

FILED  
NOVEMBER 26, 2012  
Court of Appeals  
Division III  
State of Washington

No. 30650-0-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

JAMES C. CARTER,  
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT  
Honorable Craig J. Matheson, Judge

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REPLY BRIEF OF APPELLANT

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RAP 2.2(1).....1

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A. ARGUMENT IN REPLY

**The implied finding that Mr. Carter has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.**

The State’s arguments do not apply to the issue raised by Mr. Carter.

First, because Mr. Carter is appealing a factual finding made by the trial court in its final Judgment and Sentence, his appeal is a matter of right under RAP 2.2(1) and does not implicate RAP 2.5(a). *Cf.* Brief of Respondent (“BOR”) 2–4.

Secondly and thirdly, the trial court made the implied finding that Mr. Carter has the means to pay the assessed legal financial obligations of \$3,460 commencing immediately, but there is no evidence in the record to support the finding. CP 40–41, 47; 2/15/12 RP 31–34. Contrary to the underlying premise of the State’s position, Mr. Carter is not challenging the *imposition* of these costs. He is disputing the entry of a factual finding—made without supporting evidence—that he has the present or future ability to pay these costs. Mr. Carter is most certainly an aggrieved party (*Cf.* BOR 7–9), and the lack of evidence is not “purely academic” or moot because this court can “provide effective relief” by striking the

findings as clearly erroneous. State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011); see Yacobellis v. Bellingham, 55 Wn. App. 706, 709, 780 P.2d 272 (1989), *rev. denied*, 114 Wn.2d 1002 (1990). Cf. BOR 4–7.

Finally, the State concedes Mr. Carter is indigent at this time. BOR 9. The State asserts in its brief that Mr. Carter “has demonstrated financial resources to the court on no less than two separate occasions, posting two bonds in the total of \$5,000.” BOR 10. Its citations to the record (“CP 48<sup>1</sup>, RP 33–34” at BOR 10) support only the fact that Mr. Carter was released pre-trial on \$5,000 bail. That bare fact offers no information as to who posted the bond—it could have been a family member or friend or any number of people other than Mr. Carter. He alone is obligated to pay legal financial obligations and it is his present and future ability to pay that the court must consider. The record is silent as to any evidence of such consideration. While the State points to the boilerplate language at ¶2.5 (CP 40)<sup>2</sup> as “evidence” of actual consideration, the Court in Bertrand rejected such a notion:

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

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<sup>1</sup> “CP 48” is a post-conviction Order which authorizes release if bail of \$5,000 is posted, but does not support the State’s claim that such a bond was in fact posted by Mr. Carter.

<sup>2</sup> BOR 9.

*contains no evidence to support the trial court's finding number 2.5 that Bertrand has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding number 2.5 was clearly erroneous.*

Bertrand, 165 Wn. App. 393, 267 P.3d at 517 (footnote omitted, emphasis added).

“The meaningful time to examine [Mr. Carter’s] ability to pay is when the government seeks to collect the obligation.”<sup>3</sup> If and when the Department of Corrections or the county clerk decides to enforce collection of costs will be the meaningful time to examine Mr. Carter’s ability to pay. Until then, the finding of ability to pay any LFOs must be stricken from the judgment and sentence.

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, the implied finding of present and future ability to pay legal financial obligations should be stricken from the Judgment and Sentence.

Respectfully submitted on November 24, 2012.

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<sup>3</sup> Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 24, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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