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Court of Appeals
Division III
State of Washington
5/9/2018 1:40 PM

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EDWARD ELMORE,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the denial of the Appellant's CrR 7.8 motion regarding LFO's.

III. ISSUES

1. Where the Defendant requested the court to revisit the ability to pay finding in the judgment and sentence ten years after sentence was imposed, did the court err by relying on *In re Flippo*, 187 Wn.2d 106, 385 P.3d 128 (2016) (holding such challenges are not an exception to the one year time bar)?
2. Has the Defendant presented any evidence to show the clerk's accounting was in error; and does an accounting error in collections have any bearing on the amount initially imposed or provide lawful cause to resentencing?

IV. STATEMENT OF THE CASE

The Defendant Michael Edward Elmore was convicted and

sentenced on December 14, 2007 for manslaughter in the first degree, committed on November 19, 2006. CP 1-3; *State v. Elmore*, 149 Wn. App. 1006 (2009) (for the killing of an inmate at the Washington State Penitentiary).

Elmore had an offender score of 16. CP 4. Of these, his most recent convictions were significant enough that he was likely still incarcerated on them:

Offense Dates	Offenses	Cause No.
Arson 2 nd Assault 2 nd	February 24, 2006	05-1-00665-9
Malicious Mischief 1 st Malicious Mischief 1 st Malicious Mischief 1 st	August 1, 2006	06-1-00186-8

CP 4; RCW 9.94A.510, .515 (standard ranges of 43-57 months and 63-84 months). He received a sentence of 280 months to be served consecutively to the sentence in 06-1-00186-8. CP 4, 7; RCW 9.94A.589(2)(a) (the term for a sentence for a felony committed while already under sentence shall not begin until completion of previously imposed terms).

At sentencing, the court imposed the following LFO's:

\$ 56,843.91	restitution owed to DOC Medical Disbursement Unit
\$ 200	court costs (filing fee)
\$ 250	jury demand fee

\$ 492.20	sheriff's service fees (RCW 70.48.390)
\$ 500	victim assessment (RCW 7.68.038)
\$ 775	court appointed attorney fees
\$ 100	crime lab fee (RCW 43.43.680/.690)
\$ 100	biological sample fee (RCW 43.43.7541)

CP 5-6. The total then was \$59,261.11. CP 6.

The Defendant appealed, and the mandate issued on April 13, 2009. CP 13-21. The cost bill for the appeal came to \$3570.91. CP 13 (\$38.48 to the Prosecutor's Office and \$3532.43 to OPD). Another review is pending.¹

On August 30, 2017, from prison the incarcerated Defendant filed a motion to modify the judgment and sentence and terminate LFO's. CP 24-28. He asked that the court:

- modify the finding regarding his ability to pay,
- find that the "imposition" of LFO's placed an undue burden on the Defendant and his family so as to violate the constitution, and
- "waive" the LFO's or order an evidentiary hearing on the Defendant's ability to pay.

CP 24-25, 28. The associated affidavit argued that the Defendant

¹ On November 13, 2017, the Defendant filed a CrR 7.8 motion under *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) which was transferred as a PRP (35754-6-III/95619-7) and dismissed. The Motion for Discretionary Review is pending.

would be 51 years old when he was released, had no work experience, and feels “deflated” when he reflects upon his large LFO debt. CP 29-30. He attached a summary of his prison account for a period of six months in 2017. CP 41. He also attached what he claims is a letter from the Walla Walla Clerk’s Office. CP 43. It is his own handwritten letter dated April 16, 2017 with added typing which indicates the following:

\$59,2611.11	original amount of LFO’s in 07-1-0005
12% per annum	interest rate
\$54.58	payments made
2007	year LFO’s were ordered
\$133,075...	current debt including interest

CP 43.

The State filed a response noting inter alia that:

- the Defendant is procedurally barred from challenging the J&S;
- the Defendant is confined and not being collected upon;
- the Defendant is only 33 and will not be released for many years;
- when he is released, the court will be able to assess his claim of hardship;
- when he is released and subject to collection, only a few LFO’s are available for remission under RCW 10.01.160(4).

CP 47-56.

In reply, the Defendant argued that he only recently learned that he “was being charged twice for the same case.” CP 58. In support of this claim, he provided his own affidavit which states that “WDOC has deducted \$290.77 toward an institutional debt.” CP 64-65. His trust account statement shows that he has paid \$290.79 toward restitution, and \$196.94 toward legal financial obligations. CP 81. The reply and affidavit do not explain why he believes that these deductions represent LFO’s owed in this case as opposed to the LFO’s in his many other cases. He claims, but does not prove, that his debt “is keeping Mr. Elmore from getting a gratitued (sic) 4 job which would pay Mr. Elmore more than his current gratitued (sic) 3 job.” CP 65.

The Defendant motion was denied on October 2, 2017. CP 83-84. He filed this appeal. CP 86-89.

V. ARGUMENT

- A. THE COURT MADE NO ERROR IN FINDING THAT ATTACKS UPON LFO'S AS IMPOSED IN THE JUDGMENT WERE TIME BARRED UNDER *FLIPPO*.

The Defendant argues that the superior court's reliance upon *In re Flippo*, 187 Wn.2d 106, 385 P.3d 128 (2016) was error. Appellant's Brief (AB) at 4. It is not. The Defendant specifically asked for the court to re-address the finding of ability to pay in the judgment and sentence. CP 24 ("asks this Court to [...] modify J&S by finding Defendant doesn't have the present or future ability to pay"). This is precisely what *Flippo* addresses. *In re Flippo*, 187 Wn.2d at 108 (asking the court to find that his petition to readdress the ability to pay finding in the judgment and sentence was not time barred). Such a challenge is subject to the time limits in RCW 10.73.090. *In re Flippo*, 187 Wn.2d at 114.

- B. THE COURT MADE NO ERROR IN FAILING TO CONSIDER A MERITLESS CLAIM UNDER RCW 9.94A.753 THAT THE DEFENDANT DID NOT RAISE.

For the first time on appeal, the Defendant argues that the court should have considered its authority under RCW 9.94A.753(4). AB at 4. This claim is multiply flawed. First, the Defendant never raised this statute to the court below. A court does not err in failing to

address a claim not before it. This Court should decline to address the claim. RAP 2.5(a).

Second, the Defendant misapprehends the court's ruling. The Defendant made more than one request below. They were denied for different reasons. A challenge to the imposition of the ability to pay finding in the judgment is time barred. Insofar as such a claim could be framed as a request for remission under RCW 10.01.160(4) (as the prosecutor did at CP 52), this is not time barred. Rather, the court found no "manifest hardship" at this time while the Defendant is incarcerated – the standard for remission of costs. CP 83. The court noted that this motion could be raised again at a later date when the Defendant had a colorable claim of hardship, i.e. after release from incarceration. CP 83-84. The Defendant could also petition the court to waive interest after the principal had been paid. CP 84.

Third, this statute does NOT permit the court to reduce restitution based on a defendant's claim that he lacks the ability to pay. *State v. Gray*, 174 Wn.2d 920, 928, 280 P.3d 1110 (2012). RCW 9.94A.753(4) permits the court to modify an existing restitution order after 180 days to increase the amount to be paid. *State v. Gray*, 174 Wn.2d 920 (restitution order modified for additional funeral

expenses); *State v. Gonzalez*, 168 Wn.2d 256, 260, 266, 226 P.3d 131 (2010) (restitution order was modified where crime victims compensation continued to pay the victim's medical bills and time loss related to a skull-crushing assault); *State v. Halsey*, 140 Wn. App. 313, 165 P.3d 409 (2007) (restitution modified to add accrued child rape victim's counseling costs).

A court will only impose restitution for actual expenses incurred, not likely future expenses. *State v. Gonzalez*, 168 Wn.2d at 266. The clear intent of the statute is to "ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes." *State v. Gonzalez*, 168 Wn.2d at 265. Therefore, a modification mechanism is necessary where all damages are not immediately knowable.

Here the Defendant's argument is that he lacks the ability to pay. Such claim is specifically not permitted under this statute.

... The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. ...

RCW 9.94A.753(4). This statute, which was not raised to the court below, does not permit a reduction of the restitution ordered and does not justify a revisiting of the ability to pay finding.

C. THE ALLEGED, BUT UNPROVEN, ERROR IN THE ACCOUNTING OF LFO COLLECTION CANNOT JUSTIFY A REHEARING ON LFO'S ORDERED AND IMPOSED TEN YEARS AGO.

The Defendant claims that the original "restitution amount should be modified in light of the Department of Corrections' internal collection processes." AB at 4. The argument, again, is multiply flawed. First, there are too many variables for any court to conclude that the few documents the Defendant has provided demonstrate an accounting error. And second, an error in accounting is not cause to review the imposition of LFO's.

The Defendant relies on a comparison of CP 43 and CP 81. CP 43 is his own handwritten letter which asserts that the Defendant has paid \$54.58 toward original LFO's of \$59,2611.11 (\$133,075 after interest). CP 81 is his DOC Trust Account. The Defendant focuses on the following line in the trust account:

TYPE	PAYABLE	INFO #	AMT OWING	AMT PD
DPSD	RESTITUTION DEBT	05292007	27637.19	290.79

The conclusion he draws from this comparison fails. It requires us to assume the authenticity of his claims about CP 43. The Defendant would have the court believe the typewritten information was added by the Walla Walla Clerk. Maybe it was, but this is not apparent.

Additionally, a discrepancy in the amounts can be accounted for by the dates. The date on his letter is from April 2017; while the date on the trust account is from September 2017. There is nothing suspicious or inconsistent in records that show that he repaid the Walla Walla clerk \$54 by April and that the DOC had collected \$290 from him by September.

Certainly, the DOC trust account is not a full accounting of his Walla Walla LFO's, much less the LFO's he owes in his approximately 36 cases. It plainly provides estimates only. It describes the LFO's and escorted leave as "unlimited." It is reasonable for the trust account to provide a rough estimate of larger amounts. The DOC is not the accountant for the various county clerks. The department collects from inmates' trust accounts; while the clerks keep an accounting of the LFO balances.

(11)(a) The administrative office of the courts shall mail individualized periodic billings to the address known by the office for each offender with an unsatisfied legal financial obligation.

(b) The billing shall direct payments, other than outstanding cost of supervision assessments under RCW 9.94A.780, parole assessments under RCW 72.04A.120, and cost of probation assessments under RCW 9.95.214, to the county clerk, and cost of supervision, parole, or probation assessments to the department.

(c) The county clerk shall provide the administrative office of the courts with notice of payments by such offenders no less frequently than weekly.

(d) The county clerks, the administrative office of the courts, and the department shall maintain agreements to implement this subsection.

RCW 9.94A.760(11). The clerks' accounts will change as payments come in and as interest accrues. RCW 9.94A.760(8) (DOC remits collected monies to the county clerk "daily"). It is the clerks, not the DOC, which distributes LFO's to victims and various government agencies. It is not a good use of the DOC's time to duplicate the clerks' work, particularly as to the details of a large debt.

And significantly, the trust account does not distinguish how the money was distributed among the LFO's assessed in the Defendant's many cases. The instant case is hardly the only case in which the Defendant owes LFO's. His judgment and sentence listed 15 other felony convictions occurring in rapid succession between 1997 and

2006. CP 4. The Defendant also has ten misdemeanor convictions. CP 70-71. The Defendant says he has been incarcerated for approximately 18 years. CP 30 (when he is released at 51, he will have incarcerated for approximately 36 years). In other words, his LFO's have been accumulating and drawing interest with very little repayment. Any or all of these cases may include restitution. Restitution must be distributed proportionately according to each victim's loss. RCW 9.94A.750(8); RCW 9.94A.753(9). It is impossible to say from the trust account what portion of the sum went to the Walla Walla Clerk in this case as opposed to some other clerk in some other case.

The Defendant's actual claim to the superior court was not that there were mere discrepancies, but that he had been "double charged." He has provided no evidence to support such a claim.

In any case, the Defendant is making an apples to oranges comparison. *If* collection is flawed, and this has not been demonstrated, then collection can and should be recalculated. There is no call for "equitable tolling" when what the Defendant is requesting is simply an accounting. He can make this request from the various clerks' offices at any time and repeatedly, as offenders do. But this is

not a basis to alter the original amount imposed which is based on actual damages and not manner of collection of the debt.

VI. CONCLUSION

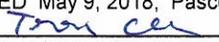
Based upon the forgoing, the State respectfully requests this Court deny the appeal and affirm the lower court's denial of the CrR 7.8 motion.

DATED: May 9, 2018.

Respectfully submitted:



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<p>Andrea Burkhart <Andrea@BurkhartandBurkhart.com></p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 9, 2018, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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May 09, 2018 - 1:40 PM

Transmittal Information

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Superior Court Case Number: 07-1-00005-1

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