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MAY 19 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	NO. 33032-0-III
)	
Respondent,)	
)	
v.)	
)	
ERNEST SORRELL,)	
)	
Appellant)	

BRIEF OF RESPONDENT

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A. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by defendant.

B. STATEMENT OF THE CASE

The State agrees with the status of the case and the factual recitation provided in Defendant's brief. Additionally, on June 13, 2013, the clerk informed the court that she initiated the in-court financial review process because the defendant failed to provide her with verification of his job searches when she attempted to determine why he had paid nothing since his release from prison. 1RP 3. The court continued the review process for three months to September 9th, and directed defendant to keep in monthly contact with the clerk and to fax her his job-seeking attempts. 1 RP 5.

At the financial review hearings on September 9, 2013, and on January 6, 2014, the court engaged defendant in discussing his current employment, pay, rent, child support, and on his future job prospects. 1 RP 7 – 19.

C. AUTHORITY AND DISCUSSION

The court's authority to impose legal financial obligations (LFOs) pursuant to RCW 9.94A.760(1) is not at issue. That the clerk of the court has authority to collect unpaid LFOs pursuant to RCW 9.94A.706(8) is not at issue. "The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or 9.94A.740" pursuant to RCW 9.94.760(1) is not at issue.

The court, after hearing the defendant's testimony, stated that defendant's nonpayment was because of defiance rather than inability. 2RP 31.¹

1. Court properly did not grant defendant's request for remission.

It is not correct to say that the court did not consider the defendant's oral motion to remit costs. At a financial review hearing on June 3, 2013, the defendant orally moved the court to remit his LFOs, but the court clerk informed the court that the defendant had not responded to her request for verification of his

job searches, and that is why she set up the review hearing. 1PR 3. The court listened to defendant's unsubstantiated rendition of his financial woes, but after hearing this information decided to continue the matter until a later date and directed defendant to keep in monthly contact with the clerk "and fax to her, send to her, mail to her whatever job applications you have, tell her who you're applying with so she can keep track of what's going on, alright?" 1RP 5-6.

It is clear that the court clerk had attempted to fulfill her duties to collect information so as to make an educated attempt at determining defendant's earning capabilities, and defendant did not fulfill his obligations to comply with such requests. RCW 9.94A.760(7)(8).

It was not error for the court to continue the matter to give the defendant an opportunity to provide more information before deciding whether to remit the LFOs. It is an abuse of discretion for the court to fail to exercise discretion, but, as shown in this matter, the court exercised an abundance of discretion. See *State v. Shirts*, 195 Wash.App. 849 (2016).

¹ State's briefing adopts Defendant's style for the report of proceedings as 1PR for hearings on 6/3/13, 9/9/13, 1/6/14, and 10/13/14; and 2PR for the hearing on 12/8/14.

The record is clear from all of the discussions the court had with defendant at his review hearings, and at the final hearing, that the court was aware that defendant was employed part-time, that there was no reason he could not get a second job in areas such as agriculture, that he was not disabled, that he was able to do physical labor, and that he picked up cans on the side of the road to make money for gas to appear at his hearings. Based on that information it was proper for the court to keep the LFOs in place for the time being until such time as defendant truly became permanently unable to pay. "It is not unconstitutional to recoup court costs (including costs of appointed counsel) from an indigent who later becomes able to pay." *State v. Blank*, 131 Wash.2d 230, 246 (1997).

The situation at hand does not compare to the circumstances in *City of Richland v. Wakefield*, 186 Wn.2 596 (2016), where the defendant in that case provided undisputed documentary evidence of a permanent disability and the reliance on only disability assistance for support. This situation also does not compare to *State v. Shirts*, *supra*, where the court categorically declined the motion to remit as untimely even though defendant

provided a written petition along with other supporting affidavits and other filings.

2. Defendant's non-payment was willful.

Upon hearing the defendant's rendition of his financial status the court found that his non-payment was because of defiance, and thus willful, and not because of inability. 2RP 31. "The burden is on the offender to show that his nonpayment is not willful." State v. Nason, 168 Wash.2d 936, 945 (1997); State v. Stone, 165 Wash.App. 796, 817 (2012).

"A defendant who claims indigency must do more than simply plead poverty in general terms...." Bower I, 64 Wash.App. at 233, 823 P.2d 1171.

He should be prepared to show the court his actual income, his reasonable living expenses, his efforts, if any, to find steady employment, his efforts, if any, to acquire resources from which to pay his court-ordered obligations, and, ... [if relevant] ... any lawful excuse he might have for his failure to report for community supervision.Id.

State v. Woodward, 116 Wash. App. 697, 704, 67 P.3d 530, 534 (2003).

In addition to all of the other testimony about defendant's work, his ability to work, pay, etc., the court also heard that defendant would rather collect cans to pay for gas to come to court

than to collect cans to pay his de-minimus \$10 monthly obligation. The court's finding is substantially supported by the evidence.

Defendant's further contention that the court failed to consider imposing jail alternatives should not be taken at face value where defendant waffled at his attorney's prompting whether he do even do community service. 2RP 26-27. Further, the court did indeed consider a jail alternative as a means of prompting compliance: the court granted a 90 day continuance and held the jail time in abeyance pending further payment. Defendant would only have had to do jail time if he did not make any payments. 2RP 32. But rather attempt any compliance whatsoever, this appeal immediately followed and the matter was stayed, and so it cannot be said that the court was given an opportunity to consider a jail alternative at the review hearing.

3. More than simple non-payment of LFOs triggers review and sanctions.

"The state has the burden of showing noncompliance by a preponderance of the evidence." RCW 9.94B.040.

[I]f an offender is capable of paying but willfully refuses to pay, or if an offender does not "make sufficient bona fide efforts to seek employment or borrow money in order to pay," the State may imprison the offender for failing to pay his or her LFO. Bearden, 461 U.S. at 668, 103 S.Ct. 2064. The burden is on the offender to show that his nonpayment

is not willful. RCW 9.94B.040(3)(b); Smith, 147 Wash.2d at 112, 52 P.3d 485. Although the offender carries the burden, due process still imposes a duty on the court to inquire into the offender's ability to pay. Smith, 147 Wash.2d at 112, 52 P.3d 485. Inquiry into the offender's ability to pay comes at "the point of collection and when sanctions are sought for nonpayment." State v. Blank, 131 Wash.2d 230, 242, 930 P.2d 1213 (1997).

State v. Nason, supra at 945.

Here, it was not simply the non-payment of LFOs, but the defendant's refusal to provide the clerk with written verification of his employment efforts that triggered this review and sanction process. As noted above, RCW 9.94.760(5) & (7) require the defendant to provide information and documentation to the court clerk, but he failed to do so.

At the review hearings the defendant provided information about his lack of payments.

It was only after the state had information about the non-payments that it filed the non-compliance motion. There is nothing in the record to suggest that the state sought sanctions without any information other than simple non-payment.

At the show cause hearing to determine whether sanctions should be imposed for willful nonpayment, the defendant was represented by counsel, and defendant testified about his financial

situation. The court had before it a wealth of information before determining that defendant's non-payment was willful.

The facts of this case do not support defendant's contention that the LFO collection statutes treat simple non-payment as the equivalent of willfulness. The statutes anticipate the clerk will work with a defendant and gather information prior to making recommendations to the court. RCW 9.94A.760(5) and (7)(b). The clerk attempted to do so in the case at hand but the defendant rebuffed her efforts.

The clerk as well as the court attempted to gain information from the defendant about his non-payment, his attempts at employment, etc., but at every step the defendant offered only conclusory, unverified self-serving statements about his financial situation. It was not until after several attempts at collection and ascertaining information about non-payment that the state sought sanctions.

4. RCW 9.94B.040 satisfies due process.

Defendant's procedural and substantive due process rights were safeguarded in the application of RCW 9.94B.040 in the context of this case. Defendant was not automatically jailed for non-payment. See *State v. Nason*, supra. Defendant was

represented by counsel at the enforcement proceedings. See *State v. Stone*, supra. Defendant had an opportunity to be heard, and was heard. See *City of Redmond v. Moore*, 151 Wash.2d 664, 670 (2004). And the court “inquired into the reasons for the failure to pay” before imposing sanctions. See *State v. Shelton*, 194 Wash.App. 660, 671 (2016)(citing *Bearden v. Georgia*, 461 U.S. 660, 672, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)).

The primary complaint of defendant is that RCW 9.94B.040 does not spell out the standard to be applied in assessing willfulness. This issue was directly addressed in *State v. Campbell*, 84 Wash.App. 596, 602 (1997): “The 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.”

This standard, coupled with the procedural safeguards of a hearing to determine non-compliance, serve to ensure that a defendant “does not face imprisonment for inability to pay, but only for contemptuous refusal to pay.” *State v. Campbell*, supra at 603.

Given that defendant provided no documentation of job searches, provided no documentation to support his health claims, stated he would rather miss work and collect cans to come to court rather than pay the court, provided excuses for anticipating why he

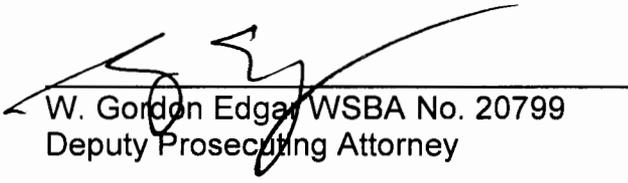
could not or would not become gainfully employed, and would not pay any amount whatsoever, it cannot be shown that the court's determination of willful non-payment was clearly erroneous.

A review of the entire record reveals that it was defiance and not indigence for defendant's non-payment.

D. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to uphold the trial court's findings of a willful nonpayment of legal financial obligations.

Respectfully submitted this
16th day of May, 2017



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