

FILED

AUG 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29461-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

KAM MILLS,

Appellant.

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

The Honorable Craig J. Matheson

REPLY BRIEF

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A. REPLY ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED MR. MILLS' RIGHT TO EQUAL PROTECTION IN IMPOSING COURT COSTS AND ATTORNEY'S FEES IN LIGHT OF HIS INABILITY 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. 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."

Mr. Mills did not waive these issues for appeal. He argues that when a trial court acts beyond its statutory sentencing authority, the issue can be heard for the first time on appeal. State v. Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996). Here, the trial court acted beyond its statutory authority when it imposed costs.

In making the determination of an ability to pay, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering

payment of court costs. Appellant concedes that 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), affirmed, 118 Wn.2d 911, 829 P.2d 166 (1992), however, here, the trial court here did make a finding of an ability to pay, by virtue of its finding in the form judgment and sentence document imposed both costs and recoupment for attorney's fees following a finding that Mr. Mills had the ability to pay. CP 28.

Mr. Mills specifically challenged this finding in his Appellant's Opening Brief, in Assignment of Error 3. That finding was erroneous. The evidence before the court showed the exact opposite; Mr. Mills was indigent. The Respondent ignores the fact that, with regard to an order of indigency for appeal, the trial court stated, "I would just tell you now I would recognize him as indigent. He's been in the penitentiary for the last four years, and he had defense counsel appointed previously." 9/29/10RP at 12. Furthermore, there was no evidence that the defendant's indigency was going to end in the future. In light of the evidence that Mr. Mills was indigent and had no ability to pay these costs nor would he

have the ability to pay in the future, he argues that the court's Finding 2.5 was clearly erroneous.

For similar reasons, the recoupment for attorney's fees was erroneous because Mr. Mills did not have a present ability to pay nor was there any indication his indigency would end. The court ordered Mr. Mills to pay \$700 for "attorney's fees" and \$2500 for defense attorney use of an expert. See CP 39 (cost bill amended). Imposition of these fees where the evidence before the court showed Mr. Mills lacked the ability to pay, and there were no indicators showing this inability would end in the near future, violated Mr. Mills' right to equal protection. Importantly, the issue is not one of Mr. Mills' indigence, it concerns the trial court's statutory authority. Mr. Mills argues that the trial court erred.

2. RESPONDENT CONCEDES THAT THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN ORDERING PAYMENT OF RESTITUTION FOR WITNESS FEES AND TRAVEL COSTS.

Appellant acknowledges Respondent's concession of error that the trial court's authority was limited to ordering restitution for those losses causally connected to Mr. Mills' crimes. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008). Here, the record reveals that the \$5,149.20 amount imposed at Mr. Mills'

2010 sentencing reflected witness fees and expenses that are properly only reimbursed via a cost bill, and do not constitute "restitution." A court abuses its discretion when a restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). Here, the trial court's order was in excess of its statutory authority and must be vacated. Moen, supra. Nothing in the restitution statute provides for recoupment of such costs where they are not within the specified loss-compensation areas set out by the Legislature. The order must be reversed.

3. THE DEFENDANT WAS SUBJECTED TO A NEW SENTENCING AND A NEW COST BILL AND IS NOT BOUND BY THE LAW OF THE CASE.

Mr. Mills was subjected to a new sentencing hearing and a new cost bill ordered as of September 29, 2010. The trial court imposed a series of costs that were different than those imposed at the original sentencing of October 18, 2006, and issued an entirely new cost bill and judgment and sentence. He is not precluded by the "law of the case" from challenging the current cost bill and restitution order.

**4. THE ISSUE IS RIPE FOR APPEAL
BECAUSE COSTS ARE BEING ASSESSED
AGAINST MR. MILLS' PRISON ACCOUNT.**

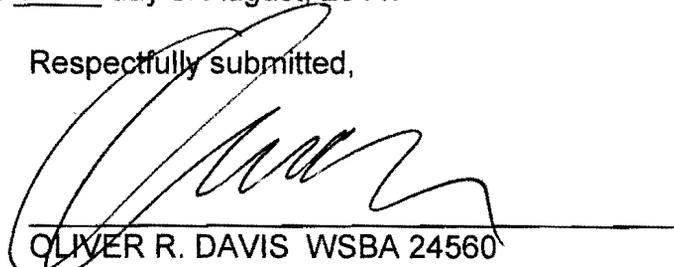
Appellant Mr. Mills noted in his Statement of Additional Grounds for Review that his prison account is already being assessed in the amount of \$738 for costs associated with the 2010 judgment and cost bill. Statement of Additional Grounds, filed June 15, 2011. Thus, because a collection effort is before this Court, the issue is ripe. Furthermore, even if one were to accept the State's argument that Mr. Mills was properly deemed to be able to pay costs following release from incarceration, he has no ability to pay those costs now. For that reason alone, the current collection efforts are beyond the scope of the judgment and sentence's determination of an ability to pay.

B. CONCLUSION

For the reasons stated, and based also on Mr. Mills' Opening Brief, Mr. Mills respectfully requests that this Court strike the orders imposing unauthorized costs and fees as argued herein, in Finding 2.5, including the amount imposed under the heading restitution in Finding 4.1.

DATED this 25 day of August, 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 29461-7-III
)	
KAM MILLS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> ANDREW MILLER, DPA	(X)	U.S. MAIL
BRENDAN SIEFKEN, DPA	()	HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF AUGUST, 2011.

X _____ 

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