

No. 30680-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOSE LUIS GONZALEZ,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Robert Lawrence-Berrey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. Mr. Gonzalez’ constitutional right to a jury trial was violated by the court’s instructions, which affirmatively misled the jury about its power to acquit.

Mr. Gonzalez incorporates as if set forth fully herein his argument in Brief of Appellant 6–24.

2. The proper remedy upon remand for unsupported Legal Financial Obligations findings is to strike them from the Judgment and Sentence.

The State concedes there is not an adequate record of the court’s consideration of Mr. Gonzalez’s ability to pay his legal financial obligations. However, the State’s suggested remedy of remand for “reconsideration of the court’s findings” is incorrect and not supported by case law. *See* Brief of Respondent (“BOR”) 11–12.

The clearly erroneous findings must be stricken from the record. State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011). This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92

(2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. Cf. State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

The offending findings are without support in the existing record and are therefore clearly erroneous. They must be stricken. Bertrand, *supra*.

3. The suggested remedy of remand to allow the trial court to reconsider whether to order restitution would result in a void order which does not meet the statutory requirements for imposition of restitution.

Appellants accepts the State’s concession that because the trial court had no statutory authority to impose restitution as a condition of community custody, that provision should be stricken. However, the State’s suggested remedy that on remand the trial court should additionally “reconsider whether restitution specifically should be ordered” would result in an order that is void because it is factually barred by application of the restitution statute. *See* BOR 14.

The authority of the trial court to impose restitution is derived entirely from statute. State v. Duback, 77 Wn. App. 330, 332, 891 P.2d 40 (1995) (citing State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992) and State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991)). The order imposing restitution is void if statutory provisions are not followed. Id. (citing State v. Lewis, 57 Wn. App. 921, 924, 791 P.2d 250 (1990)).

RCW 9.94A.573(1) provides: “When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within sixty days”. The word “shall” is a mandatory directive.

State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). In Duback, restitution was ordered at the sentencing hearing; the amount, however, was not set within the 60-day time limit mandated by statute. This Court determined that the court order of restitution was therefore void and must be reversed. Duback, 77 Wn. App. at 332–33.

Here, the sentencing was held on March 12, 2012. CP 157. Even more egregious than in Duback, at the time of sentencing the trial court did not order restitution or set a restitution hearing date, and the Judgment and Sentence specified there was “\$0.00” restitution and that Mr. Gonzalez did not waive his rights to be present at any such hearing. CP 162 at ¶ 4.D.3, 164 at ¶ 5.6. Even if this Court remanded with instructions to “reconsider whether restitution specifically should be ordered”, the trial court could not comply with the requirements of the statute: the trial court did not order restitution at the time of sentencing, and did not “determine the amount of restitution due at the sentencing hearing or within sixty days.” RCW 9.94A.753(1). Any resulting order of restitution would be void. Duback, *supra*.

The proper remedy is to strike the provision imposing restitution as a condition of community custody.

4. The remaining issues relating to conditions of community custody are not challenged and the offending provisions should be stricken from the Judgment and Sentence.

Appellant accepts the State's concessions on the remaining issues on appeal and agreement that the provisions should be stricken:

(1) The sentencing condition prohibiting the purchase, possession or viewing of "any pornographic material in any form as defined by the treatment provider or the supervising community corrections officer" is unconstitutionally vague (BOR 12–13), and

(2) There is no statutory authority for, or relation to the facts of the case, for (a) the prohibition on purchasing or possessing children's games, toys or clothing (BOR 14), and (b) the restriction on the purchase, possession or use of law enforcement identification or clothing (BOR 14).

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, the conviction should be reversed and remanded for a new trial. Alternatively, the matter should be remanded for resentencing to strike the findings of ability and means to pay legal financial obligations including costs of medical care and incarceration, as well as the conditions prohibiting use of pornography and items identified with children and law enforcement.

Respectfully submitted on January 10, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 10, 2013, 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 reply brief of appellant:

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