

No. 66794-7

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARY KAY DYER,

Appellant.

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

APPELLANT'S REPLY BRIEF

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JAN -4 PM 4:40

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A. ARGUMENT IN REPLY

THE TRIAL COURT IMPROPERLY CONDITIONED
THE LENGTH OF MS. DYER'S SENTENCE ON HER
FAILURE TO PAY RESTITUTION

The State argues the trial court did not increase Ms. Dyer's sentence or imprison her because of her failure to pay restitution. SRB at 5. The State contends Ms. Dyer misrepresents the record, which shows the trial court "initially determined Dyer was to serve a sixty-day standard range sentence—not thirty—after hearing argument from the state and Dyer regarding their sentencing recommendations." SRB at 8 (citing RP 8). According to the State, "[o]nly after the court announced Dyer's standard range sentence but before a judgment and sentence was filed, was there a discussion that ensued between the court and Dyer regarding paying off restitution." SRB at 8-9.

It is not Ms. Dyer, but the State, who misrepresents the record. Contrary to the State's representations, the trial court determined in the first instance to impose a 60-day, rather than a 30-day, sentence based on Ms. Dyer's failure to pay restitution. At the first sentencing hearing on January 6, 2010, before announcing what sentence it intended to impose, the court asked the State for its recommendation. RP 4. The deputy prosecutor stated the State

was requesting 60 days on the theft charge, in addition to restitution in the amount of \$15,044.83. RP 4. The court then asked defense counsel, who stated the defense was requesting 30 days. RP 4.

At that point, the judge asked defense counsel if Ms. Dyer had paid back any of the funds taken from the insurance company. RP 5. Counsel said no, "I don't think that Mrs. Dyer has the ability at this time to make any kind of immediate payment." RP 5.

The judge then expounded that he did think it was proper to sentence Ms. Dyer to only 30 days in jail when the amount of unpaid restitution was so high:

With no restitution made, one problem that I have, Mr. Brodsky and Ms. Dyer, is this. It's a pretty good deal for people to go out and get paid \$7,000 a month for their time in jail. That's a pretty good salary. You want me to send her and do 30 days for over \$14,000. How many people in this community would jump at the opportunity, Mr. Brodsky, to spend 30 days in jail in return for \$15,000?

RP 6.

It was only after questioning defense counsel and determining Ms. Dyer did not have the immediate ability to pay restitution, that the judge decided he could not impose the 30-day sentence requested by the defense:

I can't justify anything less than what the prosecutor is recommending. Like I say, \$14,000 for a month in jail, I'll bet you 80 percent of the population

out there if you said hey, would you go sit in jail for 60 days for \$15,000, they would jump at the opportunity. In fact, I'm surprised the State's recommending as little as they are. First offense or not. That's a large sum of money.

I'm going to accept the recommendation and I'm going to impose the sentence that's recommended by the State.

RP 8. The judge stated he would impose 60 days on the theft charge, as requested by the State. RP 8.

At that point, an extended discussion ensued about Ms. Dyer's financial situation and her possible ability to pay the restitution in the near future. The judge then stated, "If [Ms. Dyer] were to make restitution I would be willing to reconsider and order 30 days in jail if restitution were paid in full." RP 11. The judge granted Ms. Dyer's request for a 30-day continuance so that she could gather the money to pay the restitution. The judge stated, "If you can make restitution I will reconsider and impose a 30-day sentence. If you don't make restitution you will have to come back here." RP 11.

The parties and the court re-convened on February 10. Defense counsel explained Ms. Dyer had been unable to come up with the money to pay the restitution. RP 13. The judge then stated he intended to abide by his earlier comments and sentence

Ms. Dyer to 60 days in jail—rather than 30—based on her inability to pay restitution:

I'm going to abide by my earlier statements at the earlier hearing and I do sentence the defendant to serve a term of 60 days with the other standard terms and conditions.

RP 19.

The judge recognized he had not actually imposed a sentence at the earlier hearing. He recognized he had merely stated what he "was inclined to do." RP 17. At the end of the February 10 hearing, a judgment and sentence was entered sentencing Ms. Dyer to 60 days in jail on the theft charge. CP 18.

Thus, the record plainly shows the court imposed a 60-day sentence—rather than the defense's requested 30-day sentence—because Ms. Dyer had failed to pay restitution. Contrary to the State's representations, the judge did not announce his intent to impose a 60-day sentence until after he had determined that Ms. Dyer had not paid the restitution. RP 4-6. When the judge learned she had not paid the restitution, he stated he could not impose a 30-day sentence as requested by the defense, because it would not be fair to give Ms. Dyer, in effect, "\$14,000 for a month in jail." RP 8. At the second hearing, the judge affirmed he would impose 60

days in jail based on Ms. Dyer's inability to come up with any money to pay the restitution. RP 17-19.

The judge's sentence became final, and binding, only after the judgment and sentence was entered. See State v. Davis, 125 Wn. App. 59, 65, 104 P.3d 11 (2004) (Washington Supreme Court has "often, and uniformly, held that decisions of the court required to be writing are not controlled by prior oral statements of the court") (quoting State ex rel. Echtle v. Card, 148 Wash. 270, 273-74, 268 P. 869 (1928)). In other words, the judge did not actually impose a sentence until after the second hearing, after he determined Ms. Dyer was unable to pay restitution based on her indigency. Therefore, the record shows the length of the sentence was based on Ms. Dyer's inability to pay.

As argued in the opening brief, because the length of the sentence was based on Ms. Dyer's inability to pay, it was unfair in violation of constitutional due process. "An indigent person may not be incarcerated because he is unable to pay a fine which is part of a sentence." State v. Hunter, 62 So.3d 340, 344 (La. Ct. App. 2011) (and cases cited). The court here equated the amount of restitution due with the amount of time Ms. Dyer should spend in jail. RP 6. But courts should not assign a dollar amount to a "day

of a man's liberty." People v. McMillan, 53 Misc.2d 685, 686, 279 N.Y.S.2d 941 (1967); see also id. at 687 ("Equal treatment under the law' means more than 'A day for a dollar—pay and you go.").

The State recognizes that trial courts may not condition the length of a standard-range sentence on a defendant's inability to pay restitution, but the State cites State v. Sandefer, 79 Wn. App. 178, 900 P.2d 1132 (1995) to argue that is not what the trial court actually did. In Sandefer, the defendant was charged with first degree child molestation and during plea negotiations, the State offered him a sentence at the low end of the standard range. Id. at 180. Sandefer rejected the offer, proceeded to a jury trial, and was convicted. Id. At sentencing, the State requested an exceptional sentence upward based on the particular vulnerability of the victim and Sandefer objected, noting he had rejected an earlier plea offer at the bottom of the standard range. Id. The court rejected the State's request for an exceptional sentence and then responded to Sandefer's objection. The court explained it often imposed a more lenient sentence within the standard range if the defendant pled guilty. Id. Thus, if Sandefer had pled guilty, "I very possibly would have given you a more lenient sentence towards the lower end of

the range, because of saving the victim being victimized by going through this court process." Id.

On appeal, this Court acknowledged that the judge could not penalize Sandefer for exercising his right to stand trial. Id. at 184. But the Court explained that is not what the judge actually did. Instead, the judge was merely explaining to Sandefer the well-established rule that he could not demand the benefit of a plea offer he earlier rejected. Id. The record did not affirmatively show the judge conditioned the length of the sentence on Sandefer's exercise of his jury trial right. Id.

In this case, by contrast, the record affirmatively shows the judge conditioned the length of the sentence—and imposed 60 days rather than the requested 30 days—based on Ms. Dyer's inability to pay restitution. Although the sentence imposed was within the standard range, Ms. Dyer may appeal it because the court relied on an impermissible ground—Ms. Dyer's indigency—in determining the length of the sentence. See, e.g., State v. McNeair, 88 Wn. App. 331, 336, 944 P.2d 1099 (1997) (if court relies on impermissible ground, such as race, gender, or religion, to sentence someone within the standard range, an appeal is permissible); State v. Garcia-Martinez, 88 Wn. App. 322, 329, 944

P.2d 1104 (1997) ("if a court were to rely on an impermissible basis like race, gender or religion and sentence the defendant to the top of the standard range on that basis, a defendant could still appeal the sentence even though it is within the standard range because the challenge is to the constitutionality of the basis for the sentence, not its length").

Here, the court relied on an impermissible basis—Ms. Dyer's indigency—in imposing a 60-day standard-range sentence rather than a 30-day sentence. The sentence therefore violates due process and Ms. Dyer must be resentenced.

B. CONCLUSION

For the reasons above and in the opening brief, Ms. Dyer's sentence violates due process and she must be resentenced.

Respectfully submitted this 4th day of January 2012.


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Washington Appellate Project 91052
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 66794-7-I
)	
KIMBERLY THULIN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF JANUARY, 2012, 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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		<input type="checkbox"/>	HAND DELIVERY
		<input type="checkbox"/>	_____
<input checked="" type="checkbox"/>	MARY KAY DYER 4395 VISTA AVE BLAINE, WA 98230	<input checked="" type="checkbox"/>	U.S. MAIL
		<input type="checkbox"/>	HAND DELIVERY
		<input type="checkbox"/>	_____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF JANUARY, 2012.

X _____ 

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