

FILED  
SEPTEMBER 4, 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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BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

The record does not support the implied finding that Mr. Carter has the current or future ability to pay Legal Financial Obligations.

*Issue Pertaining to Assignment of Error*

Should the implied finding that Mr. Carter has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

**B. STATEMENT OF THE CASE**

In November 2011 two officers approached the defendant, James C. Carter, who was sitting in a car parked in a business parking lot in Richland, Washington during regular business hours. CP 33. Intending to initiate a social contact, they observed Mr. Carter appear to inject himself with a substance later determined to be heroin. CP 31, 34. Mr. Carter was subsequently charged with unlawful possession of a controlled substance. CP 1. Mr. Carter proceeded to a stipulated facts trial, following the court's denial of his CrR 3.6 suppression motion. 2/8/12 RP 3–30, 31; CP 30–32, 33–35. The court found Mr. Carter guilty as charged. CP 36.

The court imposed a mid-standard range sentence of 16 months confinement. CP 39, 42. The court ordered a total amount of Legal Financial Obligations (“LFOs”) of \$3,460. CP 40–41, 47. The court made

no express finding that Mr. Carter had the present or future ability to pay the LFOs. 2/15/12 RP 31–34; *see* CP 40. However, the Judgment and Sentence contained the following pertinent language by the Court:

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

CP 40 at ¶2.5. The court ordered that all payments on the LFOs be paid “commencing immediately” and that Mr. Carter “shall pay up to \$50.00 per month” from income earned while in the custody of the Department of Corrections. CP 41 at ¶4.1. The court made no inquiry into Mr. Carter’s financial resources and the nature of the burden that payment of LFOs would impose. 2/15/12 RP 31–34.

This appeal followed. CP 50.

### C. ARGUMENT

**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.**

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v.

Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “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.” RCW 10.01.160(3).

b. There is no evidence to support the trial court's implied finding that Mr. Carter has the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's

ability to pay court costs." 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court considered Mr. Carter's "past, present, and future ability to pay legal financial obligations" but made no express finding that he had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid "commencing immediately" and at the rate of \$50.00 per month *after* it had 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." CP 40 at ¶2.5; CP 41 at ¶4.1.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial 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. Bertrand, 165

Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“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 [the appellate court] 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.’ ”

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Carter’s financial resources and the nature of the burden of imposing LFOs on him. In fact, the record contains no evidence to support the trial court's implied finding in ¶2.5 that Mr. Carter has the present or future ability to pay LFOs. The implied finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court’s finding

regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOs of any nature must be stricken where the court made no inquiry and there is no evidence in the record to support such findings.

The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Carter until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he 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, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

Since the record does not support the trial court's finding that Mr. Carter has or will have the ability to pay these LFOs when and if the State attempts to collect them, the implied finding is clearly erroneous and must

therefore be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

**D. CONCLUSION**

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

Respectfully submitted on September 4, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 4, 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 brief of appellant:

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