

67271-1

67271-1

COA NO. 67271-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALLAN PARMELEE,

Appellant.

REC'D
FEB 02 2012
King County Prosecutor
Appellate Unit

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

The Honorable Gregory Canova, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 FEB -2 PM 4:05

TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY.....1

ACCRUAL OF INTEREST ON THE VICTIM PENALTY
ASSESSMENT MUST RUN FROM THE DATE OF THE
CURRENT JUDGMENT AND SENTENCE BECAUSE THE
PREVIOUS JUDGMENTS NO LONGER LEGALLY EXIST AS
A RESULT OF RESENTENCING.....1

B. CONCLUSION.....5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Carle,
93 Wn.2d 31, 604 P.2d 1293 (1980)..... 1-3

In re Pers. Restraint of Goodwin,
146 Wn.2d 861, 877, 50 P.3d 618 (2002)..... 1

State v. Amos,
147 Wn. App. 217, 195 P.3d 564 (2008)..... 3

State v. Eilts,
94 Wn.2d 489, 617 P.2d 993 (1980)..... 1, 3

State v. Freeman,
153 Wn.2d 765, 108 P.3d 753 (2005) 5

State v. Harrison,
148 Wn.2d 550, 61 P.3d 1104 (2003)..... 4

State v. Kilgore,
167 Wn.2d 28, 216 P.3d 393 (2009)..... 2, 3

State v. Toney,
149 Wn. App. 787, 205 P.3d 944 (2009),
review denied, 168 Wn.2d 1027, 230 P.3d 1061 (2010) 3

State v. Tvedt,
153 Wn.2d 705, 107 P.3d 728 (2005) 4

RULES, STATUTES AND OTHERS

Black's Law Dictionary 1584 (8th Ed. 2004). 3

U.S. Const. amend. V 4

Wash. Const. art. I, § 9..... 4

A. ARGUMENT IN REPLY

ACCRUAL OF INTEREST ON THE VICTIM PENALTY ASSESSMENT MUST RUN FROM THE DATE OF THE CURRENT JUDGMENT AND SENTENCE BECAUSE THE PREVIOUS JUDGMENTS NO LONGER LEGALLY EXIST AS A RESULT OF RESENTENCING.

The State claims interest accrues from the original judgment and sentence because where one aspect of a sentence is deemed erroneous, the otherwise correct portions remain valid. Brief of Respondent (BOR) at 7-12. That claim fails.

Parmelee does not dispute an appellate court has the authority in appropriate circumstances to invalidate part of a sentence and remand for simple correction of the invalid part, leaving the rest of the sentence intact. See In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002) ("Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.") (citing In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980) ("We declare only that the trial court must correct the erroneous portion of petitioner's sentence by properly resentencing him without regard for RCW 9.41.025 and its attendant consequences.")); State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980) (remanding for modification of the restitution order consistent with opinion: "It is well established that the imposition of an unauthorized

sentence does not require vacation of the entire judgment or granting of a new trial. [. . .] The error is grounds for reversing only the erroneous portion of the sentence imposed." (citing Carle, 93 Wn.2d 31).

But that is not what happened here. This Court did not remand for simple correction of an erroneous portion of Parmelee's earlier sentence. This Court's directive is quite clear: "The sentence is vacated and the case is remanded for resentencing and such other proceedings as are consistent with this opinion." CP 118.

This court *vacated* the sentence and remanded for resentencing accordingly. This Court did not remand for correction of the sentence.

"The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). In accordance with this Court's directive, the trial court exercised its discretion on remand by conducting a full, adversarial resentencing proceeding, giving both sides the opportunity to be heard. 1RP 35-51. The court sentenced Parmelee to a reduced term of confinement. 1RP 42-43, 45. The court exercised its discretion in other ways. It reduced Parmelee's offender score. 1RP 37-39, 43. It reduced legal financial obligations and exercised its discretion in refusing to waive interest. 1RP 44-46, 49-50. It addressed and rejected Parmelee's

certificate of discharge and credit for time served arguments. 1RP 44-45, 47-49.

Remand for resentencing and remand for correction of the judgment and sentence are two different things. Kilgore, 167 Wn.2d at 40; State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) ("Here, Toney's sentence was not final because our remand did not limit the trial court to making a ministerial correction. Rather, we unequivocally 'remand[ed] for resentencing.'"), review denied, 168 Wn.2d 1027, 230 P.3d 1061 (2010).

An appellate court may, in fashioning the remedy on remand, specify the valid portions of the original judgment and sentence remain legally intact. Carle, 93 Wn.2d at 34; Eilts, 94 Wn.2d at 496. If the trial court simply corrects the original judgment and sentence in accordance with appellate court directive rather than resentence an offender, it is the original judgment and sentence entered by the original trial court that controls. Kilgore, 167 Wn.2d at 40-41.

But here the previous judgment and sentence was vacated. CP 118. To "vacate" means "[t]o nullify or cancel; make void; invalidate." Black's Law Dictionary 1584 (8th Ed. 2004). "[R]emand for resentencing renders the prior judgment and sentence void and results in a new final judgment, which is appealable as a matter of right." State v. Amos, 147

Wn. App. 217, 224 n.1, 195 P.3d 564 (2008) (citing State v. Harrison, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003)). The State does not explain how interest on a legal financial obligation may accrue from the entry date of a void judgment and sentence.

One further response to the State's brief is in order. Referencing appeal from the 2002 judgment and sentence where the State conceded the no contact order expired five years from the date of the original 1999 sentence, the State maintains "[t]he State did not (and could not) argue that when the 1999 sentence was reversed, that no-contact order became 'void' and the five year statutory maximum should begin to run anew." BOR at 12 n.4.

Curiously, the State fails to mention the trial prosecutor at the 2011 resentencing hearing argued just that. The prosecutor actually requested the no contact order be entered from the date of the resentencing "since we are entering a judgment and sentence today." 1RP 40.

That request was properly denied and for good reason. 1RP 46. Unlike the State, every criminal defendant is protected by a number of constitutional rights. Among them is the right to be free from double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); U.S. Const. amend. V; Wash. Const. art. I, § 9. An offender cannot be constitutionally subject to multiple punishments for the same offense.

State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Once the statutory maximum amount of time for the no contact order ran its course, the hands of time could not be reset on that order without violating Parmelee's right to be free from double jeopardy.

Thus, contrary to the State's claim, the result is not the same for the issue presented in this appeal. BOR at 12 n.4. Interest accrual from the date of the judgment and sentence entered in 2011 offends no constitutional right.

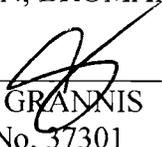
B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should remand for clarification of the judgment and sentence to specify the start date of interest accrual is June 14, 2011.

DATED this 24th day of February 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON, DSHS,)	
)	
Respondent,)	
)	
v.)	COA NO. 67271-1-1
)	
ALLAN PARMELEE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF FEBRUARY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALLAN PARMELEE
DOC NO. 793782
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF FEBRUARY, 2012.

x Patrick Mayovsky

**FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB -2 PM 4:05**