

NO. 30713-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JORGE CAMACHO,

Appellant.

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FILED  
July 19, 2012  
Court of Appeals  
Division III  
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Blaine G. Gibson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the absence of evidence, the court erred in finding appellant has the current or future ability to pay legal financial obligations (LFOs).

2. In the absence of evidence of ability to pay, the court erred in imposing incarceration costs.

Issue Pertaining to Assignments of Error

Under RCW 9.94A.760, a court may impose incarceration costs if it finds the offender has the ability to pay. Here, the only evidence of appellant's finances was an assertion by his counsel that he is indigent. In the absence of any other evidence or analysis regarding his financial situation, did the court err in finding he has the ability to pay legal financial obligations and in requiring him to pay the cost of his incarceration?

B. STATEMENT OF THE CASE

The Yakima County prosecutor charged appellant Jorge Camacho with one count of first-degree burglary and one count of second-degree assault. CP 8-9. The prosecutor also alleged a firearm sentencing enhancement and two aggravating factors. CP 8-9. The jury convicted Camacho of first-degree burglary and the lesser-included offense of fourth-degree assault. CP 91-93.

The court imposed a standard range sentence of 33 months for the burglary charge and 364 days on the gross misdemeanor to run concurrently. CP 104. The court also found Camacho had the ability to pay legal financial obligations and required him to pay the costs of his incarceration at \$50 per day up to a maximum of \$500. CP 106. The only discussion regarding Camacho's finances was counsel's assertion that he is indigent and the court's subsequent decision to cap the incarceration costs at \$500. 2RP 292. Notice of appeal was timely filed. CP 110.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT REQUIRED CAMACHO TO PAY THE COSTS OF HIS INCARCERATION.

A sentencing court may not impose incarceration costs unless the court finds the offender has the ability to pay them. RCW 9.94A.760. A court may not make a finding regarding ability to pay legal financial obligations (LFOs), unless it first considers the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). Here, the court found Camacho had the ability to pay legal financial obligations even though at sentencing it appeared to acknowledge he was

indigent. 2RP 292.<sup>1</sup> It then went on to require Camacho to pay incarceration costs, which are by statute expressly conditioned on that ability to pay. Camacho requests this court vacate the finding regarding his ability to pay and remand with instructions to strike the incarceration costs.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. Bertrand, 165 Wn. App. at 403-04, (citing Baldwin, 63 Wn. App. at 312). While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the nature of the burden imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

This Court reviews the trial court's decision on ability to pay under the clearly erroneous standard. Bertrand, 165 Wn. App. at 403-04 (citing Baldwin, 63 Wn. App. at 312). Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's

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<sup>1</sup> There are three physical volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Feb. 28, 2012; 2RP (two consecutively paginated volumes) – Feb. 29, 2012, Mar. 1, 2012, Mar. 2, 2012, Mar. 5, 2012, Mar. 6, 2012, and Mar. 12, 2012.

unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the court's finding that Camacho had the present or future ability to pay his LFOs or the incarceration costs. There was no evidence in the record that Camacho has any ability whatsoever to pay legal financial obligations. Cf. Baldwin, 63 Wn. App. at 311 (statement in presentence report that Baldwin was employable supported this Court's conclusion that sentencing court properly considered burden of costs under RCW 10.01.160). At sentencing, the only discussion of ability to pay was counsel's assertion that Camacho is indigent. 2RP 292. The court appeared to accept counsel's representation because it granted counsel's request to cap the incarceration costs at \$500. 2RP 292; CP 106. Nevertheless, the judgment and sentence contains a written finding regarding Camacho's ability to pay: "In addition to the above costs, the court finds that the defendant has the ability to pay for the costs of incarceration." CP 106. There is no evidence in the record to support this finding. Accordingly, the portion of finding 4.D.4 quoted above is clearly erroneous and should be stricken.<sup>2</sup> Bertrand, 165 Wn. App. at 405.

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<sup>2</sup> Camacho does not challenge the imposition of mandatory LFOs (See RCW 43.43. 7541 (DNA collection fee); RCW 7.68.035 (Victim Penalty Assessment)), but rather the unsupported finding of present and future ability to pay and the imposition of

Without a finding that he is able to pay, the court also erred in requiring Camacho to pay the costs of his incarceration. RCW 9.94A.760. A court may only impose sentence as authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). “When a sentence has been imposed for which there is no authority in law, the trial court has the duty and power to correct the erroneous sentence, when the error is discovered.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)).

Under the plain language of the statute, incarceration costs may not be imposed without a finding of ability to pay: “If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration.” RCW 9.94A.760(2). Although the court made such a finding, that finding is clearly erroneous and must be stricken as discussed above. Without that finding, the requirement that Camacho pay the cost of his incarceration is also invalid and should be stricken.

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incarceration costs conditioned on that ability. Moreover, before the State can collect LFOs, there must be a properly supported, individualized judicial determination that Camacho has the ability to pay. Bertrand, 165 Wn. App. at 405 n.16; RCW 9.94A.760.

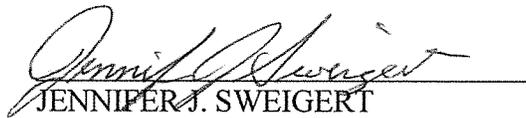
D. CONCLUSION

For the reasons stated above, Camacho requests this Court remand with instructions to strike both the unsupported finding regarding ability to pay and the imposition of incarceration costs.

DATED this 19<sup>th</sup> day of July 2012.

Respectfully submitted,

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State v. Jorge Camacho

No. 30713-1-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 19<sup>th</sup> day of July, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 19<sup>th</sup> day of July, 2012

X Patrick Mayovsky