

FILED

OCT 16, 2013

Court of Appeals

Division III

State of Washington

No. 31260-7-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID WAYNE HALLS,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Robert G. Swisher, Judge, Guilty Plea Hearing
Honorable Carrie L. Runge, Judge, Sentencing Hearing

REPLY BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ARGUMENT IN REPLY1

1. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.....1

 a. The directive to pay must be stricken.....1

 b. The imposition of discretionary court costs of \$660.00 must also be stricken.....2

2

2. The remaining issues relating to domestic violence are not challenged and the offending provisions should be stricken from the Judgment and Sentence.....3

3. The defendant’s plea was not knowingly, intelligently, and voluntarily made.....4

B. CONCLUSION.....4

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511, 517 (2011).....	3
<u>State v. Calvin</u> , 302 P.3d 509 (Wash. Ct. App. 2013).....	3
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	2
<u>State v. Thompson</u> , 153 Wn. App. 325, 223 P.3d 1165 (2009).....	2

Statutes

RCW 7.68.035.....	2
RCW 10.01.160(1).....	2
RCW 10.01.160(3).....	2, 3
RCW 36.18.020(2)(h).....	1, 2
RCW 43.43.7541.....	2
...	

A. ARGUMENT IN REPLY

Primarily Mr. Halls relies upon his Brief of Appellant to address the issues raised by the State. Additionally he states as follows in direct Reply.

1. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. Halls has the present and future ability to pay legal financial obligations and the directive to pay must be stricken. CP 51 at ¶ 2.5, CP 52 at ¶ 4.1. The court in the judgment here ordered Mr. Halls to pay a total of \$2,060.00 in legal financial obligations (LFOs), including \$660.00¹ as discretionary court costs. CP 51, 57. Paragraph 2.5 of the judgment expressly provided that "[t]he 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 defendant's status will change." CP 50. The record does not support the finding, in that it

¹ In his opening brief, the \$200.00 filing fee was claimed as a discretionary cost. However, Mr. Halls now acknowledges the criminal filing fee is a mandatory cost. RCW 36.18.020(2)(h).

does not contain any evidence of Mr. Halls' financial status or employability.

For purposes of this argument, Mr. Halls is not challenging the imposition of mandatory fines or penalties. He is, however, challenging separately the imposition of the discretionary costs. *See* subsection 1.b below; Brief of Appellant at pp. 9–12.

b. The imposition of discretionary court costs of \$660.00 must also be stricken. *See* Brief of Appellant at pp. 9–12.

The victim penalty assessment fee, criminal filing fee, and the DNA collection fee are mandatory and not dependent on present or future ability to pay. State v. Curry, 118 W n.2d 911, 917, 829 P.2d 166 (1992), citing RCW 7.68.035; RCW 36.18.020(2)(h); and State v. Thompson, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA fee is mandatory and imposed regardless of hardship), citing RCW 43.43.7541. However, court costs are discretionary under RCW 10.01.160(1). "The court shall not order a defendant to pay costs *unless the defendant will be able to pay them.*" (Emphasis added.) RCW 10.01.160(3).

Here, the court imposed discretionary costs of \$660.00. The record does not show that the trial court took Mr. Hall's financial

resources and ability to pay into account as required by RCW 10.01.160(3). The trial court neither inquired into Mr. Halls' financial resources nor weighed how imposition of discretionary costs might realistically impact his situation. The implied finding of ability to pay is unsupported by the record and clearly erroneous. The court's imposition of discretionary court costs without compliance with the requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the imposition of court costs. State v. Calvin, 302 P.3d 509, 522 (Wash. Ct. App. 2013); State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011).

2. The remaining issues relating to domestic violence are not challenged and the offending provisions should be stricken from the Judgment and Sentence.

Appellant accepts the State's concessions on the remaining issues (Brief of Respondent at p. 1–2) and its agreement that the following provisions should be stricken:

(1) The defendant's judgment and sentence should be amended and the "domestic violence" allegation removed;

(2) The \$100.00 domestic violence penalty assessment should be stricken; and

(3) The domestic violence no-contact order should be vacated.

3. The defendant's plea was not knowingly, intelligently, and voluntarily made.

Undersigned counsel asks the court to consider Mr. Halls' *pro se* arguments and documentation submitted in support of his motion to withdraw guilty plea.

B. CONCLUSION

For the reasons stated, the matter should be remanded (1) to vacate the domestic violence no-contact order, and to strike (2) the domestic violence finding and \$100 domestic violence penalty, (3) the directive to pay legal financial obligations and (4) the imposition of discretionary costs of \$660.00 from the judgment and sentence.

Respectfully submitted on October 16, 2013.

s/Susan Marie Gasch, WSBA
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 16, 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 reply brief of appellant:

David Wayne Halls (#973846)
Coyote Ridge Corrections Center
P. O. Box 769
Connell WA 99326-0769

E-mail: prosecuting@co.benton.wa.us
Andrew Kelvin Miller/Megan Whitmire
Benton County Pros Office
7122 West Okanogan Place
Kennewick WA 99336-2359

s/Susan Marie Gasch, WSBA #16485