

FILED

SEP 04 2012

COA No. 30399-3-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JERRY LANNON RUNCK, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
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Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

A. The court erred by sanctioning Jerry Lannon Runck for violating conditions of supervision.

Issues Pertaining to Assignment of Error

1. Did the court err by sanctioning Mr. Runck for violating conditions of supervision when the State failed to prove them by a preponderance of the evidence or Mr. Runck showed they were not willful? (Assignment of Error A).

II. STATEMENT OF THE CASE

On May 28, 1998, Mr. Runck pleaded guilty to two counts of third degree assault. (CP 25; 5/28/98 RP 9). He was sentenced to 3 months in jail and assessed \$897 in legal financial obligations (LFOs), consisting of \$500 victim assessment, \$110 court costs, \$37 warrant fee, and \$250 attorney fees. (CP 28). Restitution of \$156.04 was also ordered on July 6, 1998. (CP 37). An ex parte order extending jurisdiction for collection of LFOs was entered April 1, 2008. (CP 86).

On April 28, 2010, a violation report was filed against Mr. Runck for failing to pay as directed, failing to report a recent address, and failing to report to the Clerk's Office as directed. (CP

100-102). An order modifying sentence conditions was then entered on June 3, 2010, where the court found he failed to report as directed, to pay financial obligations as directed, and to provide a valid address. (CP 111). The order stated Mr. Runck was to pay \$50 or a month, effective July 1, 2010. (CP 112). It further provided:

Defendant is to report, in person, to the Office of the Spokane County Clerk . . . within 48 hours of his release, or at the time of any change in information, to provide a current address, to keep the Clerk advised of a current address at all times, to provide current financial information to the Clerk and to pay the legal financial obligations. Failure to do any of the above shall result in a bench warrant being issued for your arrest and additional sanctions may be imposed. (CP 112).

On August 18, 2011, a notice of non-compliance of LFO order was filed. (CP 113). It alleged new violations subsequent to the previous order. (*Id.*). An order for bench warrant was issued September 28, 2011. (CP 117). Mr. Runck was arrested October 4, 2011. (CP 119).

On November 4, 2011, a hearing was held on four alleged violations. (1/4/11 RP 2). Mr. Runck did not contest his failure to pay. (*Id.* at 5; CP 122). Although the State now claimed four violations, the defense had only been notified of three. Mr. Runck's

counsel formally objected to the additional violation, but nonetheless argued it. (*Id.*). One violation involved a failure to provide the Clerk's Office with a financial declaration when he was arrested. (*Id.* at 6). The court determined Mr. Runck was not in willful violation of that condition. (*Id.* at 22-23). But the court further found he violated the conditions that he report a valid address and a change of circumstances. (*Id.* at 19-22).

The court imposed a sanction of 10 days in jail for his failure to report the change of circumstances, 10 days for his failure to report a valid address, and 60 days for his failure to pay. (11/4/11 RP 21, 22, 23). The court filed its order modifying sentence conditions on November 7, 2011. (CP 159). This appeal follows.

III. ARGUMENT

A. The court erred by sanctioning Mr. Runck for failure to report a valid address and a change of circumstances and failure to pay.

RCW 9.94B.040(1) states the court may modify its order of judgment and sentence and impose further punishment if an offender violated a condition or requirement of a sentence. RCW 9.94B.040(3)(c) provides the State must prove the violation by a preponderance of the evidence and, if so proved, the court may

order the offender to be confined for a period not to exceed 60 days for each violation.

The State contended Mr. Runck failed to report a valid address. In response, he argued the Clerk's Office knew his mailing address and was in fact mailing him letters there. At the hearing on the violations, defense counsel stated:

He didn't fail to provide a current address because he provided documentary proof they had it in June of 2011, and the State is saying he failed to provide it prior to filling out the 2011 financial declaration. However, in June they had it. (11/4/11 RP 11).

The State did not dispute this information. Moreover, there is nothing in the record contrary to Mr. Runck's representation. Contrary to the court's finding, he did not fail to provide a valid address. (CP 111). As argued by defense counsel, the Clerk's Office did have his address since its subsequent notice of non-compliance of LFO order filed on August 18, 2011, alleged no failure by Mr. Runck to provide a valid address. (CP 113).

A preponderance of the evidence means that a proposition is more likely true than not. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857 (2011). Here, the State failed to prove even by a preponderance that Mr. Runck did not provide a valid address. Indeed, the evidence was to the contrary and

showed that the Clerk's Office did have his address and sent mail there. Accordingly, the court erred by finding Mr. Runck failed to provide a valid address and then sanctioning him to 10 days in jail. RCW 9.94B.040(3)(c).

The court also found Mr. Runck failed to notify the Clerk's Office of a change in circumstances. As noted by the court, the "real interesting, curious issue" is that the change was his alleged failure to report the loss of his job as a painter:

I'm confident that if he wasn't painting anymore, that the interesting question here is that this is not what we would usually expect to see in one of these hearings. Question about whether that is a change of circumstances sort of isn't entirely clear to me. I like what [defense] counsel said. Is this an issue where an individual is supposed to call the clerk's office immediately or stop in and report the change of circumstances, and like the house is on fire sort of scenario that I need to get right up there and deal with this immediately. Is the time frame, give the individual some opportunity to report it in a reasonable period of time or can they just not say anything? But interestingly, again, what we would expect, I suppose, regarding failure to report a change of circumstances would be that, I guess the most likely scenario would be that a person's come into some money, that they've got a job that they didn't tell us about, or they inherited some money that we didn't hear about, or, you know they won \$1,000 in the lotto, whatever it may be. That's typically what we would see.

What's curious here is Mr. Runck's change of circumstances would be the loss of his job. That would be the loss of his income. So by not reporting that change of circumstances, arguably, he was penalizing himself because it strikes me

that – I can't say for sure, but I would imagine that he's lost his job, and he doesn't have anything available, and he can't find something, and he's diligently looking, the clerk's office is probably going to be interested in reducing his payment, rather than continuing to suggest that he can pay an amount that's set when he had employment. (11/4/11 RP 19-20).

Despite commenting that Mr. Runck had already been penalized to some extent for not reporting the change of circumstance, *i.e.*, the loss of his job, which would have reduced his payment, the court found a willful violation. (11/4/11 RP 20-21).

But this is not the purpose of such a sanction. Rather, the requirement of reporting a change of circumstances is clearly aimed at the situation where a defendant is hiding income to avoid paying a higher amount on LFOs. RCW 9.94A.760(7)(b) states in relevant part:

[T]he county clerk may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in circumstances. . . . During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation."

Nowhere in the June 3, 2012 order modifying sentence conditions does it state that Mr. Runck must immediately report a change of circumstances. Similarly, the clerk may require the offender to report so the propriety of the collection schedule can be reviewed.

No time requirement is mentioned for the clerk and none should be read into the provision for reporting a “change of circumstance” by Mr. Runck, particularly in the circumstances here.

State v. Nason, 168 Wn.2d 936, 233 P.3d 848 (2010), provides insight. Mr. Nason challenged an auto-jail provision requiring him to report to jail if he failed to pay his legal financial obligation (LFO). He argued the auto-jail provision violated procedural due process because it led to incarceration without a hearing. The Supreme Court agreed:

Because due process requires the court to inquire into Nason’s reason for nonpayment, and because the inquiry must come at the time of the collection action or sanction, ordering Nason to report to jail without a contemporaneous inquiry into his ability to pay violated due process. . . . Because it violated due process, the portion of the auto-jail provision ordering Nason to report to jail and serve 60 days was void. (cites omitted). 168 Wn.2d at 945-46.

An auto-jail provision is not at issue here and a hearing was accorded, but the *Nason* court’s observations are pertinent with respect to the jailing of an offender for failure to pay a fine if the offender’s failure to pay was due to his or her indigence:

However, if an offender is capable of paying but willfully refuses to pay, or if an offender does not “make sufficient bona fide effort to seek employment or borrow money in order to pay,” the State may imprison the offender for failing to pay his or her LFO. . . The burden is on the offender to show that his nonpayment is not willful. . . Although the

offender carries the burden, due process still imposes a duty on the court to inquire into the offender's ability to pay. . . . Inquiry into the offender's ability to pay comes at "the point of collection and when sanctions are sought for nonpayment. . . . *Nason*, 168 Wn.2d at 945 (cites omitted).

Defense counsel advised the court Mr. Runck had a job waiting for him. (11/4/11 RP 12). Sending him to jail prevented his employment. He had no ability to pay so there was no change of circumstance. The record also reflects that the last financial declaration from Mr. Runck was furnished in March 2010 and expressly stated he may have lost his job due to incarceration. (CP 147-149). The change of circumstance had already been reported. The court thus erred by finding he failed to report a change.

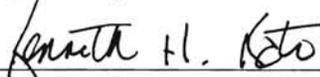
Furthermore, the court also did not inquire into Mr. Runck's present ability to pay before incarcerating him. The 11/4/11 violation hearing was the time to make this inquiry as it was at the point of collection and sanctions sought for nonpayment. See *Nason*, 168 Wn.2d at 945. The court neither followed that procedure nor made any inquiry as to his ability to pay. Because the only violation for which a sanction could be imposed was his failure to pay, the court erred by failing to ascertain whether Mr. Runck had that ability. The sanction for failure to pay must be reversed. *Id.*

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Runck respectfully urges this court to reverse the order modifying sentence conditions and imposing sanctions of 80 days in jail.

DATED this 4th day of September, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 4, 2012, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Jerry Lannon Runck, 1523 W. Knox, Spokane, WA 99205, and by email, as agreed by counsel, on Mark E. Lindsey, Spokane County Prosecutor's Office, at kowens @spokanecounty.org.

