

FILED  
MAY 06, 2014  
Court of Appeals  
Division III  
State of Washington

NO. 30713-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JORGE CAMACHO,

Appellant.

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BRIEF OF RESPONDENT

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David B. Trefry WSBA #16050  
Deputy Prosecuting Attorney  
Attorney for Respondent

JAMES P. HAGARTY  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises one assignment of error. This can be summarized as follows;

- 1) Did the court err when it required Appellant to pay the costs of his incarceration?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) The court did not err when it required Appellant to pay his legal financial obligations, appellant did not preserve this issue for review.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record if needed.

III. ARGUMENT.

**FIRST ALLEGATION.**

Appellant primarily relies upon State v. Bertrand, 165 Wn.App. 393, 267 P.3d 511 (2011) to support the allegation that the trial court erred when it imposed the costs of incarceration on Appellant. It is very important to note, as this court stated in Duncan, that Bertrand very fact specific

*Bertrand*, (State v. Bertrand, 165 Wn.App. 393, 267 P.3d 511 (2011).) which is relied upon by Mr. Duncan, involved distinguishable facts: a record from which it affirmatively appeared that the defendant was disabled and was (and would likely remain) indigent, as pointed out in *Lundy*, 176 Wn.App. at 106. Mr. Duncan presents the more typical situation of a record that does not support a finding that he is indigent with no likelihood that his indigency will end. (Slip at 8)

Appellant did not raise this issue in the trial court and he has not presented this court with a basis to allow this to be addressed for the first time on appeal. RAP 2.5 One of the most fundamental principles of appellate litigation is that a party may not assert on appeal a claim that was not presented at trial. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule has been a part of Washington’s legal landscape since territorial days. See Code of 1881, § 1088 (provisions of the civil practice act with regard to taking exceptions would also govern in criminal cases); Blumberg v. H. H. McNear & Co., 1 Wash. Terr. 141, 141-42 (1861) (court will not review claims to which error was not assigned). The Washington State Supreme Court remarked in one case that it had adhered to a contemporaneous objection requirement “with almost monotonous continuity.” State v. Louie, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing 34 prior cases going back to 1895). The contemporaneous objection rule is rooted in notions of fundamental fairness and judicial economy and has

been applied across a whole range of issues, constitutional, non-constitutional, civil and criminal. See *Karl B. Tegland*, 2A Washington Practice: Rules Practice, RAP 2.5, at 190 et. seq. (6th ed.2004) This rule is also recognized by the United States Supreme Court. See, e.g. Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944) “No procedural principle is more familiar to this Court than that a ... right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”

The totality of the sentencing hearing, the object of this appeal, is contained in the verbatim report of proceeding pages 272-94. The subsection of the Judgment and Sentence at issue is the same subsection addressed in Duncan, infra, at 7. (CP 106)

This court recently addressed this issue in State v. Duncan, COA # 29916-3-III, 2014 Wash. App. LEXIS 706 (Wash. Ct. App. Mar. 25, 2014). In Duncan the court indicates;

For the first time on appeal, Mr. Duncan contends that the record does not support the trial court's findings that he has the current or future ability to pay discretionary LFOs, including incarceration and medical costs. See In re Pers. Restraint of Pierce, 173 Wn. 2d 372, 379, 268 P.3d 907 (2011) (holding that "costs of incarceration" imposed by RCW 9.94A.760(2) fall within the broad definition of "legal financial obligation"); RCW 70.48.130(4) (authorizing

sentencing courts to order offenders to repay all or part of medical costs incurred during confinement as part of a judgment and sentence). He asks that we remand his judgment and sentence to the trial court with instructions to strike the objectionable findings as was done in State v. Bertrand, 165 Wn.App. 393, 267 P.3d 511 (2011). (Slip opinion at 3-4)

This Court then addressed the fact that this specific allegation had become common place “The convergence of three factors has contributed to the recurrent raising in appeals of this and other challenges to discretionary LFOs imposed by trial courts.” (Id at 4)

Those factors are;

First is a statutory requirement that trial courts take some account of a defendant's ability to pay the obligations in the future.

...

Second is the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive.

...

The third converging factor is boilerplate findings included in some uniform judgment and sentence forms, which, under CrR 7.2(d) are to be prescribed by the Administrator for the Courts in conjunction with the Supreme Court Pattern Forms Committee. (Id at 4-6)

The review of the case law concerning this type of allegation was addressed some of the divergent opinions that have been reached by court of review recently;

The result of these three converging factors are boilerplate findings frequently contained in a judgment and sentence, that are often unsupported by the record, that may well have been supported if addressed at sentencing, but that the defendant had no inclination to object to or challenge at that time.

In *State v. Kuster*, 175 Wn.App. 420, 425, 306 P.3d 1022 (2013), we relied on RAP 2.5(a) to decline to address a challenge to a boilerplate finding of ability to pay LFOs raised for the first time on appeal. Other divisions of the Court of Appeals have taken the same position. *State v. Blazina*, 174 Wn.App. 906, 911, 301 P.3d 492, *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, 176 Wn.App. 1, 316 P.3d 496, *petition for review filed*, No. 89518-0 (Wash. Nov. 12, 2013). *Bertrand*, which is relied upon by Mr. Duncan, involved distinguishable facts: a record from which it affirmatively appeared that the defendant was disabled and was (and would likely remain) indigent, as pointed out in *Lundy*, 176 Wn.App. at 106. Mr. Duncan presents the more typical situation of a record that does not support a finding that he is indigent with no likelihood that his indigency will end. (Slip opinion at 7-8)

The record before the trial court and now this court “present’s the more typical situation of a record that does not support a finding that he is indigent with no likelihood that his indigency will end.”( *Id* at 8)

This court need only follow the ruling in Duncan;

In the case of LFOs, there is clear potential for abuse, since a defendant might well defer rather than raise a claim of permanent indigency at the time of sentencing, if he or she thought it could be successfully raised for the first time on appeal.

The Supreme Court may clarify this issue in *Blazina* and *Paige-Colter*, but for now we do not understand the reasoning and holdings of *Moen*, *Ford*, and later cases as requiring that we entertain challenges to LFOs and

supporting findings that were never raised in the trial court.

In the unusual case of an irretrievably indigent defendant whose lawyer fails to address his or her inability to pay LFOs at sentencing and who is actually prejudiced, a claim of ineffective assistance of counsel is an available course for redress.

We decline to address the issue for the first time on appeal. (Slip at 11-12)

There is no doubt that the allegation raised in this appeal is controlled by this court's decision in Duncan.

It is also the State's position that this court may also affirm the actions of the trial court based on the record that was made in that court. While there was no specific colloquy between the court and the defendant regarding expected future income the record does contain the statements of Appellant and one pastor where they specifically address his desire to work with children. It is the State's position that this is sufficient to indication that Appellant is capable of working and intends to seek employment after he is released from prison no matter whether that is here in the United States or in Mexico;

Pastor Remocha;

He's told me that he really wants to do work with youth and I know that he is going to probably be deported. But if he wasn't, I told him it would be a great honor for me and my wife Julie who is here with me to take him and his wife Rita under our wing and work with him because I really believe that he has a heart for people and he really wants to change, Your Honor. (RP 280)

Appellant;

I know that I do have an immigration hold. I don't know what the outcome may be on that but wherever it is that I go I plan -- if the Lord is willing I plan to help kids -- youth, because I could relate to a lot of what they might be going through and maybe from my experience I could help them out. It may be here or it may be in Mexico. There's missionaries and a lot of things that I could be involved and those are my plans for the future. (RP 288-9)

Once again from Duncan;

No formal or specific findings of ability to pay are required to be made by the trial court. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Still, RCW 10.01.160(3) provides that "the court shall *take account* of the financial resources of the defendant and the nature of the burden that payment of costs will impose." (Emphasis added.) *Curry* observes that, while not required to make findings, "[t]he court is directed to *consider* ability to pay." 118 Wn.2d at 916 (emphasis added). (Id at 4)

#### IV. CONCLUSION

This court should follow the recent ruling in State v. Duncan and affirm the actions of the trial court, this appeal should be dismissed.

Dated this 6<sup>th</sup> day of May, 2014,

By: s/David B. Trefry  
DAVID B. TREFRY WSBA# 16050  
Deputy Prosecuting Attorney  
Yakima County  
P.O. Box 4846 Spokane, WA 99220  
Telephone: 1-509-534-3505  
David.Trefry@co.yakima.wa.us

DECLARATION OF SERVICE

I, David B. Trefry state that on May 6, 2014, I emailed, by agreement of the parties a copy of the Respondent's brief, to Jennifer J. Sweigert at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

And to Jorge Camacho DOC #356535 Washington State  
Corrections Center, P.O. Box 900, Shelton WA 98584

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6<sup>th</sup> day of May, 2014 at Spokane, Washington.

By: s/David B. Trefry  
DAVID B. TREFRY WSBA# 16050  
Deputy Prosecuting Attorney  
Yakima County  
P.O. Box 4846 Spokane, WA 99220  
Telephone: 1-509-534-3505  
Fax: 1-509-534-3505  
E-mail: [David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)