

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWNY LEE BERTRAND,

Appellant.

FILED
APR 11 2011
CLERK OF COURT
SUPERIOR COURT
LEWIS COUNTY

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

The Honorable Richard L. Brosey

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Court's Instruction 13 misstated the law on jury unanimity as it applied to the special verdict.

2. The trial court exceeded its statutory authority when imposed costs where there was evidence that Ms. Bertrand lacked the ability to pay.

3. The trial court's decision imposing recoupment of attorney's fees violated Ms. Bertrand's right to equal protection as there was she did not have the present ability to pay and there was no evidence her inability to pay would end.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A jury instruction that requires the jury be unanimous to find the State had not proven the special verdict beyond a reasonable doubt is erroneous and the enhancement must be stricken. Here, the trial court instructed the jury using such an improper instruction. Must this Court order the school bus route stop enhancement stricken and Ms. Bertrand resentenced?

2. A trial court must determine whether a defendant has the means to pay legal financial obligations before imposing these fees and costs. Here, there was ample evidence Ms. Bertrand was unable to pay any of the costs and fees yet the trial court

determined she had the present or future ability to pay. Was the trial court's determination clearly erroneous?

3. A trial court violates a defendant's constitutionally protected right to equal protection when it imposes recoupment for court appointed counsel where it fails to determine the ability of the defendant to pay and whether any claim of indigency will be remedied in the near future. The court here imposed recoupment despite evidence of Ms. Bertrand's inability to pay. The court also ignored evidence that Ms. Bertrand's indigency would not end soon. Did the trial court violate Ms. Bertrand's right to equal protection?

C. STATEMENT OF THE CASE

Shawny Bertrand was charged with delivery of oxycodone within 1000 feet of a school bus route stop. CP 5-6. Following a jury trial, the trial court instructed the jury in Instruction 13 regarding the school bus stop route zone special verdict:

If you find the defendant not guilty of Delivery of a Controlled Substance, do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict. *Since this is a criminal case, all twelve of you must agree on the answer the special.*

CP 33 (emphasis added).

The jury subsequently found Ms. Bertrand guilty of delivery of Oxycodone and answered “yes” to the special verdict. CP 34-35; RP 152. In addition to the standard range sentence, the court imposed a 24-month sentence enhancement based upon the jury’s finding. CP 39; RP 161.

During the jury trial, Ms. Bertrand testified that in May or June of 2009, she was evicted from the home in which she was living for a failure to pay rent. RP 110-11. Ms. Bertrand’s source of income was a monthly check she received from Social Security Insurance (SSI) through a protective payee. RP 62-63. At the time of her sentencing, Ms. Bertram was living with her grandmother. RP 155. Further, Ms. Bertram’s attorney noted that at the time of sentencing, Ms. Bertrand had extremely limited resources and her power and utilities had been shut off at one point. RP 163.

Nevertheless, the court checked the box on the preprinted form indicating it found Ms. Bertrand had the present or future ability to pay any legal financial obligations. CP 38. The court went on to impose \$1800 for recoupment of attorney’s fees, \$1000 VUCSA fine, \$500 drug fund contribution, \$100 DNA collection fee, \$200 filing fee, \$500 crime victim fee, \$104 Sheriff service fee, and \$100 lab fee. CP 41; RP 161. The court set Ms. Bertrand’s

minimum payment when she was released from prison at \$25 a month. CP 42; RP 161-62.

D. ARGUMENT

1. THE TRIAL COURT'S INSTRUCTION 16
MISSTATED THE LAW ON JURY UNANIMITY
REQUIRING THE FIREARM ENHANCEMENT
BE STRICKEN

The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Regarding special verdicts, the jury must be unanimous to find the State has proven the special finding beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). But, the jury does not have to be unanimous to find that the State had not proven the special finding beyond a reasonable doubt. *State v. Bashaw*, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

The Supreme Court has held that jury unanimity is not required to answer "no" to a special verdict question. *Goldberg*,

149 Wn.2d at 894. In *Goldberg*, upon discovering that jurors were not unanimous in answering “no” to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity. *Id.* at 891. The Supreme Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer “no” to a special verdict. *Id.* at 894.

Subsequently, in *Bashaw*, the trial court instructed the jury in precisely the same manner regarding the special verdict: “[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139. The Court in *Bashaw* found the instruction an incorrect statement of the law and ordered the special verdict stricken:

Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of the special finding increasing the maximum penalty, [citation omitted], it is not required to find the *absence* of such a finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis added). Further, the Court ruled such an error can essentially never be harmless even where as in *Bashaw*, the jury was polled and the jurors uniformly affirmed their verdict:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

...
The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48 (emphasis added).

The same instruction at issue in *Bashaw* was used in Ms. Bertrand's trial. CP 33.¹ As in *Bashaw*, the simple use of this improper instruction by the trial court was error. In addition, as in *Bashaw*, the error was not harmless since it is impossible to determine what would have occurred had the jury been properly instructed. This Court must vacate the school bus route stop special verdict and remand for resentencing.

¹ While Ms. Bertrand did not object to Court's Instruction 13, neither the defendant in *Goldberg* nor in *Bashaw* objected to the trial court's instruction or the special verdict form and raised the issue for the first time on appeal. Nevertheless, the Supreme Court addressed the issue and vacated the special finding and the enhanced sentence based upon the improper instruction. *Bashaw*, 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94. As a consequence, Mr. Bertrand may raise this issue for the first time on appeal.

2. THE TRIAL COURT EXCEEDED ITS
STAUTORY AUTHORITY AND VIOLATED MS
BERTRAND'S RIGHT TO EQUAL
PROTECTION IN IMPOSING COURT COSTS
AND ATTORNEY'S FEES IN LIGHT OF HER
INABILITY TO PAY

a. The court may impose court costs and fees only after a finding of an ability to pay. The allowance and recovery of costs is entirely statutory. *State v. Nolan*, 98 Wn.App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under 10.05 RCW or pretrial supervision."

However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs. RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial

resources of the defendant and the nature of the burden that payment of costs will impose.

While neither the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs, *State v. Curry*, 62 Wn.App. 676, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992), the trial court here purported to make a finding of an ability to pay.

Only the victim assessment and DNA collection fee were mandatory fees that could not be waived. *Curry*, 118 Wn.2d at 917 (the Supreme Court has held that the victim penalty assessment is mandatory); *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

b. The court's "finding" that Ms. Bertrand had the ability to pay was clearly erroneous in light of evidence she completely lacked any ability to repay. The court here imposed both costs and recoupment for attorney's fees following a "finding" that Ms. Bertrand had the ability to pay. In fact, the evidence before the court showed the exact opposite; Ms. Bertrand had no ability to pay.

The court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed

under the clearly erroneous standard. *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991). While the trial court is not required to make express findings as to the ability to pay, the court here did. The court checked the box next to the portion speaking to the defendant's ability to pay. CP 38. As a result, the court here found:

The court has considered the total amount owing, the defendant's past, present, and future ability to pay financial legal 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. RCW 9.94A.753.

CP 38. While the court was not *required* to make an on-the-record finding of an ability to pay, since the court *did* make an express finding, that finding is before this Court reviewed whether that finding was clearly erroneous.

Evidence adduced at trial showed Ms. Bertrand had been evicted from her home for failing to pay rent. RP 110-11. She had a limited fixed income. RP 62-63. At the time of her arraignment, it was determined Ms. Bertrand was indigent, unable to contribute to her defense, and as a result, was appointed an attorney to represent her. Further, Ms. Bertrand suffered from a medical

disability, which was the basis for her to obtain and possess Oxycodone and severely limited her ability to remedy her disability. RP 114.

Nevertheless, at sentencing, contrary to the evidence before it regarding Ms. Bertrand's indigency, the court imposed costs and fees totaling \$4334, and ordered her to make minimum payments of \$25 per month to begin upon her completion of her 36 month sentence. But, in light of this overwhelming evidence that Ms. Bertrand had no ability to pay these costs nor would she have the ability to pay in the future, the court's "finding" was clearly erroneous.

c. Imposition of the costs was not mandatory and subject to suspension due to indigency. Only the victim penalty assessment and DNA fee were mandatory; all other costs were discretionary based upon the defendant's indigency. See RCW 9.94A.760(1) ("the court *may* order the payment of legal financial obligation . . ."); RCW 43.43.690(1) ("the court *may* suspend payment of all or part of the [crime laboratory] fee) (emphasis added).

Under the plain language of these statutes, the court possessed the discretion to waive the \$1830 recoupment fee for

court appointed counsel; the \$1000 fine, the \$500 drug enforcement fund fee, and the \$100 crime lab fee. Yet, the court appeared to treat these costs and fees as mandatory.

The “[f]ailure to exercise discretion is an abuse of discretion.” *Brunson v. Pierce County*, 149 Wn.App. 855, 861, 205 P.3d 963 (2009), *citing State v. Pettitt*, 93 Wn.2d 288, 295-96, 609 P.2d 1364 (1980). The trial court here failed to exercise its discretion and waive these burdensome fees and costs.

d. The imposition of recoupment for attorney’s fees was erroneous because Ms. Bertrand did not have a present ability to pay nor was there any indication her indigency would end. The court ordered Ms. Bertrand to pay \$1830 for “[f]ees for court appointed attorney.” CP 41. Imposition of this fee where the evidence before the court showed Ms. Bertrand lacked the ability to pay and there were no indicators showing this inability would end in the near future violated Ms. Bertrand’s right to equal protection.

When imposing recoupment for attorney’s fees, certain factors must be considered or imposition of recoupment violates equal protection, including whether defendant “is or Will be able to pay.” *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1977), *citing Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642

(1974). The court must also take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose, and the court cannot require repayment if it appears that there is no likelihood that defendant's indigency will end. *Id.*

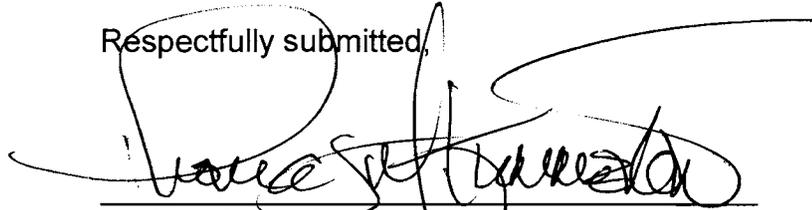
The court's "finding" here ignored the plain evidence that Ms. Bertrand had been evicted from her home and lacked any ability to pay the costs. Further, by requiring her to pay \$25 per month, the debt created by imposition of these costs, the court guaranteed that Ms. Bertrand will never pay off the debt entirely. In addition, while Ms. Bertrand had no ability to pay before being convicted because of her disability and limited fixed income, her ability to earn money would be further destroyed by the felony conviction which would stigmatize her in the job market and quash any ability she had to remedy her present indigency. Thus, the evidence established Ms. Bertrand lacked the ability to pay, and there was a complete lack of evidence that this indigency would end anywhere in the near future. The court's imposition of attorney's fees recoupment violated Ms. Bertrand's right to equal protection.

E. CONCLUSION

For the reasons stated, Ms. Bertrand submits this Court should strike the school bus route stop enhancement and remand for resentencing, as well as reverse the trial court's imposition of costs and fees and remand for a determination of the trial court to waive the costs and fees in light of Ms. Bertrand's inability to pay.

DATED this 27th day of August 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 40403-6-II
)	
SHAWNY BERTRAND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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