

No. 31046-9-III

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

FILED
JAN 29, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JOSEPH MARTIAL WONCH,
Defendant/Appellant.

APPEAL FROM THE FERRY COUNTY SUPERIOR COURT
Honorable Patrick Monasmith, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The record does not support the implied finding that Mr. Wonch has the current or future ability to pay Legal Financial Obligations.

2. The Findings of Facts and Conclusions of Law for an Exceptional Sentence contains a finding that is unsupported in the law and should be stricken.

3. The Findings of Facts and Conclusions of Law for an Exceptional Sentence contains a scrivener's error that should be corrected.

Issues Pertaining to Assignments of Error

1. Should the implied finding that Mr. Wonch 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?

2. The Findings of Facts and Conclusions of Law for an Exceptional Sentence separates one statutorily authorized aggravating circumstance into two "aggravating circumstances" and adds a third finding that either circumstance would support imposition of the exceptional sentence. Should the third finding be stricken as unauthorized under RCW 9.94A.535?

3. The Findings of Facts and Conclusions of Law for an Exceptional Sentence states that the parties stipulated to “sentencing Count I and II at Seriousness Level III, rather than Seriousness Level II.” Counts I and II have a seriousness level of I. Should this scrivener’s error in the findings be corrected?

B. STATEMENT OF THE CASE

Over time, the State filed three informations and ultimately charged the defendant, Joseph Martial Wonch, with forty (40) offenses arising from a traffic stop incident in May 2011, including the second degree unlawful possession and theft of numerous firearms and the unlawful possession of methamphetamine and oxycodone. CP 1–23, 24–69, 50–70, 71–73.

Mr. Wonch steadfastly denied being any kind of a thief and consistently admitted he unlawfully possessed the drugs. 2/21/12 RP 4, 12; 2/24/12 RP 46; 7/20/12 RP 96. The prosecutor seemed unwavering in seeking a minimum sentencing range of eight to ten years. 2/21/12 RP 5; 7/20/12 RP 95–96, 101.

On the eve of jury trial set to take place on February 21, 2012, the parties reached a plea agreement. 2/21/12 RP 3; 7/20/12 RP 95–96. In general, Mr. Wonch would plead guilty to two counts (I - possession of

methamphetamine and II - possession of oxycodone), and make an *Alford*¹ plea regarding a third count (III - unlawful possession of a firearm in the second degree) for the weapon that was found with the drugs. 2/21/12 RP 3–4.

The plea agreement included the parties’ stipulation that the two drug offenses (seriousness level I) would be sentenced at the higher standard range provided in seriousness level III due to the firearm possession offense. CP 82, 152. Although Mr. Wonch was not pleading guilty to any firearm enhancements (requiring mandatory time not subject to reduction by earned good time), this “higher range” was part of the deal contemplated by the State and defense counsel. 2/21/12 RP 5; 7/13/12 RP 84, 86–87; 7/20/12 RP 96. This stipulation for a higher standard range created an exceptional sentence. 7/13/12 RP 82–83; 7/20/12 RP 96–97.

During colloquy conducted at the guilty plea hearing, the court addressed the prosecutor’s proposed recommendation:

THE COURT: Did you understand that the prosecuting attorney would make the following recommendation to the court upon sentencing: And that would be to dismiss – dismiss all other counts – other information –

DEFENDANT: Uh-huh.

THE COURT: - filed these new counts –

DEFENDANT: That’s a big stack of papers.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

THE COURT: \$500 crime victim compensation fund assessment, \$200 court costs, \$250 court-appointed attorney's fees, restitution as determined , ... forfeit all contraband, pay jury costs as authorized by statute or law, stipulate to prior felony convictions; you may argue for a prison-based DOSA and/or the low end of the standard range at your option; *firearm possession increases standard range on drug offenses to Schedule [sic] 3, by stipulation of the lawyers* – and that's to create that range of punishment –
DEFENDANT: Yeah. To keep it out of the enhancement, right –
THE COURT: And no further criminal violations. Is that what you expected to hear from the prosecutor?
DEFENDANT: Yes, sir.

2/21/12 RP 13–14 (emphasis added); see ¶ 6(g) at CP 82.

The court also addressed the factual basis for the plea:

THE COURT: The form here asks that you state in your own words what made you guilty of this crime. And in typewritten words it indicates this:

“On May 7, 2011, in Ferry County I had methamphetamine and Oxycodone in my possession. I do not have a valid prescription for either item. I'm entering an *Alford* plea on the unlawful possession of a firearm in the second degree in order to take advantage of the state's plea proposal.”

Is that your true and correct statement, sir?

DEFENDANT: Yes, sir, your Honor.

2/21/12 RP 19; see ¶ 11 at CP 86.

The court accepted Mr. Wonch's pleas of guilty to the three counts as charged by amended information, after finding they were made knowingly, voluntarily and intelligently. 2/21/12 RP 17–20; CP 76–78.

At sentencing the court denied Mr. Wonch's request for a prison-based DOSA. 2/24/12 RP 66. Based on criminal history and the current

charges, the parties agreed Mr. Wonch's offender score was 4. 2/24/12 RP 39; 7/20/12 RP 99. Using the higher standard range stipulated to by the parties on counts I and II, the court imposed mid-range concurrent sentences of 84 months each. It also imposed a mid-range sentence of 15 months on count III. 2/24/12 RP 66–69, 75.

The court also ordered a total amount of Legal Financial Obligations (“LFOs”) of \$2,300. CP 95, 135. The court made no express finding that Mr. Wonch had the present or future ability to pay the LFOs. 2/24/12 RP 69–74; *see* CP 93 and 133 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the Court:

¶ 2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's 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.

CP 93, 133. The court made no inquiry into Mr. Wonch's financial resources and the nature of the burden that payment of LFOs would impose. 2/24/12 RP 69–74.

In terms of the financial obligations, your attorney suggests that you are indigent and unable to work, and yet you're still a relatively young man. I'm not hearing anything about any type of SSI or Social Security Disability which would have adjudicated you as unable to work. As near as I can tell, you're still big and strong and at some point would have the ability to pay court-ordered legal/financial obligations.

2/24/12 RP 69–70. The court acknowledged that while incarcerated, Mr. Wonch will generate no money, saying “I think Mr. Wonch might be indigent for certain purposes and not for others. He’s going to be off for a while and not able to earn”. 2/24/12 RP 73. The court ordered that all payments on the LFOs be paid “commencing immediately”. CP 96 and 136 at ¶ 4.3.

Within two and one-half months following sentencing, Department of Corrections sent out a letter indicating the Judgment and Sentence should be amended to show a correct standard range or instead that it was an exceptional sentence by stipulation. 7/13/12 RP 79–83; 7/20/12 RP 99. Mr. Wonch had separately filed a motion to modify or correct the Judgment and Sentence, saying the seriousness level of counts I and II (the drug offenses) had been erroneously calculated at level III (68+ to 100 months) rather than at level I (6+ to 18 months), and asked that he be re-sentenced within the level I range. CP 102–105.

A hearing was eventually held, giving the parties an opportunity to review relevant portions of the guilty plea hearing. 7/13/12 RP 82–90; 7/20/12 RP 91–113. The court heard argument of counsel and received input from Mr. Wonch. 7/13/12 RP 82–87; 7/20/12 RP 94–104. The

court concluded that stipulation to the seriousness level III range was part of the plea bargain and denied Mr. Wonch's motion. 7/20/12 RP 104–107.

The court signed an Amended Judgment and Sentence, which added the clerical checking of boxes in ¶ 2.4, indicating this was an exceptional sentence above the standard range for counts I and II and that “findings of fact and conclusions of law are attached in Appendix 2.4”. 7/20/12 RP 109–112; CP 132–33. In the written Findings of Facts and Conclusions of Law for an Exceptional Sentence regarding the prior imposition of an exceptional sentence, the court found as follows:

I. The exceptional sentence is justified by the following aggravating circumstances:

a) The Defendant and the State, as part of a plea agreement have jointly stipulated that justice is best served by the imposition of an exceptional sentence above the standard range, in the form of a stipulation to sentencing Count I and Count II at Seriousness Level III, rather than Seriousness Level II.

(b) Based upon the facts and circumstances of this matter, this court further finds the sentence imposed hereby to be consistent with and in furtherance of the interest of justice, and the Sentencing Reform Act.

(X) The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.

CP 152. This appeal followed. CP 140.

C. ARGUMENT

1. The implied finding that Mr. Wonch 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.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the

defendant and the nature of the burden that payment of costs will impose.”

RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's implied finding that Mr. Wonch has the present and future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court considered Mr. Wonch's "present and future ability to pay legal financial obligations" but made no express finding that Mr. Wonch had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid "commencing immediately" *after* it considered "the total amount owing, the defendant's 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." CP 93 and 133 at ¶ 2.5; CP 96 and 136 at ¶ 4.3.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). 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.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Wonch’s financial resources and the nature of the burden of imposing

LFOs on him. The record contains no evidence to support the trial court's implied finding in ¶¶ 2.5 and 4.3 that Mr. Wonch has the present ability to pay LFOs. The record instead supports the opposite conclusion. The court apparently took into account defense counsel's representations that Mr. Wonch was basically unemployable, indicating it was "persuaded" by the argument in awarding some costs but not others. 2/24/12 RP 55, 73–74. The court specifically acknowledged that while incarcerated, Mr. Wonch would have no money, saying "I think Mr. Wonch might be indigent for certain purposes and not for others. He's going to be off for a while and not able to earn." 2/24/12 RP 73. The implied finding that Mr. Wonch has the present ability to pay LFOs that is implicit in the directive to make payments "commencing immediately" is not supported in the record. It is clearly erroneous and the directive must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where

the court made no inquiry and there is no evidence in the record to support such findings.

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.

Mr. Wonch is not challenging *imposition* of the LFOs; rather, the trial court made the implied finding that he has the present and future ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Wonch until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ [t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.* ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

2. The Findings of Facts and Conclusions of Law for an Exceptional Sentence contains a finding that is not authorized under RCW 9.94A.535(2)(a)–(d), and the finding should be stricken.

The United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 301, 313–14, 124 S.Ct. 2531, 159 L.Ed.2d 403

(2004), caused the legislature to amend chapter 9.94A RCW to conform with Blakely's holding that the Sixth Amendment requires that a jury must determine any aggravating fact, other than prior convictions, used to impose punishment beyond the standard range. Laws of 2005, ch. 68, § 1. The revised statute separately indicates a list of aggravating factors that require a jury finding of fact, RCW 9.94A.535(3), and an *exclusive* list of factors by which trial courts can impose an aggravated exceptional sentence without a finding of fact by a jury, RCW 9.94A.535(2).

In relevant part, RCW 9.94A.535(2) provides that a trial court may impose an aggravated exceptional sentence without a finding of fact by a jury only under the following circumstances:

- (a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
- (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
- (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
- (d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to

RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

RCW 9.94A.535(2)(a)–(d).

Here, the court found there was a stipulation to imposition of an exceptional sentence, as authorized by RCW 9.94A.535(2)(a), but inexplicably set it forth as two separate grounds:

I. The exceptional sentence is justified by the following aggravating circumstances:

a) The Defendant and the State, as part of a plea agreement have jointly stipulated that justice is best served by the imposition of an exceptional sentence above the standard range, in the form of a stipulation to sentencing Count I and Count II at Seriousness Level III, rather than Seriousness Level II.

(b) Based upon the facts and circumstances of this matter, this court further finds the sentence imposed hereby to be consistent with and in furtherance of the interest of justice, and the Sentencing Reform Act.

CP 152.

However, the statute sets forth only one ground – that the parties jointly stipulate that justice is served by the imposition of an exceptional sentence above the standard range *and* the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act. Statutory phrases separated by the word “and” generally should be construed in the conjunctive. *See* 1A Norman J. Singer, *Statutes and Statutory Construction* § 21:14, at 179-

81 (6th ed.2002); HJS Dev., Inc. v. Pierce County ex rel. Dept. of Planning & Land Services, 148 Wn. 2d 451, 473 fn. 94, 61 P.3d 1141, 1152 (2003).

Thus, the court's finding of grounds (a) and (b) should be construed as equivalent to the one aggravating circumstance set forth in RCW 9.94A.535(2)(a).

The court's further finding states either one of the two "grounds" is itself sufficient to support imposition of an exceptional sentence.

(X) The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.

CP 152. This is erroneous. RCW 9.94A.535(2)(a) authorizes imposition of an exceptional sentence only under the single circumstance where the parties jointly stipulate *and* the court finds the stipulation is consistent with and furthers the interests of justice and the SRA. Thus neither of the "grounds" standing alone would justify imposition of an exceptional sentence. The trial court's "finding" is not authorized by RCW 9.94A.535(2)(a), and the erroneous finding must be stricken.

3. The Findings of Facts and Conclusions of Law for an Exceptional Sentence contains a scrivener’s error that should be corrected.

The Findings of Facts and Conclusions of Law for an Exceptional Sentence states that the parties stipulated to “sentencing Count I and II at Seriousness Level III, rather than Seriousness Level II.” CP 152 at ¶ 1(a). However, counts I (possession of a controlled substance other than marijuana—methamphetamine) and II (possession of a controlled substance other than marijuana—oxycodone) have a seriousness level of I. CP 90 and 130; RCW 69.50.4013(1); RCW 9.94A.517 (Table 3--Drug offense sentencing grid); 2011 Washington State Adult Sentencing Guidelines Manual, Part Two – Page 55. The record reflects that the stipulation was intended to raise the sentencing range from seriousness level I to seriousness level III, based in principle on the presence of a firearm. *See* RCW 9.94A.518. Therefore, this court should remand the case for correction of the Findings of Facts and Conclusions of Law for an Exceptional Sentence to reflect the correct seriousness level of I. *See, e.g., State v. Nallieux*, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence);

State v. Healy, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

D. CONCLUSION

The matter should be remanded to strike the implied finding of present and future ability to pay legal financial obligations from the Judgment and Sentence, and to strike the unauthorized "ground" and to correct the scrivener's error in the Findings of Fact and Conclusions of Law for an Exceptional Sentence.

Respectfully submitted on January 28, 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 28, 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 brief of appellant:

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