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Court of Appeals
Division II
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NO. 53574-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

BENJAMIN SERRATO,
Appellant.

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

The Honorable Randall C. Krog, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a community custody condition prohibiting Serrato from possessing alcohol.
2. The trial court erred in ordering indigent Serrato to pay a discretionary \$200 filing fee.
3. The trial court erred in ordering interest accrual on non-restitution legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Statutory authority limits the trial court's authority to impose certain conditions of community custody. Limitations on alcohol possession must be crime related. Did the trial court err in imposing a condition of community custody prohibiting Serrato from possessing alcohol when alcohol possession was not crime related?
2. The trial court found Serrato indigent. Because Serrato is indigent, he is not required to pay discretionary legal fees. Did

the trial court err in ordering indigent Serrato to pay a \$200 discretionary filing fee?

3. As of June 2018, trial courts can no longer order interest accrual on non-restitution legal financial obligations. Yet, at Serrato's May 2019 sentencing, the trial court ordered Serrato to pay interest on unpaid non-restitution legal financial obligations. Must Serrato's case be remanded to strike the non-restitution interest accrual obligation?

C. STATEMENT OF THE CASE

Benjamin Serrato met Christopher Libbert in 2013. RP¹ 1193. Libbert, homeless, lived in a cemetery not far from the Chevron where Serrato worked. RP 896, 1192, 1200. Serrato took pity on Libbert and invited him into his Portland, Oregon, apartment to get him off the street and clean up. RP 1192,

¹ The Report of Proceedings (“RP”) consists of several volumes in a single PDF document. As it is a single long PDF, citation to the report of proceedings is by page number only (rather than by volume number and page number).

1198. Before long, the relationship turned romantic and the two men lived together as a couple. RP 900, 1193-95.

Too often, Serrato wore telltale cuts, bruises, and scratches from Libbert's aggression toward him. RP 1165, 1202-03, 1209-10, 1451-52, 1464. Serrato's friends and co-workers noticed the injuries. RP 1165, 1202-03, 1209-10, 1451-52, 1464. Those familiar with the couple described the relationship as "toxic" and "dysfunctional." RP 1142, 1147, 1503. Serrato's friends encouraged him to leave Libbert yet Serrato stayed. RP 1147.

Starting in January 2014, Libbert entered into a romantic relationship with Amanda Rauch while continuing to live with Serrato. RP 897, 900-02. Serrato stayed in a relationship with Libbert even though he disapproved of Amanda. RP 1203, 1208, 1356, 1358.

In October 2016, Rauch bought a gun because of concerns over her roommate. RP 904, 907. A felony conviction

prevented Libbert from legally possessing a gun. RP 910.

Sometimes, however, Rauch gave Libbert the revolver when Libbert asked her for it. RP 929.

Serrato increasingly found himself fearful of Libbert. RP 1195-96, 1200, 1203. At times, Libbert victimized Serrato by playing Russian roulette, spinning the revolver's partially filled chamber and holding it against Serrato. RP 1222-23.

On the evening of March 31, 2017, things came to a head. RP 1308-12. Amanda gave Libbert the gun. RP 912.

Serrato was home making dinner when Libbert arrived at the apartment. RP 1311-12. Libbert menaced Serrato by forcing the barrel of Rauch's revolver into Serrato's mouth. RP 1312-14. Past instances of Libbert's Russian roulette played in Serrato's mind. RP 1314, 1357. Fearing for his life, Serrato grabbed a large kitchen knife and stabbed Libbert's side. RP 1315, 1318. Serrato continued to stab Libbert. RP 1318, 1329-30.

Serrato wrapped Libbert in a comforter and shot him in the forehead. RP 1319.

Serrato dragged Libbert out of the apartment, and loaded him into the trunk of his car. RP 1330.

Serrato drove around for a time wondering what to do with Libbert's body. RP 1330.

Serrato found himself near Dougan Falls State Park in Skamania County. RP 567, 1333-34, 1410-11. Serrato pulled into a parking area. RP 1334. Once parked, he pulled Libbert out of the trunk and shot him one more time. RP 1334. He used the comforter to drag Libbert to the edge of the parking lot and roll him off and down an embankment. RP 1336-37. Libbert put the comforter in the car and threw it off of a bridge while driving home. RP 1338.

A camper noticed the body on the embankment the next morning and called the police. RP 463, 471, 599.

When the police arrived, they noted a large amount of blood in water pooled in the parking area near the embankment. RP 539, 595, 772-73. They recovered Libbert's body. RP 578, 599. They later identified Libbert through a fingerprint comparison at the Portland Police Bureau. RP 623.

The police canvassed campers and nearby residents of the Dougan Falls campground. RP 1338-39. Several people had heard a gunshot in the early morning hours. RP 476, 489, 501, 509. One person thought she heard the shot around 3:10 a.m. RP 476. Another person said she heard two shots and put the time as 3:23 a.m. RP 506-07.

Libbert's autopsy revealed two gunshot wounds to the head and multiple stab wounds on Libbert's neck and torso. RP 956-57. Untreated, Libbert could have survived the wounds only briefly due to heavy blood loss. RP 971-72, 975, 982.

An investigation into Libbert showed he lived in Portland with Serrato. RP 478, 480, 623.

The next day, police contacted Serrato in his small apartment. RP 625, 629-30. Serrato talked freely with the police. RP 628, 632. He showed the police where to find Amanda Rauch. RP 631. The police noticed nothing out of the ordinary in the apartment. RP 690. The apartment appeared clean and orderly. RP 699-703.

The police returned later with a search warrant for the apartment. RP 626-27. During the search, officers found a large knife under the sink along with a red-tinged toothbrush which tested as blood residue. RP 699-708, 731. While the searching detectives and officers described their search as thorough, they failed to use luminal in the apartment. RP 713-14. Serrato maintained that had they done so, they would have discovered the bloody residue remaining after Serrato, always very clean, did his best to conceal the evidence of his killing Libbert in the apartment. RP 1339-1341, 1344.

The police never recovered the gun used by Serrato even though Serrato discarded it in his apartment parking lot. RP 1351-52.

The police interviewed cooperative Serrato a number of times over the next few days. RP 633, 644, 664-65, 669. Skamania County Sheriff's Sergeant Buettner arrested Serrato deciding he was "probably involved" in Libbert's death. RP 668.

The Police inspected Serrato's car and found blood in the car's trunk. RP 785-86. DNA testing identified the blood as Libbert's. RP 856-57.

The Skamania County prosecutor charged Serrato with murder in the first degree. CP 36-37. The Amended Information on which Serrato was tried included sentencing enhancements for using a firearm and a knife in killing Libbert. CP 36-37.

Serrato testified at trial. RP 1190-1232, 1305-1438. He justified killing Libbert because he feared Libbert would kill him

given Libbert's extensive history of assaulting Serrato coupled with Libbert menacing Serrato that very night with the loaded revolver. RP 1195, 1209, 1222, 1228, 1306, 1308-20.

The court instructed the jury on self-defense. CP 53-56.

The prosecutor theorized the murder did not happen in Portland as Serrato testified. RP 1584-90. Rather, given the amount of blood in the Dougan Falls parking lot, and the gunshot heard by campers and people who lived near the park, the prosecutor argued Serrato killed Libbert at Dougan Falls. RP 1584-90. 1000. Dougan Falls was not just a body dump sight. RP 617.

The jury returned a guilty verdict on murder in the first degree. CP 69; RP 1677. The jury answered in the affirmative that Serrato used a gun and a knife in killing Libbert. CP 202-03; RP 1677.

Serrato had no criminal history. CP 103-17; RP 1685. The court imposed a 364-month sentence on a standard range of

324-404 months. CP 10-7; RP 1700. Once released, the court obligated Serrato to serve 36 months of community custody and to abide by community custody conditions. CP 108-09, 116. One of the conditions prevented Serrato from merely possessing alcohol. CP 116.

Although the court found Serrato indigent, it ordered Serrato to pay a discretionary \$200 filing fee. CP 109. The court also ordered Serrato pay interest on the non-restitution legal financial obligations. CP 111.

Serrato appeals all portions of his judgment and sentence. CP 118.

After a thorough review of the record and appellate counsel's consultation with Serrato and trial counsel, Serrato submits the aforementioned issues on appeal.

D. ARGUMENT

Issue 1: The trial court erred in imposing an alcohol-related community custody condition unrelated to the charged crimes.

The trial court imposed a condition of community custody prohibiting Serrato from possessing alcohol.² CP 79. Although Serrato did not object to the imposition of this condition, sentencing errors may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.") (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

² The trial court also imposed a condition of community custody preventing Serrato from using alcohol. CP 79. Serrato does not dispute that prohibiting the use of alcohol as a condition of community custody is permitted by statute. See RCW 9.94A.703(3)(e)(authorizing the trial court, as a condition of community custody, to order an offender to not consume alcohol); *see also State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (holding that a trial court can order that a defendant sentenced to community custody not consume alcohol despite the lack of evidence that alcohol had contributed to his offense).

"As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (citing *State v. Autrey*, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006)). A "[c]rime-related prohibition" is defined, in relevant part, as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10); *see also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

There was no evidence in the record that Serrato was under the influence of alcohol when he took action against Libbert in order to save his own life. As such, the condition of community custody prohibiting Serrato from possessing alcohol is not a "[c]rime-related prohibition[s]." RCW 9.94A.030(10); *see also O'Cain*, 144 Wn. App. at 775. Accordingly, this court should

remand this case with an order to the trial court to strike the no possession of alcohol community custody condition. *See O'Cain*, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

Issue 2: The state supreme court's decision in *State v. Ramirez* requires this court to remand to strike the \$200 criminal filing fee.

On September 20, 2018, the Washington Supreme Court decided *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), that the amendments to the Legal Financial Obligations (LFO) statutes passed as House Bill 1783 applies prospectively to all cases pending on direct appeal. Under those amendments, a trial court may no longer impose discretionary LFOs upon indigent persons. RCW 10.01.160(3). Likewise, a sentencing court may no longer order an indigent person to pay the \$200 criminal filing fee. Laws of 2018, ch. 269, § 17; *Ramirez*, 191 Wn.2d at 746. Because the court found Serrato indigent, the

trial court is prohibited from ordering Serrato to pay the \$200 criminal filing fee. CP 109.

Issue 3: The court must modify Serrato's judgment and sentence to eliminate interest accrual on the non-restitution legal financial obligations.

The law prohibits interest accrual on Serrato's non-restitution legal financial obligations.

In 2018, the legislature amended former RCW 10.82.090 to prohibit interest accrual on non-restitution LFOs as of June 7, 2018. Laws of 2018, ch. 269, § 1.

The court sentenced Serrato on May 30, 2019, well after the amended law went into effect. RP 1684-1702; CP 103-17. At sentencing, the court failed to strike the following paragraph from the judgment and sentence:

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 111. The court imposed a \$500 crime victim assessment, a \$200 criminal filing fee, a \$100 DNA collection fee, and \$2049.20 in restitution. CP 109-10.

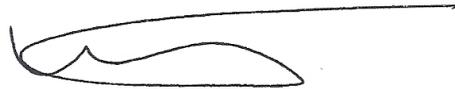
Because the court failed to strike the boilerplate interest language from the judgment and sentence, Serrato is subject to improper interest accrual on the \$800 imposed as non-restitution LFOs. Remand to strike any accrued and accruing interest is required. *Ramirez*, 191 Wn.2d at 746-47.

Serrato raises this issue for the first time on appeal. Illegal or erroneous sentences may be raised for the first time on appeal. *State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000).

E. CONCLUSION

Serrato's case should be remanded to strike the community custody condition prohibiting alcohol possession, the \$200 criminal filing fee, and the obligation to pay interest on non-restitution LFOs.

Respectfully submitted April 14, 2020.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

LISA E. TABBUT/WSBA 21344
Attorney for Benjamin Serrato

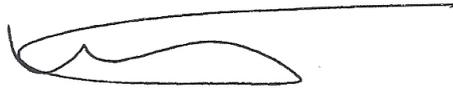
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Skamania County Prosecutor's Office, at kick@co.skamania.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Benjamin Serrato/DOC# 416192, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed April 14, 2020, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Benjamin Serrato, Appellant

LAW OFFICE OF LISA E TABBUT

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