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Court of Appeals
Division III
State of Washington
4/2/2018 8:02 AM
No. 35288-9

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

STATE OF WASHINGTON, Respondent

v.

ALEJANDRO HERRERA CASTRO, Appellant

APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY
THE HONORABLE JUDGE JOHN M. ANTOSZ

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Trial Court Erred When It Imposed Discretionary Legal Financial Obligations Without Conducting An Individualized Inquiry.
- B. The Trial Court Denied Mr. Castro His Right Of Allocation Requiring Reversal and Remand for Resentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Imposition of certain legal financial obligations is discretionary with the sentencing court. Under *Blazina*, where the court imposes a jury demand fee, a sheriff service fee, and a fee for a court-appointed attorney, must the court first conduct an inquiry into the defendant's current and future ability to meet the financial obligations?
- B. RCW 10.46.190 and RCW 36.18.016(3)(b) permit the sentencing court to impose a jury demand fee. The statutory amount for a jury demand fee is \$250. Where the trial court imposes a jury demand fee of \$2,211.56, has the court exceeded its authority?

C. Under Washington law, a defendant has the right to allocation before the court pronounces sentence. The remedy for denial of the statutory right is reversal and remand for resentencing before a different judge. Where the trial court denied the defendant this right, is he entitled to reversal of his sentence and resentencing before a different judge?

II. STATEMENT OF FACTS

In 2007, Alejandro Herrera-Castro was convicted at a jury trial of three counts of first-degree kidnapping, one count of second-degree kidnapping, four counts of assault second degree, and one count of harassment. CP 150-151. The court imposed sentence as follows:

Count 1- 77 months including a 36-month firearm enhancement

Count 2- 122 months including a 60-month firearm enhancement

Count 3- 111 months including a 60-month firearm enhancement

Count 4- 111 months including a 60-month firearm enhancement

Count 5- 69 months including a 36-month firearm enhancement

Count 6- 69 months including a 36-month firearm enhancement

Count 7- 69 months including a 36-month firearm enhancement

Count 8- 69 months including a 36-month firearm enhancement
CP 158.

The court ordered the time for serious violent offenses (Counts 2-4) to be served consecutive to one another, and the firearm enhancements of those counts to be served consecutive to the base sentence and each other. The court further ordered the firearm enhancements from counts 5-8 to be served concurrently with one another and concurrent to the firearm enhancement in counts 1 and 2. CP 158.

Mr. Castro appealed, and his convictions were affirmed in an unpublished decision issued on July 23, 2009. See Appeal No. 27244-3-III; 2009 WL 2187574. In 2012, Mr. Castro filed a CrR 7.8 motion to modify and correct his judgment and sentence. CP 14-18. He raised, among other issues, the problem that his sentence was unclear, as the trial court had neglected to write in the total number of months of confinement. CP 14. The Court of Appeals dismissed his petition and issued a certificate of finality in October 2012. CP 21. In its dismissal order, the Court did not address his concern about facial invalidity based on the absence of a total number of months.

The following year Mr. Castro raised the same concern in a second personal restraint petition. CP 28. Mr. Castro argued the judgment and sentence were facially invalid because the total sentence was unclear. CP 30. The Court disagreed and outlined the sentence exactly as the trial court had imposed it, including the concurrent firearm enhancements. CP 30. The Court concluded the resulting judgment and sentence did not exceed the statutorily allowed duration and was not facially invalid on that basis. CP 30. The Court dismissed his petition as untimely and frivolous. CP 31. A certificate of finality was issued on May 31, 2013. CP 27.

On December 7, 2016, the State filed a CrR 7.8 motion to amend the sentence and judgment. CP 32-38. The State contended the judgment and sentence was invalid on its face, as the firearm enhancements in counts 1, and 5-8 should have run consecutive to one another, not concurrent, as the sentencing court had ordered. CP 38.

At the resentencing hearing, the court found the sentence was erroneous on its face. 5/2/17 RP 21-22. The court allowed the state's motion and added 144 months of firearm enhancements to Mr. Castro's sentence. CP 44. The court imposed the same legal financial obligations as had been imposed in 2008. The non-

mandatory obligations included a \$70 sheriff's return of service fee, a \$500 appointed attorney recoupment fee, and a \$2,211.56 jury demand fee. CP 46-47. The court made no individualized inquiry into Mr. Castro's ability to pay the fees in either the original sentencing (6/23/2008) or the resentencing hearing. (5/2/2017).

The court did not provide an opportunity for Mr. Castro to allocate before imposing sentence, and when Mr. Castro objected, the court ended the hearing. 5/2/17 RP 24. Mr. Castro makes this timely appeal. CP 147.

III. ARGUMENT

A. The Trial Court Acted Without Authority When It Imposed Discretionary Legal Fees Without Conducting An Individualized Inquiry Into Mr. Castro's Current And Future Ability To Pay.

RCW 10.01.160(3) provides that a sentencing court:

...shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method payment of cost, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

The *Blazina* Court held that the statutory language obligates the sentencing court to conduct an individualized inquiry into a criminal defendant's financial circumstances and ability to pay before imposing discretionary legal financial obligations as sentencing

conditions. *State v. Blazina*, 182 Wn.2d 827 ,839, 344 P,3d 680 (2015). The inquiry must take into consideration such factors as incarceration, a defendant's other debts including restitution. *Id.* at 838.

Here, the sentencing court imposed several discretionary legal financial obligations: a \$500 court appointed attorney fee, a \$70 sheriff's return service fee, and a \$2,211.56 jury demand fee. The imposition of these fees is without any support in the record.

Additionally, the trial court acted without authority when it imposed the jury demand fee in excess of the statutory amount. RCW 36.18.016(b) provides that upon conviction in criminal cases, a jury demand fee of \$250 may be imposed as costs under RCW 10.46.190. Here, the court wrongly imposed \$2,211.56. CP 133.

This matter must be remanded for an individualized inquiry into Mr. Castro's current and future ability to pay any discretionary legal financial obligations.

B. The Trial Court Failed To Afford Mr. Castro His Right Of Allocution Before Imposing Sentence.

It is well-settled law that a criminal defendant has a statutory right of allocution *before* imposition of sentence. *In re Pers.*

Restraint of Echeverria, 141 Wn.2d 323, 335, 6 P.3d 573 (2000).

RCW 9.94A.500(1) provides:

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

(emphasis added).

In *Echeverria*, our Supreme Court held “trial courts should *scrupulously* follow [the *presentence* procedures] by directly addressing defendants during *sentencing hearings*, asking whether they wish to say anything to the court in mitigation of sentence, and allowing ‘arguments from ... the offender[s] ... as to the sentence to be imposed.’” *Echeverria*, 141 Wash.2d at 336–37 (emphasis added). Doing so “unequivocally acknowledge[s] the right of allocution as a significant aspect of the sentencing process.” *Id.* at 337. Allocution is the right of the defendant to ask for mercy and present any information in mitigation of the impending sentence. *State v. Canfield*, 154 Wn.2d 698, 116 P.3d 391 (2005).

Here, the trial court imposed an additional 144 months of firearm enhancements, raising Mr. Castro’s sentence to 524 months. The total of firearm enhancements to be served as flat time

is 360 months. CP 131. The imposition of an additional 12 years was significant. The court should have but did not afford Mr. Castro an opportunity to speak on his own behalf *before* imposing the sentence.

After imposing sentence, Mr. Castro's attorney alerted the court that Mr. Castro wished to speak. The court responded, "...I've made my ruling, I've signed the judgment and sentence. And you have the right to appeal." 5/2/17 RP 24. When Mr. Castro objected and attempted to speak to the court about his sentence the court replied, "We're done here. Your next argument would be with the Court of Appeals." 5/2/17 RP 24.

Mr. Castro was wrongly denied his right to allocution at the sentencing hearing. The denial of allocution requires a reversal of the sentence and remand for sentencing before a different judge. *State v. Aguilar-Rivera*, 83 Wn.App. 199, 203, 920 P.2d 623 (1996).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Castro respectfully asks this Court to reverse and remand for resentencing before a different judge.

Respectfully submitted this 2nd day of April 2018.

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s/Marie Trombley

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