

FILED: May 29, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ERROL LASHAWN HENDERSON,
Defendant-Appellant.

Clackamas County Circuit Court
CR1201524

A153041

George W. Neilson, Senior Judge.

Submitted on April 22, 2014.

Peter Gartlan, Chief Defender, and Morgen E. Daniels, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Erin K. Galli, Senior Assistant Attorney General, filed the brief for respondent.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

PER CURIAM

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

1 PER CURIAM

2 Defendant appeals a judgment convicting him of third-degree robbery, ORS
3 164.395, and third-degree theft, ORS 164.043. He raises two assignments of error on
4 appeal. We reject defendant's first assignment without discussion, and write only to
5 address his second assignment of error, in which he contends that the trial court erred
6 when it ordered him to pay \$510 in attorney fees. According to defendant, there was no
7 evidence of his ability to pay the fees, which were not mentioned at sentencing. *See* ORS
8 151.505(3) (a court may not order a defendant to pay fees unless the defendant "is or may
9 be able" to pay them); ORS 161.665(4) (same); *see also State v. Pendergraph*, 251 Or
10 App 630, 634, 284 P3d 573 (2012) ("[A] court cannot impose attorney fees based on a
11 record that is silent regarding the defendant's ability to pay those fees."); *State v. Kanuch*,
12 231 Or App 20, 24, 217 P3d 1082 (2009) (the state bears the burden of proving that a
13 defendant is or may be able to pay fees). The state acknowledges that, in this case,
14 defendant had no ability to object to the court's imposition of attorney fees and concedes
15 that the court erred in imposing those fees in the absence of any evidence in the record of
16 defendant's ability to pay them. We agree, and accept the state's concession.

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