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

DIVISION III

No. 35663-9-III

STATE OF WASHINGTON, Appellant,

v.

MICHAEL EDWARD ELMORE, Respondent.

APPELLANT'S BRIEF

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I. INTRODUCTION

Michael Elmore, who is incarcerated for a manslaughter conviction, filed a combined CrR 7.8 motion to modify his judgment and sentence and a motion to remit outstanding legal financial obligations (“LFOs”). In support of his motion, he submitted documentation showing a significant discrepancy in the amounts paid toward his LFO balances from his Department of Corrections trust account and the amounts credited to his LFO balances by the county clerk. The trial court declined to consider his CrR 7.8 motion as time-barred and denied his motion for remission on the grounds that he did not show a manifest hardship. Elmore now appeals and contends that the trial court erred in declining to consider the merits of his request to modify the restitution amount under RCW 9.94A.753(4).

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in failing to consider whether to modify the LFO balance owing when Elmore made a *prima facie* showing that the clerk’s balance did not accurately reflect payments made to the Department of Corrections on the obligation.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in declining to consider Elmore’s motion to modify the restitution amount as time-barred

when RCW 9.94A.753(4) allows the restitution portion of the sentence to be modified as long as the offender remains under the court's jurisdiction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Does RCW 10.73.090 bar Elmore from relief when RCW 9.94A.753(4) expressly allows the court to modify a restitution order at any time during which it has jurisdiction over the offender?

ISSUE NO. 2: Has Elmore presented sufficient evidence of a discrepancy in the restitution balance reported by the county clerk to warrant a hearing on whether the restitution order should be modified?

IV. STATEMENT OF THE CASE

Michael Elmore was convicted of manslaughter in 2007 and sentenced to 280 months in prison. CP 3, 7. The case arose from an assault involving inmates incarcerated at the Washington State Penitentiary. CP 14. The trial court imposed substantial LFOs totaling \$59,261.11, with payment to begin 90 days after his release from custody. CP 6. Of the total LFO amount, \$56,843.91 was awarded in restitution to the Department of Corrections. CP 6. Following a subsequent appeal, an additional \$3,570.91 in appellate costs were added to his judgment and sentence. CP 13.

In August 2017, Elmore filed a motion to modify the judgment and sentence and terminate the LFOs pursuant to CrR 7.8. CP 24. Although his main argument was that the LFOs were imposed without an inquiry into his ability to pay them, he also questioned the amount of the assessment in light of an apparent separate institutional debt issued by the Department of Corrections for the same costs. CP 25. In support of his motion, he submitted several documents, including a letter from the Walla Walla County Clerk's Office showing it had applied \$54.58 to his LFO account and his current balance was \$133,075. CP 43. He also submitted a statement from his inmate trust account showing payment of \$290.79 towards a "restitution debt" associated with the same cause number for the amount of \$27,637.19. CP 81. Elmore explained that the Department of Corrections was apparently separately charging him for the same restitution obligation but was not reporting the payments to the clerk, resulting in him being twice charged for the same debt. CP 59.

The State opposed Elmore's motion, arguing it was time-barred and he did not meet the standard to show a manifest hardship warranting remission. CP 49, 55-56. The trial court denied it, entering an order concluding that his CrR 7.8 motion was time-barred and he could petition the court for relief from his discretionary LFOs after his release from

custody. CP 83-84. It did not address his argument that the Department of Corrections was double-charging him for the restitution debt.

Elmore now appeals, and has been found indigent for that purpose. CP 86, 95.

V. ARGUMENT

The trial court erred in denying Elmore's motion as time-barred under *In re Flippo*, 187 Wn.2d 106, 385 P.3d 128 (2016). Although *Flippo* bars relief as to Elmore's request to modify the judgment and sentence based on the sentencing court's failure to conduct an inquiry into his ability to pay discretionary LFOs before imposing them as required by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), RCW 9.94A.753(4) allows modification of "[t]he portion of the sentence concerning restitution . . . as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction." Because Elmore made a *prima facie* showing that the restitution amount should be modified in light of the Department of Corrections' internal collection processes for the same debt, the motion to modify the amount of restitution should have been considered.

Although RCW 9.94A.753(4) allows modification of the restitution award at any time, it does not establish any particular

mechanism to bring the issue before the court. CrR 7.8 allows a party to file a motion for relief from the judgment and sentence for a variety of reasons, including mistakes and newly discovered evidence as well as for “[a]ny other reason justifying relief from the operation of the judgment.” In general, CrR 7.8 motions must be filed within one year of the time the judgment and sentence becomes final under RCW 10.73.090. However, application of the one-year time bar conflicts with RCW 9.94A.753(4)’s allowance of relief to be sought at any time while the court continues to have jurisdiction over the case. Under the rule of lenity, the conflict should be resolved in favor of permitting Elmore’s motion to proceed. *See State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991).

Alternatively, the doctrine of equitable tolling permits Elmore’s motion to be considered. Equitable tolling “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.” *State v. Littlefair*, 112 Wn. App. 749, 759, 51 P.3d 116, *review denied*, 112 Wn. App. 749 (2002) (*quoting State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997)). Examples of circumstances where equitable tolling is appropriate may include instances where the court or counsel have contributed to the error, and the party seeking relief has acted with reasonable diligence. *See, e.g., In re Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000) (defendant had

attempted to raise specific enforcement of plea agreement in prior appeal); *Duvall*, 86 Wn. App. 871 (court's reliance on defense counsel's stipulation to agreed restitution order excused State's failure to conduct a restitution hearing within the time required); *Littlefair*, 112 Wn. App. 749 (commencement of immigration proceedings justified equitable tolling as to noncitizen who was not advised that deportation would result from conviction).

Here, the problem identified by Elmore is a problem originating with the State. The restitution debts appear to have been duplicated, and the Department of Corrections apparently has not reported payments received on the restitution debt to the clerk's office. Statutorily, coordination between the Department of Corrections, the Administrative Office of the Court, and the county clerk's office is required in the collection and reporting of LFO debt. RCW 9.94A.760(11). Elmore acted diligently in filing his motion upon discovering during his yearly review that his institutional debt had been calculated to include the same obligation that Walla Walla County was collecting pursuant to the restitution award. CP 64. Under these circumstances, equitable tolling is appropriate.

Because Elmore made a *prima facie* showing that the restitution order did not reflect payments made to the Department of Corrections and should potentially be modified to prevent duplicate payment for the same obligation, his motion should have received consideration on the merits. The order dismissing his motion should be reversed.

VI. CONCLUSION

For the foregoing reasons, Elmore respectfully requests that the court REVERSE the order denying his motion to modify the restitution order as time-barred and REMAND the case for a hearing on the merits.

RESPECTFULLY SUBMITTED this 12 day of March, 2018.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE 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:

Michael Elmore, DOC #834075
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

And by e-mail to:

Teresa Chen, Special Deputy Prosecuting Attorney
tchen@co.franklin.wa.us

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

Signed this 12 day of March, 2018 in Walla Walla, Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

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