

Court of Appeals No. 34173-9-III

FILED

Nov 21, 2016

Court of Appeals

Division III

State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

PATRICK GALE WILSON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-1031-9

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

- A. The trial court did not abuse its discretion by denying the defendant's motion to terminate his discretionary legal financial obligations.

II. STATEMENT OF FACTS

The defendant, Patrick Wilson, was found guilty of one count of Rape of a Child in the First Degree by jury verdict. *See Judgment and Sentence*¹. On November 4, 2011, the trial court imposed a sentence consisting of 136 months to life in prison and lifetime community custody. *See Judgment and Sentence*. The trial court imposed discretionary costs in the amount of \$14,748.50² and mandatory costs in the amount of \$800³. *See Judgment and Sentence*. On May 22, 2014, pursuant to a Mandate issued by the Court of Appeals Division III in case number 30378-1-III, the Court ordered a modification of the Judgment and Sentence. *See Order Modifying Judgment and Sentence Pursuant to Mandate*⁴. Page 2 of Appendix F, item eight (8) was modified to: Do not possess any depictions of sexually explicit conduct as defined in RCW 9.68A.011. *Id.* Page 2 of

¹ Clerk's subnumber 133, designated on November 21, 2016.

² \$500 fine, \$60 sheriff service fee, \$2,700 court-appointed attorney fee, \$250 jury demand fee, \$130 witness fees, and \$11,108.50 in special cost reimbursements. *See Cost Bill attached to Judgment and Sentence*.

³ \$500 victim penalty assessment, \$100 felony DNA fee, and \$200 criminal filing fee. *See Judgment and Sentence and attached Cost Bill*.

⁴ Clerk's subnumber 186, designated on November 21, 2016.

Appendix F, item fourteen (14) was modified to: Do not consume alcohol (beverage or medicinal). *Id.* Page 2 of Appendix F, items fifteen (15) and sixteen (16) were stricken. *Id.* All other terms of the judgment and sentence remained in effect. *Id.*

On January 11, 2016, the defendant filed a motion under RCW 10.01.160(4) to remit his legal financial obligations (LFOs), asserting that payment of his LFOs was creating a manifest hardship on both the defendant and his immediate family. CP 1-9. Along with the motion, the defendant filed a notice of motion docket requesting a hearing without oral argument on January 28, 2016. *See* Notice of Motion Docket, filed 01/11/2016⁵. On January 26, 2016, the State filed a response, arguing that the defendant was not entitled to a hearing to determine whether modification or termination of his LFOs is appropriate until the State is attempting to enforce collection. CP 10-12.

At the defendant's request, a hearing was held on January 28, 2016. RP at 2; *see* Notice of Motion Docket. After reviewing the defendant's motion and the State's response, the court denied the defendant's motion. CP 13; RP at 2. The court ruled that the proper time for the defendant to bring a motion for a hearing to determine his financial

⁵ Clerk's subnumber 242, designated on November 21, 2016.

resources and ability to pay is once he is released from the custody of the Department of Corrections. CP 13.

III. ARGUMENT

A. A REVIEW UNDER RAP 2.5(A) IS NOT APPROPRIATE.

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

Although not addressing the issue, the defendant essentially argues the decision to deny his motion under RCW 10.01.160(4) is appealable either as a final judgment under RAP 2.2(a)(1) or a decision “denying a motion for . . . amendment of judgment” under RAP 2.2(a)(9).

A final judgment is one that settles all the issues in the case. *In re Detention of Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). The decision the defendant appealed from cannot be “final” under RAP 2.2(a)(1) because the order to pay LFOs as part of the judgment and sentence is conditional, and RCW 10.01.160(4) allows a defendant to file a petition to modify or waive LFOs at any time.

In *State v. Smits*, 152 Wn. App. 514, 517, 216 P.3d 1097 (2009), Smits filed motions to terminate LFOs the court imposed as part of his judgment and sentence for two felony convictions. The court held a hearing and denied the defendant's motions. *Id.* at 518. Following Smits's appeal, the court held a hearing to determine whether the decisions were appealable under the Rules of Appellate Procedure. *Id.* Smits argued that he was entitled to appeal the decisions as a final judgment under RAP 2.2(a)(1) or as an order granting or denying a motion to amend or vacate under RAP 2.2(a)(9) and (10). *Id.* The court ruled that Smits did not have a right to appeal as a final judgment because the court can modify the LFOs at any time and there can be no adverse consequences from a failure to pay unless a court determines the failure to pay was willful. *Id.* at 524. The decision to deny a motion to remit under RCW 10.01.160(4) is also not appealable under RAP 2.2(a)(9) because of the conditional nature of the order to pay LFOs. *Id.* The court determines the defendant's ability to pay when the request is made. *Id.* The determination does not alter or amend the judgment but rather changes the requirement of the payment based on the defendant's ability to pay. *Id.*

Smits is directly analogous to the present case. Here, the defendant filed a motion to remit under RCW 10.01.160(4) on the basis of manifest hardship. The court held a hearing and denied the defendant's motion on

the basis that it was premature. The obligation to pay the LFOs imposed is conditional and the defendant can bring a motion under RCW 10.01.160(4) at any time, and the denial of such a motion is not a denial to amend the judgment and sentence. Therefore, a review under RAP 2.5(a) is not appropriate.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION TO TERMINATE LEGAL FINANCIAL OBLIGATIONS.

The defendant argues that the court abused its discretion by denying the defendant's motion to terminate his LFOs because he set forth his disability and indigency. The defendant also asserts that the trial court failed to conduct an individualized inquiry into the defendant's current and likely future ability to pay at the time of sentencing. The trial court did not abuse its discretion to deny the defendant's motion to remit because the defendant made his motion while he was incarcerated with the Department of Corrections. Additionally, the defendant presents no evidence to show that the trial court failed to conduct an inquiry into his ability to pay at the time of sentencing.

A court's decision is manifestly unreasonable so as to constitute an abuse of discretion if it is outside the range of acceptable choices, given

the facts and the applicable reasonable standard. *State v. Lamb*, 175 Wn.2d 121, 285 P.3d 27 (2012).

The defendant's motion filed on January 11, 2016, claimed a manifest hardship under RCW 10.01.160(4). CP 1-9. He did not raise the allegation that the trial court failed to conduct an individualized inquiry into his ability to pay. The defendant now argues that the sentencing court failed to conduct the inquiry; however, the defendant admits that "[i]t is unknown if the sentencing court conducted a colloquy with regard to [the defendant's] ability to pay LFOs." Br. of Appellant at 4.

A defendant who has been ordered to pay costs and who is not in contumacious default may petition the sentencing court for remission of the payment of costs. RCW 10.01.160(4). Motions to modify or terminate LFOs are properly noted in Superior Court if the motion alleges a manifest financial hardship currently affecting the defendant or his immediate family. *Id.* A new allegation of changed financial circumstances occurring after sentencing will often require a factual hearing in order to evaluate the defendant's claim of manifest financial hardship. *Id.*

RCW 10.01.160(4) provides:

A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of

the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Relying on *State v. Crook*, 146 Wn. App. 24, 189 P.3d 811 (2008), *review denied*, 165 Wn.2d 1044 (2009), the State argued the defendant was not entitled to a hearing under RCW 10.01.160 until the State is attempting to enforce collection. The court in *Crook* held:

Mandatory Department of Corrections' deductions from inmate wages for repayment of legal financial obligations are not collection actions by the State requiring inquiry into a defendant's financial status. Statutory guidelines set forth specific formulas allowing for fluctuating amounts to be withheld, based on designated percentages and inmate account balances, assuring inmate accounts are not reduced below indigency levels.

Id. at 27-28 (citations omitted).

The defendant was under no obligation to make payments while incarcerated with the Department of Corrections; therefore, he was not entitled to a hearing under RCW 10.01.160 until the State attempted to enforce collection. The State also noted that no payment had been made on the case. CP 11. Therefore, since no payment had been made, no hardship had been imposed on either the defendant or the defendant's family.

At the defendant's request, a hearing without oral argument was held on January 28, 2016. RP at 2. After reviewing the defendant's motion

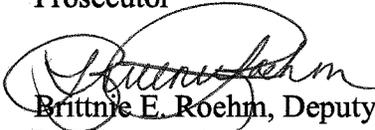
and the State's response, the court denied the motion. CP 13; RP at 2. Based on existing case law, the court properly ruled that the time for the defendant to file a motion to terminate or modify his legal financial obligations is after he has been released from prison. Thus, the court did not abuse its discretion by denying the defendant's motion to remit his LFOs.

IV. CONCLUSION

Based upon on the aforementioned facts and authorities, the defendant's appeal should be denied. The State respectfully requests that costs be taxed as requested by the State.

RESPECTFULLY SUBMITTED this 21st day of November, 2016.

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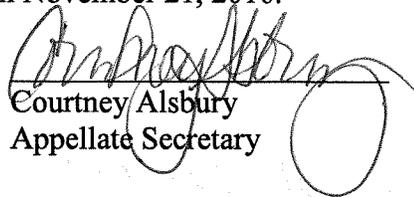
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on November 21, 2016.


Courtney Alsbury
Appellate Secretary