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Aug 01, 2016
Court of Appeals
Division III
State of Washington

NO. 33167-9-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL THOMAS COLLINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
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A. COUNTERSTATEMENT OF THE ISSUES

1. **DID THE APPELLANT'S SENTENCE OF FIFTY MONTHS CONFINEMENT, PLUS TWELVE MONTHS OF COMMUNITY CUSTODY, EXCEED THE STATUTORY MAXIMUM EVEN THOUGH THE JUDGMENT AND SENTENCE INCLUDED THE LANGUAGE "THE COMBINED TERM OF IMPRISONMENT CANNOT EXCEED THE STATUTORY MAXIMUM FOR THIS OFFENSE."?**

2. **SHOULD THE COURT REVIEW THE ISSUE OF LEGAL FINANCIAL OBLIGATIONS WHEN RAISED FOR THE FIRST TIME ON APPEAL, AND IF SO, DID THE TRIAL COURT ERR BY IMPOSING MANDATORY AND DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS ON THE APPELLANT?**

B. RESPONSE TO STATEMENT OF THE CASE

The State adopts the Appellant's Statement of the Case with the following corrections and additions. During the Appellant's sentencing, the trial court made an individualized inquiry into the Appellant's ability to pay his legal financial obligations. The Appellant claimed he could not work because he had been on disability before. When the court followed up, the Appellant admitted he had not been on disability for a year and a half or two

years. 2/3/15 RP 3. The Judgment and Sentence reflects the trial court struck three of the fines the State requested based on this inquiry. CP 130. It also reflects the Appellant having a criminal history including 21 felony convictions. CP 127.

C. RESPONSE TO ARGUMENT

1. THE CASE SHOULD BE REMANDED FOR RESENTENCING FOR THE COURT TO INDICATE TEN MONTHS OF COMMUNITY CUSTODY ON THE CHARGE OF IDENTITY THEFT IN THE SECOND DEGREE.

A defendant's sentence "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." RCW 9.94A.701. The State concedes the trial court is required to reduce the term of community custody, and not leave such a determination up to the Department of Corrections. *State v. Boyd*, 174 Wash.2d 470, 472, 275 P.3d 321 (2012).

The statutory maximum for Identity Theft in the Second Degree, a class "C" felony, is five years. RCW 9A.20.021. Therefore, based on the trial court's sentence of fifty months, the

term of community custody should be ten months, to not exceed the statutory maximum.

2. THE COURT SHOULD NOT CONSIDER THE ISSUE OF LEGAL FINANCIAL OBLIGATIONS FOR THE FIRST TIME ON APPEAL AND, IN ANY EVENT, THE COURT PROPERLY MADE AN INDIVIDUALIZED INQUIRE AND ADJUSTED THE FINES AND FEES IN ACCORDANCE WITH THAT INQUIRY.

The Court should decline to consider the issue of the Appellant's legal financial obligations (LFOs) for the first time on appeal. Any defendant who does not object to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. *State v. Blazina*, 182 Wash. 2d 827, 832, 344 P.3d 680 (2015) citing RAP 2.5(a). The general rule, that arguments not raised in the trial court cannot be considered on appeal, applies. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); Rules of Appellate Procedure (RAP) 2.5(a). The reason for this rule is to allow the trial court the opportunity to correct the error and to give the opposing party an opportunity to respond. If the Appellant had brought his issues with the legal financial obligations to the attention of the trial court, the issue could have been easily corrected with one or two questions. Instead, by waiting until his

appeal, he asks the State to bear the costs of transporting him and conducting another sentencing hearing, or the costs of having the fines stricken in their entirety.

Unpreserved LFO errors do not automatically receive review. *Blazina* at 833. Such a broad review of unpreserved sentencing errors is only permitted in instances where a failure to grant review would cause defendants to be unjustly punished and to be treated inconsistently. *Id.* at 834. Allowing sentencing review of LFO orders does not promote sentencing uniformity in the same manner. *Id.* In cases such as this, "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." *Blazina* at 834.

Blazina took the opportunity to "emphasize" RCW 10.01.160(3)'s requirement of an individually inquiry into a defendant's ability to pay is required. *Id.* at 839. This case is not one that requires such emphasis, in this case the trial court did inquire into the Appellant's ability to work in the future. The Appellant stated his was disabled, but was forced to concede he had not received disability for some period of time. Page three of the Judgment and Sentence indicates the Appellant had twenty-one felony convictions in the years leading up to the current case,

showing that he did have some physical ability to take action accomplish certain goals. CP 127. This stands in contrast to the Appellant's claim that he is unable to work.

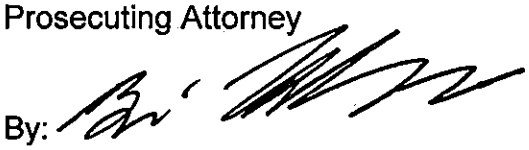
Even so, on page of six of the Judgment and Sentence Judge Cameron Mitchell struck two of the discretionary fines, one for $600.00 attorney's fees and another for the $500.00 9A.20.021 fine, as well as the mandatory DNA collection fee of $100.00. Judge Cameron Mitchell followed the rule by verbally making his inquiry and then adjusting the fines and fees as a result of that inquiry.

D. CONCLUSION

The State respectfully requests that the trial court's discretionary ruling on the issue of legal financial obligations with upheld and that he case be remanded back to the trial court to reflect ten months of community custody.

Dated this 26 day of July, 2016.

Respectfully submitted,
SHAWN P. SANT
Prosecuting Attorney



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Affidavit of Service	Susan Marie Gasch gaschlaw@msn.com	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated August 1, 2016, Pasco WA Gail L Johnston Original e-filed at the Court of Appeals; Copy to counsel listed at left

Signed and sworn to before me this 1st day of August, 2016 Deborah L. Ford
Notary Public and for the State of Washington residing at Kennewick. My appointment expires: May 19, 2018