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Appellate Unit

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAY -4 PM 4:00

NO. 67876-1-1

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

STATE OF WASHINGTON, Respondent,

v.

JOSEPH WILLIAMS, Appellant.

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

The Honorable Mary I. Yu, Judge

BRIEF OF APPELLANT

REBECCA WOLD BOUCHEY
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it found Williams had the current or future ability to pay legal financial obligations. CP 143 (Section 4.2)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it found, absent an inquiry into the appellant's individual circumstances, that he has the current or future ability to pay LFOs?

C. STATEMENT OF THE CASE

On August 10, 2011, Joseph Williams pled guilty to two counts of residential burglary, one count of possessing stolen property in the third degree, two counts of trafficking in stolen property in the first degree, one count of criminal trespass in the first degree, one count of theft in the second degree, and one count of theft in the third degree. CP 97, 131; 8/10/11 RP 33.

There was no dispute as to Williams' criminal history or offender score. 9/9/11 RP 4. The court sentenced Williams to the

high end of the standard range: 84 months for both residential burglary convictions and both trafficking convictions and 29 months for theft in the second degree, all concurrent. 9/9/11 RP 13. For the misdemeanors, the court sentenced Williams to 364 days, concurrent. 9/9/11 13.

The court also imposed \$840 of legal financial obligations. CP 143.

Although there was no discussion of Williams' financial circumstances, the judgment and sentence made a written "finding," which was pre-printed on the sentencing form: "Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed." CP 143 (Section 4.2). Williams was deemed to have timely appealed.

The motion for order of indigency states that Williams is unemployed with no sources of income. Supp. CP, Order to Proceed In Forma Paupris, 3. Williams was found to be indigent on appeal.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FOUND WITHOUT EVIDENCE THAT WILLIAMS HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04. This error may be raised for the first time on appeal. Bertrand, at 394.

While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). Such error may be raised for the first time on appeal. See

Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" that Williams had the present or future ability to pay his LFOs. The record suggests instead that opposite is true—that Williams has no source of income. Supp. CP, Order to Proceed In Forma Paupris, 3.

Accordingly, the court's finding that Williams had the present or future ability to pay LFOs was clearly erroneous and should be stricken. See Bertrand, 165 Wn. App. at 405. Before the State can collect LFOs in this case, moreover, there must be a properly supported, individualized judicial determination that Williams has the ability to pay.

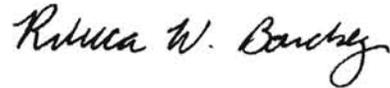
E. CONCLUSION

For the reasons stated above, the trial court's finding that Williams had the present or future ability to pay LFOs was clearly erroneous and must be stricken.

DATED: May 4, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Rebecca W. Bouchey".

Rebecca Wold Bouchey
WSBA No. 26081
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, DSHS,)	
)	
Respondent,)	
)	
v.)	COA NO. 67876-1-I
)	
JOSEPH WILLIAMS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF MAY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH WILLIAMS
DOC NO. 954443
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF MAY, 2012.

x 