pay when imposing mandatory financial obligations. At sentencing, the court imposed only mandatory financial obligations. Because the court's finding on the judgment and sentence regarding Sellers' ability to pay was irrelevant and has no practical effect on his sentence, is remand to strike the finding unnecessary?

B. STATEMENT OF THE CASE

Following a jury trial, Sellers was convicted of unlawful possession of a firearm in the first degree and possession of cocaine in King County Superior Court. CP 32, 34, 53; 3RP 167-68.¹ He received a Drug Offender Sentencing Alternative (DOSA) and was sentenced to a total of 15 months incarceration and 15 months of community custody. CP 56.

At sentencing, the court inquired of Sellers' financial situation:²

THE COURT: And what is the financial situation of the defendant?

¹ The State adopts the appellant's designation of the verbatim report of proceedings.

² In his opening brief, Sellers inaccurately states that "there was no discussion of Sellers' financial circumstances. . . ." Brf. of Appellant at 3.

MR. HAMILTON: I haven't discussed it at length, but I think he will be entitled to a court-appointed attorney on appeal. I don't know what the standards are for indigency, but other than the house, he doesn't have much. I think he would satisfy any state standards with regard to indigency. So he works, as he sort of indicated to you, sort of part-time here and there. He does not have a stable specific job.

THE COURT: All right. I will waive the additional costs and fees.

3RP 186-87. The court imposed only the mandatory \$500 victim penalty assessment, and the mandatory \$100 DNA collection fee.

CP 55. Sellers appeals. CP 69-70.

C. ARGUMENT

Sellers does not challenge the sentencing court's imposition of \$600 in mandatory legal financial obligations. Rather, he asks this Court to remand his case for the sole purpose of striking language from his judgment and sentence that refers to his "present or likely future ability to pay the financial obligations imposed."

However, the sentencing court was not required to take into account Sellers' ability to pay when imposing the mandatory

obligations that it did. Sellers' financial circumstances become relevant only at the time that the State attempts to collect on his obligation. Because the language Sellers complains of has no practical effect on his sentence, this Court cannot offer him any meaningful relief. There is no need to remand this case to strike irrelevant and inconsequential language from the judgment and sentence. Sellers' sentence should be affirmed.

1. THE SENTENCING COURT WAS NOT REQUIRED TO CONSIDER SELLERS' FINANCIAL RESOURCES WHEN IT IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS.

When sentencing a defendant for a felony, the court must impose a mandatory \$500 victim penalty assessment ("VPA"). RCW 7.68.035(1)(a). The defendant's ability to pay is irrelevant. State v. Curry, 62 Wn. App. 676, 683, 814 P.2d 1252 (1991) affirmed, 118 Wn.2d 911, 829 P.2d 166 (1992).

The time to examine the defendant's ability to pay is when the State seeks to collect the financial obligation. State v. Smits, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). A defendant is not an "aggrieved party" until the State seeks to

enforce the payment of the financial obligations. Smits, 152 Wn. App. at 525; State v. Mahone, 98 Wn. App. 342, 347-48, 989 P.2d 583 (1999) (citing State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997)).

Before being incarcerated for failing to pay a legal financial obligation, a defendant must be given an opportunity to show that he has not willfully failed to pay. RCW 9.94A.6333. A defendant may petition the court at any time to remit or modify legal financial obligations due to hardship. RCW 10.01.160(4). Because adequate safeguards exist to prevent indigent defendants from being incarcerated for failing to pay, imposition of the mandatory VPA raises no constitutional concern. State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992); State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008).

Like the VPA, felony sentences must include a DNA collection fee of \$100, without regard for the defendant's individual financial circumstances. RCW 43.43.7541; see also State v. Brewster, 158 Wn. App. 856, 218 P.3d 249 (2009) and State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009) (2008 amendments to RCW 43.43.7541, making the collection fee

mandatory regardless of ability to pay, apply to all sentencing hearings that occur after the effective date of the amendment).

To the contrary, 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). Even so, formal findings are not required. State v. Baldwin, 63 Wn. App. at 310.

As to non-mandatory costs imposed pursuant to RCW 10.01.160, the inquiry required at sentencing relates solely to the defendant's future ability to pay, and is necessarily speculative. Baldwin, 63 Wn. App. at 310. Thus, 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) (citing State v. Baldwin, 63 Wn. App. at 312).

Here, the court was under no obligation to consider Sellers' financial resources when it imposed the mandatory victim penalty assessment and DNA collection fee. See State v. Curry, 62 Wn. App. at 683; RCW 7.68.035; RCW 43.43.7541. Because the court imposed only the mandatory VPA and DNA collection fee, any

finding that it made regarding Sellers' present or likely future ability to pay was unnecessary and irrelevant.

2. BECAUSE THE SENTENCING COURT IMPOSED ONLY MANDATORY LEGAL FINANCIAL OBLIGATIONS, THIS COURT CAN OFFER SELLERS NO MEANINGFUL RELIEF ON REMAND.

Sellers rightly does not challenge the court's imposition of mandatory legal financial obligations. Because the State has not yet sought to enforce payment, the court's imposition of the mandatory legal financial obligations is not ripe for review. State v. Bertrand, 165 Wn. App. at 405.

Rather, Sellers argues that the finding that he has the present or likely future ability to pay his legal financial obligations must be stricken because it is not supported by the record.³

However, that finding need not be stricken because it was wholly irrelevant to the mandatory financial obligation imposed. It has no practical effect on Sellers' sentence and striking it would serve no purpose. Because this Court cannot offer Sellers any meaningful relief, remand is unnecessary.

³ Sellers is not clear as to what financial obligation he believes the court's finding applies to. The language that he disputes appears *after* the court's imposition of the VPA; it precedes only the imposition of the \$100 DNA collection fee. CP 55. Therefore, Sellers' argument must be limited to the DNA collection fee.

A case is moot when the court cannot provide meaningful relief. State v. Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). A moot appeal should generally be dismissed. Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

Although moot, the court may choose to address a case if it involves matters of continuing and substantial public interest. Hart v. Department of Social and Health Services, 111 Wn.2d 445, 759 P.2d 1206 (1988). When deciding whether a matter is of continuing and substantial public interest, the focus is on three factors: (1) whether the issue is of a public or private nature, (2) whether a determination of the issues is desirable to provide future guidance, and (3) whether the issue is likely to recur. Hart, 111 Wn.2d at 448; Sorenson, 80 Wn.2d at 558.

Washington courts have invoked the continuing and substantial public interest exception to hear cases involving matters of constitutional interpretation, validity and interpretation of statutes and regulations, and important issues likely to arise in the future. Hart, 111 Wn.2d at 449. Cases that are limited to their facts, and that will be of little use or guidance to others, do not fall within the substantial public interest exception. Id. at 451.

A finding regarding Sellers' ability to pay mandatory costs was not necessary at the time of sentencing. RCW 43.43.7541. The question of his financial resources becomes relevant only at the time the State seeks to enforce collection of the obligation. State v. Baldwin, 63 Wn. App. at 310. As a result, the language in the judgment and sentence that Sellers complains of has no practical effect. At the time the State seeks to enforce the obligation, the court will be required to give Sellers the opportunity to show that he does not have the ability to pay. RCW 9.94A.6333(2). Nonwillful violations are treated more leniently than those that are willful, and Sellers would not be incarcerated for his inability to pay. Id.; see also State v. Curry, 118 Wn.2d at 918.

Because the only relevant finding regarding Sellers' ability to pay the imposed mandatory costs must be made at the time of enforcement, the boilerplate finding on the judgment and sentence is irrelevant. This Court is incapable of providing Sellers with any meaningful remedy and should dismiss his moot appeal.

Moreover, Sellers' appeal does not involve any matter of continuing or substantial public interest. The first factor—whether the issue is of a public or private nature—argues against this Court deciding to consider the merits of Sellers' case. The argument he

raises is personal to him; it relates only to the specific facts of his case and, under those facts, whether or not there was an adequate basis for the court's finding. Therefore, an analysis of the first factor suggests that this Court should refuse to address Sellers' moot appeal.

The second factor, whether a decision on the issue would provide future guidance to others, similarly suggests that this Court should decline to remand Sellers' case to strike the language he complains of. Since Sellers raises a fact-specific inquiry relating to the record surrounding his financial circumstances, this case will not provide future guidance to courts, defense attorneys, prosecutors, or anyone else.

Finally, a review of the third factor, whether the issue is likely to recur, does not support remand. Even if the exact same scenario were to reoccur, any harm would be equally non-existent. Therefore, the issue raised by Sellers does not involve a matter of continuing and substantial public interest, and the court should dismiss his appeal.

Sellers largely relies on State v. Bertrand and State v. Baldwin in support of his argument that remand is necessary. However, the financial obligations imposed in those cases

consisted of non-mandatory costs. Bertrand, 165 Wn. App. at 398; Baldwin, 63 Wn. App. at 306. Thus, an inquiry into the defendant's financial circumstances was required pursuant to RCW 10.01.160; if the record lacked evidence to support a finding of ability to pay, the defendant was entitled to have such a finding stricken. Bertrand, 165 Wn. App. at 404-05. Such is not the case here, where the court imposed only mandatory obligations.

D. CONCLUSION

For the reasons outlined above, this Court should affirm Sellers' sentence, as remanding to strike irrelevant and inconsequential language would serve no purpose.

DATED this 2 day of JULY, 2012.

Respectfully submitted,

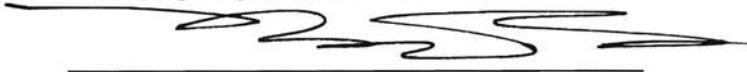
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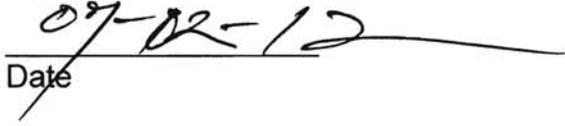
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rebecca Wold Bouchey, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. NELSON SELLERS, Cause No. 67938-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date