No. 45883-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CANDACE RALSTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 6

1. The trial court imposed an excessive sentence on Ms. Ralston and her sentence must be reversed and her case remanded for resentencing. 6

   a. When a sentence is clearly excessive, it must be reversed. 6

   b. Ms. Ralston's sentence was clearly excessive and must be reversed 9

2. The fees imposed against Ms. Ralston must be stricken and the case remanded because the court failed to consider Ms. Ralston's financial resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3) 12

   a. The court ordered Ms. Ralston to pay $39,211.85 in discretionary legal costs without finding she would have the ability to pay them. 12

   b. An illegal sentence may be challenged for the first time on appeal, and is ripe for review prior to the collection of legal fees 15

   c. Ms. Ralston's case must be remanded because the record does not show the trial court would have found the evidence established she had the ability to pay $39,211.85 in discretionary legal fees 16

E. CONCLUSION 18

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) 16

State v. Branch, 29 Wn.2d 635, 919 P.2d 1228 (1996) 10

State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) 16

State v. Ford, 137 Wn.2d 427, 973 P.2d 452 (1999) 15

State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986) 9

State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997) 16

State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995) 6, 7, 8, 12

Washington Court of Appeals Decisions

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011) 13

State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013) 15

State v. Haley, 140 Wn. App. 313, 165 P.3d 409 (2007) 8

State v. Knutz, 161 Wn. App. 395, 253 P.3d 436 (2011) 10

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) 16

State v. Ross, 71 Wn. App. 556, 861 P.2d 473 (1993) 7

State v. Serrano, 95 Wn. App. 700, 977 P.2d 47 (1999) 11

State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) 16

United States Supreme Court Decisions

North Carolina v. Alford, 500 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) 3

Washington Statutes

RCW 9.94A.535(3)(d) 3, 9

RCW 9.94A.585(4)(a) 6

RCW 9.94A.585(4)(b) 1, 7

RCW 10.01.160 ..... 12, 13

RCW 10.01.160(3) 1, 12, 14, 15, 16

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it imposed a sentence against Ms. Ralston that was clearly excessive.

2. The trial court violated RCW 10.01.160(3) when it imposed $39,211.85 in discretionary legal fees against Ms. Ralston without determining she had the ability, or likely future ability, to pay them.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RCW 9.94A.585(4)(b), a sentence should be reversed when it is clearly excessive. Ms. Ralston was convicted of one count of theft in the first degree and one count of forgery for stealing $213,581.15 from the resort where she was employed. Her standard sentencing range was 2-6 months and 0-90 days, respectively. The trial court imposed a sentence of 96 months incarceration, a significantly longer sentence than typically given for property crimes involving greater losses. Did the trial court abuse its discretion given that this sentence was clearly excessive?

2. Pursuant to RCW 10.01.160(3), a court may not impose legal costs unless it finds the defendant is or will be able to pay them. The trial court imposed $39,211.85 in discretionary legal fees, despite accepting that Ms. Ralston would be unlikely to pay enough money

toward the fees each month to cover even the accruing interest. Must this order be stricken and Ms. Ralston's case be remanded because the trial court failed to comply with the statute when imposing these exorbitant costs?

C. STATEMENT OF THE CASE

Candace Ralston was employed at Alderbrook Resort & Spa ("Alderbrook") for several years. RP 206; CP 21. From November 2009 to April 2011, Ms. Ralston worked in Alderbrook's accounting department, first as an assistant and later as the accounting program manager. RP 206; CP 21. The State alleged Ms. Ralston stole $213,581.15 from the resort while working in the accounting department. RP 251. It claimed she took over $190,000 in cash and the remaining amount in forged checks.

According to the State, Ms. Ralston was able to do this because the bank was conveniently located along her route home from work and as a result, she was typically responsible for making the resort's cash deposits at the bank. RP 206. The State claimed that before making a deposit Ms. Ralston routinely took some of the cash and rewrote the deposit slip. RP 221. She accounted for the discrepancies with false debits to Alderbrook's gift card account. RP 221.

Jan Miser, the head of Human Resources, was the only Alderbrook employee authorized to sign checks for the resort. RP 209. According to the testimony proffered by the State, Ms. Miser examined the invoices attached to the checks carefully but paid little attention to the checks that were written out for her signature by the accounting department. RP 211. This allowed Ms. Ralston to obtain two signed checks for her son's soccer team and one check for a timeshare drawn on Alderbrook's accounts. RP 207, 211. Ms. Ralston then forged Ms. Miser's name on checks for legitimate Alderbrook expenses in order to cover her actions. RP 212-13.

The State amended the information against Ms. Ralston five times. RP 67. The fourth amended information charged Ms. Ralston with one count of first degree theft and three counts of forgery. CP 118. Ms. Ralston submitted an Alford plea, denying she committed the crimes alleged but agreeing there was sufficient evidence for a jury to convict her.[1] RP 204; CP 64. She also stipulated that there was sufficient evidence to support the aggravating factor that her actions constituted a major economic offense.[2] RP 205; CP 65. In exchange

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[1] North Carolina v. Alford, 500 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

[2] RCW 9.94A.535(3)(d)

for her change of plea, the State dropped two of the forgery charges against her in a fifth amended information, leaving one count of first degree theft and one count of forgery. RP 205; CP 64, 67.

Given Ms. Ralston's offender score of 1, the standard range for the theft charge was 2 to 6 months, and the standard range for the forgery charge was 0 to 90 days. CP 58. No agreement was reached between the parties regarding the State's recommendation. The State merely indicated it would ask for an exceptional sentence. CP 60.

The trial court reviewed impact statements from the State's witnesses in preparation for sentencing and permitted three witnesses to speak at the sentencing hearing: (1) Brian McGinnis, the Alderbrook owners' representative; (2) Sarah Delgado, a staff accountant who assisted Ms. Ralston at Alderbrook; and (3) Tammy Kessler, a representative from "West Sound FC soccer team." RP 242, 244, 246. Mr. McGinnis discussed the time and resources expended by Alderbrook to assist the State in prosecuting the case, the negative media attention that resulted, and the "very bad feeling" he had after finding out about the theft. RP 242-43. Ms. Delgado explained in detail the impact the case had on her professionally and personally. RP 244-46. Although the court later indicated it did not consider any

alleged theft against the soccer team, it permitted Ms. Kessler to discuss how Ms. Ralston "took advantage" of the boys on the team, including Ms. Ralston's own sons, who were members. RP 247, 271. Ms. Kessler acknowledged all of the funds allegedly taken from the soccer team had been returned, but insisted that "somebody that has that type of attitude, especially taking children's money, should receive a really strong sentence so to get the – you know, that they know that they can't do that to a minor." RP 247.

After listening to these witnesses at length, the court denied Ms. Ralston's request to have her mother speak at sentencing. RP 259. The trial court and Ms. Ralston's counsel engaged in the following exchange:

> THE COURT: While the State has the statutory allowance for victims to speak, there is nothing similar with respect to defendants.
>
> [DEFENSE COUNSEL]: Well, two people presented evidence who were not victims.
>
> THE COURT: And I heard no objection.

RP 259. Despite the court's reasoning, the State had offered no objection to Ms. Ralston's mother addressing the court, but the trial court nonetheless denied the defense's request to have her speak. Id.

The State recommended nine years on the theft charge and four years on the forgery charge, deferring to the court as to whether they should run concurrently or consecutively. RP 258. The trial court imposed 96 months on the theft charge and 36 months on the forgery charge, to run concurrently. RP 272. It also required Ms. Ralston to pay restitution, with the specific amount to be set at a later date after a hearing. RP 272. Finally, despite determining Ms. Ralston would only be able to pay back any legal fees at a rate of $25 per month, it ultimately imposed a total of $39,811.85 in legal costs, which included $39,211.85 in discretionary fees. RP 272-73; CP 12-13; Supp CP __ (Order Re Costs, January 23, 2014, sub no. 264).

D. ARGUMENT

1. **The trial court imposed an excessive sentence on Ms. Ralston and her sentence must be reversed and her case remanded for resentencing.**

a. When a sentence is clearly excessive, it must be reversed.

Appellate review of a defendant's sentence is dictated by statute. State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). When the trial court orders an exceptional sentence, that sentence must be reversed if the reasons are not supported by the record or if they do not justify the sentence. Id.; RCW 9.94A.585(4)(a). If support can be found in the

record, then the sentence must be reversed if it "was clearly too excessive or clearly too lenient." Ritchie, 126 Wn.2d at 392; RCW 9.94A.585(4)(b).

The trial court's imposition of an exceptional sentence is reviewed for an abuse of discretion. Ritchie, 126 Wn.2d at 392. The trial court abuses its discretion when the sentence is based on untenable grounds or for untenable reasons, or takes action that no reasonable person would have taken. Id. at 393. When the length of the sentence is so long that it "shocks the conscience of the reviewing court," the trial court has acted in a way that no reasonable person would, and has therefore abused its discretion. Ritchie, 126 Wn.2d at 396 (quoting State v. Ross, 71 Wn. App. 556, 573, 861 P.2d 473 (1993)).

In Ritchie, the court examined the sentences of three defendants. 126 Wn.2d at 398-404. The first defendant severely beat and attempted to rape an elderly woman with Alzheimer's before killing her. Id. at 398. The trial court imposed a sentence less than three times the top of the defendant's standard range. Id. at 399 (standard range was 240 to 320 months, the court sentenced defendant to 900 months). The second defendant raped a six-week-old baby girl, causing severe injury to the newborn that resulted in surgery and hospitalization. Id. at 400-01.

The trial court imposed a sentence of incarceration approximately four and a half times the top of the defendant's standard range, with additional community custody time. Id. at 401 (standard range was 51 to 68 months and the court imposed 312 months). The third defendant was convicted of breaking a 20-month-old boy's arms and legs, and evidence at trial suggested he had systematically tortured the children in his care, including repeatedly suffocating, and then resuscitating, the boy's younger sister. Id. at 402-03. The trial court imposed a sentence approximately nine times the top of the defendant's standard range. Id. at 404 (standard range was 3 to 9 months and the court imposed 84 months).

The Ritchie court affirmed all of the defendants' sentences, finding none shocked the conscience. Id. at 404. In each case, the defendant had engaged in incredibly brutal acts against a particularly vulnerable victim, and the sentences imposed were three to nine times the top of the standard range. Cases following Ritchie have shown such sentences are common when the facts are similarly egregious. See e.g. State v. Haley, 140 Wn. App. 313, 325, 165 P.3d 409 (2007) (defendant sentenced to less than 5 times the top of the standard range after raping a three-year-old). In contrast, Ms. Ralston committed a

property crime against a corporation, and was sentenced to a period of incarceration sixteen times the top of her standard range. RP 272; CP 58.

b. Ms. Ralston's sentence was clearly excessive and must be reversed.

Property crimes are, of course, subject to exceptional sentences. The legislature's intent that property crimes involving multiple acts or victims, resulting in a loss substantially greater than typical for the offense, occurring over a long period of time, or committed while in a position of trust, be punished more severely is evident from the plain language of RCW 9.94A.535(3)(d). However, where the trial court properly acted within its authority to impose an exceptional sentence, that sentence may still be unlawfully excessive. Prior cases involving the imposition of exceptional sentences for property crimes, in which the courts did not find the defendant's sentence was excessive, demonstrate that Ms. Ralston's sentence was harsher than the typical exceptional sentence.

In State v. Oxborrow, the defendant created an elaborate pyramid scheme, in which he defrauded investors of over $58 million. 106 Wn.2d 525, 526-27, 723 P.2d 1123 (1986). Of the amount stolen,

$13 million was never returned. Id. at 527. Losses to individuals were as high as $2.4 million and over 500 of the investors lost everything. Id. at 527. Given that the theft occurred in the early 1980s, these numbers are even more striking if one accounts for inflation. The court upheld the defendant's exceptional sentence, finding that 180 months, or 15 times the top of the standard range, was not clearly excessive given the enormity of the amount stolen. Id. at 534. In comparison, Ms. Ralston allegedly stole $213,581.15 approximately 30 years later, and received a sentence 16 times the top of her standard range.

In State v. Knutz, the defendant preyed on an elderly man living in an assisted living home, convincing her to give him $347,000 over the course of three years. 161 Wn. App. 395, 399, 253 P.3d 436 (2011). The trial court imposed an exceptional sentence of five years, which was only ten times the top of the standard range. In State v. Branch, the defendant stole from his own company. 129 Wn.2d 635, 639, 919 P.2d 1228 (1996). Although the defendant's sentence was 16 times the top of the standard range, it resulted in a sentence of 48 months for a theft of nearly $400,000, committed in 1996. Id. at 650. Again, the comparison is striking. The State alleged Ms. Ralston stole considerably less money but she was sentenced to a far longer period of

incarceration. The facts of Ms. Ralston's offense and the severity of the sentence imposed is easily distinguished from those cases in which this Court has found a sentence was not clearly excessive.

The State may highlight that Ms. Ralston, unlike some defendants, maintained her innocence at sentencing despite her plea of guilty, but a court may not consider a defendant's professed innocence when imposing an exceptional sentence. State v. Serrano, 95 Wn. App. 700, 709, 977 P.2d 47 (1999). Thus, the court should not have considered that factor when imposing sentence.

It is unclear, however, what the court did choose to consider. It refused to hear from Ms. Ralston's only sentencing witness despite hearing from multiple State witnesses, including one who was clearly confused about the basis for the charges against Ms. Ralston and discussed issues the court later determined were improper considerations at sentencing. RP 247, 271. Although the court pointed to the fact Ms. Ralston failed to object to these witnesses, the State similarly had made no objection. RP 259. Thus, the court's decision appeared arbitrary and biased against Ms. Ralston. The court's subsequent imposition of a 96-month sentence was shocking in light of the facts of the case and Ms. Ralston's offender score. The sentence

was clearly excessive and an abuse of discretion. It must be reversed and the case remanded for resentencing. Ritchie, 126 Wn.2d at 392.

2. **The fees imposed against Ms. Ralston must be stricken and the case remanded because the court failed to consider Ms. Ralston's financial resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3).**

   a. The court ordered Ms. Ralston to pay $39,211.85 in discretionary legal costs without finding she would have the ability to pay them.

Under RCW 10.01.160, a court may order a defendant to pay legal fees, but it "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." In determining the amount of the fees, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." At sentencing, the trial court ordered Ms. Ralston to pay $5,678 in legal costs, which included discretionary costs of $200 for a filing fee and $4,878 for sheriff service fees. CP 12. It later imposed an additional $34,133.85 in defense costs, including fees for the court appointed attorney and defense expert for a total of $39,211.85 in discretionary fees. Supp CP __ (Order Re Costs, January 23, 2014, sub no. 264).

Formal findings supporting the trial court's decision to impose legal fees under RCW 10.01.160 are not required, but the record must minimally establish that the sentencing judge actually considered the defendant's individual financial circumstances and made an individualized determination she has the ability, or likely future ability, to pay. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). In this case, boilerplate language in the Judgment and Sentence stated:

> The court has considered the total amount owing, the defendant's 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.

CP 9. However, nothing in the record suggests that the court actually considered Ms. Ralston's financial circumstances before imposing the costs, or determined it was likely Ms. Ralston would ever be able to pay the $39,211.85 of discretionary costs imposed.

Instead, the court imposed the costs, and then questioned defense counsel about what kind of payment schedule Ms. Ralston would require, given her limited means. RP 272-72. The court engaged in the following exchange with defense counsel:

> THE COURT: The court costs will include the filing fee of $200.00; sheriff's return on service,

> which at this point, I believe, totals $4,878.50. The Court will also require that you reimburse the County for the cost of court-appointed counsel as well as the cost of defense experts. Additionally, $500.00 to the crime victims compensation fund; $100.00 to the DNA fund.
>
> The Court will require that, if these monies are not paid in full, that there be monthly payments toward the legal financial obligation. And Mr. Cordes, what type of employment and monthly income do you anticipate your client would be having after her release, which is when the payments are required to start?
>
> [DEFENSE COUNSEL]: Given her background, Your Honor, and the conviction, I don't have any idea. I mean, she's probably not going to get any type of employment that she's previously had, so my guess is that if she gets employment it's going to be on the low end somewhere.
>
> THE COURT: Well, the Court at this time will set minimum monthly payments of $25.00 per month. Obviously, that isn't going to be enough to even cover the interest that accrues at twelve percent per annum.

RP 272-73.

Thus, in direct violation of RCW 10.01.160(3), the trial court ordered the costs before giving any consideration to whether Ms. Ralston would be able to pay them. In fact, after issuing the order the trial court acknowledged Ms. Ralston was unlikely to ever have the ability to pay the costs in full, and set a low minimum monthly

payment in recognition of her inability to pay the fees after her release. RP 273; CP 13. As the court noted, because Ms. Ralston would be capable of paying so little, her payments on the ordered costs would not "even cover the interest that accrues at twelve percent per annum." RP 273.

b. An illegal sentence may be challenged for the first time on appeal, and is ripe for review prior to the collection of legal fees.

Ms. Ralston did not object to the imposition of these fees. This Court indicated in State v. Blazina that it may decline to consider a challenge to costs raised for the first time on appeal, despite addressing this issue in past cases. 174 Wn. App. 906, 911, 301 P.3d 492 (2013), rev. granted 178 Wn.2d 1010 (2013). However, it is well established that an illegal or erroneous sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999). The imposition of $39,211.85 in discretionary fees was an unlawful sentencing order.

In addition, while this Court has previously suggested legal costs may be challenged only after the State seeks to enforce the order, those cases did not address the validity of an order that failed to comply with RCW 10.01.160(3). See e.g. State v. Lundy, 176 Wn. App. 96,

107, 308 P.3d 755 (2013); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003). A claim is fit for judicial determination "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). This order meets all of these requirements. The court's failure to comply with RCW 10.01.160(3) is a legal issue fully supported by the record. Although Ms. Ralston could later seek to modify the court's order, that fact does not change the finality of the original sentencing order. Ms. Ralston is entitled to review of the unlawful order of costs imposed by the trial court.

c. Ms. Ralston's case must be remanded because the record does not show the trial court would have found the evidence established she had the ability to pay $39,211.85 in discretionary legal fees.

Remand is the appropriate remedy when the trial court fails to comply with a sentencing statute unless the record clearly indicates the court would have imposed the same condition regardless. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). Here, the record does not show the evidence supported a finding that Ms. Ralston had the ability, or likely future ability, to pay $39,211.85 in discretionary legal

fees. When the court inquired about Ms. Ralston's ability to make payments, it accepted defense counsel's representation that Ms. Ralston was unlikely to find lucrative employment given her convictions and lengthy prison sentence, and set the monthly payments so low that they will not even cover the accruing interest. RP 273; CP 13.

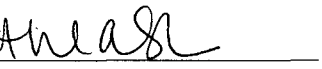
In addition, the court noted Ms. Ralston would be required to pay back the amount taken from the resort, which totaled over $200,000 and further burdens Ms. Ralston's ability to pay the discretionary legal fees. RP 272. Because the evidence showed that, in fact, Ms. Ralston would not have the future ability to pay the costs imposed, the order must be stricken and the case remanded.

E. CONCLUSION

For the reasons above this Court should reverse Ms. Ralston's sentence and remand the case for resentencing.

DATED this 22nd day of August, 2014.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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	)	
Respondent,	)	
	)	NO. 45883-7-II
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	)	
CANDACE RALSTON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF AUGUST, 2014.

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