

FILED
SEPT 17, 2012
Court of Appeals
Division III
State of Washington

No. 30631-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

LUIS VALENCIA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court exceeded its sentencing authority.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State bears the burden of proving the facts necessary to support the sentence imposed by the trial court. RCW 10.01.160(4) provides that a “court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” Where there is no record to establish Mr. Valencia’s ability to pay, but the trial court nonetheless entered such finding, did the trial court exceed its authority?

C. STATEMENT OF THE CASE

A jury convicted Mr. Valencia of attempted residential burglary. CP 14. Based entirely upon a mathematical error, the trial court miscalculated Mr. Valencia’s offender score as a 6 rather than a 5, and thus imposed a standard range sentence of 24.75 months on January 5, 2011. CP 16, 19. The correct standard range was 16.5 to 21.75 months. CP 60.

Mr. Valencia appealed that conviction and sentence. While the scoring error was apparent on the face of the judgment, Mr. Valencia’s appointed attorney did not raise the issue on appeal. Instead, in

November 2011, pro se, Mr. Valencia filed a motion to vacate

his sentence and for resentencing. CP 50-53. Because the motion was originally set before the wrong judge, the matter was continued several more weeks. 11/23/11 RP 2. Finally on January 5, 2012, 12 months after his original judgment, the court entered an amended judgment and sentence with the corrected offender score of 5 and imposed a standard range sentence of 16.74 months. CP 60, 63. Mr. Valencia was soon released from confinement, having served the corrected sentence.

The amended judgment includes a finding that Mr. Valencia has the present and future ability to pay legal financial obligations. CP 61 (Finding of Fact 2.5).

D. ARGUMENT

The court's findings in the judgment and sentence supporting the imposition of legal financial obligations are unsupported by substantial evidence.

1. The trial court erred in imposing costs as a part of Mr. Valencia's sentence.

“A trial court only possesses the power to impose sentences provided by law.” In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Where a court exceeds its sentencing authority the resulting sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). The State bears the burden of presenting evidence to

support the sentence imposed regardless of whether the defendant objects. Ford, 137 Wn.2d at 480-81.

Finding 2.5 in the Judgment and Sentence provides

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 resources and the likelihood of the defendant's status will change. The court finds . . . that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 61.

To affirm this finding on appeal "the record must be sufficient for [this Court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden.'" State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511, 517 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). Here, however, the record before this Court does not indicate that the sentencing court had before it any information from which to make such a finding. As in Bertrand, the record is completely silent. As in Bertrand, the finding is unsupported by the record and must be stricken.

2. This issue is properly before this Court.

Under Ford the trial court's unsupported finding is subject to challenge on appeal regardless of whether Mr. Valencia objected below.

If a defendant waits to challenge the sentencing court's finding or statutory authority where there is no record to support the finding that defendant will likely be barred by the provisions of RCW 10.73.090(1). That statute provides "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final." Because costs and fees are a part of the sentence pursuant to RCW 9.94A.760, the propriety of their imposition is subject to the time-bar of RCW 10.73.090. Thus, a defendant cannot wait to challenge the court's finding.

This issue is properly before this Court.

E. CONCLUSION

For the reasons above, this Court must reverse Mr. Valencia's convictions and sentence.

Respectfully submitted this 17th day of September, 2012.



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DIVISION THREE**

STATE OF WASHINGTON,)	
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RESPONDENT,)	
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v.)	NO. 30631-3-III
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LUIS VALENCIA,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/>	ANDREW MILLER, DPA	(X)	U.S. MAIL
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	KENNEWICK WA 99336-2341		
<input checked="" type="checkbox"/>	LUIS VALENCIA	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2012.

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