No. 32696-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JONATHAN KUHLMAN,

Defendant/Appellant.

Appellant's Brief (Amended)

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in computing the offender score for second degree rape by counting as sex offenses two other current offenses of distribution of a controlled substance to a person under the age of 18 with sexual motivation.

2. The record does not support the finding Mr. Kuhlman has the current or future ability to pay the imposed legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are RCW 9.94A.835 (1) and (2) ambiguous? If so, should the finding of sexual motivation by special verdict be stricken and the offender score and sentence reduced accordingly?

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

C. STATEMENT OF THE CASE

Johnathan Kuhlman was convicted by a jury of second degree rape, communication with a minor for immoral purposes, and two counts of distribution of a controlled substance to a person under the age of 18. CP

50-54. The jury found by special verdict that the latter two counts occurred with sexual motivation. CP 55-56.

The Court sentenced Mr. Kuhlman to a minimum sentence of 246 months on the most serious charge of second degree rape, which included the special verdict enhancements of sexual motivation from the two counts of distribution of a controlled substance to a person under the age of 18. CP 63. Calculation of the offender score on the second degree rape conviction included counting the two counts of distribution of a controlled substance to a person under the age of 18 with sexual motivation as three points each for being other current sex offenses. CP 59-60; 8/5/14 RP 6-7.

The sentencing court imposed discretionary costs of $1156 and mandatory costs of $800[1], for a total Legal Financial Obligation (LFO) of $1956. CP 61, 71. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760) The court has considered the total amount owing, the defendant's past, 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 60.

[1] $500 Victim Assessment, $200 criminal filing and $100 DNA fee. CP 61, 71.

The Court did not inquire into Mr. Kuhlman's financial resources or consider the burden payment of LFOs would impose on him. 8/5/14 RP 2-28.

This appeal followed. CP 72-73.

D. ARGUMENT

1. Since RCW 9.94A.835 (1) and (2) are ambiguous, the finding of sexual motivation by special verdict should be stricken and the offender score and sentence reduced accordingly.

A sentence imposed contrary to the law may be raised for the first time on appeal. *State v. Anderson,* 58 Wn.App. 107, 110, 791 P.2d 547 (1990). On appeal, a defendant may challenge a sentence imposed in excess of statutory authority because "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002). "Questions of statutory interpretation are questions of law subject to de novo review." *State v. Franklin,* 172 Wn.2d 831, 835, 263 P.3d 585 (2011).

When interpreting the meaning and purpose of a statute, the objective of the court is to determine the intent of the legislature. *State v. Jones,* 172 Wn.2d 236, 242, 257 P.3d 616 (2011) (quoting *State v. Jacobs,*

154 Wn.2d 596, 600, 115 P.3d 283 (2005)). Effect is to be given to the plain meaning of the statute when the plain meaning can be determined from the text of the statute. *Id.* The statute is to be read as a whole, with consideration given to all statutory provisions in relation to one another and with each provision given effect. *State v. Merritt,* 91 Wn.App. 969, 973, 961 P.2d 958 (1998).

If the plain words of a statute are unambiguous, the court need not inquire further. *State v. Gonzalez,* 168 Wash.2d 256, 263, 226 P.3d 131 (2010). But if the language is ambiguous, the rule of lenity applies and requires the statute to be interpreted in the defendant's favor unless there is legislative intent to the contrary. *Jacobs,* 154 Wash.2d at 601, 115 P.3d 281. A statute that is inconsistent with its own terms is ambiguous. *State v. Hennings*, 129 Wash.2d 512, 522, 919 P.2d 580 (1996).

RCW 9.94A.835 provides in pertinent part:

> (1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, *other than sex offenses as defined in RCW 9.94A.030* when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.
>
> (2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused

> committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. *This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.*

RCW 9.94A.835(1) and (2) (emphasis added).

RCW 9.94A.030(46) defines "sex offense" to include "A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135." RCW 9.94A.030(46)(c).

9.94A.835(1) clearly excludes "sex offenses" defined in 9.94A.030 as offenses where a prosecutor "shall file a special allegation of sexual motivation." Yet 9.94A.030 defines felonies with a finding of sexual motivation as "sex offenses." Thus, any felony becomes a "sex offense" once a prosecutor files a special allegation of sexual motivation, which then excludes it as an offense where a special allegation of sexual motivation may be filed. If this sounds confusing it is because RCW 9.94A.835 (1) is inconsistent with its own terms. A statute that is inconsistent with its own terms is ambiguous. *Hennings,* supra.

RCW 9.94A.835(2) is likewise ambiguous because it also excludes "sex offenses" defined in 9.94A.030 as offenses where the factfinder shall make a finding of sexual motivation.

Since RCW 9.94A.835(1) and (2) are ambiguous, the rule of lenity applies and the statute must be interpreted in the defendant's favor unless there is legislative intent to the contrary, which does not appear to be the case. *Jacobs*, supra. Therefore, the finding of sexual motivation by special verdict should be stricken and the offender score reduced accordingly.

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

Mr. Kuhlman did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Moreover, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal. *State v. Blazina*, __Wn.2d__, 344 P.3d 680 (March 12, 2015). The individual courts of appeal may exercise discretion whether to accept review of this issue, but the *Blazina* Court opted to accept review because, "We thought it justifiable to review these challenges raised for the first time on appeal because the error, if permitted to stand, would create inconsistent

sentences for the same crime and because some defendants would receive unjust punishment simply because his or her attorney failed to object." *Blazina*, 344 P.3d at 683.

Here, there is insufficient evidence to support the trial court's finding that Mr. Kuhlman has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3)

requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id*. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id*.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id*. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id*. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id*.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915-16.

Here, there is insufficient evidence to support the trial court's finding that Mr. Kuhlman has the present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be

sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Kuhlman's financial resources and the potential burden of imposing LFOs on him. The record contains no evidence to support the trial court's finding that he has the present or future ability to pay LFOs. 8/5/14 RP 2-28.

Since the finding that Mr. Kuhlman has the present or future ability to pay LFOs is simply not supported by the record, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Kuhlman 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

E. CONCLUSION

For the reasons stated the matter should be remanded to strike the special verdicts, reduce the sentence accordingly, and to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

Respectfully submitted April 16, 2015.

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s/David N. Gasch
Attorney for Appellant
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on April 16, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the amended brief of appellant:

Jonathan E. Kuhlman
#801090
1313 N. 13th Ave
Walla Walla, WA 99362

E-mail: prosecuting@co.benton.wa.us
Andrew Miller
Anita Petra
Benton County Prosecutor

_____

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com