

FILED
Court of Appeals
Division II
State of Washington
1/23/2020 3:16 PM

No. 53100-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND R. CRUZ,

Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 18-1-01449-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 2

 1. The State concedes that the jury was instructed on the elements of a different charge than was alleged in the first amended information 2

 2. Cruz was not charged any discretionary legal financial obligations..... 3

 3. The State concedes that the language regarding interest on non-restitution legal financial obligations should be modified consistent with the current version of RCW 10.82.090 4

D. CONCLUSION..... 6

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Porter, 186 Wn.2d 85, 375 P.3d 664 (2016) 3

Decisions Of The Court Of Appeals

State v. Morales, 174 Wn. App. 370, 298 P.3d 791 (2013) 3

Statutes and Rules

U.S. Const. Amend. VI 3

Wash. Const. art 1 § 22 3

RCW 2.36.150 4

RCW 2.40.010 4

RCW 7.68.035 3

RCW 9A.56.068 2

RCW 9A.56.160 2, 3

RCW 9.94A.760 4

RCW 10.01.160 4

RCW 10.73.160 5

RCW 10.82.090 1, 3, 5, 6

RCW 43.03.060 4

CrR 2.1(a)(1) 3

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether an information that lists the RCW for possession of stolen property in the second degree but contains the elements for possession of stolen motor vehicle, is constitutionally insufficient when the jury is instructed on the proper elements of possession of stolen property in the second degree.

2. Whether a cost bill that indicates that witness costs are payable by the State improperly orders a defendant to pay discretionary costs when the witness costs are neither ordered by the Court nor added to the judgment and sentence.

3. Whether outdated boilerplate language in a judgment and sentence regarding interest on non-restitution legal financial obligations should be modified to comply with RCW 10.82.090.

B. STATEMENT OF THE CASE.

Cruz assigns error only to count three of the amended information and to legal financial obligations. The State generally accepts the Statement of the Case contained in the Brief of Appellant as sufficient to address the issues raised in this appeal. Additional facts will be contained in the argument section below as needed.

C. ARGUMENT.

1. The State concedes that the jury was instructed on the elements of a different charge than was alleged in the first amended information.

Count three of the amended information charged RCW 9A.56.160, which is in fact possession of stolen property in the second degree. However, the elements listed in the amended information were the elements of a separate offense, RCW 9A.56.068, possession of a stolen vehicle. CP 1-2. The jury instructions were consistent with the elements of RCW 9A.56.160, as was the evidence elicited at trial. RP 270, 274-77, 301, 329, RP 335, 423-425-11; CP 24, 27. The deputy prosecutor and the defense attorney argued the elements contained in the jury instructions. RP 434, 446-447, 456. While all parties at the trial seemed to be aware that the factual basis alleged in count three involved the elements in the jury instructions and stolen property other than a motor vehicle, the information erroneously contained the elements for a different offense.¹

¹ Defense counsel conceded possession of stolen property during his closing argument stating, "It's pretty clear after the fact that he was assisting in transporting that property," and "It was obvious, so he knew that they would be on that surveillance equipment or surveillance camera of him carrying some of that stolen property." RP 456.

Cruz now argues that the jury instructions allowed him to be convicted of an uncharged alternative means of possession of stolen property; however, that is not correct. Brief of Appellant, at 12. In fact, the amended information apprised him of the nature of a completely different offense. The express language of RCW 9A.56.160 excludes a motor vehicle. RCW 9A.56.160(1)(a). While it is unfortunate that this error was apparently missed by all parties involved, the State does not now argue that the amended information was constitutionally sufficient with regard to count 3. State v. Porter, 186 Wn.2d 85, 89, 375 P.3d 664 (2016); U.S. Const. Amend. VI; Wash. Const. art 1 § 22; CrR 2.1(a)(1). The State concedes that the deficiency warrants reversal and remand for a new trial on Count 3 if the State chooses to proceed further on that charge. State v. Morales, 174 Wn. App. 370, 384, 298 P.3d 791 (2013).

2. Cruz was not charged any discretionary legal financial obligations.

At sentencing, the trial court imposed only the \$500 crime victim's compensation fee, which is a mandatory legal financial obligation. RCW 7.68.035(1)(a). The Judgment and Sentence did not include witness costs and Cruz was never ordered to pay them.

CP 11. Instead, the cost bill simply tracks the witness fees, payable by the State of Washington, that were accrued at trial.

RCW 2.40.010 states, "Witnesses shall receive for each day's attendance in all courts of record of this state the same compensation per day and per mile as jurors in superior court." Jurors are authorized a maximum of twenty-five dollars and a minimum of ten dollars per each day's attendance plus mileage at the rate determined by RCW 43.03.060. RCW 2.36.150. The referenced Cost Bill memorialized that and, as noted in the Certification of County Clerk, the amount is "payable by the State of Washington." CP 130-131. A criminal defendant may be ordered to repay such costs by the trial court, but that did not occur here. RCW 10.01.160, RCW 9.94A.760, CP 11. The trial court never ordered Cruz to repay the State for the witness fees.

3. The State concedes that the language regarding interest on non-restitution legal financial obligations should be modified consistent with the current version of RCW 10.82.090.

Effective June 7, 2018, "no interest shall accrue on non-restitution legal financial obligations." RCW 10.82.090(1). The statute also now states "The court shall waive all interest on the portions of legal financial obligations that are not restitution that

accrued prior to June 7, 2018.” RCW 10.82.090(2)(a). While the boilerplate language included in Cruz’s judgment and sentence refers to the correct RCW, the language included reflects the law as it existed prior to June 7, 2018.

Given the current form of RCW 10.82.090, it is clear that Cruz is not required to pay interest on non-restitution legal financial obligations as he was sentenced after June 7, 2018. CP 84. The Administrative Office of the Courts provided a modified form for a felony prison judgment and sentence that reflects the change in the law on its website in July of 2019.² To reflect the current state of the law, the language should read:

The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until paid in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

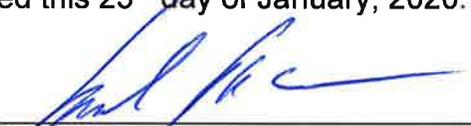
The State does not oppose remand for entry of an order substituting that language for the erroneously included language.

² See, www.courts.wa.gov/forms/?fa=forms.contribute&formID=18, at form WPF CR 84.0400 P; 07/2019.

D. CONCLUSION.

The State concedes that the charge listed in count three of the amended information was insufficient to apprise Cruz of the elements that the jury convicted him of having committed. Cruz was not charged discretionary legal financial obligations. Cruz does not assign error to his convictions in count one or two. The State agrees that this Court should reverse the conviction for count three and remand for a new trial if the State elects to proceed further on that count. The State respectfully requests that this Court affirm Cruz's convictions for burglary in the second degree and theft of a motor vehicle and remand for resentencing on those charges.³ The State further concedes that the language contained in the judgment and sentence should be modified to comply with the current version of RCW 10.82.090.

Respectfully submitted this 23rd day of January, 2020.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

³ The State notes that Cruz's offender score on the burglary goes from 11 to 10, based on his criminal history and on from 7 to 6 on the theft of a motor vehicle offense without the additional conviction in court 3. CP 8, 19, 20.

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: January 23, 2020

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

January 23, 2020 - 3:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53100-3
Appellate Court Case Title: State of Washington, Respondent vs Raymond R. Cruz, Appellant
Superior Court Case Number: 18-1-01449-6

The following documents have been uploaded:

- 531003_Briefs_20200123151627D2927964_9842.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Cruz, Raymond FINAL.pdf

A copy of the uploaded files will be sent to:

- ltabbutlaw@gmail.com
- valerie.lisatabbut@gmail.com

Comments:

Sender Name: Linda Olsen - Email: olsenl@co.thurston.wa.us

Filing on Behalf of: Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:
2000 Lakedrige Dr SW
Olympia, WA, 98502
Phone: (360) 786-5540

Note: The Filing Id is 20200123151627D2927964