No. 31700-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

COLE L. HEALY,
Defendant/Appellant.

APPEAL FROM THE PEND OREILLE COUNTY SUPERIOR COURT
Honorable Allen C. Nielson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing discretionary costs.

2. The trial court erred in imposing a sentencing condition prohibiting obstructing behavior.

Issues Pertaining to Assignments of Error

1. Should the directive to pay legal financial obligations based on an implied 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?

2. Does a trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Mr. Healy's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

3. The phrase "obstructing behavior" does not provide adequate notice of what conduct is prohibited or an ascertainable standard to prevent arbitrary enforcement. Is the condition of community custody prohibiting Mr. Healy from engaging in "obstructive behavior" unconstitutionally vague?

B. STATEMENT OF THE CASE

Correctional Sergeant Stephen Higgins, Pend Oreille County Sheriff's Office, overheard loud talking in the cell next to his office at the jail facility. 5/20/13 RP 25–27. As he opened the door, the defendant, Cole Healy, jumped off a bunk bed and threw an un-connecting overhead punch at a fellow cell mate. 5/20/13 RP 27–28. Sgt. Higgins stepped between the two, saying "Stop", and put his hand on Mr. Healy's chest when he appeared to try another contact. 5/20/13 RP 28. Mr. Healy stepped slightly back, while knocking or pushing the officer's hand off, and then backed away as the officer said, "Don't". 5/20/13 RP 28–29.

A jury found Mr. Healy guilty of third degree assault against a law enforcement officer, as charged. CP 1, 73; 5/20/13 RP 85. The trial court imposed a low-end standard range sentence of three months confinement. CP 78; 5/20/13 RP 96.

The court imposed discretionary costs of $300 and mandatory costs of $800, for a total Legal Financial Obligation ("LFO") of $1,100. CP 80–81 at ¶ 4.3. The trial court made no express finding that Mr. Healy had the present or future ability to pay the LFOs. CP 76–84; 5/20/13 RP 88–102. The Judgment and Sentence contains the following language:

> **2.5 Legal Financial Obligations/Restitution**. The court has considered the total amount owing, the defendant's 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. …

CP 78.

The trial court did not inquire into Mr. Healy's financial resources, and the nature of the burden that payment of LFOs would impose. 5/20/13 RP 88–102. The trial court ordered Mr. Healy to make monthly payments of not less than $25, commencing upon release from custody. CP 81 at ¶ 4.3; 5/20/13 RP 101.

As a condition of sentence, the court prohibited Mr. Healy from engaging in "obstructing behavior". CP 80.

This appeal followed. CP 87–96.

C. ARGUMENT

1. 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.

Mr. Healy did not make these arguments below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *See* State v. Calvin, ___ Wn. App. ___, 302 P.3d 509, 521 fn 2 (2013)

(considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); *see also* State v. Bertrand, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (also considering the challenge for the first time on appeal); *cf.* State v. Blazina, 174 Wn. App. 906, 911-12, 301 P.3d 492 (2013), *rev. granted* (Wash. Oct. 2, 2013) (declining to consider the challenge for the first time on appeal, where the trial court did not set a date for the defendant to begin paying his financial obligations).

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. Healy 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 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." RCW 10.01.160(3).

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make specific formal 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] toconsider ability to pay". Id. at 915-16.

Here, there is insufficient evidence to support the trial court's implied finding that Mr. Healy has the present and future ability to pay legal financial obligations. CP 78 at § 2.5. The trial court considered

Mr.Healy's "present and future ability to pay legal financial obligations" but made no express finding that Mr. Healy had the present or future ablity to pay those LFOs. CP 78. The finding, however, is implied because the court ultimately ordered Mr. Healy to make monthly payments of $25 commencing on a date certain. CP 81; 5/20/13 RP 101.

Whether a finding is expressed or implied, it 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." Bertrand, 165 Wn. App. at 404 n.13 (*quoting* 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. at 404 (*quoting* Baldwin, 63 Wn. App. at 312)

(internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. at 405; *see also* Calvin, 302 P.3d at 522.

Here, the record does not show that the trial court took into account Mr. Healy'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 implied finding that he has the present or future ability to pay LFOs. To the contrary, the trial court found him indigent for purposes of pursuing this appeal (on file; SCOMIS sub-number 36, filed 5/29/13), and was aware Mr. Healy would be homeless once he was released from confinement and would have to beg or borrow money to make any monthly payment. 5/20/13 RP 98–99. The implied finding that Mr. Healy has the present or future ability to pay LFOs that is implicit in the directive to make monthly payments of $25 beginning on a date certain is simply not supported in the record. The finding is clearly erroneous and the directive to make monthly payments must be stricken from the Judgment and Sentence. *See* Bertrand, 165 Wn. App. at 405 (reversing the trial court's finding of the defendant's ability to pay LFOs, and stating that this reversal "forecloses the ability of the Department of Corrections to begin collecting LFOs from [the defendant] until after a future determination of her ability

to pay."); *see also* Calvin, 302 P.3d at 522 (striking the trial court's ability to pay finding).

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 it 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. Compare 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), with 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 of $300 must also be stricken. Since the record does not reveal the trial court took Mr. Healy'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 court 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. Id. 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 statutory 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. Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *See* Calvin, 302 P.3d at 521–22.

Here, after considering Mr. Healy's "present and future ability to pay legal financial obligations" (in boilerplate language), the court imposed discretionary costs of $300. CP 80–81. However, the record reveals no balancing by the court through inquiry into Mr. Healy's financial resources and the nature of the burden that payment of LFOs would impose on him. 5/20/13 RP 88–102.

In sum, the record reveals that the trial court did not take Mr. Healy's particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). The implied 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. Baldwin, 63 Wn. App. at 312; Calvin, 302 P.3d at 522; Bertrand, 165 Wn. App. at 405.

2. The sentencing condition prohibiting engaging in "obstructive behavior" is unconstitutionally vague.

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14, Const. art. I, § 3; City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. Bahl, 164 Wn.2d at 751-52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. Bahl, 164 Wn.2d at 752. *See also* State v. Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (pre-enforcement challenges to community custody conditions are ripe for review when the issue raised is

primarily legal, further factual development is not required, and the challenged action is final). In Valencia, the petitioner's vagueness challenge to their community custody condition prohibiting possession or use of "any paraphernalia that can be used for the ingestion or processing of controlled substances" was held to be ripe for review. Valencia, 169 Wn.2d at 786–91. Here, Mr. Healy similarly challenges a sentencing condition as unconstitutionally vague. The issue is ripe for review and should be considered on its merits.

"[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." Bahl, 164 Wn.2d at 752. This assures that ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement of the laws. Id. at 752–53 (quoting Douglass, 115 Wn.2d at 178 (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983))).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. Bahl, 164 Wn.2d at 753, 193 P.3d 678. If the condition is

unconstitutionally vague, it will be manifestly unreasonable. Valencia, 169 Wn.2d at 793 (*citing* Bahl, 164 Wn.2d at 753).

Here, the sentencing condition prohibits "obstructing behavior." "Obstruct" is defined to include "to block or close up by an obstacle" or "to hinder from passage, action, or operation: (e.g. IMPEDE)" or "to cut off from sight (e.g. a wall *obstructs* the view). "Obstruct." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 22 Nov. 2013. <http://www.merriam-webster.com/dictionary/obstruct>.
Although the word "obstructing"—given the ubiquitous array of crime shows accessible on television and other media— is often linked to criminal misbehavior, there is nothing in the condition as written that limits Mr. Healy to refraining from obstructing conduct that is illegal. The condition is no more acceptable from a vagueness standpoint than the conditions found vague in Bahl, which prohibited the possession of or access to pornography. As in Bahl, the vague scope of proscribed conduct fails to provide Mr. Healy with fair notice of what he can and cannot do.

Moreover, the breadth of potential violations under this condition offends the second prong of the vagueness test, rendering the condition unconstitutionally vague. Because the condition might potentially encompass a wide range of everyday conduct, it " 'does not provide

ascertainable standards of guilt to protect against arbitrary enforcement.' " Bahl, 164 Wn.2d at 753 (quoting Kolender, 461 U.S. at 357, 103 S.Ct. 1855). An inventive probation officer could envision any common place conduct as possibly tipping the scale into criminal behavior. For example, miscalculating the angle of drop in felling a tree by a landowner, which causes a road blockage; or catching one's walker when trying to disembark a store escalator during the Christmas holiday season; or sudden debilitating car trouble on a one lane bridge; or jumping up to cheer on a possible touchdown to the continued detriment of fans seated behind you in the sports bar or stadium. Another probation officer might not arrest for the same "violation," i.e. innocent/accidental yet obstructive behavior. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague and therefore manifestly unreasonable. The condition at issue should be found void for vagueness.

D. CONCLUSION

For the reasons stated, the matter should be remanded to strike the directive to pay *and* the imposition of discretionary costs from the Judgment and Sentence. Remand is also appropriate to strike the sentence condition prohibiting obstructive behavior as unconstitutionally vague.

Respectfully submitted on November 25, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 25, 2013, 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 brief of appellant:

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