

66203-1

66203-1

NO. 66203-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALFREDO LOPEZ-CRUZ,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. Alfredo Lopez-Cruz's convictions for trafficking in stolen property in the first degree and theft in the first degree, based on a single course of conduct, violate state and federal constitutional double jeopardy provisions.

2. The court erred by imposing legal financial obligations without inquiring into Mr. Lopez-Cruz's indigence or requiring proof that the costs imposed were actually incurred in the case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The double jeopardy clause of the Fifth Amendment to United States Constitution and Article 1, section 9 of the Washington Constitution protect against multiple punishments for the same offense. Here, the two convictions for trafficking and theft were part of the same course of conduct for purposes of double jeopardy. Did Mr. Lopez-Cruz's two convictions therefore violate state and federal double jeopardy protections?

2. A court lacks authority to impose legal financial obligations unless it first determines that the individual has some ability to pay and assesses the actual cost of the items for which the defendant is required to pay. Here, the court imposed legal financial obligations without any information about Mr. Lopez-Cruz's ability to pay, even

though it had previously found him indigent, and did not ascertain whether the requested costs were actually incurred during the trial. Did the court lack evidence that Mr. Lopez-Cruz had the ability to pay costs and lack authority to impose non-mandatory legal financial obligations?

C. STATEMENT OF THE CASE.

Alfredo Lopez-Cruz lived in Sedro-Wooley, Washington, and he was known for fixing cars. 10/4/10 RP 92, 97.¹ When Mateo Cholula, the owner of a 1997 Honda Civic, needed a new engine for his car, he approached Mr. Lopez-Cruz for assistance. *Id.* They reached a deal, for which Mr. Cholula agreed to pay \$1800 in cash, and Mr. Lopez-Cruz agreed to install a working engine. *Id.* at 95-96.

Jose Tapia, Sr., owned a 1999 Acura, which he had been attempting to sell for approximately two years. 10/4/10 RP 12-14. Since Mr. Tapia's sales method involved leaving it parked on the public road with a "for sale" sign in the window, it took several days for him to notice it was missing, and he initially assumed his son had taken it to college. *Id.* at 14. Mr. Tapia's Acura was recovered

¹ The Verbatim Report of Proceedings consists of volumes from proceedings on October 4, 5, 6, and November 3, 2010, which will be referred to as "RP," accompanied by the date, ie: "10/4/10 RP ___."

two months later in a gravel pit, with most of its vital parts removed, including its engine. Id. at 24. The stolen engine was recovered from Mr. Cholula's Honda; police matched up the vehicle identification numbers (VIN's). 10/5/10 RP 10-11.

Mr. Lopez-Cruz was charged with two counts of theft in the first degree and one count of trafficking in stolen property in the first degree. CP 8-9.

Following a bench trial, the Honorable David Needy acquitted Mr. Lopez-Cruz of one count of theft in the first degree² and convicted him of one count of theft in the first degree and trafficking in stolen property in the first degree. CP 81-85. This appeal follows. CP 80.

D. ARGUMENT

1. MR. LOPEZ-CRUZ'S CONVICTIONS FOR TRAFFICKING AND THEFT, BASED ON A SINGLE EPISODE AND THE SAME EVIDENCE, VIOLATE DOUBLE JEOPARDY.

a. Double jeopardy principles bar a defendant from being convicted more than once for the same criminal conduct.

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the

² Mr. Lopez-Cruz was acquitted of stealing the car, itself. CP 81-85.

same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. amend. 5; Const. art. 1, § 9. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); RAP 2.5(a). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); Gocken, 127 Wn.2d at 100. Where a defendant is charged with violating two separate statutory

provisions for a single act, courts must determine whether, in light of legislative intent, the charged crimes constitute the same offense. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932). To determine this, courts should ask if the crimes are the same in law and fact. Offenses are the same in fact “when they arise from the same act or transaction.” State v. Martin, 149 Wn. App. 689, 699, 205 P.3d 931 (2009). Offenses are the same in law “when proof of one would also prove the other.” Id.

The inquiry must focus on the offenses as they were charged and prosecuted in a given case, rather than a mere abstract comparison of statutory elements. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (defendant’s conviction for both rape and felony murder in the commission of a rape violated the prohibition against double jeopardy, even though one could be guilty under the felony murder statute without committing a rape); In re Pers. Restraint of Orange, 152 Wn.2d 795, 818-19, 100 P.3d 291 (2004). If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694; State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005).

b. The two convictions, as charged and prosecuted, violated double jeopardy. The Court of Appeals has analogously held that possessing stolen property in the first degree is a lesser offense of trafficking in stolen property. State v. Knight, 54 Wn. App. 143, 154-56, 772 P.2d 1042, rev. denied, 113 Wn.2d 1014 (1989) (conviction for attempted trafficking in stolen property in the first degree reversed where trial court failed to instruct the jury on the lesser crimes of first and second degree possession of stolen property). Convictions for both offenses violate the prohibition against double jeopardy since “the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.” Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

The appropriate inquiry here focuses on whether the evidence to prove count II (trafficking in stolen property), as charged and prosecuted, also proved the crime of theft in the first degree (Count III), as charged and prosecuted. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005); Orange, 152 Wn.2d at 818. It is irrelevant whether, in another scenario, the charge of trafficking in stolen property could theoretically be established without also proving theft in the first degree. Whalen, 445 U.S. at

694. Here, Mr. Lopez-Cruz was charged and prosecuted for trafficking in stolen property, which was precisely the same act and the same evidence which proved the crime of theft in the first degree. Hence, the two convictions violate the protections against double jeopardy. Whalen, 445 U.S. at 694; Orange, 152 Wn.2d at 818.

In United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), a conviction for criminal contempt was held to bar a subsequent prosecution for possession of drugs. Since the contempt charge was based on a violation of a court order not to commit any criminal offenses, and possession of drugs was the criminal offense, proof of the contempt charge also proved the drug charge, and the offenses were held to be the same. Id. at 699-700. This was so even though the crimes of criminal contempt and drug possession clearly have completely different elements. See also Brown, 432 U.S. at 164 (“separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition”); State v. Hughes, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009) (convictions for rape and child rape based on the same act of intercourse violated the prohibition against double jeopardy

even though one element of child rape required proof of age and one element of rape required proof of non-consent).

The “property” in both charges was the same; that is, the engine, or the value thereof, from the complainant’s car, as was the charging period for both offenses. 10/4/10 RP 95-96; 10/5/10 RP 51-55; CP 84-85.

The very same evidence that the State offered to prove Count II also proved the crime in Count III. The two offenses, as charged and prosecuted, constituted the same offense; therefore Mr. Lopez-Cruz’s convictions on both Counts II and III violate the prohibition against double jeopardy. See Orange, 152 Wn.2d at 820 (two convictions violated prohibition against double jeopardy where “the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault”).

c. The proper remedy is vacation of the conviction in Count III. Where, as here, two convictions violate the prohibition against double jeopardy, the remedy is to vacate the conviction for the offense that formed part of the proof of the other offense. State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714, (2007); State v.

Read, 100 Wn. App. 776, 792-93, 998 P.2d 897 (2000), aff'd. on other grounds, 147 Wn.2d 238, 53 P.3d 26 (2002). Accordingly, the conviction for theft in the first degree in Count III must be vacated.

2. THE COURT IMPROPERLY IMPOSED
LEGAL FINANCIAL OBLIGATIONS BASED
ON AN UNSUPPORTED AND INCORRECT
FINDING MR. LOPEZ-CRUZ HAD THE
ABILITY TO PAY.

Courts may require an indigent defendant to reimburse the state for only certain authorized costs and only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty. Id.

a. There is no evidence to support the trial court's finding that Mr. Lopez-Cruz had the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.”

118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the constitution “direct [a court] to consider ability to pay.” Id. at 915-16. RCW 10.01.160(3) provides,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Here, the court made a finding on the Judgment and Sentence that Mr. Lopez-Cruz had the ability to pay financial obligations. CP 69-79.³ But a finding must have support in the record. A trial court’s findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

There was no evidence Mr. Lopez-Cruz was employed or employable following his release from prison. Mr. Lopez-Cruz was represented by a court-appointed attorney during trial and the court

³ In the Judgment and Sentence, the court’s findings include the statement:

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 the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 5.

found he remained unable to pay for counsel on appeal. Yet inexplicably, the court entered a finding on the Judgment and Sentence that he “has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 5.

The trial court’s explicit finding that Mr. Lopez-Cruz had the ability to pay legal financial obligations is contrary to the record and should be stricken. Moreover, because the record does not support a finding that Mr. Lopez-Cruz has the present or future ability to pay costs, non-mandatory legal financial obligations may not be imposed. Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

b. The court improperly and without authority ordered Mr. Lopez-Cruz to pay discretionary costs and penalties. Costs that may be imposed on a criminal defendant must be “expenses specially incurred by the state in prosecuting” and convicting the defendant. RCW 10.01.160(1), (2). “Costs may be imposed only upon a convicted defendant,” and therefore, costs incurred when a defendant is not convicted may not be imposed. RCW 10.01.160(1).

The court ordered Mr. Lopez-Cruz to pay a \$200 “criminal filing fee.” CP 73. This amount appears preprinted on the

Judgment and Sentence form as if it is imposed as a matter of routine rather than based on the amount actually incurred. Id. Because there is no evidence in the record to establish the actual cost, the trial court erred in imposing the filing fee.

Furthermore, the statute “encourages” judges to consider the offender’s financial obligations and actual ability to pay before determining that a penalty should be imposed. RCW 10.99.080(5). The trial court did not evaluate Mr. Lopez-Cruz’s ability to pay or the uncontested evidence of his indigence before imposing an added penalty.

One of the goals of the Sentencing Reform Act is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Washington State Sentencing Guidelines Commission, Adult Sentencing Manual, I-vii (2008). But the amount of fines and fees imposed upon conviction vary greatly by “gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced.” See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008). This study found that, three years post-sentencing, less than 20 percent of the

fees, fines and restitution had been paid for roughly three quarters of the cases in the study. Id. at 20.

The court's imposition of legal financial obligations without giving any consideration to the person's ability to pay exacerbates the problems that those released from confinement must face and may, in fact, lead to increased recidivism.

It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

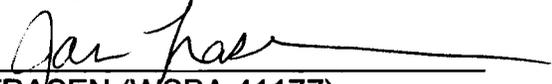
The court's imposition of substantial legal financial obligations, even though it knew of Lopez-Cruz's ongoing indigence, coupled with the obvious hardship of reentering society after spending time in prison, constitutes significant punishment that violates the right to equal protection of the law, is contrary to statute, and must be reconsidered on remand, giving attention to his poverty.

E. CONCLUSION

For the foregoing reasons, Mr. Lopez-Cruz respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 4th day of May, 2011.

Respectfully submitted,



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Respondent,)	
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v.)	NO. 66203-1-I
)	
ALFREDO LOPEZ-CRUZ)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 4TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF MAY, 2011.

X _____ *JA*

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