

73312-5

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FILED
October 30, 2015
Court of Appeals
Division I
State of Washington

COA NO. 73312-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH SERNA,

Appellant.

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

The Honorable Joseph P. Wilson, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
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STATUTES

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A. ASSIGNMENT OF ERROR

The judgment and sentence contains a clerical error regarding imposition of a cost and the total amount of legal financial obligations.

Issue Pertaining to Assignment of Error

Where the trial court expressly waived the \$200 cost under RCW 46.61.5054(1) on the record at sentencing, whether the judgment and sentence including that cost constitutes a clerical error that should be corrected?

B. STATEMENT OF THE CASE

The State charged Joseph Serna with driving under the influence of an intoxicating liquor. CP 85. A jury found Serna guilty. CP 42. The court sentenced Serna to 60 months confinement. CP 18.

At the sentencing hearing, the prosecutor addressed legal financial obligations, telling the court he was "recommending the minimum, \$600. There is some other assessment that the Court can waive. I have no objection to you doing so, if there is information to support that." 5RP¹ 4. Defense counsel noted Serna had outstanding legal financial obligations and child support to pay, and asked the court to waive all non-mandatory

¹ The verbatim report of proceedings is referenced as follows: 1RP – 1/29/15; 2RP – 2/17/15; 3RP – 2/18/15; 4RP – 2/19/15 (court reporter mistakenly put 3/19/15 as the date); 5RP – 3/26/15.

fees and costs in the present case. 5RP 6. In rendering sentence, the judge said "I have to impose a \$500 victim penalty assessment and the \$100 biological sample fee so I will impose those. I will waive court costs and attorney's fees." 5RP 12. The following exchange between the judge and prosecutor subsequently took place:

The Court: You said the DUI assessment and fees. What particular are there –

Mr. Hunter: Well, just the one that I know for sure would be applicable in superior court.

The Court: The \$200 fee?

Mr. Hunter: Yes. So when you said waived, I already wrote waived on that on the J and S, if you intended that. If you want to impose it I will change it.

The Court: Do I have authority to waive that?

Mr. Hunter: It was in the last sentence of that paragraph B said upon verified petition of the person assessed the fee, the Court may suspend all or part, I guess I let the Court consider the – or – so I guess __

The Court: I am not going to impose the \$200. I will not impose attorney's fees or court costs.

5RP 13.

The judgment and sentence includes the \$200 fee that the judge said he waived, for a total of \$800 in legal financial obligations. CP 20.

Serna appeals. CP 1-13.

C. ARGUMENT

THE JUDGMENT AND SENTENCE MUST BE CORRECTED TO REMOVE THE \$200 COST AND REFLECT A TOTAL AMOUNT OF \$600 IN LEGAL FINANCIAL OBLIGATIONS.

RCW 46.61.5054(1)(a) provides: "In addition to penalties set forth in *RCW 46.61.5051 through 46.61.5053 until September 1, 1995, and RCW 46.61.5055 thereafter, a two hundred dollar fee shall be assessed to a person who is either convicted, sentenced to a lesser charge, or given deferred prosecution, as a result of an arrest for violating RCW 46.61.502, 46.61.504, 46.61.520, or 46.61.522." RCW 46.61.5054(1)(b) states "Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay."

The judgment and sentence includes the \$200 fee under RCW 46.61.5054(1). CP 20. The total amount of legal financial obligations is listed as \$800, which includes the \$200 fee, the \$500 victim assessment, and the \$100 DNA fee. CP 20.

Inclusion of the \$200 fee is a clerical error. The record clearly shows the court intended to waive that fee. 5RP 13. The prosecutor told the court he wrote "waived" on the judgment and sentence, but he wrote it in the wrong place. 5RP 13. The handwritten word "waived" appears next to "emergency response costs" rather than "other costs" pursuant to RCW

46.61.5054(1). CP 20. Further, the prosecutor did not correct the total amount of legal financial obligations to \$600 in the judgment and sentence, which is all that remains after the \$200 cost is removed. CP 20.

Where, as here, "the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009). The remedy is to remand to the trial court for correction of the judgment and sentence to remove the \$200 fee and correct the total amount to \$600. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (remanding to trial court for correction of the scrivener's errors in the judgment and sentence).

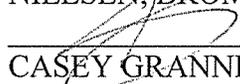
D. CONCLUSION

For the reasons set forth, Serna requests correction of the judgment and sentence.

DATED this 20th day of October 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC


CASEY GRANNIS

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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 73312-5-1
)	
JOSEPH SERNA,)	
)	
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 30TH DAY OF OCOTBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH SERNA
DOC NO. 855138
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER 2015.

x *Patrick Mayovsky*