

FILED

AUG 22 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31353-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CASEY R. ROBERTSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

APPELLANT’S ASSIGNMENTS OF ERROR 1

ISSUE PRESENTED..... 1

STATEMENT OF THE CASE 1

ARGUMENT..... 1

CONCLUSION..... 4

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BERTRAND, 165 Wn. App. 393,
267 P.3d 511 (2011), *review denied*,
175 Wn.2d 1014, 287 P.3d 10 (2012).....2

STATE V. CALVIN, -- Wn. App. --,
302 P.3d 509 (2013)3

STATE V. CURRY, 118 Wn.2d 911,
829 P.2d 166 (1992)2

STATE V. KUSTER, -- Wn. App. --,
-- P.3d --, 2013 WL 3498241 (Div. 3, 2013).....2

STATE V. SMITS, 152 Wn. App. 514,
216 P.3d 1097 (2009)2, 3

STATUTES

RCW 10.01.160(1).....2

RCW 10.01.160(3).....2

RCW 10.01.160(4).....2

I.

ASSIGNMENTS OF ERROR

1. The record does not support the implied finding that Robertson has the current or future ability to pay Legal Financial Obligations.
2. The trial court erred by imposing discretionary costs.

II.

ISSUE PRESENTED

- A. DID THE TRIAL COURT ERR IN IMPOSING LFOs ON THE DEFENDANT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

The first area that needs to be addressed is the fact that the defendant raised issues regarding LFOs for the first time on appeal. There was no protest at

the sentencing hearing. As per *State v. Kuster*, -- Wn. App. --, -- P.3d --, 2013 WL 3498241 (Div. 3, 2013).

Even if this court chooses to address the defendant's appeal, the outcome is no better from the defendant's perspective. The trial court may order a convicted felon to repay court costs, including attorney fees, as part of his judgment and sentence. RCW 10.01.160(1); *State v. Smits*, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009).

The trial court may not, however, require an indigent defendant to reimburse the State for such costs unless the defendant then has or will have the means to do so in the future. RCW 10.01.160(3); see *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). Thus, if *collection* of LFOs *later* presents a financial hardship, a defendant may petition the court to modify his LFO payments. RCW 10.01.160(4). Accordingly, the time to examine a defendant's ability to pay is when the government seeks to collect those LFO costs. *Smits*, 152 Wn. App. At 523-24.

It is well-established that RCW 10.01.160(3) does not require the trial court to enter formal, specific findings. See *Curry*, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for us to review whether the trial court took the defendant's financial resources into account. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014, 287 P.3d 10 (2012). But, where the trial court does enter a finding, it must be

supported by evidence. *State v. Calvin*, -- Wn. App. --, 302 P.3d 509, 521 (2013). In other words, the trial court does not have to enter findings prior to imposing discretionary LFOs.

In this case, the trial court did not enter formal findings about the defendant's ability to pay his LFOs. Nevertheless, the record is sufficient for us to review whether the trial court took into account his financial resources. The defendant is not in custody for failure to pay LFOs. He is in jail for the crime of vehicular assault. Page 6 of the defendant's Judgment and Sentence indicates that the only costs imposed by the trial court are the \$500 Victim Assessment, \$100 DNA collection fee and \$200 in court costs. These costs are mandatory.

The defendant stated he is looking for work. The defendant also stated that he was in the "union" and had been working until he and others were laid off. The defendant does not indicate he is less than able bodied. The record goes on for several paragraphs regarding the defendant's ability to pay. There was no error in the trial court's imposition of mandatory fees.

The defendant finds fault in the trial court's requirement that the defendant pay \$25 per month. *Smits* answers this issue. "... [t]he time to examine a defendant's ability to pay is when the government seeks to collect those LFO costs. *Smits*, 152 Wn. App. At 523-24.

The trial court did not err in the defendant's sentencing.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the defendant's sentence be affirmed.

Dated this 19th day of August, 2013.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", with a circled initial "A" at the start.

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