



NO. 31922-9-III

FILED
June 4, 2014
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | MOTION ON THE MERITS |
| |) | (Franklin County No. |
| vs. |) | 13-1-50239-8) |
| |) | |
| FRED EDWARD, III, |) | |
| |) | |
| Appellant. |) | |
| |) | |

I. Identity of Moving Party:

The State of Washington, Respondent, by Shawn P. Sant, Franklin County Prosecuting Attorney, by and through Teresa Chen, Deputy Prosecuting Attorney, asks for the relief designated in Part II.

II. Statement of Relief Sought:

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction and sentence of the Appellant in the above-entitled case.

III. Facts Relevant to Motion:

Pursuant to Rule of Appellate Procedure 18.14(e), this motion

is made on the grounds that the issues on appeal are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision is clearly within the discretion of the trial court.

The Defendant Fred Edward, III, has been convicted of possessing methamphetamine. CP 4, 25; 3 RP¹ 38.

At the sentencing hearing, the court imposed legal financial obligations (LFO's). 3 RP 50. Citing, RCW 69.50.430(2), the Defendant asked the court to "defer" the \$2000 VUCSA fine, "because of the indigency of my client." 3 RP 50. The court found that that the Defendant was indigent, and struck the VUCSA fine. CP 8; 3 RP 51.

The court imposed other LFO's, including \$1231 in discretionary costs. CP 8; RP 50; Appellant's Brief at 4. The court found the Defendant has the ability or likely future ability to pay his legal financial obligations at the rate of \$100/mo. CP 7, 9. The Defendant did not object to the remaining LFO's.

Pending trial, the Defendant posted bail in the amount of

¹ 1 RP refers to the transcript of pretrial hearing as recorded by Court Reporter John McLaughlin; 2 RP refers to the transcript of the trial as recorded by Court Reporter Patricia Adams; and 3 RP refers to the transcript of the sentencing hearing as recorded by Court Reporter Joseph King.

\$8000. 3 RP 42. There had been testimony at trial that the Defendant owned a motor home and another vehicle. 3 RP 51. He has the ability to fix furnaces. 2 RP 23. He requested sentencing alternatives such as work release, because he "has employment opportunities available to him." 3 RP 46. His offense demonstrated that he had the discretionary funds to spend money on six baggies of illegal drugs. 2 RP 35-36, 39, 96, 113. He had a credit card. 2 RP 41.

On appeal, the Defendant challenges the finding of his ability to pay and the imposition of discretionary costs.

IV. Grounds for Relief and Argument:

THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay.

The Court of Appeals recently addressed this challenge in *State v. Duncan*, -- P.3d --, No. 29916-3-III, 2014 WL 1225910 (Wn. App. filed Mar. 25, 2014), noting that the challenge is

"recurrent" in appeals. *State v. Duncan*, 2014 WL 1225910 at *2. The court held that it would decline to address for the first time on appeal a claim that the record did not support the trial court's findings regarding ability to pay discretionary LFO's. The opinion explains that an offender may decline to challenge the finding at the trial level, because the State's burden of proof is so low. *Id.* But also an offender has good strategic reasons to waive the issue at the time of sentencing when there are "more important issues at stake." *Id.* at *1, *3. At the moment the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful" to portray oneself as perpetually unemployed and irretrievably indigent. *Id.* at *3. And, in any case, the matter can be readdressed later by a petition for remission at the more pertinent time, i.e. the time of collection. *Id.*

This authority should decide the matter without further discussion. The Court of Appeals will not hear a challenge to LFO's that is not preserved below. The Defendant did not challenge the imposition of discretionary LFO's but only the VUCSA fee. The challenge is not preserved.

However, if this Court were to review the challenge, the record provides sufficient evidence for the sentencing court's finding and sentence. The Defendant has job skills. He worked in the recent past and is capable of working immediately, which is why he requested work release. Apparently, he was capable of earning enough to pay the significant fees that are required for sentencing alternatives like work release.² The Defendant had capital. He owned a motor home and a vehicle. He was capable of coming up with bail of \$8000.

The court found that the Defendant was able to pay his fines at a rate of \$100/mo. In addition to mandatory costs, the court imposed a little over a thousand dollars in discretionary costs. Considering the small amount of fines imposed and the reasonable payment schedule, the court had sufficient evidence of the Defendant's ability to pay the ordered costs.

The Defendant asks to strike finding 2.5, arguing that this would be consistent with the holding in *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). Appellant's Brief at 8. Because,

² According to page 12 of the Franklin County Work Release Application, a work release participant must pay \$128/week for the program.
<http://www.co.franklin.wa.us/sheriff/workrelease.shtml> at 12.

unlike *Bertrand*, there is evidence on the record demonstrating the Defendant's ability to pay, there is no cause to strike the supported finding. The Defendant's request to strike the court's factual finding must be denied. The finding is supported in the record; and the trial court deserves discretion on factual matters.

The Defendant not only asks to strike the factual finding, but also to strike the imposition of costs. Appellant's Brief at 10. This remedy is not supported in law.

In *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and, therefore, held that the finding was clearly erroneous. *State v. Bertrand*, 165 Wn. App. at 404. However, the court also noted that the question was not ripe under *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991). *State v. Bertrand*, 165 Wn. App. at 405. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO's. *State v. Bertrand*, 165 Wn. App. at 405.

Note that even if the finding were without basis in the record (which is not the case here), the Defendant's request to strike not just the finding but also the imposition of fines is not the holding in *Bertrand*. Rather the *Bertrand* court struck the finding, but affirmed the imposition of LFO's, noting that the proper time to address the question is "when the government seeks to collect the obligation." *State v. Bertrand*, 165 Wn. App. at 405, citing *State v. Baldwin*, 63 Wn. App. at 310.

The Defendant asserts that the court did not balance his financial resources and the nature of the burden of the LFO's. Brief of Appellant at 11; see also RCW 10.01.160. The court's decision certainly does balance the Defendant's financial resources, i.e. his employability and his willingness to pay \$504/mo in work release fees with the minimal \$100/mo legal financial obligation.

This record is sufficient to sustain the finding that the Defendant has the present and future ability to pay \$100 a month. The court did not abuse its discretion in imposing the legal financial obligations.

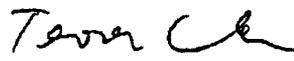
V. Conclusion:

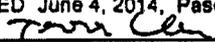
Respondent finds no meritorious issues which can be or have been raised by the Appellant and submits that Appellant's conviction should be affirmed.

Dated this 4th day of June, 2014.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: 
Teresa Chen,
WSBA # 31762
Deputy Prosecuting Attorney

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| <p>David N. Gasch <gaschlau@msn.com></p> | <p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 4, 2014, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p> |
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FRANKLIN COUNTY PROSECUTOR

June 04, 2014 - 11:59 AM

Transmittal Letter

Document Uploaded: 319229-319229 MOM.pdf

Case Name: State v. Fred Edward, III

Court of Appeals Case Number: 31922-9

Party Represented: State of Washington

Is This a Personal Restraint Petition? Yes No

Trial Court County: Franklin - Superior Court # 13-1-50239-8

Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: Motion on the Merits
- Response/Reply to Motion: _____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic 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.

Proof of service is attached and an email service by agreement has been made to gaschlaw@msn.com and apolomsky@co.franklin.wa.us.

Sender Name: Teresa J Chen - Email: tchen@wapa.sep.wa.gov