

68149-4

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NO. 68149-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MONSON,

Appellant.

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

The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON~~

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A. ASSIGNMENT OF ERROR

The trial court erred when it found appellant has the current or future ability to pay legal financial obligations (LFOs). CP 15 (Finding 2.5).

Issue Pertaining to Assignment of Error

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

B. STATEMENT OF THE CASE

On October 27, 2010, the Snohomish County prosecutor charged appellant Joshua Dale Monson with possession of methamphetamine. CP 125; RCW 69.50.4013. Monson was subsequently convicted by a jury as charged. CP 51.

Monson was sentenced to a standard range sentence of 22 months. CP 15-16; December 5, 2011 Sentencing Transcript (SRP) 20. After noting Monson "is essentially indigent at this time[.]" the court imposed \$700 in legal financial obligations (LFOs). CP 18; SRP 20-21.

Despite the oral notation by the court noting Monson was indigent, the judgment and sentence made the following written "finding" on the preprinted form:

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 15 (finding 2.5).

Monson appealed his judgment and sentence. CP 1-12. An order of indigency was filed contemporaneously with the notice of appeal. Supp CP __ (sub no. 96, Order Authorizing Appeal in Forma Pauperis . . . , 12/28/11).

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND MONSON 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 (citing Baldwin, 63 Wn. App. at 312). 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 404¹ (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 Monson had the present or future ability to pay his LFOs. To the contrary, the court seemed to recognize the opposite when it noted he "is essentially indigent at this time." SRP 20.²

¹ The ACORDS docket shows that Bertrand filed a petition seeking review of a different issue; the state has not sought review of this Court's ruling on the LFO issue.

² Cf. Baldwin, 63 Wn. App. at 311 (statement in presentence report that Baldwin was employable supported this Court's conclusion that sentencing court properly considered burden of costs under RCW 10.01.160).

Accordingly, the portion of finding 2.5 quoted above was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405.³ Moreover, before the State can collect LFOs, there must be a properly supported, individualized judicial determination that Monson has the ability to pay. Id., at 405 n.16.

D. CONCLUSION

This Court should remand with an order that the trial court strike the unsupported finding from the judgment and sentence.

DATED this 30th day of April 2012.

Respectfully submitted,

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³ Monson does not challenge the imposition of these mandatory LFOs (See RCW 43.43.7541 (DNA collection fee); RCW 7.68.035 (Victim Penalty Assessment); RCW 43.43.690 (Crime lab fee)), but rather the unsupported finding of present and future ability to pay.

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v.)	COA NO. 68149-4--I
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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 30TH DAY OF APRIL 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] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] JOSHUA MONSON
NO. 266684
SNOHOMISH COUNTY JAIL
3025 OAKES AVENUE
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL 2012.

x *Patrick Mayovsky*

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