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Court of Appeals
Division III
State of Washington

No. 32457-5-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DEVONN DESHEA KINSEY,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Salvador Mendoza, Jr., Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing judge erred by sentencing appellant with an offender score of 9 plus.

2. The record does not support the finding appellant 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. In violation of the Fourteenth Amendment and article I section 3 guarantee of due process of law, did the State present insufficient evidence to prove appellant's criminal history?

2. Should the directive to pay legal financial obligations based on a finding of current or future ability to pay 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 the record does not reveal that it took the defendant's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

B. STATEMENT OF THE CASE

Devonn Deshea Kinsey, the defendant, was charged and convicted by a jury of felony harassment. CP 66, 104. The jury rendered its verdict on April 24, 2014. 4/24/14 RP 132. Sentencing took place the following Tuesday, April 29, 2014. 4/29/14 RP 138–46.

At sentencing the prosecutor maintained Kinsey’s offender score was 9 plus resulting in a standard range of 51 to 60 months and recommended a sentence of 60 months. 4/29/14 RP 138. Defense counsel objected to calculation of the offender score at 9 plus and the resulting standard range because the State presented no certified copies or other verification of Kinsey’s prior criminal convictions and the summary shown on the Judgment and Sentence prepared by the State was insufficient to establish correct criminal history. 4/29/14 RP 139, 143. The court noted the defense objection for the record and sentenced Kinsey to confinement of 60 months based on an offender score of 9 plus. 4/29/14 RP 143–44; CP 54, 59.

After the court imposed sentence the State submitted documents from its file as support for its summary of Kinsey’s criminal history, consisting of “his printout from the Judicial Information System as well as his Triple I out-of-state history.” 4/29/14 RP 145. Over defense objection

the court apparently without reviewing the materials stated it “will admit that and has considered that”. 4/29/14 RP 145. Later that day the State filed the documents in the court file with a cover letter. *See* CP 7–47.

The sentencing court imposed discretionary costs of \$1964.50 and mandatory costs of \$1050¹, for a total Legal Financial Obligation (LFO) of \$3014.50. CP 56. The court made a boilerplate finding Kinsey had the ability to pay the LFOs:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The 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 the defendant’s status will change.

The court finds:

[X] That the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 55. The trial court did not inquire into Kinsey’s financial resources or whether he is disabled or the nature of the burden payment of LFOs would impose and ordered Kinsey to make \$100 monthly payments towards the LFOs beginning immediately. 4/29/14 RP 138–46; CP 57.

This appeal followed. CP 5–6.

C. ARGUMENT

1. Kinsey's sentence must be vacated because the sentencing judge failed to properly determine the offender score and standard range.

A sentencing court's calculation of an offender score is reviewed de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Under RCW 9.94A.525 the sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). An offender "cannot agree to a sentence in excess of that which is statutorily authorized." *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). In particular, an offender "cannot waive a challenge to a miscalculated offender score." *In re Goodwin*, 146 Wn.2d 861, 873–874, 50 P.3d 618 (2002).

The State must prove the existence of prior convictions used to calculate an offender score by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999); *see also* RCW 9.94A.500(1). It is the State's burden and obligation to prove criminal history and to assure that the record before the sentencing court supports the criminal history determination. *State v. Mendoza*, 165 Wn.2d 913, 920,

¹ \$500 Victim Assessment and fees for criminal filing (\$200), jury demand (\$250) and

205 P.3d 113 (2009). Generally this is accomplished through a certified copy of the judgment and sentence unless the defendant affirmatively acknowledges the criminal history on the record. *Id.* at 930.

The burden is on the State “because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’” *Ford*, 137 Wn.2d at 480 (quoting *In re Personal Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). “This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing ‘some minimal indicium of reliability beyond mere allegation.’” *Mendoza*, 165 Wn.2d at 920 (emphasis in original, citation omitted).

Here, defense counsel objected to the use of the State’s summary of prior convictions on the proposed Judgment and Sentence because of the State’s failure to provide certified copies or other verification. The court disregarded the objection and sentenced Kinsey using the unsupported offender score of 9 plus. Bare assertions, unsupported by competent evidence, do not satisfy the State’s burden to prove prior convictions. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). When a convicted

DNA collection (\$100). CP 56.

defendant disputes facts material to his sentencing, “the court must either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530(2); *accord Cadwallader*, 155 Wn.2d at 874.

Kinsey objected to the State’s rendition of his prior convictions without verification. Because the prior convictions control his offender score, his objections are material. RCW 9.94A.525. The sentencing court relied on the material facts to which Kinsey objected when determining his sentence. It imposed the maximum sentence possible based on the State’s proffered offender score of 9 plus. The sentencing court erred when it failed to hold an evidentiary hearing and instead relied on material facts to which Kinsey objected.

The State was not allowed to offer additional evidence after the court overruled Kinsey’s objection and pronounced the sentence. In *Mendoza*, the Court reaffirmed that “[w]hen a defendant raised a specific objection at sentencing and the State fails to respond with evidence of the defendant’s prior convictions, then the State is held to the record as it existed at the sentencing hearing.” *Mendoza*, 165 Wn.2d at 520–21. This rule rests upon principles of due process. *State v. McCorkle*, 137 Wn.2d 490, 496–97, 973 P.2d 461 (1999) (citing *Ford*, 137 Wn.2d at 485 (“where the State fails to carry its burden of proof after a specific objection, it

would not be provided a further opportunity to do so.”). The rule was reaffirmed in *State v. Lopez*, which stated, “[w]here the defendant raises a specific objection and ‘the disputed issues have been fully argued to the sentencing court, we ... hold the State to the existing record.’” 147 Wn.2d 515, 520, 55 P.3d 609 (2002) (quoting *Ford*, 137 Wn.2d at 485). *Lopez* emphasized the State should not be granted a second opportunity to provide evidence it should have submitted in the first instance. *Lopez*, 147 Wn.2d at 520–21. The rule applies even where the trial court overrules the defense objection in error. *Lopez*, 147 Wn.2d at 520 n.2.

Here, the State produced a summary of alleged criminal history and maintained Kinsey’s resulting offender score was 9 plus and defense counsel specifically objected. The court overruled the objection and relied upon the State’s summary in finding the State had proved an offender score of 9 plus. Under the authorities cited above, the State was not entitled to a second opportunity to prove the alleged criminal history or to offer evidence it should have submitted in the first instance.

Former RCW 9.94A.520(2) (2005) requires that, “[w]here the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.” The purpose of the statute is

To prevent ex parte contact with the judge, sua sponte investigation and research of a judge, and sentencing based on speculative facts. Underlying this statutory procedure is the principle of due process. The court should only consider adjudicative evidence that the parties in an adversarial context have ‘the opportunity to scrutinize, test, contradict, discredit, and correct.’

State v. Grayson, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005) (citing George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge’s Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 St. John’s L.Rev. 291, 319 (1998) (citing *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 57, 97 S.Ct. 2229, 52 L.Ed.2d 100 (1977); David Boerner, *Sentencing in Washington, A Legal Analysis of the Sentencing Reform Act of 1981 § 6.25* (1985)).

Here, the State offered the additional printout materials after the court overruled Kinsey’s objection and pronounced the sentence, and the court expressly stated it “will admit that and has considered that”. The additional documents were not presented or considered in an adversarial context where the parties had an opportunity to scrutinize, test, contradict, discredit, and correct them. The State may not rely upon those documents to sustain its burden of proof.

The matter should be remanded for resentencing. *State v. Jones*, ___ Wn.2d ___, 338 P.3d 278, 283 (Wash. 2014); RCW 9.94A.530(2).

2. The directive to pay based on unsupported findings 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.

Kinsey did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 477; *see also State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014, 287 P.3d 10 (2012) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal); *State v. Bower*, 64 Wn. App. 808, 810, 827 P.2d 308 (1992) (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); *State v. Calvin*, __ Wn. App. __, 316 P.3d 496, 507-08 (2013) (declining to consider the challenge for the first time on appeal); *State v. Quintanilla*, 178 Wn. App. 493, 313 P.3d 493, 497 (2013) (acknowledging *State v. Blazina*, but also discussing the

merits of the LFO issue raised by the defendant).²

a. The finding of ability to pay/directive to pay must be stricken.

There is insufficient evidence to support the trial court's finding that Kinsey has the present and future ability to pay legal financial obligations and the directive to pay must be stricken. 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. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

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

² Appellant is aware this Court recently issued an opinion holding that this issue may not be challenged for the first time on appeal. See *State v. Duncan*, No. 29916-3-III, 2014 WL 1225910, at *2-6 (March 25, 2014). However, this issue is now pending before the Washington Supreme Court in *State v. Blazina*, No. 89028-5, consolidated with *State v. Paige-Colter*, No. 89109-5. Oral argument took place in these cases on February 11, 2014. Consideration of the petition for review filed in *Duncan* (No. 90188-1) has been deferred pending a final determination in *Blazina*. Therefore this issue is raised in order to preserve the argument, should the Washington Supreme Court effectively overrule this Court’s opinion in *Duncan*.

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.” *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings 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, *Curry* recognized that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” *Id.* at 915-16.

Here, there is insufficient evidence to support the trial court's findings that Kinsey has the present or future ability to pay legal financial obligations. 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 517 fn.13, citing *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.

The record does not show the trial court took into account Kinsey'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 finding that Kinsey has the present or future ability to pay. To the contrary, the trial court found Kinsey indigent for purposes of pursuing this appeal. CP 3–4. The finding that Kinsey has the present or future ability to pay LFOs is not supported in the record. The finding is clearly erroneous and the finding and the directive to pay must be stricken from the judgment and sentence.

See Bertrand, 165 Wn. App. at 404-05 (ordering the trial court to strike an unsupported finding of ability to pay).

b. The imposition of discretionary costs of \$1964.50 must also be stricken. Because the record does not reveal the trial court took Kinsey'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. 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 this provision 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 the appellate court to review whether the trial court took the defendant's financial resources into account. *Bertrand*, 165 Wn. App. at 404. Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Id.*

Here, the court ordered Kinsey to pay discretionary costs of \$1964.50, consisting of a \$228 sheriff service fee, \$300 bench warrant fee, \$700 court-appointed attorney fee and \$236.50 defense costs recoupment and \$500 fine pursuant to RCW 9A.20.021. However, the record reveals no balancing by the court through inquiry into Kinsey's financial resources and the nature of the burden that payment of LFOs would impose on him. Further, there was no evidence of Kinsey's present or future employment, or an inquiry into his resources or employability. Contrary to what was stated in its finding of ability to pay, the trial court did not inquire as to whether or not Kinsey was disabled.

The trial court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) is an abuse of discretion. *See Baldwin*, 63 Wn. App. at 312 (stating this standard

of review). The imposition of the discretionary costs of \$1,964.50 should be stricken from the Judgment and Sentence.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing to determine the correct offender score. In the alternative, the trial court should be ordered to strike from the Judgment and Sentence the finding of ability to pay Legal Financial Obligations and the imposition of discretionary costs.

Respectfully submitted on January 16, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 16, 2015, 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 brief of appellant:

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