

FILED
Court of Appeals
Division III
State of Washington
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No. 352889

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO HERRERA-CASTRO,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. Did the trial court error in failing to reconsider Mr. Herrera-Castro's legal financial obligations?
2. Did the trial court error in failing to provide Mr. Herrera-Castro the opportunity to allocute?

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Was the court resentencing Mr. Herrera-Castro such that it needed to exercise its discretion on areas outside the facially invalid portion of the previous sentence?

2. Are either of the issues manifest constitutional error?

III. STATEMENT OF THE CASE

A jury found Mr. Herrera-Castro guilty of nine crimes: second degree kidnapping of Ms. Suarez; first degree kidnapping of Luis, Juan, and Mr. Ibarra Suarez; second degree assault of Ms. Suarez, Luis, Juan, and Mr. Ibarra Suarez; and gross misdemeanor harassment of Mr. Ibarra Suarez. The trial court sentenced Mr. Herrera-Castro to standard range sentences, with the sentences to run concurrently except for consecutive sentencing of the three first degree kidnappings. Mr. Herrera-Castro appealed. The Court of Appeals affirmed in an unpublished decision in

State v. Herrera-Castro, No. 27244-3-III, 2009 Wash. App. LEXIS 1787 (Ct. App. July 23, 2009).

In November 2016 the Department of Corrections (DOC) contacted the State to assist in reading the judgment and sentence. CP 35. The State concluded that the judgment and sentence reflected a sentence that is invalid on its face, and so could not assist DOC in interpreting the judgment and sentence in accordance with applicable law.

The judgment and sentence included: count 1 kidnapping in the second degree, count 2 kidnapping in the first degree, count 3 kidnapping in the first degree, count 4 kidnapping in the first degree, count 5 assault in the second degree, count 6 assault in the second degree, count 7 assault in the second degree, count 8 assault in the second degree and count 12, a misdemeanor harassment count. CP 60-61. The court sentenced Mr. Herrera-Castro to the low end on each count, added the firearm enhancement to the time for each count, but did not break down what part was the firearm count, and found that the assault 2 counts were the same criminal conduct as the kidnapping counts. The court ordered that counts 2, 3 and 4 run consecutively, as well as the firearm enhancement from count 1. CP 67-68. In a handwritten notation the sentencing court ordered the firearm enhancements from the assault in the second degree to run

concurrently to each other and to count 2. CP 68. The court left the “actual months of total confinement” line blank.

The State moved to correct the judgment and sentence under CrR 7.8. It noted that it was collaterally attacking the judgment, the motion was untimely, but the judgment was facially invalid, thus exempt from the time bar. CP 36. The reason the State noted the judgment and sentence was facially invalid is that it ran firearm enhancements concurrently, contrary to law. It also noted that the judgment was unclear, but that fact did not make it facially invalid. *Id.* The trial court granted the State’s CrR 7.8 motion and signed a corrected judgment and sentence. CP 126-44.

IV. ARGUMENT

A. Mr. Herrera-Castro was not resentenced, thus there was no need or ability for the court to exercise its discretion.

Mr. Herrera-Castro’s claims of error are based on the premise that he was resentenced, and the trial court exercised discretion in resentencing him. He was not. Instead the court corrected a facial invalidity in his judgment and sentence. The State’s motion was an untimely collateral attack on a facially invalid judgment and sentence. RCW 10.73.090. As such the trial court was limited to correcting the facial invalidity. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 309 P.3d 451 (2013). A judgment and sentence is invalid on its face when it does not follow

applicable law. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011). The trial court could not, and did not, address any other aspect of the judgment and sentence that was facially valid or not subject to some other exclusion to the time bar found in RCW 10.73.090. For instance, the original judgment imposed a low-end standard range sentence. The State could not, and did not, seek to reopen that part of the sentence, since it was facially valid.

Mr. Herrera-Castro makes no claim that the legal financial obligations in his judgment and sentence were facially invalid, and these were the same legal financial obligations imposed in the original judgment and sentence. There was simply no discretion for the judge correcting the original judgment and sentence to exercise on the matter of the financial obligations.

The same is true of his right of allocution. That right attaches at sentencing. It is provided to allow the defendant to speak in support of mitigation of the sentence. *In re Pers. Restraint of Escheverria*, 141 Wn.2d 323, 336, 6 P.3d 573 (2000). Here the trial court was correcting a facially invalid judgment and sentence by changing a portion that was unlawfully run concurrently to run consecutively. The court had no authority to change the other aspects of the judgment and sentence, and thus there was no reason to speak in mitigation. For that matter there was

no ability for the State to advocate for a sentence above the low end of the standard range either.

B. Neither of the issues Mr. Herrera-Castro raises would be manifest constitutional error, so the court should not consider them.

Neither of Mr. Herrera-Castro's claims of error are manifest constitutional errors. RAP 2.5. Legal financial obligations are not constitutional errors. *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015). The right of allocution is not a constitutional right. *In re Pers. Restraint of Escheverria*, 141 Wn.2d 323, 333-34, 6 P.3d 573 (2000). There was no objection to LFO's or lack of allocution at the hearing, and the court should decline to review these issues.

V. CONCLUSION

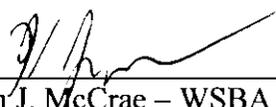
Mr. Herrera-Castro raises issues that are not constitutional under RAP 2.5, and are only applicable to discretion the trial court did not have. Mr. Herrera-Castro makes no argument that his legal financial obligations imposed when he was sentenced after trial were facially invalid or are subject to some other exception to the time bar. Nor was the right of allocution implicated because he was not being resentenced. Because Mr. Herrera-Castro was not resentenced, and the Court had no discretion to do

anything but correct the facial invalidity in the original judgment and sentence, the appeal should be denied.

Dated this 14th day of May 2018.

Respectfully submitted,

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