

68414-1

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NO. 68414-1-I

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

STATE OF WASHINGTON

Respondent

v.

JERRY L. JAMISON,

Appellant

2013 MAR - 7 PM 1:23

FILED
COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. ISSUES

(1) The trial court imposed \$600.00 in legal financial obligations, consisting of a \$500.00 victim assessment and a \$100.00 biological sample fee. It set a payment schedule of \$25 per month commencing 60 days after release. It found that the defendant had the ability to pay this amount. Does this finding have any impact on the court's ability to impose and collect these financial obligations?

(2) If this court reviews the finding, is it supported by facts in the record which show that the defendant is 28 years old, in good health, and has held jobs in the past?

II. STATEMENT OF THE CASE

The State charged the defendant with possession of a controlled substance while on community custody. CP 64. A jury convicted him as charged. 2/17 RP 268, CP 2.

The court sentenced the defendant to 24 months confinement followed by 12 months of community custody. 3/7 RP 8, CP 5-6. In addition, the court imposed a \$500.00 victim penalty assessment and a \$100.00 biological sample fee. 3/7 RP 8, CP 7. The defendant did not object.

The court also asked counsel if he was privately retained. Counsel replied that he was. The court also asked if the defendant was employed. Counsel responded "Well, as a result of the conviction, he is not anymore." The court found the defendant was indigent and waived the drug fine and court costs. 3/7 RP 8-9, CP 7.

The court entered a finding that the defendant had the present and future ability to pay legal financial obligations. CP 4. The defendant did not object to this finding.

III. ARGUMENT

A. SINCE THE FINDING CONCERNING THE DEFENDANT'S ABILITY TO PAY HAS NO IMPACT ON THE DEFENDANT'S RIGHTS, IT NEED NOT BE REVIEWED.

1. By Statute, The Victim Penalty Assessment And Biological Sample Fee May Be Collected Without Any Finding Concerning The Defendant's Ability To Pay.

The sole issue In this case, raised for the first time on appeal, concerns imposition of \$600.00 in legal financial obligations. The defendant challenges both the trial court's imposition of these obligations and its finding that he has the present and future ability to pay \$25 per month following release towards those obligations.

Citing State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012), the defendant claims that since “the record is completely silent” as to his present or future ability to pay, “the finding is unsupported by the record and must be stricken.” Brief of Appellant 3. Because the finding has no impact on the defendant’s rights or obligations, and the imposition of those legal financial obligations are required by statute, there is no reason for this Court to strike the finding or reverse the imposition of the obligations.

The defendant’s argument treats “legal financial obligations” as a homogeneous category. This assumption is incorrect. “[D]ifferent components of the financial obligations imposed on a defendant, such as attorney fees, court costs, and victim penalty assessments, require separate analysis.” State v. Baldwin, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991). It is therefore necessary to examine the specific statutory provisions governing the financial obligations that were imposed in the present case.

The largest portion of the obligations here consisted of a \$500 victim penalty assessment. Under RCW 7.68.035(1)(a), this assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigent

defendants. See State v. Williams, 65 Wn. App. 456, 460-61, 828 P.2d 1158 (1992) (the victim's penalty assessment is mandatory and requires no consideration of a defendant's ability to pay at sentencing).

The final \$100 was a biological sample fee. Under RCW 43.43.7541, this fee must be included in every sentence for a crime for which a biological sample must be collected. This includes every case in which a person is convicted of a felony. RCW 43.43.7454(1). Again, there is no exception for indigent defendants. See State v. Thompson, 153 Wn. App. 325, 336-38, 223 P.3d 1165 (2009) (the legislature removed any discretion of the sentencing court to not impose a biological sample fee in the 2008 amendment to RCW 43.43.7541).

Once these obligations have been imposed, collection is governed by RCW 9.94A.760. The sentencing court should "set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligations." RCW 9.94A.760(1). The Department of Corrections (DOC) is authorized to collect these amounts during the period of supervision. RCW 9.94A.760(8). "[T]he department may make a recommendation to the court that the offender's monthly payment schedule be modified so as to

reflect a change in financial circumstances.” To determine the appropriateness of the payment schedule, DOC may require the defendant to provide information under oath concerning his assets and earning capabilities. RCW 9.94A.760(7)(a).

These statutes do not require a showing of ability to pay before the court may collect legal financial obligations. Rather, RCW 9.94A.760(8) authorizes DOC to collect the monthly payment amount set by the court. This does not mean that the defendant’s ability to pay is irrelevant. Rather, his financial situation may be a basis for modifying the monthly amount. RCW 9.94A.760(7)(a).

2. Under Case Law, The Statutory Procedures Are Constitutionally Sufficient.

In arguing that a finding of ability to pay is required before collection, the defendant relies on Division Two’s decision in State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011). That decision must be examined in light of the prior cases on which it was based: (1) the Supreme Court’s decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and (2) this Division’s decision in Baldwin.

In Curry, the Supreme Court differentiated between two different kinds of legal financial obligations: court costs and the victim penalty assessment. Court costs are governed by RCW

10.01.160. That statute precludes imposition of costs “unless the defendant is or will be able to pay them.” RCW 10.01.160(3). The statute further provides for remission of costs or modification of the method of payment on a showing that payment would impose manifest hardship on the defendant or his immediate family. RCW 10.01.160(4).

The Supreme Court held that these statutory provisions satisfied constitutional requirements. The court rejected any requirement for specific findings regarding a defendant’s ability to pay.

According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

Curry, 118 Wn.2d at 916.

Curry went on to consider the validity of victim penalty assessments. Unlike RCW 10.01.160, the statute on victim assessments does not contain any provision for consideration of

indigency. The court nonetheless held that the statute was constitutionally valid:

[T]here are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants. Under [former] RCW 9.94A.200, a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. . . Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

Curry, 118 Wn.2d at 918 (citations omitted).

Under Curry, neither the imposition nor the collection of the victim penalty assessment depends on a prior showing of ability to pay. Rather, the proper time for consideration of indigency is at a sanctions hearing. If the lack of payment is not willful, sanctions may not include incarceration. The statutes governing the biological sample fee are substantially identical to that governing the victim assessment, so the same reasoning should apply to that fee as well.

In Baldwin, this Division applied the holding of Curry. The trial court had imposed \$85 in court costs and \$500 for recoupment of attorney fees. With regard to the \$85 in court costs, this court held that Curry was dispositive as to their validity. Baldwin, 63 Wn.

App. at 308-09. The \$500 attorney fee assessment, however, implicated the defendant's constitutional right to counsel. Further analysis was therefore necessary. Id. at 309.

This court nonetheless held that the assessment was valid without a specific finding of ability to pay. Under RCW 10.01.160, the court was required to consider the defendant's financial resources. The record showed that the court had done so. The pre-sentence report indicated that the defendant was employable. Consequently, the imposition of the \$500 assessment was not an abuse of discretion. Baldwin, 63 Wn. App. at 311-12.

In Bertrand, Division Two purported to apply this court's holding in Baldwin, but its analysis is murky. The trial court in Bertrand imposed \$4,304 in "legal financial obligations." The opinion does not specify the nature of these "obligations." The record indicated that the defendant was disabled. There was apparently no other information in the record concerning the defendant's ability to pay. Bertrand, 165 Wn. App. at 398.

Division Two analyzed this situation as follows:

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 us 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. Baldwin, 63 Wn. App. at 312. . . The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court's finding ... that [the defendant] has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding ... was clearly erroneous.

Bertrand, 165 Wn. App. at 617.

In following this analysis, Division Two appears to have applied Bertrand out of context. The quoted language from Baldwin is based on RCW 10.01.160, which governs imposition of court costs. Baldwin applied this requirement to attorney fees as well. Id. at 310. In Bertrand, however, the court applied this analysis to “legal financial obligations,” without specifying their nature.

If the obligations at issue consisted solely of court costs and attorney fees, the court was correct. RCW 10.01.160(4) requires a trial court to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” If, however, the holding of Bertrand is extended beyond this context, it is wrong. Statutes involving other kinds of legal financial obligations do not usually contain similar requirements. In

particular, there is no such requirement in the statutes governing the victim's assessment or biological sample fees.

After the Bertrand court overturned the finding concerning ability to pay, it went on to consider the appropriate remedy. It cited the following language from Baldwin:

[T]he meaningful time to examine the defendant's ability to pay is *when the government seeks to collect the obligation*. . . The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship.] Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time*.

Bertrand, 165 Wn. App. at 405, quoting Baldwin, 63 Wn. App. at 310-11 (Bertrand court's emphasis). Based on this language, the Bertrand court concluded:

Although the trial court ordered [the defendant] to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding [of ability to pay] forecloses the ability of the Department of Corrections to begin collecting LFOs from Bertrand until after a future determination of her ability to pay. Thus, because Bertrand can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

Bertrand, 165 Wn. App. 393 at 405.

This conclusion misstates the analysis of Baldwin. That case discussed two ways in which a defendant's ability to pay is

considered at the time of collection. First, the defendant cannot be incarcerated for non-willful failure to pay. Second, the defendant may petition for a remission of costs. Baldwin, 63 Wn. App. at 310-11; see Curry, 118 Wn.2d at 917-18 (discussing safeguards for indigent defendants who fail to pay crime victim assessments).

Both of these remedies, however, require an affirmative showing by the defendant. At a violation hearing, the defendant bears the burden of showing that his failure to pay was not willful. State v. Woodward, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). Similarly, a petition for remission of costs should be granted only on an affirmative showing of manifest hardship. RCW 10.01.160. Thus, contrary to what Bertrand says, nothing in Baldwin requires an affirmative showing of ability to pay before financial obligations can be collected.

Any such holding would essentially negate the Supreme Court's analysis in Curry. There, the court held that both court costs and the victim penalty assessment could be imposed without any specific finding of the defendant's ability to pay. Curry, 118 Wn.2d at 916-17. Under Bertrand, however, the obligations cannot be *collected* without such a finding. What purpose is served by

imposing legal financial obligations if nothing can be done to collect them?

In short, the trial court's finding concerning ability to pay is, in the context of this case, of no legal significance. That finding has no impact on either the court's ability to impose the obligations or the Clerk's ability to collect them. If the defendant is unable to pay \$25.00 per month after he is released, he can seek modification of the payment schedule. His ability to do so is not affected by the finding in the judgment and sentence. Since the finding has no effect, no purpose would be served by striking it.

B. IF THIS COURT REVIEWS THE FINDING, IT IS SUPPORTED BY EVIDENCE THAT THE DEFENDANT IS IN GOOD HEALTH AND CAPABLE OF HOLDING A JOB.

Even if the finding of ability to pay is open to challenge, it is adequately supported by the record. The record in this case states that the defendant has been employed in the past. He had sufficient financial resources to retain counsel. 3/7 RP 8-9.

In Baldwin, the pre-sentence report described the defendant as "employable." This information "establish[ed] a factual basis for the defendant's future ability to pay." Baldwin, 63 Wn. App. at 311. Similarly in the present case, information that the defendant has job

skills supports an inference that he has the ability to pay \$25.00 per month after release.

In contrast, the record in Bertrand contained *no* information about the defendant's ability to pay. To the contrary, it showed that the defendant was disabled. Bertrand, 165 Wn. App. at 517. These problems do not exist in the present case.

At the time of payment, the defendant will be out of custody and capable of obtaining employment. Considering the record as a whole, the trial court's finding of ability to pay is not clearly erroneous.

IV. CONCLUSION

For the reasons stated above, the provision of the judgment and sentence dealing with legal financial obligations should be affirmed. The defendant has not challenged his conviction for possessing a controlled substance while on community custody

or his sentence of 24 months' confinement. Those portions of the judgment and sentence should be affirmed in any event.

Respectfully submitted on March 6, 2013.

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March 6, 2013

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2013 MAR -7 PM 1:23

**Re: STATE v. JERRY L. JAMISON
COURT OF APPEALS NO. 68414-1-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

Kathleen Wehler for

THOMAS CURTIS
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

*I have enclosed a copy of the document
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is a copy of the document.
I am responsible of paying under the laws of the
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6th March 13
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THE STATE OF WASHINGTON,

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No. 68414-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 6th day of March, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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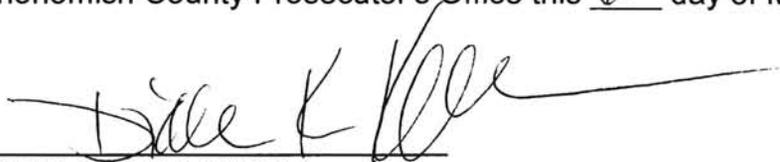
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1511 THIRD AVENUE, SUITE 701
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 6th day of March, 2013.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit