

No. 49431-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KRISTOPHER ERDELBROCK,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to sustain a conviction for failure to register as a sex offender.
2. The trial court erred in failing to enter written findings of fact and conclusions of law following the trial.
3. The trial court erred in failing to enter sufficient oral findings of fact and conclusions of law.
4. The trial court committed error by imposing discretionary legal financial obligations without inquiring into Mr. Erdelbrock's indigence or his ability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Erdelbrock was charged with failing to register as a sex offender under RCW 9A.44.130(1) and (6)(b), and RCW 9A.44.132(1)(a)(ii). As such, the State was required to prove beyond a reasonable doubt that during the charging period, Mr. Erdelbrock lacked a fixed residence and had a corresponding duty to report weekly to the county sheriff. Where the State produced no evidence that Mr. Erdelbrock was undomiciled, other than his own prior statements, did the State produce sufficient evidence under the *corpus delicti* rule to show Mr. Erdelbrock was required to report weekly under the charged

subsections of the statute? Was the evidence produced at trial insufficient as a matter of law?

2. CrR 6.1(d) requires the trial court to enter written findings of fact and conclusions of law following a bench trial in a criminal case. The purpose of the rule is to enable effective appellate review. Did the trial court violate CrR 6.1(d), precluding effective appellate review, by failing to enter written (or sufficient oral) findings and conclusions following the bench trial in Mr. Erdelbrock's case?

3. Before imposing legal financial obligations, a sentencing court must make an inquiry as to a defendant's ability to pay. This court may address a trial court's failure to conduct this inquiry for the first time on appeal. The trial court here imposed discretionary financial obligations against an indigent defendant, although it did not inquire on the record as to the defendant's ability to pay. Should the Court remand with instructions to strike the improperly imposed discretionary legal financial obligations?

C. STATEMENT OF THE CASE

Kristopher Erdelbrock was previously convicted of a sex offense in 2013. CP 9-10.¹ He was also convicted of failure to register

¹ Mr. Erdelbrock's 2013 conviction was for Rape of a Child in the Third Degree in Cowlitz County. CP 9-10.

as a sex offender in 2015. Id. He stipulated to these prior offenses at a bench trial on the instant offense. Id.; RP 6.

The State charged Mr. Erdelbrock with one count of failure to register as a sex offender under RCW 9A.44.130(1), (6)(b), and RCW 9A.44.132(1)(a)(ii). CP 7-8. The State alleged that between August 11 and September 3, 2015, Mr. Erdelbrock knowingly failed to report weekly to the Cowlitz County Sheriff, as required by offenders with no fixed residence. CP 7-8.

At trial, Deputy Darrin Ullmann of the Cowlitz County Sheriff's Office testified that he is the coordinator for the registered sex offender office for the county. RP 9-10. Deputy Ullman stated that following Mr. Erdelbrock's release from custody in 2015, the deputy met with Mr. Erdelbrock to explain the registration process with him. RP 13. Deputy Ullmann testified that Mr. Erdelbrock stated he was "transient," and that he did not have a place to live. Id. The deputy stated he explained the statutory requirements to Mr. Erdelbrock for those without a fixed residence. RP 13-14.

Deputy Ullmann explained that sex offenders without housing must check in weekly on Tuesdays, during business hours. RP 14-15. These offenders must fill out a log containing every place they have

stayed during the previous week, and the deputy's clerk does the data entry. Id. Deputy Ullmann testified that Mr. Erdelbrock had not called to change his address since August 4, 2015; nor did he check in with the office as required. RP 15. Mr. Erdelbrock also could not be located by calling local jails or hospitals. RP 16.

The deputy's clerk, Kristine Taff, also testified at trial. RP 19-22. She discussed the procedures for homeless offenders to register weekly, and stated she did not know if anyone had verified where Mr. Erdelbrock was staying. RP 24-25. Deputy Ullmann conceded he had not verified that Mr. Erdelbrock was homeless or looked for him until August 11, 2015. RP 30.

At the end of the trial, the judge provided an equivocal oral ruling finding Mr. Erdelbrock guilty of failure to register. RP 44 ("So I think there's no other alternative but to maybe finding him guilty under the statute..."). No written findings of fact or conclusions of law were filed.

Mr. Erdelbrock appeals. CP 26-40.

D. ARGUMENT

1. The State failed to prove each element of the charged offense beyond a reasonable doubt.

- a. Due process required the State prove each element of the offense beyond a reasonable doubt.

Due Process requires the State prove every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. XIV; Const. art I, § 3. Evidence is sufficient to support a determination of guilt only if a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Reversal for insufficient evidence requires dismissal of the charge with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

- b. The State did not prove that Mr. Erdelbrock lacked a fixed residence during the charging period.

Here, the State proceeded under a specific theory: that Mr. Erdelbrock failed to report weekly, as required where a sex offender lacks a fixed residence. See RCW 9A.44.130(6)(b). The first element burdened the State with proving that Mr. Erdelbrock had a prior

conviction for a felony sex offense. CP 7-8; RP 5 (by stipulation). The second element burdened the State with proving that due to this conviction, Mr. Erdelbrock was required to register in Washington during the charging period. The third element specified the State had to prove that between August 11, 2015, and September 3, 2015, Mr. Erdelbrock: “did knowingly fail to report weekly to the Cowlitz County Sheriff.” CP 7-8.

The State chose to prosecute Mr. Erdelbrock for this particular violation of the registration statute and no other.² However, the State’s proof regarding this element was insufficient as a matter of law.

In this case, the State took on the burden of proving a negative: that Mr. Erdelbrock was not living anywhere that met the definition of a fixed residence.³ See State v. Batson, 194 Wn. App. 326, 330, 377 P.3d 238 (2016) (noting that at times, the State must prove a negative).

² The weekly reporting obligation – which applies only to offenders who lack a fixed residence – is the sole theory under which the State proceeded. RP 33-34 (State closing argument).

³ See State v. Prestegard, 108 Wn. App. 14, 19, 28 P.3d 817, 820 (2001) (reversing where trial court erroneously kept the accused from presenting evidence “about how the sheriff’s office regularly lost court documents that were delivered to the main intake window”).

At times, the State must prove a negative in order to convict in a failure to register case. In Prestegard, this Court noted, “to prove this negative, the State had to prove that the sheriff’s office had a routine practice for handling sex offenders’ registrations; that its practice was reliable; and thus, that it would have [his] new registration with his change of address if he filed one.” Id.

The State did not meet this burden, in part, because the State did not present evidence of Mr. Erdelbrock’s transient status – and therefore his requirement to register under the charged subsection – with evidence other than his own statements. This lack of evidence violates the *corpus delicti* rule.

Under the *corpus delicti* rule, a defendant’s extrajudicial statements may not be admitted into evidence absent independent proof of the existence of every element of the crime charged. See State v. Aten, 130 Wn. 2d 640, 655, 927 P.2d 210 (1996) (citing 1 McCORMICK ON EVIDENCE § 145, at 227 (John W. Strong ed., 4th ed. 1992)). The *corpus delicti* rule was established to protect against improper and unjust convictions based upon a false confession alone. City of Bremerton v. Corbett, 106 Wn.2d 569, 574-77, 723 P.2d 1135 (1986) (citing Smith v. United States, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954)); J. Wigmore, Evidence §§ 2070-71 (rev. 1978).

The general “judicial distrust of confessions,” as the Court wrote in Corbett, stems from the concern that a confession “may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a

mentally disturbed individual.” 106 Wn.2d at 576 (citing Note, Proof of the Corpus Delicti Aliunde the Defendant's Confession, 103 U. Pa. L.Rev. 638, 642-46 (1955); Note, Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule, 46 Fordham L. Rev. 1205 (1978)).

Here, no evidence that Mr. Erdelbrock “lacked a fixed residence,” as required under the statute, was presented by the State, other than Mr. Erdelbrock’s own admissions. In Washington, an accused person’s statement is not sufficient to prove a crime occurred. The State must present evidence that the crime described in the statement actually occurred; this evidence must be independent of the statement itself. State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006), as amended (Jan. 26, 2007).

Because the State failed to present evidence that Mr. Erdelbrock lacked a fixed residence – and thus that he had an affirmative duty to register weekly under RCW 9A.44.130(6)(b), the evidence at trial was insufficient.

- c. This case is different from *Peterson*, because the State charged Mr. Erdelbrock under only RCW 9A.44.130(6)(b).

In State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010), the Supreme Court held that failure to register is not an alternative means crime. Consequently, Peterson found that proof of residential status – during the charging period of an alleged failure to register offense – is not a necessary element. This reasoning was driven by the particular facts of that case. Police officers verified that Mr. Peterson vacated his registered residence at the end of October of 2005, only to register as homeless about five weeks later. Id. at 766. Even though the State did not put on evidence concerning his whereabouts after he left his apartment, the State had established beyond a reasonable doubt that he had failed to comply with his registration requirements. Mr. Peterson’s documented move established the *actus reus* of failure to register, because the change of registration address was done after even the most lenient deadline to *update* registration had passed: “Peterson registered outside of *any deadline* contained in the statute.” Id., at 772 (emphasis in the original). No matter what his residential status may have been in the intervening timeframe, Mr. Peterson had violated at least one registration requirement.

This case is different. Here, the State's amended information charged a single failure: the failure to report weekly due to Mr. Erdelbrock's alleged status as lacking a fixed residence. CP 7-8. The State chose to take on the burden of proving, beyond a reasonable doubt, that during the charging period, Mr. Erdelbrock's residential status was that of someone lacking a fixed address to whom the weekly reporting obligation applied. CP 7-8; RP 5 (Deputy prosecutor: "Here, we're just focusing on a transient, and so we did take out some of the superfluous language ...").

The State's proof on this assumed element failed. For example, the State did not disprove the possibility that in the charging period, Mr. Erdelbrock was living at a fixed residence different from the transient camps they checked. They did not put on any evidence as to where Mr. Erdelbrock was living in the charging period. He could have rented a motel room, week by week, that would have met the statutory definition of a "fixed residence," or he could have moved in, on a temporary basis, with a friend who had a spare bedroom available for him. If he had assumed a new Cowlitz County residence, then perhaps he would have had three days within which to report a change

of address under RCW 9A.44.130(5)(a), but that is not a statutory violation the prosecution charged here.

On these facts, with the elements set out in the amended information, the State's proof of guilt was insufficient as a matter of law. A conviction based on insufficient evidence cannot stand. State v. Veliz, 176 Wn.2d. 849, 865, 298 P.3d 75 (2013). To retry Mr. Erdelbrock for the same conduct would violate the prohibition against double jeopardy. E.g., Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The conviction must be reversed and dismissed for insufficient evidence.

2. The trial court erred in failing to enter written findings of fact and conclusions of law following Mr. Erdelbrock's bench trial.

Following a bench trial in a criminal case, the judge has a mandatory duty to enter written findings of fact and conclusions of law. CrR 6.1(d) provides:

In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the

questions raised on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). A trial court's oral opinion is no more than an oral expression of the court's informal opinion at the time rendered. Id. An oral opinion has no binding effect unless formally incorporated into written findings, conclusions and judgment. Id. As the Supreme Court noted in Head,

An appellate court should not have to comb an oral ruling to determine whether the appropriate findings have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Id. at 624.

In addition, appellate review is facilitated by written findings and conclusions. Id. "A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court." Id. That focus will simplify and expedite appellate review. Id. at 622-23.

Here, the trial court entered no written findings and conclusions as required by CrR 6.1(d). The court provided only an oral ruling, which has no binding effect. Head, 136 Wn.2d at 622. In addition, the oral ruling does not set forth the particular evidence the judge relied on to find each element of the charged crime. RP 44. Here, the court's

oral ruling was also equivocal, as the court stated, “[S]o I think there’s no other alternative but to maybe finding him guilty under the statute based on the facts and the evidence that was admitted.” RP 44. Under these circumstances, effective appellate review is impossible.

The remedy for a court’s failure to enter written findings and conclusions pursuant to CrR 6.1(d) is to remand for entry of such findings and conclusions. Head, 136 Wn.2d at 624. On remand, the trial court is not bound by its earlier oral decision. Id. at 625. The trial court is free to determine that, despite its earlier ruling, a conviction is not appropriate after specifically addressing the evidence relating to each of the elements of failure to register; the court is, however, bound by the existing record. Id.

3. The trial court improperly imposed discretionary legal financial obligations based on an unsupported finding that Mr. Erdelbrock had the ability to pay.

Courts may require an indigent defendant to reimburse the state for only certain authorized costs, and only if the defendant has the financial ability to do so. State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680, 684 (2015) (“the state cannot collect money from defendants who cannot pay”); see also Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16,

829 P.2d 166 (1992); RCW 10.01.160(3) (“The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them”). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty.

- a. There is no evidence to support the trial court’s finding that Mr. Erdelbrock had the present or future ability to pay legal financial obligations.

“The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.; RCW 10.01.160(3) (the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose).

Here, the court entered a finding on the Judgment and Sentence that Mr. Erdelbrock had the ability to pay LFOs. CP 16.⁴ This was identical to the standard “boilerplate language” that the Supreme Court

⁴ In the Judgment and Sentence, the court’s findings include the statement:

The court has considered the total amount owing, the defendant’s present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. RCW 10.01.60. CP 16

found an insufficient assessment of a defendant's inability to pay LFOs in Blazina. 182 Wn.2d at 831.

There was no evidence Mr. Erdelbrock was employed or would be employable following his release from prison. Mr. Erdelbrock was represented by a court-appointed attorney during trial, and the trial court found he remained sufficiently indigent to require appointed counsel on appeal. Yet inexplicably, the court entered a finding on the Judgment and Sentence that he "has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 16. Despite the fact that the State's case relied upon the allegation that Mr. Erdelbrock was homeless, the court imposed LFOs that are non-mandatory. CP 19 (Sec. 4.3(a)); RP 50 (imposing discretionary costs, despite the State's suggestion that the court impose "zero costs" in this case).

b. Because the court failed to exercise its discretion in the imposition of LFOs, this Court should remand for resentencing.

Since the Blazina decision, the mandate to trial courts has been clarified: judicial discretion must be exercised when the issue of LFOs is considered, and the trial court must consider a defendant's "current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. As the Blazina Court

(J & S § 2.5).

discussed, Washington has become part of the “national conversation” on the equal justice concerns raised by LFO’s, because the amount of fines and fees imposed upon conviction varies greatly by “gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced.”⁵

The court’s imposition of legal financial obligations without considering a person’s ability to pay exacerbates the problems that those released from confinement face, and often leads to increased recidivism.

It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

The Blazina Court also discussed its concern about LFOs inhibiting re-entry for past offenders, noting that LFOs accrue interest

⁵ See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008); Blazina, 182 Wn.2d at 835-36.

at a rate of 12 percent, so that even an individual “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.”

Blazina, 182 Wn.2d at 836 (citing State Minority and Justice Commission at 22).

The court’s imposition of discretionary legal financial obligations, even though it knew of Mr. Erdelbrock’s ongoing indigence, coupled with the obvious hardship of reentering society after spending 15 months in prison, constitutes significant punishment. It violates the right to equal protection of the law, is contrary to statute and case law, and should be remanded with instructions to strike the improperly imposed financial legal financial obligations.

4. Any request that costs be imposed on Mr. Erdelbrock for this appeal should be denied because he does not have the present or likely future ability to pay them.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1). A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 192 Wn. App. at 389.

Mr. Erdelbrock does not have a realistic ability to pay appellate costs. During the trial, there was considerable testimony about Mr. Erdelbrock's alleged "transient" status. E.g., RP 13-14, 17, 21-22, 30. At sentencing, the court noted that although Mr. Erdelbrock could not afford the majority of court costs, the court would still impose the court filing fee. RP 49-50. For reasons that remain unclear, the court ultimately declined the State's suggestion to impose "zero costs." RP 50.

At the same time, the court entered an order authorizing Mr. Erdelbrock to seek review at public expense and appointed public counsel on appeal. As this Court noted in Sinclair, RAP 15.2(f)

requires a party granted such an order of indigency to notify the trial court of any significant improvement in financial condition. Sinclair, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f).

Our Supreme Court has more recently stated the following on appellate costs: “We must consider the obvious goal of those rules to award costs in a fair and just manner depending on the realities of the situation. Thus, the most important rule for us to consider is RAP 1.2(c) ... The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice...” State v. Stump, 185 Wn.2d 454, 464, 374 P.3d 89 (2016).

There is no record indicating Mr. Erdelbrock’s financial condition has improved since the time of this trial.

Nor is Mr. Erdelbrock’s financial situation likely to improve to the point where he will be able to pay appellate costs. At sentencing, the court sentenced him to a standard range sentence of 15 months in the Department of Corrections, with 36 months of community custody to follow, as well as the ongoing duty to register. CP 12-25; RP 49.

Because Mr. Erdelbrock remains indigent and is unlikely ever to be able to pay appellate costs, this Court should exercise its discretion and decline to award costs if the State substantially prevails on appeal.

E. CONCLUSION

Mr. Erdelbrock's conviction should be reversed and dismissed for insufficient evidence. In the alternative, because the trial court did not enter written findings of fact and conclusions of law as required by CrR 6.1(d), the case should be remanded for entry of such findings and conclusions. Mr. Erdelbrock also asks this Court to remand this case for consideration of his ability to pay legal financial obligations. Lastly, if the State substantially prevails on appeal, this Court should decline to award costs.

Respectfully submitted this 11th day of January, 2017.

s/ Jan Trasen

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

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RESPONDENT,)	
)	
v.)	NO. 49431-1-II
)	
KRISTOPHER ERDELBROCK,)	
)	
APPELLANT.)	

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