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Court of Appeals

Division III

State of Washington

No. 34108-9-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DEMETRIO PAZ,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Henry A. Rawson, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....2

 1. RCW 9.94A.701 is ambiguous as to the community
custody term applicable to second degree assault.....2

 2. The trial court failed to enter written findings of fact and
conclusions of law under CrR 3.5.....7

 3. Appeal costs should not be imposed.....9

D. CONCLUSION.....12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>United States v. Lanier</i> , 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).....	5
<i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 383 P.2d 900 (1963).....	8
<i>In re Detention of Williams</i> , 147 Wn.2d 476, 55 P.3d 597 (2002).....	6

<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	3
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	3
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	10
<i>State v. Boyd</i> , 174 Wn.2d 470, 275 P.3d 321 (2012).....	7
<i>State v. Dailey</i> , 93 Wn.2d 454, 610 P.2d 357 (1980).....	8
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	6
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	3
<i>State v. Friedlund</i> , 182 Wn.2d 388, 341 P.3d 280 (2015).....	9
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998).....	9
<i>State v. Hescok</i> , 98 Wn. App. 600, 989 P.2d 1251 (1999).....	8
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	3
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	4–5
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	9
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612, rev. denied, 185 Wn.2d 1034 (2016).....	9, 10, 11
<i>State v. Smith</i> , 68 Wn. App. 201, 842 P. 2d 494 (1992).....	8

Statutes

RCW 9.94A.030(46).....	6
RCW 9.94A.030(55)(a)(viii).....	1, 4
RCW 9.94A.411(2).....	1, 4, 6

RCW 9.94A.701.....	1, 2
RCW 9.94A.701(1)(b).....	5
RCW 9.94A.701(2).....	2, 4, 5, 6
RCW 9.94A.701(3).....	3, 4
RCW 9.94A.701(3)(a).....	6
RCW 702(1).....	5
RCW 10.73.160.....	9
RCW 10.73.160(1).....	9

Court Rules

CrR 3.5.....	1, 7, 8, 9
CrR 3.5(c).....	1
CrR 3.6.....	8
RAP 7.2(e).....	9
RAP 14.2.....	9
RAP 15.2(f).....	10, 12

Other Resources

General Court Order, Court of Appeals, Division III (filed June 10, 2016).....	11
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an 18-month community custody term based on appellant's commission of second degree assault when that crime qualifies as both a violent offense (18-month term) and a crime against a person (12-month term).

2. The trial court erred when it failed to enter written findings of fact and conclusions of law pursuant to CrR 3.5.

Issues Pertaining to Assignments of Error

1. Second degree assault qualifies as both a "violent offense" under RCW 9.94A.030(55)(a)(viii) and a "crime against persons" under RCW 9.94A.411(2). The community custody statute, RCW 9.94A.701, does not specify which community custody term to impose when an offense qualifies as both violent and against persons. Is RCW 9.94A.701 therefore ambiguous and must the lesser community custody term be imposed under the rule of lenity?

2. CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. No findings or conclusions were filed in this case. Must this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

The Okanogan County Prosecutor's Office charged Demetrio Paz with one count of second degree assault. CP 201-02. Following a pre-trial evidentiary hearing, the court orally ruled Mr. Paz' statements made to law enforcement while in custody were admissible. RP 27-33. A jury convicted Mr. Paz as charged. CP 41; RP 222-23.

At sentencing, the court imposed a standard range sentence of 70 months. CP 24-25; RP 237. The court also imposed 18 months community custody, the term applicable for violent offenses. CP 25; RP 241. The court declined to assess discretionary costs requested by the state and imposed a \$500 victim assessment and \$100 DNA collection fee. CP 26-27; RP 229, 236-37, 241.

Mr. Paz timely filed a Notice of Appeal. CP 6.

C. ARGUMENT

1. RCW 9.94A.701 is ambiguous as to the community custody term applicable to second degree assault.

Second degree assault is statutorily defined as both a violent offense and a crime against a person. These two types of offenses carry different mandatory community custody terms under RCW 9.94A.701(2)

and (3). Because these statutes irreconcilably conflict, they are ambiguous, and the rule of lenity requires them to be interpreted in Mr. Paz' favor. The trial court therefore erred in imposing 18 months of community custody rather than 12 months.

Statutory interpretation is an issue of law reviewed de novo. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). A trial court's authority to impose a community custody condition is also an issue of law reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The court's primary duty in construing a statute is to determine the legislature's intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. *Id.* If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and circumstances surrounding its enactment to determine legislative intent. *Id.*

The trial court sentenced Mr. Paz to 18 months of community custody because second degree assault is defined as a “violent offense” under RCW 9.94A.030(55)(a)(viii). This community custody term is consistent with RCW 9.94A.701(2), which specifies a “court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.” (Emphasis added.)

However, RCW 9.94A.411(2) also specifies that second degree assault is a “crime against persons.” RCW 9.94A.701(3) requires a court to “sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: (a) Any crime against persons under RCW 9.94A.411(2).” (Emphasis added.)

Therefore, second degree assault is statutorily defined as both a violent offense and a crime against a person. But different community custody terms apply to these two types of offenses. Because the statute does not specify which community custody term applies in these circumstances, it is ambiguous. Under the rule of lenity, ambiguous criminal statutes must be construed in the accused’s favor. *State v. Jacobs*,

154 Wn.2d 596, 603, 115 P.3d 281 (2005); *see also United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (“[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”).

The State may argue the legislature intended for those who commit violent offenses to receive a longer term of community custody than those who commit crimes against persons. Any such argument should be rejected because it is not clear from the statute. For instance, when an offender is sentenced to less than one year incarceration, the court may impose “up to one year of community custody” for both a violent offense and a crime against a person. RCW 9.94A.702(1). The two offenses are treated no differently. But where the sentence is longer than one year, as here, the statute does not provide a clear community custody term for an offense qualifying as both violent and against a person.

Further, RCW 9.94A.701(1)(b) requires courts to impose three years of community custody for a “serious violent offense.” RCW 9.94A.701(2) requires courts to impose 18 months of community custody “for a violent offense that is not considered a serious violent offense.”

(Emphasis added.) This provision expressly distinguishes between a violent and a serious violent offense, making it clear which community custody term should apply.¹ By contrast, RCW 9.94A.701(3)(a) includes no such distinguishing or clarifying language: the trial court must sentence an offender to one year of community custody for “[a]ny crime against persons under RCW 9.94A.411(2).” The legislature did not say “any crime against persons that is not considered a violent offense,” as it did in RCW 9.94A.701(2).

“Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions.” *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citations omitted). The legislature included clarifying language in RCW 9.94A.701(2) that it omitted in RCW 9.94A.701(3)(a). Therefore, it is not clear from the statute that the legislature intended second degree assault to be punished as a violent offense rather than a crime against a person. *See State v. Delgado*, 148 Wn.2d 723, 728–729, 63 P.3d 792 (2003) (treating two-strike statute differently than three-strike statute based on legislature’s

¹ Second degree assault is not listed as a serious violent offense under RCW 9.94A.030(46).

omission of specific language).

The statute remains ambiguous as to whether Mr. Paz should receive 18 months of community custody because second degree assault is a violent offense or 12 months of community custody because it is a crime against a person. The rule of lenity dictates the ambiguous statute be interpreted in Mr. Paz' favor, and so the 12-month term applies. This Court should vacate the community custody term and remand for resentencing. *See State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

2. The trial court failed to enter written findings of fact and conclusions of law under CrR 3.5.

Before trial, the court held a hearing under CrR 3.5 to determine admissibility of Mr. Paz' statements to Deputy Sheriff Joshua Brown. RP 27–33. The court found the statements admissible. RP 32–33. The court failed to enter written findings or conclusions as required by CrR 3.5. That court rule provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision, but failed to enter the required written findings and conclusions.

The oral decision is “no more than a verbal expression of [the court's] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding “unless it is formally incorporated into findings of fact, conclusions of law, and judgment.” *State v. Hescok*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” *State v. Smith*, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although *Smith* involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See *Smith*, 68 Wn. App. at 205 (“[T]he State's obligation is similar under both CrR 3.5 and CrR 3.6). But where no actual

prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing and remand for entry of the findings and conclusions is necessary. *Id.*; *State v. Friedlund*, 182 Wn.2d 388, 393–97, 341 P.3d 280 (2015) (concluding trial court lacks authority to enter belated written findings under RAP 7.2(e)).

3. Appeal costs should not be imposed.

Mr. Paz asks this court to exercise its discretion not to award costs in the event the state substantially prevails on appeal.

Under RAP 14.2, clerks or commissioners may not exercise discretion in imposing appellate costs; costs must be awarded. However, the appellate courts have discretion to refrain from ordering an unsuccessful appellant to pay appellate costs even if the state substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, rev. denied, 185 Wn.2d 1034 (2016); RAP 14.2. In *Sinclair*, the court affirmed that RCW 10.73.160 authorizes the appellate court to deny appellate costs in appropriate circumstances. 192 Wn. App. at 388.

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. In the same way that imposition of legal financial obligations following a trial creates problematic ongoing consequences for the criminal defendant, so, too, costs on appeal grow at a compounded interest rate of 12%, lengthen court jurisdiction, interfere with employment opportunities, and create barriers to re-integration in the community. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Under *Sinclair*, it is "entirely appropriate for an appellate court to be mindful of these concerns." *Sinclair*, 192 Wn. App. at 391.

Under RAP 15.2(f), where a trial court has made an unchallenged finding of indigency, there is a presumption of continued indigency throughout review. *Sinclair*, 192 Wn.2d at 393. The appellate courts should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant "cannot contribute anything toward the costs of appellate review." *Sinclair* 192 Wn. App. at 391.

In *Sinclair*, the court ordered appellate costs not to be awarded. *Id.* at 363. The court found the trial court had authorized the defendant to pursue his appeal in *forma pauperis*, and to have appointed counsel and preparation of the record at state expense. *Id.* at 392. The court held Sinclair's indigency, advanced age and lengthy prison sentence precluded the possibility he could pay appellate costs.

Mr. Paz is currently 29 years old. CP 21; RP 233.² The trial court found him indigent for purposes of defending against the state's prosecution. CP 203. The court found Mr. Paz remained indigent for purposes of appeal and was unable to pay for the expenses of appellate review and was entitled to appointment of appellate counsel at public expense. CP 1-2, 3-5. The record establishes he has no assets, no extensive work history, a 9th grade education, a number of prior felonies, and a current sentence of 70 months (5.8 years). CP 25, 194, 197-98. Appellate counsel anticipates filing a report as to Mr. Paz' continued indigency and likely inability to pay an award of costs no later than 60 days following the filing of this brief, as required by the General Court Order, Court of Appeals, Division III (filed June 10, 2016).

² Mr. Paz' date of birth is April 13, 1987. CP 21.

RAP 15.2(f) provides there is a presumption of continued indigency throughout the appeal. In the event he does not substantially prevail on the state's appeal, Mr. Paz asks the court to consider his present and/or likely future inability to pay and not assess appellate costs against him.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing. If Mr. Paz is not deemed the substantially prevailing party on appeal, he asks this Court to decline to assess appeal costs should the state ask for them.

Respectfully submitted on September 19, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 19, 2016, 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 brief of appellant:

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