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NO. 69961-0-I

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

REC'D
JUL 03 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

EDWARD FULTON,

Appellant.

2013 JUL -3 PM 4:29
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
EDWARD FULTON

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

The Honorable Joan E. DuBuque, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE TRIAL COURT ERRED WHEN IT FOUND FULTON HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.	3
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Baldwin
63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991)..... 3, 5

State v. Bertrand
165 Wn. App. 393, 267 P.3d 511 (2011)..... 3, 5

State v. Blank
131 Wn.2d 230, 930 P.2d 1213 (1997)..... 4

State v. Ford
137 Wn.2d 472, 973 P.2d 452 (1999)..... 4

State v. Grayson
154 Wn.2d 333, 111 P.3d 1183 (2005)..... 5

RULES, STATUTES AND OTHER AUTHORITIES

RCW 10.01.160 4

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 75 (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 Edward Fulton with attempting to elude a pursuing police vehicle, second-degree malicious mischief, third degree malicious mischief, and reckless endangerment. CP 47. After an evaluation by Western State Hospital, Fulton was found competent to enter a plea. CP 35-45. Fulton pled guilty at arraignment. CP 50-71. In his statement on plea of guilty, Fulton admitted that:

On Dec. 3, 2012 in King Co WA, I drove a motor vehicle after being given a visual and audible signal by a uniformed police officer to stop. I willfully failed to stop and I drove the vehicle in a reckless manner by driving on a sidewalk while attempting to elude a pursuing police vehicle. On that same day I knowingly & maliciously created a substantial risk of interruption and impairment of service rendered to the public by physically damaging and tampering with the Seattle Justice Center by shooting the windows with a pellet gun.

CP 61. Regarding the two misdemeanor charges, Fulton admitted:

On December 3, 2012 in King Co WA I knowingly and maliciously caused physical damage to the Last Supper Club by throwing a brick at a window of that building. On the same date, I knowingly and maliciously caused physical damage to the windows of Garfield High School, Allstate Insurance and the Crossroads Trading Company. Also on Dec. 3, 2012 I recklessly engaged in conduct which created a substantial risk of death and serious physical injury to other persons by discharging a pellet gun towards the windows of an occupied business.

CP 71.

The court initially sentenced Fulton to eight months confinement for attempting to elude, with five months on the second-degree malicious mischief to run concurrently. CP 76. On the two misdemeanors, the court imposed suspended sentences on the condition of 24 months probation. CP 80-81. The court required Fulton to obtain a mental health evaluation and follow treatment recommendations of a provider informed of his substance abuse history. CP 82. The court also made a finding in the felony judgment and sentence, 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 75.

At his sentencing hearing, Fulton complained of being forced to plead guilty. RP 30. The court asked Fulton whether he wished to

withdraw his plea. RP 30. He said he did not, and clarified he was referring to other past incidents. RP 30.

Notice of appeal was timely filed. CP 84. While the appeal was pending, new counsel was appointed in the trial court and a motion for resentencing was filed. Supp. CP¹ ____ (Sub no. 41, Defendant's Motion for Resentencing, filed 4/2/2013). On April 18, 2013, an amended Judgment and Sentence was filed that corrected Fulton's offender score from 4 to 3 and reduced his confinement on the attempting to elude charge to six months. Supp. CP ____ (Sub no. 47, Amended Judgment and Sentence, filed 4/16/2013). No additional notice of appeal was filed from the amendment.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND FULTON HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay Legal Financial Obligations (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

¹ A supplemental designation of clerk's papers was filed July 2, 2013.

on ability to pay under the “clearly erroneous” standard. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 312). An erroneous finding may be challenged 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). The finding of ability to pay in this case should be vacated because it is unnecessary and unsupported by the record.

Findings on ability to pay LFOs are not required at the time the LFOs are imposed unless non-mandatory fines are imposed. State v. Blank, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997); RCW 10.01.160(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.”). In general, the proper time for findings regarding ability to pay is “the point of collection and when sanctions are sought for nonpayment.” Id. Here, the court imposed only the mandatory Victim Penalty Assessment and DNA Collection fees. CP 75. All other legal financial

obligations were waived. CP 75. Thus, there was no need for the court to make findings regarding Fulton's ability to pay at his sentencing hearing.

If the court opts to make such a finding, 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). As in Bertrand, this record reveals no evidence or analysis supporting the court's finding Fulton had the present or future ability to pay his LFOs. And given Fulton's mental health problems, his financial resources are likely to be meager. CP 10-17; RP 11-16. 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, there must be a properly supported, individualized judicial determination that Fulton has the ability to pay. Id. at 405 n. 16. This Court should strike the unnecessary and unsupported finding from the judgment and sentence.

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

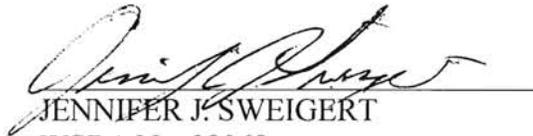
D. CONCLUSION

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

DATED this 3rd day of July, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Jennifer J. Sweigert", is written over a horizontal line.

JENNIFER J. SWEIGERT

WSBA No. 38068

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Attorney for Appellant

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69961-0-1
)	
EDWARD FULTON,)	
)	
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 3RD DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDWARD FULTON
NO. 213011584
KING COUNTY JAIL
500 FIFTH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF JULY 2013.

X *Patrick Mayovsky*