

No. 44813-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN THOMAS,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable Frank Cuthbertson, Judge

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*OPENING BRIEF OF APPELLANT*

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A. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in failing to comply with RCW 10.01.160(3) when imposing legal financial obligations.
2. Appellant Benjamin Thomas assigns error to the boilerplate “finding” pre-printed on the judgment and sentence which provided:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. 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 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 238-39.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RCW 10.01.160(3), did the trial court err as a matter of law in failing to determine the defendant’s actual ability to pay and the potential effect of the imposition of several thousand dollars of costs on the indigent defendant before imposing legal financial obligations?
2. Does a pre-printed “finding” entered in every case satisfy the requirement of amounting to an actual finding relative to the specific situation of the individual defendant?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Benjamin Thomas was charged by information with first-degree assault with a deadly weapon enhancement. CP 1-2; RCW 9A.36.011(1)(a); RCW 9.94A.530; RCW 9.94A.533; RCW 9.94A.825. Pretrial proceedings were held on January 4, February 1 and 8, 2013, after which trial was held before the Honorable Judge Frank Cuthbertson on

February 25, 26, 27, March 4, 5 and 6, 2013.<sup>1</sup> The deadly weapon enhancement was not submitted to the jury, and Thomas was not found guilty of first-degree assault but was found guilty of the lesser offense of second-degree assault. CP 108-10.

On April 19, 2013, Judge Cuthbertson ordered Thomas to serve a standard-range sentence. CP 238-49; RP 416. Thomas appealed and this pleading follows. See RP 231.

2. Testimony at trial

On June 21, 2011, there was an altercation at a bar where some men were playing - or “shooting” - pool. Greg Mitchell, who was injured during the incident, said he had played four games of pool that night against Benjamin Thomas, whom Mitchell had seen before but did not really know. RP 21-27.

Mitchell said Thomas was talking “smack,” heckling Mitchell and saying he was going to beat Mitchell’s “ass” in pool. RP 25-27. Mitchell denied, however, taking part in the bluster. RP 21-28. Instead, Mitchell said he told Thomas to “chill out” and it was just a game. RP 28-29. Mitchell thought Thomas appeared intoxicated, because Thomas was talking “loud” and seemed to be sort of slurring his speech. RP 29-30.

According to Mitchell, the altercation started when Thomas was

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<sup>1</sup>The verbatim report of proceedings will be referred to as follows:  
the volume containing the proceedings of January 1, 2013, as “1RP;”  
February 1, 2013, as “2RP;”  
February 8, as “3RP;”  
the chronologically paginated volumes containing the proceedings of February 25-27, March 4-6 and April 19, 2013, as “RP;”  
the closing argument of March 5, 2013, as “4RP;”  
a sentencing continuance on April 5, 2013, as “5RP.”

sitting at the bar drinking and “antagonizing” Mitchell. RP 30-31.

Mitchell, who was holding a pool cue, took a step towards Thomas. RP 30-32. Thomas suddenly got up of the stool and swung, hitting Mitchell on the side of the face with a water glass. RP 30-32. Mitchell then tried to hit Thomas with the pool stick but the “bouncer” for the bar stopped him. RP 32.

Mitchell was taken to a hospital and had to have stitches. RP 32-42. A doctor testified that Mitchell had complex facial lacerations. RP 88-89. For his part, Thomas also went to an emergency room, where he was treated for a cut to his right palm. RP 231-36. The person who treated him said Thomas claimed he had injured it while cutting a fish. RP 231-36.

Mitchell claimed he did not threaten Thomas that night. RP 42. Mitchell admitted, however, that when he took that step towards Thomas, it was because Mitchell wanted to stop Thomas and make him shut up. RP 50-51.

The bartender said Thomas was not normally “rowdy” although he thought Thomas did sometimes have a loud mouth. RP 99-111. That night, the bartender did not see what happened but he recalled that Mitchell had at one point asked if Thomas always talked “smack” like he was doing with Mitchell and the bartender had nodded. RP 110-22. The bartender said Mitchell seemed clearly annoyed. RP 123.

Another person on a pool team with Mitchell admitted that Mitchell would actually “talk a lot of trash” when playing pool. RP 127-28, 32-33. A woman who worked there, Brittany Berry, confirmed that

“[a]ll the guys talk crap” when playing pool. RP 150.

Another woman who was there that night and knew both men disputed Mitchell’s claim that he was not also “talking mess,” saying she heard Mitchell doing so. RP 243-45. It got kind of loud between them and seemed heated. RP 246. After the incident, that woman was outside and saw Thomas there, bleeding from his hand. RP 247-48. She heard the bouncer then tell Thomas he needed to leave. RP 247-48.

Sylvia Lewis, who was there as a patron but worked at the bar, saw Thomas outside bleeding after the incident. RP 173. Thomas was not angry or yelling or anything but just appeared to be in shock about what had occurred. RP 186-87.

A videotape taken from the surveillance camera in the bar that night was played. RP 284-86.

The officer who interrogated Thomas after the incident said Thomas admitted he was drinking and heckling people. RP 297-99. Thomas also told the officer that he thought Mitchell was coming to hit him so he reacted and hit Mitchell first. RP 300-301.

Benjamin Thomas testified that he was shooting pool and talking “smack” to everyone that night. RP 340-41. He explained that he and Mitchell had been going back and forth and, when Mitchell started towards him, it appeared that Mitchell was going to attack. RP 342. Mitchell was coming at him “fast” and had a pool stick in his hand. RP 356. Thomas just reacted, trying to protect himself, standing up swinging. RP 342. Afterwards, when Thomas had been told to leave, he drove to a nearby Denny’s, but some bikers came up and boxed in his car. RP 346,



369-70.

Pamela Smith, the friend who came to pick Thomas up, saw the biker guys and the situation when she arrived. RP 239-41.

Thomas said he told the emergency room that he had cut his hand while slicing a fish because he was worried the bikers might be associated with Mitchell and thought they might come after him. RP 231-56.

D. ARGUMENT

THE SENTENCING COURT ERRED IN FAILING TO  
COMPLY WITH STATUTORY REQUIREMENTS IN  
IMPOSING LEGAL FINANCIAL OBLIGATIONS

The authority to order the defendant in a criminal case to pay court costs is wholly statutory. See State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992); RCW 9.94A.760. In this case, this Court should reverse the sentencing court's order that Mr. Thomas, who is indigent, pay legal financial obligations of \$2300, because that order was not entered in compliance with statutory requirements.

a. Relevant facts

At sentencing, the prosecutor asked the court to impose a number of "legal financial obligations" against Mr. Thomas, as follows:

[T]he State asks the Court to impose \$500 for crime victim penalty assessment, \$200 court costs. Because this matter went to trial, it would be a \$1500 DAC recoupment and \$100 DNA sample fee[.]

RP 411. In imposing the sentence, the court followed the prosecutor's recommendations and ordered Thomas to pay the requested costs. RP 415-16.

In a pre-printed portion of the judgment and sentence, the

document provided:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. 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 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 240-41. Boilerplate language also imposed interest "from the date of the judgment until payment in full." CP 241.

b. The sentencing court acted outside its statutory authority in ordering the costs

This Court should vacate the imposition of costs and interest in this case, because the sentencing court acted outside its statutory authority in ordering Mr. Thomas to pay these costs.

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. 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.

RCW 10.01.160(3).

In this case, the lower court did not make any specific findings that Mr. Thomas, who was indigent, "is or will be able" to pay the \$2300 (plus interest) before ordering him to do so. See CP 238-49. Instead, the only such alleged "finding" was the pre-printed "boilerplate" finding,

apparently included on every judgment and sentence in the county. See CP 238-39.

That finding, however, does not withstand review. A finding of fact must be supported by “substantial evidence in the record.” See State v. Echevarria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997). “Substantial evidence” is evidence sufficient to convince a rational, fair-minded trier of fact of the truth of the declared premise. Id. There is no evidence whatsoever that the court “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 the defendant’s status will change” before entering the costs. Nor was there anything in the record showing an ability or likely future ability to pay.

“boilerplate” finding is not evidence that the trial court actually gave independent thought and consideration to the facts of the particular case. See, e.g., Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). Indeed, there is not even a “box” next to the preprinted language for the judge to “check off” if she makes the relevant finding in the particular case - the “boilerplate” finding is presumptively entered in *every* case, regardless of the evidence or circumstances involved.

Thus, the “boilerplate” language did not amount to a proper finding by the court sufficient to show compliance with the mandates of RCW 10.01.160(3). See, e.g., State v. Bertrand, 165 Wn. App. 393, 404 n. 13, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012). And while the Supreme Court has held that there is no constitutional requirement that

a court enter formal, specific findings regarding ability to pay, where, as here, an unnecessary finding is made in “boilerplate” language, that “finding” is subject to this Court’s scrutiny. See Curry, 118 Wn.2d at 918; Bertrand, 165 Wn. App. at 404 n. 13. The trial court’s “boilerplate” “finding,” included by virtue of being in the judgment and sentence in every case, was unsupported by the record and wholly improper.

There was thus no true finding or consideration under RCW 10.01.160(3) before imposition of the costs in this case. Further, because interest is already running and accruing against Thomas he is already suffering from the improper order.

It is important to remember that recoupment of costs against an indigent defendant are only constitutional when the trial court is required to consider ability to pay and if the procedures for modification of the obligation exist for those who cannot pay. See State v. Blank, 131 Wn.2d 230, 237, 930 P.2d 1213 (1997) (RCW 10.73 provision for appellate costs). In Blank, the failure to include a pre-imposition consideration of ability to pay was upheld because the defendant might later acquire the means to pay but could raise an objection to enforcement later based on inability to pay and/or ask for “remission” of those costs later. 131 Wn.2d at 242-43. And the Supreme Court specifically required that “ability to pay (and other financial considerations) must be inquired into before enforced payment or imposition of sanctions for nonpayment” and relied on the remission procedures in concluding that RCW 10.73.160 was not unconstitutional. 131 Wn.2d at 246-47.

Now, however, we know that, in fact, the remission process is

broken, as are many of the protections detailed in Blank. The imposition of costs and their substantial impact on the lives of indigents has recently been detailed at length by the ACLU, which discovered that lower courts in this state are requiring people to give up public assistance and other public monies given to cover their basic needs and even imprisoning poor people for failure to pay on such debt. *See* ACLU/Columbia Legal Services Report: Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People for Being Poor (February 2014).<sup>2</sup>

Similarly, a study from the Washington State Minority and Justice Commission examined the impact of such costs, finding that the imposition of them reduces income, worsens credit ratings, makes it more difficult to secure stable house, hinders “efforts to obtain employment, education, and occupational training” and has other serious effects “which in turn prevents people from restoring their civil rights” and becoming full members of society. *See* Washington State Minority and Justice Commission, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008).<sup>3</sup>

Further, once such an order is entered, the defendant may be subject to arrest for failure to pay and is immediately liable not only for the amount ordered but also to pay the astronomical interest rate of 12%. See RCW 10.82.090.

In response, the prosecution may attempt to prevent this Court

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<sup>2</sup>Available at [aclu-wa-org/news/report-exposes-modern-day-debtors-prisons-washington](http://aclu-wa-org/news/report-exposes-modern-day-debtors-prisons-washington).

<sup>3</sup>Available at [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

from addressing this issue by claiming it was “waived” as it was not raised below. Any such effort should fail. It is well-settled that, where a court acts without statutory authority in ordering a sentence, that issue may be raised for the first time on appeal. See State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A similar issue is currently before the Supreme Court in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013). In Blazina, as here, the defendant did not object to the trial court’s failure to comply with the requirements of RCW 10.01.160. In addition, while it is not on review, this Court has recently held, in State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013), that a lower court order imposing legal financial obligations is not “ripe for review” until the prosecution tries to enforce them, as Division One held in State v. Calvin, 176 Wn. App. 1, 302 P.3d 509 (2013) (as amended 10/22/13), review granted, \_\_\_ Wn.2d \_\_\_ (2014) (currently stayed pending Blazina).

Regarding the latter issue, however, our courts have repeatedly held that a defendant may challenge sentencing rulings for the first time on appeal when the ruling in question is in violation of statutory requirements. See, e.g., State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993) (“when a sentencing court acts without statutory authority in imposing a sentence, the error can be addressed for the first time on appeal”). And the Supreme Court has rejected the idea that challenges to sentencing conditions are not “ripe” where, as here, the issues are primarily legal, do not require further factual

development and involve a final decision of the court. Bahl, 164 Wn.2d at 751. Here, the order of costs is immediately enforceable as of the day of its entry and starts gathering interest upon that date and the issue is legal - did the trial court act outside its statutory authority in ordering costs? No further factual development or proceedings are required for that question to be answered by this Court.

Notably, in its decision in Calvin, Division One focused solely on whether there was a *factual* issue with the trial court's decision below, finding that the failure to identify such a dispute below had waived the issue on appeal. The issue here, however, is legal - did the trial court act outside its statutory authority in failing to comply with RCW 10.01.060 in imposing the discretionary legal financial obligations. The question of whether a court acts outside its statutory authority is reviewed de novo, as it is a matter of law. See, State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010).

RCW 10.01.160(3) mandates that a court "shall not order a defendant to pay costs" unless and until the court finds the defendant "is or will be able to pay them," and further that the court "shall" take the defendant's financial resources and the nature of the financial burden into account before imposing it. Here, the state provided no evidence establishing Thomas' ability to pay, nor did it ask to have the trial court make any determination under RCW 10.01.160 in asking for imposition of the costs, although Thomas was represented by appointed counsel. This Court should hold that the trial court failed to comply with statutory requirements in imposing the discretionary costs for attorney's fees in this

case, and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should strike the order of costs against Mr. Thomas, as those costs were imposed without statutory authority.

DATED this 25th day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at pcpatcecf@co.pierce.wa.us, and to Benjamin Thomas at his last known address, 19149 108<sup>th</sup> Lane S.E., Renton, WA. 98055-6417.

DATED this 25th day of July, 2014.

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