

**FILED**  
**Feb 05, 2015**  
Court of Appeals  
Division III  
State of Washington

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 31922-9-III

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

91284-0

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STATE OF WASHINGTON,

Respondent,

vs.

FRED EDWARD III,

Defendant/Petitioner.

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PETITION FOR REVIEW

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**FILED**  
FEB 10 2015  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
CF

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I. IDENTITY OF PETITIONER.

Petitioner, Fred Edward III, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Commissioner's Ruling filed October 21, 2014, affirming his conviction and sentence. A copy of the Commissioner's Ruling is attached as Appendix A. A copy of the Court's order denying the Motion to Modify Commissioner's Ruling, dated January 7, 2015, is attached as Appendix B. This petition for review is timely.

III. ISSUE PRESENTED FOR REVIEW.

Should the directive to pay legal financial obligations based on a finding of current or future ability to pay be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record? Did the trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Mr. Edward's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

#### IV. STATEMENT OF THE CASE.

Mr. Edward was charged and convicted by a jury of possession of a controlled substance. CP 4. The sentencing court imposed discretionary costs of \$1231 and mandatory costs of \$700<sup>1</sup>, for a total Legal Financial Obligation (LFO) of \$1931. CP 8. The Judgment and Sentence contained the following language:

¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760) 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.

CP 7.

The Court found Mr. Edward indigent and struck the \$2000 drug fine. The Court did not inquire further into Mr. Edward's financial resources and the nature of the burden that payment of the remaining LFOs would impose on him. 9/11/13 RP 50-52. The court ordered Mr. Edward to pay at least \$100 per month commencing immediately. CP 9.

This appeal followed. CP 2-3.

#### V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other

decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)). Specifically, the decision of the Court of Appeals 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).

The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.<sup>2</sup>

Ms. Edward did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. Edward has the present and future ability to pay legal financial obligations and the directive to pay must be stricken. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do

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<sup>1</sup> \$500 Victim Assessment and \$200 criminal filing fee. CP 8.

otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “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.” *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” *Id.* at 915-16.

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<sup>2</sup> This issue is currently pending before the Washington Supreme Court in *State v. Blazina*, No. 89028-5, consolidated with *State v. Paige-Colter*, No. 89109-5.



Here, there is insufficient evidence to support the trial court's finding that Mr. Edward has the present or future ability to pay legal financial obligations as stated in paragraph 2.5 of the Judgment and Sentence. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] 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 under the clearly erroneous standard.’ ” *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show the trial court took into account Mr. Edward's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's finding that he has the present or future ability to pay LFOs. In fact the Court found Mr. Edward indigent and struck the \$2000 drug fine. 9/11/13 RP 51. Nevertheless, the court ordered Mr. Edward to pay at least \$100 per month commencing immediately. CP 9. Therefore, the finding that Mr. Edward has the present or future ability to pay LFOs is simply not supported in the record. Since it is clearly erroneous, the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

This remedy of striking the unsupported finding is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of "fixing" it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was

omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991); *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

b. The imposition of discretionary costs must also be stricken. Since the record does not reveal that the trial court took Mr. Edward's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the judgment and sentence. A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin*, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. But,

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.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. See *Curry*, 118 Wn.2d at 916.

Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404.

Here, the court imposed discretionary costs of \$1231 after finding Mr. Edward indigent. The record reveals no further balancing by the court of Mr. Edward's financial resources and the nature of the burden that payment of LFOs would impose on him. 9/11/13 RP 50-52.

In sum the record reveals the trial court did not take Mr. Edward's particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). The finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay *and* the imposition of the discretionary costs. *Bertrand*, 165 Wn. App. at 405.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted February 5, 2015,

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s/David N. Gasch  
Attorney for Petitioner  
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 5, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

Fred Edward  
724 W. Jay Street  
Pasco, WA 99301

**E-mail:** [Appeals@co.franklin.wa.us](mailto:Appeals@co.franklin.wa.us)  
Shawn P Sant  
Teresa Chen  
Franklin County Prosecutor's Office  
1016 N 4th Ave  
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---

s/David N. Gasch, WSBA #18270  
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Clerk/Administrator

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*The Court of Appeals  
of the  
State of Washington  
Division III*



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October 21, 2014

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CASE # 319229  
State of Washington v. Fred Edward III  
FRANKLIN COUNTY SUPERIOR COURT No. 131502398

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling (**November 20, 2014**). Please file the original with one copy; serve a copy upon the opposing attorney and file proof of such service with this office.

If a motion to modify is not timely filed, appellate review is terminated.

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley  
Clerk/Administrator

RST:jcs  
Encl.

c: Information Copy:  
Honorable Alexander Carl Ekstrom (Judge Mendoza's case)  
**E-Mail**

c: Fred Edward  
724 West Jay Street  
Pasco, WA 99301

The Court of Appeals  
of the  
State of Washington  
Division III

601 21 2014

RECEIVED  
CLERK OF COURT

STATE OF WASHINGTON,  
Respondent,

v.

FRED EDWARD III,  
Appellant.

COMMISSIONER'S RULING  
NO. 31922-9-III

Mr. Edward appeals his Franklin County Superior Court jury conviction of possession of a controlled substance, methamphetamine. He contends that there is insufficient evidence to support the trial court's finding that he had the current or future ability to pay legal financial obligations (LFO) imposed as part of his sentence, and the court abused its discretion by imposing discretionary costs where there is nothing in the record showing the court considered his financial resources and considered the burden it would impose on him as required by RCW 10.01.160. The decision of the trial court is affirmed.



No. 31922-9-III

Mr. Edward was convicted of possession of methamphetamine. At sentencing the court imposed discretionary costs of \$1231 and mandatory costs of \$700, for a total LFO of \$1931. The trial court stated in the judgment and sentence that Mr. Edward “has the ability or likely future ability to pay the legal financial obligations imposed herein.” While the court found that Mr. Edward was indigent and waived a \$2000 drug fine, it nevertheless imposed the other LFOs and ordered Mr. Edward to pay \$100 per month starting immediately.

Mr. Edward appeals.

Mr. Edward contends that there is insufficient evidence in the record to support the trial court’s finding that he had the present or future ability to pay the LFOs.

This Court recently published an opinion in *State v. Duncan*<sup>1</sup>, 180 Wn. App. 245, 327 P.3d 699 (2014), a case that presented the identical issue raised by Mr. Edward. This Court specifically held that an appellate court will not address a claim of the record not supporting the trial court’s findings that the defendant had the current or future ability to pay a discretionary legal financial obligation which is raised for the first time on appeal. *Duncan*, 180 Wn. App. at 253. Since Mr. Edward did not raise this issue below, in light of the *Duncan* decision, the Court may decline to consider it now on appeal.

Nevertheless, Mr. Edward’s issue is without merit anyway. The trial court may require an offender to pay costs if it determines that the offender, at the time of sentencing, has the means to pay. RCW 9.94A.760(2). No formal or specific findings of

ability to pay are required to be made. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Also, RCW 10.01.160(3) provides that “the court shall *take account* of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” (Emphasis added.) While the trial court is not required to make findings, “[t]he court is directed to *consider* ability to pay.” *Curry*, 118 Wn.2d at 916, 829 P.2d 166 (emphasis added). “The State’s burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one” and is deemed met by a single reference in a presentence report to the defendant describing himself as “employable.” *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013) (quoting *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991)). Indeed, “a trial court is prohibited from imposing LFOs only when it appears from the record that there is no likelihood that the defendant’s indigency will end.” *State v. Duncan*, 180 Wn. App. at 250; *State v. Lundy*, 176 Wn. App. at 99, 308 P.3d 755.

Here, the record is sufficient to sustain the trial court’s finding that Mr. Edward had the present and future ability to pay \$100 per month towards the LFOs imposed. At trial there was testimony that Mr. Edward owned a motor home and another vehicle. He was employable as he had the ability to fix furnaces and he had requested sentencing alternatives such as work release because as his attorney stated at sentencing, Mr. Edward “has employment opportunities available to him.” (3 RP 46). He also has a

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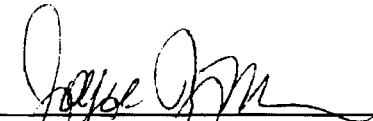
<sup>1</sup> A petition for review is pending in *State v. Duncan*, which has been stayed

No. 31922-9-III

credit card. Clearly, this evidence is sufficient to meet the States burden, and the trial court did not abuse its discretion by imposing the discretionary LFOs.

The State's motion on the merits is granted and the decision of the trial court is affirmed.

October 21 , 2014.

  
\_\_\_\_\_  
Joyce J. McCown  
COMMISSIONER

---

pending the final decision in Supreme Court case No. 89028-5, *State v. Blazina*.

Renee S. Townsley  
Clerk/Administrator

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of the  
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January 7, 2015

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CASE # 319229  
State of Washington v. Fred Edward III  
FRANKLIN COUNTY SUPERIOR COURT No. 131502398

Counsel:

Enclosed is a copy of the Order Denying Motion to Modify the Commissioner's Ruling of October 21, 2014.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.5(a). A party seeking discretionary review must file a motion for discretionary review in the Supreme Court and a copy in the Court of Appeals within 30 days after this Court's Order Denying Motion to Modify. The address for the Washington State Supreme Court is: Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:pb  
Enc.

c: Fred Edward  
724 West Jay Street  
Pasco, WA 99301

**FILED**  
**JAN. 7, 2015**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF  
WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 31922-9-III</b>
	)	
<b>Respondent,</b>	)	
	)	<b>ORDER DENYING</b>
<b>v.</b>	)	<b>MOTION TO MODIFY</b>
	)	<b>COMMISSIONER'S RULING</b>
<b>FRED EDWARD III,</b>	)	
	)	
<b>Appellant.</b>	)	


Having considered appellant's motion to modify the commissioner's ruling of October 21, 2014, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

DATED: January 7, 2015

PANEL: Judges Lawrence-Berrey, Brown, Siddoway

FOR THE COURT:

  
LAUREL H. SIDDOWNAY  
CHIEF JUDGE