70002-2

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No. 70002-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

FREDERICK E. HARDTKE,
Appellant.

REPLY BRIEF OF APPELLANT

ORIGINAL

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III. INTRODUCTION

Respondent's arguments are unpersuasive.

IV. ARGUMENT

A. The San Juan County Sheriff is authorized to expend funds to monitor pretrial defendants.

Apparently conceding that a trial court is not authorized by statute or court rule to impose the cost of pretrial electronic monitoring on a defendant, the State creatively argues that a lack of statutory authority for the public expenditure of funds to implement a pretrial release condition implies that the cost should be borne by the defendant. The State appears to argue that, without this authorization, electronic monitoring was not available unless the defendant paid the costs.

However, a county sheriff is required to carry out the orders of the court. RCW 36.28.010(c). Such orders can include the imposition of electronic monitoring as a condition of pretrial release. RCW 10.21.030(2)(d). The legislature has not conditioned the availability of electronic monitoring on the requirement that the defendant pay the associated costs.[1] Therefore, the legislature has authorized funding for pretrial electronic monitoring.

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[1] The lack of a legislative condition that the defendant pay the costs of pretrial electronic monitoring is in contrast to the legislative requirement that defendants pay the costs of

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It appears true that the legislature has not expressly and specifically authorized counties to pay the costs of electronic monitoring. The undersigned attorney could not find authority for counties to pay the costs of electronic monitoring imposed in a sentence, either. Yet, the legislature has authorized courts to impose electronic monitoring in sentences. *See, e.g.,* RCW 9.94A.680 (alternatives to total confinement in the SRA). By mandating electronic monitoring, the legislature implicitly has authorized funding for it.

RCW 10.21.030(2)(d) does authorize electronic monitoring as a pretrial condition of release "when available." There is no evidence in the record that electronic monitoring was not available. In fact, Mr. Hardtke was monitored electronically.

Thus, electronic monitoring was available as a condition the court could impose. The court apparently found that this condition, combined with the reduced performance bond and other conditions, was sufficient to protect the public. The court was not authorized to impose the costs of this monitoring on Mr. Hardtke, as explained in Mr. Hardtke's opening brief and not disputed by the State. The court erred by imposing this cost.

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the 24/7 alcohol monitoring program cited in the State's memorandum. *See* RCW 36.28A.350 ("The court may condition any bond or pretrial release upon participation in the 24/7 sobriety program and payment of associated costs and expenses, if available.").

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B. Mr. Hardtke could not agree to an illegal sentence

The State argues that Mr. Hardtke should be held to the terms of the plea agreement and cannot argue on appeal that the sentence is illegal. However, the trial court was without authorization to impose an illegal sentence. Mr. Hardtke cannot agree to such a sentence. *Personal Restraint of Goodwin*, 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002); *Personal Restraint of Moore*, 116 Wn.2d 30, 38–39, 803 P.2d 300 (1991).

C. The appropriate remedy is remand only for the purposes of removing the cost of electronic monitoring.

Since the sentence imposed by the trial court contains error, the sentence should be reversed. However, only the erroneous portion of the sentence should be reversed. *State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980); *Personal Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980).

V. CONCLUSION

The trial court lacked the statutory authority to impose the costs of pretrial electronic monitoring on Mr. Hardkte. He could not agree to this erroneous sentence and thereby waive his right to appeal it. This court should reverse the imposition of the costs of pretrial monitoring.

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Respectfully submitted,

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Dated: December 20, 2013

By: _____

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STATE OF WASHINGTON, Respondent, v. FREDERICK E. HARDTKE, Appellant.	DECLARATION OF DELIVERY

I declare under penalty of perjury under the laws of the State of Washington that on the date signed below I mailed the following documents:

Reply Brief of Appellant

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