

67271-1

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NO. 67271-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
ALLAN PARMELEE,
Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE GREGORY CANOVA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where one aspect of a sentence is determined to be erroneous, the otherwise correct portions of the sentence are not invalidated. Interest accrues on legal financial obligations from the date of judgment. Parmelee's sentence has twice been reversed on grounds unrelated to the imposition of his legal financial obligations. Interest on his victim penalty assessment has never been waived. Should this Court find the judgment and sentence unambiguous, and reject Parmelee's argument that his \$500 legal financial obligation can only accrue interest from the date of the most recent judgment and sentence?

B. STATEMENT OF THE CASE

In 1999, Parmelee was convicted by jury verdict of stalking and three counts of domestic violence violation of a court order. CP 17, 168; State v. Parmelee, 108 Wn. App. 702, 704, 32 P.3d 1029 (2001), review denied, 146 Wn.2d 1009, 52 P.3d 519 (2002). On April 30, 1999, the court imposed a standard range sentence of 12 months confinement as to the felony (stalking) and 12 months of confinement on each of the misdemeanors (violation of court order), all to be served consecutively, for a total of 48 months.

CP 17-19, 168-71. The court imposed a financial obligation of \$1,185.06, of which \$685.06 was court costs, and \$500 was a victim penalty assessment. CP 18. Parmelee appealed. CP 16. This Court affirmed his convictions, but remanded for resentencing because two of the misdemeanor convictions merged with the stalking conviction. CP 44. Legal financial obligations were not at issue in the appeal.

On December 13, 2002, Parmelee was resentenced. CP 87-95. The court imposed an exceptional sentence of 48 months on the stalking conviction, and re-imposed a sentence of 12 months on the remaining violation of a court order conviction, each term to be served consecutively, for a total term of 60 months confinement. Id. The court imposed \$1,185 in financial obligations--\$685 for court costs, and \$500 for the victim penalty assessment. CP 89. Parmelee appealed again. CP 69. This Court affirmed the sentence in a published opinion issued May 24, 2004. CP 101-10; State v. Parmelee, 121 Wn. App. 707, 90 P.3d 1092 (2004). Again, legal financial obligations were not at issue. Although it affirmed Parmelee's sentence, this Court remanded for clarification of the expiration date of the no-contact order. CP 103-10. The sentencing court had originally imposed a five-year no contact

order as part of Parmelee's April 30, 1999 judgment and sentence. CP 103. Because Parmelee's sentence was not stayed pending appeal, this Court remanded for clarification that the expiration date of the no contact order would be April 30, 2004, the statutory maximum expiration date for the order. Id.

In 2006, Parmelee filed a personal restraint petition, challenging his exceptional sentence in light of the Supreme Court's Blakely¹ decision in 2005. CP 117. Parmelee's exceptional sentence on the felony charge was reversed and the case remanded for resentencing on April 28, 2009. CP 116-18. Legal financial obligations were not an issue in the petition.

On June 10, 2011, Parmelee was sentenced for the third time; the State opted not to recommend an exceptional sentence, and Parmelee received a standard range sentence of 12 months on the felony. CP 163-67. Again, the court re-imposed the same sentence on the misdemeanor conviction, to run consecutively to the felony sentence. CP 176-77. With respect to legal financial obligations, the court waived the previously imposed court costs of \$685, but once again imposed the mandatory \$500 victim penalty

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

assessment. CP 165; RP 44-46. The court denied Parmelee's request to waive interest accrual on the \$500 victim penalty assessment. RP 49-50.

Parmelee appeals his third judgment and sentence, claiming that it is ambiguous because it does not specify the "start date" for accrual of interest on the \$500 victim penalty assessment.

C. ARGUMENT

Parmelee's convictions for stalking and one count of misdemeanor violation of a court order have been upheld since he pled guilty in 1999. Nonetheless, he has been sentenced three times. At the original sentencing hearing and at each re-sentencing hearing, the court has properly imposed and re-imposed legal financial obligations, which Parmelee has never challenged. Now Parmelee claims that the judgment and sentence requires clarification with respect to the date that interest will accrue on the imposed victim penalty assessment. He argues that this Court must remand for clarification that interest can only accrue from the entry of his most recent sentence, June 14, 2011.

Parmelee's argument must be rejected, as the judgment and sentence requires no clarification. It provides that interest shall

accumulate pursuant to statute, which commands interest to accrue as of the date of judgment. Therefore, the judgment and sentence is clear that interest shall accrue as of the date it was entered.

Execution of Parmelee's judgment has never been stayed; he has remained obligated to pay his financial assessments despite his appeals and the pendency of his personal restraint petition. Although the sentencing court has now waived the original \$685 in court costs that was imposed in the two prior judgments, the victim penalty assessment was never vacated (and was not even challenged), and thus interest has properly accrued on that obligation since it was initially imposed. A determination that Parmelee is not responsible for the accrued interest on a valid twelve-year-old legal financial obligation would significantly diminish the punitive and deterrent value of the obligation, would contradict established precedent, and would contravene common sense.

1. THE JUDGMENT AND SENTENCE IS NOT AMBIGUOUS.

Financial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. Former RCW 10.82.090(1) (1995).

At the time of Parmelee's original sentence in 1999, and at the time of his resentencing in 2002, the sentencing court was not authorized to waive the accrued interest on his legal financial obligations. Id. See also State v. Claypool, 111 Wn. App. 473, 476, 45 P.3d 609 (2002), rev. denied, 148 Wn.2d 1004 (2003) (a court does not have the discretion to order interest to accrue as of a future date, such as release from incarceration). If an offender was not required to pay interest on his legal financial obligation as part of his criminal sanction, "the value of the fine would be lessened by time." State v. Cunningham, 116 Wn. App. 946, 954, 69 P.3d 358 (2003). "[T]o permit the criminal defendant to avoid interest would reduce the punitive effect of this criminal sanction." Id.

In 2004, the legislature amended RCW 10.82.090 and allowed the court discretion to waive interest on non-restitution obligations once a defendant was released from custody. Former RCW 10.82.090 (2004).² In 2011, the legislature amended the statute once again, this time allowing waiver of interest on non-restitution fines while an offender is still incarcerated. RCW

² Laws of 2004, ch. 291, § 1.

10.82.090.³ However, the default statutory provision remains that, "[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments." Id.

Parmelee's judgment and sentence provides: "Financial obligations shall bear interest pursuant to RCW 10.82.090." CP 165. RCW 10.82.090 invokes the date of judgment as the operative date by which interest shall accrue. Because Parmelee's obligation to pay the victim penalty assessment has never been vacated, the judgment and sentence unambiguously provides that interest shall accrue on the \$500 victim penalty assessment as of April 30, 1999, the date it was initially ordered. CP 163, 165. It requires no further clarification.

2. THE INTEREST THAT ACCRUED ON THE VICTIM PENALTY ASSESSMENT UNDER PARMELEE'S PRIOR JUDGMENT AND SENTENCES REMAINS VALID.

Recognizing that the delay of punishment can reduce its deterrent effect, the execution of a judgment is not automatically stayed pending appeal. RCW 9.95.062. A defendant has no

³ Laws of 2011, ch. 106, § 2.

automatic right to such a stay; it is discretionary with the court. State v. Cole, 90 Wn. App. 445, 447, 949 P.2d 841 (1998), citing State v. Blilie, 132 Wn.2d 484, 493, 939 P.2d 691 (1997) and State v. Smith, 84 Wn.2d 498, 499, 527 P.2d 674 (1974). Unless the execution of judgment is stayed, a defendant is required to make payments toward his legal financial obligations during the pendency of appellate review. In fact, if a sentencing court determines by a preponderance of the evidence that a defendant has *not* made efforts to pay his financial obligations (to the extent of his ability) the court shall *not* stay execution of the judgment. RCW 9.95.062(1)(d).

The execution of Parmelee's sentence has never been stayed. Therefore, he first became obligated to pay the victim penalty assessment over twelve years ago, when he was originally sentenced on April 30, 1999. He has paid nothing, despite the significant passage of time. RP 45. As demonstrated below, his obligation to pay the victim penalty assessment has never been vacated; as such, any interest that has accrued remains valid.

A court has the responsibility to correct an erroneous sentence. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868-89, 50 P.3d 618 (2002). But correction of an erroneous

sentence does not mean that other, valid portions of the judgment and sentence are no longer final. Id. at 877, citing In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980).

In Carle, the court imposed sentence based on a deadly weapon enhancement that was later found to be inapplicable to the defendant's case. In re Carle, 93 Wn.2d at 32-33. The Court concluded that the defendant was required to be resentenced without the enhancement, but specifically determined that the error did not render Carle's entire sentence invalid. Id. at 34. The case was remanded for resentencing without the enhancement, but the Court specifically stated, "Our holding does not affect the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced." Id., citing McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), overruled in part on other grounds by State v. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973).

In State v. Eilts, our Supreme Court again determined that that, "[A]n unauthorized sentence does not require vacation of the entire judgment," when it found that probation conditioned on the payment of unauthorized restitution remained valid, despite the necessity to remand for a new restitution order. Eilts, 94 Wn.2d 489, 494-95, 617 P.2d 993 (1980), citing Carle, 93 Wn.2d at 34.

"The error is grounds for reversing only the erroneous portion of the sentence imposed." Eilts, 94 Wn.2d at 494-95.

In State v. Smissaert, 103 Wn.2d 636, 694 P.2d 654 (1985), the Court considered whether the sentencing court erred when it entered an amended judgment and sentence *nunc pro tunc*, which increased the sentence the defendant was required to serve, and which effectively eliminated the defendant's ability to file a timely appeal. The Court determined that resentencing should date from the entry of the amended sentence. Smissaert, 103 Wn.2d at 641. Even so, the Court noted that "resentencing to correct an error does not nullify the underlying judgment. . . . [A] [t]imely appeal from the resentencing itself is valid, but the original judgment is not reopened by later amendment of the sentence." Id. at 642.

Thus, it is well established that where one portion of a sentence is determined to be erroneous, the otherwise valid portions of the sentence are not invalidated. Although the court ultimately waived Parmelee's responsibility to pay the \$685 in court costs originally assessed, Parmelee's obligation to pay the \$500 victim penalty assessment has never been overturned. His first resentencing was required because two of his misdemeanor court order violation convictions merged with his felony stalking

conviction. His subsequent resentencing was necessary because of Blakely. Neither of those errors invalidated his properly imposed victim penalty assessment. Likewise, interest has properly accrued on that obligation from the date it was originally imposed--April 30, 1999.

In support of his argument, Parmelee cites to In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 162 P.2d 413 (2007) and State v. Harrison, 148 Wn.2d 550, 61 P.2d 1104 (2003). Those cases are inapposite.

Skylstad dealt with the issue of when a judgment is "final" in the specific context of the one year time-bar for collateral attacks under RCW 10.73.090. The Court determined that a personal restraint petition filed while the defendant's sentence was still under direct review, but more than one year from the date of his conviction, was not procedurally barred. Skylstad, 167 Wn.2d at 946. That holding has no relevance to whether or not Parmelee's entire judgment and sentence became invalid when one aspect of it was determined to be erroneous.

Harrison is also distinguishable. There, the Court determined that the doctrine of collateral estoppel did not preclude the sentencing court from reconsidering an exceptional sentence

on remand, where the State had breached the plea agreement. Harrison, 148 Wn.2d at 563. The language in Harrison that Parmelee cites to in support of his argument that all aspects of his prior sentences are "void" must be limited to the error complained of in that case. It does not follow from Skylstad or Harrison that the resentencing of a defendant to correct an error as to one aspect of the sentence renders the otherwise valid aspects of that judgment and sentence void.⁴

This Court should recognize that since his original sentence in 1999, Parmelee has always been under the court's obligation to pay the \$500 victim penalty assessment along with interest that has accrued thereon, despite the fact that two of the misdemeanor counts merged with the felony, and despite the fact that his exceptional sentence required correction. The judgment and sentence is unambiguous in that interest shall accrue as of the date of its entry. It requires no clarification.

⁴ On direct appeal of his 2002 Judgment and Sentence, Parmelee argued, and the State conceded, that because Parmelee's sentence had not been stayed, the no contact order with the victim expired five years from the date of his original 1999 sentence. CP 108-09. The State did not (and could not) argue that when the 1999 sentence was reversed, that no-contact order became "void" and the five year statutory maximum should begin to run anew. Although Parmelee takes a contrary position with respect to his legal financial obligations in this appeal, the result must be the same.

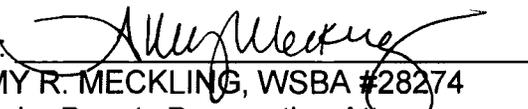
D. CONCLUSION

For the above stated reasons, this Court should affirm
Parmelee's sentence.

DATED this 20 day of December, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ALLAN PARMELEE, Cause No. 67271-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

12/20/11
Date