

NO. 66203-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ALFREDO LOPEZ-CRUZ,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

Alfredo Lopez-Cruz argues that his convictions for Trafficking in Stolen Property for a stolen engine and Theft in the First Degree for defrauding someone of more than \$1,500 for installing the engine in a vehicle constitute double jeopardy. Under State v. Walker, 143 Wn. App. 880, 181 P.3d 31 (2008), the convictions for trafficking and theft do not constitute double jeopardy.

Lopez-Cruz also contends that the trial court failed to make findings that he had the ability to pay legal financial obligations. However, State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992), provides that a trial court is not required to make findings at the time legal financial obligations are ordered.

II. ISSUES

Where trafficking in stolen property in the first degree and theft in the first degree contain different elements, does punishment for each crime constitute double jeopardy?

Where a person steals more than \$1,500 from another person by deceiving that person about the ownership of an engine, does punishment for trafficking and theft constitute double jeopardy?

Is a trial court required to make a factual determination about a defendant's ability to pay legal financial obligations at the time of sentencing, contrary to the Supreme Court's holding in State v. Curry, 118 Wn. 2d 911, 916, 829 P.2d 166 (1992)?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On October 30, 2009, Alfredo Lopez-Cruz was charged in count 1 with Theft of a Motor Vehicle alleged to have occurred on June 11, 2009, in count 2 with Trafficking in Stolen Property in the First Degree of an engine alleged to have occurred between June 11, 2009, and August 31, 2009, and in count 3 with Theft in the First Degree of money alleged to have occurred between June 11, 2009, and August 31, 2009. CP 1-2. Lopez-Cruz was alleged to have stolen a motor vehicle, taken the engine and sold and installed the engine in a vehicle owned by another person, charging that person \$2,000. CP 4.

On December 22, 2009, the state amended count 1 of the information to allege the alternative of Taking a Motor Vehicle Without Permission in the First Degree. CP 8-9.

On October 4, 2010, Lopez-Cruz's case went to bench trial. 10/4/10 RP 3.¹

October 5, 2010, the trial court dismissed count 1 finding insufficient evidence that the defendant stole the motor vehicle. 10/5/10 RP 151. The trial court denied the defense motion to dismiss the Trafficking the First Degree in Count 2 and Theft in the First Degree in count 3. 10/5/10 RP 151.

On October 6, 2010, the trial court found Lopez-Cruz guilty as charged in count 2 of Trafficking in Stolen Property in the First Degree for the stolen engine and in count 3 of Theft in the First Degree for the \$1,800 paid by the victim. 10/6/10 RP 79.

On November 3, 2010, the trial court sentenced Lopez-Cruz to 15 months of prison time. CP 72, 78.

On November 4, 2010, Lopez-Cruz timely filed a notice of appeal. CP 80.

On January 5, 2011, the trial court entered written findings of fact and conclusions of law. CP 81-5.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

2//10 RP	Knapstad Motion
10/4/10 RP	Trial Day 1 (Jury trial waiver, Opening, Testimony)
10/5/11 RP	Trial Day 2 (Testimony)
10/6/11 RP	Trial Day 3 (Testimony, closing and verdict)
11/3/10 RP	Sentencing (attached to the end of the 10/4/11 transcript).

2. Statement of Facts

i. Trial Testimony

Jose Manuel Tapia lived at 835 King Drive in Burlington. 10/4/10 RP 11. He owned a black 1999 Acura Integra. 10/4/10 RP 12. Tapia's son used the car to drive to high school, but they decided to sell the car. 10/4/10 RP 13-4. They had it for sale for \$8,900. 10/4/10 RP 15. The car was missing from the house and Tapia first thought his son had it. 10/4/10 RP 15. Two days later he realized his son did not have the car and he reported the car as stolen to police on June 13, 2009. 10/4/10 RP 16, 18-9.

Tapia had acquaintances provide him some information about where the car was after it was stolen. 10/4/10 RP 23-4. The car was found after it was stolen and it was towed back to Tapia's house on July 11th. 10/4/10 RP 24. Alfredo Lopez-Cruz's brother-in-law bought the remains of the gutted vehicle for \$300. 10/4/10 RP 24-5, 28. On September 21, Tapia was notified that the engine of his vehicle had been recovered. 10/4/10 RP 26-7.

Tapia's daughter testified that after the vehicle was stolen, she started asking around to see if any cousins or friends knew where the car was. 10/4/10 RP 47, 53. The daughter contacted a cousin named Juan Contreras who gave her information that she provided to police. 10/4/10 RP 54. The daughter knew Lopez-Cruz because he spent time with her son's father. 10/4/10 RP 57. The daughter spoke with Lopez-Cruz at a gym days after the

car was stolen and Lopez-Cruz asked her which car it was. 10/4/10 RP 57.

The daughter told him it was the black Acura. 10/4/10 RP 58.

Tapia's son testified regarding when the Acura was stolen. 10/5/10 RP 75, 77. Tapia's son testified he knew Alfredo Lopez-Cruz through his cousin, Juan Contreras. 10/5/10 RP 82. Lopez-Cruz had talked to Tapia's son about the Acura because Lopez-Cruz was a known mechanic. 10/5/10 RP 83. Lopez-Cruz looked under the hood at an after-market piece. 10/5/10 RP 83. Tapia's son also spoke with Lopez-Cruz at the gym after the car was stolen and Lopez-Cruz said he heard the car had been stolen and as sorry to hear it. 10/5/10 RP 89-90. They ran into each other a second time at the gym two weeks later and Lopez-Cruz again offered to help find the car. 10/5/10 RP 92.

Matel Cholula lived in Sedro Woolley in 2009. 10/4/10 RP 89. Cholula had knowl Alfredo Lopez-Cruz for about two years before June of 2009. 10/4/10 RP 90. Cholula knew that Lopez-Cruz knew about fixing cars and putting in engines and went to him when his car needed a new engine. 10/4/10 RP 92. Lopez-Cruz told Cholula that he could find Cholula an engine for his car and that he could order one. 10/4/10 RP 94. Cholula recalled that the conversation was between May 20th and May 30th. 10/4/10 RP 94. Two or three days after they spoke, Lopez-Cruz told Cholula that he had located an engine for \$1,800. 10/4/10 RP 95. Cholula paid Lopez-Cruz

\$1,500 and that Lopez-Cruz would call when he had the motor. 10/4/10 RP 95-6. Cholula paid Lopez-Cruz \$300 a week later, plus an additional \$500 to install the engine. 10/4/10 RP 96. Lopez-Cruz told Cholula that once he was paid everything, he would go get the motor. 10/4/10 RP 10/4/10 RP 96. It took one or two weeks after Lopez-Cruz was paid before Lopez-Cruz called. 10/4/10 RP 96. Lopez-Cruz took Cholula's car to his house on Minkler Road in Sedro Woolley where the engine was installed. 10/4/10 RP 97, 10/5/10 RP 24-5. Cholula showed in photographs of the outside of the residence where the vehicle, engine and tools had been. 10/5/10 RP 26-9. Lopez-Cruz had Cholula drive to pick up some parts for the car because officers had stopped Lopez-Cruz the day before. 10/5/10 RP 31-2. A citation for an infraction of Lopez-Cruz dated June 17, 2009, was admitted into evidence. 10/5/10 RP 32-3.

Cholula testified he was contacted by officers in September about the stolen engine and the car was taken by officers. 10/5/10 RP 35-6. Cholula contacted Lopez-Cruz when he found out the engine was stolen. 10/5/10 RP 37. Lopez-Cruz first said that he had left the papers regarding the engine outside and that they had gotten wet so he did not have receipts. 10/5/10 RP 37. Lopez-Cruz another time told Cholula that Cholula should not say that Lopez-Cruz had ordered the engine. 10/5/10 RP 38. When they spoke a third time, Lopez-Cruz told Cholula that he had a lawyer and was going to

say he put the engine in the car, but was not going to say he ordered the engine. 10/5/10 RP 38-9. Cholula got the car back but had to pay to have another engine installed. 10/5/10 RP 40.

On cross-examination, Cholula testified that in the first conversation he had with Lopez-Cruz after Cholula found out the car was stolen, Lopez-Cruz told Cholula to call Jose because Jose said his engine was stolen. 10/5/10 RP 66-7. Cholula did not know Jose. 10/5/10 RP 68. Lopez-Cruz told Cholula that he thought the engine was Jose's. 10/5/10 RP 69.

Officer Howland of the Burlington Police Department took the report of the stolen vehicle from Jose Tapia and his daughter on June 13, 2011. 10/4/10 RP 60-2. On July 6, 2009, Howland got additional information from Tapia's daughter about a possible suspect, Alfredo Lopez-Cruz. 10/4/10 RP 64. Howland found that Lopez-Cruz lived on Minkler Road. 10/4/10 RP 66. On July 11, 2009, Howland found the vehicle had been recovered and went to the Skagit County Jail to interview Lopez-Cruz. 10/4/10 RP 66.

Deputy Hamlin of the Skagit County Sheriff's Office testified that on July 11, 2009, he responded to a report of a stolen vehicle in a gravel pit off Minkler Road. 10/4/10 RP 35-6. Hamlin found the vehicle stripped with the engine, bumpers, and steering column missing with the rest completely gutted. 10/4/10 RP 37.

Sergeant Butler of the Burlington Police Department testified that in September of 2009 he responded to a report of a stolen motor being located in a vehicle. 10/5/10 RP 7-8. He contacted Mateo Cholula at a residence in Sedro Woolley. 10/5/10 RP 9. Cholula opened the hood so that officers could look at the engine and find the VIN number. 10/5/10 RP 10-1. Butler recorded the VIN number and verified it was the stolen engine and impounded the car. 10/5/10 RP 11-2, 14-6. Butler tried two times to contact suspect at his residence but could not locate him. 10/5/10 RP 12.

Detective Floyd of the Burlington Police Department testified about being assigned the case for follow-up investigation. 10/5/10 RP 94-5. Floyd was with Butler when they contacted Mateo Cholula regarding the engine. 10/5/10 RP 100-1. Floyd testified that Cholula was first a bit shocked or taken aback about the engine being stolen and then was very cooperative and easy to work with even when it came to seizing the vehicle. 10/5/10 RP 103, 106. Floyd also testified that the distance between Lopez-Cruz's residence and where the Acura was located was 0.3 miles. 10/5/10 RP 109-10.

Lopez-Cruz called Lecia Edwards to testify about her contact with Lopez-Cruz near her residence at 3801 Seneca Drive in Mount Vernon. 10/5/10 RP 158-64. Edwards had seen Lopez-Cruz about six times since his family had moved in around May of 2009. 10/5/10 RP 159.

Lopez-Cruz called his sister to testify about Lopez-Cruz residing at her residence on Minkler Road in Sedro Woolley. 10/5/10 RP 165-6. The sister claimed that Lopez-Cruz had moved in April of 2009, and did not work on cars at her residence. 10/5/10 RP 166-9. But his sister also testified that Lopez-Cruz did not work on cars. 10/5/10 RP 169. On cross-examination, she testified that Lopez-Cruz moved out because she was too strict and wouldn't let him work on cars. 10/5/10 RP 184.

Lopez-Cruz also called his other sister who lived on Seneca Street in Mount Vernon to testify. 10/15/10 RP 191. She testified Lopez-Cruz moved in with her starting in March of 2009. 10/15/10 RP 192. She testified he worked on cars at her house. 10/15/10 RP 193. She claimed that she saw Cholula when he had a car worked on at her residence. 10/15/10 RP 196. She let her brother live with her even though it was not on the rental agreement. 10/15/10 RP 200. She also said he was allowed to work on cars, despite a clause in the lease that said they couldn't work on cars at the house and complaints by neighbors. 10/15/10 RP 202.

Lopez-Cruz testified. 10/5/10 RP 204. He said he was a mechanic, knows about engines and testified about the type of engines. 10/6/10 RP 10-4. He admitted he had put an engine in Cholula's vehicle but claimed that Cholula had brought him the engine. 10/5/10 RP 209, 213, 10/6/10 RP 4. Lopez-Cruz testified that he did not strip the engine from Tapia's car.

10/6/10 RP 5. He claimed he installed the engine in Cholula's car at his sister's residence on Seneca street. 10/6/10 RP 7. Lopez-Cruz testified that he had a prior conviction for making a false statement. 10/6/10 RP 15.

The State called Cholula's girlfriend to testify that they paid \$2,000 for the engine. 10/6/10 RP 29.

ii. Oral Findings

Given there was a bench trial, there are findings of the trial court that can be used to determine the facts relied upon for conviction to determine if the offenses constituted double jeopardy as alleged by Lopez-Cruz. The trial court held as follows:

On June 13, 2009, the Tapia family reported their 1999 Acura Integra had been stolen from their Burlington residence two days before. RP 81.

On June 17, 2009, the defendant, Alfredo Lopez-Cruz, installed an engine into Matea Cholula-Rivera's vehicle. CP 81. Prior to installing the vehicle, Cholula-Rivera had problems with the engine in his car. CP 82. Knowing Lopez-Cruz was a mechanic, Cholula-Rivera contacted him and had discussions with him about engines and models that were compatible with his car. CP 82. Lopez-Cruz told Cholula-Rivera that he could locate an engine and install it. CP 82. The discussions between Lopez-Cruz and

Cholula-Rivera regarding the engine were consistent with the time frame of when the Tapia car was stolen. CP 83.

The trial court found that Cholula-Rivera paid the defendant \$1,800 for the engine and \$500 for installation. CP 83.

The trial court found that Lopez-Cruz's claims that Cholula-Rivera found the engine and brought it to Lopez-Cruz to install were not credible. CP 83-4. The trial court found that at the time he procured the engine, Lopez-Cruz knew that it was stolen and installed it into Cholula-Rivera's vehicle. CP 84.

iii. Sentencing

On November 3, 2010, Lopez-Cruz was sentenced. 11/3/10 RP 99. Lopez-Cruz agreed to his criminal history and also agreed that his highest-range was 13 to 17 months of prison time. 11/3/10 RP 99. The court sentenced Lopez-Cruz to the middle of the range of 15 months on the count of Trafficking in Stolen Property in the First Degree and 12 months on the charge of Theft in the First Degree. 11/3/10 RP 102, CP 71-2. The Court ordered that standard legal financial obligations be ordered and restitution for the cost of the engine. 11/3/10 RP 102-3. Pursuant to the language of the court rule, the judgment and sentence included findings regarding the ability to pay legal financial obligations which read:

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 has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 71.

IV. ARGUMENT

1. **Convictions for Trafficking in Stolen Property in the First Degree and Theft in the First Degree did not amount to double jeopardy.**

Lopez-Cruz contends that his punishment for convictions of trafficking in stolen property of the stolen engine and theft in the first degree for the \$1,800 he received for the engine constitute double jeopardy. The State contends that these crimes have different elements and facts supporting them such that they were properly punished separately.

At issue in any double jeopardy analysis is whether the legislature intended to impose multiple punishments for the same offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). We review double jeopardy questions de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Courts may discern the legislature's purpose by applying the tests set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) ("same elements test"), and State v. Reiff, 14 Wn. 664, 667, 45 P. 318 (1896) ("same evidence test"). State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). Under Blockburger's "same elements" test, a court may penalize a defendant for one

act or transaction that violates two distinct statutory provisions only if each “ provision requires proof of a fact which the other does not.” 284 U.S. at 304, 52 S.Ct. 180. And under the Washington rule for “same evidence,” double jeopardy attaches only if the offenses are identical in both law and fact, which is demonstrated when “the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.” Reiff, 14 Wn. at 667, 45 P. 318. In other words, if the evidence to prove one crime would also completely prove a second crime, the two crimes are the same in law and fact. Orange, 152 Wn.2d at 820, 100 P.3d 291. The Washington rule is largely indistinguishable from the Blockburger rule. Orange, 152 Wn.2d at 816, 100 P.3d 291.

State v. Walker, 143 Wn. App. 880, 885-86, 181 P.3d 31 (2008).

The State contends that the convictions for Trafficking in Stolen Property in the First Degree and Theft in the First Degree fail both the “same elements” test and the “same evidence” tests to establish double jeopardy.

i. Trafficking in Stolen Property in the First Degree and Theft in the First Degree have different elements.

Trafficking in Stolen Property in the First Degree contains the element that there must be a knowing trafficking in stolen property. RCW 9A.82.050, 9A.82.010(19), CP 9. Here the trial court specifically found that Lopez-Cruz had procured the engine knowing it was stolen. CP 84.

Theft in the First Degree has a different intent as well as a value element that is not part of the charge of Trafficking in Stolen Property in the First Degree. RCW 9A.56.030(1)(a), CP 9.

There are different elements. And case law has previously addressed this precise issue holding these two offenses do not have the “same elements.” In the case of State v. Walker the defendant was charged with Theft in the First Degree for stealing old growth cedar from a national forest. He was also charged with Trafficking in Stolen Property in the First Degree for the wood he had cut down and for cedar he had already sold to a mill on two separate days before arrest. That decision explains the different elements of the offenses.

We first hold that the two charged crimes contained unique elements. The two convictions did not subject Walker to double jeopardy under the Blockburger “same elements” test. 284 U.S. at 304, 52 S.Ct. 180.

To prove first degree theft, the State had to prove:

- (1) Walker wrongfully obtained or exerted unauthorized control over Forest Service property;
- (2) the property exceeded \$1,500 in value;
- (3) Walker intended to deprive the Forest Service of its property; and
- (4) the acts occurred in Washington.

To prove first degree trafficking in stolen property, the State had to prove:

- (1) Walker trafficked in stolen property,
- (2) Walker acted knowingly, and
- (3) the acts occurred in Washington.

“Traffic” means “to possess or obtain control of stolen property with intent to sell or dispose of the property to another person.” Clerk's Papers at 18.

The two charges in this case are unique in several ways. Most importantly, the intent elements differed: (1) for theft, the State had to prove Walker intended to deprive the owner of its property; while (2) for trafficking, the State had to prove Walker intended to sell or dispose of another's property to a third party. A person could steal (i.e., intend to

deprive an owner) of its property without intending to sell or dispose of that property to a third party and could sell property to another knowing that it was stolen without having been the thief.

¶This court has ruled that “a person can be convicted of theft and of trafficking in the same property.” State v. Strohm, 75 Wn. App. 301, 310-11, 879 P.2d 962 (1994), *review denied*, 126 Wn.2d 1002, 891 P.2d 37 (1995). And our Supreme Court held, “[N]othing in the trafficking statute precludes the statute from applying to the thief who initially stole the property.” Michielli, 132 Wn.2d at 237, 937 P.2d 587. Accordingly, we hold that these two offenses do not violate double jeopardy under Blockburger, 284 U.S. at 304, 52 S.Ct. 180.

State v. Walker, 143 Wn. App. 880, 886-7, 181 P.3d 31 (2008) (footnote omitted).

The analysis of Walker regarding the different elements covers the present situation and Lopez-Cruz fails to distinguish why the reasoning should not apply here.²

ii. As proven here, the trafficking and theft was based upon different evidence.

The court in Walker also analyzed the “same evidence” test where theft and trafficking in the same property applied. The State cites to the lengthy quotation from Walker to explain the analysis of the “same elements” test.”

² More than failing to distinguish Walker, Lopez-Cruz fails to cite to the case at all. The undersigned prosecutor readily found the case with minimal research effort. This (footnote continued)

The evidence of trafficking does not prove the elements of theft of the wood, that (1) Walker wrongfully obtained or exerted unauthorized control over wood belonging to another; (2) the wood belonged to the Forest Service; (3) the wood exceeded \$1,500 in value; or (4) Walker intended to deprive the Forest Service of its property. Rather, this evidence speaks only to the elements of trafficking, specifically that Walker possessed or obtained control over the wood rightfully belonging to another with an intent to sell or dispose of it to another person. This evidence of trafficking did not completely prove the second crime, theft.

Nor does the State's evidence of theft completely prove the trafficking crime. To prove theft, the State relied in part on Officer Webster's testimony that he saw Walker splitting the cedar blocks belonging to the Forest Service with a froe and a mallet.

State v. Walker, 143 Wn. App. 880, 888-9, 181 P.3d 31 (2008).

The same analysis applies to the present case. The theft in the first degree flowed from Lopez-Cruz misrepresenting the ownership of the engine to Cholula in order to deceive him and obtain the more than \$1,500 from Cholula with the intent to deprive him of that money. As in Walker, this “speaks only to the elements of trafficking” that Lopez-Cruz possessed or obtained control over the engine rightfully belonging to another with an intent to sell or dispose of it to another person. But this does not establish all of the elements of theft.

As concluded in Walker:

suggests that there may have been a failure to disclose adverse legal authority. RPC 3.3(a)(3).

Thus, the crimes have different elements and the evidence used to prove one crime would not also completely prove a second crime. The two convictions accordingly are not the same in law or fact. Orange, 152 Wn.2d at 820, 100 P.3d 291. Therefore, we hold that, as charged and proven here, these two convictions did not subject Walker to multiple punishments for the same offense and his right to be free from double jeopardy was not violated.

State v. Walker, 143 Wn. App. 880, 889, 181 P.3d 31 (2008).

Lopez-Cruz relies almost exclusively on State v. Knight, 54 Wn. App. 143, 154-55, 772 P.2d 1042 (1989) a case in which possession of stolen property was held to be a lesser offense to attempted trafficking in stolen property. That case involved possession and trafficking of the same property, which was in fact the same situation as in Walker. In contrast to that situation, here the charge was for trafficking in an engine of one person and theft of money that he got for the engine from a different person.³ This makes the present case more egregious under the “same evidence” test.

³ There State in Knight also conceded that the all the elements of possession of stolen property were lesser elements of trafficking. The State does not so concede here regarding theft and trafficking.

2. **A trial court is not required to make a formal findings on the record of the ability to pay legal financial obligations at time those obligations are set at sentencing and Lopez-Cruz failed to raise the issue below.**

Lopez-Cruz also contends that at sentencing the trial court failed to make findings supporting the determination that the defendant had the ability to pay legal financial obligations in the future.

Contrary to this assertion, case law cited by Lopez-Cruz⁴ specifically provides that a trial court is not required to make a determination of ability at the time of sentencing.

Here, the Court of Appeals in Curry was correct when it held that the statute does not impose the additional requirement of formal findings on the record. 62 Wn. App. at 680, 814 P.2d 1252. The court recognized that there were contrary decisions, but nevertheless was “persuaded that the constitution does not require the judge to provide such added protection.” Curry, 62 Wn. App. at 680, 814 P.2d 1252; *see also Eisenman* (rejecting Earls and Hayes). Thus, the court held that “the failure to enter findings is not a constitutional error which requires resentencing”. Curry, at 680–81, 814 P.2d 1252.

Neither the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs. According to the statute, the imposition of fines is within the trial court's

⁴ Lopez-Cruz cites to State v. Curry to assert “Curry recognized, however, that both RCW 10.01.160 and the constitution “direct [a court] to consider ability to pay. *Id.* at 915-6.” The State contends this citation is misleading. In fact Curry at that page reads: “Prior to the current cases, the Court of Appeals has interpreted this statute in two cases to mean that the trial court must enter into the record specific, formal findings regarding the defendant's ability to pay costs.” State v. Curry, 118 Wn. 2d 911, 914-15, 829 P.2d 166 (1992). As described above, the court in Curry went on to hold that a trial court need not make a determination of future ability to pay at the time that the amount of legal financial obligations are set in the trial court.

discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. Imposing an additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.

State v. Curry, 118 Wn. 2d 911, 916, 829 P.2d 166 (1992) (emphasis added).

The Court in Curry rejected the position that Lopez-Cruz is asserting. The statutory scheme does not require a trial court to enter formal, specific findings regarding a defendant's ability to pay when assessing costs. Id. As the court in Curry reiterated, it is not permissible to sanction offenders who lack the ability to pay. Id. A show cause or contempt hearing must be held before sanctions for nonpayment can be imposed. State v. Blank, 131 Wn. 2d 230, 241, 930 P.2d 1213 (1997).

Sanctions can only be imposed for intentional or willful refusal to pay. Id. Finally, the ability to pay is determined at the time collection is sought, rather than at the time the monetary obligation is imposed. State v. Blank, 131 Wn.2d at 242, 930 P.2d 1213.

Lopez-Cruz also did not raise the issue of ability to pay legal financial obligations in the trial court. 11/3/10 RP 99-106. The evidence from the testimony at trial in the present case indicated that Lopez-Cruz was able to work as a vehicle mechanic. 10/6/10 RP 10-4. He has not shown

that the trial court would have made a contrary determination about the ability to pay had he raised this issue before the trial court. He should be precluded from raising this issue at this time under Curry and RAP 2.5(a).

V. CONCLUSION

For the foregoing reasons, Lopez-Cruz's appeal should be denied and his conviction affirmed.

DATED this 22nd day of July, 2011.

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ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jan Trasen, addressed as Washington Appellate Project, 1511 Third Avenue, Ste 701, Seattle, WA 9811-3647. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 22nd day of July, 2011.


KAREN R. WALLACE, DECLARANT