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COURT OF APPEALS
DIVISION II

NO. 43753-8

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

THOMAS COLE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 12-1-00432-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the court abused its discretion in imposing \$500 in discretionary attorney fees where the court considered defendant's present or future ability to pay?
2. Whether a remand is required when the trial court failed to sentence defendant to a fixed term of community custody pursuant to RCW 9.94A.701(1)(a)?

B. STATEMENT OF THE CASE.

1. Procedure

On February 7, 2012, the Pierce County Prosecutor's Office charged appellant, Thomas Cole ("defendant"), with one count of failure to register as a sex offender. CP 1.

On June 28, 2012, the case proceeded to a bench trial before the Honorable Ronald Culpepper. 1 RP 4.¹ On July 2, 2012, the court found defendant guilty of failing to register as a sex offender. 2 RP 141.

¹ The State will refer to the verbatim report of proceedings as follows: The two sequentially paginated volumes referred to as 1–2 will be referred to by the volume number followed by RP. The sentencing hearing is not sequentially paginated and will be referred to as 3 RP.

At sentencing, the court imposed a low-end sentence of 17 months imprisonment. CP 22–40 at 28; 3 RP 10. Defendant's offender score was a six. CP 22–40 at 25. The court imposed community custody as follows:

The defendant shall be on community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court as follows: Count 1: 0–36 months for FTRSAO—not to exceed statutory max.

CP 22–40 at 29.

The court imposed the following Legal Financial Obligations (LFOs): \$500.00 crime victim assessment fee; \$100.00 DNA database fee; and \$500.00 in attorney fees. CP 22–30 at 26; 3 RP 11.

Defendant filed this timely appeal on July 20, 2012. CP 7.

2. Facts

Defendant has a conviction for Child Rape in the first degree. CP 22–40 at 25. This conviction requires him to register as a sex offender indefinitely. 2 RP 42, 116; RCW 9A.44.130. Defendant was registered as a sex offender on November 23, 2011, with the address of "Transient, Pierce County, Washington." 2 RP 44, 49.

Steven Roth met defendant at a party and later saw him on the street with a duffel bag. 2 RP 76–77. Roth offered his residence to defendant as a temporary place to sleep. 2 RP 77, 81. Defendant understood that his stay was only temporary and testified that he needed to leave the residence "as soon as possible" and that he "needed to get a job."

2 RP 100. Defendant registered with Roth's address on November 30, 2011. 2 RP 51, 53.

Steven Roth, his girlfriend, and his child, moved out of the 76th Avenue West residence by December 30, 2011. 2 RP 110. Defendant testified that, despite allegedly still living with the Roths, he was unaware that the family had moved out. 2 RP 111. Defendant believed that he still had permission to live at 4510 76th Avenue West, University Place, even though nobody answered the door to let him inside. 2 RP 108. The court considered this portion of defendant's testimony not credible. 2 RP 139. The court found that defendant was aware of his January 1, 2012, duty to register as a sex offender and that he failed to do so. 2 RP 140–141.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN IMPOSING DISCRETIONARY ATTORNEY FEES UPON DEFENDANT.

a. The matter is not properly before this Court.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). However, RAP 2.5(a) provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In determining whether a defendant may raise an issue for the first time on appeal under RAP 2.5(a), the court must first make a cursory determination as to whether the alleged error even suggests a constitutional issue. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If it does, the court must then determine if the error is manifest; that is, if the asserted error had practical and identifiable consequences in the trial of the case. *Id.* at 345. See also *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (holding that an appellant must show that he or she incurred actual prejudice in order to demonstrate that a constitutional error is manifest). Once the appellant has demonstrated that the error is both constitutional and manifest, the burden shifts to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011). When the record does not contain the facts necessary to adjudicate a claimed error, “no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In the present case, defendant did not object to the imposition of LFOs. Because there is no record of defendant’s inability to pay LFOs, the defendant has not suffered prejudice and the claimed error cannot be manifest. *McFarland*, 127 Wn.2d at 333. Defendant does not claim any of the three conditions listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal. Because defendant failed to raise his inability to pay fees at the trial court level and now improperly petitions

the Court to review the issue for the first time on appeal, the issue is not properly before this Court.

b. The issue is not ripe for review.

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *State v. Smits*, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009). *See also State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (holding that "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation.").

"The party presenting an issue for review has the burden of providing an adequate record to establish such error[.]" *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *see also* RAP 9.2(b).² "If the appellant fails to meet this burden, the trial courts decision stands." *State v. Tracy*, 128 Wn. App. 388, 394–395, 1215 P.3d 381 (2005).

Here, there is no evidence that the State has sought collection of defendant's attorney fees. The issue is thus not ripe for review.

² RAP 9.2(b) states, in relevant part: "If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding." *Id.*

- c. The trial court acted within its discretion in imposing attorney fees upon defendant after he was convicted.

Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial pursuant to RCW 10.01.160(1)–(2). This statute "allows courts to require an indigent defendant convicted of a felony to pay court costs, including recoupment of fees for court appointed counsel." *State v. Smits*, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009). RCW 10.01.160(3) conditions this assessment of fees, however, upon the trial court's *consideration* of defendant's present or future ability to pay. Formal findings regarding a defendant's ability to pay LFOs are not required. *State v. Curry*, 62 Wn. App. 676, 679–680, 814 P.2d 1252 (1991). *See also State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55 (1991); *State v. Suttle*, 61 Wn. App. 703, 812 P.2d 119 (1991) (in both cases, financial obligations were upheld in the absence of formal findings regarding the ability to pay).

In the present case, the Judge Ronald Culpepper found that defendant was able to pay his LFOs. Finding 2.5 of defendant's judgment and sentence states that:

The court has considered the total amount owing, the defend's [sic] past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the likely future ability to pay the legal financial obligations imposed herein.

CP 22–40 at 26. Not only did the trial court formally state that it considered defendant's ability to pay, but defendant and his counsel acknowledged as much by signing the judgment and sentence which contained the finding. CP 22–40 at 35.

The trial court's support for imposing attorney fees upon defendant is not limited to finding 2.5 in defendant's judgment and sentence. Indeed, the record contains sufficient evidence from which the trial court could determine that defendant had the present *or future* ability to pay attorney fees.

Defendant is 21 years old.³ At trial, defendant was age 20. There is no evidence that defendant has any physical impairments that would hinder his future ability to pay LFOs. In fact, defendant's use of a bicycle as his means of transportation indicates that he did not have any significant physical impairments that would seriously affect his present or future ability to pay. 2 RP 99. Additionally, defendant recognized that he "needed to get a job" and did not give the court any reason to doubt that he could do so. 2 RP 100. Indeed, defendant testified that he was trying to find work while staying at the Roth residence. 2 RP 101.

Defendant's defense was based upon the notion that he was *not* homeless (and thus was not required to re-register as a sex offender) because he had permission to live with the Roth family. Defendant now argues on appeal that because he *is* homeless, he does not have the present

or future ability to pay LFOs.⁴ Even assuming defendant's alleged current homelessness is accurate, this would not preclude a trial court from finding defendant has the *future* ability to pay LFOs. To rule otherwise would not only exempt an entire class of individuals from payment of discretionary court fees, but it would send a message that 20-year-old homeless individuals have little hope for any future financial opportunity.

The trial court's finding 2.5 of defendant's judgment and sentence states for the record that the court has considered defendant's ability to pay. CP 22-40 at 26. Defendant and his counsel signed to this finding. Defendant was age 20 at trial, recognized a need to look for work, did in fact look for work, and has no physical impairments. The trial court did not abuse its discretion in imposing attorney fees upon defendant.

2. A REMAND IS REQUIRED FOR THE TRIAL COURT TO CORRECT DEFENDANT'S COMMUNITY CUSTODY TERM TO A FIXED PERIOD OF THREE YEARS CONSISTENT WITH RCW 9.94A.701(1).

Here, defendant was sentenced to an indefinite term of community custody: the longer of the period of early release; or zero to 36 months.

³ Defendant was born in September, 1991. CP 22-40 at 25.

⁴ Implicit in the trial court's ruling was the fact that defendant did not live at 76th Avenue West. There is no evidence, however, that defendant is currently homeless.

CP 22-40 at 29. The correct term of community custody, however, is a fixed period of three years. RCW 9.94A.701 provides, in relevant part, as follows:

- (1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:
 - (a) A sex offense not sentenced under RCW 9.94A.507[.]

"It is well established that the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial." *State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980), *overruled by statute on other grounds as stated in State v. Barr*, 99 Wn.2d 75, 658 P.2d 1247 (1983). The error is grounds for reversing only the erroneous portion of the sentence imposed." *Id.* at 496.

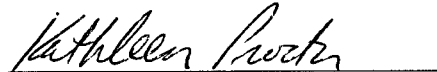
Here, the erroneous community custody term of zero to 36 months is within the range of the correct term of 36 months. Accordingly, an order for corrected judgment and sentence is sufficient to bring defendant's sentence into compliance with RCW 9.94A.701(1).

D. CONCLUSION.

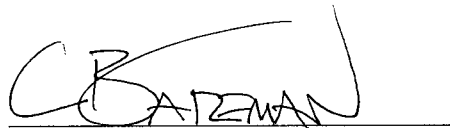
For the reasons listed above, the State respectfully asks this Court to affirm the trial court's imposition of attorney fees but remand to the trial court for entry of an order correcting the judgment and sentence.

DATED: MARCH 27, 2013

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-27-13 Theresa Kah
Date Signature