

08063-3

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NO. 68063-3-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GENE CAMARATA

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
TABLE OF CASES	i
STATUTES	ii
RESPONSE TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	1
ARGUMENT	2
1. <u>Judge Cooper did not lack jurisdiction to sign an order amending the judgment and sentence in compliance with a mandate from this Court</u>	2
2. <u>The sentencing court did not err in ordering appellant to pay discretionary fees and costs</u>	5
CONCLUSION	7

TABLE OF AUTHORITIES

TABLE OF CASES

<u>Ferguson v. Pony Express Courier Corp.</u> , 898 S.W.2d 128 (Mo.Ct.App.1995)	3
<u>McElwee v. McElwee</u> , 911 S.W.2d 182, 186 (Tex.Ct.App.1995)	3
<u>Payton v. State</u> , 937 So.2d 462 (Miss.Ct.App.) cert. denied, 937 So.2d 450 (Miss.2006)	3
<u>Pueblo of Laguna v. Cillessen & Son, Inc.</u> , 101 N.M. 341, 682 P.2d 197 (1984)	3

<u>Skagit County v. Waldal</u> , 163 Wn.App. 284, 261 P.3d 164 (2011)	3, 4
<u>State v. Baldwin</u> , 63 Wn.App. 303, 312, 818 P.2d 1116 (1991)	6, 7
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)	5
<u>State v. Cockrell</u> , 102 Wn.2d 561, 689 P.2d 32 (1984)	4
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992)	5, 6
<u>State v. Nossaman</u> , 63 Or.App. 789, 666 P.2d 1351, 1355 (1983).	3
<u>State v. Richardson</u> , 105 Wn.App. 19, 23, 19 P.3d 431 (2001)	6

STATUTES

RCW 4.12.040	3
RCW 10.01.160(3)	5
RCW 10.01.160(4)	7

RESPONSE TO ASSIGNMENTS OF ERROR

1. Judge Cooper did not lack jurisdiction to sign an order amending the judgment and sentence in compliance with a remand from this Court.

2. The sentencing court did not err in ordering Appellant to pay discretionary fees and costs.

STATEMENT OF THE CASE

The State hereby adopts the statement of the case prepared by Appellant's counsel with the following additions:

Prior to entering his guilty pleas on this case, Appellant was engaged by the court in a lengthy colloquy regarding both the rights that were being given up and the potential consequences of being found guilty. 6/26/08 RP 2-6. Within that colloquy, there was specific discussion regarding the various legal financial obligations that the court was likely to impose at the time of sentencing and Appellant made no claim that he would be unable to pay said obligations. 6/26/08 RP 5.

During Appellant's sentencing argument by counsel there was a specific reference to Appellant regaining access to a Visa debit card which provided Appellant with financial resources plus a

specific request for time payments of \$25 per month for the yet-to-be-imposed legal financial obligations, again with no claim that Appellant would be unable to pay said obligations. 6/26/08 RP 18.

When Appellant's actual sentence was pronounced, the court specifically granted the request for payments of \$25 per month toward the just-imposed legal financial obligations. 6/26/08 RP 22.

While the court imposed conditions of supervision there was a specific inquiry made regarding Appellant's future employability and while Appellant's counsel acknowledged uncertainty in that regard there was also reference to Appellant's "trying to return to school and get (job) training." 6/26/08 RP 24.

ARGUMENT

1. Judge Cooper did not lack jurisdiction to sign an order amending the judgment and sentence in compliance with a mandate from this Court.

Appellant takes exception to Judge Cooper's ministerial act in which he signed an order amending the judgment and sentence on this case consistent with the remand from this court. The State argues that a judge's recusal from a case does not prohibit the judge from performing ministerial functions on that case.

RCW 4.12.040 prohibits a recused judge from hearing or trying any action or proceeding in said case. As recently as 2011, this court engaged with the issue of determining what actions a judge may or may not take after recusing. Skagit County v. Waldal, 163 Wn.App. 284, 287, 261 P.3d 164 (2011).

In that case, this court observed that there appeared to be no Washington authority on this point and then proceeded to consider how the federal courts and other state courts have handled this issue. Id. 287-88. The court adopted by reference a summary of this analysis found in Payton v. State, 937 So.2d 462, 465 (Miss.Ct.App.) cert. denied, 937 So.2d 450 (Miss.2006). (A recused judge is prohibited: from “hearing a case” Ferguson v. Pony Express Courier Corp., 898 S.W.2d 128, 130 (Mo.Ct.App.1995); from acting “in matters involving the exercise of discretion” Pueblo of Laguna v. Cillessen & Son, Inc., 101 N.M. 341, 682 P.2d 197, 199 (1984); from entering a judgment on a case, State v. Nossaman, 63 Or.App. 789, 666 P.2d 1351, 1355 (1983) and McElwee v. McElwee, 911 S.W.2d 182, 186 (Tex.Ct.App.1995).) Ultimately the court adopted the following bright line rule: “once a judge has recused, the judge should take no other action in the case except for the necessary ministerial acts

to have the case transferred to another judge.” Skagit County at 288.

Interestingly, Appellant doesn’t cite to Skagit County for the proposition that Judge Cooper no longer had jurisdiction over the case but instead relies upon an earlier decision by the state Supreme Court, State v. Cockrell, 102 Wn.2d 561, 689 P.2d 32 (1984). The irony is that, while the focus on the decision was on whether or not Judge Buckley should have granted the defendant’s motion for recusal, Cockrell also describes circumstances where the first judge assigned to the case, Judge Kristiansen, had recused himself at the omnibus hearing on September 17, 1982 but then granted an continuance requested by defendant September 23, 1982.

What is clear from both Cockrell and Skagit County is that some ministerial functions can still be carried out by a recused judge (granting a continuance, arranging for the transfer of the case to a new judge) but a recused judge cannot act on the case in any manner which calls for the exercise of discretion or judgment.

In the case at hand there was a remand from this court to the trial court to remove certain conditions of supervision from the appellant’s judgment and sentence. An order was presented to the

trial court which did just that. Jude Cooper's act of signing this order did not involve any exercise of discretion or judgment on his part.

Further, Appellant did not suffer any prejudice as a result of Judge Cooper signing the order. Accordingly, this court should hold that the order is valid and deny this appeal.

2. The sentencing court did not err in ordering appellant to pay discretionary fees and costs.

Appellant next claims that record is insufficient to support the imposition of discretionary fees and costs as part of the legal financial obligations resulting from the conviction on this case.

Appellant alleges that the sentencing court erred by not considering whether Appellant presently had, or would have, the ability to pay as required by RCW 10.01.160(3) and State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992).

The essence of Appellant's argument is that in the absence of formal findings of fact to the contrary, there is not substantial evidence in the record to support the imposition of fees and costs. State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006).

However, "[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 at 916. Also, while it may be helpful if the court considers specific monetary figures when assessing a defendant’s ability to pay, no formal findings are required. State v. Richardson, 105 Wn.App. 19, 23, 19 P.3d 431 (2001).

A court’s determination as to a defendant’s resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. Richardson at 23, also State v. Baldwin, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991). This is a judgment which requires discretion and should be reviewed for an abuse of discretion. Baldwin at 312.

The sentencing record clearly demonstrates that there was substantial evidence to support a finding that the Appellant was either currently able, or in the future would likely become able, to pay the legal financial obligations. It was understood that Appellant would shortly be retrieving a Visa debit card which gave him access to financial means plus he was exploring options for education and job training. Not only was there no objection from Appellant at the time of the court’s imposition of fees and costs, the court set in place the Appellant’s own proposed payment plan of \$25 per month.

The inquiry at sentencing as to future ability to pay is somewhat speculative. Baldwin at 311. Should the Appellant find itself unable to make the agreed payments the statute expressly provides for an opportunity to petition the court for relief. RCW 10.01.160(4). "Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant in time." Baldwin at 311. To the State's knowledge, Appellant has not pursued this option.

The sentencing court's decision to impose discretionary legal financial obligations was not clearly erroneous and was not an abuse of discretion. Accordingly, this court should affirm the imposition of costs and fees in this case and likewise deny this part of the appeal.

CONCLUSION

Subsequent to receiving a remand from this court ordering that certain conditions of supervision be removed, Judge Cooper performed a solely ministerial act by signing an order which put in effect the terms of the remand. Judge Cooper retained the authority to do so and Appellant was not prejudiced.

Further, the sentencing court's decision to impose discretionary legal financial obligations was not clearly erroneous, was not an abuse of discretion and is supported by substantial evidence in the record.

For all of these reasons the State requests that Appellant's appeal be denied.

Respectfully submitted on December 28, 2012.

A handwritten signature in black ink, appearing to read "Paul R. Sander". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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