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STATE OF WASHINGTON

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No. 66794-7

IN THE 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 OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Mary Kay Dyer was convicted of one count of first degree theft and the State requested over \$15,000 in restitution. Before imposing a sentence, the court gave Ms. Dyer one month to raise enough money to pay the entire restitution bill. The court ruled that if she could raise the money in one month, it would sentence her to 30 days in jail, but if she could not raise the money, it would sentence her to 60 days in jail. After one month, Ms. Dyer was not able to raise the money and the court sentenced her to 60 days in jail. The court's decision to impose a longer sentence based on Ms. Dyer's inability to pay restitution, where her refusal to pay was not willful, violated due process.

B. ASSIGNMENT OF ERROR

The court's decision to impose a longer sentence based on Ms. Dyer's inability to pay restitution violated the state and federal constitutional right to due process of law.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

It is fundamentally unfair in violation of due process for a court to imprison a defendant based on her inability to pay restitution, unless the defendant's refusal to pay is willful. Did the court's decision to impose a longer sentence based on Ms. Dyer's

inability to pay restitution, where her refusal to pay was not willful, violate due process?

D. STATEMENT OF THE CASE

The State charged Ms. Dyer with one count of first degree theft, RCW 9A.56.030(1)(a), RCW 9A.56.020(1)(b).¹ CP 67-68.

Breanna Leonard, Ms. Dyer's former daughter-in-law, testified that, on December 4, 2009, she observed Ms. Dyer give her son Christopher Cousins the key to Ms. Dyer's Chevy Blazer. 11/29/10RP 106, 111. Mr. Cousins drove away in the Blazer, with Ms. Leonard following in her own truck. 11/29/10RP 107. Ms. Leonard did not know where they were going. 11/29/10RP 108. Ms. Leonard followed Mr. Cousins down the freeway to a rural area, where Mr. Cousins pulled off into a field. 11/29/10RP 108. Soon afterward, Ms. Leonard saw flames leaping out of the Blazer. 11/29/10RP 109. Mr. Cousins ran to Ms. Leonard's truck, jumped in, and told her to drive away and keep her mouth shut. 11/29/10RP 110. When they got back onto the freeway, Mr. Cousins threw the key to the Blazer out of the window. 11/29/10RP 110.

¹ The State also charged Ms. Dyer with one count of making false statements to an officer, RCW 9A.76.175. CP 67-68.

Ms. Dyer told police her car had been stolen. 11/29/10RP 139. Police later found the car in a rural area in Skagit County, completely burnt. 11/29/10RP 29-30, 33. Ms. Dyer's insurance company, Nationwide Insurance, paid her \$14,594.83 on her insurance claim. 11/29/10RP 101-02.

The jury found Ms. Dyer guilty of first degree theft of the insurance proceeds as charged.² CP 24.

At sentencing, the State requested the court impose \$15,044.83 in restitution. 1/06/11RP 4. The State also requested the court impose a standard-range sentence of 60 days. 1/06/11RP 4. The defense requested a standard-range sentence of 30 days, based on Ms. Dyer's lack of criminal history. 1/06/11RP 4.

The judge asked defense counsel whether any of the money taken from the insurance company had been returned, and counsel asserted that Ms. Dyer did not have the ability at that time to make any payments. 1/06/11RP 5. Then the judge stated:

With no restitution made, one problem that I have, Mr. Brodsky [defense counsel] 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

² The jury also found her guilty of making false statements to an officer, as charged. CP 24.

community would jump at the opportunity, Mr. Brodsky, to spend 30 days in jail in return for \$15,000?

1/06/11RP 6.

The judge then inquired of Ms. Dyer whether she was employed and when she said no, the judge responded, "She's never going to pay restitution." 1/06/11RP 6. Ms. Dyer explained she was currently going to school to obtain a certificate in medical coding. 1/06/11RP 7. The judge scoffed at that idea, stating "I don't know if doctors are going to want you to work in their office with a felony record." 1/06/11RP 7. The judge then stated he would impose a sentence of 60 days as recommended by the State:

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. I'm going to sentence you to 365 days with 305 days suspended as to the false statement. On the theft in the first degree I will sentence you to 60 days in the Whatcom County Jail. I'm going to order the restitution, the \$15,044.83. I will have the standard monetary obligations and the \$500 fine.

1/06/11RP 7-8.

Ms. Dyer then explained she planned to sell her ownership interest in a house she jointly owned with her ex-husband in order to pay the restitution. 1/06/11RP 9. Based on Ms. Dyer's representations, the judge stated he would be willing to reconsider his decision if she were able to raise the money for the restitution within the next month:

THE COURT: If she were to make restitution I would be willing to reconsider and order 30 days in jail if restitution were paid in full.

MR. BRODSKY: If the court is willing to grant a reasonable period of time, 60 days, to report, certainly Mrs. Dyer would, I think the court's calculation is correct, if she could get this paid off in that period of time --

THE COURT: I will give her 30 days. I will allow you to report in 30 days. Do you want to do that or do you want to go in and get it over with now?

THE DEFENDANT: I'd like the 30 days.

THE COURT: Let's do this, then. Miss Gigliotti [deputy prosecutor], I want to go ahead and reset this for sentencing at the defendant's request. You know what my decision is here. 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.

1/06/11RP 11.

One month later, on February 10, the parties returned to court. Defense counsel requested a continuance, explaining Ms. Dyer would not be able to get funds from the sale of her house anytime soon. 2/10/11RP 13. He also explained she was due to

receive a portion of a large Indian trust settlement as a member of the Sioux Indian tribe but had not yet received those funds.

2/10/11RP 13. Without finding that Ms. Dyer was willfully refusing to pay, the court imposed a 60-day sentence based on her inability to pay restitution. The court stated, "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." 2/10/11RP 19.

E. ARGUMENT

THE COURT'S DECISION TO IMPOSE A LONGER SENTENCE BASED ON MS. DYER'S INABILITY TO PAY RESTITUTION VIOLATED DUE PROCESS

1. The State may not imprison an offender for failing to pay restitution, unless the refusal to pay is willful. It is fundamentally unfair and a violation of constitutional due process to imprison indigent defendants solely because of their inability to pay court-ordered fines and restitution. State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992) (citing Bearden v. Georgia, 461 U.S. 660, 667-68, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970)); State v. Bower, 64 Wn. App. 808, 813-14, 827 P.2d 308 (1992); U.S. Const. amend. XIV; Const. art. I, § 3. "[T]he State cannot 'impos[e] a fine

as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." Bearden, 461 U.S. at 667 (quoting Tate v. Smart, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971)). "In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." Bearden, 461 U.S. at 667-68.

A limited exception applies if a person's refusal to pay is willful. Id. at 668. If an offender willfully refuses to pay restitution when she has the means to pay, "the State is perfectly justified in using imprisonment as a sanction to enforce collection." Id. But if the defendant "has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of [her] own," it is fundamentally unfair to imprison her without considering whether adequate alternative methods of punishment are available. Id. at 668-69.

In Bower, this Court addressed whether Washington's statutory scheme adequately protects offenders who fail to pay restitution based on indigency. Bower, 64 Wn. App. 808. The Court concluded the statutes accord with due process because

"[t]here are adequate safeguards to protect defendants who default based on an inability to pay." Id. at 813. For instance, under former RCW 9.94A.200(2)(a) (now RCW 9.94B.040(3)(b)), if an offender violates a condition or requirement of sentence, a court must grant her a hearing to show cause why she should not be punished for the noncompliance. Id. at 813. A defendant may petition the court if she is unable to make restitution payments, and in doing so will not be subject to arrest prior to a show cause hearing. Id. at 813-14. In addition, RCW 7.21.010(1)(b) defines contempt of court as any *intentional* disobedience of a court order. Id. Finally, if an offender's violation is not willful, the court may modify its previous order. Id. at 810-11 (citing former RCW 9.94A.200 (now RCW 9.94A.040(3)(d))). These safeguards are necessary to protect offenders who fail to pay restitution due to indigency. Id. at 813.

Although a court need not consider a defendant's ability to pay when setting the total restitution amount, the court must consider the ability to pay when setting the minimum monthly payment. State v. We, 138 Wn. App. 716, 728, 158 P.3d 1238 (2007) (citing RCW 9.94A.753(1)). The government may not seek to enforce collection of restitution at a time when the defendant is

unable to pay. See Curry, 118 Wn.2d at 917. If an offender is at risk of probation revocation due to failure to pay restitution, the sentencing court must inquire into the offender's "good faith attempt and ability to repay the money." State v. Jeffries, 42 Wn. App. 142, 146-47, 709 P.2d 819 (1985).

Here, the trial court ordered Ms. Dyer to spend an additional 30 days in jail based solely on her inability to pay the full restitution amount, which totaled over \$15,000. 1/06/11RP 4, 11, 19. The court explicitly ruled that if she could not pay the entire amount within 30 days, he would require her to spend an additional 30 days in jail. 1/06/11RP 11. Thirty days later, Ms. Dyer explained she did not have the funds to pay the entire restitution amount, despite her good faith efforts to raise the money. 2/10/11RP 13. The court made no finding that Ms. Dyer in fact had the funds to pay the restitution but willfully refused to do so. Nonetheless, the court imposed a longer sentence based on her inability to pay.

A court may not imprison an offender "solely because [she] lacked the resources to pay [restitution]." Bearden, 461 U.S. at 667-68. The court may not imprison the offender based on her failure to pay restitution unless her refusal to pay was willful. Id. at 668. Because the court imposed a longer sentence on Ms. Dyer

solely based on her inability to pay restitution, where her refusal to pay was not willful, the court's decision violated due process.

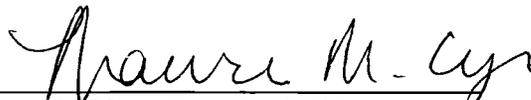
2. The sentence must be reversed and remanded for imposition of a 30-day term. When a court imposes an unlawful sentence, the remedy is to reverse the erroneous portion of the sentence. In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002).

Here, the court sentenced Ms. Dyer to 60 days in jail based on her inability to pay restitution. 1/06/11RP 11; 2/10/11RP 19. If not for Ms. Dyer's inability to pay restitution, the court would have sentenced her to 30 days. Id. Thus, the sentence must be reversed and remanded for imposition of a 30-day sentence. West, 154 Wn.2d at 215; Goodwin, 146 Wn.2d at 869.

F. CONCLUSION

The court violated constitutional due process by imposing a longer sentence based on Ms. Dyer's inability to pay restitution, where her refusal to pay was not willful. The sentence must be reversed and remanded for imposition of a 30-day sentence.

Respectfully submitted this 26th day of July 2011.



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

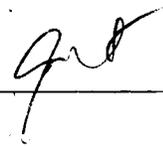
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 66794-7-I
)	
MARY KAY DYER,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING 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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| | 311 GRAND AVENUE | <input type="checkbox"/> | _____ |
| | BELLINGHAM, WA 98225 | | |
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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JULY, 2011.

X _____


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