NO. 38775-1-II

IN THE COURT OF APPEAL

FOR THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

JOHN T. ENTLER,

Appellant.

ON APPEAL FROM THE

SUPERIOR COURT OF COWLITZ COUNTY

Before the Honorable James E. Warme

REPLY BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The Order Denying The Motion To Refund LFO's Collected And Applied To Cause No. 90-1-00077-7 Must Be Vacated Because The Ten-Year Enforcement Period Expired.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Whether Or Not The Trial Court Has The Authority To Order The Refund Of The LFO's, Whether Or Not That Determination Does Not Moot This Appeal. Did Appelalnt's Legal Financial Obligations In Cause No. 09-1-00077-7 Expire In December, 2000 Because More Than Ten Years Have Passed Since His Release From Total Confinement In 1990 For The Crime For Which The Legal Financial Obligations Were Ordered, And No Extension Was Ever Sought Or Ordered?

C. STATEMENT OF THE CASE

John Entler was convicted of second degree theft in Cowlitz County cause number 90-1-00077-7 in 1990. He was sentenced to approximately two to three months in the Cowlitz County Jail and was also ordered to pay legal financial

obligations ("LFO's"). The Clerk Papers [CP] 1-7, 61. After serving his ordered jail time. he was released from total confinement in December 1990. CP 61. Mr. Entler was convicted in 1993 of second degree theft in Cowlitz County No. 93-1-00469-6 and ordered to pay LFOs in the amount of $660.00. CP 21. Mr. Entler remains in custody of the Department of Corrections, during which time the State collected approximately #2025 in LFOs. CP 21. That amount was transferred to satisfy LFOs in Cowlitz County Cause Numbers 93-1-00469-6, 93-1-00470-0, and 93-1-00641-9. CP 21. His LFOs in 93-1-00469-6 was satisfied in August, 2003. CP 21. Additional money was collected in that cause number beyond that date and applied to 90-1-00077-7. CP 21.

Mr. Entler moved for refund of the overpayment applied to Cause No. 90-1-00077-7 on October 14, 2008, CP 20-54. The court denied the motion on December 9, 2008. Report of Proceedings (December 9, 2008) at 3-4. The Court entered an order denying the motion for refund of LFOs on December 19, 2008. CP 72. Mr. Entler appeals from that order. CP 73-74.

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D. ARGUMENT

1. THE ORDER DENYING THE MOTION TO REFUND LFO'S COLLECTED AND APPLIED TO CAUSE NO. 09-1-00077-7 MUST BE VACATED BECAUSE THE TEN-YEAR ENFORCEMENT PERIOD EXPIRED.

a. Whether Or Not The That Trial Court Has The Authority To Order The Clerk To Refund The LFO's Is Not Dispositive.

The Department of Corrections (DOC) argues that the Trial Court may not have the authority to order the Clerk to refund the LFO's DOC admits the Clerk unlawfully applied to Cause No. 90-1-00077-7. Response Brief, at 6-8.

DOC argues and raises an issue that was not raised in the Trial Court. Even if the Court were to hold that the Trial Court does not have the authority to refund the LFO's this Court would still have to rule on the issues raised in Appellant's Opening Brief. In other words the issue raised by DOC regarding the authority to refund the LFO over-payment does not moot this appeal. But as discussed below, the Trial

Court modified the judgment and sentence to authorize the Clerk to keep the overpayment. Thus, the Trail Court's modification of the judgement and sentence is directly related to the refund issue.

Second, Appellant's case is analogous to State v. Angulo, 77 Wn.App. 657, 659-663, 893 P.2d 662(1995). The Trial Court in Anglo's case modified the judgment and sentence. In the modification, the trial court required Angulo to pay $2,118.71 of his restitution obligation within 30 days, and refused to return a like amount of $2,118.71 belonging to Angulo and used as evidence at trial.

Before sentencing, Angulo moved the Superior Court for return of the $2,118.71. Angulo, 77 Wn.App. at 659. The trial court's disposition of Angulo's motion was not part of the record on appeal, but evidenctly, the Court of Appeals stated, the Trail Court denied the motion without prejudice. Angulo, 77 Wn.App. at 659.

Angulo unsuccessively appealed his conviction. While Angulo was still incarcerated, the prosecutor moved the Superior Court to Apply the $2,118.71 to Angulo's restitution

obligation. Angulo renewing his motion for return of his money, arguing that the Trial Court lacked authority to modify the judgement and sentence so that the prosecutor could apply the funds to his LFO. Angulo, 77 Wn.App. at 659. The prosecutor agreed that applying the $2,118.71 to the restitution obligation (LFO) constituted a modification of the payment schedule. The Trial Court modified the judgement and sentence by requiring Angulo to pay the $2,118.71 toward his Court ordered financial obligations within 30 days. Angulo, 77 Wn.App. at 659. Pending authorization from Angulo, the court retained custody of the $2,118.71. Angulo, 77 Wn.App. at 659-60. The Court of Appeals held that the Trial Court had no authorioty to modify the judgment and sentecne, and had no authority to retain Angulo's properety, the Court of Appeals vacated the modification order and directed the Trial Court to return Angulo's money. Angulo, 77 Wn.App. at 663.

In Appellant's case the Clerk was Collecting LFO's under a cause number (93-1-00469-6) that had not expired, Response Brief of DOC, at 2-3, that the Trial Court authorized them to do under No. 93-1-000469-6. The Clerk having satisfied the LFO's owed under Cause No. 93-1-00469-6, then applied the

over-colected funds to cause No. 90-1-00077-7. Appelant's Opening Brief, at 2;Response Brief of DOC, at 2-3. Appellant moved the court the same as Angulo to prevent the Clerk (rather than prosecutor) from applying the funds to LFO's and for refund of the LFO, the Trial Court denied the motion, and modified the judgment and sentence (similar to Angulo) to allow the Clerk to use the funds for LFO's by extending the judgment and sentence an additional 10 years conrary to RCW 9.94A.760. Appelant's Opening Brief, at 2-10.

Whether or not the funds were used for purposes for trial Angulo,77 Wn.App. at 659, because evidence was required to be returned after trial, or where a Clerk is authorized to seize funds for purposes of satisfying LFO's, in either case, if there was no authority to modify the judgment and sentence, and the modification to the judgment and sentence was to authorize confiscation of funds to be applied LFO's, which is the case in both Appellant's and Angulo's case, it does not make since to hold that the a trail court has authority to refunds confiscated funds in one matter and not in the other.

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The Clerk admits that if Appellant **did not** owe under any other cause numbers, the funds would be returned to Appellant. Motion to Modify, at Appendix 2, p. 1.("First of all, if there was and overpayment received and the defendant did not owe money in any other Cowlitz County Superior Court legal financial obligations, the overpayment would be refunded to the payer.").

Also, the Clerk still has the funds over-collected. Motion to Modify, at Appendix 2, pp. 4 & 5. Appendix 2, at pp. 2 & 3 show what disbursments where made, and to who. Pages 4 & 5 show that the over-collected funds where applied to the expired cause number, but no disbursments to any victim. Appendix 2 established that the Clerk still retains the Over-collected funds.

The issue of whether or not the Trial Court has the authority to order refund of the over-collected funds of Appellant is moot on this appeal because an adverse ruling by this court on this issue does not moot the main issue under appeal, which is whether or not the Trail Court exceeded it's authority in extending the judgement an additional ten years to authorized the Clerk to apply the over-collected founds to

to Cause No. 09-1-0077-7.

This Court should allow DOC or the Clerk the oportinity to voluntarily refund the LFO based on this Court ruling in this matter, and allow the Trial Court in the first instance to address the issue of a refund before this court enteratins DOC's question as to whether or not the Trial Court has the authority to order the refund of the over-collected LFO's. DOC or the Clerk would have to refund the over-collected funds or face certain liability in a civil suite, based on this court ruling.

CONCLUSION.

For the reasons stated herein and Appellant's Opening Brief, Appellant respectfully request this Court order the Trial Court to vacate the November 19, 2008 order extending the judgement and additional ten years, and remand the matter to the Trail Court.

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I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Signed this _____ day of _____,2010

Signed:_____

JOHN THOMAS ENTLER, #964471

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Signed:_____

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