

No. 66794-7-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**MARY KAY DYER, Appellant.**

FILED  
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STATE OF WASHINGTON  
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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether Dyer is entitled to be re-sentenced because the trial court was willing to give Dyer the opportunity to pay off restitution and consider reducing her 60 day standard range jail sentence to 30 days in jail if she could pay off her \$15,000 restitution debt from the sale of a home she allegedly had a financial interest in .

**C. FACTS**

Mary Kay Dyer was charged with one count of first degree theft pursuant to RCW 9A.56.030(1)(a), RCW 9A.56.020(1)(b) and one count of making a false statement to an officer pursuant to RCW 9A.76.175. CP 67-68. Dyer was charged after authorities determined she had given her son, Christopher Cousins, the keys to her Chevy Blazer in order to destroy it for insurance purposes. 11/29/10 RP 106, 111. Cousins took the Blazer to a rural area and set fire to it. *Id.* at 109. After the Blazer was destroyed, Dyer claimed it had been stolen and filed a stolen vehicle report with law enforcement. *Id.* at 139. Dyer thereafter filed an insurance claim and collected approximately \$14,594.83 from her insurance company. *Id.* at 101-02. Following a jury trial, Dyer was convicted of first degree theft of the insurance proceeds and false reporting, as charged. CP 15-23.

On January 6<sup>th</sup> 2011 the matter came on for sentencing. 1/6/11 RP

2. Dyer faced up to 365 days in jail on the making a false statement offense and a standard range sentence of 0-90 days for her theft conviction. Id at 3-4. The deputy prosecutor requested a 60 day sentence, in addition to court costs, fees and restitution. Id. at 4. Dyer requested a 30 day jail sentence. Id. The Court inquired if “there had been any return of any funds that were taken from the insurance company.” Id. at 5. Dyer’s attorney explained that she did not have the means to make any immediate payment. Id. The Court then asked what happened to the \$14,000 and was informed that Dyer had paid bills, bought herself a car and that she currently was not working. 1/6/11 RP 6. The Court thereafter orally pronounced it would follow the prosecutor’s recommendation stating:

I can’t justify anything less than what the prosecutor is recommending. Like I say, \$14,000 for a month in jail, I’ll bet you 80 percent of the population out there if you said hey, would you go sit in jail for 60 days for \$15,000, they would jump at the opportunity. In fact, I am surprised that the State’s recommending as little as they are. First offense or not. That’s a large sum of money. I am going to accept the state’s recommendation and I’m going to impose the sentence that’s recommended by the state. I’m going to sentence you to 365 days with 305 days suspended as the false statement. On the theft in the first degree I will sentence you to 60 days in the Whatcom County jail. I’m going to order the restitution, the \$15,044.83. I will have the standard monetary obligations and the \$500.00 fine.

1/6/11 RP 8. The Court then explained Dyer that when she gets out and gets employed, she would need to make payments on restitution owed. Id. at 9. He warned that if she gets out, has the ability to pay because of income and doesn't she will face jail time. Id. Dyer then explained she understood and that she was hoping to use funds from the sale of a home she owned on Oregon with her ex-husband to pay off restitution owed. Id.

The trial court then stated that if Dyer were to make restitution, he would be willing to reconsider and order 30 days in jail. Id. at 11. Dyer's attorney then requested to continue sentencing 60 days, representing to the court that Dyer could get the restitution paid off in that period of time. Id. The Court thereafter gave Dyer the option of implementing her sentence immediately or waiting 30 days to give her the opportunity to pay restitution owed and have the court reconsider its initial 60 day sentence. Dyer then requested sentencing be set over 30 days to give her the opportunity to pay restitution from her interest in her Oregon home. Id. at 11. The court then reset sentencing at the defendant's request for 30 days advising Dyer that he would reconsider sentencing and impose 30 days in jail if she could in fact make restitution. 1/6/11 at 11.

On February 10<sup>th</sup>, 2011 Dyer was on for imposition of her sentence. 2/10/11 at 13. Dyer requested another continuance explaining that funds from the sale of her Oregon house was not likely going to occur any time soon but that she had additional funding resources she thought she could obtain funds from. 2/10/11 at 13. Dyer also requested additional time because she asserted she was suffering from a carotid artery aneurism that she needed an ultrasound and medical treatment for. Id. at 14. Dyer's attorney also stated that even a two week continuance could provide Dyer "the opportunity to make restitution." Id. at 17. The deputy prosecutor's position was "we are just delaying the inevitable." 2/10/11 at 17. The Court then stated:

I'm going to abide by me earlier statements at the earlier hearing and I do sentence the defendant to serve a term of 60 days with the other standard terms and conditions. Restitution, if it's not agreed upon, at least in the amount, to be determined by the court.

Id at 19.

Dyer now timely appeals the trial court's consideration, prior to implementation of her sentence, of Dyer's ability to pay restitution. CP 4-14.

**D. ARGUMENT**

- 1. Dyer cannot appeal her standard range sentence where the record reflects the trial court did not violate her due process rights in imposing a 60 day standard range sentence that the court intended to impose whether or not restitution was paid.**

Dyer contends the trial court's imposition of a standard range 60 day sentence violated her right to due process of law under the state and federal constitutions. Br. of App. at 1. Specifically, Dyer contends the trial court imprisoned Dyer for an additional thirty days in jail within the standard range because she could not pay \$15,000 in restitution. A careful review of the record however, demonstrates the trial court did not increase Dyer's sentence or imprison her because of her failure to pay restitution. Dyer's appeal should be rejected.

The Sentencing Reform Act clearly states that a "sentence within the standard range for the offense shall not be appealed." RCW 9.94A.585(1). In State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, *cert .denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986), our State Supreme Court affirmed this principle, holding challenges to the amount of time given within the correct standard range are precluded because the trial court has the authority to impose any sentence within the standard range that it deems appropriate. *Id* at 182. A

trial court's decision regarding the length of a sentence within the standard range is not appealable because "as a matter of law there can be no abuse of discretion." State v. Ammons, at 183; *see also*, State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993).

A sentencing judge has broad discretion pursuant to the Sentencing Reform Act in imposing any sentence within the statutory limits. State v. Herzog, 112 Wn.2d 419, 771 P.2d 739 (1989). The trial court considers risk assessments and presentence reports, victim impact statements, criminal history and allows argument from the prosecutor, defense counsel, the defendant, victims and law enforcement before imposing sentence. RCW 9.94A.500. Under the SRA, a trial judge may rely on facts that are admitted, proved or acknowledged to determine "any sentence" within the standard range. RCW 9.94A.530(2). When a defendant raises a timely and specific objection to sentencing facts being considered, the court must either not consider the fact or hold an evidentiary hearing. *Id.*

Standard range sentences obtained from constitutional error, procedural error, an error of law or the trial court's failure to exercise discretion however, may be reviewable on appeal. State v. Herzog, 112 Wn.2d at 423; State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183

(2005). In State v. Standefer, 79 Wn.App. 178, 181, 900 P.2d 1132

(1995), for example the defendant challenged his standard range sentence asserting the trial court impermissibly imposed the high end of the standard range merely to punish him for exercising his right a jury trial.

At issue were the sentencing court's following comments at sentencing::

I frequently...in sentencing within the standard range give a defendant more or less lenient sentence if the defendant has entered a plea of guilty. And the predominant reason I do that, not because I'm trying to be nice to a defendant, but I know that defendants who do enter pleas of guilty, in cases of this nature, it saves the parent and the child a lot of grief, in that they don't have to go through this experience , this heart rendering experience in the courtroom in having a poor little girl testify in front of a whole bunch of strangers about what happened to her.

Mr. Sandefer if you entered a plea of guilty, I very possibly would have given you a more lenient sentence towards the lower end to he range, because of saving the victim being victimized by going through this court process. You didn't, and I'm not going to give you that break.

Standefer, 70 Wn.App. at 180.

This Court permitted review of Standefer's standard range sentence predicated on Standefer's allegations that the sentencing court imposed his standard range sentence on constitutionally impermissible grounds but found these comments in context did not indicate the sentencing court had improperly penalized the defendant for exercising his right to stand trial. Instead, the trial court determined these comments were instead a fair

response to the defendant's objection to the state's recommendation for an exceptional sentence and his request for a lower standard range sentence. Id at 179-80.

Similar in Standefer, Dyers standard range sentence may be reviewable to the extent she asserts her sentence was predicated on impermissible constitutional grounds. Specifically, that the trial court imprisoned her for an additional 30 days in jail because she was not able to pay restitution in violation of due process and Article 1, section 17 of the Washington State Constitution which prohibits imprisonment for debt. Nothing in the record below however, evidences the trial court actually penalized or gave Dyer additional jail time for this impermissible basis.

The trial court, contrary to Dyer's misrepresentations, initially determined Dyer was to serve a sixty-day standard range sentence-not thirty- after hearing argument from the state and Dyer regarding their sentencing recommendations. In fact, the court expressed surprise that the State had not sought more time given the nature of the crime and the amount of money fraudulently obtained by Dyer. RP 8. Only after the court announced Dyer's standard range sentence but before a judgment and sentence was filed, was there a discussion that ensued between the court and Dyer regarding paying off restitution. When Dyer indicated she

could pay restitution owed if given additional time, the court gave Dyer the option of proceeding with the imposition of her sentence or setting sentencing over thirty days in order to give her the opportunity to pay restitution. Dyer sought the continuance, understanding that if she could pay the restitution the court would *reconsider* its previous sentencing decision and sentence Dyer to thirty days in jail.

When Dyer appeared for sentencing a month later, she asked that sentencing be set over again for various reasons and explained that restitution had not been paid but that she was still looking into additional funding resources in hopes of paying it off. The trial court denied Dyer's request, reaffirmed its prior sentencing determination and imposed the sixty day standard range sentence. This record therefore reflects the trial court did not impermissibly increase or as Dyer had hoped, even decrease Dyer's sentence because of her ability or inability to pay restitution. The trial court therefore did not violate Dyer's right to due process of law at sentencing or the Washington State Constitutional prohibition against imprisonment for debt when it reaffirmed that it was sentencing Dyer to the 60 day standard range sentence. See, Br. of App. at 10. To the extent this Court construes that the trial court erred by setting sentencing over a month to give Dyer the opportunity to pay off restitution in order to reduce

her jail sentence from 60 to 30 days, Dyer invited the error. The invited error doctrine prohibits a party from creating an error, even constitutional error at trial and then complaining of it on appeal. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). This doctrine requires some affirmative, knowing, and voluntary action by the defendant that materially contributed to the error. In re Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). In this case, Dyer did not object when the trial court after initially sentencing her to 60 days in jail, offered to set over imposition of her sentence to allow Dyer the opportunity to pay off restitution. In fact, the record reflects Dyer, when given the option of having her sentence imposed immediately or setting formal imposition over, specifically affirmatively requested the opportunity for thirty additional days because she thought she could pay off restitution and Dyer wanted the court to reconsider its 60 day sentence if restitution were to be paid. Dyer should not now, for the first time on appeal, be able to assert the trial court erred given her affirmative request to the trial court for the opportunity to pay off restitution and obtain a 30 day jail sentence.

Finally, Dyer contends that if this Court finds error, her 60 day sentence should be reversed and the matter remanded for imposition of a

30-day sentence. Br. of App. at 10. Dyer states “If not for Ms. Dyer’s inability to pay restitution, the court would have sentenced her to 30 days.” Br. of App. at 10. The record belies Dyer’s representation. What the record clearly establishes is that the trial court intended to follow the state’s recommendation of a 60 day sentence and was only willing to reconsider and impose less time if restitution could be paid based on Dyer representations to the court-following the court’s initial pronouncement of her sentence, that she had means to pay off the restitution owed. 1/6/10 RP 11, 2/10/11 19. Remand for imposition of a thirty day sentence would not be appropriate under these circumstances. Remand for resentencing is the remedy unless the record clearly establishes the court would have imposed the same sentence notwithstanding the error. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). The record here demonstrates the trial court intended to impose a 60-day sentence notwithstanding whether restitution was or could be paid. Remand for resentencing is therefore not necessary. Dyer’s judgment and sentence should be affirmed.

**E. CONCLUSION**

For the reasons set forth above, the State requests this court affirm Dyer's 60 day standard range judgment and sentence.

Respectfully submitted this 2<sup>nd</sup> day of November, 2011.



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**CERTIFICATE**

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to this Court and appellant's counsel, Maureen Cyr, addressed as follows:

Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

  
Legal Assistant

11/02/2011  
Date