

FILED
Court of Appeals
Division II
State of Washington
9/26/2019 1:05 PM

NO. 52895-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAVEL VICTOROVICH KORYAVYKH,

Appellant.

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

The Honorable Michael E. Schwartz, Judge

BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	4
1. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO ACCURATELY REFLECT THE SENTENCE THE TRIAL COURT IMPOSED	4
2. THE LEGAL FINANCIAL OBLIGATION INTEREST ACCURAL PROVISION VIOLATES RECENT LEGISLATIVE AMENDMENTS AND SHOULD ACCORDINGLY BE STRICKEN FROM KORYAVYKH'S JUDGMENT AND SENTENCE.....	5
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Mayer
128 Wn. App. 694, 117 P.3d 353 (2003) 4

Presidential Estates Apartment Ass'n v. Barrett
129 Wn.2d 320, 917 P.2d 100 (1996)..... 4

State v. Priest
100 Wn. App. 451, 997 P.2d 452 (2002) 4

State v. Ramirez
191 Wn.2d 732, 426 P.3d 714 (2018)..... 5, 6

RULES, STATUTES AND OTHER AUTHORITIES

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.
(Wash. 2018)..... 5

LAWS OF 2018, ch. 269, § 1..... 5

RCW 7.68.035 5

RCW 10.82.090 3, 5

A. ASSIGNMENTS OF ERROR

1. The judgment and sentence does not accurately reflect the trial court's oral pronouncement of Pavel Victorovich Koryavykh's sentence.

2. The trial court erred in imposing an interest accrual provision related to legal financial obligations (LFOs) in Pavel Victorovich Koryavykh's judgment and sentence.

Issues Pertaining to Assignments of Error

1. At sentencing, the trial court stated it was imposing two concurrent 45-day sentences on each count and suspended the sentence for two years subject to probationary conditions. Contrary to the trial court's oral pronouncement of the sentence, the judgment and sentence provides a 90-day sentence for Count II (driving with a license suspended in the third degree) and a 364-day sentence for Count III (reckless driving). Should this case be remanded so that the judgment and sentence may be amended to reflect the trial court's intent to sentence Koryavykh to two concurrent 45-day suspended sentences?

2. Given the prospective application of recent amendments to LFO statutes, should the interest accrual provision be stricken from Koryavykh's judgment and sentence?

B. STATEMENT OF THE CASE

This case pertains to a traffic incident on May 23, 2018 in Graham, Washington. RP 312-13, 315. Officer Lucas Baker testified he was in his marked patrol car (a Ford Explorer SUV) behind two motorcycles, one of which was a cruiser and one of which he described as a “crotch rocket” sport bike. RP 326, 332-33. Baker followed the motorcycles for a period, and both operated within the 55 mile-per-hour speed limit. RP 327. Suddenly, both motorcycles revved and accelerated at a high rate. RP 328, 331. Baker activated his lights and sirens and pursued the motorcycles. RP 330. Baker was able to overtake the cruiser, which was traveling at about 90 miles per hour, but was not able to catch up to the sports bike, although he continued pursuit. RP 331-35. Koryavykh drove the sports motorcycle. RP 332. Koryavykh stopped when an officer in front of him shone a spotlight on him and ordered him to stop in a gas station parking lot. RP 393-94, 401.

The State charged Koryavykh with attempting to elude a pursuing police vehicle, driving with a license suspended in the third degree (DWLS 3rd), reckless driving, and reckless driving–racing. CP 5-7.

Following a jury trial, Koryavykh was acquitted of reckless driving–racing. CP 67. He was convicted of DWLS 3rd and reckless driving. CP 65-66; RP 561. The jury could not reach a unanimous verdict the attempting

to elude charge so the trial court declared a mistrial as to that charge.¹ CP 64 (blank verdict form); RP 559 (declaring mistrial on deadlocked count).

At sentencing, the trial court stated it was imposing “45 days in the Pierce County Jail. I’m going to suspend the balance. 45 days on each count, and that will be concurrent, and then I’m going to suspend the balance for a two year period.” RP 584. However, the judgment and sentence entered by the court states that Koryavykh’s sentence was 90 days for Count II and 364 days for Count III, contrary to the court’s oral pronouncement of the sentence. CP 74.

The trial court also imposed a \$250 victim penalty assessment. CP 74, 76. The judgment and sentence included an interest accrual provision that read, “The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 77 (capitalization omitted).

Koryavykh appeals. CP 82.

¹ At sentencing, the State indicated it planned not to retry Koryavykh for attempting to elude and the trial court dismissed this charge without prejudice. RP 573; CP 72-73.

C. ARGUMENT

1. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO ACCURATELY REFLECT THE SENTENCE THE TRIAL COURT IMPOSED

At sentencing, the judge intended to sentence Koryavykh to two concurrent 45-day sentences for the DWLS 3rd and reckless driving convictions. RP 584. In the judgment and sentence, however, the court imposed a 90-day sentence for the DWLS 3rd and a 364-day sentence for reckless driving. CP 74. This error should be corrected.

This should be treated as a mere scrivener's error. A "scrivener's error" is synonymous with a "clerical mistake." In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2003). "A clerical mistake is one that when amended would correctly convey the intention of the court based on other evidence." State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2002) (citing Presidential Estates Apartment Ass'n v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). The remedy for such an error is remand for correction of the error. Mayer, 128 Wn. App. at 701-02. Accordingly, Koryavykh requests remand so that the judgment and sentence may be amended to accurately reflect the sentence imposed by the trial court.

2. THE LEGAL FINANCIAL OBLIGATION INTEREST ACCRUAL PROVISION VIOLATES RECENT LEGISLATIVE AMENDMENTS AND SHOULD ACCORDINGLY BE STRICKEN FROM KORYAVYKH'S JUDGMENT AND SENTENCE

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783) applies prospectively to cases currently pending on direct appeal. State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). When legal financial obligations are impermissibly imposed, the remedy is “for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs.” Id. at 750.

A nonrestitution interest condition was imposed in Koryavykh’s judgment and sentence. CP 77 (indicating that LFOs imposed in the judgment shall bear interest from the date of judgment until paid in full). This violates the law. HB 1783 eliminated interest accrual on the nonrestitution portions of LFOs.² LAWS OF 2018, ch. 269, § 1 (codified as amended at RCW 10.82.090); Ramirez, 191 Wn.2d at 747. Although interest must accrue on restitution amounts, if any, “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1).

The provision requiring payment of interest in the judgment and sentence violates this provision. The recent amendment to RCW 10.82.090

² No restitution was imposed in this case. The trial court imposed only a victim penalty assessment of \$250 pursuant to RCW 7.68.035(1)(a).

applies prospectively to cases not yet final on appeal. Ramirez, 191 Wn.2d at 747. Accordingly, this court should order that the interest accrual provision be stricken from the judgment and sentence.

D. CONCLUSION

The scrivener's error providing erroneous sentence lengths in the judgment and sentence must be corrected. The interest accrual provision must also be stricken from the judgment and sentence.

DATED this 26th day of September, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March". The signature is fluid and cursive, with a large loop at the end.

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

September 26, 2019 - 1:05 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52895-9
Appellate Court Case Title: State of Washington, Respondent v. Pavel V. Koryavykh, Appellant
Superior Court Case Number: 18-1-02030-3

The following documents have been uploaded:

- 528959_Briefs_20190926130254D2204048_5853.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 52895-9-II.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

Comments:

Copy mailed to: Pavel Koryavykh 19616 12th Ave Ct E Graham, WA 98338-

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190926130254D2204048