

U 8645-3

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NO. 68645-3-I

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

REC'D
AUG 31 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JOSE LeMASSON,

Appellant.

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

The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

2012 AUG 31 PM 4:03
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The trial court erred when it found appellant has the current or future ability to pay legal financial obligations (LFOs). CP 38 (Finding 4.2).

Issue Pertaining to Assignment of Error

Did the trial court err when it found, absent an inquiry into the 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 Jose LeMasson with attempting to elude and possession of heroin with intent to deliver. CP 26-27; RCW RCW 46.61.024; RCW 69.50.401(2),(2)(a). LeMasson was subsequently convicted by a jury of the possession charge only. CP 28-29.

LeMasson was sentenced to a standard range sentence of 13 months. CP 36-44; August 5, 2011 Sentencing Transcript (SRP) 16. Despite a plea at sentencing from LeMasson's counsel to waive all monetary obligations due to LeMasson's indigence, the court imposed \$1065 in legal financial obligations (LFOs). CP 38; SRP 13-14, 17. The judgment and sentence includes the following written "finding" in preprinted form:

165 Wn. App. at 404¹ (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 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) (unlawful sentence may be challenged for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" that Monson had the present or future ability to pay his LFOs. To the contrary, the only mention of this was by defense counsel, who noted LeMasson has been indigent throughout the entire proceedings. SRP 13-14.²

¹ The ACORDS docket shows that Bertrand filed a petition seeking review of a different issue; the state has not sought review of this Court's ruling on the LFO issue.

² Cf. Baldwin, 63 Wn. App. at 311 (statement in presentence report that Baldwin was employable supported this Court's conclusion that sentencing court properly considered burden of costs under RCW 10.01.160).

Accordingly, the portion of finding 4.2 quoted above was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405.³ Moreover, before the State can collect LFOs, there must be a properly supported, individualized judicial determination that LeMasson has the ability to pay. Id., at 405 n.16.

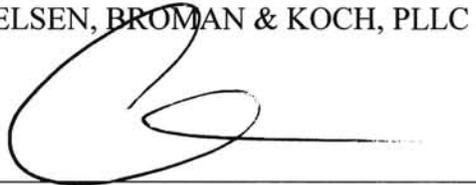
D. CONCLUSION

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

DATED this 31st day of August 2012.

Respectfully submitted,

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³ LeMasson does not challenge the imposition of mandatory LFOs (See RCW 43.43.7541 (DNA collection fee); RCW 7.68.035 (Victim Penalty Assessment)), but rather the unsupported finding of present and future ability to pay.

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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 31ST DAY OF AUGUST 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] JOSE LeMASSON
18914 129TH AVENUE NE
BOTHELL, WA 98011

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2012.

x *Patrick Mayovsky*