

71323-0

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No. 71323-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MASON-WEBB,

Appellant.

---

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

The Honorable Timothy Bradshaw

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority when it imposed discretionary court costs in the absence of evidence that Mr. Mason-Webb possessed the ability to pay.

2. In the absence of substantial evidence, the trial court erred in entering finding 4.2 of the Judgment and Sentence purporting to find Mr. Mason-Webb had the present or future ability to pay discretionary costs imposed by the court.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A trial court must determine whether a defendant has the means to pay legal financial obligations before imposing discretionary fees and costs. Here, there was no evidence Mr. Mason-Webb possessed the ability to pay any of the costs and fees yet the trial court determined he had the present or future ability to pay. Was the trial court's determination clearly erroneous?

C. STATEMENT OF THE CASE

Joshua Mason-Webb was convicted of first degree escape following a jury trial. CP 38. At sentencing, in the absence of any request by the State, in addition to the \$600 in mandatory costs, the court imposed \$465 in discretionary "court costs." CP 41; 12/3/2013RP

7. In a boilerplate “finding,” the court checked the box at section 4.2 of the Judgment and Sentence, which purported to find:

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 41.

D. ARGUMENT

THE FINDING THAT MR. MASON-WEBB HAD THE PRESENT OR FUTURE ABILITY TO PAY THE DISCRETIONARY COST IS WITHOUT SUPPORT

1. The court must inquire about the defendant’s ability to pay before imposing discretionary costs. The allowance and recovery of costs is entirely statutory. *State v. Nolan*, 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999).<sup>1</sup> Unlike mandatory obligations, if a court intends to impose *discretionary* legal financial obligations (LFOs) as a sentencing condition, such as court costs and fees, it must consider the defendant’s

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<sup>1</sup> Mr. Mason-Webb did not object at the time the court imposed the costs but he may still raise this issue for the first time on appeal. *See State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal). In addition, whether a defendant may raise the imposition of discretionary cost for the first time on appeal is pending before the Supreme Court in *State v. Blazina*, 174 Wn.App. 906, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013). *Blazina* was argued on February 11, 2014, and a decision is pending.

present or likely future ability to pay.<sup>2</sup> *State v. Lundy*, 176 Wn.App. 96, 103, 308 P.3d 755 (2013).

While the trial court need not make a formal finding that the defendant has or will have the ability to pay, *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991), where the court does make such a finding, the record must support it. *State v. Bertrand*, 165 Wn.App. 393, 403-05, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). The appellate court reviews the trial court's determination of the defendant's financial resources and ability to pay for clear error. *Bertrand*, 165 Wn.App. at 404 n. 13.

““A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a definite and firm conviction that a mistake has been committed.”” *Lundy*, 176 Wn.App. at 105 (internal quotation marks omitted), *quoting Schryvers v. Coulee Cmty. Hosp.*, 138 Wn.App. 648, 654, 158 P.3d 113 (2007).

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<sup>2</sup> Mr. Mason-Webb does not challenge the mandatory costs of \$600 imposed by the court. *See State v. Curry*, 62 Wn.App. 676, 681, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992) (a \$500 victim assessment is required by RCW 7.68.035, irrespective of the defendant's ability to pay); *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (a \$100 deoxyribonucleic acid collection fee is required by RCW 43.43.7541, also irrespective of the defendant's ability to pay).

Here, the trial court imposed the discretionary court costs and purported to make a finding that Mr. Mason-Webb had, or would have, the financial ability to pay it. There is nothing in the record to support this finding.

2. The trial court failed to consider Mr. Mason-Webb's ability to pay the costs. The trial court may order a defendant to pay court costs as here pursuant to RCW 10.01.160. But,

[t]he 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.

RCW 10.01.160(3).

In *Bertrand*, the appellate court held that in order to uphold a finding of ability to pay on appeal, the record must be “sufficient for us to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden’ imposed by LFOs.” 165 Wn.App. at 404, *quoting Baldwin*, 63 Wn.App. at 312. In *Bertrand*, the defendant had disabilities that may have reduced or possibly eliminated her future ability to pay LFOs, however the trial court ordered the defendant to pay the LFOs within 60 days of the judgment and sentence even while still incarcerated. 165 Wn.App. at

404 n. 15. The record failed to show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before the appellate court contained no evidence to support the trial court's finding that Bertrand had the present or future ability to pay LFOs. Accordingly, the Court of Appeals held that the trial court's judgment and sentence finding was clearly erroneous. *Bertrand*, 165 Wn.App. at 404.

In this case, the only evidence presented regarding Mr. Mason-Webb's employment history was that he was given a pass from the work-release program to interview for a prospective job. 11/14/2013RP 38. Although he was serving a drug-related sentence when housed in work release, there was no evidence at all of his present or future employment prospects. 11/14/2013RP 54-56. At sentencing, the trial court did not make any inquiry into Mr. Mason-Webb's resources or employability. Indeed, the State did not even argue that there was evidence to support the finding. More importantly, the State never asked for imposition of this discretionary cost.

Ultimately, the trial court's finding is not supported. The record fails to show that the trial court took Mr. Mason-Webb's financial resources and ability to pay into account. The trial court erred in

imposing the \$465 in discretionary costs. This Court should remand to the trial court to strike the finding of ability to pay.

3. The issue is ripe. Although Mr. Mason-Webb challenges the trial court's finding that he had the current or future ability to pay LFOs, he does not challenge the trial court's decision to impose those costs. Generally, "challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." *Lundy*, 174 Wn.App. at 108 (emphasis omitted); see also *Bertrand*, 165 Wn.App. at 405 ("[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." (emphasis omitted), quoting *Baldwin*, 63 Wn.App. at 310.

Because the State has not yet attempted to collect Mr. Mason-Webb's LFOs, any challenge to the trial court's imposition of the LFOs at this time would not be ripe. *Lundy*, 174 Wn.App. at 108. More importantly here, because a party can challenge a finding of fact at any time, Mr. Mason-Webb's challenge to the trial court's finding of an ability to pay here is properly before the Court. *Lundy*, 174 Wn.App. at 105 n. 6.

E. CONCLUSION

For the reasons stated, Mr. Mason-Webb asks this Court to remand for the trial court to strike the finding of an ability to pay the discretionary cost.

DATED this 25<sup>th</sup> day of July 2014.

Respectfully submitted,



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JOSHUA MASON-WEBB,	)	
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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
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[X] JOSHUA MASON-WEBB	(X)	U.S. MAIL
867718	( )	HAND DELIVERY
CLALLAM BAY CORRECTIONS CENTER	( )	_____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF JULY, 2014.

X \_\_\_\_\_ 

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