

**NO. 42904-7**

---

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MAURICIO T. PAIGE-COLTER, APPELLANT

---

---

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie A. Arend, Judge

No. 11-1-03207-0

---

---

**BRIEF OF RESPONDENT**

---

---

MARK LINDQUIST  
Prosecuting Attorney

By  
MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Did the defendant fail to preserve any issue concerning legal financial obligations because he failed to object at the trial court?..... 1

    2. Did the trial court err when it found that the defendant has the ability to pay his legal financial obligations? ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT. ..... 2

    1. DEFENDANT DID NOT PRESERVE FOR APPEAL ANY ISSUES CONCERNING LEGAL FINANCIAL OBLIGATIONS ..... 2

    2. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS ..... 4

D. CONCLUSION. ..... 10

## Table of Authorities

### State Cases

<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 1120 (1991) .....	5, 8
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011) .....	3, 4, 6, 8
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992) .....	7
<i>State v. Curry</i> , 62 Wn. App. 676, 814 P.2d 1252, 1254 (1991) .....	5, 8, 9
<i>State v. Eisenman</i> , 62 Wn. App. 640, 810 P.2d 55 (1991) .....	5
<i>State v. Ford</i> , 137 Wn.2d 472, 477, 973 P.2d 452 (1999) .....	3
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011) .....	3
<i>State v. Lynn</i> , 67 Wn. App. 339, 345, 835 P.2d 251 (1992) .....	2, 3
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) .....	3
<i>State v. Riley</i> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) .....	2
<i>State v. Smits</i> , 152 Wn. App. 514, 216 P.3d 1097 (2009) .....	7
<i>State v. Suttle</i> , 61 Wn. App. 703, 812 P.2d 119 (1991) .....	6
<i>State v. Thompson</i> , 153 Wn. App. 325, 336, 223 P.3d 1165, 1170 (2009) .....	9

### Statutes

RCW 10.01.160 .....	5, 7, 8
RCW 36.18.020(h) .....	9
RCW 43.43.754(1) .....	9
RCW 43.43.7541 .....	9
RCW 7.68.035 .....	8

RCW 7.68.035(1)(a) ..... 8  
RCW 9.94A.030(30)..... 9  
RCW 9.94A.760(1)..... 9

**Rules and Regulations**

RAP 2.5(a) ..... 2, 3

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant fail to preserve any issue concerning legal financial obligations because he failed to object at the trial court?
2. Did the trial court err when it found that the defendant has the ability to pay his legal financial obligations?

B. STATEMENT OF THE CASE.

On August 9, 2011, the State charged Maurico Terrence Paige Colter (“defendant”) with assault in the first degree (Count I), and unlawful possession of a firearm in the first degree (Count II). CP 1-2.

On November 15, 2011, jury trial proceeded before the Honorable Stephanie A. Arend. 1 RP 1. The jury found defendant guilty as charged. CP 66-67. The jury also found that defendant was armed with a firearm on Count I. CP 68.

On December 9, 2011, the court sentenced defendant to a total of 360 months of confinement: 300 months for Count I, 116 months on Count II to run concurrently, and 60 months on the enhancement on Count I. CP 70-83.

The court also imposed three mandatory fees: a \$500 victim assessment, \$100 DNA database fee, and \$200 criminal filing fees. The only discretionary cost imposed was a \$1500 DAC recoupment fee. CP 70-83. Restitution was imposed in the amount of \$29,832. 12/9/2011 RP

6. Defendant did not object to the court's finding of his ability to pay his legal financial obligations (LFOs). 12/9/2011 RP 15.

Defendant filed a timely notice of appeal. CP 84.

C. ARGUMENT.

1. DEFENDANT DID NOT PRESERVE FOR APPEAL ANY ISSUES CONCERNING LEGAL FINANCIAL OBLIGATIONS.

Arguments not raised in the trial court are generally not considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). However, RAP 2.5(a) provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.* The defendant does not claim any of the three conditions listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal; in fact, defendant cannot meet any of the requirements of RAP 2.5(a).

In determining whether a defendant may raise an issue for the first time on appeal under RAP 2.5(a), the court must first make a cursory determination as to whether the alleged error even suggests a constitutional issue. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If it does, the court must then determine if the error is manifest; that is, if the asserted error had practical and identifiable consequences in

the trial of the case. *Id.* at 345. See also *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (holding that an appellant must show that he or she incurred actual prejudice in order to demonstrate that a constitutional error is manifest). Once the appellant has demonstrated that the error is both constitutional and manifest, the burden shifts to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011). Furthermore, when the record does not contain the facts necessary to adjudicate a claimed error, “no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In the present case, defendant failed to object to the LFOs imposed during sentencing. Because there is no record of defendant’s inability to pay LFOs, the defendant has not suffered prejudice and the claimed error cannot be manifest. *State v. McFarland*, 127 Wn.2d 322, 333. Therefore, defendant’s new claim must be otherwise justified under RAP 2.5(a) or under case law.

Defendant briefly cites to *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), and *State v. Bertrand*, 165 Wn. App. 393, 395, 297 P.3d 511 (2011). However, the court in *Ford* arrived at a more specific conclusion, that “illegal or erroneous sentences may be challenged for the first time on appeal.” *Id.* at 477. The court in *Ford* based this conclusion upon a careful analysis of seven cases, none of which address the issue of imposition of LFOs. *Id.* at 477. *Ford* itself fails to mention LFOs and

instead addressed the proper calculation of an offender score involving out of state convictions alleging that this error may be raised for the first time on appeal. Further, the court in *Bertrand* found that the issue could be reviewed under the clearly erroneous standard. *Bertrand*, 165 Wn. App. at 404. There is nothing in the record in the instant case that shows this finding to be clearly erroneous. There is nothing in the record to suggest defendant had any kind of disability that could affect his future ability to pay. The record does not support review under the clearly erroneous standard.

Defendant failed to object in the trial court to the court's finding concerning his ability to pay his LFOs. Defendant also presented no evidence at the trial court concerning the court's finding. Therefore, the issue raised by defendant is not properly before this Court for review.

## 2. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS.

The sole issue in this case, raised for the first time on appeal, concerns the collection of \$2,300 in LFOs. Brief of Appellant 3. Defendant argues that the trial court must have evidence to show that defendant has the present or future ability to pay his LFOs. Brief of Appellant 3. However, this challenge should not be considered because it has no impact on defendant's rights or obligations.

- a. The trial court did not err in making finding 2.5.

The Appellate Court reviews a sentencing court's determination of a defendant's resources and ability to pay under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 1120 (1991) (reasoning that the erroneous standard applies because defendant's ability to pay and financial status are essentially factual findings). Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial pursuant to RCW 10.01.160.

This statute contains the following constitutional safeguards:

(1) A sentencing court may impose repayment of court costs *only if it determines that the defendant is or will be able to pay*, and

(2) A defendant who has been ordered to pay costs and who *is not in contumacious default* in the payment thereof may at *any time* petition the sentencing court for remission of the payment of costs.

RCW 10.01.160 (emphasis ours). In light of such safeguards, the judiciary is not required to provide the added protection of formal findings to support the assessment of court costs. *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991). (See also *State v. Eisenman*, 62 Wn. App. 640, 810 P.2d 55 (1991); *State v. Suttle*, 61 Wn. App. 703, 812 P.2d

119 (1991) (in both cases, financial obligations were upheld in the absence of formal findings of fact).

In the present case, the court found that defendant was able to pay his LFOs. Finding 2.5 of defendant's judgment and sentence states that:

The court has considered the total amount owing, the defend's [sic] 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 that the defendant has the likely future ability to pay the legal financial obligations imposed herein.

CP 74.

The defendant argues that, under *Bertrand*, "a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him." Appellants Brief 3, *citing State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). However, *Bertrand* is distinguishable. The court in *Bertrand* did not address whether defendant's LFOs were mandatory. Furthermore, the court found that the defendant may have been unable to pay her LFOs, especially in light of her disability. *Id.* at 404. In the instant case, there is no indication that the defendant suffers from any disability or has an inability to pay his LFOs. Additionally, the fees imposed upon the defendant in *Bertrand* were far greater than the present case, exceeding \$4,300.

It appears that the defendant wants this Court to impose upon the sentencing judge a requirement to entertain a colloquy with each defendant regarding his or her ability to pay LFOs, but the statutory language of RCW 10.01.160 and case law clearly establish that no formal findings are required. *See State v. Curry*, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992) (concluding that the Court of Appeals was correct in holding that RCW 10.01.160 does not impose the additional requirement of formal findings regarding a defendant's present or future ability to pay LFOs). Moreover, because the time to determine a defendant's ability to pay is when the government seeks collection, the trial court could not have erred in failing to consider defendant's ability to pay at sentencing. *State v. Smits*, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009).

Even if formal findings were required, the trial court's finding 2.5 of defendant's judgment and sentence states for the record that the court has considered defendant's ability to pay. Should this Court reverse finding 2.5 on the basis that the record does not support it, it would create precedent that essentially requires formal findings regarding a defendant's ability to pay LFOs, which is contrary to previously established case law. The court may use finding 2.5 in defendant's judgment and sentence to determine that the trial court took defendant's financial resources into

account. The sentencing judge found that the defendant had the likely ability to pay his LFOs.

Formal findings are not required to support the sentencing judge's decision in determining court costs. The facts in this case are clearly distinguishable from the facts in *Bertrand*. The trial court properly imposed LFOs upon defendant. The court is required to impose mandatory costs, and may impose discretionary costs according to the statute. In addition, RCW 10.01.160 provides safeguards for defendant to petition the court for future remission of his LFOs. The trial court did not err.

- b. The trial court did not err in imposing legal financial obligations.

There are different components of a defendant's financial obligation which require a separate analysis because each raises its own distinct problems. *State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116, 1120 (1991); *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991).

The victim penalty assessment fee is mandatory per RCW 7.68.035. Under RCW 7.68.035(1)(a), this assessment must be imposed on every defendant who is convicted of a felony. The statute does not contain any exception for indigent defendants. See *State v. Curry*, 62 Wn.

App. 676, 680, 814 P.2d 1252, 1254 (1991) (finding that “. . . imposition of the VPA [victim penalty assessment] is mandatory and requires no consideration of a defendant’s ability to pay.”). The trial court did not err in imposing this mandatory fee.

Defendant’s \$100 DNA database fee is also mandatory per RCW 43.43.754(1) & RCW 43.43.7541, which states that this fee must be included in every sentence for a crime for which a biological sample must be collected. This includes every case for which a person is convicted of a felony. RCW 43.43.754(1). Similarly to the victim assessment fee, there is no exception for indigent defendants. *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165, 1170 (2009) (finding that “In 2008, the legislature passed an amendment to make the fee mandatory regardless of hardship.”). The trial court did not err in imposing this fee.

Defendant’s \$200 criminal filing fee is also mandatory per RCW 36.18.020(h), which states that upon conviction, a defendant in a criminal case shall be liable for a fee of two hundred dollars. The statute is clear. The trial court did not err in imposing the fee.

The court also properly imposed the \$1500 DAC recoupment fee. RCW 9.94A.030(30). Although, the DAC recoupment fee is discretionary, courts are given the authority to impose court-appointed attorney’s fees. *See* RCW 9.94A.760(1), RCW 9.94A.030(30). Neither

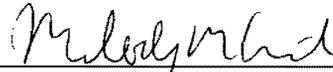
defendant nor his attorney objected to the imposition of this fee. The court properly imposed LFOs upon the defendant after conviction.

D. CONCLUSION.

For the reasons stated above, the State asks this Court to affirm the trial court's finding as the imposition of LFOs.

DATED: October 2, 2012.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



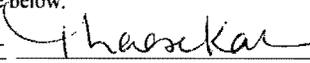
MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

---

Niko Olsrud  
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-2-12   
Date Signature

# PIERCE COUNTY PROSECUTOR

## October 02, 2012 - 3:50 PM

### Transmittal Letter

Document Uploaded: 429047-Respondent's Brief.pdf

Case Name: St. v. Paige-Colter

Court of Appeals Case Number: 42904-7

Is this a Personal Restraint Petition?  Yes  No

#### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

#### Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: [tnichol@co.pierce.wa.us](mailto:tnichol@co.pierce.wa.us)

A copy of this document has been emailed to the following addresses:  
[steadj@nwattorney.net](mailto:steadj@nwattorney.net)