

original

NO. 34185-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL E. ASHBY, APPELLANT

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 90-1-01075-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is an appeal of an order denying the defendant's motion for remission of appellate costs appealable as a matter of right under RAP 2.2(a)?
2. Should this court decline to review the defendant's first and third assignments of error when they are not properly before this court?
3. Did the trial court act properly in denying the defendant's motion for arrest of judgment when the defendant's motion did not state a basis for relief and was not timely filed?

B. STATEMENT OF THE CASE.

On October 24, 2005, Superior Court Judge Thomas Felnagle signed an order entitled "Order Denying Motion for Arrest of Judgment and Remission of Appellate Costs." CP 80. In that order the court stated:

The court having considered the materials submitted by the parties and without oral argument: ORDERED (1) Defendant's motion for arrest of judgment is denied in that it is untimely and fails to state a basis for relief; (2) Defendant's motion for remission of appellate costs is denied in that it fails to show that costs have been collected or that a manifest hardship exists.

Id.

Michael Ashby, hereinafter “defendant,” sought a motion for reconsideration of the court’s ruling. CP 205-217, 218-256. On November 17, 2005, the court entered an order entitled “Order on Motions to Reconsider, Vacate, and to be Declared Indigent” CP 80. In the order the court denied the defendant’s motion for reconsideration. Id. The defendant filed a timely notice of appeal seeking review from the November 17th order. CP 34.

C. ARGUMENT.

1. APPEAL OF AN ORDER DENYING THE DEFENDANT’S MOTION FOR REMISSION OF APPELLATE COSTS IS NOT APPEALABLE AS A MATTER OF RIGHT UNDER RAP 2.2(a).

RAP 2.2(a), in part, states:

Rule 2.2 DECISIONS OF THE SUPERIOR COURT WHICH MAY BE APPEALED

- (a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:
 - (1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.
 - (10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment.

- (11) Order on Motion for Arrest of Judgment. An order arresting or denying arrest of a judgment in a criminal case.
- (12) Final Order after Judgment. Any final order made after judgment which affects a substantial right.

The State concedes that the denial of the defendant's motion for arrest of judgment is appealable under RAP 2.2(a). Further argument as to the first issue is contained below.

The second portion of the court's October 24th ruling, however, is not appealable as a matter of right. The second portion of the court's ruling denied the defendant's motion for remission of appellate costs. CP 80. The denial of a motion for the remission of appellate costs is not a basis for an appeal as a matter of right under RAP 2.2(a). If the defendant wishes to seek review of the court's denial of his motion for the remission of appellate costs, the defendant would be required to seek discretionary review under RAP 2.3(a). The defendant has not pursued discretionary review of the court's denial of his motion for remission of appellate costs.

The defendant has already been informed by this court that he would need to pursue a motion for discretionary review in order to dispute the court's order denying his motion for remission of appellate costs. The

defendant has not filed such discretionary review.¹ Therefore, this court should decline to review whether the trial court erred in denying the defendant's motion for remission of appellate costs.

2. THIS COURT SHOULD DECLINE TO REVIEW THE APPELLANT'S FIRST AND THIRD ASSIGNMENTS OF ERROR AS THEY ARE NOT MATTERS PROPERLY BEFORE THIS COURT.

The defendant asserts that (1) the trial court lacked authority to enter an order adding costs and (2) that Department of Corrections (DOC) policy number 200.00 does not authorize the transfer of funds. Br. of Appellant at p. 1. Neither issue was raised below, and are not part of the trial court's order and, therefore, are not properly before this court. This court should refuse to reach the defendant's first and third assignments of error.

3. THE TRIAL COURT ACTED PROPERLY IN DENYING THE DEFENDANT'S MOTION FOR ARREST OF JUDGMENT AS THE DEFENDANT'S MOTION DID NOT STATE A BASIS FOR RELIEF AND WAS NOT TIMELY.

CrR 7.4 states, in part:

- (a) Arrest of judgments. Judgment may be arrested on the motion of the defendant for the following cases: (1) Lack of jurisdiction of the person or offense; (2) the indictment

¹ On August 15, 2006, the defendant filed a motion for discretionary review to the Washington Supreme Court, but it addressed the appointment of appellate counsel, not the imposition of appellate costs. The motion was ultimately denied.

or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime.

(b) Time for motion; contents of motion. A motion for arrest of judgment must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as judgment is entered.

In the present case, the court ordered the imposition of appellate costs on December 3, 2004. CP 11-12. The defendant filed a motion for arrest of judgment on August 15, 2005, more than eight months later. CP 39-56. Under CrR 7.4(b), the defendant had only 10 days from December 3, 2004, in which to file his motion, and he failed to do so. The trial court properly denied the defendant's motion for arrest of judgment as it was not timely filed.

The trial court also properly denied the defendant's motion for arrest of judgment on the basis that it failed to state a basis for relief. CP 80. CrR 7.4 states that a judgment may be arrested for lack of jurisdiction of the person or offense, the indictment or information does not charge a crime, or there was insufficient proof of a material element of the crime. In the present case, the defendant asserted that he did not have the funds to pay for appellate costs. CP 39-56. In his motion, the defendant stated that CrR 7.4(a)(3) states that a judgment should be arrested if there is "insufficient proof of a material element of the crime, and/or ability to pay court costs." CP 39-56 (emphasis added). The defendant added in the language "and/or ability to pay court costs," as such language does not

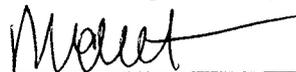
appear in CrR 7.4(a)(3). The defendant asserted that he was unable to pay appellate costs. Id. The inability to pay court costs is not a valid basis for arrest of judgment under CrR 7.4. Therefore, the trial court properly denied the defendant's motion.

D. CONCLUSION.

The trial court properly denied the defendant's motion for arrest of judgment as it was not timely and did not satisfy any of the grounds for relief under CrR 7.4. This court should affirm the trial court's order.

DATED: February 9, 2007.

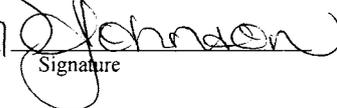
GERALD A. HORNE
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/9/07 
Date Signature

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DIVISION II