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SEP 07 2012

King County Prosecutor
Appellate Unit

NO. 68062-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC CARMICHAEL

Appellant.

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

The Honorable Hollis R. Hill, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE COURT CAN PROVIDE MEANINGFUL RELIEF BY STRIKING THE UNSUPPORTED FINDING REGARDING CARMICHAEL'S SUPPOSED ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

The State argues there is no need to vacate the improper finding of ability to pay legal financial obligations because the obligations imposed were mandatory. Brief of Respondent at 5-6, 9. This reasoning is faulty under State v. Bertrand 165 Wn. App. 393, 267 P.3d 511 (2011). It is true the appellant in Bertrand challenged both the imposition of the LFOs and the finding of his ability to pay. Id. at 395. However, the Court in Bertrand affirmed imposition of the LFOs. Id.

Even though the LFOs were properly imposed, the court found the finding of ability to pay was nevertheless significant. Id. It reversed and remanded for the trial court to vacate its unsupported finding that Bertrand had the current or future ability to pay them. Id. Notably, the Bertrand court did not rely on the fact that some of the LFOs imposed were non-mandatory or the requirement under RCW 10.01.160. Id. at 403-05. It reversed because the trial court's factual finding was clearly erroneous. The same is true here.

The State also incorrectly cites Bertrand to argue Carmichael's challenge to this unwarranted finding is not ripe. Brief of Respondent at 5.

Bertrand did not so hold. The Bertrand court held Bertrand's challenge to the imposition of the LFOs was not ripe. 165 Wn. App. at 405 ("We next address whether Bertrand's challenge to the imposition of LFOs is ripe for our review."). But it considered Bertrand's challenge to the finding of ability to pay previously to and separately from the imposition of the LFOs. Id. at 403-04.

The court first noted Bertrand argued the finding was not subject to a ripeness analysis because it was clearly erroneous. Id. at 403-04. The court then agreed with Bertrand that the finding was clearly erroneous. Id. While rejecting the challenge to the LFOs, the court nonetheless reversed the finding of ability to pay and remanded to the trial court to strike the unsupported finding. Id. The court should do the same here.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the appellant's opening and supplemental briefs, Carmichael requests this Court reverse his sentence and remand to strike the finding of his ability to pay LFOs and for resentencing.

DATED this 7th day of September, 2012.

Respectfully submitted,

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COA NO. 68062-5-1

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DIVISION ONE
SEATTLE, WA

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 7TH DAY OF SEPTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIC CARMICHAEL
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MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF SEPTEMBER, 2012.

x Patrick Mayovsky