

74035-1

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Court of Appeals
Division I
State of Washington

74035-1

NO. 74035-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

GWEN ARDREY AKA GWEN GUTIERREZ,

Appellant.

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

The Honorable Julie Lawton Garratt, Judge
The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in imposing a 24-month sentencing term under RCW 46.61.520(1) based on a prior reckless driving offense because the State failed to prove this prior conviction at sentencing.

Issue Pertaining to Assignment of Error

In Pacific Municipal Court, Gwen Lynn Ardrey (a/k/a Gwen Lynn Gutierrez) entered into a Stipulated Order of Continuance in October 2008, agreeing to comply with several conditions in exchange for the State reducing its charge from driving while intoxicated to reckless driving. As part of the agreement, Ardrey also stipulated to the police report's admissibility and waived the right to trial by jury, the right to call and cross-examine witnesses, and the right to testify in her own defense. After Ardrey's full compliance during the continuance period of two years, a judgment for reckless driving was entered in Pacific Municipal Court without Ardrey's presence and without any process to Ardrey whatsoever. Given that the State has put forth no evidence establishing that Ardrey was formally adjudicated guilty of reckless driving beyond a reasonable doubt, has the State failed to prove the existence of this prior conviction and, if so, did the trial court err in using this prior conviction to increase Ardrey's sentence by two years under RCW 46.61.520(2)?

B. STATEMENT OF THE CASE

In November 2014, the State charged Ardrey with vehicular homicide, alleging that Ardrey proximately caused injury to Josh Colson on June 8, 2014, that Colson died as a proximate result of the injury, and that Ardrey was operating the vehicle under the influence of an intoxicating liquor or drug in a reckless manner. CP 1. Ardrey pleaded guilty. CP 9-22; 1RP¹ 12-13.

The State sought to impose an additional 24-month sentencing term under RCW 46.61.520(2), which provides that for a current vehicular homicide conviction, “an additional two years shall be added to the sentence for each prior offense as defined in RCW 46.61.5055.”² CP 10, 29, 31-32; 1RP 36-39. Ardrey disputed this enhancement, contending that the State

¹ Ardrey refers to the verbatim reports of proceedings as follows: 1RP—April 22 and September 4, 2015; 2RP—September 10, 2015.

² Here, the pertinent provision is RCW 46.61.5055(14)(a)(xii), which defines “prior offense” as

A conviction for a violation of RCW 46.61.5249 [first degree negligent driving], 46.61.500 [reckless driving], or 9A.36.050 [reckless endangerment] or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 [driving under the influence] or 46.61.504 [physical control of vehicle under the influence], or an equivalent local ordinance, or of RCW 46.61.520 [vehicular homicide] or 46.61.522 [vehicular assault]
.....

This provision was formerly RCW 46.61.5055(14)(a)(x) (2015), but has been renumbered by the legislature more recently than Ardrey’s sentencing. LAWS OF 2015, 2d Spec. Sess., ch. 3, § 9.

could not prove the existence of a July 2008 Pacific Municipal Court conviction for reckless driving under RCW 46.61.500. CP 10, 29, 33-57.

Ardrey pointed out that the pertinent Pacific municipal court files had been destroyed and that there was no copy of the judgment and sentence available (assuming any ever existed). CP 33-34, 48. The court docket and an October 2008 audio recording (later transcribed by the defense)—which were the only remaining available court file contents—showed Ardrey entered into a Stipulated Order of Continuance (SOC) under King County Local Limited Jurisdiction Criminal Rule (LCrRLJ) 8.3.³ CP 43-44, 47, 51-52, 54-57. Pursuant to the SOC, if Ardrey complied with various conditions during a continuance period of two years, the prosecution would amend its charges from driving under the influence (DUI) to reckless driving. CP 43-44, 51-52, 55.

Ardrey asserted that, after she successfully complied with all SOC conditions, the municipal court never reduced the reckless driving charge to a conviction.⁴ CP 38-39. The municipal court made certain entries in the court docket on October 1, 2010, including “Charge 1 Amended to:

³ For ease of reference, a copy of LCrRLJ 8.3 is appended to this brief.

⁴ Ardrey also asserted the State failed to prove that the prior offense involved the use of intoxicating liquor or drugs, thereby violating due process under City of Walla Walla v. Greene, 154 Wn.2d 722, 166 P.3d 1008 (2005), and State v. Mullen, 186 Wn. App. 321, 345 P.3d 26 (2015). But, as the State correctly pointed out, Ardrey expressly agreed that this prior offense “involved alcohol” in the plea agreement. CP 29; IRP 35-38.

RECKLESS DRIVING,” “Finding/Judgment of Guilty for Charge 2,” “Case Heard Before Judge ROCHON, L. STEPHEN,” “Review set for SOC on 10/01/2010 canceled,” various compliance-with-SOC-condition entries, and “Case Disposition of CL entered.” CP 44. According to an e-mail from municipal court personnel, “There is no recording 10/1/2010 that was the review date end of jurisdiction. Court administrator reviews the file, checks defendant[’]s DCH [defendant case history] for any violations. If there are no violation[s] the amendment is done in JIS outside of court. Docket I sent you shows that.” CP 47. Thus, although the continuance period had concluded and Ardrey had complied with all conditions, Ardrey never returned to court for any stipulated facts trial or other adjudication of guilt with respect to the reckless driving charge. CP 38-39. Rather, the municipal court appears to have amended charges and entered judgment without the State’s or Ardrey’s input, involvement, or presence.

The municipal court’s procedure, Ardrey argued, could not have resulted in a valid reckless driving conviction. CP 38-39. Therefore, contended Ardrey, the State was unable to prove this prior offense and the trial court could not impose the additional two-year sentencing term under RCW 46.61.520(2). CP 39.

The trial court disagreed with Ardrey, ruling that she could not show any constitutional deficiency with respect to the prior reckless driving

offense. 2RP 6-8. The trial court reasoned, “here there was not trial, nor would there be any reason to have one, since Ms. [Ardrey] complied with all of the conditions, and therefore received her benefit of the bargain, namely a reduction of the DUI to a Reckless Driving.” 2RP 7.

The trial court sentenced Ardrey to 102 months, consisting of a 78-month standard range sentence and the 24-month RCW 46.61.520(2) enhancement. CP 62; 2RP 44. The court waived all nonmandatory legal financial obligations, stating, “I want you to focus on restitution and have the ability to do so.” CP 61; 2RP 45-46. Ardrey timely appeals. CP 68-69.

C. ARGUMENT

1. BASED ON THE RECORD, IT IS IMPOSSIBLE TO PROVE THAT PACIFIC MUNICIPAL COURT VALIDLY CONVICTED ARDREY OF RECKLESS DRIVING, AND THIS PRIOR OFFENSE MAY NOT BE USED TO INCREASE ARDREY’S SENTENCE BY TWO YEARS

The State bears the burden to prove the existence of a prior conviction by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999), abrogated in part on other grounds by RCW 9.94A.530(2) and by State v. Cobos, 182 Wn.2d 12, 15, 338 P.3d 283 (2014). It is also the State’s obligation to ensure the record before the sentencing court supports the criminal history determination; the defendant bears no burden. Id.

“The best evidence of a prior conviction is a certified copy of the judgment.” Id. “However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history.” Id. “Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” Id. at 481 (collecting cases).

Here, there is no copy of the judgment and sentence because Pacific Municipal Court destroyed its file in 2013. CP 48. The only three documents in the record germane to Ardrey’s criminal history are the municipal court’s docket printout, a transcript from a hearing from October 2008 at which Ardrey and the City of Pacific entered into the SOC, and a municipal court employee’s e-mail elucidating the municipal court’s SOC procedure following a defendant’s compliance. These documents do not come close to establishing Ardrey was adjudicated guilty of reckless driving. In fact, they establish the exact opposite.

When the parties enter into an SOC, no adjudication of guilt for any offense occurs. Rather, the defendant must agree that the police report

contained in the court file is admissible at trial.⁵ LCrRLJ 8.3(c)(2). The defendant must also waive the right to a speedy trial, to a jury trial, to hear, question, or call witnesses, and to testify. LCrRLJ 8.3(c)(5), (7). The SOC must provide clear statements of “each and every condition of the SOC,” “of the outcome of the case if all conditions of the SOC are met,” “of the elements of the offense(s) that must be proven in order to convict the defendant,” and “of the maximum penalties allowed by law, any minimum penalties and/or any other applicable restrictions/requirements under the law.” LCrRLJ 8.3(c)(8)–(9), (12)–(13). The defendant’s agreement to enter the SOC must be made freely, knowingly, voluntarily, and intelligently without threats or coercion, and the defendant must have fully read the SOC or have had it read to her. LCrRLJ 8.3(c)(15)–(16). None of these provisions indicates that a defendant is adjudicated guilty of any crime by agreeing to a SOC or that the defendant waives the right to further adjudicative proceedings, such as a stipulated facts trial or a guilty plea.

Certain provisions of LCrRLJ 8.3 show that it is not intended to take the place of a proceeding that adjudicates the question of guilt beyond a reasonable doubt, even if the defendant complies with all of the SOC’s

⁵ The defendant only must “agree[] to the facts in a police report and/or other documents in the event that the conditions of the SOC are not met.” LCrRLJ 8.3(c)(1) (emphasis added). Likewise, the parties must agree that “the evidence at trial shall be limited to the police report currently contained in the court file or attached to the SOC as an exhibit” only if the conditions of the SOC are not satisfied. LCrRLJ 8.3(c)(4).

conditions. LCrRLJ 8.3(c)(12), for instance, states that the SOC must include a “clear statement of the elements of the offense(s) that must be proven in order to convict the defendant.” By its own terms, this provision indicates the State must still prove elements of the offense in question to convict the defendant. The trial court’s statement that there would be “no reason” to have a trial “since Ms. [Ardrey] complied with all of the conditions” of the SOC relieves the State of its burden of proving guilt beyond a reasonable doubt. 2RP 7.

Similarly, by entering into an SOC, the defendant only waives her “right to a speedy trial for the duration of the SOC, and that the new commencement date for speedy trial purposes is the last day of the period of continuance.” LCrRLJ 8.3(c)(7). From this it follows that regardless of whether the defendant complies with the conditions of the SOC, the actual trial at which the question of guilt is adjudicated must commence by the last day of the SOC’s continuance period. By agreeing to an SOC, although she waived several rights, Ardrey did not waive her right to a trial to establish her guilt for reckless driving beyond a reasonable doubt.

In response, the State might point to LCrRLJ 8.3(c)(9), which requires the SOC to include a “clear statement of the outcome of the case if all conditions of the SOC are met.” The State might argue that this shows the SOC could have contained a provision that Ardrey would be found guilty

of reckless driving if she complied with conditions. This argument is foreclosed by the factual record available, however.

Although the SOC document did not survive the destruction of Ardrey's file, the municipal court relayed the outcome of the case to Ardrey when it approved the SOC. The municipal court referred to the SOC as a contract between Ardrey and the city prosecutor, stating "this document here, um, is essentially a contract between the two of you. I'm not involved with setting these terms." CP 55. After listing Ardrey's obligations under the agreement, the municipal court stated, "And then, what the Prosecutor promises if you're all compliant with that, at the end of two years, he'll amend the charge or change the charge, to reckless driving." CP 55. Thus, Ardrey was informed that, if she met all the conditions of the SOC, the outcome would be the prosecutor's reduction in charging from DUI to reckless driving. She was not informed that the municipal court found her guilty beyond a reasonable doubt of reckless driving. Nowhere in the municipal court's discussion of the SOC was Ardrey informed that she was giving up the right to a trial on reckless driving. The records available to this court demonstrate that Ardrey did not waive her right to have the question of guilt adjudicated beyond a reasonable doubt.

Moreover, if successful compliance with an SOC may establish guilt beyond a reasonable doubt of a particular offense, then the SOC is

tantamount to a guilty plea and must accordingly comply with requisite constitutional and CrR 4.2 requirements. Nowhere in the transcript of the SOC colloquy were these requirements met. CP 51-57.

The Washington courts have drawn a distinction between guilty pleas and stipulated trials. In State v. Wiley, 26 Wn. App. 422, 424, 613 P.2d 549 (1980), Division One was the first Washington court to discuss whether a “stipulation to facts . . . was tantamount to a guilty plea thus calling into play the procedural safeguards contained in CrR 4.2.” The court determined that a guilty plea “is functionally and qualitatively different from a stipulation” given a “guilty plea generally waives the right to appeal” and “has been said to be ‘itself a conviction; nothing remains but to give judgment and determine punishment.’” Wiley, 26 Wn. App. at 551 (quoting Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). A stipulation, by contrast, “is only an admission that if the State’s witnesses were called, they would testify in accordance with the summary presented by the prosecutor. The trial court must make a determination of guilt or innocence.” Id. (emphasis added); see also State v. Davis, 29 Wn. App. 691, 696, 630 P.2d 938 (1981) (“With a trial by stipulation, however, the defendant does not stipulate to his guilt; the trial court must make that determination.”).

The Washington Supreme Court more recently elucidated the distinction between guilty pleas and stipulated trials in the analogous context of drug court contracts in State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010). Drum entered into a pretrial drug court contract, similar to Ardrey's SOC, stating he agreed and stipulated "that the facts presented by [law enforcement] reports, declarations, statements, and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charge(s)." Id. at 28 (emphasis omitted) (quoting clerk's papers). On appeal, the Court of Appeals determined "Drum waived any right to challenge the sufficiency of the evidence when he signed the Contract, and it therefore refused to address his claim on the merits." Id. at 31. The Supreme Court aptly identified the deficiency in the Court of Appeals' reasoning:

While refusing to review the merits of that claim in light of Drum's stipulation, the court also held that the Contract was not the equivalent of a guilty plea because the trial court independently determined Drum's guilt. This put Drum in a catch-22 situation. He received no appellate review of the merits of his sufficiency of the evidence claim because his stipulation was held binding, but the Court of Appeals held his stipulation was not the equivalent of a guilty plea because the trial court was not bound by the stipulation and independently determined his guilt.

Id. at 33 (citation omitted). The Supreme Court noted it was "troubled by the Court of Appeals' suggestion that a drug court contract clause stipulating

to the sufficiency of the evidence results in the defendant waiving his right to a determination of guilty beyond a reasonable doubt.” Id. at 34. The court stressed that entering a drug court contract does not forfeit the right to an independent judicial finding of guilt beyond a reasonable doubt: “A trial court still has the authority to find the defendant not guilty if it determines that the stipulated evidence does not establish all elements of the crime beyond a reasonable doubt.” Id.

The SOC at issue here was akin to the drug court contract at issue in Drum. Ardrey agreed that the police reports were automatically admissible and could be considered by the municipal court in determining her guilt. CP 54-57. Indeed, as the municipal court stated, “I’m just gonna read the police report as all the evidence in the case to see if you’re guilty or not.” CP 56. Although Ardrey permitted the municipal court to consider the facts contained in police report, the municipal court knew it would still have the responsibility of making an adjudication of Ardrey’s guilt.⁶ Like Drum, Ardrey never waived her right to an adjudication of guilt on the reckless driving charge.

⁶ The municipal court’s docket confirms this understanding. The October 1, 2008 entry contains, “AGREED SOC WITH CONDITIONS SIGNED & FILED,” “IF CONDITIONS ARE MET, CHARGE TO BE AMENDED TO RECKLESS DRIV,” and “Charge: Other Deferral.” CP 43. A charge cannot be at the same time adjudicated and deferred. Furthermore, in the hearing summary portion of the docket, the October 1, 2008 hearing is listed as a “PRE-TRIAL CONFERENCE,” indicating that the municipal court treated the SOC procedure merely as a pretrial hearing, not a formal adjudication of Ardrey’s guilt.

The superior court's ruling that Ardrey was not entitled to a trial or other formal adjudication of guilt with respect to reckless driving endorses the very Catch-22 the Drum court rejected. The trial court stated, "She's already agreed to -- when she entered into the [SOC], that if she doesn't get into trouble, she'll have a reckless driving conviction on her record instead of a DUI. There's no trial under those circumstances." IRP 32-33. If the SOC was a guilty plea, as this statement suggests, then the municipal court failed to adhere to the constitutional requirements of entering and accepting the plea, which the transcript provides. CP 51-57. If the SOC was not a guilty plea, then Ardrey was entitled to the municipal court's independent determination of her guilt at some formal adjudication. Drum, 168 Wn.2d at 33-34. Either way, it cannot be proven that Ardrey's reckless driving conviction was validly adjudicated by Pacific Municipal Court.

Additional evidence in the record shows that the "conviction" for reckless driving was not validly adjudicated because it afforded Ardrey no ability to be present or assert her rights at a formal adjudication. The municipal court docket entry on October 1, 2010 reads,

Charge 1 Amended to: RECKLESS DRIVING

Finding/Judgment of Guilty for Charge 2

Case Heard Before Judge ROCHON, L STEPHEN

Review set for SOC on 10/01/2010 canceled

Defendant Complied with No Criminal Violations

Defendant Complied with Notify court of address change

Defendant Complied with DUI: No refusing a BAC test

Defendant Complied with No Driving w/o License and Ins

Defendant Complied with Stipulated Order of Continuance

ATY 1 WHITE-SWAIN, KRISTA COLLEEN
Removed

Case Disposition of CL Entered

CP 44 (emphasis added). This shows that the charge was amended and the finding and judgment of guilt was entered in October 2010. Yet it also establishes that neither Ardrey nor her attorney was present for the amendment or apparent adjudication given that the court cancelled the SOC review hearing. An e-mail from municipal court clerk Corrine Wildoner confirmed there was no recording from the October 1, 2010 SOC review hearing because there was no hearing: "Court administrator reviews the file, checks defendant[']s [criminal history] for any violations. If there are no violation[s] the amendment is done in JIS outside of court." CP 47 (emphasis added). There was no hearing at which Ardrey's guilt of reckless driving was adjudicated.

“Under the Sixth and Fourteenth Amendments, a criminal defendant has the right to attend all critical stages of h[er] trial.” State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326 (2008). The verdict is a critical stage of a criminal proceeding. Id. (citing State v. Rice, 110 Wn.2d 577, 617, 757 P.2d 889 (1988)). In Pruitt, this court determined that a “bench trial in drug court on the charge of possession of a stolen access device was a critical stage of proceedings against Pruitt.” 145 Wn. App. at 799. This was so because “the trial court considered the evidence against Pruitt, found him guilty of the crime for which he was charged, and entered written findings of fact and conclusions of law memorializing this ruling.” Id. Although “Pruitt previously stipulated to certain matters in his diversion agreements, he never stipulated to a trial in his absence.” Id. at 800. Because Pruitt was not present at the adjudication of his guilt, this court reversed. Id. at 801.

The in absentia proceedings of the municipal court are of the same flavor. As discussed, the municipal court never informed Ardrey it was adjudicating her guilt when she entered into the SOC. And while Ardrey may have stipulated to certain factual matters as part of the SOC, she did not agree to a stipulated facts trial or other adjudication of her guilty in her absence. While it received various payments from Ardrey to oversee her compliance with the SOC, Pacific Municipal Court never again had any in-person contact with Ardrey. CP 44, 52-53. When the SOC period expired,

the municipal court appears to have adjudicated her guilt much like the trial court in Pruitt: it amended charges and entered a finding and judgment of guilty for the amended charge. Cf. Pruitt, 145 Wn. App. at 799-800. Thus, even if Pacific Municipal Court adjudicated Ardrey's guilt and entered a conviction, it plainly violated Ardrey's constitutional right to be present during those proceedings. The Pacific Municipal Court reckless driving offense cannot be proven.

The State might argue, as it argued below, that it need not prove the constitutional validity of a prior conviction before it can use the prior conviction at a sentencing hearing. The Washington Supreme Court has stated, "To require the state to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions." State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986). But the court tempered this statement by recognizing that "a prior conviction . . . which is constitutionally invalid on its face may not be considered" in a subsequent sentencing proceeding. Id. "Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Id.

Here, there is no judgment and sentence whose face shows the constitutional invalidity of the conviction because the bulk of the Pacific Municipal Court file no longer exists. Absent a certified copy of the

judgment and sentence, the State must establish the prior conviction with other evidence from the record, such as transcripts and docket entries. Ford, 137 Wn.2d at 480. But, as discussed, all the other evidence available shows Pacific Municipal Court failed to validly reduce the reckless driving offense to a conviction. The documents that are available therefore “evidence[] infirmities of a constitutional magnitude.” Ammons, 105 Wn.2d at 188. The State cannot prove otherwise.

The State also might point to Ardrey’s Department of Licensing driving record, which gives an entry for “Reckless Driving” “Conviction 10/1/2010” “Pacific Muni Court.” Supp. CP ____ (Sub. No. 24; State’s Proof of “Prior Offense” for Two-Year Enhancement and Response to Defendant’s Brief). But the Department of Licensing’s ability to parrot the docket entries of Pacific Municipal Court does establish the validity of the conviction in question. Although in In re Personal Restraint of Adolph the Washington Supreme Court determined “A DOL driving record abstract” was “comparable to a certified judgment and sentence because they are official government records,” the court also stated this was because the driving record abstract was “based on information obtained directly from the courts” 170 Wn.2d 556, 570, 243 P.3d 540 (2010) (emphasis added). The evidence available to assess the prior offense demonstrates the Pacific Municipal Court failed to validly convict Ardrey of reckless driving. The

Department of Licensing record, which lists the conviction obtained from the municipal court, is not removed from the taint of the municipal court's procedures. Under the circumstances, the Department of Licensing driving record proves nothing.

The State is unable to prove the existence of a valid Pacific Municipal Court conviction for reckless driving. The trial court erred in using this conviction to increase Ardrey's sentence by two years under RCW 46.61.520(2). Ardrey requests that this court strike this two-year term from her sentence.

2. THIS COURT SHOULD DENY APPELLATE COSTS

Ardrey should prevail on appeal, but, in the event she does not, this court should deny any request by the State for appellate costs.

This court indisputably has discretion to deny appellate costs. RCW 10.73.160(1) ("The court of appeals . . . may require an adult offender convicted of an offense to pay appellate costs."); State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719, at *4 (Jan. 27, 2016) (holding RCW 10.73.160 "vests the appellate court with discretion to deny or approve a request for an award of costs").

There are several reasons this court should exercise discretion to deny appellate costs. The trial court determined that Ardrey was "unable by reason of poverty to pay for any of the expenses of appellate review" and

that she could not “contribute anything toward the costs of appellate review.” Supp. CP ____ (Sub. No. 36; Order Authorizing Appeal In Forma Pauperis, Appointment of Counsel and Preparation of Record). In the declaration Ardrey submitted in support of indigency, Ardrey listed her monthly income as between \$600 and \$1,100, stated she qualified for food stamps, and indicated she paid nearly \$500 in monthly expenses, which included child support. Supp. CP ____ (Sub. No. 35; Declaration of Financial Data). Based on the trial court’s determination of indigency, Ardrey is presumed indigent through this review. RAP 15.2(f); Sinclair, 2016 WL 393719, at *7.

In addition, the trial court waived all nonmandatory legal financial obligations, including court costs and fees for court-appointed counsel. CP 61; 2RP 45-46. The trial court waived these costs even though Ardrey agreed to pay them as part of her plea. See CP 32. One of the trial court’s bases for waiver was that it planned to “impose restitution to be determined at a later date.” 2RP 46. The trial court stated, “rather than having you spend your money on these other fees, I want you to focus on restitution and have the ability to do so.” 2RP 46. Earlier this month, the trial court imposed \$12,092.96 in restitution. Supp. CP ____ (Sub No. 43; Order Setting Restitution). To impose appellate costs would undermine the trial court’s clear preference that Ardrey remain focused on paying restitution rather than discretionary fees.

This court has no basis to determine that Ardrey has a present or future ability to pay, especially in light of the substantial amount of restitution the trial court imposed. This court should accordingly decline to assess appellate costs against Ardrey in the event she does not substantially prevail on appeal.

D. CONCLUSION

The State failed to prove Ardrey's reckless driving offense had been validly reduced to a conviction. The trial court therefore lacked authority to impose an additional 24-month term of incarceration under RCW 46.61.520(2). Ardrey accordingly asks that this court strike this 24-month term from her sentence.

DATED this 24th day of February, 2016.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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APPENDIX

LCrRLJ 8.3. Stipulated Orders of Continuance

- a) At any time prior to trial, the parties may move for entry of a Stipulated Order of Continuance (hereinafter "SOC").
- b) Unless waived by the Court upon motion of the parties, each and every SOC shall be signed by the defendant, his or her attorney of record, and the prosecuting attorney.
- c) At a minimum each SOC form shall include the following:
- (1) A clear statement that the defendant, by entering into a SOC, agrees to the facts in the police report and/or other documents in the event that the conditions of the SOC are not met.
 - (2) A clear statement that the police report currently contained in the court file or attached to the SOC as an exhibit, or other specified documents, shall be deemed admissible at trial.
 - (3) A clear statement that the police report and/or other documents shall be submitted to the court and may be marked as exhibits, but will not be admitted into evidence unless the case proceeds to trial.
 - (4) A clear statement that the parties agree that in the event that the conditions of the SOC are not met, the evidence at trial shall be limited to the police report currently contained in the court file or attached to the SOC as an exhibit and/or other specified documents submitted to the court at the time that the SOC is approved.
 - (5) A clear statement that all parties, by entering into an SOC, waive their constitutional right to a jury trial, their right to hear and question witnesses, their right to call witnesses, and the defendant's right to testify or not to testify.
 - (6) A clear statement of the period of continuance, which shall be no more than 2 years.
 - (7) A clear statement that the defendant, by entering into a SOC, is waiving his right to a speedy trial for the duration of the SOC, and that the new commencement date for speedy trial purposes is the last day of the period of continuance.
 - (8) A clear statement of each and every condition of the SOC, each condition being set forth in a separate paragraph.

(9) A clear statement of the outcome of the case if all conditions of the SOC are met.

(10) A clear statement acknowledging the requirement that the defendant will report to and be supervised by KCDC probation services or Bellevue probation services or probation monitoring, and will pay probation fees accordingly, provided that if this condition is specifically waived there must be a clear statement of that fact and the reasons therefore.

(11) A clear statement that the defendant fully understands that in case of non-compliance, a warrant for his or her arrest may issue, and that the likely result of non-compliance will be a conviction for the crime charged and imposition of up to the maximum penalties allowed by law.

(12) A clear statement of the elements of the offense(s) that must be proven in order to convict the defendant.

(13) A clear statement of the maximum penalties allowed by law, any mandatory minimum penalties and/or any other applicable restrictions/requirements under the law.

(14) A clear statement advising the defendant that if he or she is not a citizen of the United States, any finding of guilt to any offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(15) A clear statement that the defendant agrees that his or her decision to enter the SOC is made freely, knowingly, intelligently and voluntarily; that no one has threatened harm of any kind to the defendant or to any other person to cause the defendant to enter into the SOC, and that no one has made any promises of any kind, except those contained in the SOC agreement, to cause the defendant to enter into the SOC.

(16) A clear statement that the defendant has done one or more of the following: (a) read the SOC in its entirety and/or (b) has had the SOC read to him or her in its entirety by someone else (if that person is an interpreter the interpreter shall submit the appropriate declaration with the SOC).

(17) No SOC shall be effective until approved by the Court.

{Adopted effective January 1, 2000; amended effective September 1, 2001; September 1, 2008.}

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 74035-1-I
)	
GWEN ARDREY AKA GWEN GUTIERREZ,)	
)	
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 24TH DAY OF FEBRUARY 2016, 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] GWEN ARDREY
DOC NO. 385602
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF FEBRUARY 2016.

X *Patrick Mayovsky*