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Court of Appeals
Division III
State of Washington
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No. 36123-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY RENE VASQUEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John M. Antosz

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The judgment and sentence contains a clerical error which must be corrected.

2. In the event the State substantially prevails on appeal, this Court should deny any request for costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court imposed sentences for three counts to be served concurrently and a firearm enhancement to be served consecutively. The judgment and sentence omits the total number of months of confinement ordered by the court. Should this Court remand to the trial court to correct the clerical error?

2. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because the appellant is presumably still indigent where there has been no evidence provided to this Court, and there is no reason to believe, that his financial condition has improved or is likely to improve?

C. STATEMENT OF THE CASE

On November 16, 2015, a jury found appellant, Anthony Rene Vasquez, guilty of aggravated murder in the first degree, unlawful possession of a firearm in the second degree, three counts of drive-by shooting, and tampering with a witness. CP 1-2. The trial court sentenced

Vasquez to life without parole plus 60 months. CP 6. On appeal,[1] this Court reversed the three drive-by shooting convictions and the drive-by shooting aggravator and remanded for resentencing. CP 9.

At resentencing, the State argued for an exceptional sentence and the defense argued for a mid-range sentence within the standard range. RP 5-20 Finding that Vasquez's high offender score resulted in some of the current offenses going unpunished, the court imposed an exceptional sentence pursuant to RCW 9.94A.535(2)(c).[2] RP 27-32; CP 74, 91-92. The court sentenced Vasquez to 660 months for murder in the first degree while armed with a firearm (count one), 60 months for unlawful possession of a firearm (count three), and 60 months for tampering with a witness (count seven). CP 71-76. The court stated that the sentences for the three counts would be served concurrently and the firearm enhancement would be served consecutively.[3] RP 31-32. The judgment and sentence omits the total number of months of confinement ordered by the court. CP 76.

Vasquez filed a timely notice of appeal. CP 95.

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[1] 2 Wn. App. 2d 632, 415 P.3d 1205 (2018).

[2] The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury when the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

[3] The court also ordered 36 months of community custody and imposed $500.00 in mandatory legal financial obligations. CP 77-79.

D. ARGUMENT

1. A REMAND IS REQUIRED FOR THE TRIAL COURT TO CORRECT THE JUDGMENT AND SENTENCE WHICH OMITS THE TOTAL NUMBER OF MONTHS OF CONFINEMENT ORDERED BY THE COURT.

On a judgment and sentence, a clerical error is one that, if amended, "correctly convey[s] the intention of the court based on other evidence." *State v. Hayes*, 177 Wn. App. 801, 811, 312 P.3d 784 (2016)(citing *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011)). When the error is clerical in nature, it does not provide an independent ground for resentencing. *Hayes*, 177 Wn. App. at 811. The remedy is a remand to the trial court to correct the judgment and sentence. *Hayes*, 177 Wn. App. at 812.

The record reflects that the trial court stated that it will impose 660 months for count one including 60 months for the firearm enhancement, 60 months for count three, and 60 months for count seven. The court ordered the sentences for the three counts to be served concurrently and the firearm enhancement to be served consecutively for a total of 660 months in confinement. RP 28-32. It is evident that the court erroneously omitted the total number of months in confinement on the judgment and sentence. CP 76. Consequently, a remand is required for the court to correct the clerical error.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE VASQUEZ REMAINS INDIGENT.

It is well established that "Washington's Const. art. I, section 22 (amendment 10) grants not a mere privilege but a 'right to appeal in all cases.' " *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978)(quoting *State v. Schoel*, 54 Wn.2d 388, 341 P.2d 481 (1958)). In honoring this right, the Washington Supreme Court emphasized that the "presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court." *Sweet*, 90 Wn.2d at 282.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs "is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all." The Court emphasized that the authority "is permissive" as RCW 10.73.160

specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the "court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1)(emphasis added).

Accordingly, in the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Vasquez is indigent. The trial court found that Vasquez is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 101-03. This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court, and there is no reason to believe, that Vasquez's financial condition has improved or is

likely to improve. Vasquez is therefore presumably still indigent and this Court should exercise its discretion to not award costs.

E. CONCLUSION

For the reasons stated, this Court should remand to the trial court for correction of the judgment and sentence which omits the total number of months of confinement ordered by the court.

In the event the State prevails on appeal, this Court should exercise its discretion and not award costs because Vasquez remains indigent.

DATED this 19th day of December, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Grant County Prosecutor's Office at kburns@grantcountywa.gov by agreement of the parties and by U.S. mail to Anthony Rene Vasquez, DOC # 346135, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362.

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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.

DATED this 19th day of December, 2018.

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