

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34958-6-III

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STATE OF WASHINGTON, Respondent,

v.

ARISTEO GARCIA RUBIO, Appellant.

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION**

Aristeo Garcia Rubio appeals from his conviction of a single count of second degree rape of a child. Sentencing errors require correction.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** The trial court erred in imposing discretionary costs of incarceration.

**ASSIGNMENT OF ERROR NO. 2:** The trial court erred in requiring Rubio to register as a sex offender within 24 hours of release from custody.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** Whether the imposition of costs of incarceration was unlawful when the trial court found Rubio lacked the ability to pay discretionary legal financial obligations.

**ISSUE NO. 2:** Whether the community custody condition requiring registration as a sex offender within 24 hours of release from custody conflicts with the statutory registration requirements.

#### **IV. STATEMENT OF THE CASE**

A jury convicted Rubio of one count of rape of a child in the second degree and found as an aggravating circumstance that Rubio violated a position of trust. CP 24, 86-87. At sentencing, the court imposed an exceptional sentence of 120 months to life. CP 102, RP (Hearings)<sup>1</sup> at 71. That term was followed by community custody for up to life. CP 103, RP (Hearings) at 72. As a condition of community custody, the sentencing court required that Rubio “[r]egister as a sex offender as required by RCW 9A.44.130 within 24 hours of release from incarceration.” CP 104. The judgment and sentence also includes a notice of registration requirements that states, “The defendant must register immediately upon being sentenced unless he or she is in custody, in which case the defendant must register within 24 hours of release.” CP 107.

After imposing the prison term, the sentencing court engaged in an inquiry concerning Rubio’s ability to pay discretionary legal financial obligations. RP (Hearings) at 73. Evidence introduced at trial showed that the defendant had previously worked for a middle school. I RP (Trial) at 63. At sentencing, defense counsel argued that Rubio had lost that job,

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<sup>1</sup> The Verbatim Reports of Proceeding in this case consist of one document containing hearings held on 11/4/16 and 12/23/16, reported by Susan Anderson, and one document containing four volumes of trial proceedings, consecutively paginated, reported by Joan Anderson. For clarity, this brief will identify the documents as RP (Hearings) and (Volume) RP (Trial), respectively.

would not be employed for 10 years while in prison, and would face difficulty with employment after release in light of the sex conviction. RP (Hearings) at 74. Counsel also indicated he was asking the court to find Rubio indigent for appellate purposes, which the court subsequently did. RP (Hearings) at 74; Supp. CP 121.

The trial court agreed, specifically finding Rubio was currently indigent and lacked the future ability to pay discretionary obligations. RP (Hearings) at 75. It struck a discretionary attorney fee recoupment provision. RP (Hearings) at 74-75. However, it proceeded to impose costs of incarceration, which it capped at \$300. RP (Hearings) at 75; CP 105.

Rubio now appeals. CP 100.

## **V. ARGUMENT**

1. The trial court's imposition of costs of incarceration when it found Rubio lacked the future ability to pay costs was unlawful.

RCW 10.01.160(1) allows a trial court to impose costs on a convicted defendant. Costs of incarceration are expressly identified in RCW 10.01.160(2) as an item subject to the statute.

Under RCW 10.01.160(3), “The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” The use of “shall” in this context indicates the legislature intended an imperative meaning. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

A sentencing court’s authority “is limited to that expressly found in the statutes,” with the result that the court’s action is void if the statutory provisions are not followed. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002); *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800 (1983). Moreover, a defendant cannot agree to a sentence in excess of what the legislature authorized. *In re Personal Restraint of Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991).

Here, the statutory language provides that the sentencing court may impose discretionary costs, such as costs of incarceration, only if it finds that the defendant has the likely present or future ability to pay them. The sentencing court here orally found that Rubio was currently indigent and lacked the future ability to pay discretionary costs. RP (Hearings) at 75. In light of that finding, the court was precluded from imposing the costs of incarceration by RCW 10.01.160(3). Consequently, its imposition of costs of incarceration when it found Rubio was unable to pay them exceeds its authority under the statute.

Accordingly, the imposition of costs of incarceration should be stricken from the judgment and sentence.

2. The condition of community custody requiring registration as a sex offender within 24 hours of release from custody exceeds the trial court's authority because it conflicts with the statutory requirements and creates confusion as to Rubio's obligations.

The condition of community custody imposed incorporates RCW 9A.44.130 by reference, but states that Rubio is required to register as a sex offender within 24 hours of his release from incarceration. This condition conflicts with the statutory registration requirements by significantly shortening the time in which registration is required, and is confusing because it conflates two separate statutory registration obligations. Because the 24 hour condition is not statutorily authorized, it should be stricken.

The sentencing court lacks authority to impose a community custody condition unless the condition is authorized by the legislature. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). Conditions exceeding the court's authority may be challenged for the first time on appeal. *Id.* (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

Under RCW 9.94A.703, the sentencing court is required to impose certain conditions, allowed to waive others, and may impose other conditions at its discretion. Complying with registration requirements under RCW 9A.44.130 is not identified as any one of the permissible conditions. However, at its discretion, the sentencing court may require the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d). This authority can include the power to require the defendant to obey laws. *State v. Jones*, 118 Wn. App. 199, 205-06, 76 P.3d 258 (2003).

Thus, under these authorities, the sentencing court had authority to require Rubio to comply with RCW 9A.44.130’s registration requirements. However, it further required him to register within 24 hours of release from custody. This conflicts with the statutory obligations.

RCW 9A.44.130 establishes a comprehensive registration scheme with specific requirements depending upon a number of factors, including the registrant’s custodial status, providing:

Sex offenders or kidnapping offenders who are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, must register **at the time of release from custody** with an

official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register **within three business days from the time of release** with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation.

RCW 9A.44.130(4)(a)(i) (emphasis added). Under this statute, upon his release from prison, Rubio will have two separate registration requirements. First, he will be required to register “at the time of release from custody” with an individual designated by the Department of Corrections. Second, he will be required to register “within three business days from the time of release” with the county sheriff where he will reside.

By requiring registration within 24 hours, the condition imposes an affirmative obligation on Rubio. But nothing in the record identifies a crime-related reason why the registration period should be different than provided for in the registration statute. Nor does the significantly shortened time frame clearly serve any interest in preventing re-offense or keeping the community safe when nothing in the record suggests any reason to deviate from the statutory requirements. As such, the 24 hour registration condition cannot be justified under RCW 9.94A.703(3)(d).

Moreover, the condition is extremely confusing as it conflates the two separate registration requirements imposed under RCW 9A.44.130(4)(a)(i). If understood to refer to the initial registration requirement with the individual designated by the Department of Corrections, the condition extends the required period from “at the time of release from custody” to within 24 hours from release. If understood to refer to the subsequent registration requirement with the county sheriff, the condition reduces the required period from within “three business days from the time of release” to within 24 hours. Because it is not clear which registration requirement the 24 hour time period applies to, it is not clear what the defendant is required to do to register. Nor is it clear that registration with the county sheriff within 24 hours of being released from the Department of Corrections is feasible due to factors entirely out of Rubio’s control, including the date and time of his release, the distance of the facility from which he is released from his county of residence, his transportation back to his county of residence, and the hours of the county sheriff’s office where he resides.

While it is unquestionably in Rubio’s interest to have a clear understanding of his registration requirements on release, it is also in the State’s interest to ensure Rubio has clear notice of his requirements since a failure to register is punishable only if Rubio acted “knowingly.” RCW

9A.44.132(1). Here, by introducing an unnecessary conflict, the community custody condition undermines Rubio's knowledge of exactly what he is required to do.

Because the condition that Rubio register as a sex offender within 24 hours from his release from custody is not required by the registration statute, and does not further any apparent recidivism-prevention or community-safety interests or relate to the circumstances of the crime, that portion of the condition exceeds the sentencing court's authority and should be stricken. That portion of the condition requiring that he comply with RCW 9A.44.130 may be retained.

## VI. CONCLUSION

For the foregoing reasons, Rubio respectfully request that the court STRIKE the imposition of costs of incarceration and the requirement that he register as a sex offender within 24 hours of release from custody.

RESPECTFULLY SUBMITTED this 22 day of June, 2017.

  
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ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**DECLARATION OF SERVICE**

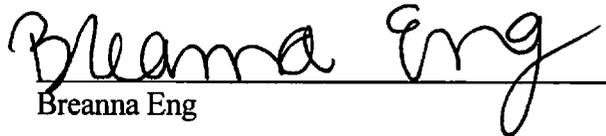
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 22nd day of June, 2017 in Walla Walla, Washington.

  
Breanna Eng

**BURKHART & BURKHART, PLLC**

**June 22, 2017 - 11:10 AM**

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Appellant's Brief

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