

09695-5

09695-5

NO. 69695-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES SPIVEY,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BRUCE HILYER

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

In section 4.1 of the judgment and sentence, the court imposed mandatory financial assessments totaling \$600. In section 4.2 of the judgment and sentence, the court imposed nothing, waiving all non-mandatory financial assessments. On appeal, Spivey challenges the boilerplate language contained in section 4.2 of the judgment and sentence relating to a defendant's ability to pay non-mandatory fees, which were not assessed in his case. Is Spivey entitled to relief based on an inconsequential finding?

**B. STATEMENT OF THE CASE**

Appellant Spivey was charged in King County Superior Court with Arson in the First Degree. CP 1. Spivey waived his right to a jury trial and voluntarily agreed to resolution of the case via a stipulated facts trial. CP 33-37, 105. The court found Spivey guilty as charged. CP 124-26. Spivey was sentenced to 22 months of incarceration and 18 months of community custody. CP 109-10. The court imposed the mandatory victim penalty assessment of \$500, and the mandatory DNA collection fee of \$100. CP 108. The

court waived all non-mandatory financial assessments. CP 108.

Spivey filed this timely appeal. CP 133-34.

**C. ARGUMENT**

Spivey challenges boilerplate language in section 4.2 of the judgment and sentence, regarding a defendant's "present or likely future ability to pay the financial obligations imposed." He argues that this "finding" by the sentencing court was "clearly erroneous and should be stricken." Brf. of App. at 8. However, the court made no such finding, as it did not impose any financial obligations under section 4.2 of the judgment and sentence. Rather, the court *waived* all non-mandatory financial assessments in section 4.2, specifically "because the defendant lacks the present and future ability to pay them." CP 108. Spivey's challenge to his sentence thus lacks merit.

Moreover, any such finding as it *might* pertain to the mandatory financial obligations imposed in section 4.1 of the judgment and sentence has no impact on Spivey's rights or obligations. It impacts neither the court's ability to impose the

obligations, nor the State's ability to collect them. If Spivey is unable to pay, he can seek modification of the payment schedule. His ability to do so is not affected by the "finding" in the judgment and sentence.

Finally, Spivey's claim that there is a requirement of a "properly supported, individualized judicial determination" that he has the ability to pay his legal financial obligations prior to their collection is inaccurate. Sufficient safeguards exist such that Spivey will not be incarcerated for a non-willful failure to pay, and he has the opportunity to petition the court for remission of the costs should he experience manifest hardship.

**1. SPIVEY CHALLENGES BOILERPLATE LANGUAGE IN THE JUDGMENT AND SENTENCE THAT HAS NO APPLICATION TO HIS CASE.**

Sections 4.1 and 4.2 of the judgment and sentence clearly divide financial assessments into two distinct groups: (1) Restitution and *mandatory* assessments, and (2) *non-mandatory*, "other" financial obligations. CP 108. These two distinct categories are listed in separate sections of the judgment and sentence:

4.1 RESTITUTION, VICTIM ASSESSMENT, AND DNA FEE:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.  
 Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.  
 Restitution to be determined at future restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_ m.  
 Date to be set.  
 Defendant waives right to be present at future restitution hearing(s).  
 Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment in the amount of \$500 (RCW 7.68.035 - mandatory).  
Defendant shall pay DNA collection fee in the amount of \$100 (RCW 43.43.7541 - mandatory).

4.2 OTHER FINANCIAL OBLIGATIONS: 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. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a)  \$\_\_\_\_\_, Court costs (RCW 9.94A.030, RCW 10.01.160);  Court costs are waived;  
(b)  \$\_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030);  Recoupment is waived;  
(c)  \$\_\_\_\_\_, Fine;  \$1,000, Fine for VUCSA  \$2,000, Fine for subsequent VUCSA (RCW 69.50.430);  VUCSA fine waived;  
(d)  \$\_\_\_\_\_, King County Interlocal Drug Fund (RCW 9.94A.030);  
 Drug Fund payment is waived;  
(e)  \$\_\_\_\_\_, \$100 State Crime Laboratory Fee (RCW 43.43.690);  Laboratory fee waived;  
(f)  \$\_\_\_\_\_, Incarceration costs (RCW 9.94A.760(2));  Incarceration costs waived;  
(g)  \$\_\_\_\_\_, Other costs for: \_\_\_\_\_.

CP 108.

The "finding" that Spivey challenges (that the defendant has the present or future ability to pay) appears in section 4.2, and relates solely to the imposition of non-mandatory assessments. No such "finding" appears in section 4.1, where the mandatory assessments were imposed against him. Indeed, the court specifically waived the non-mandatory assessments in section 4.2

“because the defendant lacks the present and future ability to pay them.” CP 108.

Therefore, the language Spivey challenges has no applicability to his sentence. Relief is unwarranted.

**2. EVEN IF THE LANGUAGE REGARDING NON-MANDATORY ASSESSMENTS IN SECTION 4.2 IS CONSTRUED TO APPLY TO THE MANDATORY FINANCIAL OBLIGATIONS IMPOSED IN SECTION 4.1, IT HAS NO IMPACT ON SPIVEY’S RIGHTS AND NEED NOT BE REVIEWED.**

Moreover, even if this Court were to adopt Spivey’s strained interpretation of the judgment and sentence (that the boilerplate language of section 4.2 applies to the obligations imposed in section 4.1), the sentencing court was under no obligation to consider Spivey’s ability to pay the *mandatory* victim penalty assessment or the *mandatory* DNA collection fee. Therefore, the factual finding is inconsequential and it need not be reviewed by this Court.

Spivey claims that the court was required to consider his financial resources, and the burden resulting from the \$600 assessments imposed. See Brf. of App. at 7. However, his argument fails to distinguish mandatory assessments from

non-mandatory ones. “[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).

Here, the court imposed a \$500 victim penalty assessment. CP 108. 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.

The court also imposed a \$100 DNA collection 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 43.43.754(1)(a). Again, there is no exception for indigent defendants. See State v. Brewster, 158 Wn. App. 856, 218 P.3d 249 (2009) and State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009) (2008 amendments to RCW 43.43.7541, making the collection fee mandatory regardless of ability to pay, apply to all sentencing hearings that occur after the effective date of the amendment).

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 the DOC to collect the monthly payment amount set by the court. However, this does not mean that the defendant’s ability to pay is irrelevant. Indeed, his financial situation may be a basis for modifying the monthly payment amount. RCW 9.94A.760(7)(a).

Unlike mandatory assessments, imposition of *non-mandatory* assessments requires the sentencing court to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.”

RCW 10.01.160(3). Formal findings are not required. Baldwin, 63 Wn. App. at 310. The record at sentencing must merely be sufficient to review whether the trial court considered the financial resources of the defendant, and the nature of the burden that would be imposed by the financial obligations. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (citing Baldwin, 63 Wn. App. at 312).

Here, the sentencing court was under no obligation to consider Spivey's financial resources when it imposed the *mandatory* victim penalty assessment and *mandatory* DNA collection fee in section 4.1 of the judgment and sentence. Thus, even in the unlikely scenario that section 4.2 of the judgment and sentence is read to apply to section 4.1, the language regarding present or likely future ability to pay was unnecessary and irrelevant. This Court need not review language in the judgment and sentence that has no impact on Spivey's rights.

**3. THERE IS NO REQUIREMENT OF AN INDIVIDUALIZED JUDICIAL DETERMINATION THAT SPIVEY HAS THE ABILITY TO PAY PRIOR TO COLLECTION OF HIS LEGAL FINANCIAL OBLIGATIONS.**

Finally, in just one sentence at the conclusion of Spivey's brief he claims that "before the State can collect LFOs, there must be a properly supported, individualized judicial determination that Spivey has the ability to pay." Brf. of App. at 8-9. Spivey is wrong.

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

In Curry, the Supreme Court differentiated between two different types of legal financial obligations: court costs and the victim penalty assessment. While the statute on victim assessments does not contain any provision for consideration of indigency, Curry 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).

The statute governing the DNA collection sample is substantially identical to that governing the victim assessment, so the same reasoning should apply to those fees as well.

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). Curry 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.

In Baldwin, this Court applied the holding of Curry. There, the trial court had imposed \$85 in court costs and \$500 for an attorney fee assessment. Baldwin, 63 Wn. App. at 306. With regard to the \$85 in court costs, this court held that Curry was dispositive as to their validity. Id. at 309. The \$500 attorney fee assessment, however, implicated the defendant's constitutional right to counsel. Further analysis was therefore necessary. Id. at 309. Ultimately however, this Court held that the attorney fee assessment was valid without a specific finding of ability to pay. Id. at 311. Under RCW 10.01.160, the court was required to consider Baldwin'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 attorney fee 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. There, the trial court imposed \$4,304 in "legal financial obligations." Bertrand, 165

Wn. App. at 398. The opinion does not specify the nature of these “obligations.” The record indicated that the defendant was disabled. Id. at 403. There was apparently no other information in the record concerning the defendant’s ability to pay. Id. at 398.

The Bertrand court 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 404.

Thus, 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. Baldwin, 63 Wn. App. 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. If, however, the holding of Bertrand is extended beyond the context of non-mandatory fees, it is wrong. There is no requirement to consider the defendant’s financial circumstances in the statutes governing victim penalty assessments or biological samples. See RCW 7.68.035; RCW 43.43.7541.

After the Bertrand court overturned the finding concerning the defendant’s 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. Baldwin 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?

#### **D. CONCLUSION**

In sum, Spivey illogically attempts to apply boilerplate language from one section of the judgment and sentence to an entirely different section. His claim that the trial court made a finding regarding his ability to pay mandatory assessments is misplaced.

Moreover, even if the court did make such a finding with respect to mandatory assessments, it is of no significance. The finding has no impact on either the court's ability to impose the obligations, or the State's ability to collect them. If Spivey is unable

to pay 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.

Finally, Spivey's conclusory claim, that an individualized finding of his ability to pay is required to be made prior to collection, is contrary to the state supreme court's decision in Curry, and is inaccurate. At any future violation hearing for failure to pay, Spivey will have the opportunity to affirmatively show that his failure was non-willful. Additionally, Spivey can also seek remission of costs upon an affirmative showing of manifest hardship. Such safeguards render the statutes at issue constitutionally adequate. The judgment and sentence should be affirmed.

DATED this 7<sup>th</sup> day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

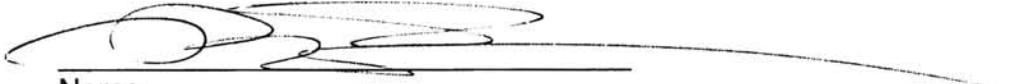
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CHARLES SPIVEY, Cause No. 69695-5 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of August, 2013

A handwritten signature in black ink, appearing to be "Andrew Zinner", written over a horizontal line.

Name  
Done in Seattle, Washington