



FILED  
May 29, 2014  
Court of Appeals  
Division III  
State of Washington

No. 31922-9-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

FRED EDWARD III,

Defendant/Appellant.

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Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The record does not support the finding that Mr. Edward has the current or future ability to pay Legal Financial Obligations.

2. The trial court erred by imposing discretionary costs.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

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? Did the trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took Mr. Edward's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

C. STATEMENT OF THE CASE

Mr. Edward was charged and convicted by a jury of possession of a controlled substance. CP 4. The sentencing court imposed discretionary costs of \$1231 and mandatory costs of \$700<sup>1</sup>, for a total Legal Financial Obligation (LFO) of \$1931. CP 8. The Judgment and Sentence contained the following language:

¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760)  
The court has considered the total amount owing, the defendant's

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<sup>1</sup> \$500 Victim Assessment and \$200 criminal filing fee. CP 8.

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 ability or likely future ability to pay the legal financial obligations imposed herein.

CP 7.

The Court found Mr. Edward indigent and struck the \$2000 drug fine. The Court did not inquire further into Mr. Edward's financial resources and the nature of the burden that payment of the remaining LFOs would impose on him. 9/11/13 RP 50-52. The court ordered Mr. Edward to pay at least \$100 per month commencing immediately. CP 9.

This appeal followed. CP 2-3.

D. ARGUMENT

The directive to pay based on an unsupported finding 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.<sup>2</sup>

Mr. Edward did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State*

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<sup>2</sup> Assignments of Error Nos. 1 and 2.

*v. Calvin*, \_\_\_ Wn. App. \_\_\_, 302 P.3d 509, 521 fn 2 (2013), citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).<sup>3</sup>

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's finding that Mr. Edward 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

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<sup>3</sup> Appellant is aware that 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. The cases were scheduled for oral argument February 11,

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 finding that Mr. Edward has the present or future ability to pay legal financial obligations as stated in paragraph 2.5 of the Judgment and Sentence. A finding 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*

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2014. Therefore, this issue is raised in order to preserve the argument, should the Washington Supreme Court overrule this Court's opinion in *Duncan*.

*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.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), 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. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show the trial court took into account Mr. Edward'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 he has the present or future ability to pay LFOs. In fact the Court found Mr. Edward indigent and struck the \$2000 drug fine. 9/11/13

RP 51. Nevertheless, the court ordered Mr. Edward to pay at least \$100 per month commencing immediately. CP 9. Therefore, the finding that Mr. Edward has the present or future ability to pay LFOs is simply not supported in the record. Since it is clearly erroneous, the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

This remedy of striking the unsupported finding is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534,

541, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991); *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

b. The imposition of discretionary costs of \$1150 must also be stricken. Since the record does not reveal that the trial court took Mr. Edward'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. But,

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 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). *Calvin*, 302 P.3d at 521-22.

Here, the court imposed discretionary costs of \$1231 after finding Mr. Edward indigent. The record reveals no further balancing by the court of Mr. Edward's financial resources and the nature of the burden that payment of LFOs would impose on him. 9/11/13 RP 50-52.

In sum the record reveals the trial court did not take Mr. Edward's particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). The finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay *and* the imposition of the

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discretionary costs. *Calvin*, 302 P.3d at 522; *Bertrand*, 165 Wn. App. at 405.

E. CONCLUSION

For the reasons stated the matter should be remanded for resentencing to strike the directive to pay and the imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted May 29, 2014,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on May 29, 2014, 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 Appellant's Brief:

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