

NO. 30713-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JORGE CAMACHO,

Appellant.

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

The Honorable Blaine G. Gibson, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

INCARCERATION COSTS MAY NOT BE IMPOSED BECAUSE THE RECORD SHOWS CAMACHO DID NOT HAVE THE MEANS TO PAY AT THE TIME OF SENTENCING.

RCW 9.94A.760 permits the court to impose incarceration costs when sentencing an offender for a felony. But incarceration costs may not be imposed unless the court determines the offender “at the time of sentencing” has the means to pay. RCW 9.94A.760. The court erred in imposing incarceration costs in Camacho’s case because the record demonstrates the court did not determine that Camacho, at the time of sentencing, had the means to pay. On the contrary, the court signed an order finding him indigent for purposes of appeal. This error may be raised for the first time on appeal because, in the absence of a valid determination of means, the court lacked statutory authority to impose incarceration costs as part of the sentence. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)).

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise sentencing

challenges for the first time on appeal); see also, State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). Specifically, this Court has held a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

In Moen, this Court held that a timeliness challenge to a restitution order could be raised for the first time on appeal. Id. at 537. The court looked at the authorizing statute, which set forth a mandatory 60-day limit, and the record, which showed the trial court did not comply with that statutory directive. Specifically rejecting a waiver argument, this Court explained, “We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.9A.142(1) had passed as a waiver of that timeliness requirement; it was invalid when entered.” Id. at 541 (emphasis added). This Court concluded the restitution was not ordered in compliance with the authorizing statute and, therefore, the validity of the order could be challenged for the first time on appeal. Id. at 543-48.

Here, the record shows the trial court failed to comply with the statutory requirements set forth in RCW 9.94A.760(2). Camacho may

therefore challenge the order requiring him to pay incarceration costs for the first time on appeal. Moen, 129 Wn.2d at 543-48.

While formal findings supporting the trial court's decision to impose incarceration costs under RCW 9.94A.760(2) are not required, the record must minimally establish the sentencing judge did, in fact, consider the defendant's individual financial circumstances and make an individualized determination he has the ability to pay. See State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992) (finding former statute authorizing imposition of court costs constitutional); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (reversing finding of ability to pay legal financial obligations because record was insufficient to determine on appeal whether trial court considered the burden on defendant and her resources). When the record does not show this occurred, the order is not in compliance with RCW 9.94A.760 and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Camacho's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Camacho's ability to pay or ask it to make a determination under RCW 9.94A.760(2) when it asked that

incarceration costs be imposed.<sup>1</sup> 2RP 272-94. The trial court made no inquiry into Camacho's financial resources, debts, or employability. There was no specific evidence before the trial court regarding Camacho's past employment outside his confinement in prison or his future employment prospects.

The pastor's offer to work with him if he remains in the country does not suggest an offer of paid employment, nor does Camacho's vague assertion of a desire to work with children. 2RP 280, 288-89. The court in Duncan pointed out an assertion that an offender is "employable" is sufficient basis to support the finding of ability to pay. State v. Duncan, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2014 WL 1225910 (no. 29916-3-III, filed Mar. 25, 2014) (quoting State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991)). But even this minimal benchmark was not met; neither the pastor nor Camacho himself asserted he was currently employable. There was no discussion at the sentencing hearing regarding Camacho's financial circumstances except the assertion that he was indigent. 2RP 292.

The only part of the record that even remotely suggests the trial court complied with RCW 9.94A.760(2) is the boilerplate finding in the Judgment and Sentence. CP 106. However, this finding does not establish compliance

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<sup>1</sup> It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

with RCW 9.94A.760's requirements. A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir. 2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

In sum, the record fails to establish the trial court actually took into account Camacho's financial circumstances before imposing incarceration costs and fails to establish a basis for finding ability to pay at the time of sentencing. As such, the court did not comply with the authorizing statute. Consequently, this Court should permit Camacho to challenge the legal validity of the order requiring him to pay incarceration costs for first time on appeal, and it should vacate the order. As the State points out, a panel of this Court reached a contrary decision in Duncan, \_\_\_ Wn. App. at \_\_\_, 2014 WL 1225910 (no. 29916-3-III, filed Mar. 25, 2014). A panel of Division Two also reached a contrary conclusion in State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), review granted, \_\_\_ P.3d \_\_\_ (Oct.

02, 2013). The Supreme Court has accepted review of the issue in Blazina.

Oral argument was heard February 11, 2014.

D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Camacho requests this Court remand with instructions to strike both the unsupported finding regarding ability to pay and the imposition of incarceration costs.

DATED this 5<sup>th</sup> day of June, 2014.

Respectfully submitted,

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State v. Jorge Camacho

No. 30713-1-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 5<sup>th</sup> day of June, 2014, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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**Signed** in Seattle, Washington this 5<sup>th</sup> day of June, 2014.

X *Patrick Mayovsky*