

No. 31046-9-III  
COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

FILED  
March 28, 2013  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent

v.

JOSEPH MARTIAL WONCH

Appellant

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APPEAL FROM THE SUPERIOR COURT  
FERRY COUNTY  
HONORABLE ALLEN C. NIELSON

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BRIEF OF RESPONDENT

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## **A. RESPONSE TO ASSIGNMENTS OF ERROR**

1. *The Defendant Seeks Relief from an Implied Finding that is Supported in the Record*
2. *The Findings of Fact and Conclusions of Law for an Exceptional Sentence contain a Finding that is Unsupported in the Law and Should be Stricken, But Which Does Not Affect The Sentence Imposed.*
3. *The Findings of Fact and Conclusions of Law for an Exceptional Sentence Contains a Scrivener's Error that Should be Corrected.*

## **B. STATEMENT OF THE CASE**

Except to the extent inconsistent with specific issues included in this brief, the State otherwise accepts that Appellant's Statement of the Case is accurate.

## **C. ARGUMENT**

1. *The Defendant Seeks Relief from an Implied Finding that is Supported in the Record*

A sentencing court may order a criminal defendant to pay costs if the defendant "is or will be able to pay them." RCW 10.01.160(3). If not ordered at sentencing, a subsequent order may be entered that imposes costs. RCW 9.94A.760(1). That a defendant is indigent for purposes of appointment of counsel is not determinative of the issue whether costs may be imposed. *Fuller v. Oregon*, 417 U.S. 40, 45-50, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). If the sentencing court later determines that the costs will impose a manifest hardship on the defendant or his family, the court may modify the

monetary portion of the sentence. *Curry*, 118 Wn.2d at 914; RCW 10.01.160(4). As to the process of imposing costs upon a defendant at sentencing, the Court in *Curry* stated:

Neither the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs. According to the statute, the imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence reduced. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

*Curry*, 118 Wn.2d at 916. The issue, then, is not whether there was an implied finding of fact that is unsupported by the record, because there is no need that any finding be entered. Instead, the issue is whether the trial court properly exercised its discretion in imposing legal financial obligations in this case. It did.

At the time of sentencing, the trial court accepted input from defense counsel regarding imposition of costs, ultimately concluding that rather than imposing jury costs – which the defendant had agreed to pay as part of a plea bargain on the day of trial – the defendant would instead be directed to pay the following costs: \$500.00 crime victims compensation; \$500.00 attorney's fees; \$200.00 filing fee; \$1,000.00 drug fine; \$100.00 drug lab fee. RP 69-74. Each individual element of the total legal financial obligation requires separate analysis. *See, State v. Baldwin*, 63 Wn.App. 303, 309, 818 P.2d 1116 (1991) (“As noted in *Curry*, different components

of the financial obligations imposed on a defendant, such as attorney fees, court cost, and victim penalty assessment, require separate analysis.

However it is not necessary for the State to defend the imposition of costs in this case because Mr. Wonch concedes that issue in his brief:

Mr. Wonch is not challenging *imposition* of the LFO's; rather the trial court made the implied finding that he has the present and future ability to pay them, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous.

Appellant's Brief at page 13. Since imposition of the legal financial obligations is not at issue, it is not clear what relief is being sought. Mr. Wonch requests that the Court of Appeals strike a finding of fact, but specifically states the offensive finding was never made but was only implied. The implication of Mr. Wonch's request is larger than it may at first appear.

In every case where legal financial obligations are imposed, there must be some ability to pay the obligation now or in the future. *See*, RCW 10.01.160(3). In the instant case, there is clear evidence in the record that the trial court discussed the issue of ability to pay with Mr. Wonch's attorney and with Mr. Wonch himself. RP 69-74. The trial court took into consideration the terms of the plea deal to which Mr. Wonch had consented, and its own observations of Mr. Wonch, after having heard from Mr. Wonch and from Mr. Wonch's family. *Id.* There is no hint here that the costs were imposed without due consideration. Quite the contrary, to the extent a finding was required to be made and supported in the

record, the record does contain clear indication that the trial court properly based imposition of costs on present or future ability to pay. RP 69-74. In particular, the sentencing court noted:

In terms of financial obligations, your attorney suggests that you are indigent and unable to work, and yet you're still a relatively young man. I'm not hearing anything about any type of SSI or Social Security Disability which would have adjudicated you as unable to work. As near as I can tell, you're still big and strong and at some point would have the ability to pay court-ordered legal/financial obligations.

RP 69-70. The point, however, is that no finding is required. Previously, the trial court was required to make a specific finding as to the defendant's ability to pay, but that is no longer required. *See, State v. Earls*, 51 Wn.App. 192, 752 P.2d 402 (1988)(requiring specific findings); *but see, State v. Curry, supra* (recognizing that specific findings are no longer required).

Thus, Mr. Wonch appears to be arguing that although the trial court did not enter a finding that he had the ability to pay, such a finding is implied by the imposition of a payment obligation. This may be true, but it is not relevant because he is not challenging imposition of the costs. Mr. Wonch is not asking that this Court order his legal financial obligations be stricken because they were improperly imposed. He is not asking that this Court review a refusal by the trial court under RCW 10.01.160(4) not to reduce his legal financial obligation because they impose an manifest hardship.

It has been held that "the meaningful time to examine the

defendant's ability to pay is when the government seeks to collect the obligation." *State v. Baldwin*, 63 Wn.App. At 310. It appears that Mr. Wonch is either trying to return to the rule in *State v. Earls*, that a specific finding of ability to pay must be made prior to imposing costs, or that he is prematurely trying to block the State from seeking to collect on those obligations. Neither effort should succeed. The sentencing court did establish a record that would support a finding, though no finding was made and no record was required. Mr. Wonch does not challenge the imposition of costs, has not sought relief as provided for by statute, and there is no evidence that the costs work a manifest hardship upon him. Even if that information was in the record, Mr. Wonch asks for nothing that would provide him any relief – there is no request for injunction, no request that payment obligations be delayed or eliminated, that certain of the costs be reduced or remitted.

2. *The Findings of Fact and Conclusions of Law for an Exceptional Sentence contain a Finding that is Unsupported in the Law and Should be Stricken, But Which Does Not Affect The Sentence Imposed.*

On July 20, 2012, the sentencing court entered Findings of Fact and Conclusions of Law for an Exceptional Sentence. CP 95. There are two bases for imposition of the agreed exceptional sentence, one of which is specifically authorized by RCW 9.94A.535(2)(a) and one of which is not. The first one, in paragraph I(a) of the Findings of Fact is not challenged by Mr. Wonch. The State concedes that the second one, in

paragraph I(b) is not authorized by RCW 9.94A.535(2)(a) and should be stricken. However, this should have no effect on the sentence imposed because the sentencing court specifically found that either I(a) or I(b) constitute sufficient cause to impose the exceptional sentence. As stated in *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003):

Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing.

Here, the trial court specifically found that either one of the two bases were sufficient cause to impose the sentence given. CP 95. Also, during the motion hearing on July 20, 2012, the sentencing court made it very clear that it considers the sentence in this case to have been the result of the bargain between Mr. Wonch and the State and that the Court believes Mr. Wonch has received the benefit of that bargain by having a reduction in charges and a dismissal of firearm enhancements that would have resulted in a greater sentence. RP 104-110. As the trial court saw it, the intent of the bargain was to utilize an exceptional sentence to reach a range of 68+ to 100 months. CP 110. Mr. Wonch stipulated to the exceptional sentence necessary to get into that range and the trial court sentenced within that range. There is every reason to believe that the trial court, which has already denied a request by Mr. Wonch to reduce his sentence, would affirm the sentence already handed down.

3. *The Findings of Fact and Conclusions of Law for an Exceptional Sentence Contains a Scrivener's Error that Should be Corrected.*

The State agrees that the scrivener's error in the Findings of Fact and Conclusions of Law for an Exceptional Sentence should be corrected to reflect the correct seriousness level.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court: (1) deny Mr. Wonch's request to strike the implied finding of present or future ability to pay; (2) strike paragraph I(b) from the Findings of Fact and Conclusions of Law for an Exceptional Sentence and find that there is no need to resentence Mr. Wonch; and (3) direct that the scrivener's error in the Findings of Fact and Conclusions of Law for an Exceptional Sentence be corrected to show the correct seriousness level.

Respectfully submitted this 28th day of March, 2013.

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COURT OF APPEALS, DIVISION III  
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH MARTIAL WONCH Appellant.	No. 31046-9-III Ferry County #11-1-00015-9 PROOF OF SERVICE
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I, Cynthia Nelson, do hereby certify under penalty of perjury that on March 28, 2013, 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:

**RESPONDENT'S BRIEF and PROOF OF SERVICE**

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DATED this 28th day of March, 2013, in Republic, Ferry County, Washington.

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