

**FILED**

OCT 22, 2013

Court of Appeals  
Division III  
State of Washington

No. 31099-0-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

SOPHIA MARIE GONZALEZ,  
Defendant/Appellant.

APPEAL FROM THE KITTITAS COUNTY SUPERIOR COURT  
Honorable Scott R. Sparks, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

Primarily Ms. Gonzalez relies upon her Brief of Appellant to address the issues raised by the State. Additionally he states as follows in direct Reply.

**1. The trial court erred when it failed to make and enter the statutorily required written findings in support of its decision to impose an exceptional sentence, and remand is required.**

*See* Brief of Appellant at pp. 6–10. The State primarily responds that (1) this issue may become moot “given the appellant’s anticipated release date”, but in any event (2) the exceptional sentence was “justified”. Brief of Respondent at pp. 9–12. A case is moot if the court cannot provide either the relief originally sought or any effective relief. *See* Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd., 131 Wn.2d 345, 350, 932 P.2d 158 (1997). In State v. Ford, 99 Wn. App. 682, 995 P.2d 93 (2000), the State’s challenge based on mootness due to dismissal of the case was overcome where the effective relief included possible elimination of all criminal history. In State v. Raines, 83 Wn. App. 312, 315, 922 P.2d 100 (1996), *superseded by statute on other grounds*, Laws of 1999, ch. 196, § 5 as recognized in State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), the court found that the case was not moot even

though the appellant had served his entire sentence because the modified sentence that he challenged had potential impact on his future offender score.

As in Raines, resolution of the issue here has a potential impact on Ms. Gonzalez' future offender score and the claim of mootness should be rejected. Although it proffers its own reasons for imposing an exceptional sentence, the State concedes the statutory requirements for imposing an exceptional sentence were not met in this case. The State also does not address the sub-argument that the oral ruling does not support imposition of an exceptional sentence. Remand is appropriate to secure written findings as required by RCW 9.94A.535, in order for this Court to perform Ms. Gonzalez' requested appellate review of the imposition of the exceptional sentence under RCW 9.94A.585(4).

**2. The directive to pay Legal Financial Obligations based on an unsupported finding of ability to pay, and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.**

Although Ms. Gonzalez did not make these arguments below, illegal or erroneous sentences may be challenged for the first time on

appeal. *See* State v. Calvin, 302 P.3d 509, 521 n.2 (Wash. Ct. App. 2013) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal) (citing Ford, 137 Wn.2d at 477); *see also* State v. Bertrand, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (also considering the challenge for the first time on appeal); *cf.* State v. Blazina, 174 Wn. App. 906, 911-12, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013) (declining to consider the challenge for the first time on appeal, where the trial court did not set a date for the defendant to begin paying his financial obligations).

a. The directive to pay must be stricken. *See* Brief of Appellant at pp. 11–15. The court in the judgment here ordered Ms. Gonzalez to pay a total of \$4,100 in legal financial obligations (LFOs), including \$3,500 as discretionary court costs. Paragraph 2.5 of the judgment expressly provided that "[t]he court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that defendant's status will change." The record does not support the finding, in that it does not contain any evidence of Ms. Gonzalez' financial status or employability.

The State counters that the Pre-Sentence Investigation report (“PSI”) provided information as to past seasonal employment. Brief of Respondent at p. 15. However, the State offers no citation to the record showing that the court considered this aspect of the nine-page PSI document, and it concedes the court did not expressly, on the record, inquire as to Ms. Gonzalez’ present and future financial status or employability, and hence her ability to pay. Id. There is insufficient evidence to support the trial court's implied finding that Ms. Gonzalez has the present and future ability to pay legal financial obligations and the directive to pay must be stricken.

b. The imposition of discretionary court costs of \$3,500 must also be stricken. See Brief of Appellant at pp. 15–18. The victim penalty assessment fee and the DNA collection fee are mandatory and not dependent on present or future ability to pay. State v. Curry, 118 W n.2d 911, 917, 829 P.2d 166 (1992), citing RCW 7.68.035; State v. Thompson, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA fee is mandatory and imposed regardless of hardship), citing RCW 43.43.7541. However, court costs are discretionary under RCW 10.01.160(1). "The court shall not order a defendant to pay costs *unless the defendant will be able to pay them.*" (Emphasis added.) RCW 10.01.160(3).

Here, the court imposed discretionary costs of \$3,500. The record does not show that the trial court took Ms. Gonzalez' financial resources and ability to pay into account as required by RCW 10.01.160(3). The trial court neither inquired into her financial resources nor weighed how imposition of discretionary costs might realistically impact his situation. The implied finding of ability to pay is unsupported by the record and clearly erroneous. The court's imposition of discretionary court costs without compliance with the requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the imposition of court costs. State v. Calvin, 302 P.3d 509, 522 (Wash. Ct. App. 2013); Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011).

**3. The sentencing court did not have statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.**

*See* Brief of Appellant at pp. 18–20. The trial court did not have the statutory authority to sentence Ms. Gonzalez to a variable term of community custody contingent on the amount of earned release. Under RCW 9.94A.701 it could only sentence her to a finite term of 12 months.

Therefore, the variable term of community custody imposed by the trial court was improper, and the matter should be remanded for resentencing to a finite term.

The State responds that since the Department of Corrections (“DOC”) has apparently declined to supervise the appellant, the issue should be considered moot. Brief of Respondent at p. 17. It offers no legal authority in support of the notion that DOC’s declination to supervise an offender removes a court’s imposition of sentence conditions requiring DOC supervision and affirmative and/or prohibited conduct. The sentence to a variable term of community custody contingent on the amount of earned release remains in effect. Regardless whether DOC declines to supervise or instead later changes its mind and reinstates supervision, the variable term is unauthorized by the legislature. This court can provide effective relief where Ms. Gonzalez remains subject to the sentence of supervision imposed by the trial court as well as sentence conditions which may result in violations subject to sanctions.

**4. The Judgment and Sentence, Appendix 4.6 and domestic violence no-contact order have internal inconsistencies which cannot be resolved by looking at the oral ruling, and the matter should be remanded for clarification.**

*See* Brief of Appellant at pp. 20–21. The State responds with its own understanding of what the challenged inconsistencies mean. Brief of Respondent at pp. 17–18. However, it is the trial court’s intent that is relevant to Ms. Gonzalez. The State appears to concede the relevant documents do have inconsistencies which require trial court action (“Once the appellant is released from prison . . . the court will make the appropriate amendments to the Judgment and Sentence and the No Contact Order to authorize contact for purposes of completing the parenting class.”). Brief of Respondent at 18. Ms. Gonzalez accepts the “concession”. Remand for clarification by the trial court is appropriate.

**B. CONCLUSION**

For the reasons stated here and in the brief of appellant, the matter should be remanded for entry of written findings and conclusions in support of the exceptional sentence, and counsel should thereafter be allowed to assign additional assignments of error and provide supplemental briefing if appropriate. Additionally, remand is appropriate with

instructions to impose a finite term of 12 months community custody, to strike the implied finding of present and future ability to pay legal financial obligations and the imposition of discretionary costs from the Judgment and Sentence, and to provide clarification of the inconsistent sentencing documents.

Respectfully submitted on October 22, 2013.

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**PROOF OF SERVICE (RAP 18.5(b)) AMENDED**

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 22, 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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