

FILED
Mar 07, 2012
Court of Appeals
Division III
State of Washington

No. 29930-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MICHAEL A. WILLETT,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The record does not support the finding that Mr. Willett has the current or future ability to pay legal financial obligations.

Issue Pertaining to Assignment of Error

Should the finding that Mr. Willett has the current or future ability to pay legal financial obligations be stricken from the Judgment and Sentence as clearly erroneous, where it is not supported in the record?

B. STATEMENT OF THE CASE

Michael Anthony Willett was found guilty by jury verdict of residential burglary as charged. CP 1, 52; Howze¹ 5/6/11 RP 4. The court imposed a mid-standard range sentence of 60 months, to run concurrently with the sentence in another case. CP 54–56. No community custody was imposed. CP 56.

At sentencing, the court asked, “Is Mr. Willett going to be prepared to pay LFOs?” His attorney responded, “He will, your Honor, when he gets out, certainly initially at a reduced rate, and then thereafter, depending upon his job prospects.” Ken Beck 5/17/11 RP 25. As a condition of sentence, the court made the following finding:

¹ Three reporters transcribed the proceedings. Citations to the record will reference the transcriber’s name and date of hearing. For example, Howze 5/6/11 RP ____ and Ken Beck 5/17/11 RP ____.

¶ 2.5 **Ability to Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, 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. The court finds: [X] that the defendant has the ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753 [*sic*]

CP 55 (bolding in original). This appeal followed. CP 67.

C. ARGUMENT

The finding that Mr. Willett has the current or future ability to pay legal financial obligations is not supported in the record and must be stricken from the Judgment and Sentence.

The record does not support the trial court's judgment and sentence "finding" that Mr. Willett has the current or future ability to pay legal financial obligations (hereinafter "LFOs"). CP 55 at ¶ 2.5. The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge

took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard (bracketed material added) (internal citation omitted).” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312.

The record here does not show that the trial court took into account Mr. Willett’s financial resources and the nature of the burden of imposing LFOs. At sentencing, the court asked, “Is Mr. Willett going to be prepared to pay LFOs?” His attorney responded, “He will, your Honor, when he gets out, certainly initially at a reduced rate, and then thereafter, depending upon his job prospects.” Ken Beck 5/17/11 RP 25. Thereafter, the Court simply found that Mr. Willett “has the ability to pay LFOs.” Ken Beck 5/17/11 RP 27. The court did not delve into his resources, debt owed or other obligations, work history, work prospects, or any other areas that would bear on whether Mr. Willett has the present ability or likely future ability to pay the financial obligations imposed by the court Beck RP 12–31. Thus the record contains no evidence to support the trial court's finding in ¶ 2.5 that Mr. Willett has the present or future ability to pay LFOs. The finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

D. CONCLUSION

For the reason stated, this Court should remand the matter for resentencing to strike the finding as to ability and means to pay legal financial obligations.

Respectfully submitted on March 7, 2012.

s/Susan Marie Gasch, WSBA
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 7, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Michael A. Willett (#781631)
D-A-57-L
Coyote Ridge Corrections Center
P. O. Box 769
Connell WA 99326-0769

E-mail: kburns@co.grant.wa.us
D. Angus Lee
Grant County Prosecutor's Office
P. O. Box 37
Ephrata WA 98823-0037

s/Susan Marie Gasch, WSBA #16485