

FILED: December 26, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JEFFREY PAUL ERICKSON,
Defendant-Appellant.

Washington County Circuit Court
C102206CR

A150625

Thomas W. Kohl, Judge.

Submitted on November 27, 2013.

Peter Gartlan, Chief Defender, and Eric Johansen, Senior Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Jeremy C. Rice, Assistant Attorney General, filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge.

PER CURIAM

Portion of judgment requiring defendant to pay attorney fees reversed; otherwise affirmed.

1 PER CURIAM

2 Defendant was convicted of multiple crimes and sentenced to 20 years in
3 prison. On appeal, his only challenge is to the trial court's order that he pay \$23,952 in
4 court-appointed attorney fees. According to defendant, there is no evidence in the record
5 that he has any assets or income, and, consequently, no basis on which the trial court
6 could have concluded that he "is or may be able" to pay those costs of his defense. ORS
7 151.505(3) ("The court may not require a person to pay costs under this section unless the
8 person is or may be able to pay the costs."); ORS 161.665(4) ("The court may not
9 sentence a defendant to pay costs under this section unless the defendant is or may be
10 able to pay them.").

11 The state concedes that, under our case law, defendant is correct: The
12 record does not support the trial court's order that defendant pay his attorney fees. *See*
13 *Pendergraph*, 251 Or App 630, 634, 284 P3d 573 (2012) ("[A] court cannot impose
14 attorney fees based on a record that is silent regarding the defendant's ability to pay those
15 fees."); *State v. Kanuch*, 231 Or App 20, 24, 217 P3d 1082 (2009) (explaining that the
16 state "bears the burden of persuasion and the obligation to make a record" concerning a
17 defendant's ability to pay attorney fees). The state maintains, however, that
18 *Pendergraph* and *Kanuch* were wrongly decided and that "[t]he standard under ORS
19 161.665 and ORS 151.505 is very low."

20 We decline the state's invitation to revisit our prior cases, adhere to our
21 reasoning in *Pendergraph* and *Kanuch*, and conclude that the trial court erred in

1 imposing attorney fees on defendant in the absence of any evidence that he "is or may be
2 able" to pay those attorney fees.

3 Portion of judgment requiring defendant to pay attorney fees reversed;
4 otherwise affirmed.