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Court of Appeals
Division III
State of Washington

NO. 34221-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOSE LUIS AGUILAR,

Defendant/Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES ii

STATUTES ii

ASSIGNMENT OF ERROR 1

ISSUE RELATING TO ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

CONCLUSION 9

APPENDIX “A”

TABLE OF AUTHORITIES

CASES

State ex rel Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1981) 5

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 6, 8

STATUTES

RCW 9.94A.507..... 8

RCW 9.94A.729(3)..... 7

RCW 10.01.160(3)..... 6

RCW 10.01.160(4)..... 5

ASSIGNMENT OF ERROR

1. The trial court's failure to modify Jose Luis Aguilar's legal financial obligations (LFOs), or to terminate them, with the exception of mandatory LFOs and restitution, constitutes an abuse of discretion.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Will Mr. Aguilar ever be able to make payment of the LFOs originally ordered in his September 24, 2014 Judgment and Sentence based upon the length of his prison sentence and his inability to earn significant funds for payment? (CP 3)

STATEMENT OF THE CASE

Mr. Aguilar was convicted of second degree murder and first degree child rape. A Judgment and Sentence was entered on September 24, 2014. A total of $34,918.97 was imposed in LFOs. There was restitution of $2,189.44. (CP 16)

Mr. Aguilar filed a motion to terminate his LFOs on January 20, 2016. (CP 21)

A new sentencing hearing was ordered on February 1, 2016. (CP 27)

Mr. Aguilar responded with a declaration which was filed on February 4, 2016. (CP 29)

On February 18, 2016 the Court entered an order that contained the following provisions:

> The Court finds that the defendant may have the future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753. He has minimal ability to currently pay.
>
> It is appropriate to re-address LFO issue when Def. is released from custody.

(CP 33-34)

Mr. Aguilar filed a Notice of Appeal on March 18, 2016. (CP 36)

SUMMARY OF ARGUMENT

The trial court abused its discretion when it failed to either modify Mr. Aguilar's LFO requirements, or, alternatively, dismiss all non-mandatory LFOs.

Mr. Aguilar was sentenced to three hundred and fifty-seven (357) months in prison on a charge of second degree murder. Count II in the Judgment and Sentence, involving first degree child rape, was a consecutive sentence of one hundred and twenty-three (123) months to life.

The likelihood that Mr. Aguilar will ever be released from prison is minimal at best.

Mr. Aguilar should be relieved of all non-mandatory LFOs.

ARGUMENT

The trial court's ruling involving Mr. Aguilar's motion to terminate LFOs follows:

> It seem[s] to me that the present ability is minimal but I don't see a problem taking 75 percent of [h]is earnings from jail. At this point in time I don't think it's appropriate to

> address or eliminate some LFO's. It certainly would be at the time he is released. At that time we will have another hearing to determine if he is able to work if not we will take whatever we can. So I think that is the best way to go. So I find currently he has a very minimal ability to pay his fines but I can't make a determination as to future ability. My understanding he was 37 years old when the Judgment and Sentence was entered. He will be in his late 50's early 60's it's very possible he may not be able to work at that time and we might have to adjust the LFO's. I've indicated that the Court finds the defendant may have the ability in the future to pay his legal financial obligations. He has minimal ability at this time to currently pay and it is appropriate to readdress the LFO issue once the defendant is out of custody.

(McLaughlin RP 3-4)

RCW 10.01.160(4) provides, in part:

> 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 ….

Mr. Aguilar contends that the trial court abused its discretion at the hearing on his motion to terminate LFOs.

> Where the decision or order of the court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1981).

At his original sentencing hearing on September 24, 2014 the State advised the Court:

> Today the court doesn't have any choice but to impose the life sentence, and that was what the State's position on this case was is to give a sentence where we expect that the

> result of which would be that the defendant will die in prison.

(Pelletier RP 4, ll. 1-5)

The sentencing court did not conduct any colloquy with regard to Mr. Aguilar's ability to pay LFOs. (Pelletier RP 15, ll. 6-8)

Mr. Aguilar is not contesting the fact that he is required to pay restitution and mandatory court costs. However, he further contends that the sentencing court's failure to conduct a colloquy at the time of sentencing, along with the resentencing court abusing its discretion concerning his ability to pay, constitutes a violation of the ruling in *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015).

The *Blazina* case interpreted RCW 10.01.160(3). The Court ruled at 838:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors … such as incarceration, any of defendant's other debts, including restitution, when determining a defendant's ability to pay.

Mr. Aguilar was sentenced to three hundred and fifty-seven (357) months in prison on the charge of second degree murder. A consecutive sentence of one hundred and twenty-three (123) months to life was imposed on his conviction for first degree child rape. The total sentence is four hundred and eighty (480) months to life.

RCW 9.94A.729(3) provides, in part:

> An offender may earn early release time as follows:
>
> (a) …;
> (b) …;
> (c) In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 2003, the aggregate earned release time may not exceed ten percent of the sentence.

Ten (10%) percent of four hundred and eighty (480) months is forty-eight (48) months. This means that Mr. Aguilar will not become eligible for release for a period of four hundred and thirty-two (432) months (36 years) from his date of sentencing less any credit for time served in the Benton County Jail.

Mr. Aguilar was thirty-seven (37) years old at the time of sentencing. He will be seventy-three (73) years old before he is even eligible to be considered for release. Even then, Mr. Aguilar may not be released

since his sentence is subject to review by the Independent Sentence Review Board. RCW 9.94A.507 (Appendix "A")

The *Blazina* Court went on to say, *supra* 838-39:

> Courts should also look to the comment in court rule GR 35 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if a person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. … In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. … Although the ways to establish indigent status remain nonexaustive …, if someone does meet with GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Mr. Aguilar's imprisonment for probably the rest of his life substantiates that he is truly indigent for purposes of paying LFOs.

CONCLUSION

The likelihood that Mr. Aguilar will ever be released from prison is minimal. It appears that the State will get its wish that Mr. Aguilar die in prison.

Even if Mr. Aguilar is eventually released from prison, it will not be until he is seventy-three (73) years old. The likelihood of his securing employment is nonexistent.

The trial court abused its discretion. No reasonable person would leave the LFOs in effect, with the exception of those LFOs that are mandatory.

Mr. Aguilar requests that his case be remanded to the trial court to remove all non-mandatory LFOs.

DATED this 26th day of September, 2016.

Respectfully submitted,

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APPENDIX “A”

RCW 9.94A.507

Sentencing of sex offenders.

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); or

(b) Has a prior conviction for an offense listed in *RCW **9.94A.030**(31)(b), and is convicted of any sex offense other than failure to register.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW **9.94A.535**, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, and there has been a finding that the offense was predatory under RCW **9.94A.836**, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW **9.94A.837**, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW **9.94A.838** that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW **13.04.030**(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.95.420 through 9.95.435.

(b) An offender released by the board under RCW 9.95.420 is subject to the supervision of the department until the expiration of the maximum term of the sentence. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

[**2008 c 231 § 33.** Prior: **2006 c 124 § 3**; (2006 c 124 § 2 expired July 1, 2006); **2006 c 122 § 5**; (2006 c 122 § 4 expired July 1, 2006); **2005 c 436 § 2**; **2004 c 176 § 3**; prior: **2001 2nd sp.s. c 12 § 303.** Formerly RCW 9.94A.712.]

NOTES:

Reviser's note: *(1) The reference to RCW 9.94A.030(31)(b) was apparently in error. The reference should be to RCW 9.94A.030(34)(b). RCW 9.94A.030 was subsequently amended by 2010 c 224 § 1 and by 2010 c 274 § 401, changing subsection (34) to subsection (35). RCW 9.94A.030 was subsequently amended by 2011 c 87 § 2, changing subsection (35) to subsection (36). RCW 9.94A.030 was subsequently amended by 2015 c 287 § 1, changing subsection (36) to subsection (37).

(2) This section was recodified pursuant to the direction found in section 56(4), chapter 231, Laws of 2008.

(3) 2005 c 436 § 6 (an expiration date section) was repealed by **2006 c 131 § 2.**

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

Expiration date—2006 c 124 § 2: "Section 2 of this act expires July 1, 2006." [**2006 c 124 § 4.**]

Effective date—2006 c 124: See note following RCW 9.94A.030.

Effective date—2006 c 122 §§ 5 and 7: "Sections 5 and 7 of this act take effect July 1, 2006." [**2006 c 122 § 9.**]

Expiration date—2006 c 122 §§ 4 and 6: "Sections 4 and 6 of this act expire July 1, 2006." [**2006 c 122 § 8.**]

Effective date—2006 c 122 §§ 1-4 and 6: See note following RCW 9.94A.836.

Severability—Effective date—2004 c 176: See notes following RCW 9.94A.515.

Intent—Severability—Effective dates—2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application—2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

NO. 34221-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JOSE LUIS AGUILAR, Defendant, Appellant.	))))))))))))	BENTON COUNTY NO. 13 1 00605 1 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 26th day of September, 2016, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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