

68062-5

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NO. 68062-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC CARMICHAEL

Appellant.

REC'D
JUL 16 2012
King County Prosecutor
Appellate Unit

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COURT CLERK
STATE OF WASHINGTON
DIVISION ONE

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

The Honorable Hollis R. Hill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

In the absence of evidence, the court erred in finding appellant has the current or future ability to pay legal financial obligations (LFOs). CP 459 (Finding 4.2).

Issue Pertaining to Assignment of Error

Did the trial court err 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

The King County prosecutor charged appellant Eric Carmichael with one count of possession of a stolen motor vehicle, one count of possession of stolen property, one count of unlawful possession of a firearm, and one count of possession of methamphetamine. CP 196-98. The court denied Carmichael's motions to suppress the evidence and to dismiss the case under CrR 8.3 for governmental mismanagement. CP 297; Supp. CP ____ (Sub no. 111). At trial, the State conceded there was insufficient evidence of possession of a stolen vehicle. 3RP¹ 798. The jury found Carmichael guilty of possession of stolen property, unlawful possession of a firearm, and possession of methamphetamine. CP 331-33.

¹ There are 12 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 15, 2011, Aug. 31, 2011; 2RP – Sept. 30, 2011, Nov. 30, 2011, Dec. 12, 2011; 3RP – Nov. 1, 2011, Nov. 2, 2011, Nov. 3, 2011, Nov. 7, 2011, Nov. 8, 2011, Nov. 9, 2011, Nov. 14, 2011, Nov. 15, 2011, Nov. 16, 2011, Dec. 20, 2011

The court imposed a standard range sentence of 116 months for unlawful possession of a firearm and concurrent sentences for the other two offenses. CP 460. The court imposed legal financial obligations and entered a finding that “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 459. There was no discussion or evidence presented regarding Carmichael’s financial resources at either trial or sentencing. Notice of appeal was timely filed. CP 467.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND CARMICHAEL HAD THE PRESENT OR FUTURE ABILITY TO PAY THE 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, 404, 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 404 (citing Baldwin, 63 Wn. App. at 312).

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); cf. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). This error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 403, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (defendant may challenge an illegal sentence for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's finding Carmichael had the present or future ability to pay his LFOs. CP 459. And given Carmichael's frequent incarcerations, his financial resources are likely to be meager. CP 463. Accordingly, finding 4.2 was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 404-05.² Before the State can collect LFOs,

² Carmichael does not challenge the imposition of these LFOs but rather the unsupported finding of present and future ability to pay.

there must be a properly supported, individualized judicial determination that Carmichael has the ability to pay. Id. at 405 n. 16.

D. CONCLUSION

This Court should remand with an order that the trial court strike the unsupported finding from the judgment and sentence.

DATED this 16th day of July, 2012.

Respectfully submitted,

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STATE OF WASHINGTON,)	
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v.)	COA NO. 68062-5-1
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ERIC CARMICHAEL,)	
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Appellant.)	

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 16TH DAY OF JULY, 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] ERIC CARMICHAEL
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MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JULY, 2012.

x Patrick Mayovsky

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STATE OF WASHINGTON