

FILED
COURT OF APPEALS
DIVISION II

2015 MAY 18 AM 9:03

STATE OF WASHINGTON No. 45883-7-II

BY Ca
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CANDACE RALSTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

P/m 5/15/15

TABLE OF CONTENTS

A. ARGUMENT IN REPLY..... 1

 1. Ms. Ralston’s sentence must be reversed because it is clearly excessive..... 1

 2. A portion of the restitution award should be vacated because it was based on insufficient evidence. 4

 3. The legal costs imposed against Ms. Ralston should be stricken and the case remanded because the court failed to consider Ms. Ralston’s financial resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3). 7

B. CONCLUSION 9

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Blazina, __ Wn.2d __, 344 P.3d 680, 685 (2015) 7, 8

State v. Deskins, 180 Wn.2d 68, 322 P.3d 780 (2014)..... 4, 6

State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008) 5

State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005)..... 5

State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986)..... 3, 4

State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995)..... 1, 2

Washington Court of Appeals

State v. Dauenhauer, 103 Wn. App. 373, 12 P.3d 661 (2000) 5

State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038 (1993)..... 4

State v. McCarthy, 178 Wn. App. 290, 313 P.3d 1247 (2013) 5

Constitutional Provisions

U.S. Const. amend. XIV 4

Wash. Const. art. I, § 3 4

Washington Statutes

RCW 9.94A.753 5

RCW 9A.20.021 4

RCW 9A.56.030 3, 4

RCW 10.01.160 7

A. ARGUMENT IN REPLY

1. Ms. Ralston’s sentence must be reversed because it is clearly excessive.

Ms. Ralston was sentenced to 96 months in prison for taking approximately \$200,000 from her employer, Alderbrook Resort & Spa (“Alderbrook”). 2 RP 251, 272. With an offender score of 1, the standard range for the theft charge to which she submitted an Alford¹ plea was only 2 to 6 months. CP 58. When the length of a sentence is so long that it “shocks the conscience of the reviewing court,” it must be reversed. State v. Ritchie, 126 Wn.2d 388, 396, 894 P.2d 1308 (1995).

In its response, the State questions the utility of comparing Ms. Ralston’s sentence to other exceptional sentences. Resp. Br. at 5. While the court rejected a proposal to *require* a proportionality review of exceptional sentences in Ritchie, the consideration of other sentences remains a useful tool in examining whether an exceptional sentence is excessive. 126 Wn.2d at 396. Indeed, “excessive” is defined as “exceeding what is usual, proper, necessary, or normal.”² It is a word

¹ North Carolina v. Alford, 500 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

² <http://www.merriam-webster.com/dictionary/excessive> (last accessed May 14, 2015).

that, by definition, indicates a comparison to what is typical.

Something that is usual or normal does not “shock the conscience.” In order to determine whether an exceptional sentence requires reversal, it is helpful to consider the exceptional sentences that other defendants have received.

As explained in Ms. Ralston’s opening brief, the court in Ritchie examined the sentences of three defendants who had, respectively, beaten and raped an elderly woman, raped and severely injured a newborn, and physically tortured small children. 126 Wn.2d at 398-404. While the defendants in Ritchie received sentences that were three to nine times the top of the standard range, Ms. Ralston received a sentence that exceeded the top of the standard range by sixteen times. Id.; CP 58.

In its response, the State claims “the mere fact Ralston’s victims chose to organize their business as a corporation does not make them any less human” and argues that the theft from a business impacts its profitability, which impacts its ability to retain and hire workers. Resp. Br. 5. First, it is disingenuous for the State to imply that the embezzlement in this case inflicted the same horror on its victims as the acts committed by the defendants in Ritchie. Second, the State’s

speculative argument about the impact the loss had on Alderbrook is directly contradicted by the record, which shows Alderbrook was reimbursed for almost the entire loss by its insurer. CP 786.

Ms. Ralston's sentence is excessive when compared to cases involving only economic loss as well. See Op. Br. at 11-13. The State takes issue with Ms. Ralston's reliance on State v. Oxborrow, apparently arguing that the defendant in Oxborrow only "obtained" \$58 million and returned \$45 million. 106 Wn.2d 525, 527, 723 P.2d 1123 (1986); Resp. Br. at 11. In her opening brief, Ms. Ralston stated the defendant had "defrauded" investors of over \$58 million and \$13 million was never returned. Op. Br. at 11-12. Given that the defendant engaged in an elaborate pyramid scheme, Ms. Ralston's description is apt. In either event, \$13 million was lost in that case. Oxborrow, 106 Wn.2d at 527.

The State further argues that Oxborrow is not helpful because the defendant was sentenced to the maximum amount of time on the theft charge. Resp. Br. at 6. This argument is misguided. When making first degree theft punishable by up to ten years in prison, the legislature accounted for all crimes of this nature in which the loss of property exceeded \$5,000 in value. RCW 9A.56.030; RCW

9A.20.021(1)(b). The implication in the State’s argument, that the defendant would have been sentenced to more time if that were possible, suggests the case was not properly charged or the statute failed to account for thefts of this magnitude. Neither contention is apparent from Oxborrow or RCW 9A.56.030. Ms. Ralston’s 8-year sentence for a theft of \$213,581.15 shocks the conscience when it is compared to the defendant’s 10-year sentence for a theft of \$13 million in Oxborrow, 30 years earlier. Ms. Ralston’s sentence was excessive and this Court should reverse.

2. A portion of the restitution award should be vacated because it was based on insufficient evidence.

The State claims Ms. Ralston would unfairly benefit from a “windfall” if a portion of the restitution award was vacated because Alderbrook and its accounting firm only roughly estimated some of their expenses. Resp. Br. at 13. This claim fails to appreciate that the evidence presented at restitution hearings must meet due process requirements. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Any claimed loss must be supported by substantial credible evidence. State v. Deskins, 180 Wn.2d 68, 82, 322 P.3d 780 (2014). If the State is unable to meet this burden by a preponderance of the evidence, an award of

restitution is improper. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). This is not a “windfall” to the defendant, but an appropriate safeguard against the imposition of restitution that lacks the evidence to support it.

Similarly, the State’s suggestion that Ms. Ralston should be grateful it decided not to pursue a request for restitution unrelated to the charges is meritless. Resp. Br. at 11. The State conceded below that some of the work performed by the accounting firm, Moss Adams, LLP (“Moss Adams”) was unrelated to the charged offenses. 3 RP 10. Pursuant to RCW 9.94A.753(5), restitution is permitted only for losses that are “causally connected to the crime charged.” State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Restitution may not be imposed based on a general scheme or acts connected with the charged crime, if the acts are not a part of the charge. State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). Instead, “[t]he losses must be the result of the ‘precise offense charged.’” State v. McCarthy, 178 Wn. App. 290, 297, 313 P.3d 1247 (2013).

Understanding this limitation, the State sought less than the full amount charged by Moss Adams. However, it was unable to provide supporting evidence to show how much of the accounting firm’s time

was expended on the analysis of transactions irrelevant to the charged crimes. 3 RP 10. The State's decision to reduce the amount by ten percent was not supported by substantial evidence because no itemization was provided and the State represented Moss Adams had not attempted to calculate the true amount. 3 RP 10. Thus, the reduction by ten percent amounted to nothing more than a guess.

As the State acknowledges, Alderbrook also failed to track the time its employees expended in order to attend to "various issues surrounding" the case against Ms. Ralston, forcing Alderbrook to offer its best guess instead. CP 834; 3 RP 28-29; Resp. Br. at 12-13.

In its response, the State argues simply that this Court should defer to the trial court's acceptance of Alderbrook's estimate. Resp. Br. at 11. Such deference is not required, or appropriate, when the State failed to present any evidence that the employees at issue had lost a full two weeks of work, as claimed by Alderbrook, to assist with the case. CP 834.

The type of speculation and conjecture required to estimate the expenses incurred by Moss Adams and the Alderbrook employees is impermissible. Deskins, 180 Wn.2d at 82-83. The order should be vacated and the case remanded for a new restitution hearing.

3. The legal costs imposed against Ms. Ralston should be stricken and the case remanded because the court failed to consider Ms. Ralston's financial resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3).

Our Supreme Court recently held “RCW 10.01.160(3) requires the record to reflect the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.” State v. Blazina, ___ Wn.2d ___, 344 P.3d 680, 685 (2015). In Blazina, the judgment and sentence contained boilerplate language, almost identical to the boilerplate language in Ms. Ralston’s judgment and sentence, stating the trial court considered the defendant’s financial resources and the likelihood her status would change. Id. at 681-82; CP 9. However, unlike in Blazina, the findings here did not include a statement that the court found Ms. Ralston actually had the ability to pay. CP 9.

Further, no such finding was made on the record. The court simply imposed the costs and questioned defense counsel about what kind of payment schedule Ms. Ralston would require, given her limited financial resources and exorbitant prison sentence. 2 RP 272-73. The State claims *this* was the court’s analysis of Ms. Ralston’s ability to pay. Resp. Br. at 13. It argues that in recognition of Ms. Ralston’s

limited abilities, the court set the payments “at a mere \$25.00 per month.” Resp. Br. at 13. However, like the trial court, which stated that these payments would not “be enough to even cover the interest that accrues at twelve percent per annum,” the State concedes that “[t]he costs imposed in this case, combined with the large restitution award, cast doubt on Ralston’s ability to pay.” 2 RP 272-73; Resp. Br. at 14. Thus, even as the State attempts to identify an individualized inquiry of Ms. Ralston’s ability to pay, which is clearly missing from the record, it is forced to acknowledge that any determination Ms. Ralston had the ability to pay would have been made in error.

The trial court required Ms. Ralston to pay \$39,211.85 in discretionary legal financial obligations *in addition to* the \$294,115.73 in restitution later imposed by the court. CP 766-68, 832-33. As the court recognized in Blazina, “on average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. Ms. Ralston is unlikely to be in a better position than the average person, given that the nature of her conviction will likely make it impossible for her to secure employment when she is eventually released. Although Ms. Ralston did not challenge the imposition of the

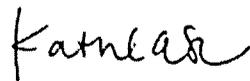
legal financial obligations at the trial level, given the enormity of the financial obligations imposed in this case without any regard for Ms. Ralston's ability to pay, this Court should exercise its discretion under RAP 2.5 and remand Ms. Ralston's case for a new sentencing hearing. See Blazina, __ Wn.2d __, 344 P.3d at 682, 685.

B. CONCLUSION

For the reasons stated above and in her opening brief, this Court should reverse.

DATED this 15th day of May, 2015.

Respectfully submitted,



KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 CANDACE RALSTON,)
)
 Appellant.)

NO. 45883-7-II

FILED
COURT OF APPEALS
DIVISION II
2015 MAY 18 AM 9:04
STATE OF WASHINGTON
BY SC DEPUTY

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TIMOTHY HIGGS	()	U.S. MAIL
[timh@co.mason.wa.us]	()	HAND DELIVERY
MASON COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE
PO BOX 639		VIA COA PORTAL
SHELTON, WA 98584-0639		
[X] CANDACE RALSTON	(X)	U.S. MAIL
752252	()	HAND DELIVERY
WACC FOR WOMEN	()	_____
9601 BUJACICH RD NW		
GIG HARBOR, WA 98335		

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF MAY, 2015.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711