NO. 44723-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANK YOUELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 12-1-02203-0

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On June 15, 2012, the Pierce County Prosecuting Attorney (State) charged the defendant, Frank Youell, with one count of unlawful possession of a firearm in the first degree (UPF1). CP 1. The defendant filed a motion to suppress evidence, specifically the firearm, under CrR 3.6. CP 3-13.

The case was assigned to Hon. Bryan Chushcoff for the suppression hearing and trial. 12/11/2012 RP 4. The court denied the motion. CP 41. Because the case hinged upon the legality of the discovery of the firearm, arguments centered on that issue. The defendant waived jury trial and proceeded to trial on stipulated facts. CP 25, 26-29. The court found the defendant guilty as charged. CP 44.

The court sentenced the defendant to 42 months in prison. CP 52. The court also ordered the defendant to pay a total of $1,300 in legal financial obligations (LFOs). CP 50.

The defendant filed a timely notice of appeal. CP 73.

2. Facts

In the early morning hours of June 14, 2012, police were dispatched to the area of East 56th St. and McKinley Ave. in Tacoma regarding a reported armed robbery. 12/11/2012 RP 8. The suspect was described as a light-skinned or Native American male wearing a black coat, or black puffy coat, and blue jeans. 12/11/2012 RP 9. The 911 caller reported that the suspect was carrying a .38-type handgun. 12/11/2012 RP 10.

Shortly after the call, police saw the defendant walking on a sidewalk at East 52nd and McKinley. 12/11/2012 RP 11. Because the defendant met the description given, police contacted him. 12/11/2012 RP 14. The contact resulted in discovery of a handgun in the defendant's waistband. 12/11/2012 RP 21.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

a. Initial contact by police was not a "seizure" under the Constitution.

"[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification." ***United States v. Mendenhall***, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); ***State v. Rankin***, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). "[T]he police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing." ***State v. Young***, 135 Wn.2d 498, 511, 957 P.2d 681 (1998).

As part of a police officer's general duty, he may approach a citizen and ask questions limited to eliciting that information necessary to perform that function has not 'seized' the citizen. ***State v. Bailey***, 154 Wn. App. 295, 300, 224 P. 3d 852 (2010). The United States Supreme Court has made clear that

> Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required.

Florida v. Bostick, 501 U.S. 429, 434-35, 111 S. Ct. 2382, 115 L. Ed. 2d

389 (1991). *Accord,* ***State v. Harrington***, 167 Wn.2d 656, 664, 222 P.3d 92 (2009) ("Article I, section 7 does not forbid social contacts between police and citizens: '[A] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.'") (quoting ***Young***, 135 Wn.2d at 511).

In ***Young***, a Pierce County deputy sheriff saw the defendant speaking with a woman on a street corner in the late evening. *Id.* at 502. The deputy got out of his car and spoke with Young, learning his name. There was no suspicion of illegal activity. *Id.* The deputy drove further down the road, out of sight and ran a records check on Young. The deputy returned to Young's location and shined a spotlight on him. *Id.*, at 503. Young quickly walked behind a tree and appeared to drop something. The deputy stopped and found drugs there. *Id.* The conversation and spotlighting did not amount to a "seizure" under Art. 1, sec. 7. *Id.*, at 513.

"A seizure occurs when an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. This is an objective standard." ***Rankin***, 151 Wn.2d at 694. Factors indicative of a seizure include the "threatening presence of several officers, the display of a weapon by an officer, some physical touching of

the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." ***Harrington***, 167 Wn.2d at 664 (quoting ***State v. Young***, 135 Wn.2d 498, 512, 957 P.2d 681 (1998)).

Where an officer retains the person's identification card can be a factor in determining whether the person is "seized." An officer's request for identification, without more, is not a seizure. ***State v. Smith***, 154 Wn. App. 695, 226 P.3d 195 (2010); ***State v. Hansen***, 99 Wn. App. 575, 578–579, 994 P.2d 855 (2000). However, if an officer removes a suspect's identification or property from the suspect's presence, then the suspect is seized. *See* ***State v. Armenta***, 134 Wn.2d 1, 12, 948 P.2d 1280 (1997) (officer held a large amount of defendant's money for "safe-keeping"); ***State v. Thomas***, 91 Wn. App. 195, 200-201, 955 P.2d 420 (1998) (officer took license from defendant's presence for a records check).

In ***Smith***, when the officer requested identification, he remained within two to three feet of Smith while holding Smith's check cashing card. Smith was not seized because the officer did not remove Smith's identification or property from his presence. Similarly, in ***Hansen***, 99 Wn. App. at 579, the examination of the defendant's license was not a seizure where the policeman never left the defendant's side.

Here, as in ***Smith*** and ***Hansen***, the officer's examination of the identification was brief and never out of the defendant's presence. It did not result in a "seizure" of the defendant. As in ***Young***, police contacted the defendant without a "show of authority." He was not seized or detained in the initial contact.

b. The stop was a lawful investigative detention.

To justify an investigative detention under the Fourth Amendment and Art. I, § 7, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry v. Ohio***, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); ***State v. Armenta***, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. *See* ***State v. Kennedy***, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *see, e.g.*, ***State v. Young,*** 167 Wn. App. 922, 275 P. 3d 1150 (2012).

State v. Randall, 73 Wn. App. 225, 226, 868 P.2d 207 (1994) addressed a similar issue and similar facts as the present case. The University of Washington Police Department received a report of an armed robbery. *Id.* Dispatch provided a description of the two suspects and described the gun used in the robbery as a small caliber handgun. *Id.*

Approximately ten minutes after the broadcast, an Officer saw Randall who matched the description of one of the suspects, about six blocks away from where the robbery allegedly occurred. *Id.* Randall was standing next to another male, both who left the area upon seeing the patrol vehicle. *Id.*

The officer approached Randall, identified himself, and told Randall he fit the description of a robbery suspect. *Id.* The Officer asked Randall if he was carrying any weapons and he denied possessing any weapons. *Id.* at 227. At that point, Randall reached for his pocket and the officer frisked him. *Id.* The officer felt a hard, L-shaped object through Randall's heavy coat, stopped the frisk, and detained Randall. *Id.* The object was removed and consisted of only a pipe and baggie of drugs. *Id.* No weapons were found and no evidence was obtained to connect Randall to the robbery. *Id.*

The Court of Appeals affirmed the trial court's decision denying the motion to suppress. The court found, that these facts supported an investigative detention and a weapons frisk. *Id.* at 229-231. The court's decision noted that this investigation involved an alleged armed robbery, a violent crime posing a significant threat to the safety of the officer and the public in general. *Id.* at 230.

A similar decision was reached in ***State v. Harvey***, 41 Wn. App. 870, 872-874, 707 P.2d 146 (1985). There, police dispatch reported a

burglary in progress in West Seattle at 8:50 p.m. *Id.* at 871. The report identified a black male as the suspect and included a partial clothing description, although the officer characterized the clothing description as "skimpy." *Id.* The police arrived approximately one and half blocks away from the scene when a taxi driver pointed out Harvey, who was walking through an apartment complex as the "person that you want." *Id.* The Officer observed that Harvey fit the description of the suspect. *Id.*

The officer drove into the parking lot and ordered Harvey to stop and to place his hands on the patrol car with his legs out. *Id.* The officer proceeded to pat down Harvey and, while doing so, asked him his name, address, and what he was doing there. *Id.*

The Court found that the investigative stop was justified under these facts. The appellate court held that sufficient grounds existed for the officer to make a ***Terry*** stop. ***Harvey***, 41 Wn. App. at 874. The court also found that the pat-down search of Harvey was lawful. *Id.* at 874-875.

As in ***Randall*** and ***Harvey***, the officers in the present case contacted the defendant based on specific and articulable facts giving rise to a reasonable suspicion that the defendant was the person who had committed the reported robbery. Officers in this case responded to a 911 call where a woman reported being robbed at gunpoint by a light skin (possibly Native American) male, wearing a black jacket and gray pants.

The woman also described the weapon as a .38 type handgun. The defendant not only fit the description of the robbery suspect, but he was also walking in the area near the robbery scene. He consented to a frisk by police. 12/11/2012 RP 19. Once police illuminated the defendant and saw that he fit the description of the suspect, police had authority to conduct an investigative detention or "***Terry*** stop."

Washington appellate courts, in the above cases, have instructed litigants that the trial court's decision should focus on the fact that this investigation involved an alleged armed robbery, a violent crime posing a significant threat to the safety of the officer and the public in general. Moreover, that "When acting on a tip that a violent offense has just been committed . . . the officer must make a swift decision based upon a quick evaluation of the information available at the instant his or her decision is made." ***Randall***, 73 Wn. App. at 226.

Pursuant to ***Terry v. Ohio***, 392 U.S. at 26-27, police officers may make limited searches for the purposes of protecting the officers' safety during an investigative detention. An officer need not be absolutely certain that the detained person the officer is investigating at close range is armed or dangerous; the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. ***Terry***, 392 U.S. at 27. Reviewing courts have been reluctant to

substitute their judgment for that of police officers in the field. "A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing." ***State v. Collins***, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting ***State v. Belieu***, 112 Wn.2d 587, 601-602, 773 P.2d 46 (1989). Factors to be considered include that the reported crime involved the use of a weapon (***Belieu***, at 604); and the suspect's clothing would allow for concealment of weapon. *See* ***State v. Xiong***, 137 Wn. App. 720, 154 P.3d 318 (2007).

Here, police were responding to a 911 call regarding a robbery using a firearm at East 56th and McKinley. They had a description of the suspect and the gun. The caller to 911 had ended her call abruptly. The 911 operator had been unable to reconnect with the caller. Minutes after the 911 call, the police officers came upon the defendant walking only blocks away from the reported robbery. He met the description of the suspect. He was wearing a baggy or "puffy" coat. These factors are similar to those found sufficient to permit a stop and frisk in ***Belieu*** and ***Xiong***. The totality of the circumstances justified the stop and the weapons frisk in this case.

c. Standard of review and characterization of findings.

Whether police have seized a person is a mixed question of law and fact. ***State v. Harrington***, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). The appellate court reviews a trial court's order on a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. ***State v. Bliss***, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "Credibility determinations are for the trier of fact and are not subject to appellate review. We must defer to the [trier of fact] on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." ***State v. Liden***, 138 Wn. App. 110, 117, 156 P.3d 259 (2007). The trial court's conclusions of law following a suppression hearing are reviewed *de novo*. ***Armenta***, 134 Wn.2d at 9.

Here, the officers contacted the defendant and engaged him in conversation about what he was doing in the area. The officers illuminated him because the area was dark. Officers did not use their blue "emergency" lights, nor make any other show of authority. *Cf.* ***State v. Gantt,*** 163 Wn. App. 133, 135, 257 P. 3d 682 (2011). Therefore, this was

not a "seizure" or detention under the law. The defendant was likewise not seized when he provided his identification, stated that he did not have any weapons, and said that he would consent to a frisk of his person for weapons. The encounter turned to a seizure only when the defendant began crying, whispering "oh my god, oh my god," and the officers handcuffed him. 12/11/2012 RP 20-21. The officers had a reasonable suspicion to detain the defendant to investigate the reported robbery, and reason to believe that the defendant may be armed.

As the responding officers were conducting an area check, the officers contacted the defendant who matched the description of the robbery suspect, only blocks from the robbery scene. The defendant identified himself and stated that he was walking from the store that was closed. The officers informed the defendant that they were investigating a robbery. 12/11/2012 RP 16, 19.

The defendant assigns error to Finding of Fact 4: "foot traffic in this area at that time of night was minimal to non-existent." CP 38. App Br. at 1. Officer Wolfe testified that:

> Q: Given that it is a residential area at 12:42 a.m., how would you describe foot traffic at this time of day?
> A: It would be unusual.

12/11/2012 RP 13. The defendant also assigns error in Finding 4; "The defendant appeared to substantially match the suspect description." CP 38. App Br. at 1. Officer Wolfe testified:

> Q: When you spot the defendant, what is it that you noticed about him?
> A: I noticed that he matched the description of our suspect given.
> Q: How so?
> A: Indian male, Native American wearing a black coat and blue jeans.

12/11/2012 RP 12. And further:

> Q: You turned on your spotlight to illuminate him?
> A: Uh-huh.
> Q: Why did you do that?
> A: Because it is dark outside. At that hour in the morning, it is very dark outside. You know, we really couldn't see very much. There isn't a whole lot of streetlights there. Again, he is wearing baggy, puffy clothing and things like that, so...

12/11/2012 RP 13.

The defendant assigns error to Finding of Fact 5: "The defendant responded that he was just coming from a store at East 56th and McKinley Avenue (the location of the reported robbery)." CP 38. App. Br. at 1. Officer Wolfe testified:

> Q: Tell us about that contact.
> A: I was driving -- riding in the passenger side. My partner was driving that night. Get out, identify him, you know, as looking like possibly our suspect. We ask him what he is doing. We [sic] said that he is walking to the corner store at 56th and McKinley. He said that

> they were closed and that he was going to walk over to 40th and McKinley where there was a 7/11 that's open for 24 hours.

12/11/2012 RP 13-14.

These Findings are all supported by substantial evidence. The court did not err in making these Findings.

d. The Conclusions of Law include findings of fact.

The defendant assigns error to all of Conclusions of Law 2, 3, and 4. App Br. at 2-3. However, while they contain conclusions of law, these also include mischaracterized findings of fact. A finding of fact is an assertion that evidence shows something has occurred, existed, or will occur or exist, independent of an assertion of its legal effect. ***State v. Williams***, 96 Wn.2d 215, 221, 634 P.2d 868 (1981); ***State v. Niedergang***, 43 Wn. App. 656, 658–59, 719 P.2d 576 (1986). The statement is a conclusion of law if the determination is made by a process of legal reasoning from the facts. ***Niedergang***, 43 Wn. App. at 658–659. The Court reviews findings of fact that are improperly called conclusions of law as findings of fact. ***Lanzce G. Douglass, Inc. v. City of Spokane Valley***, 154 Wn. App. 408, 225 P.3d 448 (2010); ***State v. Marcum***, 24 Wn. App. 441, 445, 601 P.2d 975 (1979). Conversely, conclusions of law

mischaracterized "findings of fact" are reviewed *de novo*. ***State v. Cole***, 122 Wn. App. 319, 93 P.3d 209 (2004).

> Conclusion of Law 2 includes the facts:
>
> > The reasonable suspicion of his involvement in the reported armed robbery stemmed from the totality of the circumstances including but not limited to his proximity both temporally and geographically to the reported robbery, his substantially matching the description of the suspect, and his potential possession of a firearm. The reasonable suspicion of his potential possession of a firearm stemmed from the totality of the circumstances including but not limited his excited reaction to being asked to consent to a frisk for weapons.

CP 39. This is not a conclusion of law; it is a finding of fact. Theses facts are supported by testimony that the defendant was close to the reported robbery (12/11/2012 RP 8, 11); he fit the description given (*Id.*, at 9, 12); and the report of a firearm (*Id.*, at 10). He reacted emotionally when police asked to frisk him: weeping and repeating "Oh my God." *Id.*, at 20.

> In Conclusion 3, the court included:
>
> > Reasonable suspicion supporting a *Terry* stop existed no later than when the defendant admitted to being at the scene where the robbery reportedly occurred.

CP 40. "Reasonable suspicion" for a stop is a legal conclusion, reviewed de novo. *See, e.g.*, ***State v. Lee***, 147 Wn. App. 912, 916, 199 P.3d 445 (2008). But facts leading to that conclusion are reviewed for supporting evidence. *See* ***Bliss***, 153 Wn. App. at 203. Therefore, the statement after "*Terry*" is a factual finding of when the suspicion existed. Officer Wolfe

testified that the defendant told them that the defendant had gone to a store at east 56th and McKinley, which he had found to be closed. 12/11/2012 RP 14.

In Conclusion 4, the court included:

> The officers had a reasonable concern for their safety given that they were responding to a reported armed robbery and given the defendant's telling responses when he initially denied possessing a weapon but then began to cry and repeatedly say "oh my god" after consenting to a frisk of his person for weapons.

CP 40. As pointed out above, the defendant did react emotionally and initially denied being armed. 12/11/2012 RP 20.

Thus, the legal conclusions are supported by findings of fact, which are supported by substantial evidence. The court correctly applied the law. The court did not abuse its discretion in denying the motion to suppress and admitting the evidence.

2. THE TRIAL COURT LAWFULLY ORDERED THE DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS.

a. The trial court did not err in ordering the defendant to pay legal financial obligations.

Pursuant to RCW 10.01.160, the court may require defendants to pay court costs and other assessments associated with bringing the case to trial:

> (1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

RCW 10.01.160(1).

Different components of defendant's financial obligations require separate analysis because some LFO's are mandatory and some are discretionary. ***State v. Baldwin***, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); ***State v. Curry***, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992). The sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard. ***Baldwin***, 63 Wn. App. at 312.

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

As in ***State v. Lundy***, -Wn. App.-, 308 P.3d 755 (2013), the defendant in the present case does not distinguish between mandatory and

discretionary legal financial obligations. This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. *See* RCW 9.94A.505, RCW 9.94A.753(4) and (5); ***Lundy***, at 759. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g.*, ***State v. Kuster***, 175 Wn. App. 420, 306 P.3d 1022 (2013). In the present case, the court imposed mandatory fees: CVPA, filing fee, and DNA. CP 50. The court also ordered $500 recoupment for attorney fees. *Id.* The trial court followed the law. There was no error.

b. The ***Calvin*** opinion was recently changed to agree with ***Blazina*** and ***Lundy***.

The defendant relies, in part, on ***State v. Calvin***, 176 Wn. App. 1, 302 P. 3 509 (2013). App. Br. at 21. However, Division I has changed the relevant holding of that case. On October 22, 2013, Division I of the Court of Appeals filed an Order granting reconsideration and amending its opinion in ***State v. Calvin***. *See*, Order Granting (attached as Appendix). The Court reversed itself and deleted the section which had previously found no evidence to support the trial court's findings. Order Granting, at 1. The Court deleted and replaced section V of ***Calvin***, 302 Wn. App. at

521-522. The new section V declines to review the LFO issue for the first time on appeal. Order Granting, at 3. The Court goes on to say that, substantively, the trial court's "finding" was supported by the record and therefore was not clearly erroneous. *Id.*, at 3-4. Regarding the LFO issues, the Court affirmed the trial court in all aspects.

Division I also rejected this argument in ***State v. Parmelee***, 172 Wn. App. 899, 917, 292 P.3d 799 (2013), where the defendant argued that the trial court erred by imposing discretionary legal financial obligations without finding that he had any ability to pay. Division I held that the court's discretionary LFO order did not require findings (citing ***Curry***, 118 Wn.2d at 916) and that the issue of ability to pay would be considered when the State tried to collect (citing ***Blank***, 131 Wn.2d at 242). *Id.*, at 918.

c. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also 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 ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P. 3d 492 (2013), *review granted*, 178 Wn.2d 1010 (2013), the Court of Appeals declined to review the LFO issue for the first time on appeal. *See also* ***State v. Lundy***, -Wn. App.-, 308 P.3d 755, 763 (2013); ***State v. Ralph***, 175 Wn. App. 814, 827, 308 P.3d 729 (2013) (Johanson, A.C.J., concurring in both cases). In ***Calvin***, *supra*, Division I likewise now declines to review the issue for the first time on appeal.

In this case, the defendant does not claim any of the three circumstances listed under RAP 2.5(a) in which an issue could be raised for the first time on appeal. The defendant made no objection to the imposition of LFO's. 4/4/2013 RP 11. Therefore, the defendant did not properly preserve this issue for appeal. The Court of Appeals should not review this issue.

d. The issue is not ripe for review.

Trial courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay:

> 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.

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(4):

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* ***State v. Blank***, 131 Wn.2d 230, 930 P.2d 1213 (1997); ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time

of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d 230, 241–242.

Here, the judgment and sentence recites that the court considered or, in the language of the statute, "took account" of, the defendant's present and likely future financial resources:

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

CP 50. That recitation satisfies the prerequisites for imposing financial obligations.

The "boilerplate" finding of ability to pay on the Judgment and Sentence is likely an effort to standardize compliance with RCW 10.01.160(3) and ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992). As the Court of Appeals observed in its original opinion in ***Calvin***, 302 P.3d at 521, and ***Lundy***, 308 P.3d at 760, it is unnecessary under the statute.

In ***Lundy***, the Court notes that confusion stems from a misreading of the fifth factor in ***Curry***, 118 Wn.2d at 915: "A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end." Division II points out that ***Curry*** does not say that "a

repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations." 308 Wn. App. at 760, n.9. Although the trial court also "found" that the defendant had the present or likely future ability to pay the financial obligations, that conclusion or finding is immaterial and does not warrant relief even if it is not supported by the record. *See* ***State v. Caldera***, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). As pointed out above, in the present case, the record included more than enough information to support the trial court's "finding."

The defendant has the burden to show indigence. *See* RCW 10.01.020; ***Lundy***, 308 Wn. App. at 759, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. Here, the State has not attempted to collect legal financial obligations from the defendant nor established when he is expected to begin repayment of these obligations. *See* CP 50. The State has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. *See* ***Lundy***, 308 P.3d at 761.

The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature. The challenge to the order requiring payment of legal financial obligations is not ripe for review.

D. CONCLUSION.

The court's Findings and Conclusions are based upon sufficient evidence and the correct application of the law. The court properly ordered the defendant to pay LFO's. The defendant's alleged errors were neither preserved for appeal, nor are they ripe for review. For all of the reasons

argued above, the State respectfully requests that the judgment and sentence be affirmed.

DATED: DECEMBER 17, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB #,17442

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.

12/17/13 [signature]
Date Signature

APPENDIX "A"

Order Granting

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

STATE OF WASHINGTON, Respondent, v. DONALD L. CALVIN Appellant.	)	No. 67627-0-I ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION AND AMENDING OPINION

The respondent, State of Washington, filed a motion for reconsideration. The appellant, Donald Calvin, has filed an answer. A panel of the court has determined that the motion should be granted, and the published opinion filed May 28, 2013 shall be amended. Now, therefore, it is hereby

ORDERED that the motion is granted; it is further

ORDERED that the published opinion filed May 28, 2013 be amended as follows:

DELETE the last two sentences of the first paragraph on page 1 that read:

We affirm his convictions. Because there is no evidence to support the trial court's finding that Calvin has the ability to pay court costs and the record does not otherwise show that the trial court considered Calvin's financial resources, we remand for the trial court to strike the finding and the imposition of court costs.

REPLACE those sentences with the following sentence:

We affirm.

DELETE section V. Legal Financial Obligations, which begins on page 20 and ends on page 22, in its entirety.

REPLACE that section with the following:

V. Legal Financial Obligations

The trial court ordered Calvin to pay a total of $1,300 in legal financial obligations (LFOs), including $450 in court costs. It also entered a boilerplate finding stating that had the ability to pay LFOs:

The court has considered the total amount owing, the defendant's 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 ability or likely future ability to pay the legal financial obligations imposed herein.

Calvin challenges the imposition of $450 in court costs, arguing that the boilerplate finding is not supported by evidence, and that the trial court was required to determine whether he had the ability to pay before ordering the payment of costs. The State argues that Calvin did not preserve this issue for review and cannot raise it for the first time on appeal. We agree with the State.

Under RCW 10.01.160(3), "[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." Our Supreme Court has made several things clear about this

statute. First, the sentencing court's consideration of the defendant's ability to pay is not constitutionally required. State v. Blank, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997) ("the Constitution does not require an inquiry into ability to pay at the time of sentencing"). Accordingly, the issue raised by Calvin is not one of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a).

Second, the imposition of costs under this statute is a factual matter "within the trial court's discretion." State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002); In re Pers. Restraint of Shale, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). Calvin's failure to object below thus precludes review.

Third, "[n]either the statute nor the constitution requires a sentencing court to enter formal, specific findings" regarding a defendant's ability to pay. Curry, 118 Wn.2d at 916. The boilerplate finding is therefore unnecessary surplusage. If a challenge to the court's discretion were properly before us, striking the boilerplate finding would not require reversal of the court's discretionary decision unless the record affirmatively showed that the defendant had an *inability* to pay both at present and in the future.

Finally, even if the finding were properly before us for review, we would conclude that it is not clearly erroneous.[1] Calvin testified to his high school

education, some technical training, and his past employment as a carpenter, including a brief time in the union. Calvin also had retained, not appointed, counsel at trial. These facts are sufficient to support the challenged finding under the clearly erroneous standard.

Calvin also challenges the imposition of a $250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the court even take a defendant's financial resources into account before imposing a fine, let alone enter findings. Calvin has not articulated any basis for striking the fine.

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[1] We review the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646, 837 P.2d 646 (1991). "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.'" Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

DELETE the first paragraph on page 24 with reads:

We affirm Calvin's convictions and remand for the trial court to strike the finding that Calvin has the present or future ability to pay LFOs and the imposition of $450 in court costs.

No. 67627-0-I/5

REPLACE that paragraph with the following paragraph:

We affirm.

DATED this 22nd day of October, 2013.

Appelwick, J.

WE CONCUR:

Spearman, A.C.J.

Grosse, J.

PIERCE COUNTY PROSECUTOR

December 17, 2013 - 11:36 AM

Transmittal Letter

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