

FILED

MAY 05 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA No. 29461-7-III

IN 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 BENTON COUNTY

The Honorable Craig J. Matheson

---

APPELLANT'S CORRECTED OPENING BRIEF

---

OLIVER R. DAVIS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## **A. ASSIGNMENTS OF ERROR**

1. The trial court exceeded its statutory authority when it imposed costs in the absence of substantial evidence that Mr. Mills had the ability to pay.

2. The trial court erred in entering Finding 2.5 in the judgment and sentence in the absence of substantial evidence that Mr. Mills had the ability to pay.

3. The trial court's order imposing restitution was issued in excess of its statutory authority where the record indicates that the amount referred to was for witness costs, compensation for which is not within the court's authority to order.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. 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 no evidence Mr. Mills was able to pay any of the costs and fees yet the trial court determined he had the present or future ability to pay. Was the trial court's determination clearly erroneous?

2. 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 indigency will be remedied in the near future. The court here imposed recoupment despite evidence of Mr. Mills' inability to pay. The court also ignored evidence that Mr. Mills' indigency would not end soon. Did the trial court violate Mr. Mills' right to equal protection?

3. Did the trial court exceed its statutory authority in imposing restitution?

### **C. STATEMENT OF THE CASE**

Kam Mills was originally sentenced on October 18, 2006. CP 5-14. Following an unpublished decision in which the Court of Appeals ruled that a prior rape offense had been improperly included in his offender score, Mr. Mills was re-sentenced on September 29, 2010, absent the previously included prior conviction. State v. Mills, 142 Wn. App. 1017, 2007 WL 4536630(2007), review denied, 164 Wn.2d 1012 (2008); 9/29/10RP at 2. The trial court considered various sentencing options and orders, including denying a request for a SSOSA sentence. 9/29/10RP at 9-10.

The trial court issued a new judgment and sentence that included an order to pay \$5,149.20 to the Benton County Prosecutor, as an amount referred to as "restitution." CP 26

(Finding 4.1). However, the record of Mr. Mills' prior sentencing indicates that this dollar amount referred to costs relating to witness interviews and fees. 10/18/06RP at 109, 126.

At Mr. Mills' new sentencing hearing, the trial court, in addition to the amount of \$5,149.20 stated in the judgment and sentence, also issued a "cost bill" and a "cost bill amended" which ultimately imposed costs in the amount of \$4,790.75, and employed a form cost bill which provided for costs to the county for filing fees, "witness fees," attorney's fees, and the like. CP 28-29 (judgment and sentence, Finding 4.1), CP 35 (judgment and sentence, cost bill), CP 39 (cost bill amended). The court waived accrual of interest on the amount accumulated since sentencing and ordering of the original cost bill, for a then-different amount, in 2006. 9/29/10RP at 14; CP 38.

In summary, as a result of his 2010 sentencing, Mr. Mills is currently subject to an amount of \$5,149.20 for expenses that are not authorized by the restitution statute, and which are duplicative of the cost bill entered on the same date.

In addition, the trial court had no evidence upon which to base its factual finding, reflected in the judgment and sentence document, that Mr. Mills had an ability to pay costs, a finding that

must be made before entering the cost bill order. CP 28-29 (Finding 4.1), CP 35 (cost bill), see also CP 39 (cost bill as amended).

Mr. Mills timely appeals. CP 130.

#### D. 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.**

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), affirmed, 118 Wn.2d 911, 829 P.2d 166 (1992), the trial court here purported to make a finding of an ability to pay.

**b. The court's finding that Mr. Mills had the ability to pay was clearly erroneous in light of evidence that he was indigent.** The trial court here 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. In fact, the evidence before the court showed the exact opposite; Mr. Mills was indigent. 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. There was no evidence that the defendant’s indigency was going to end in the future.

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, in its use of the form judgment and sentence. The court did not strike Finding 2.5 in the judgment, and as a result, the court here found:

**ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** 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.

CP 28 (judgment and sentence, Finding 2.5). While the court below 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 and it is reviewed for whether it was

clearly erroneous. 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, the court's Finding 2.5 was clearly erroneous.

**c. Imposition of the costs was not mandatory and subject to suspension due to indigency.** Only a victim penalty assessment and a DNA fee are mandatory; all other costs, including those ordered in Mr. Mills' case, 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"). Under the plain language of these statutes, the court possessed the discretion to waive these fees. 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 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.

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. Barklind, 87 Wn.2d at 817.

The court's Finding 2.5 in this case was contrary to the undisputed evidence that Mr. Mills had no ability to pay the costs.

In addition, while Mr. Mills had no present ability to pay, his ability to earn money was further destroyed by the felony convictions for sex offenses which will stigmatize him in the job market and quash any ability he had to remedy his present indigency. Thus, the evidence established Mr. Mills lacked the ability to pay, and there was a complete lack of evidence that this indigency would end at any time in the foreseeable future. The court's imposition of attorney's fees recoupment in the absence of an ability to pay violated Mr. Mills' right to equal protection.

**2. THE TRIAL COURT EXCEEDED ITS  
STAUTORY AUTHORITY IN ORDERING  
PAYMENT OF RESTITUTION FOR WITNESS  
FEES AND TRAVEL COSTS.**

a. **The court may impose restitution only for losses connected to the defendant's crimes.** The court below had authority to order restitution at Mr. Mills' sentencing hearing. RCW 9.94A.753(5). However, that 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). The question is whether the amounts imposed were causally connected to the crimes for which Mr. Mills was convicted. This is a question of law that the Court of Appeals will review *de novo*. State v.

Johnson, 96 Wn. App. 813, 816, 981 P.2d 25 (1999) (in general, proper application of a statute is a question of law).<sup>1</sup>

**b. The witness fees and expenses are not within the authority granted by the restitution statute.** Specifically, interpretation of the restitution statute is an issue of law the appellate courts review *de novo*. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010), cert. denied, \_\_\_ U.S. \_\_\_, 131 S.Ct. 318, 178 L.Ed.2d 207 (2010). 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." The statute, RCW 9.94A.753, provides:

Except as provided in subsection (6) of this section [applicable solely to rape offenses], restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

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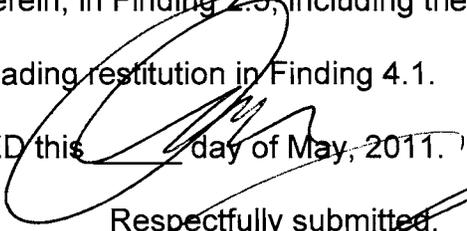
<sup>1</sup> When a trial court acts beyond its statutory sentencing authority, the issue can be heard for the first time on appeal. State v. Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996).

(Emphasis added.) RCW 9.94A.753(3). The record of Mr. Mills' prior sentencing indicates that the \$5,149.20 amount referred to witness costs and other expenses plainly not permitted by the restitution statute: the deputy prosecutor stated of that amount, "That is actually to our office for travel costs for our witnesses for the trial as well as for the victim and witness interviews." 9/29/10RP at 109, see also 9/29/10RP at 126 (referring to the amount as incurred by the county for "travel costs").

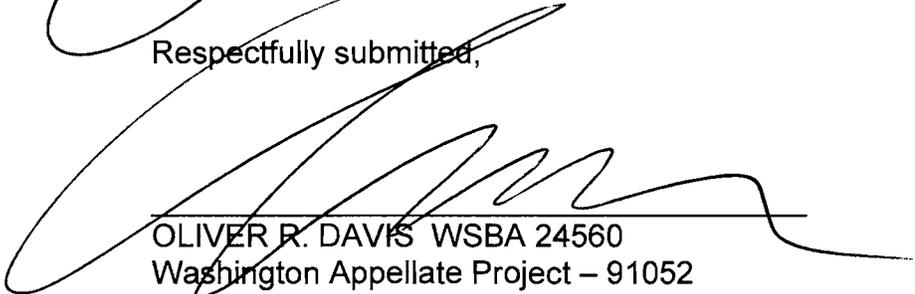
A court abuses its discretion when a restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). Here, the trial court's order was in excess of its statutory authority and must be vacated. Nothing 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. Additionally, to receive restitution, a person must first be a victim of the crime. State v. Kisor, 82 Wn. App. 175, 183, 916 P.2d 978 (1996), overruled on other grounds by Enstone, 137 Wn.2d 675, supra.

**E. CONCLUSION**

For the reasons stated, 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  day of May, 2011.

Respectfully submitted,

  
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Washington Appellate Project – 91052  
Attorneys for Appellant

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

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

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JOSEPH ALVARADO, STATE THAT ON THE 3<sup>RD</sup> DAY OF MAY, 2011, I CAUSED THE ORIGINAL **APPELLANT'S CORRECTED OPENING BRIEF** 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:

[X] ANDREW MILLER, DPA BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY OF MAY, 2011.

X \_\_\_\_\_ *JA* \_\_\_\_\_

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