Court of Appeals No. 31922-9-III

NO. 91284-0

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

FRED EDWARD, III,

Petitioner.

PETITION FOR REVIEW

RESPONDENT'S BRIEF

Respectfully submitted:
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Prosecuting Attorney

Teresa Chen

by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the sentencing of the Petitioner.

III. ISSUES

1. Has the Defendant demonstrated any conflict with authority which would permit review under RAP 13.4(b)?
2. Did the sentencing court abuse its discretion in finding the Defendant had the ability to pay legal financial obligations where the Defendant owned property, had credit, had recently been employed, and stated that he had employment opportunities available to him?

IV. STATEMENT OF THE CASE

The Petitioner/Defendant Fred Edward, III, has been convicted

of possessing methamphetamine. CP 4, 25; 3 RP[1] 38. On appeal, he challenges the imposition of legal financial obligations (LFO's).

At the sentencing hearing, citing, RCW 69.50.430(2), the Defendant asked the court to "defer" the $2000 VUCSA fine, "because of the indigency of my client." 3 RP 50. The court found that that the Defendant was indigent and struck the VUCSA fine. CP 8; 3 RP 51. Finding that the Defendant has the ability or likely future ability to pay his legal financial obligations at the rate of $100/mo (CP 7, 9), the court imposed other LFO's, including $1231 in discretionary costs. CP 8; RP 50; Appellant's Brief at 4. The Defendant did not object to the remaining LFO's.

The Defendant argues that the lower court did not inquire into his financial resources. Petition for Review at 2. However, the record before the lower court was replete with information such that there was no necessity for further inquiry: Pending trial, the Defendant posted bail in the amount of $8000 (3 RP 42); there had been testimony at trial that the Defendant owns a motor home and another vehicle (3 RP 51); he has a credit card (2 RP 41); he has the ability to fix furnaces (2 RP 23);

[1] 1 RP refers to the transcript of pretrial hearing as recorded by Court Reporter John McLaughlin; 2 RP refers to the transcript of the trial as recorded by Court Reporter Patricia Adams; and 3 RP refers to the transcript of the sentencing

he requested sentencing alternatives such as work release, because, according to his attorney, he "has employment opportunities available to him" (3 RP 46); and his offense demonstrated that he had the discretionary funds to spend money on six baggies of illegal drugs (2 RP 35-36, 39, 96, 113).

The Court of Appeals granted the State's Motion on the Merits and affirmed the sentence, holding that the court could decline to consider a challenge raised for the first time on appeal. Commissioner's Ruling at 2 (citing *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014)). The court also found that the claim was also without merit. Commissioner's Ruling at 2-4. The Ruling observes that there is sufficient evidence in the record to support the sentencing court's finding of present and future ability to pay $100/mo based on Mr. Edward's ownership of a motor home, other vehicle, and credit card; his attorney's statement that Mr. Edward has employment opportunities available to him; and his apparent employability as evidenced by his ability to fix furnaces and find employment for the purpose of work release. Commissioner's Ruling at 3-4.

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hearing as recorded by Court Reporter Joseph King.

V. ARGUMENT

A. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY AUTHORITY.

The Defendant claims that review should be accepted, because the Commissioner's Ruling conflicts with *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), and *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). Petition for Review at 3. This is incorrect.

The Defendant cites *Fuller v. Oregon* and *State v. Curry* for the proposition that courts may only require an indigent defendant to pay costs if the defendant has the ability to do so. Petition for Review at 3. Because the superior court found that the Defendant Edwards has the ability to pay (and the Court of Appeals agreed), there is no conflict.

The Defendant cites *State v. Curry* for the proposition that the superior court must consider ability to pay. Petition for Review at 4. Because the court entered a finding determining the Defendant's ability to pay (CP 7, 9), there is no conflict.

The Defendant cites *State v. Bertrand* for the proposition that

the record must be sufficient for the appellate court to review whether the trial court considered the defendant's ability to pay. Petition for Review at 5. Because the record is sufficient and the court of appeals relied on specific facts on the record in deciding the challenge, there is no conflict.

The Defendant claims "[t]he record contains no evidence to support the trial court's finding that he has the present or future ability to pay LFO's." Petition for Review at 6. This is patently false. Criminal defendants who challenges the imposition of LFO's often argue that the sentencing court's finding is boilerplate. Here it is the petition which is boilerplate, failing to consider the real facts and evidence in the particular record. The court of appeals listed many actual, specific facts which support the finding.

Because the Defendant fails to demonstrate any conflict of authority, there is no consideration which would permit review under RAP 13.4(b). The petition must be denied.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Defendant claims that the record does not support a finding of his ability to pay. The record is that the Defendant has job

skills. He worked in the recent past and is capable of working immediately, which is why he requested work release. Apparently, he was capable of earning enough to pay the significant fees that are required for sentencing alternatives like work release.[2] The Defendant had capital. He owned a motor home and a vehicle. He was capable of coming up with bail of $8000.

The court found that the Defendant was able to pay his fines at a rate of $100/mo. In addition to mandatory costs, the court imposed a little over a thousand dollars in discretionary costs. Considering the small amount of fines imposed and the reasonable payment schedule, the court had sufficient evidence of the Defendant's ability to pay the ordered costs. There was no abuse of discretion.

The Defendant asks to strike finding 2.5, arguing that this would be consistent with the holding in *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). Petition for Review at 8. Because, unlike in *Bertrand*, there is evidence on the record demonstrating the Defendant's ability to pay, there is no cause to strike the supported finding. The Defendant's request to strike the court's factual finding

[2] According to page 12 of the Franklin County Work Release Application, a work release participant must pay $126/week to participate in the program. http://www.co.franklin.wa.us/sheriff/workrelease.shtml.

must be denied. The finding is supported in the record; and the trial court deserves discretion on factual matters.

The Defendant not only asks to strike the factual finding, but also to strike the imposition of costs. Petition for Review at 8. This remedy is not supported in law.

In *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and, therefore, held that the finding was clearly erroneous. *State v. Bertrand*, 165 Wn. App. at 404. However, the court also noted that the question was not ripe under *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991). *State v. Bertrand*, 165 Wn. App. at 405. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO's. *State v. Bertrand*, 165 Wn. App. at 405.

Note that even if the finding were without basis in the record (which is not the case here), the Defendant's request to strike not just the finding but also the imposition of fines is not the holding in

Bertrand. Rather the *Bertrand* court struck the finding, but affirmed the imposition of LFO's, noting that the proper time to address the question is "when the government seeks to collect the obligation." *State v. Bertrand*, 165 Wn. App. at 405, *citing State v. Baldwin*, 63 Wn. App. at 310.

The Defendant asserts that the court did not balance his financial resources and the nature of the burden of the LFO's, as RCW 10.01.160(3) requires. Petition for Review at 8. The court's decision certainly does balance the Defendant's financial resources, i.e. his employability and his willingness to pay $504/mo in work release fees with the minimal $100/mo legal financial obligation.

This record is sufficient to sustain the finding that the Defendant has the present and future ability to pay $100 a month. The court did not abuse its discretion in imposing the legal financial obligations.

C. THE COURT SHOULD NOT ADDRESS A CHALLENGE TO THE IMPOSITION OF LFO'S MADE FOR THE FIRST TIME ON APPEAL.

Notwithstanding the fact that this Court has accepted review of *State v. Blazina*, No. 89028-5 consolidated with *State v. Paige-Colter*,

No. 89109-5, the existing authority only supports denial of this petition. *State v. Duncan*, 180 Wn. App. 246, 253-54, 327 P.3d 699 (2014) (acknowledging the pending cases yet deciding the matter based on a plethora of existing authority).

Consistent with *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), **this Court should refuse to review a challenge to LFO's raised for the first time on appeal**. Many defendants fail to challenge the imposition of LFO's at sentencing, because the state's burden is so low and because there will be other, better opportunities to make that challenge. *State v. Duncan*, 180 Wn. App. at 250-51. The appropriate time to challenge LFO's is at the time of collection.[3] *State v. Hathaway,* 161 Wn. App. 634, 651, 251 P.3d 253 (2011) (challenges to LFOs are not properly before the court until the State seeks to enforce them); *State v. Smits,* 152 Wn. App. 514, 524, 216 P.3d 1097 (2009); *State v. Blank,* 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

[3] N.B. Corrections deductions from inmate wages for repayment of legal financial obligations are not collection actions by the State requiring inquiry into a defendant's financial status." *State v. Crook,* 146 Wn. App. 24, 27–28, 189 P.3d 811 (2008). There is no lawful or public policy reason to challenge the imposition of costs on an inmate who is being supported by the State such that any funds in his prisoner account are necessarily not needed for his support.

Because indigency is not a static condition, the time of actual collection is also the appropriate time to better assess the offender's actual ability to pay. *State v. Mahone,* 98 Wn. App. 342, 349, 989 P.2d 583 (1999) (a person is not an "aggrieved party" under RAP 3.1 "until the State seeks to enforce the award of costs and it is determined that [the defendant] has the ability to pay"; appellate review is inappropriate in this case); *State v. Blank,* 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

The *Duncan* opinion explains that an offender has good strategic reasons to waive the issue at the time of sentencing when there are "more important issues at stake." *State v. Duncan*, 180 Wn. App. at 251. At the moment the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful" to portray oneself as perpetually unemployed and irretrievably indigent. *Id.*

And, in any case, the matter can be readdressed by a petition for remission after release from incarceration and during the period of collection. *Id.* Washington's recoupment statute contains sufficient safeguards to prevent imprisonment solely for a person's inability to pay. *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). A

criminal defendant may petition the court for remission under this statute at the time that the State seeks to collect. RCW 10.01.160(4).

It is a poor use of judicial resources to accept review of challenges to LFO's raised on direct appeal after sentencing when no objection was made at the time of sentencing. *State v. Duncan* is correctly decided.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: February 12, 2015.

Respectfully submitted:

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AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 12th day of February, 2015, a copy of the foregoing was delivered to Fred Edward, Appellant, 721 West Jay Street, Pasco WA 99301 by depositing in the mail of the United States of America a properly stamped and addressed envelope; and to David Gasch, opposing counsel, gaschlaw@msn.com, by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 12th day of February, 2015.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2018

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Please accept the attached for filing in the State V Fred Edward III, Supreme Court No. 91284-0, Court of Appeals No. 31922-9-III.

Thank you

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