NO. 30560-1-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

FILED
FEB 25, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL THOMAS STEELMON

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES 1

1. THE TRIAL COURT IMPOSED $2,520.00 IN LEGAL FINANCIAL OBLIGATIONS, CONSISTING OF A $500.00 VICTIM ASSESSMENT, A CRIMINAL FILING FEE OF $200.00, A SHERIFF SERVICE FEE OF $170.00, A JURY DEMAND FEE OF $250.00, A BENCH WARRANT FEE OF $100.00, A FEE FOR COURT APPOINTED ATTORNEY OF $700.00, A FINE OF $500.00 AND A $100.00 FELONY DNA COLLECTION FEE. THE COURT DID NOT SET A PAYMENT SCHEDULE FOR THE DEFENDANT AT THE TIME OF SENTENCING. THE COURT DID FIND THE DEFENDANT HAS THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS IMPOSED AS PART OF HIS SENTENCE. DOES THIS FINDING HAVE ANY IMPACT ON THE COURT'S ABILITY TO IMPOSE AND COLLECT THESE FINANCIAL OBLIGATIONS? 1

2. IF THIS COURT REVIEWS THE FINDING, IS IT SUPPORTED BY THE FACTS IN THE RECORD WHICH SHOW THAT THE DEFENDANT IS 48 YEARS OLD, PRESENTED A REQUEST TO WAIVE CERTAIN COURT COSTS WITHOUT INDICATING A PHYSICAL INABILITY TO MEET HIS FINANCIAL OBLIGATIONS AND THAT REQUEST WAS CONSIDERED AND DECLINED BY THE TRIAL COURT? 1

B. STATEMENT OF THE CASE 2

TABLE OF CONTENTS CONTINUED

1. PROCEDURAL HISTORY 2

2. FACTS 2

C. ARGUMENT 3

1. THE TRIAL COURT CORRECTLY IMPOSED THE LEGAL FINANCIAL OBLIGATONS WHICH WERE SUPPORTED BY THE RECORD. 3

2. IF THIS COURT REVIEWS THE TRIAL COURT'S FINDING, IT IS SUPPORTED BY EVIDENCE THAT THE APPELLANT IS CAPABLE OF PAYING HIS LEGAL FINANCIAL OBLIGATIONS. 12

D. CONCLUSION 14

TABLE OF AUTHORITIES

CASES

State v. Baldwin, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991) 5, 6, 8, 9, 10, 11

State v. Bertrand, 165 Wn.App. 393, 404, 267 P.3d 511 (2011). 6, 9, 10, 11, 13

State v. Curry, 62 Wn.App. 676, 683, 814 P.2d 1252 (1991) *affirmed*, 118 Wn.2d 911, 829 P.2d 166 (1992) 4, 7, 11, 12

State v. Thompson, 153 Wn.App. 325, 223 P.3d 1165 (2009) 5

State v. Woodward, 116 Wn.App. 697, 703-04, 67 P.3d 530 (2003) 11

State v. Cook, 146 Wn.App. 24, 27, 189 P.3d 811 (2008) 5

STATUES

RCW 10.01.160 ..... 4, 7, 8, 9, 11

RCW 10.01.160(3) 6

RCW 10.01.160(4) 5, 10

RCW 43.43.7541 5

RCW 7.68.035 3

RCW 7.68.035(1)(a) 4

RCW 9.94A.200 7

TABLE OF AUTHORITIES CONTINUED

RCW 9.94A.6333 5

RCW 9.94A.760 5

RCW 9.94A.760(1) 6

RCW 9.94A.760(7)(a) 6

RCW 9.94A.760(8) 6

RCW 9A.52.025(1) 2

A. ISSUES

1. THE TRIAL COURT IMPOSED $2,520.00 IN LEGAL FINANCIAL OBLIGATIONS, CONSISTING OF A $500.00 VICTIM ASSESSMENT, A CRIMINAL FILING FEE OF $200.00, A SHERIFF SERVICE FEE OF $170.00, A JURY DEMAND FEE OF $250.00, A BENCH WARRANT FEE OF $100.00, A FEE FOR COURT APPOINTED ATTORNEY OF $700.00, A FINE OF $500.00 AND A $100.00 FELONY DNA COLLECTION FEE. THE COURT DID NOT SET A PAYMENT SCHEDULE FOR THE DEFENDANT AT THE TIME OF SENTENCING. THE COURT DID FIND THE DEFENDANT HAS THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS IMPOSED AS PART OF HIS SENTENCE. DOES THIS FINDING HAVE ANY IMPACT ON THE COURT'S ABILITY TO IMPOSE AND COLLECT THESE FINANCIAL OBLIGATIONS?

2. IF THIS COURT REVIEWS THE FINDING, IS IT SUPPORTED BY THE FACTS IN THE RECORD WHICH SHOW THAT THE DEFENDANT IS 48 YEARS OLD, PRESENTED A REQUEST TO WAIVE CERTAIN COURT COSTS WITHOUT INDICATING A PHYSICAL INABILITY TO MEET HIS FINANCIAL OBLIGATIONS AND THAT REQUEST WAS CONSIDERED AND DECLINED BY THE TRIAL COURT?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Appellant, Daniel Thomas Steelmon, was charged by an Information filed March 31, 2010, with the felony crime of Theft in the Second Degree, RCW 9A.52.025(1), a class "C" felony. (CP 37-38). The Appellant was arraigned on April 6, 2010 and was found guilty by jury verdict on June 8, 2010 of the crime charged. (CP 19). The Appellant was sentenced on January 24, 2012 by the Honorable Bruce Spanner to 18 months of incarceration and filed a notice of appeal on January 24, 2012. (CP 2-3).

2. FACTS

Respondent accepts and relies upon the Appellant's statement of facts and requests it be incorporated within Respondent's brief. Respondent also presents the following additional facts to supplement Appellant's statement of facts. Trial counsel for the Appellant stated at sentencing, "He (meaning the Appellant) did point out that there are on page 5 of 10, that there are certain costs that he would like eliminated. One is for bus – well, felony drugs of $500. This was a theft second case not a drug case. He also is indicating the $100 felony DNA charge. You just recently had?" (RP 1/24/2012; page 3). The defendant's attorney

was in reality requesting the trial court to not impose the $500 victim assessment under RCW 7.68.035 and the $100 Felony DNA collection fee. (CP 8). The Court inquired of the Appellant, "You have a right to address me before I impose sentence. Is there anything you would like to say? Appellant responded, "No, your Honor. I'm fine." (RP 1/24/2012; page 4). The court also considered the Appellant's request to waive costs. "Will also impose – I'm declining your request to waive costs. . . . I'm also assessing a $500.00 victim assessment, $720.00 in court costs, a $700.00 court-appointed attorney fee, a $500.00 fine, a $100.00 felony DNA collection fee." (RP 1/24/12; page 4). The trial court did review a signed affidavit from Appellant regarding his finances to support his request for a court-appointed attorney to assist in his appeal." (RP 1/24/12; page 5-6).

C. ARGUMENT

1. THE TRIAL COURT CORRECTLY IMPOSED THE LEGAL FINANCIAL OBLIGATONS WHICH WERE SUPPORTED BY THE RECORD.

The finding of the court concerning the defendant's ability to pay has no impact on the defendant's rights; it does not need to be reviewed by the appellate court. By statute, the victim penalty

assessment and biological sample fee may be collected without any finding concerning the defendant's ability to pay. The sole issue in this case, raised for the first time on appeal, concerns the collection of $1,920.00 in legal financial obligations. Appellant challenges the trial court's finding that he has the current or future ability to pay legal financial obligations. This challenge does not need to be considered, because it has no impact on the Appellant's rights or obligations.

The Appellant claims that the court may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. The court did not abuse its discretion when it made the finding that the Appellant had the ability to pay legal financial obligations. RCW 10.01.160 requires the trial court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." However, the sentencing court is not required to consider the Appellant's financial resources when it imposed mandatory legal financial obligations. When sentencing a defendant for a felony, the court must impose a mandatory $500 victim penalty assessment. RCW 7.68.035(1)(a). The defendant's ability to pay is irrelevant. *State v. Curry*, 62 Wn.App. 676, 683, 814 P.2d 1252

(1991) *affirmed*, 118 Wn.2d 911, 829 P.2d 166 (1992). Like the victim penalty assessment, the felony sentence must include a DNA collection fee of $100, without regard for the defendant's individual financial circumstances. RCW 43.43.7541. *State v. Thompson*, 153 Wn.App. 325, 223 P.3d 1165 (2009). For mandatory legal financial obligations, the time to examine the defendant's ability to pay is when the State seeks to collect the financial obligation. *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991). The defendant would not be an aggrieved party until the State seeks to enforce the payment of the financial obligations. A defendant would then be given an opportunity to show that he has not willfully failed to pay those financial obligations prior to being incarcerated. RCW 9.94A.6333. The Appellant could petition the court at any time to remit or modify legal financial obligations due to hardship. RCW 10.01.160(4). Because adequate safeguards exist to prevent indigent defendants from being incarcerated for failing to pay, the imposition of the mandatory financial obligations would raise no constitutional concerns. *State v. Cook*, 146 Wn.App. 24, 27, 189 P.3d 811 (2008).

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 trial court in the instant case did not set a minimum monthly amount to be paid by the Appellant towards satisfying the legal financial obligations. The Department of Corrections is authorized to collect these amounts during the period of supervision. RCW 9.94A.760(8). To determine the appropriateness of the payment schedule, the Department may require the defendant to provide information under oath concerning his assets and earning capabilities. RCW 9.94A.760(7)(a).

The imposition of non-mandatory legal financial obligations, such as court costs and recoupment for appointed counsel, requires the sentencing court to consider the defendant's financial resources. RCW 10.01.160(3). However, formal findings are not required. *State v. 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).

The Supreme Court held the statutory provisions as set out in RCW 10.01.160 satisfy 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. *Curry* went on to consider the validity of victim penalty assessments. Unlike RCW 10.01.160, the statute on victim assessments does not contain any provision for consideration of indigency. The court 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).Under *Curry,* neither

the imposition nor the collection of the victim penalty assessment depends on a prior showing of ability to pay. Rather, the proper time for consideration of indigency is at a sanctions hearing. If the lack of payment is not willful, sanctions may not include incarceration. The statutes governing the biological sample are substantially identical to that governing the victim assessment, so the same reasoning should apply to those fees as well.

In *Baldwin*, Division One applied the holding of *Curry.* The trial court had imposed $85.00 in court costs and $500.00 for recoupment of attorney fees. With regard to the $85.00 in court costs, the court held that *Curry* was dispositive as to their validity. *Baldwin,* 63 Wn.App. at 308-09. The $500.00 attorney fee assessment, however, implicated the defendant's constitutional right to counsel. The court still held that the assessment was valid without a specific finding of ability to pay. Under RCW 10.01.160, the court was required to consider the defendant's financial resources. The record showed that the court had done so. Consequently, the imposition of the $500.00 assessment was not an abuse of discretion. *Baldwin,* 63 Wn.App. at 311-12.

In *Bertrand*, Division Two purported to apply the court's holding in *Baldwin,* but its analysis is murky. The trial court in

Bertrand imposed $4,304.00 in "legal financial obligations." The opinion does not specify the nature of these "obligations." The record indicated that the defendant was disabled. There was apparently no other information in the record concerning the defendant's ability to pay. *Bertrand,* 165 Wn.App. at 398.

Division Two 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 617.

In following this analysis, 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. *Id.* 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. RCW 10.01.160(4) requires a trial court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." If, however, the holding of *Bertrand* is extended beyond this context, it is wrong. Statutes involving other kinds of legal financial obligations do not usually contain similar requirements. In particular, there is no such requirement in the statutes governing biological samples.

After the *Bertrand* court overturned the finding concerning 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. 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 mis-states the analysis of *Baldwin.* That case 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 affirmation 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,* 1218 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?

In short, the trial court's finding concerning ability to pay is, in the context of this case, of no legal significance. That finding has no impact on either the court's ability to impose the obligations or the Clerk's ability to collect them. If the defendant 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. Since the finding has no effect, no purpose would be served by striking it.

2. IF THIS COURT REVIEWS THE TRIAL COURT'S FINDING, IT IS SUPPORTED BY EVIDENCE THAT THE APPELLANT IS CAPABLE OF PAYING HIS LEGAL FINANCIAL OBLIGATIONS.

Even if the finding of ability to pay is open to challenge, it is adequately supported by the record. In the instant case the court stated on the record that it had considered the appellant's request to waive court costs and declined to do so. The court had the Appellant's financial affidavit to support his request for court appointed appellant counsel. The court did in fact grant the Appellant's request for court appointed counsel after reviewing this affidavit. However, the court declined to waive any of the court costs imposed both after a request from the Appellant and after reviewing his financial status. This was a sufficient review by the court that supports his finding the Appellant had the ability to pay his financial legal obligations in the future. In contrast the defendant in *Bertrand,* 165 Wn.App. at 517, was disabled. There is no basis to strike the legal financial obligations from the Appellant's sentence. The record does support the findings as entered by the trial court as part of the judgment and sentenced imposed. The Appellant was found to be indigent at the time of sentencing when the court appointed appellant counsel. At the time of sentencing, the Appellant was in custody and about to begin a prison sentence. At the time of payment, he would be out of custody and capable of obtaining employment. Considering the record as a whole, the trial

court's finding of ability to pay is not clearly erroneous. The court decision should be reviewed for an abuse of discretion and clearly there was no abuse in imposing the courts costs in the instant case.

D. CONCLUSION

For the reasons stated above, the provision of the judgment and sentence dealing with legal financial obligations should be affirmed. The Appellant has not challenged his conviction for Theft in the Second Degree or his sentence of 18 months confinement. Those portions of the judgment and sentence should be affirmed in any event.

Dated this 25th day of February, 2013.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By:
David W. Corkrum,
WSBA #13699
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta being first duly sworn on oath deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 25th day of February, 2013, a copy of the Respondent's Brief was delivered to Daniel Thomas Steelmon, #292437, Appellant, P.O. Box 2049, Airway Heights, WA 99001 and to David N. Gasch, opposing counsel by depositing in the mail of the United States of America a properly stamped.

Abigail Iracheta

Signed and sworn to before me this 25th day of February, 2013.

Deborah L. Ford

Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2014