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No. 70203-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KENNETH R. BURNETT,

Appellant.

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

REPLY BRIEF OF APPELLANT
AND RESPONSE TO CROSS-APPEAL

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A. ARGUMENT IN REPLY

Mr. Burnett contends that the trial court abused its discretion by entering a boilerplate finding that he had the present and future ability to pay certain legal financial obligations in the absence of any inquiry or other evidentiary support in the record. AOB 3-6. The prosecutor does not dispute this point, therefore, Mr. Burnett asks this Court to direct that the unsupported and erroneous finding be stricken. State v. Calvin, 176 Wn.App. 1, 302 P.3d 509, 521-22 (2013) (“where the trial court does enter a finding, it must be supported by evidence.”)

As to the fine imposed under RCW 69.50.430, the prosecutor argues there is no statutory requirement to find an ability to pay, so no error in the entry of the erroneous finding. BOR 3. Instead, the prosecutor argues in its cross-appeal that Judge Bowden erred in reducing the RCW 69.50 fine. Because the trial prosecutor did not object to the sentencing court’s action the issue is waived for purposes of appellate review. State v. Cham, 165 Wn.App. 438, 446, 267 P.3d 528 (2011). Moreover, the record amply supported the judge’s decision to reduce the fine based on indigence, the cross-appeal should be rejected.

In support of the finding of indigence, Mr. Burnett's counsel advised the court that although "[h]e has had some work history in the past. He has not been employed for some time." RP 3. The prosecutor at sentencing did not dispute counsel's assertion, nor offer anything to the contrary. Id. Since sentencing in Washington does not require sworn testimony or compliance with the Rules of Evidence, it is unclear what further support might be appropriate. ER 1101(c)(3); see e.g. State v. Griffin, 173 Wn.2d 467, 474-75, 268 P.3d 924 (2012).

Furthermore, the record supports the finding of indigence given Mr. Burnett's representation by the Snohomish County Public Defender for the outset of the case. CP 9. This conclusion was reiterated in the sentencing judge's findings following sentencing that Mr. Burnett was still indigent and entitled to seek appellate review of the RCW 69.50 fine. CP 54-60. The appellate court may affirm the superior court on any ground the record supports. Gronquist v. State, ___ Wn.App. ___, 313 P.3d 416, 420 (2013), citing State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). In Mr. Burnett's case, the record amply supports Judge Bowden's implicit finding of indigence pursuant to RCW 69.50.430, in his decision to suspend or defer the imposition of this fine. The prosecutor's cross-appeal should be rejected.

A comparison to State v. Mayer, which the prosecutor cites, illustrates the sufficiency of the record to support the indigence finding. State v. Mayer, 120 Wn.App. 720, 86 P.3d 217 (2004). The record established Mr. Mayer was “very talented,” works on cars in body shops where he is “well sought after.” 120 Wn.App. at 723. Mayer’s counsel specifically represented at sentencing that “he has got a way to make a steady income, a good income.” Id. The sentencing court found Mayer indigent, however, based “solely on the impact incarceration will have on Mr. Mayer’s earning capacity. The trial court made the finding even though Mr. Mayer indicated he will have no difficulty finding work as a highly trained body and fender man after he gets out of prison. The trial court’s finding was devoid of supporting evidence indicating Mr. Mayer was indigent at the time of sentencing.” 120 Wn.App. at 728. In Mr. Burnett’s case, the record established his indigence from the time the case was initiated and he was appointed counsel, through sentencing when counsel outlined his lack of recent or future employment prospects.

In Cowan the sentencing court imposed the mandatory fine against the husband, but not against the wife in a joint prosecution for manufacturing marijuana at their home and surrounding property. State

v. Cowan, 116 Wn.App. 752, 67 P.3d 1108 (2003). The opinion contains no other indications regarding the potential indigence of Ms. Cowin, particularly in the face of the apparently contrary finding as to Mr. Cowin. The appellate court’s conclusion, therefore, that “there is no evidence that the trial court made a finding of indigency,” makes sense and stands in contrast to Mr. Burnett’s case where the issue was squarely presented to the sentencing judge and who plainly sought to exercise his discretion pursuant to the statute. Cf. 116 Wn.App. at 760; RP 3-4.

The question that remains is where the sentencing court finds a defendant indigent pursuant to this statute, does the judge retain the discretionary authority to suspend or defer only a portion of the fine rather than the entire discretionary penalty? Furthermore, where there is a finding of indigence, does the statute permit the sentencing court to impose some, or all, of the fine based on the nature of the underlying conduct, e.g. “trafficking.” The plain language of the statute appears to indicate a limit on the discretionary authority of the sentencing court by requiring an all or nothing determination, that is that the fine in the specified amount “shall be fined two thousand dollars” ... “[u]nless the court finds the person to be indigent....” RCW 69.50.430(2).

In light of the necessity of striking the boilerplate finding in the judgment and sentence, and having made an implicit finding of indigence in Judge Bowden's decision to suspend or defer a portion of the fine, the statute by its plain language appears to require suspension of the remaining amount, and Mr. Burnett requests the Court so find.

B. CONCLUSION

Mr. Burnett requests this Court reverse the boilerplate finding of "ability to pay" and remand with directions to suspend or defer the remaining portion of the RCW 69.50.430 fine in light of the implicit finding of indigence made at the time of sentencing.

DATED this 3rd day of February 2014.

Respectfully submitted,



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