No. 46350-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEE FLOYD,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY,
No. 10-1-00019-6

The Honorable Frank Cuthbertson, Judge

OPENING BRIEF OF APPELLANT

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON COURT OF APPEALS

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENT OF ERROR

The resentencing court acted without statutory authority in ordering forfeiture of property.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A sentencing court is limited to imposing only those sentences supported by statute. Did the trial court act outside its statutory authority in ordering forfeiture of property as a condition of the sentences even though there was no statute authorizing such an order?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Thomas L. Floyd was charged by second amended information with second-degree assault and six counts of violation of a presentence no-contact order, all charged as "domestic violence" offenses. CP 9-12; RCW 9A.36.021(1)(a); RCW 10.99.020; RCW 26.50.110(1). He was convicted after a jury trial in 2011 and appealed. CP 324; see CP 349-75.

On December 17, 2013, this Court affirmed the convictions but remanded for resentencing. CP 349-75. After a continuance before the Honorable John A. McCarthy on February 7, 2014, on May 5, 2014, the Honorable Frank E. Cuthbertson imposed a standard range sentence based upon an offender score of "2." CP 376-89; SRP 1-24.[1]

Mr. Floyd appealed and this pleading follows. See CP 397.

2. Facts relevant to issues on appeal

Mr. Floyd's previous appeal from his convictions and sentences

[1]The verbatim report of proceedings consists of two volumes. The proceedings of February 7, 2014, will be referred to herein as "1RP." The proceedings of May 6, 2014, will be referred to as "SRP."

resulted in this Court's decision to vacate the sentences and remand for resentencing with a new offender score. At the hearing on remand, held May 5, 2014, the prosecutor presented "all new" sentencing paperwork to the judge, including a sentencing range calculated based on an offender score of "2." SRP 2, 8-9. Despite the change in offender score and the prosecutor's admission that the initial, much lengthier sentence had been calculated in error, the prosecutor asked the court to impose "basically the same amount of time in custody" that had been imposed before Floyd's successful first appeal. SRP 10-11. The prosecutor also asked the court to impose "[a]ll the other conditions of the sentence" the previous sentencing judge had imposed. SRP 12.

For his part, counsel agreed that the new, corrected offender score was a "2." SRP 16-17. He objected, however, to the prosecution's request for essentially the same sentence, noting that the original sentence had been imposed by a judge who thought an offender score of "4" was correct, but that had been found by the Court of Appeals to be wrong. SRP 16-17. That error in the offender score had informed the first judge's sentencing, and "makes a significant difference" to the determination of the appropriate sentence, counsel pointed out. SRP 17.

In imposing shorter sentences, the judge said nothing about ordering forfeiture of any property. SRP 20-21. However, the judgment and sentence ordered as a condition of the sentences, that Floyd "FORFEIT ITEMS SEIZED." CP 309.

D. ARGUMENT

THE LOWER COURT ERRED IN ORDERING FORFEITURE OF PROPERTY WITHOUT STATUTORY AUTHORITY

Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). As a result, in this state, a sentencing court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999).

For this reason, a sentencing court has no "inherent" authority to order specific conditions of a sentence and must instead have a statutory grant upon which to rely. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992). Further, the court must act within the confines of the authority it is granted. Id. When a sentencing acts outside its statutory authority, its action is void and the error may be raised for the first time on appeal. See State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002).

In reviewing whether the trial court acted without statutory authority in ordering forfeiture of property as part of a judgment and sentence, this Court applies de novo review. State v. Roberts, __ Wn. App. __, 39 P.3d 955 (2014 WL 7185111) (12/17/14).

On such review in this case, this Court should hold that the lower court acted without statutory authority in ordering, as a condition of the sentence, that Floyd must "FORFEIT ITEMS SEIZED." See CP 309.

"Forfeitures are not favored." City of Walla Walla v. $401.333.44,

164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). Further, there is no "inherent" authority to order forfeitures, which must instead by authorized wholly by statute. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 856387 (1997), review denied, 134 Wn.2d 1016 (1998).

Put another way, a trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. Alaway, 64 Wn. App. at 800-801. And this is true even when a defendant is accused or convicted of a crime. Id. As this Court noted in Alaway, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866.

Here, there was no discussion whatsoever of any statutory authority to order forfeiture of any items below. See SRP 1-24. But there was no statutory authority to support it. Even a cursory examination of the law proves this point. While RCW 10.105.010 authorizes law enforcement agencies to seize and forfeit certain items used in relation to or traceable in specific ways to the commission of a felony, the statutory requirements for those forfeitures were not followed here. The seizing agency - here, the police - must serve proper notice on all persons with a known right or interest in the property, who then have a right to a hearing where they can attempt to establish an ownership right. RCW 10.105.010(3), (4) and (5).

The forfeiture proceedings are held as a **separate civil matter**, with the deciding authority **not** the superior court. RCW 10.105.010(6). RCW 10.105.010 thus does not support the sentencing court taking the step of ordering, as a condition of a sentence in a criminal case, the forfeiture of property without following any of the requirements of the statute for notice, proof, a possible hearing, etc.

Other forfeiture statutes similarly authorize a law enforcement agency - rather than the sentencing court - to conduct forfeiture proceedings for property in relation to certain crimes. RCW 69.50.505 governs forfeitures related to controlled substances, allowing forfeiture of controlled substances, raw materials for such substances, properties used as containers for them, and other conveyances and items used in drug crimes. To have that authority, however, the "law enforcement agency" seeking the seizure has to provide notice of intent of forfeiture on anyone with known rights or interests in the property, who then have an opportunity to be heard, often at a civil hearing "before the chief law enforcement officer of the seizing agency," or, if the person exercises the right of removal, may be in a court of competent jurisdiction under civil procedure rules, at which the law enforcement agency must establish that the property is subject to forfeiture. See RCW 69.50.505; Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Other forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, **in separate civil proceedings**, that property should be forfeited as a result of its relation to a crime. RCW 9A.83.030 governs forfeitures associated with money laundering and required that the attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, provide notice to all persons with known rights, and gives the person affected the right to a hearing under the same circumstances as in drug forfeiture cases and other rights, prior to forfeiture occurring. RCW 9.46.231 governs forfeitures associated with gambling laws, requiring notice within 15 days of the seizure to any with a known right or interest, the right to a hearing, the right to removal in certain cases, the right to appeal, and the concomitant right of the state and agency to reap financial benefits from selling the items seized, in various iterations. And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving the person when the item is seized with a written inventory and information on how to get their property back if they believe their property was improperly seized under the warrant. But that rule is limited to items *illegally* seized and deemed "(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]"

None of these statutes or rules provides any authority for a

sentencing court in a criminal case to order forfeiture of the property of a defendant seized by police based solely upon his criminal conviction without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had "inherent power to order how property used in criminal activity should be disposed of").

Further, as this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead, this Court declared, "the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction, as it was here. And indeed, to the extent that the trial court may have assumed it had authority to order the forfeiture based solely upon the fact that Mr. Floyd was convicted of a crime, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture.

In State v. Roberts, __ Wn. App. __, 339 P.3d 955 (2014 WL 7185111), supra, this Court recently addressed the same issue in a case from the same lower court as here, Pierce County Superior Court. In that case, the judge ordered forfeiture of property as part of a judgment and sentence, with nary a citation to statute in support. This Court held that "the trial court acted without statutory authority when it ordered forfeiture of property in law enforcement's possession." Further, it clarified the broad language of a previous case, State v. McWilliams, 177 Wn. App. 139, 311 P.3d 584 (2013), review denied, 179 Wn.2d 1020 (2014), noting that, in that case, the defendant had apparently not argued that the trial court did not have statutory authority to order forfeiture but instead had argued that the court exceeded its authority in ordering forfeiture without due process. Roberts, supra. The Court made it clear that, in McWilliams, it had not held that a court could order forfeiture absent a statute authorizing such an order. Roberts, supra. Just as in Roberts, here, the forfeiture condition was not statutorily authorized and must be stricken.

E. CONCLUSION

For the reasons stated herein, this Court should strike the order of forfeiture, as it was imposed without statutory authority.

DATED this 17th day of February, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at pcpatcecf@co.pierce.wa.us, and to Thomas Floyd, 8539 Zircon Dr. S.W. Unit 78, Lakewood, WA. 98498-5112.

DATED this 17th day of February, 2015.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

RUSSELL SELK LAW OFFICES

February 17, 2015 - 8:06 AM

Transmittal Letter

Document Uploaded: 1-463504-Appellant's Brief.pdf

Case Name: State v. Floyd
Court of Appeals Case Number: 46350-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: K A Russell Selk - Email: karsdroit@aol.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us