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68060-9

JUN 13 2012
King County Prosecutor
Appellate Unit

NO. 68060-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

GERARDO JARA-AGUIRRE,

Appellant.

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

The Honorable James Cayce, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred when it found appellant has the current or future ability to pay legal financial obligations (LFOs). CP 98 (subsection 4.2 of felony judgment and sentence).

Issue Pertaining to Assignment of Error

Did the trial court err when it found, absent an inquiry into the appellant's individual circumstances, that he has the current or future ability to pay LFOs?

B. STATEMENT OF THE CASE

A King County jury convicted appellant Gerardo Jara-Aguirre (Jara) of felony harassment, misdemeanor violation of a court order and second degree assault, along with various aggravators and a deadly weapon finding for the assault. CP 34-36, 91-93; 9RP 6; 11RP 2-4.¹

Jara received a standard range sentence totaling 24 months for the felony convictions (8 months for the harassment, concurrent with 12 months for the assault, plus an additional 12 months for the deadly weapon finding) and a consecutive suspended 364-day sentence for the

¹ There are twelve volumes of verbatim report of proceedings referenced as follows: 1RP - 10/6/11; 2RP - 10/10/11; 3RP - 10/11/11; 4RP - 10/12/11; 5RP - 10/13/11; 6RP - 10/17/11; 7RP - 10/18/11; 8RP - 10/19/11; 9RP - 10/20/11; 10RP - 10/21/11 (am); 11RP - 10/21/11 (pm); and 12RP - 12/9/11.

misdemeanor conviction. CP 96-107; 12RP 9. The court also imposed \$600 in legal financial obligations (LFOs). CP 98; 12RP 10.

Despite the trial court signing an order on Jara's behalf "Authorizing Appeal in Forma Pauperis", the felony judgment and sentence contains the following written "finding" on the preprinted form:

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. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 98 (subsection 4.2).

Jara appealed his judgment and sentence. CP 126-27. The order "Authorizing Appeal In Forma Pauperis" was filed contemporaneously with the notice of appeal. Supp CP __ (sub no. 88, Order Authorizing Appeal in Forma Pauperis . . . , 12/09/11).

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FOUND JARA HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay LFOs, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn.

App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04 (citing Baldwin, 63 Wn. App. at 312). While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404² (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

² The ACORDS docket shows Bertrand filed a petition seeking review of a different issue; the state has not sought review of this Court's ruling on the LFO issue.

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" that Monson had the present or future ability to pay his LFOs. To the contrary, the court seemed to recognize the opposite when it signed an order allowing him to appeal at public expense. Supp CP __ (sub no. 88, supra); 12RP 13.³

Accordingly, the portion of subsection 4.2 quoted above was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405.⁴ Moreover, before the State can collect LFOs, there must be a properly supported, individualized judicial determination that Jara has the ability to pay. Id., at 405 n.16.

³ Cf. Baldwin, 63 Wn. App. at 311 (statement in presentence report that Baldwin was employable supported this Court's conclusion that sentencing court properly considered burden of costs under RCW 10.01.160).

⁴ Jara does not challenge the imposition of these mandatory LFOs (See RCW 43.43.7541 (DNA collection fee); RCW 7.68.035 (Victim Penalty Assessment)) but rather the unsupported finding of present and future ability to pay.

D. CONCLUSION

This Court should remand with an order that the trial court strike the unsupported finding from the judgment and sentence.

DATED this 13th day of June 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 68060-9-1
)	
GERARDO JARA-AGUIRRE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JUNE, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GERARDO JARA-AGUIRRE
DOC NO. 35628
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JUNE, 2012.

x Patrick Mayovsky

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