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Court of Appeals
Division III
State of Washington

No. 31620-3-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CLAYTON M. COTTER,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating Mr. Cotter's offender score in violation of RCW 9.94A.525(5)(a)(i).
2. The record does not support the implied finding that Mr. Cotter has the current or future ability to pay Legal Financial Obligations.
3. The trial court erred by imposing discretionary costs.

Issues Pertaining to Assignments of Error

1. Is the 2006 sentencing court's determination that three crimes constituted the same criminal conduct binding on the current sentencing court under RCW 9.94A.525(5)(a)(i), assuming the 2006 court made that determination?
2. Should the directive to pay Legal Financial Obligations based on an implied finding of current or future ability to pay them be stricken from the Judgment and Sentence as clearly erroneous, where the finding is not supported in the record?
3. Did the trial court abuse its discretion in imposing discretionary costs where it did not take Mr. Cotter's financial resources into account, nor consider the burden it would impose on him, as required by RCW 10.01.160?

B. STATEMENT OF THE CASE

Clayton M. Cotter, along with two other men, was involved in an altercation with a man named Demetres Perry. RP 101-109, 228-231, 242-246, 274-277, 309-317, 481-483, 515-524, 531-534. During this altercation, Mr. Perry sustained a broken arm and a broken nose. RP 108, 197-198, 207. Eyewitnesses observed Mr. Cotter holding some type of object, described as either a baseball bat, a pipe, a pool cue, a stick, or a bar. RP 104, 245-246, 258-259, 260, 270-271, 275, 285, 310, 513, 524, 529.

The State charged Mr. Cotter with one count of second degree assault. CP 99-100. The jury rejected Mr. Cotter's claim of self-defense or defense of others, and found him guilty. CP 153-157, 164; RP 615-617, 702. The jury also found that Mr. Cotter or an accomplice was armed with a deadly weapon at the time of the crime. CP 167; RP 703.

The trial court sentenced Mr. Cotter, based upon an offender score of two, to a total term of confinement of 25 months, comprised of 13 months on the charge, and a 12 month deadly weapon enhancement. CP 186, 188; RP 723. Prior to sentencing, Mr. Cotter signed a document entitled "Understanding of Defendant's Criminal History." CP 179-180; RP 713. The trial court calculated Mr. Cotter's offender score of two

based upon five prior juvenile offenses. CP 186. Three of the five juvenile offenses showed an offense date of 11/11/05, and a sentencing date of 03/30/06. CP 186. There was no discussion during the sentencing hearing regarding whether the 2006 sentencing court found that these three offenses were the same criminal conduct. RP 710-727.

The trial court also imposed discretionary costs of \$200 in court costs, and mandatory costs of \$9,359.14¹, for a total Legal Financial Obligation (LFO) of \$9,559.14. CP 189-190, 196; RP 723. The trial court made no express finding that Mr. Cotter had the present or future ability to pay the LFOs. CP 184-196; RP 721-727. The Judgment and Sentence contains the following language:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 187.

The trial court did not inquire into Mr. Cotter's financial resources, and the nature of the burden that payment of LFOs would impose. RP 721-727. The trial court ordered Mr. Cotter to make monthly payments of

¹ \$500 Victim Assessment, \$100 DNA collection fee, and \$8,759.14 in restitution. CP 189-190; RP 723.

\$25, beginning “sooner or by 4/14/14.” CP 191; RP 723-724. Mr. Cotter appealed. CP 197-210.

C. ARGUMENT

1. The 2006 sentencing court’s determination that three offenses constituted the same criminal conduct is binding on the current sentencing court under RCW 9.94A.525(5)(a)(i), assuming the 2006 court made that determination.

A defendant may challenge a sentencing court’s calculation of his offender score for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A challenge to the offender score is reviewed de novo. *Id.*

The State has the burden to establish on the record the existence and the classification of the convictions relied on in calculating the score. *State v. Ford*, 137 Wn.2d 472, 480-82, 973 P.2d 452 (1999). RCW 9.94A.525 provides, in relevant part:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except . . . *Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score.* The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the

“same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations. . . .

RCW 9.94A.525(5)(a)(i) (emphasis added).

“If the statute's meaning is plain on its face, we must give effect to that plain meaning as an expression of the legislative intent.” *State v. Tarabochia*, 150 Wn.2d 59, 63, 74 P.3d 642 (2003) (quoting *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003)). "An unambiguous statute should not be subjected to judicial construction." *Id.*

RCW 9.94A.525(5)(a)(i) unambiguously tells the current sentencing court to count as one offense convictions found by a prior court to encompass the same criminal conduct. The current sentencing court may only make its own determination how to count other prior adult or juvenile offenses if the prior sentences were served concurrently (adult) or consecutively (juvenile). *See* RCW 9.94A.525(5)(a)(i). Here, the three prior convictions from 2006 appear to be the same criminal conduct, as they all have the same offense date and were sentenced on the same day. CP 186; *see also* RCW 9.94A.589(1)(a) (defining “same criminal

conduct” as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.”). Given this fact, under RCW 9.94A.525(5)(a)(i), the current sentencing court cannot presume the convictions were not the same criminal conduct.

There was no discussion during the sentencing hearing regarding whether the 2006 sentencing court found that these three offenses were the same criminal conduct. RP 710-727. If the 2006 court did so, the current sentencing court would be obligated to count the three prior offense as one offense under RCW 9.94A.525(5)(a)(i). The resulting offender score and standard range would then be lower on Mr. Cotter’s second degree assault conviction. *See* RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness levels); RCW 9.94A.525(8) (offender score rules).

Therefore, the case should be remanded to determine whether the 2006 sentencing court found that these three offenses were the same criminal conduct.

2. The directive to pay Legal Financial Obligations based on an unsupported finding of ability to pay, and the discretionary costs imposed without compliance with RCW 10.01.160, should be stricken from the Judgment and Sentence.

Although Mr. Cotter did not make these arguments below, illegal or erroneous sentences may be challenged for the first time on appeal. *See*

State v. Calvin, 302 P.3d 509, 521 n.2 (Wash. Ct. App. 2013) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal) (citing *Ford*, 137 Wn.2d at 477); *see also State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013) (declining to consider the challenge for the first time on appeal, where the trial court did not set a date for the defendant to begin paying his financial obligations).

a. The directive to pay-must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. Cotter has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

In *Curry*, our Supreme Court concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” *Curry*, 118 Wn.2d at 916. However, the *Curry* court recognized that both RCW 10.01.160 and the federal constitution require consideration of the ability to pay. *Id.* at 915-16.

Here, there is insufficient evidence to support the trial court's implied finding that Mr. Cotter has the present and future ability to pay legal financial obligations. CP 187. The trial court considered Mr.

Cotter's "present and future ability to pay legal financial obligations" but it made no express finding that Mr. Cotter had the present or future ability to pay those LFOs. CP 187. The finding, however, is implied because the court ultimately ordered Mr. Cotter to make monthly payments of \$25 commencing on a date certain. CP 191; RP 723-724.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *Bertrand*, 165 Wn. App. at 404 n.13 (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard." *Bertrand*, 165 Wn. App. at 404 (quoting *Baldwin*, 63 Wn. App. at 312) (internal citation omitted). A finding that is unsupported in the record

must be stricken. *Bertrand*, 165 Wn. App. at 405; *see also Calvin*, 302 P.3d at 522.

Here, the record does not show that the trial court took into account Mr. Cotter's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding that he has the present or future ability to pay LFOs. To the contrary, the trial court found him indigent for purposes of pursuing this appeal (on file; SCOMIS sub-number 44, filed 4-23-13). The implied finding that Mr. Cotter has the present or future ability to pay LFOs that is implicit in the directive to make monthly payments of \$25 beginning on a date certain is simply not supported in the record. The finding is clearly erroneous and the directive to make monthly payments must be stricken from the Judgment and Sentence. *See Bertrand*, 165 Wn. App. at 405 (reversing the trial court's finding of the defendant's ability to pay LFOs, and stating that this reversal "forecloses the ability of the Department of Corrections to begin collecting LFOs from [the defendant] until after a future determination of her ability to pay."); *see also Calvin*, 302 P.3d at 522 (striking the trial court's ability to pay finding).

b. The imposition of discretionary costs of \$200 in court costs must also be stricken. Because the record does not reveal that the trial court took Mr. Cotter's financial resources into account and considered the

burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the Judgment and Sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin*, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. *Id.* This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. However:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

It is well-established that this statutory provision does not require the trial court to enter formal, specific findings. *See Curry*, 118 Wn.2d at 916. But, in the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *See Calvin*, 302 P.3d at 521-22.

Here, the court ordered Mr. Cotter to pay discretionary costs of \$200 in court costs², as well as \$9,359.14 in mandatory fees, for a total LFO in the amount of \$9,559.14. CP 189-190, 196; RP 723. After considering Mr. Cotter’s “present and future ability to pay legal financial obligations” (in boilerplate language), the court imposed discretionary costs of \$200 in court costs. CP 187, 189; RP 723. At a minimum, the imposition of discretionary costs represents an implied finding that Mr. Cotter is or will be able to pay them. However, the record reveals no balancing by the court through inquiry into Mr. Cotter’s financial resources and the nature of the burden that payment of LFOs would impose on him. RP 721-727. Further, there was no evidence of Mr. Cotter’s present or future employment, nor an inquiry into his resources or employability. *See Calvin*, 302 P.3d at 522. The trial court neither inquired into Mr. Cotter’s financial resources nor weighed how imposition of discretionary costs might realistically impact his situation.

The trial court’s imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) is an

² A \$200 criminal filing fee imposed under RCW 36.18.020(2)(h) is mandatory, not discretionary. *See, e.g., State v. Blazina*, 174 Wn. App. 906, 911 n.3, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013). The \$200 in court costs imposed here was not labeled as the criminal filing fee by the trial court, and therefore, it cannot be considered as such. *See State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013).

abuse of discretion. *See Baldwin*, 63 Wn. App. at 312 (stating this standard of review). The remedy is to strike the directive to pay beginning on a date certain and the imposition of the discretionary costs of \$200 in court costs. *See Calvin*, 302 P.3d at 522; *Bertrand*, 165 Wn. App. at 405.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing to determine whether the three prior 2006 convictions should have been counted as the same criminal conduct. The matter should also be remanded to strike the implied finding of present and future ability to pay Legal Financial Obligations by removing the directive to make monthly payments, and to strike the imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted on October 23, 2013.


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