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NO. 69961-0-I 3:33

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDWARD FULTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE JOAN DUBUQUE

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, Fulton 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 Fulton entitled to relief based on inconsequential language on his Judgment and Sentence?

B. STATEMENT OF THE CASE

Appellant Fulton pled guilty to Attempting to Elude a Pursuing Police Vehicle, Malicious Mischief in the Second Degree, Malicious Mischief in the Third Degree, and Reckless Endangerment. CP 50-72. Fulton was sentenced to eight months of incarceration for the eluding charge, but his sentence was later amended to six months, after the parties agreed that Fulton's offender score was one point lower. CP 74, 76, 119, 121. The court imposed the mandatory victim penalty assessment of \$500, and the mandatory DNA collection fee of \$100. CP 75. The court

waived all non-mandatory financial assessments. Id. Fulton appealed. CP 84-85.

C. ARGUMENT

Fulton 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 Appellant at 5. 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 75. Fulton'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 Fulton's rights or obligations. It impacts neither the court's ability to impose the obligations nor the State's ability to collect them. If Fulton 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, Fulton’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 not ripe for review, and inaccurate. Sufficient safeguards exist such that Fulton 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. FULTON CHALLENGES SURPLUSAGE 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(2), 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 75.

The "finding" that Fulton 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 75.

Because no financial assessments were imposed under section 4.2, the language Fulton 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 FULTON'S RIGHTS AND NEED NOT BE REVIEWED.

Moreover, even if this Court were to adopt Fulton'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 Fulton'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.

"[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). Findings regarding a defendant's ability to pay are not required prior to the imposition of

mandatory assessments, as they are required to be imposed regardless of a defendant's financial circumstances. State v. Lundy, 2013 WL 4104978, *2 (Div. 2, Aug. 13, 2013). See also RCW 7.68.035(1)(a); State v. Williams, 65 Wn. App. 456, 460-61, 828 P.2d 1158 (1992) (imposition of victim penalty assessment is mandatory and requires no consideration of a defendant's financial circumstances); RCW 43.43.7541; State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009) (imposition of DNA collection fee mandatory).

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).

Fulton agrees that any finding regarding his ability to pay was unnecessary in his case, as only mandatory financial obligations were imposed. See Brf. of Appellant at 4-5. However, he argues that, "If the court opts to make such a finding, 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." Brf. of Appellant at 5. In support of this claim, Fulton cites Baldwin and Bertrand, supra. Those cases do not support his argument that an unnecessary and inconsequential "finding" merits appellate review.

First, Baldwin is inapposite because in that case the court imposed non-mandatory financial obligations, not the mandatory assessments at issue here. 63 Wn. App. at 309 (court costs and recoupment of attorney fees).

Second, in Bertrand, Division Two purported to apply this Court's holding in Baldwin, but its analysis is murky. The trial court had imposed \$4,304 in "legal financial obligations." Bertrand, 165 Wn. App. at 398. The opinion does not specify the nature of these "obligations." See Lundy, 2013 WL 4104978 at *3, fn. 8 ("We note that the *Bertrand* decision failed to distinguish between mandatory and discretionary costs."). 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. As outlined above, there is no requirement to consider the defendant's financial circumstances in the statutes governing victim penalty assessments or biological samples.

Here, the sentencing court was under no obligation to consider Fulton'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 surplusage in the judgment and sentence that has no impact on Fulton's rights.

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

Finally, in just one sentence, Fulton conclusively claims that "before the State can collect LFOs, there must be a properly supported, individualized judicial determination that Fulton has the ability to pay." Brf. of App. at 5. Fulton is wrong.

In arguing that a finding of ability to pay is required before *collection*, Fulton again relies on Bertrand. But 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 attorney fee recoupment. 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 recoupment,

however, implicated the defendant's constitutional right to counsel. Further analysis was therefore necessary. Id. at 309. Ultimately, this Court held that imposing recoupment of attorney fees 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.

Purporting to rely on Baldwin, Bertrand addressed the appropriate "remedy" for the trial court's lack of factual support for its finding of ability to pay:

[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, Fulton attempts to apply boilerplate language from one section of the judgment and sentence to an entirely different section. His argument 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 Fulton 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, Fulton'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, Fulton will have the opportunity to affirmatively show that his failure was non-willful. Additionally, Fulton 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 22nd day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

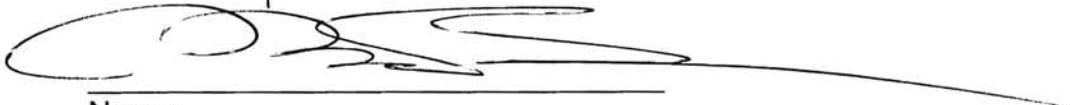
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, 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. EDWARD FULTON, Cause No. 69961-0 -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 12 day of August, 2013

A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington