Filed
Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS LEE FLOYD, Appellant.	No. 46350-4-II UNPUBLISHED OPINION

JOHANSON, C.J. — Thomas Floyd appeals a forfeiture provision in his judgment and sentence.[1] In a supplemental brief, he appeals the trial court's imposition of legal financial obligations. We reverse the forfeiture order and remand to the superior court to strike the provision from the judgment and sentence. We decline to consider the legal financial obligation challenge because Floyd raises it for the first time on appeal.

FACTS

After a jury trial in 2011, Floyd was convicted of one count of second degree assault and six counts of violation of a presentence no-contact order, all charged as domestic violence offenses. At sentencing, the prosecutor discussed imposing legal financial obligations, and Floyd did not

[1] A commissioner of this court initially considered this appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

object. The trial court imposed a total of $1,800 in legal financial obligations. In addition, although the parties did not discuss forfeiture at sentencing, the 2011 judgment and sentence required Floyd to "forfeit items seized." Clerk's Papers at 308.

Floyd appealed his convictions and sentences. We affirmed his convictions, but remanded for resentencing with a new offender score to be calculated without consideration of two 1972 convictions. *State v. Floyd*, 178 Wn. App. 402, 316 P.3d 1091 (2013), *review denied*, 180 Wn.2d 1005 (2014).

At resentencing, the parties discussed the offender score. Further, the State raised the issue of legal financial obligations, asking that the sentencing court reimpose all other conditions of the original sentence, "including all the fines and fees." Report of Proceedings (May 5, 2014) at 11. Floyd did not object. The resentencing court imposed "standard" fines and fees of $1,800. In addition, although the parties again did not discuss forfeiture, the 2014 judgment and sentence again required Floyd to forfeit seized items.

ANALYSIS

Floyd contends that the trial court acted without statutory authority when it ordered him to forfeit seized property. We agree and remand to the trial court to strike the language "forfeit items seized" from Floyd's 2014 judgment and sentence. Floyd, in a supplemental brief, challenges the trial court's imposition of legal financial obligations. We decline to consider this issue, raised for the first time on appeal.

I. FORFEITURE

Floyd contends that the resentencing court exceeded its statutory authority when it ordered him to forfeit items seized.[2] Although Floyd did not object to the forfeiture requirement, it is well established that "[a]n appellant may challenge an illegal or erroneous sentence for the first time on appeal." *State v. McWilliams*, 177 Wn. App. 139, 150, 311 P.3d 584 (2013) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)), *review denied*, 179 Wn.2d 1020 (2014); *see also State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

The State argues, however, that we should decline to review this issue because the record is insufficient for review in that Floyd does not identify any property seized. The State also argues that Floyd may claim his seized property by requesting a hearing in the superior court pursuant to CrR 2.3(e).

In *State v. Roberts*, 185 Wn. App. 94, 96-97, 339 P.3d 995 (2014), we recently rejected these same arguments as a basis to refuse relief from a forfeiture order lacking statutory authority. There we held that

> [t]he State argues that CrR 2.3(e) allows a defendant to move at any time for the return of seized property, and that Roberts failed to do so. But CrR 2.3(e) does not provide any statutory authority for forfeiture of seized property. And even if CrR 2.3(e) somehow authorized forfeiture, that rule applies only to property seized in an *unlawful* search. There is no indication that any property here was seized in an unlawful search.

[2] The State does not argue that Floyd is bound by the 2011 forfeiture order because he did not appeal it. Because we vacated Floyd's sentence in the original appeal, we will consider Floyd's argument even though he did not challenge the original forfeiture order. *See State v. Rowland*, 160 Wn. App. 316, 331, 249 P.3d 635 (2011), *aff'd*, 174 Wn.2d 150, 272 P.3d 242 (2012); *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) ("[T]he defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence.").

Roberts, 185 Wn. App. at 96-97.

In *Roberts*, we reversed the trial court's forfeiture order because neither the court nor the State provided any statutory authority for that order. 185 Wn. App. at 96-97. The same circumstances are present here. Although the record does not allow us to determine what, if anything, the State actually seized, it does plainly order Floyd to forfeit any property seized in this matter. Under *Roberts*, that order cannot stand.

The State additionally relies on *McWilliams*, in which we held that the trial court did not abuse its discretion in ordering the forfeiture of seized property. 177 Wn. App. at 152. In that case, however, the defendant did not argue that the trial court had no statutory authority to forfeit seized property. Instead, the defendant argued that the trial court *exceeded* its statutory authority by ordering forfeiture without procedural due process. *McWilliams*, 177 Wn. App. at 149. In that posture, *McWilliams* cannot support the presence of statutory authority here, in contradiction of *Roberts*.

As in *Roberts*, the State has not shown that the trial court had statutory authority to order forfeiture of Floyd's seized property. We hold that the trial court erred in entering the forfeiture order, and we remand to the trial court to strike the forfeiture order from Floyd's judgment and sentence.

II. LEGAL FINANCIAL OBLIGATIONS

Floyd's 2014 judgment and sentence contains a preprinted finding that he had the ability to pay the imposed legal financial obligations. Floyd did not challenge this finding during resentencing, which occurred after our decision in *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), and before the Supreme Court's remand decision in *State v. Blazina*, 182 Wn.2d

827, 344 P.3d 680 (2015) (affirming Court of Appeals' exercise of discretion to refuse to address issue raised for the first time on appeal, but exercising its own discretion to reach the issue and remand to trial court for further proceedings). In *State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015), we held that parties who failed to challenge legal financial obligations in sentencings after our decision in *Blazina* have waived those challenges. Under *Lyle*, Floyd has waived his legal financial obligation challenge.

Reversed and remanded to strike forfeiture provision from sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.

JOHANSON, C.J.

We concur:

Bjorgen, J.

BJORGEN, J.

Sutton, J.

SUTTON, J.