

69695-5

REC'D

JUN 10 2013

King County Prosecutor
Appellate Unit

69695-5

NO. 69695-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES SPIVEY,

Appellant.

2013 JUN 10 PM 4:32
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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

The Honorable Bruce W. Hilyer, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
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A. ASSIGNMENT OF ERROR

The trial court erred by finding appellant Charles Spivey had the present and likely future ability to pay his legal financial obligations.

Issue Pertaining to Assignment of Error

Did the trial court err by finding Spivey had the present and likely future ability to pay his legal financial obligations where the record did not support the finding?

B. STATEMENT OF THE CASE

Early one winter morning in 2012, a fire occurred in a Georgetown apartment building occupied by at least 10 persons. CP 39, 2RP 123-25, 142.¹ Seattle Fire Department investigators determined someone intentionally set the fire using an accelerant such as gasoline. CP 39; 2RP 125-27.

Seattle Police Detective John Lewitt was assigned to investigate. 2RP 117, 122-24. Lewitt learned that a few hours before the fire, Spivey had called police to report he had been assaulted by Lawrence Taylor, who was known as "LT." 2RP 96-97, 135-36. Spivey told officers Taylor punched him in the face twice and knocked him to the ground. 2RP 136,

¹ In this brief, the verbatim report of proceedings is cited as follows: 1RP – 11/14, 11/19/2012; 2RP – 11/20/2012; 3RP – 11/21, 12/4/2012.

146-47. According to Spivey, Taylor lived at the apartment building where the fire occurred. He gave officers directions to where he believed Taylor lived in the building, but the officers did not find him there. 2RP 98-99, 137-38. Spivey was angry the officers did not find and arrest Taylor. 2RP 135, 138.

Lewitt went to the area of the fire and found Taylor. 2RP 138-39. Taylor said he had been evicted from his apartment several months earlier but stayed off and on at someone else's apartment in the building. 2RP 139-40. The apartment he had formerly lived in was on the same floor the fire occurred on. 2RP 140. Taylor said he did not know if Spivey could have been angry enough about the assault to start the fire. 2RP 245-48. Taylor told Lewitt to check out a neighbor, Dave Watson. 2RP 247-48. Lewitt did not follow that lead. 2RP 247.

Lewitt proceeded to a nearby gas station and found Spivey. Spivey said he was homeless and lived under a bridge nearby. He called the police after reporting Taylor's assault and after completing his report, went to the Industry Lounge, a neighborhood bar. 2RP 146-47. Spivey cleaned the bar after it closed to make some money. 2RP 147-48. Lewitt later confirmed that Spivey had worked cleaning up the Industry Lounge that

night. 2RP 184-87. In a storage room containing the cleaning supplies were some portable gas cans. 2RP 184-86.

After providing that information, Spivey left. 2RP 150-51. Lewitt also spoke with Gurmeet "Gary" Singh, who said he was a good friend of Spivey's. 2RP 143, 149-53. By this time Lewitt believed Spivey was a viable suspect in the fire case. 2RP 153. The two made small talk and Lewitt thought Singh was a "very nice guy." 2RP 151. Lewitt asked Singh to call him if he heard anything about the fire and gave Singh his business card and number. 2RP 151-53. He did not offer Singh money or say anything about having Singh work for him. 2RP 152-53.

A few days later, Singh called and left Lewitt a message stating he knew something about the fire. 2RP 154. Lewitt returned the call, and Singh told him he and Spivey were drinking and smoking crack when Spivey disclosed he had set the fire. Singh also said he was "a hundred percent sure" Spivey started the fire. 2RP 159-60. Later that evening, Lewitt met with Singh and took a taped statement. Singh did not appear drunk or high. Lewitt did not offer Singh money for his information. 2RP 161-64. According to Singh, Spivey disclosed he set the fire to "teach them a lesson." 2RP 164.

A day or two later, Singh told Lewitt a gas station clerk in the neighborhood told him Spivey had bought gas only hours before the fire. 2RP 176-78. Lewitt confirmed this with the clerk. 2RP 179-83. He also learned that Spivey later confronted the clerk and was angry with him for disclosing he had bought gasoline. 2RP 186-89.

During the investigation, Lewitt asked Singh if he would wear a recording device. 2RP 166-67. Singh did not ask for any money or favors and agreed to wear a "body wire." 2RP 167-68. Singh wore the wire for several days, but never obtained more information from Spivey about the fire. 2RP 170-76, 229-31.

Despite never offering to pay Singh, Lewitt on the first night employing the wire gave Singh \$40 for beer to facilitate a discussion among ~~at the~~ the group of homeless individuals that Singh and Spivey smoked crack and drank alcohol with. 2RP 171-72, 216, 221-23, 299-300. He gave Singh \$5 the next day for food. The following day, Lewitt gave Singh \$10 and a pack of cigarettes, and also bought him \$10 or \$20 worth of cell phone time. 2RP 172-75. Lewitt did not give Singh the money in exchange for information. 2RP 175-76.

After learning the above, Lewitt concluded he had probable cause to arrest Spivey, which was done by fellow officers. 1RP 18-29, 47-49;

2RP 189-92. Lewitt interviewed Spivey at the police downtown headquarters. 2RP 191-93. Spivey did not appear to be under the influence of alcohol or drugs. 2RP 194. Lewitt read the Miranda² rights, which Spivey waived. 2RP 194-203, 305-06. Spivey confessed to setting the fire because he was angry at Taylor for punching him. 2RP 208-13.

The State charged Spivey with first degree arson. CP 1-5. Spivey filed a pretrial motion to suppress his statements. CP 7-19. He argued he was unlawfully arrested without probable cause because the State failed to establish Singh, the informant, had a factual basis for his allegations or provided information that was reliable and credible. CP 14-17. He further contended Singh's information was not corroborated. CP 17-19; 2RP 326-31, 350-51.

The trial court denied the motion. CP 127-31. It found the police had probable cause to arrest Spivey without Singh's information. CP 130; 2RP 352-53. The court found Singh was not a confidential informant. The factual basis for the information was Spivey's own confession. CP 130; 2RP 253. Further, according to the court, Singh's reliability was corroborated by police investigation. CP 130; 2RP 354.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Spivey waived his right to a jury trial and agreed to a trial on stipulated facts. He agreed the trial court could consider the facts set forth above, as well as certain documents including Lewitt's police report and a fire investigator's report. CP 38-104. Spivey stipulated he set the fire by pouring gasoline in the inside hallway of the residence and lit it with a lighter because he was angry with Taylor for having punched him in the face earlier in the evening. CP 34.

After considering this information, the trial court found Spivey guilty. The court concluded that even without Spivey's confession, the State proved each element of the charge beyond a reasonable doubt. CP 124-26; 2RP 355-56. The trial court imposed a standard range sentence of 22 months in prison and an 18-month term of community custody. The court imposed a \$500 victim penalty assessment and a \$100 DNA collection fee. CP 106-13.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND SPIVEY HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay legal financial obligations (LFOs), a sentencing court must consider the defendant's financial resources and the burden of imposing such obligations. State v.

Bertrand, 165 Wn. App. 393, 404, 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 404 (citing Baldwin, 63 Wn. App. at 312).

While formal findings are not required, 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); cf. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). This error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 403, 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) (defendant may challenge an illegal sentence for the first time on appeal).

Spivey's judgment and sentence includes the following preprinted language: "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 108,

§ 4.2. The record does not support this statement. The closest the court came to considering Spivey's ability to pay LFOs was when it responded "no" to the prosecutor's question whether it was imposing any court costs. 2RP 377.

As in Bertrand, this record reveals no evidence or analysis supporting the court's finding Spivey had the present or future ability to pay his LFOs. There is, however, evidence to the contrary. At the time of trial, Spivey was homeless and living under a bridge. 2RP 146. He and Singh panhandled and slept wherever they could. CP 95. He cleaned at the Industry Lounge one night a week for a "few dollars." CP 56. The defense psychosocial assessment revealed a longstanding addiction to crack cocaine. CP 116-17. Finally, Spivey was 60 years old. CP 116. Cf., State v. Blazina, 42728-1-II, 2013 WL 2217206 (May 21, 2013) (distinguishing Bertrand and refusing to address finding for first time on appeal, noting "Bertrand had disabilities that might reduce her likely future ability to pay").

Accordingly, finding 4.2 is clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 404-05.³ Before the State can collect

³ Spivey does not challenge the imposition of these LFOs but rather the unsupported finding of present and future ability to pay.

LFOs, there must be a properly supported, individualized judicial determination that Spivey has the ability to pay. Id. at 405 n.16.

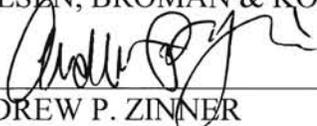
D. CONCLUSION

The trial court's finding that Spivey had the present or future ability to pay the LFOs was not supported by the record. This Court should reverse the finding and remand to the trial court to strike it.

DATED this 10 day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 18631

Office ID No. 91051
Attorneys for Appellant

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v.)	COA NO. 69695-5-1
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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 10TH DAY OF JUNE 2013, 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] CHARLES SPIVEY
S/O ST. VINCENT DePAUL
5950 4TH AVENUE S.
SEATTLE, WA 98101

2013 JUN 10 PM 4:32
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JUNE 2013.

x Patrick Mayovsky

COPY

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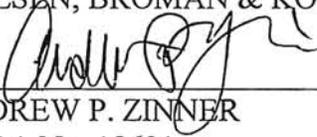
D. CONCLUSION

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DATED this 10 day of June, 2013.

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RECEIVED
COURT
DIV

JUN 10 2013

[X] CHARLES SPIVEY
S/O ST. VINCENT DePAUL
5950 4TH AVENUE S.
SEATTLE, WA 98101

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JUNE 2013.

X Patrick Mayovsky