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MAY 15 2012

King County Prosecutor
Appellate Unit

NO. 67962-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN GRANT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it found Grant had the current or future ability to pay legal financial obligations (LFOs).

Issue Pertaining to Assignment of Error

Whether the trial court erred when it found, absent an inquiry into appellant's individual circumstances, that he has the current or future ability to pay LFOs?

B. STATEMENT OF THE CASE

Grant pled guilty to four offenses in two cases. In 10-1-08369-0 KNT, he pled guilty to one count of misdemeanor harassment and one count of unlawful possession of firearm in the second degree. CP 53-84. In 10-1-09830-1 KNT, he pled guilty to two counts of robbery in the first degree. CP 10-32.

The court imposed standard range, concurrent sentences on all four convictions, totaling 129 months. CP 36, 90, 95. These terms were run consecutively, however, to Grant's sentences on

two previously revoked DOSAs from Pierce County.¹ CP 14, 28, 36, 54, 65, 79, 90, 95; RP 11-12.

In each case, the court imposed \$600.00 in legal financial obligations. CP 35, 89. Although there was no discussion of Grant's financial circumstances, the judgments include a written "finding," which was pre-printed on the sentencing form: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 35, 89 (Section 4.2).

Grant timely filed his Notices of Appeal in each case. CP 43, 99. His motion for order of indigency indicates he is unemployed, owns no real estate, owns no stocks or bonds, is not the beneficiary of any trust, and has no savings or substantial income of any kind. Supp. CP ____ (sub no. 56, Motion and Declaration for Order Authorizing Review at Public Expense, no. 10-1-09830-1 KNT). Grant was found to be indigent for purposes of appeal. Supp. CP

¹ Grant asked the sentencing court to run his time from current offenses concurrently with the time from his revoked DOSA sentences, but the court concluded it had no discretion to do so under RCW 9.94A.589(2)(a) (requiring consecutive sentences when new offenses committed while defendant "under sentence for conviction of a felony"). RP 5-8, 11-12.

___ (sub no. 57, Order Authorizing Review at Public Expense, no. 10-1-09830-1 KNT).

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND – WITHOUT EVIDENCE – THAT GRANT HAD THE PRESENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04. This error may be raised for the first time on appeal. Bertrand, 165 Wn. App. at 395; see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of

the burden” imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); see also State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court’s failure to exercise discretion in sentencing is reversible error).

As in Bertrand, this record reveals no evidence or analysis supporting the court’s “finding” that Grant had the present or future ability to pay his LFOs. The record actually suggests precisely the opposite – that Grant has no source of income or significant assets.

Accordingly, the court’s finding that Grant has the present or future ability to pay LFOs is clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405. Before the State can collect LFOs in this case, there must be a properly supported, individualized judicial determination that Grant has the ability to pay. Id.

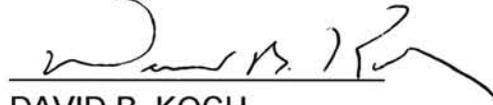
D. CONCLUSION

For the reasons stated above, the sentencing court's finding that Grant has the present or future ability to pay LFOs was clearly erroneous and must be stricken.

DATED this 15th day of May, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

DAVID B. KOCH

WSBA No. 23789

Attorneys for Appellant

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COA NO. 67962-7-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF MAY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RYAN GRANT
DOC NO. 799501
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MAY, 2012.

x *Patrick Mayovsky*

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