

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS RICHARD FAMBRO,

Appellant.

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

The Honorable Grant Blinn

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	1
C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> ...	1
D. <u>STATEMENT OF THE CASE</u>	2
E. <u>ARGUMENT</u>	4
1. RESENTENCING IS REQUIRED BECAUSE THE COURT ERRED IN SENTENCING FAMBRO TO 36 MONTHS OF COMMUNITY CUSTODY FOR IDENTITY THEFT WHERE THE LENGTH OF TIME THAT IS STATUTORILY REQUIRED IS 12 MONTHS.	4
2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE FAMBRO REMAINS INDIGENT.	5
F. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	Page
<i>Brooks v. Rhay</i> , 92 Wn.2d 876, 602 P.2d 356 (1979)	5
<i>McNutt v. Delmore</i> , 47 Wn.2d 563, 288 P.2d 848 (1955)	1
<i>State v. Blazina</i> , 82 Wn.2d 827, 344 P.3d 680 (2015)	5
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000)	6
RCW 9.94A.411(2)(a)	4
RCW 9.94A.701(3)(a)	4
RCW 10.73.160(1)	7
RAP 14.2	5
RAP 15.2(f)	7

A. INTRODUCTION

A trial court has the power and duty to correct an erroneous sentence. *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955). The court here erroneously sentenced Curtis Richard Fambro to 36 months of community custody where the statutorily required sentence is 12 months. Consequently, a remand for resentencing is required for the court to correct the sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing Fambro to 36 month of community custody for identity theft.

2. In the event the State substantially prevails on appeal this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is resentencing required because the trial court erred in sentencing Fambro to 36 months of community custody for identity theft where the length of time statutorily required is 12 months?

2. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Fambro is presumably still indigent where there has been no evidence provided to this Court, and there is no reason to believe, that his financial condition has improved or is likely to improve?

D. STATEMENT OF THE CASE

1. Procedure

On October 6, 2016, the State charged appellant, Curtis Richard Fambro, with one count of identity theft in the second degree committed on July 7, 2016, one count of theft in the second degree committed on July 7, 2016, one count of forgery committed on July 7, 2016, one count of identity theft in the first degree committed on July 12, 2016, one count of theft in the second degree committed on July 12, 2016, one count of forgery committed on July 12, 2016, one count of identity theft in the first degree committed on July 13, 2016, one count of theft in the first degree committed on July 13, 2016, and one count of forgery committed on July 13, 2016. CP 1-4. The State amended the information on June 20, 2017, seeking an aggravated exceptional sentence pursuant to RCW 9.94A.535(2)(c), alleging that the defendant has committed multiple current offenses and the defendant's high offender score will result in some of the current offenses going unpunished. CP 18-22.

Following a trial before the Honorable Grant Blinn, on June 23, 2017, a jury found Fambro guilty on all counts except forgery as charged in count three. CP 108-116; RP 340-42. On August 11, 2017, based on an offender score of 9+ the court sentenced Fambro to 73.5 months in confinement with 36 months of community custody and imposed

mandatory legal financial obligations. CP 120-36, 153-54; 08/11/16 RP 7-9.

Fambro filed a timely notice of appeal. CP 144.

2. Facts

a. Trial Testimony

On July 21, 2016, an officer responded to a report of a forgery at Columbia Bank in Fife. The bank manager provided the officer with cashed checks which were later discovered to be forged business checks drawn from Firstline Systems. RP 97-98, 220. The checks had Curtis Richard Fambro named as the payee with an address. RP 116, 118. A fraud investigator provided still images of the suspect taken from the bank surveillance system. RP 113-15, 119-21, 160, 168-75. From viewing the surveillance video, the investigator concluded that Fambro cashed a check and received money three different times. RP 172-73.

The bank notified Firstline Systems, a construction company in Kirkland, about the checks. RP 124-25, 151. Fambro was never an employee or contractor for the company. RP 126-27. The company verified that the checks were not legitimate. RP 125, 148.

A detective interviewed Fambro at the Fife Police Station on October 5, 2016, after he had been arrested. RP 264. When the detective asked Fambro if he cashed three checks at Columbia Bank in July, he said

he could not remember. RP 265, 273-74. At the end of the interview, the detective told Fambro he was going forward with charges of identity theft. Fambro responded, “Fair enough.” RP 274.

Fambro did not testify at trial. RP 275.

b. Sentencing

At sentencing, the court asked whether there is community custody on any of the counts and defense counsel replied that he did not believe so. RP 8. However, the judgment and sentence requires Fambro to serve 36 months of community custody on counts I, IV, and VII for “serious violent offenses.” CP 128.

E. ARGUMENT

1. RESENTENCING IS REQUIRED BECAUSE THE COURT ERRED IN SENTENCING FAMBRO TO 36 MONTHS OF COMMUNITY CUSTODY FOR IDENTITY THEFT WHERE THE LENGTH OF TIME THAT IS STATUTORILY REQUIRED IS 12 MONTHS.

Under RCW 9.94A.701(3)(a), when the court sentences an offender to the custody of the department of corrections for any crime against persons, the court shall in addition sentence the offender to community custody for one year. RCW 9.94A.411(2)(a) categorizes identity theft in the first and second degree as a crime against persons.

A jury convicted Fambro of one count of identity theft in the second degree and two counts of identity theft in the first degree. CP 108, 111, 114.

The judgment and sentence reflects that the court sentenced Fambro to 73.5 months in confinement and 36 months on community custody. CP 127-128. The court subsequently corrected the confinement portion of the judgment and sentence, stating that all other terms and conditions of the original judgment and sentence shall remain in full force and effect. CP 153-54.

The record establishes that the court erred in sentencing Fambro to 36 months of community custody where the length of time that is statutorily required is 12 months. The appropriate remedy for an erroneous sentence is resentencing. *Brooks v. Rhay*, 92 Wn.2d 876, 878, 602 P.2d 356 (1979). Accordingly, a remand for resentencing is required for the court to correct the error.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE FAMBRO REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk

determines by a preponderance of evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 82 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs "is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all." The Court

emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Fambro is indigent. The trial court found that Fambro is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 151-52. This Court should therefore presume that Fambro remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party’s financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court, and there is no reason to believe, that Fambro’s financial condition has significantly

improved. Fambro is therefore presumably still indigent and this Court should exercise its discretion to not award costs where there is no basis for the commissioner or clerk to determine by a preponderance of evidence that his financial circumstances have significantly improved since the last determination of indigency.

F. CONCLUSION

For the reasons stated, this Court should remand for resentencing. In the event the State prevails on appeal, this Court should deny costs because Fambro remains indigent.

DATED this 20th day of February, 2018.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant Curtis Richard Fambro

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office and by U.S. Mail to Heber Shane Green, DOC # 808495, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362.

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

DATED this 20th day of February, 2018.

/s/ Valerie Marushige
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Transmittal Information

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DECLARATION OF SERVICE**

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office and by U.S. Mail to Curtis Richard Fambro, DOC # 808495, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362.

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

DATED this 20th day of February, 2018.

/s/ Valerie Marushige
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