

FILED  
Nov 16, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 306313-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

LUIS CISNEROS VALENCIA, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 10-1-00072-4

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BRIEF OF RESPONDENT

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## I. STATEMENT OF THE CASE

Luis Cisneros Valencia was found guilty on December 8, 2010, by jury-verdict of Attempted Residential Burglary, and was sentenced to 16.5 months confinement. (CP 58-65). As part of his sentence, certain court costs, fees, and fines were assessed against him. (CP 61). The costs, fees, and fines are as follows: \$500.00 victim assessment penalty mandated by RCW 7.68.035; a fine in the sum of \$500.00 authorized by RCW 9A.20.021; \$100.00 felony DNA collection fee; \$200.00 filing fee; \$100.00 bench warrant fee; \$235.00 sheriff's service fee; \$200.00 jury demand fee; \$77.00 witness fee; \$700.00 attorney's fee; \$390.50 special costs reimbursement; giving rise to the total sum of \$3,052.00. (CP 23, 61). Mr. Valencia cannot show that he has ever been brought into court regarding his legal financial obligations, nor can he show that he has ever faced the threat of any jail time because of his failure to pay them.

Mr. Valencia now appeals this assessment, arguing insufficient facts supported the finding of his ability to pay.

## II. ARGUMENT

### 1. MR. VALENCIA WAIVED HIS RIGHT TO APPEAL THE COST BILL.

In order to raise an issue on appeal, the general rule is that an individual must have allowed the trial court a chance to correct that error, whether through an objection at the time, or a motion for a new trial. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). The reason for this rule is to prevent a defendant from going before a finder of fact in circumstances he finds acceptable, receiving a verdict he does not approve of, and then attack the trial court's judgment for an error it could have corrected. *Id.* However, Rule of Appellate Procedure (RAP) 2.5 lays out exceptions to this rule as follows: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can

be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). Mr. Valencia does not argue that the trial court lacked jurisdiction, or that there were insufficient facts to justify the conviction of Mr. Valencia, nor does Mr. Valencia allege a Constitutional violations.

Mr. Valencia did not object to the ordered costs at either sentencing. (01/05/11, RP 8). Consequently, Mr. Valencia has waived his objections, and under RAP 2.5, this Court should dismiss his appeal.

**2. MR. VALENCIA'S ARGUMENT ABOUT THE AWARD OF COSTS IS NOT RIPE.**

Any argument about Mr. Valencia's indigent status cannot be considered ripe. Mr. Valencia provides no indication that he has ever faced any kind of sanction, or that the State of Washington has ever tried to collect on his legal financial obligations. Mr. Valencia suffers no injury from the imposition of costs and fees until the State attempts to collect on them. As such, only then

would Mr. Valencia be entitled to a protest about his indigent status. The Court has stated as such: "If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault of his own, to repay, the statute allows for remission of the costs award." *State v. Blank*, 131 Wn.2d. 230, 253, 930 P.2d 1213 (1997).

*State v. Zeigenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) is illustrative . In *State v. Zeigenfuss*, an inmate protested the Department of Corrections procedure for imposing sanctions upon those who fail to pay their legal financial obligations. *Id.* at 112. The Court stated, in answer to her claims: "Ziegenfuss has not failed to pay the VPA [Victim Penalty Assessment], nor has she been incarcerated or otherwise sanctioned for violating the terms of her community custody. As yet, therefore, she has suffered no harm, and her challenge to the constitutionality of the

process in DOC community custody violation hearings is premature." *Id.*

Another illustrative case is *State v. Crook*, 146 Wn. App. 24, 189 P.3d 811 (2008). There, Mr. Crook appealed an order denying his motion to alleviate him of his financial obligations. *Id.* at 26. The Courts response was: "Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs." *Id.*

Finally, *State v. Wimbs*, 68 Wn. App. 673, 847 P.2d 8 (1993) clearly shows what consideration, if any, is necessary before the imposition of costs. In *Wimbs*, the only funds of the defendant considered consisted of \$108.00 held by the Yakima police department, all of which was dispersed to the State, in order to pay Mr. Wimbs cost bill, which left \$575.50 of the original \$683.50 cost bill. *Id.* at 680-681. In

the Courts words: "The court's order also finds that Mr. Wimbs has the ability to pay. The record contains no evidence of Mr. Wimbs' ability to pay the remaining \$575.50." *Id.* at 681. The Court upheld the imposition of fines and costs, agreeing with the lower court. *Id.*

Mr. Valencia has suffered no harm as a result of the imposition of costs. When the State attempts to collect such from him, he will be given a chance to be heard and make arguments about his ability to pay. The Court has made it clear: "There is no reason at this time to deny the State's cost request based upon speculation about future circumstances." *State v. Blank*, 131 Wn.2d at 253.

Finding 2.5 of the Judgment and Sentence dated January 5, 2012, simply indicates that the court believes that Mr. Valencia may be able to pay his legal financial obligations. (CP 61). When the State attempts to collect the legal financial obligations, the defendant can claim

indigence. At that time, the court will be able to make a determination based upon the best possible evidence.

**3. MR. VALENCIA IS NOT AN "AGGRIEVED PARTY" AS PER RAP 3.1**

Mr. Valencia is not an aggrieved party. "We have defined 'aggrieved party' as one whose personal right or pecuniary interests have been affected." *State v. Taylor*, 150 Wn.2d 599, 604, 80 p.3d 605 (2003). The Courts of this State have stated that an individual against whom costs have been assessed, but on which no actions have been taken is not aggrieved for the purposes of RAP 3.1. *State v. Smits*, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009). The reasons for this are apparent. No pecuniary interests have been impacted by the simple fact that the State has assessed costs against Mr. Valencia. If and when the State attempts to collect upon Mr. Valencia's legal financial obligations, he will then be an aggrieved party, able to petition the court for protection from collection orders.

The simple assessment of costs is not enough to convert a party without a grievance to an aggrieved party. *Id.* While Mr. Valencia may not like the fact that costs have been assessed against him, "[a]n aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result." *Taylor*, 150 Wn.2d at 604. The only point at which Mr. Valencia may challenge the collection of costs, despite his indigent status, is when the State attempts to collect on them.

**4. MR. VALENCIA IS LIKELY TO HAVE THE CAPACITY TO REPAY HIS LEGAL FINANCIAL OBLIGATIONS.**

Mr. Valencia may have been indigent at the time of trial, but this does not preclude the assessment of costs. Both RCW 10.01.160 and RCW 9.94A.753 ask the court to look to the defendant's current and future ability to pay. The court did exactly that in Finding 2.5:

The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial 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 at 40.

It could be true that Mr. Valencia cannot pay at the current time, but the court had confidence that Mr. Valencia would be able to pay his court costs in the future.

The burden to show that the trial court had insufficient facts before it to make a finding lies entirely on Mr. Valencia. *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 939-940, 845 P.2d 1331 (1993). Mr. Valencia claims that the court had no evidence whatsoever before it demonstrating the possibility of a future ability to pay. However, Mr. Valencia informed the court prior to being sentenced that he was gifted with certain skills. (01/05/11, RP 4-5). The defendant mentioned specifically that he had "construction and electrical skills," which the State would take to mean as experience

working in construction, or as an electrician. (01/05/11, RP 4). Both of these trades are skilled professions, which offer substantial wages.

The court had sufficient evidence before it to make Finding 2.5. The defendant cites no evidence showing that the court was in error when it decided that he was capable of meeting his legal financial obligations. As such, the defendant has failed to meet his burden

### **III. CONCLUSION**

Mr. Valencia's appeal of his legal financial obligations is untimely. The time to request the alleviation of his legal financial obligations is when the State attempts to collect on them. Furthermore, Mr. Valencia is likely to be able to pay for them. Between the opportunities the State provides inmates, and the demonstrations Mr. Valencia has made of his financial resources, the court had sufficient evidence to support

Finding 2.5. As such, the lower court's ruling should be affirmed.

**RESPECTFULLY SUBMITTED** this 16th day of  
November 2012.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

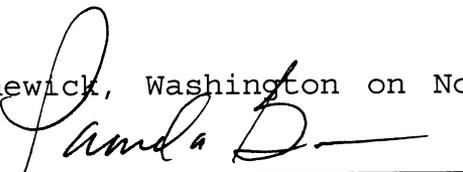
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\_\_\_\_\_  
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