

No. 33153-9-III

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

FILED
Sep 10, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

ROMAN LEE BONE,

Appellant.

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

The Honorable Judge Evan E. Sperline

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Roman Lee Bone was found guilty of second degree burglary after a bench trial. Mr. Bone's offender score was calculated to be an 8, which included two prior convictions of possession of a controlled substance by a prisoner. These drug offenses occurred on the same date in 2009 and were sentenced on the same date and in the same county. The current sentencing court erred by failing to consider whether these crimes encompassed the same criminal conduct under RCW 9.94A.525(5)(a)(i). Mr. Bone requests a remand for resentencing because of the trial court's failure to conduct the "same criminal conduct" inquiry.

The current sentencing court also erred by imposing legal financial obligations when evidence showed Mr. Bone did not have the ability to pay present and future legal financial obligations. Mr. Bone requests that this Court strike the erroneous discretionary LFOs and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating Mr. Bone's offender score in violation of RCW 9.94A.525(5)(a)(i).
2. The trial court erred by imposing present discretionary legal financial obligations and by authorizing the imposition of future

discretionary legal financial obligations, including a \$750 court-appointed attorney recoupment and the potential award of appellate costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the sentencing court erred by not considering whether two prior convictions constituted the same criminal conduct under RCW 9.94A.525(5)(a)(i).

Issue 2: Whether the trial court's imposition of present discretionary legal financial obligations and authorization of possible future discretionary legal obligations was unsupported by the record and requires resentencing.

D. STATEMENT OF THE CASE

The State charged Mr. Bone with second degree burglary. (CP 1–2). Following a bench trial, the trial court found Mr. Bone guilty as charged. (CP 33; RP Vol. II¹ 3-63, 73).

At sentencing, Mr. Bone's offender score was calculated to be an 8. (CP 36-37). His prior criminal history included two counts of possession of a controlled substance by a prisoner. (CP 36). These drug offenses were committed on the same date in 2009 and in the same county, and Mr. Bone was sentenced for them on the same date in 2010. (CP 36). The judgment and sentence contains the following notation next to the two drug offenses: "did not encompass." (CP 36). The trial court did not

¹ Two volumes were transcribed in this case. Appellant's reference to "Vol. I" is the volume transcribed by Amy Brittingham. Appellant's reference to "Vol. II" is the volume transcribed by Tom Bartunek.

consider or inquire whether the 2009 drug possessions encompassed the “same criminal conduct.” (RP Vol. I 38–45).

The judgment and sentence contains the following language:

¶ 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. (RCW 10.01.160).

(CP 37).

At sentencing the trial court inquired into Mr. Bone's financial ability:

JUDGE: Does Mr. Bone have a long term financial—or ability to pay legal financial obligations?

[DEFENSE COUNSEL]: Let's say very long term.

(RP Vol. I 41). The court granted Mr. Bone's motion for an order of indigency. (RP 42).

Mr. Bone was sentenced to a term of confinement of 53 months.

(CP 38). The trial court ordered Mr. Bone to pay a \$750 fee for his court-appointed attorney pursuant to RCW 9.94A.760. (CP 40; RP Vol. I 41).

The court also imposed the potential future discretionary legal costs of an appeal against the defendant pursuant to RCW 10.73.160. (CP 42).

Mr. Bone timely appealed. (CP 52).

E. ARGUMENT

Issue 1: Whether the sentencing court erred by not considering whether two prior convictions constituted the same criminal conduct under RCW 9.94A.525(5)(a)(i).

A defendant may challenge a sentencing court's calculation of his offender score for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A challenge to the offender score is reviewed de novo. *Id.*

The State has the burden to establish on the record the existence and the classification of the convictions relied on in calculating the score. *State v. Ford*, 137 Wn.2d 472, 480-82, 973 P.2d 452 (1999). RCW 9.94A.525 provides, in relevant part:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except . . . Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. *The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations. . . .*

RCW 9.94A.525(5)(a)(i) (emphasis added).

The current sentencing court must determine the offender score based upon “other current and prior convictions.” *State v. Williams*, 176 Wn. App. 138, 141, 307 P.3d 819 (2013) (citing RCW 9.94A.589(1)(a)). Where there has not been a determination that prior convictions constituted the same criminal conduct, the current sentencing court is still required to “decide whether to count those crimes separately using the ‘same criminal conduct’ analysis found in RCW 9.94A.589(1)(a).” *State v. Johnson*, 180 Wn. App. 92, 104, 320 P.2d 197 (2014) (citing RCW 9.94A.525(5)(a)(i)) (quotations omitted). “If a prior sentencing court found multiple offenses ‘encompass the same criminal conduct,’ the current sentencing court must count those prior convictions as one offense.” *Williams*, 176 Wn. App. at 141 (citing RCW 9.94A.525(a)(i)). But, “[i]f the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court *must independently evaluate* whether those prior convictions ‘encompass the same criminal conduct’ and, if they do, must count them as one offense.” *Id.* (citations omitted) (emphasis added).

Here, there was no discussion during the sentencing hearing about whether the 2009 sentencing court found the two drug possession offenses were the same criminal conduct. (RP Vol. I 38–45). The only information

regarding this question is a notation on the judgment and sentence that these crimes “did not encompass.” (CP 36). Even if the original sentencing court found the crimes did not encompass the same criminal conduct, if the sentences were served concurrently, then the current sentencing court would be obligated to consider whether to count the two prior offenses as one offense. *See* RCW 9.94A.525(5)(a)(i); *see also* *Johnson*, 180 Wn. App. at 104.

It is likely the two prior drug possession offenses were sentenced concurrently. Sentences imposed under RCW 9.94A.589 are served concurrently. *See* RCW 9.94A.589(1)(a). “Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1)(a).

The current sentencing court cannot presume the 2009 drug possession offenses are not the same criminal conduct, as they were sentenced on the same date and in the same county. (CP 36); *see also* RCW 9.94A.525(5)(a)(i) (“The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations. . . .”).

In addition, the current sentencing court could have found the 2009 drug offenses encompassed the same criminal conduct had the court performed the analysis.

“Same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Here, the two prior convictions from 2009 appear to be the same criminal conduct. First, they both have the same offense date, so they were likely committed “at the same time and place.” (CP 36); RCW 9.94A.589(1)(a).

Second, two counts of possession of a controlled substance, even if two different controlled substances are involved, can encompass the “same criminal conduct.” *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994) (simultaneous possession of two different controlled substances encompassed same criminal conduct); *see also State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993) (simultaneous delivery of two different drugs to same undercover officer encompassed same criminal conduct); *State v. Porter*, 133 Wn.2d 177, 186, 942 P.2d 974 (1997) (three counts of delivery of a controlled substance encompassed same criminal conduct because the sales were sequential).

Third, the two prior convictions from 2009 do not involve a different criminal intent, because possession of a controlled substance is a

strict liability crime. *See State v. Bradshaw*, 152 Wn. 2d 528, 539-40, 98 P.3d 1190 (2004) (no *mens rea* element in possession of a controlled substance); *State v. Deer*, 175 Wn.2d 725, 735, 287 P.3d 539 (2012) (possession of a controlled substance is a strict liability offense); *see also* RCW 9.94A.589(1)(a) (defining same criminal conduct).

Finally, the two prior convictions from 2009 involve the same victim, the general public. *See* RCW 9.94A.589(1)(a) (defining same criminal conduct). The “victim” in a possession of a controlled substance case is the general public. *State v. Haddock*, 141 Wn.2d 103, 111, 3 P.3d 733 (2000) (citing *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); *Garza-Villarreal*, 123 Wn.2d at 47, 864 P.2d 1378)).

The case should be remanded for resentencing to determine whether the 2009 drug offenses were the same criminal conduct.

Issue 2: Whether the trial court’s imposition of present or future discretionary legal financial obligations was unsupported by the record and requires resentencing.

“A defendant who makes no objection to the imposition of discretionary LFOs [legal financial obligations] at sentencing is not automatically entitled to review.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Instead, “RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of

right . . . [and] [e]ach appellate court must make its own decision to accept discretionary review.” *Id.* at 834-35. Mr. Bone requests this Court exercise its discretion under RAP 2.5(a) to decide the LFO issue for the first time on appeal. *See id.*

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). “Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original).

The applicable statute states:

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.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant’s current or future ability to pay based on the particular facts of the defendant’s case. *Blazina*, 182 Wn.2d at 834. The record must reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay, and the

burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837–39. This inquiry also requires the court to consider important factors, such as incarceration and a defendant’s other debts, including any restitution. *Id.* at 838–39.

“[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.* at 838 (quoting RCW 10.01.160(3)). “[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants’ inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants’ lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d

at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837.

A trial court must consider the defendant’s ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant’s ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Id.* (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *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)).

Here, Mr. Bone faces 53 months of incarceration. (CP 38). The trial court briefly inquired into Mr. Bone’s ability to pay LFOs and it was represented by defense counsel it would be a long time before he could pay. (RP Vol. I 41). No further inquiry regarding Mr. Bone’s ability to pay was made by the trial court. (RP Vol. I 41). Mr. Bone’s motion for indigency was also granted. (RP Vol. I 42). Because the record shows

that Mr. Bone would likely not be able to pay costs for a very long time and that the trial court entered an order on indigency, the court erred in imposing discretionary costs. *See Lundy*, 176 Wn. App. at 103; RCW 10.01.160(3); *Blazina*, 344 P.3d at 839. Substantial evidence does not support the imposition of the discretionary LFOs, and the record actually indicates the contrary to what the court imposed, that Mr. Bone does not have the ability to pay LFOs. *See Brockob*, 159 Wn.2d at 343 (citing *Nordstrom Credit, Inc.*, 120 Wn.2d at 939).

In addition, the record does not reflect that the trial court made an individualized inquiry into Mr. Bone's ability to pay. *See Blazina*, 182 Wn.2d at 834. The trial court asked defense counsel a single question; it did not consider important factors, such as incarceration and Mr. Bone's other debts. *Id.* at 838–39.

The erroneous discretionary LFOs included the \$750 in court-appointed attorney recoupment and the potential “award of costs on appeal against the defendant” (CP 40, 42). Mr. Bone requests that this Court strike the erroneous discretionary LFOs and remand for resentencing. *See Blazina*, 182 Wn.2d at 839 (setting forth this remedy).

F. CONCLUSION

The current sentencing court was required to conduct an analysis of the two prior 2009 drug possession convictions on Mr. Bone's judgment and sentence to determine whether they were the same criminal conduct. Mr. Bone respectfully requests this case be remanded for resentencing for this purpose.

Mr. Bone also requests this Court remand for resentencing to strike the discretionary present and future LFOs that were imposed, including the \$750 court-appointed attorney recoupment and the potential award of appellate costs, because the record does not reflect Mr. Bone has the ability to pay.

Respectfully submitted this 9th day of September, 2015.



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/s/ Kristina M. Nichols

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33153-9-III
vs.)
)
ROMAN LEE BONE)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on September 9, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Roman Lee Bone, DOC # 354180
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Having obtained prior permission from the Grant County Prosecutor's Office, I also served the Respondent State of Washington at kburns@grantcountywa.gov using Division III's e-service feature.

Dated this 9th day of September, 2015.



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