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NOV 17 2010
King County Prosecutor
Appellate Unit

NO. 65634-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TROY VANSICKLE,

Appellant.

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

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Appellant's due process rights when it incarcerated him for failing to make restitution payments without inquiring into his ability to pay.

2. The order modifying Appellant's sentence is void because the trial court lacked jurisdiction to enforce the legal financial obligations of his sentence relative to his 1992 conviction. CP 14-18.

Issues Pertaining to Assignment of Error

1. Does RCW 9.94B.040 require a trial court to find a non-complying offender willfully violated a condition of his sentence before it may order the offender incarcerated?

2. Does due process require a trial court to determine whether a non-complying offender had the ability to pay before finding his failure to pay his legal financial obligations was willful?

3. Did the trial court lose jurisdiction to enforce the conditions of Appellant's sentence related to his 1992 conviction, when the order extending jurisdiction was entered after the 10-year limitation period had expired?

B. STATEMENT OF THE CASE

1. Vansickle's Criminal History

a. 1992 extortion conviction

Appellant Troy Vansickle pleaded guilty to first degree extortion on December 20, 1991. Supp. 1CP¹ __ (sub. no. 28, Statement of Defendant on Plea of Guilty, 12/20/91). On March 26, 1992, the trial court sentenced Vansickle to 9 months of incarceration and ordered him to pay \$10,300.11 in restitution. CP 31; Supp. 1CP __ (sub. no. 34, Order Setting Restitution, 3/26/92). Vansickle completed his term of confinement on January 5, 1993.² Supp. 1CP __ (sub. no. 40, Return of Commitment Judgment and Sentence, 1/7/1993).

b. 1996 theft conviction

Vansickle pleaded guilty to first degree theft on April 19, 1996. Supp. 2CP __ (sub. no. 21, Statement of Defendant on Plea of Guilty,

¹ There are three separate superior court cause numbers associated with this appeal. The following citation method will be employed to distinguish between these cause numbers in citing to documents not yet designated as clerk's papers: "Supp. 1CP" refers to supplemented documents from superior court cause No. 91-1-02542-4; "Supp. 2CP" refers to supplemented documents from superior court cause No. 94-1-08166-3; and "Supp. 3CP" refers to supplemented documents from superior court cause No. 96-1-05575-8. A supplemental designation of clerk's papers has been filed contemporaneously with this brief.

² The referenced document appears to contain an error stating that Vansickle completed his commitment on January 5, 1992, rather than on January 5, 1993. The document was filed on January 7, 1993.

4/19/96). The trial court sentenced Vansickle to 9 months of incarceration and ordered him to pay \$51,750 in restitution. CP 8; Supp. 2CP __ (sub. no. 31, Order Setting Restitution, 7/1/96). On March 3, 1997, in an unpublished opinion, this court vacated the trial court's restitution order and remanded for a new restitution hearing because the State conceded that the trial court erred by setting restitution in the amount of Vansickle's defaulted loan instead of for the value of the stolen item. See State v. Vansickle, 1997 WL 88856 (unpublished). On September 16, 1997, the trial court entered a new restitution order for \$53,661. Supp. 2CP __ (sub. no. 53, Order Setting Restitution, 9/16/97).

c. 1997 theft convictions

Vansickle pleaded guilty to four counts of first degree theft on April 17, 1997. Supp. 3CP __ (sub. no. 40A, Statement of Defendant on Plea of Guilty, 4/17/97). The trial court sentenced Vansickle to 22 months of incarceration and ordered him to pay \$169,815 in restitution. CP 67-68.

2. History of sentence violations.

On November 9, 2000, the State filed a motion to show cause for Vansickle's alleged failure to make restitution payments. Supp. 2CP __ (sub. no. 58, Notice of Sentencing Modification Hearing and Motion to Show Cause, 11/9/00). On January 16, 2001, the trial court found that Vansickle had failed to make restitution payments but did not impose

incarceration based on Vansickle's representation that he would make substantial payments prior to a review hearing set for April 17, 2001. Supp. 2CP __ (sub. no. 61, Order Modifying Sentence and Jail Commitment, 1/16/01). On April 17, 2001, the trial court set restitution payments at \$500 a month on each cause number and continued the hearing until July 18, 2001³ to allow Vansickle to submit financial declarations and documentation. Supp. 2CP __ (sub. no. 64, Order Modifying Sentence, 4/18/01). On September 25, 2001, the State filed a motion to hold Vansickle in contempt alleging that he had failed to file the required monthly financial reports relative to September 1999 through April 2001, that his monthly financial reports for May 2001 through July 2001 were incomplete, and that he had failed to file monthly financial reports since July 2001. Supp. 2CP __ (sub. no. 66, State's Brief in Support of Motion to Hold Defendant in Contempt, 9/25/01). The State conceded that Vansickle was in compliance with the trial court order that he make \$500 monthly payments on his legal financial obligations. Supp. 2CP __ (sub. no. 66, supra).

On March 22, 2002, the trial court sanctioned Vansickle to 120 days of incarceration for failing to make restitution payments from April

³ Although the record is unclear, it appears that the trial court continued the review hearing until October 25, 2001.

2000 to May 2000, February 2001 to April 2001, and October 2001 to November 2001. Supp. 1CP __ (sub. no. 67, Findings of Fact, Conclusions of Law, Order Modifying Sentence and Jail Commitment, 3/22/02). On September 13, 2002, the trial court sanctioned Vansickle with 300 days of incarceration for failing to make restitution payments from December 2001 to August 2002, and for failing to file monthly financial reports from October 2001 to July 2002; the trial court also ordered Vansickle to file monthly financial reports and make restitution payments as previously ordered. Supp. 1CP __ (sub. no. 71, Order Modifying Sentence and Jail Commitment, 9/13/02). On September 18, 2002, the trial court issued a bench warrant for Vansickle's arrest because he failed to report to jail to serve his sentence; Vansickle was detained at the King County Jail on March 11, 2003. Supp. 1CP __ (sub. no. 72, Order for Bench Warrant, 9/18/2002); Supp. 1CP __ (sub. no. 74, Bench Warrant, 3/20/2003).

On March 24, 2003, the trial court entered an order extending its jurisdiction over the legal financial obligations of Vansickle's March 3, 1992 conviction.⁴ Supp. 1CP __ (sub. no. 76, Order Extending Jurisdiction, 3/24/2003).

⁴ The trial court entered orders extending jurisdiction over the legal financial obligations of Vansickle's 1996 conviction on May 2, 2006 and

3. Current sentence violations

On October 24, 2003, the trial court found Vansickle had violated his sentence by failing to make restitution payments from September 2002 to October 2003, and by failing to file monthly financial reports from October 2002 to October 2003 (25 violations); the trial court deferred sentencing until August 5, 2004. Supp. 3CP __ (sub. no. 75, Order Modifying Sentence and Jail Commitment, 10/24/03). Vansickle failed to appear at the August 5, 2004 sentencing hearing and the trial court issued a bench warrant for his arrest. Supp. 3CP __ (sub. no. 79, Bench Warrant, 8/5/04). The State filed motions to show cause for Vansickle's violations of his sentencing conditions on March 24, 2006, October 3, 2007, and October 9, 2007. Supp. 2CP __ (sub. no. 95, Motion to Show Cause, 3/24/06); Supp. 3CP __ (sub. no. 81, Motion to Show Cause, 10/3/07); Supp. 3CP __ (sub. no. 85, Motion to Show Cause, 10/9/07). Vansickle was arrested and booked into the King County Jail on March 5, 2010. Supp. 3CP __ (sub. no. 86, Bench Warrant, 3/15/10).

Vansickle's 1997 conviction on October 9, 2007. Supp. 2CP __ (sub. no. 97, Order Extending Jurisdiction, 5/2/2006); Supp. 3CP __ (sub. no. 83, Order Extending Jurisdiction, 10/9/07).

On May 27, 2010, the trial court held a hearing on Vansickle's alleged violations of his sentence. RP 1.⁵ The trial court found Vansickle committed one continuing violation of his sentence for failing to make restitution payments between November 2003 and March 2010 for the months in which he was not incarcerated, and that he committed 39 violations of his sentence for failing to file monthly financial reports between December 2003 and March 2010 for the months in which he was not incarcerated. CP 36-38. The trial court sentenced Vansickle to 15 days of incarceration for each violation, including the 25 violations found on October 24, 2003, for a total of 975 days of incarceration. CP 36-38. Vansickle timely appeals. CP 73-77.

C. ARGUMENT

1. VANSICKLE'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT INCARCERATED HIM FOR FAILING TO PAY RESTITUTION WITHOUT FIRST INQUIRING INTO HIS ABILITY TO PAY RESTITUTION

Persons convicted of a crime in Washington State may be subject to payment of legal financial obligations as a condition of their sentence.

⁵ There is one volume of the verbatim report of proceedings dated May 27, 2010.

RCW 9.94A.760(1).⁶ A trial court may sanction an offender who violates a condition of his sentence. RCW 9.94B.040. Under RCW 9.94B.040(3)(b), a trial court “shall require the offender to show cause why the offender should not be punished for noncompliance.” The State has the burden of showing by a preponderance of the evidence that the offender has violated a condition of his sentence. RCW 9.94B.040(3)(c). If the State carries its burden, the trial court may sanction the offender to confinement for a period not to exceed sixty days for each violation. RCW 9.94B.040(3)(c).

In the context of sanctions against an offender for failing to meet his legal financial obligations, a trial court violates the offender’s due process rights by ordering incarceration if the offender’s failure to pay was due to his indigence. State v. Nason, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (citing Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 111, 52 P.3d 485 (2002)). Although the offender carries the burden of showing that nonpayment of legal financial obligations was not willful, due process imposes an independent duty on the trial court to inquire into the offender’s ability to pay. Nason, 168 Wn.2d at 945 (citing Smith, 147 Wn.2d at 112). The trial court’s duty to inquire into the offender’s ability

⁶ RCW 9.94A.760(1) provides in part: “Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence.”

to pay comes at “the point of collection and when sanctions are sought for nonpayment.” Nason, 168 Wn.2d at 945 (quoting State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997)).

In Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct 2064, 76 L. Ed. 2d 221 (1983), the United States Supreme Court held that an offender’s due process rights were violated by revoking probation for nonpayment of fines where the offender was unable to pay because he was indigent. “[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure pay.” Bearden, 461 U.S. at 672 (emphasis added).

Bearden suggests a three-part inquiry the trial court must conduct before it may sanction an offender to incarceration for failing to make restitution payments. 460 U.S. at 672. Under Bearden, before a trial court may subject an offender to incarceration for failing to pay restitution, it must consider (1) whether the offender is able to pay restitution, (2) whether the offender has made bona fide effort to acquire the resources to pay, and, if necessary, (3) whether alternative measures other than imprisonment are available. Bearden, 460 U.S. at 672 (see also Smith, 147 Wn.2d at 112). Thus, a trial court finding that an offender willfully refused to pay restitution is unsupported absent a Bearden inquiry and is tantamount to incarcerating an indigent offender for his inability to pay

restitution in violation of the due process clause of the fourteenth amendment of the United States Constitution.

Following Bearden, the Washington State Supreme Court held in Smith that a trial court has an independent duty to inquire into an offender's ability to pay legal financial obligations before ordering incarceration, despite the offender's burden in Washington State to prove his inability to pay. 147 Wn.2d at 112. In granting Smith's petition for writ of habeas corpus, the Washington Supreme Court reasoned, "because the record shows no inquiry at all into Smith's ability to pay her fines, much less the three-part inquiry required by Bearden, her commitment violated the fourteenth amendment to the United States Constitution." Smith, 147 Wn.2d at 112.

As in Smith, the trial court here failed to conduct a Bearden analysis before sanctioning Vansickle to 210 days of incarceration on 14 violations of failing to pay restitution and, thus, the trial court order imposing incarceration violated Vansickle's due process rights. At the May 27, 2010 sentence violation hearing, Vansickle asserted he was willing to comply with his restitution orders, but he has been unable to pay restitution because of his indigence. RP 14-18. Specifically, Vansickle asserted that he has been unable to comply with his restitution orders because of his 2001 bankruptcy, continuing child support obligations to

his three children, his father's bout with pancreatic cancer and resulting death, his own medical issues, his periods of incarceration, and his lack of employment. RP 14-18. The trial court did not respond to Vansickle's assertions that he was indigent and thus unable to pay restitution. RP 18-19. Instead, the trial court summarily found Vansickle in violation of his sentence and ordered him to 15 days of incarceration on each violation. RP 18-19. Further, the trial court did not enter any findings of fact indicating that it did not find Vansickle's testimony regarding his financial situation credible, that Vansickle was capable of paying restitution, or that Vansickle's failure to pay restitution was willful. The trial court's oral ruling is similarly devoid of any finding that Vansickle was capable of paying restitution, and thus, cannot support a finding that he willfully failed to pay restitution. RP 18-22.

Because the trial court failed to inquire into Vansickle's ability to pay restitution before imposing incarceration, contrary to Bearden and Smith, the trial court order modifying Vansickle's sentence violated his due process rights. Accordingly, this court should vacate that portion of the trial court's order imposing incarceration for failing to pay restitution.

2. THE TRIAL COURT LACKED JURISDICTION
TO SANCTION VANSICKLE FOR VIOLATING
CONDITIONS OF HIS SENTENCE RELATIVE
TO HIS 1992 CONVICTION

The trial court order modifying Vansickle's sentence indicates that it sanctioned him to 15 days of incarceration on each of 65 violations of his sentences relative to three previous convictions. However, because the trial court had lost jurisdiction to enforce the legal financial obligations of Vansickle's 1992 conviction, its order modifying his sentence is void. Additionally, because it is unclear whether the trial court would have imposed the same sanctions for violating conditions of two sentences as opposed to three sentences, this court should remand for a new sentence violation hearing.

A party may challenge a trial court's jurisdiction at any time and an order entered by a court lacking jurisdiction is void. ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Commission, 15 Wn. App. 788, 801, 214 P.3d 938 (2009). When a trial court lacks jurisdiction, the only permissible action it may take is to dismiss the action. ZDI Gaming, 15 Wn. App. at 801.

"The primary purpose of statutory construction is to give effect to the legislature's intent." City of Bellevue v. E. Bellevue Cmty. Council, 138 Wn.2d 937, 944, 983 P.2d 602 (1999). "When a statute is not

ambiguous, a court must determine the Legislature's intent by the language of the statute alone." State v. S.M.H., 76 Wn. App. 550, 559, 887 P.2d 903 (1995). The court must then apply the language as written. In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 591, 980 P.2d 1271 (1999). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

The language used in the statutes addressing legal financial obligations and restitution plainly indicates that Vansickle's obligations relative to his 1992 conviction had expired. The legal financial obligation statute provides in part:

[L]egal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend the criminal judgment an additional ten years for payment of legal financial obligations including crime victim's assessments.

RCW 9.94A.760(4).

Similarly, the restitution statute provides in part:

For purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's

release from total confinement or ten years subsequent to the entry of judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. . . .”

RCW 9.94A.753(4).

Thus, “[t]he plain language of the statute dictates that [legal financial obligations] from pre-July 2000 offenses expire after the 10-year limitation period.” State v. Gossage, 165 Wn.2d 1, 7, 195 P.3d 525 (2008). Further, “if the court does not extend the criminal judgment, the judgment expires and the [legal financial obligations] are unenforceable.” Gossage, 165 Wn.2d at 7.

By the plain language of RCW 9.94A.760(4) and RCW 9.94A.753(4), the 10-year limitation period begins to run when the offender is released from “total confinement.” “Total confinement” means “confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day.” In re Detention of Albrecht, 147 Wn.2d 1, 8, 51 P.3d 73 (2002) (quoting former RCW 9.94A.030(35)

(1996)). Accordingly, the 10-year limitation period is not tolled while the offender is on community custody or while under partial confinement.⁷

Moreover, the Washington State Supreme Court has made it clear that with respect to the initiation of the 10-year enforcement period for LFOs, “‘release from total confinement’ can only mean release from confinement for the crime for which restitution was ordered.” Sappenfield, 138 Wn.2d at 593 (emphasis added). Accordingly, time spent in confinement for a different violation does not toll the trial court’s jurisdiction over the restitution order. Sappenfield, 138 Wn.2d at 593. This court has also held that “total confinement” does not include subsequent periods of incarceration for violations of conditions of community custody or payment of restitution related to the original crime. In re Personal Restraint of Spires, 151 Wn. App. 236, 241-42, 211 P.3d 437 (2009).

Here, the trial court had lost jurisdiction to enforce the legal financial obligations related to Vansickle’s 1992 conviction because the order extending jurisdiction was entered after 10-year limitation period had ended. Supp 1CP (sub no. 76, supra). The record shows Vansickle

⁷ “‘Partial confinement’ means confinement for 12 months or less in a state facility for a substantial portion of each day, or, if home detention or work crew has been ordered, confinement in an approved residence for a substantial portion of each day.” State v. Gartrell, 138 Wn. App. 787, 790, 158 P.3d 636 (2007) (citing RCW 9.94A.030(32)).

completed his term of total confinement on January 5, 1993. Thus, the trial court's jurisdiction over Vansickle's legal financial obligations related to his 1992 conviction would expire on January 5, 2003, unless it entered an order extending its jurisdiction prior to this date. However, the trial court order extending its jurisdiction was not entered until March 24, 2003, after its jurisdiction had already expired. Id. Thus, the order extending jurisdiction was void and the trial court's jurisdiction over Vansickle's legal financial obligations related to his 1992 conviction ended on January 5, 2003. Accordingly, the trial court order imposing sanctions for Vansickle's sentence violations in regard to his 1992 conviction is similarly void and should be vacated. Moreover, because it is unclear whether the trial court would have imposed the same sanctions in regard to Vansickle's obligations on his two remaining convictions had it known that it did not have jurisdiction over the 1992 sentence, this court should remand for a new sentence violation hearing.

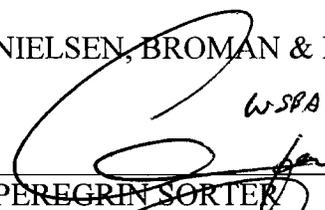
D. CONCLUSION

For the foregoing reasons the Court should vacate the trial court's order modifying Vansickle's sentence and remand for a new sentence violation hearing.

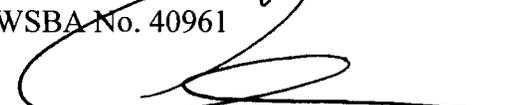
Respectfully submitted this 17th day of November, 2010.

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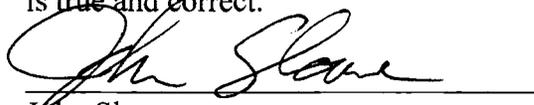
Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

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Containing a copy of the brief of appellant, in State v. Troy Vansickle,
Cause No. 65634-1-I, in the Court of Appeals, Division I, for the state of Washington.

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



John Sloane
Done in Seattle, Washington

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