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Court of Appeals
Division III
State of Washington
5/31/2019 9:59 AM

NO. 36487-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS PADGETT,

Appellant.

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

The Honorable Richard H. Bartheld, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to strike the \$100 DNA collection fee from the amended judgment and sentence.
2. The amended judgment and sentence contains multiple scrivener's errors that should be corrected on remand.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the amended judgment and sentence erroneously requires Mr. Padgett to pay a \$100 DNA fee when Padgett has a prior felony conviction, and the court indicated its intent to strike the fee?
2. Whether, on post-appeal remand, the trial court erred in including multiple scrivener's errors on the amended judgment and sentence?

C. STATEMENT OF THE CASE

The trial court heard Mr. Padgett's case on remand after two successful appeals. See Nos. 32927-5-III and 35034-7-III. CP 1-38.

Mr. Padgett waived his presence at the hearing. CP 41-42; RP 3. Attorney Robert Thompson appeared and represented Mr. Padgett's interests. RP 3. Mr. Thompson also represented Mr. Padgett at the original sentencing hearing. RP 11-12.

The parties discussed several things in light of the two opinions. Mr. Thompson complained that he had not received trial defense counsel's file as previously ordered by the court. RP 5, 24-26. The court signed an order requiring counsel to turn over the file. RP 26-28.

Counsel also talked about Mr. Padgett discovering, through a public disclosure request, that the pre-sentence investigation questionnaire he filled out never made it to the PSI writer. RP 7. The PSI writer, Roger Martinez, noted in the PSI that he "obtained a defendant statement regarding the offense." RP 12. Mr. Padgett provided allocution at the original sentencing hearing. RP 12. Although Mr. Padgett was concerned that his written answers to the PSI questionnaire never made it to Mr. Martinez, attorney Thompson commented, "As I stand here, I cannot prove it materially would have impacted the PSI." RP 10.

The opinion on No. 32927-5-III ordered dismissal of count 8 due to insufficient evidence. CP 2, 10-11, 30.

At the hearing, no one discussed the incident dates for any of the counts.

The court adopted Padgett's criminal history specifying Padgett had a 2006 felony bail jump conviction. RP 53

The court continued to find Mr. Patchett indigent. RP 21.

The court struck various discretionary legal financial obligations (LFOs). CP 57. The court also announced its intent to strike the \$100 DNA fee. RP 22. Yet, the DNA fee remains on Padgett's judgment and sentence. CP 57.

Mr. Padgett appealed all portions of the amended judgment and other issues addressed in the order. RP 63.

D. ARGUMENT

Issue 1: Because Padgett has a prior felony conviction and the court stated its intent to strike the \$100 DNA fee, the court must strike the fee from the judgment and sentence.

The Washington Supreme Court's recent decision in *State v. Ramirez* requires this court to vacate the order requiring Mr. Padgett to pay a DNA collection fee.

House Bill 1783, effective June 7, 2018, prohibits trial courts from imposing certain financial obligations on a defendant who is indigent at the time of sentencing. LAWS of 2018, ch. 269, § 6(3). *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

Ramirez held that the amendment applies prospectively to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 747. The charges included an amendment to former RCW 43.43.7541 to make the DNA database fee no longer

mandatory if the State has previously collected the offender's DNA as a result of a prior conviction. LAWS of 2018, ch. 269, §§ 17(2)(h), 18.

Ramirez controls Mr. Padgett's case. He was indigent at the time of the resentencing on his direct appeal. RP 21-22. The amended judgment and sentence includes criminal history of a Yakima County conviction for a felony bail jumping committed on January 18, 2006, and sentenced on April 7, 2006. CP 53. The amended judgment and sentence reflects the DNA fee applies to any felony committed after July 1, 2002. CP 57. The previous application of the DNA fee prevents the trial court from imposing it again on this case.

Importantly, the court at sentencing articulated its intent to strike the DNA fee. "I will strike the DNA collection fee." RP 22.

Mr. Padgett is indigent. The court intended to strike the DNA fee. The error in imposing the fee requires remand to strike the \$100 fee.

Issue 2: Mr. Padgett's case should be remanded to the trial court to strike or correct multiple scrivener's errors on Mr. Padgett's amended judgment and sentence.

Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. Clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any

party. *State v. Coombes*, 191 Wn. App. 241, 255, 361 P.3d 270 (2015); *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010).

There are numerous scrivener's errors on the amended judgment and sentence. CP 51-62.

First, on the Amended Felony Judgment and Sentence header, there are several actions noted, one of which requires the "dismissal of Count 9." This court, in Opinion No. 32927-5, dismissed Count 8 for insufficient evidence. CP 9-10, 30. The court did not similarly dismiss count 9. The reference to count 9 is a scrivener's error. On remand, the court should instead strike count 8 on the amended judgment and sentence.

Second, Section 1.2 notes, "The defendant was given the right of allocution and asked if any legal cause existed why judgment should not be entered." RP 51. "Allocution" refers to the personal right of a defendant to plead for mercy before the court imposes a sentence. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 336, 339 n. 54, 6 P.3d 573 (2000). Here, as Mr. Padgett was not present at the resentencing hearing – either personally or telephonically - he was not afforded the right to allocution.

CP 41-42; RP 3. Contrary language in section 1.2 should be stricken as a scrivener's error.

Third, at Section 2.1 as to count 1, the amended judgment and sentence lists the incident date as occurring between May 11, 2012, and January 17, 2014. CP 51. Yet, the amended information under which Padgett was tried lists the date range on Count 1 as May 11, 2012 – January 1, 2013. Supplemental Designation of Clerk's Papers, Amended Information. Incidentally, The Court's Instructions to the Jury for Count 1 listed a date range of May 11, 2012 – January 17, 2013. Supp. DCP, Court's Instructions to the Jury, Instruction 12. The erroneous information on the Judgment and Sentence requires remand for correction.

Fourth, at Section 2.1 as to count 9, the amended judgment and sentence lists the incident date as January 1, 2013. CP 52. Yet, the amended information lists the incident date as January 1 – January 17, 2013. Supp. DCP, Amended Information, page 4. CP 52. The jury instructions specified the date of occurrence simply as January 1, 2013. Supp. DCP, Court's Instructions to the Jury, Instruction 28.

Fifth, count 10 on the amended judgment and sentence also lists erroneous information. The amended information lists a date range for Count 10 as August 1, 2012 – January 17, 2013. Supp. DCP Amended

Information, page 4. The Court's Instructions to the Jury, Instruction 28, included the same date range. Supp. DCP, Court's Instructions, Instruction 28. Yet, the amended judgment and sentence lists a date range of August 1, 2012 – January 31, 2014. CP 52. The erroneous information should be corrected on remand.

Sixth, the court found Mr. Padgett indigent. CP 22. Yet, the court failed to strike the contrary following boilerplate language from the amended judgment and sentence:

2.7 Financial Ability: The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed therein. RCW 9.94A.753.

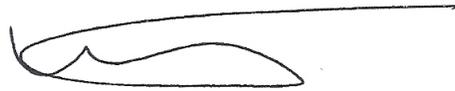
CP 53. As the court found Mr. Padgett indigent, Section 2.7 is in error and should be stricken on remand.

The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction. This court should remand Mr. Padgett's case for correction.

E. CONCLUSION

On remand, the trial court should strike the \$100 DNA collection fee and correct the many scrivener's errors on the judgment and sentence.

Respectfully submitted May 31, 2019.

A handwritten signature in black ink, appearing to read "LISA E. TABBUT". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

LISA E. TABBUT/WSBA 21344
Attorney for Travis Padgett

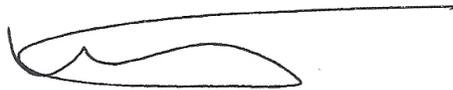
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Yakima County Prosecutor's Office, at appeals@co.yakima.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Travis Padgett, DOC#370308, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 31, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Travis Padgett

LAW OFFICE OF LISA E TABBUT

May 31, 2019 - 9:59 AM

Transmittal Information

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