

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 29461-7-III
)	
Respondent,)	
)	Division Three
v.)	
)	
KAM ALAN MILLS,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Kulik, C.J. — Kam Alan Mills appeals the trial court’s order to pay restitution, costs and fees following his conviction. Because there is no statutory authority for payment of witness fees and expenses, we vacate the order on these fees and costs and affirm the remaining order. And the trial court did not err finding Mr. Mills had the ability to pay these costs.

FACTS

In October 2006, Mr. Mills was convicted of first degree child molestation and second degree child molestation. On appeal, we affirmed the convictions but determined that Mr. Mills’s sentence was improperly calculated. We remanded the case to the

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Benton County Superior Court for resentencing. *State v. Mills*, noted at 142 Wn. App. 1017, 2007 WL 4536630, *review denied*, 164 Wn.2d 1012 (2008).

In September 2010, the trial court issued a new judgment and sentence that included an order to pay \$5,149.20 in restitution to the Benton County prosecutor's office for witness interviews and travel expenses. This restitution amount was identical to the restitution amount in the original judgment and sentence. The court also ordered Mr. Mills to pay \$4,790.75 in costs and fees. The court waived the interest accumulated during his appeal.

On appeal, Mr. Mills contends the trial court erred by finding that he had the ability to pay the cost bill. He also contends that the trial court did not have statutory authority to impose restitution for witness fees and expenses.

ANALYSIS

The trial court's determination as to the defendant's resources and ability to pay is reviewed under the clearly erroneous standard. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). The trial court's decision to impose recoupment of court costs, including witness fees, is reviewed for an abuse of discretion. *Id.*

Ability to Pay. Mr. Mills did not object to the trial court's finding that he had the ability to pay costs and fees. A party may not appeal an issue that was not raised in the

trial court unless the issue involves a manifest error affecting a constitutional right, lack of jurisdiction, or failure to establish facts on which relief can be granted. RAP 2.5. A trial court's failure to consider a person's ability to pay does not constitute a constitutional error. *State v. Bower*, 64 Wn. App. 808, 810, 827 P.2d 308 (1992). However, when a trial court acts beyond its statutory sentencing authority, we can hear the issue for the first time on appeal. *State v. Moen*, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996).

The court can order a defendant convicted of a felony to repay court costs as a part of the judgment and sentence. RCW 10.01.160(2) limits the costs to those "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW."

A sentencing court cannot order a defendant to pay court 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." RCW 10.01.160(3). The sentencing court does not need to enter formal, specific findings regarding a defendant's ability to pay court costs. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). "[T]he meaningful time to examine the

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defendant's ability to pay is when the government seeks to collect the obligation.”

Baldwin, 63 Wn. App. at 310.

Costs include court costs and recoupment of fees for court-appointed counsel.

State v. Smits, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009).

Failing to find that the defendant does not have the ability to pay under RCW 10.01.160 does not offend constitutional principles because other statutory protections are in place to protect a defendant who defaults on payment of the assessment. *State v. Campbell*, 84 Wn. App. 596, 601, 929 P.2d 1175 (1997). Mr. Mills challenges the statutory sentencing authority of the trial court and may have the issue heard for the first time on appeal.

In the judgment and sentence, the court made a general finding that Mr. Mills had the ability or future ability to pay. As concluded in *Baldwin*, the court did not have an obligation to make specific findings to support its decision that Mr. Mills has the ability or will have the ability to pay.

This general finding is supported by the record. In his first appeal, this court concluded that the trial court did not err by finding Mr. Mills had the ability to pay because his presentence report showed he was receiving \$1,289 from his United States Army pension. The issue of Mr. Mills's future ability to pay had been determined.

At the 2010 sentencing hearing, Mr. Mills requested that the court adopt the same cost bill from 2006, minus interest. Mr. Mills did not request any changes. The court asked if Mr. Mills had any objections to the imposition of the cost bill; Mr. Mills replied that he did not have any objections. Furthermore, the trial court also received assurance from Mr. Mills that he would pay the costs in order to avoid paying interest. Based on Mr. Mills's acceptance of the cost bill and his assurance that he would pay, it was not clearly erroneous for the trial court to determine that Mr. Mills had the ability to pay costs.

The trial court's statement that it would find Mr. Mills indigent does not negate the court's finding that Mr. Mills had the ability to pay costs. The court's statement relates to Mr. Mills's ability to pay for his current appeal and not the ability to pay future costs. As in *State v. Hartz*, the court did not contradict itself by finding the defendant indigent for purposes of his appeal but not indigent for court costs and restitution. *State v. Hartz*, 65 Wn. App. 351, 355-56, 828 P.2d 618 (1992). The court's finding of Mr. Mills's ability to pay his future costs is supported by the record.

The trial court acted within its statutory authority in ordering Mr. Mills to pay costs and attorney fees. RCW 10.01.160(3) allows the court to impose costs if the defendant is or will be able to pay them. The court determined that Mr. Mills could pay

costs. Also, the award of costs is not a constitutional violation of the equal protection clause because the other protections are available to Mr. Mills when collection occurs. The trial court did not err by ordering Mr. Mills to pay costs and attorney fees.

Witness Fees. A court abuses its discretion when a restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999) (quoting *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)).

“[A] challenge to a sentence that is contrary to law may be raised on appeal for the first time.” *State v. Anderson*, 58 Wn. App. 107, 110, 791 P.2d 547 (1990).

RCW 9.94A.753(3) provides that pursuant to a criminal conviction, restitution ordered by a court must be “based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.”

The trial court’s authority is limited to ordering restitution for those losses causally related to the crime. *State v. Griffith*, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008) (quoting *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)). If the court finds that a portion of the damages are not causally related to the defendant’s actions, the court must vacate that portion of the restitution order. *State v. Dennis*, 101 Wn. App. 223, 229,

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6 P.3d 1173 (2000). The remedy is to vacate the amount of restitution related to the witness travel expenses and remand to the trial court for resentencing. *See State v. Moon*, 124 Wn. App. 190, 195, 100 P.3d 357 (2004).

Here, the State admits that the witness fees and travel costs were not causally connected to the sexual molestation. The court violated its statutory authority by ordering Mr. Mills to pay the unconnected charges. Because the trial court acted outside the scope of statutory authority, Mr. Mills may address this issue on appeal without objecting to it at trial.

The trial court improperly ordered Mr. Mills to pay witness fees and travel expenses as part of his restitution. Therefore, we affirm the sentence as to court costs. But we vacate the restitution for witness fees and expenses.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.