

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

STATE OF WASHINGTON,

Respondent,

v.

KRIS A. SAEGER,

Appellant.

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

The Honorable Toni A. Sheldon

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to file written findings of fact and conclusions of law following a bench trial as required by CrR 6.1.

2. The trial court exceeded its statutory authority when it imposed costs where there was evidence that Mr. Saeger lacked the ability to pay.

3. The trial court's decision imposing recoupment of attorney's fees violated Mr. Saeger's right to equal protection as there was evidence he did not have the present ability to pay and there was no evidence his inability to pay would end.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 6.1(d) requires the trial court enter written findings of fact and conclusions of law following a bench trial. In the instant case, Mr. Saeger waived his right to a jury trial and agreed to a bench trial. However, no written findings of fact and conclusions of law were entered following the trial. Does the failure to enter written findings of fact and conclusions of law require remand?

2. A trial court must determine whether a defendant has the means to pay legal financial obligations before imposing these fees and costs. Here, there was ample evidence Mr. Saeger was unable 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?

3. A trial court violates a defendant's constitutionally protected right to equal protection when it imposes recoupment for court appointed counsel where it fails to determine the ability of the defendant to pay and whether any claim of indigency will be remedied in the near future. The court here imposed recoupment despite evidence of Mr. Saeger's inability to pay. The court also ignored evidence that Mr. Saeger's indigency would not end soon. Did the trial court violate Mr. Saeger's right to equal protection?

C. STATEMENT OF THE CASE

Kris Saeger was charged with three counts of felony harassment. CP 16-17. Mr. Saeger waived his right to a jury trial and the matter proceeded as a bench trial. CP 18, RP 1-2. After hearing the evidence, the trial court found Mr. Saeger guilty as charged.

At sentencing, the State sought \$1,910 in assessments. RP 93. Mr. Saeger's counsel related Mr. Saeger's financial status and objected to the imposition of the costs:

Mr. Saeger is 35 years old. He has his income Social Security Disability from post-traumatic stress disorder

which occurred when he was severely beaten a couple of years ago, and that's the basis for his disability.

RP 97. Nevertheless, without stating the basis of its finding, the court checked the box on the preprinted form indicating it found Mr. Saeger had the present or future ability to pay any legal financial obligations. CP 7-8, Finding 2.5. The court went on to impose \$1,910 in fees: \$200 filing fee, \$500 crime victim fee, \$260 Sheriff service fee, \$100 DNA fee, and \$850 in attorney's fees recoupment. CP 9-10; RP 100. The court recognized Mr. Saeger's meager financial status when it set Mr. Saeger's minimum payment at \$25 a month. RP 100 ("With the limited income that Mr. Saeger must have through his disability, the Court will set the minimum monthly payment at \$25.00 per month.").

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 6.1

The court entered the Judgment and Sentence on November 26, 2013, and Mr. Saeger filed his Notice of Appeal on the same day. CP 4-15. Written findings of fact and conclusions of law as to guilt, as required by CrR 6.1, have never been entered.

CrR 6.1(d) requires:

In a case tried without a jury, the court *shall* enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days notice of presentation to the parties.

(Emphasis added.) The term “shall” indicates a mandatory duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). And the importance of written findings and conclusions was reinforced by the Supreme Court decision *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). In *Head*, the Supreme Court noted:

A trial court’s oral opinion and memorandum opinion are no more than oral expressions of the court’s informal opinion at the time rendered. An oral opinion “has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.”

Head, 136 Wn.2d at 622, quoting *State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

The *Head* Court determined that in adult bench trials where written findings and conclusions are not filed, remand for entry of findings is the appropriate remedy. *Head*, 136 Wn.2d at 622. But, at the hearing on remand, no additional evidence may be taken as the findings and conclusions are based solely on the evidence already taken. *Head*, 136 Wn.2d at 625.

We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Head, 136 Wn.2d at 624.

Here, the court has never entered the required written findings of fact and conclusions of law following the bench trial. Accordingly, this Court must remand Mr. Saeger’s matter for the entry of the CrR 6.1 findings.

2. THE TRIAL COURT EXCEEDED ITS
STAUTORY AUTHORITY AND VIOLATED
MR. SAEGER’S RIGHT TO EQUAL
PROTECTION IN IMPOSING COURT COSTS
AND ATTORNEY’S FEES IN LIGHT OF HIS
INABILITY TO PAY

a. The court may impose court costs and fees only after a finding of an ability to pay. The allowance and recovery of costs is entirely statutory. *State v. Nolan*, 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those “expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision.”

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs “unless the defendant is or will be able to pay them.” In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs.

RCW 10.01.160(3) provides:

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.

This Court reviews a trial court's determination on an offender's financial resources and ability to pay under the clearly erroneous standard. *State v. Bertrand*, 165 Wn.App. 393, 404 n. 13, 267 P.3d 511 (2011), citing *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991), review denied, 175 Wn.2d 1014 (2012). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Schryvers v. Coulee Community. Hospital*, 138 Wn.App., 648, 654, 158 P.3d 113 (2007), quoting *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The record must be sufficient for this Court to review whether “the trial court judge took into account the financial resources of the defendant and the nature of the burden” under a clearly erroneous standard. *Bertrand*, 165 Wn.App. at 404.

b. The court's "finding" that Mr. Saeger had the ability to pay was clearly erroneous in light of evidence he completely lacked any ability to repay. The court here imposed both costs and recoupment for attorney's fees following a "finding" that Mr. Saeger had the present and future ability to pay. RP 7-8. In fact, the evidence before the court showed the exact opposite; Mr. Saeger had no ability to pay, either presently or in the future.

If a sentencing court finds an offender has the ability to pay LFOs, it must make an adequate record for this court to conclude it had a sufficient "factual basis" to do so. *Baldwin*, 63 Wn.App. at 311 (affirming a trial court finding that an offender had the present or likely future ability to pay LFOs where the only evidence to support it was a statement in the presentence report that the offender "describe[d] himself as employable"). Some evidence is required. *Bertrand*, 165 Wn.App. at 404 (reversing, as clearly erroneous, a trial court finding that an offender had the present or likely future ability to pay LFOs where the record contained no evidence to support it).

The court here found:

The court has considered the total amount owing, the defendant's past, present, and future ability to pay financial legal 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.
RCW 9.94A.753.

CP 8. While the court was not *required* to make an on-the-record finding of an ability to pay, since the court *did* make an express finding, that finding is before this Court to review whether that finding was clearly erroneous. *Bertrand*, 165 Wn.App. at 403-04.

In *Bertrand*, the evidence from trial showed Ms. Bertrand's income source was disability, as it is here with Mr. Saeger. Despite this fact, the trial court imposed costs and fees totaling \$4,334, and ordered her to make minimum payments of \$25 per month to begin upon her completion of her 36-month sentence. In overturning the trial court's finding that Ms. Bertrand had the present and future ability to pay, this Court noted:

The record here does not 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 us on appeal contains no evidence to support the trial court's finding number 2.5 that Bertrand has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding number 2.5 was clearly erroneous.

Bertrand, 165 Wn.App. at 404. This Court further noted that “in light of Bertrand's disability, her ability to pay LFOs now or in the near future is arguably in question.” *Id.* at 404 fn.15.

Here, the facts mirror *Bertrand*. In both circumstances the defendant's sole source of income was disability. Nevertheless, the trial court made a specific finding, checking finding 2.5 in the Judgment and Sentence, that the defendant had the present and future ability to pay, thus imposing thousands of dollars in legal financial obligations. Based upon this Court's well-reasoned decision in *Bertrand*, this Court should reverse finding 2.5 and remand for the trial court to strike it. *Bertrand*, 165 Wn.App. at 405.

To the extent the State may argue the issue is not ripe because there have been no attempts at recovery of these items, the argument fails. Generally, “the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation.” *Bertrand*, 165 Wn.App. at 405 (emphasis omitted), quoting *Baldwin*, 63 Wn.App. at 310. Further, under RAP 3.1, an offender is not aggrieved by an order to pay “until the State seeks to enforce payment and contemporaneously determines [the offender's] ability to pay.” *State v. Smits*, 152 Wn.App. 514, 525, 216 P.3d 1097 (2009), quoting

State v. Mahone, 98 Wn.App. 342, 347-48, 989 P.2d 583 (1999).

These rules govern review of *orders* to pay LFOs, not *factual findings* of ability to pay LFOs. *See Bertrand*, 165 Wn.App. at 403-05. Such factual findings are governed by the clearly erroneous standard and are ripe for review upon entry.

c. The imposition of recoupment for attorney's fees was erroneous because Mr. Saeger did not have a present ability to pay nor was there any indication his indigency would end. The court ordered Mr. Saeger to pay \$850 for “[f]ees for court appointed attorney.” CP 9. Imposition of this fee where the evidence before the court showed Mr. Saeger lacked the ability to pay and there were no indicators showing this inability would end in the near future violated his right to equal protection.

When imposing recoupment for attorney's fees, certain factors must be considered or imposition of recoupment violates equal protection, including whether defendant “is or Will be able to pay.” *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1977), *citing Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). The court must also take into account the financial resources of the defendant and the nature of the burden that payment of costs will

impose, and the court cannot require repayment if it appears that there is no likelihood that defendant's indigency will end. *Id.*

The court's "finding" here ignored the plain evidence that Mr. Saeger had very limited income from Social Security Disability and lacked any ability to pay the costs. Further, by requiring him to pay only \$25 per month, the debt created by imposition of these costs will never be paid off entirely give the interest rate on the judgment of 12% per annum. RCW 10.82.090; RCW 19.52.020. In addition, while Mr. Saeger had no ability to pay before being convicted because of his disability and limited fixed income, his ability to earn money would be further destroyed by the felony conviction which would stigmatize him in the job market and quash any ability he had to remedy his present indigency. Thus, the evidence established Mr. Saeger lacked the ability to pay, and there was a complete lack of evidence that this indigency would end anywhere in the near future. The court's imposition of attorney's fees recoupment violated Mr. Saeger's right to equal protection.

E. CONCLUSION

For the reasons stated, Mr. Saeger asks this Court to remand the matter to the trial court to enter written findings of fact and conclusions of law. In addition, Mr. Saeger requests this Court reverse the trial court's imposition of costs and fees and remand for a determination of the trial court to waive the costs and fees in light of Mr. Saeger's inability to pay.

DATED this 10th day of May 2013.

Respectfully submitted,



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DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 44264-7-II
)	
KRIS SAEGER,)	
)	
Appellant.)	

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