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No. 64473-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC O'GRADY,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE STATE CORRECTLY CONCEDES THE SENTENCING ERROR, WHICH SHOULD BE CURED FORTHWITH

The prosecution appropriately concedes that the trial court imposed incorrect terms of community custody.

Response Brief, at 3-4.

The term of community custody for assault in the second degree must be 18 months. Id. The term of community custody for rape in the third degree must be 36 months, but it cannot exceed the statutory maximum of 60 months for this class C felony. In re: Personal Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009); RCW 9A.20.021; RCW 9A.44.060. O'Grady already served a prison term of 54 months in custody for this offense. CP 28-29. Accordingly, he can serve no more than six months of community custody for this offense.

Mr. O'Grady respectfully requests this Court enter an order correcting his term of community custody forthwith.

2. BECAUSE THE COURT WAS AWARE OF O'GRADY'S INDIGENCY AND THE ONEROUS NATURE OF FINANCIAL OBLIGATIONS, IT SHOULD NOT HAVE ORDERED THAT HE PAY NON-MANDATORY LFOS.

The prosecution agrees that the trial court understood at the time of sentencing, Mr. O'Grady was indigent. Response Brief, at 2. He had been in prison, was returning to prison, and lacked job skills. Nevertheless, the court entered a finding that O'Grady had the ability or likely future ability to pay non-mandatory legal and financial obligations. CP 26. This finding of fact is not supported by the record.

The prosecution contends that the \$1050 of legal and financial obligations is a paltry sum that O'Grady could repay over 10 years of working odd jobs. This assessment of the amount of money O'Grady must pay is erroneous.

Legal and financial obligations are subject to 12% interest rate, accruing from the date of sentence and compounded until paid in full. RCW 10.82.090¹; RCW 4.56.110(4)² RCW 9.94A.760.

¹ RCW 10.82.090(1) provides, "financial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."

This compounded interest makes the amount of money O'Grady owes far higher than the flat sum imposed.

Considering the highly likely scenario that upon his release from prison, it would take a long time for O'Grady to find any employment whatsoever, this interest will undoubtedly accrue and make it harder for O'Grady to pay these non-mandatory fees and fines. Indeed, now that O'Grady has been released from prison he is under very strict community custody monitoring, including a no contact with any minors order, and thus it is unrealistic to expect him to find any employment.

The prosecution calls these fees "standard" but there is nothing standard about them. They are not mandatory. By law, the court is required to determine a person's ability to pay before imposing them. RCW 10.01.160(3).

The prosecution cites a 1935 case as authority for the appropriateness of imposing jury fees on O'Grady notwithstanding his guilty plea. Response Brief, at 10 (citing State v. Birch, 136 Wash. 670, 49 P.2d 921 (1935)). But Birch cites no statutory

² RCW 4.56.110(4) provides, "judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof." RCW 19.52.020(1) sets the interest rate as 12 percent per annum.

authority and has no legal analysis of the court's authority to impose fees on an indigent person. It is inapposite.

The prosecution asks this Court to disregard references to court-commissioned report assessing the impact of legal and financial obligations on indigent people and showing the disparity of such costs from superior courts across the state. The report was generated by the Washington State Minority and Justice Commission, which was created by the Supreme Court and is charged with ensuring fair and equal treatment of all people in the courts in this state. See Minority and Justice Commission, Commission bylaws, Preamble, available at: www.courts.wa.gov/committee. The Research Report cited in O'Grady's opening brief was commissioned by this Supreme Court-led committee and is a formal assessment of the consequences and disparities of court-imposed legal and financial obligations in the state. Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008).³ It is available on the court's website.

³ Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

The prosecution's basis for filing a motion to strike is that the "wisdom" of imposing fees is better left to the legislature.

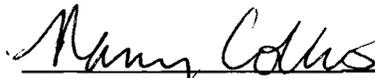
Response at 11. But the trial court has discretion when imposing fees, by statute, and is legally required to find a person is able to pay before imposing such fees. The Report by the Minority and Justice Commission contains useful information for evaluating the imposition of legal and financial obligations. Additionally, this Court should not turn a blind eye to the policy considerations when evaluating the costs and fees imposed upon O'Grady despite his poverty. The State's motion to strike should be denied.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. O'Grady respectfully requests this Court correct the sentencing error and remand his case to further evaluate the appropriateness of non-mandatory financial penalties.

DATED this 10th day of December 2010.

Respectfully submitted,



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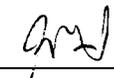


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I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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