

FILED

AUG 13, 2013
Court of Appeals
Division III
State of Washington

No. 31556-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

IGNACIO SALAZAR,

Appellant.

On Appeal from the Benton County Superior Court
The Honorable Cameron Mitchell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it ordered discretionary court costs without considering appellant's financial resources and the burden these costs would impose.

2. The sentencing court erred when it tied the period of community custody to the amount of earned early release credit appellant might earn in prison.

Issues Pertaining to Assignments of Error

1. By statute, before imposing discretionary court costs, sentencing courts must consider a defendant's financial resources and the burden these costs would impose. Where the court failed to comply with this statutory mandate, should these costs be stricken?

2. The statutes pertaining to community custody no longer tie the supervision period to earned early release credit. Did the sentencing court err when it nonetheless did so?

B. STATEMENT OF THE CASE

The Benton County Prosecutors Office charged Ignacio Salazar with four criminal offenses: (count 1) Delivery of a Controlled Substance; (count 2) Delivery of a Controlled Substance; (Count 3)

Possession with Intent to Manufacture or Deliver a Controlled Substance; and (count 4) Possession of a Controlled Substance. Counts 1 and 2 included school bus zone enhancements. CP 5-7.

Salazar's case went to trial. But after a police detective engaged in conduct possibly requiring a mistrial, the parties negotiated a settlement. See RP¹ 352-413. Salazar entered an Alford² plea to the charge in count 1 without the school bus zone enhancement. CP 61-62; RP 414-424. The State dismissed the charges in counts 2 through 4. CP 59-60; RP 414, 424. And although Salazar's standard range was 60 to 120 months, the State agreed to recommend a 36-month exceptional sentence. CP 62-63.

At sentencing, the court imposed the recommended exceptional sentence. CP 75, 79-82; SRP 5-7. The court also imposed \$4,442.28 in discretionary court costs (a jury demand fee, witness fees, attorney fees, and investigator fees). CP 83. Interest is accruing on this amount, and Salazar is required to pay up to \$50.00 per month to satisfy his obligations. CP 74.

¹ "RP" refers to the consecutively paginated verbatim report of proceedings labeled "Volumes I, II, and III." "SRP" refers to the verbatim report of proceedings for the March 27, 2013, sentencing hearing.

² North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.

The court also imposed community custody. CP 75; SRP 14.

The Judgment indicates:

(A) The defendant shall be on community placement or community custody for the longer of:

- (1) the period of earned early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court, as follows:

Count 1 for 12 months;

CP 75.

Salazar timely filed his Notice of Appeal. CP 84.

C. ARGUMENT

1. THE SENTENCING COURT ERRED WHEN IT ORDERED SALAZAR TO PAY DISCRETIONARY COSTS WITHOUT FIRST ASSESSING HIS FINANCIAL RESOURCES AND THE RESULTING BURDEN.

RCW 10.01.160(3) provides "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. 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."

Ed. 2d 162 (1970).

There is no requirement that the sentencing court enter formal findings in this regard. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). However, findings or not,³ the record must demonstrate that the trial court took the defendant's financial resources and ability to pay into account. State v. Calvin, ___ Wn. App. ___, 302 P.3d 509, 521-522 (2013); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). The decision to impose discretionary legal financial obligations is reviewed under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

At Salazar's sentencing, defense counsel specifically objected to the imposition of discretionary costs, pointing out that Salazar had no means to pay back these sums, particularly since he was headed to federal custody at the conclusion of this case. SRP 8. While the court did delete two of the costs as unwarranted [SRP 11-13], there is no indication the court considered Salazar's ability to pay the remaining costs. Therefore, they must be stricken. Calvin, 302 P.3d at 522 (striking costs as remedy).

³ No finding was entered in Salazar's case. See CP 73 (box under section 2.5, entitled "Ability To Pay Legal Financial

2. THE SENTENCING COURT COULD NOT TIE SALAZAR'S COMMUNITY CUSTODY TERM TO HIS PERIOD OF EARNED EARLY RELEASE.

Because Salazar was convicted of delivering methamphetamine under RCW 69.50.401(2)(b), the court was required to impose a one-year term of community custody. RCW 9.94A.701(3)(c). Under the current statutory scheme, it is no longer proper to link the community custody term to the potential period of earned early release. State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Salazar's community custody term cannot exceed 12 months. By indicating the community custody term could be based on earned early release credit, the sentencing court erred.

Obligations," left blank.

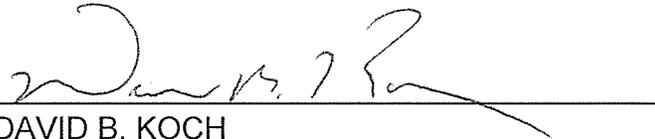
D. CONCLUSION

This Court should strike the imposition of \$4,442.28 in discretionary court costs and strike that portion of Salazar's Judgment indicating the period of earned early release potentially controls his community custody term.

DATED this 13th day of August, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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State v. Ignacio Salazar

No. 31556-8-III

Certificate of Service

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 13th day of August, 2013, I caused a true and correct copy of the **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 13th day of August, 2013.

x 