

70928-3

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NO. 70928-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ARNOLD,

Appellant.

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

The Honorable Charles Snyder, Judge

REPLY BRIEF OF APPELLANT

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A handwritten signature, possibly "J. Dobson", is written in black ink. To its right is a circular stamp, likely a court or filing office seal, though the text within it is illegible.

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A. ARGUMENT IN REPLY

In his opening brief, appellant Alexander Arnold asserts the trial court failed to follow the statutory mandate under RCW 10.01.160, which required it to consider his ability to pay his non-mandatory legal financial obligations (LFOs) before ordering them. Brief of Appellant (BOA) at 11-29. In response, the State first claims appellant invited the error. Brief of Respondent (BOR) at 13-14. The State is incorrect.

The doctrine of invited error “prohibits a party from setting up an error at trial and then complaining of it on appeal.” In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000) (citations omitted). The Washington Supreme Court has observed that the invited error doctrine “appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court [does] not apply the doctrine.” Id. at 724 (citations omitted).

The record shows Arnold did not set up the challenged sentencing error. The State claims: “Arnold specifically requested the court impose a [attorney reimbursement fee] cost of \$600.00 at sentencing.” BOR at 13. This suggests Arnold affirmatively

volunteered to pay the attorney reimbursement fee. The record shows this is not so. Arnold merely challenged the amount of the fee being requested by the State (\$2,700.00) as unjustifiably inflated. RP 10-11. Arnold never asked that the fee be imposed. He never affirmatively agreed he had the ability to pay the fee. There is nothing suggesting he ever intended to set up this error merely to have something to challenge on appeal. Hence, the invited error doctrine does not apply. See, State v. Young, 129 Wn. App. 468, 472, 119 P.3d 870 (2005) (holding invited error doctrine did not apply where the parties did not intend the error).

Next, the State claims Arnold may not argue for the first time on appeal that the imposition of the jury demand fee of \$250.00 constituted an illegal sentencing provision because the error cannot be found within the four corners of the judgment and sentence. BOR at 13-14 (citing State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004), and In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)). A similar argument was rejected by the Washington Supreme Court in State v. Wilson, 170 Wn.2d 682, 244 P.3d 950 (2010). In Wilson, the Supreme Court was asked to decide whether an offender score based on an erroneously scored prior conviction constituted factual or legal error. Id. at 687. The

State claimed the offender score calculation was a factual dispute, which was waived by Wilson. Id. at 689-90. It also claimed the sentencing error could not be challenged for the first time on appeal because it was not facially apparent on the judgment and sentence. Id. at 690, n. 4.

The Supreme Court held the sentencing error was a legal error, which was apparent by looking at the requirements of the statute, and no inquiry into substantive facts could change this. Id. at 689-90 (“The prior conviction was either for a felony or a misdemeanor, and it cannot be reclassified through any factual inquiry”).

In so ruling, the Supreme Court also rejected the State's waiver argument, explaining:

The State also argues that the error must be facially apparent on the current judgment and sentence. It is unclear why the State thinks this is so. In Ross, we discussed that Goodwin contained obvious errors, and that a defendant would need to show “that an error of fact or law exists within the four corners of his judgment and sentence” to invoke the waiver analysis in Goodwin. Ross, 152 Wn.2d at 231. Neither petitioner in Ross could show any error whatsoever, but Mr. Wilson has already done so, and the State admits the error. Or, the State may be thinking of RCW 10.73.090, which prohibits a collateral attack more than one year after a final judgment if the judgment and sentence is valid on its face, but this is

not an instance of collateral attack as Mr. Wilson directly appealed.

Id. at 890, n. 4.

As in Wilson, the error asserted here (i.e. the trial court's failure to comply with RCW 10.01.160) is a legal error that requires no further development of the substantive facts. Either the trial court engaged in the individualized inquiry required under RCW 10.01.160(3) or it did not, and any consideration of the substantive facts regarding appellant's financial status cannot change this. See, BOA at 21-23 (discussing this further). Hence, waiver does not apply.

Additionally, as in Wilson, the State's argument about the four-corners rule is unpersuasive. Arnold has demonstrated there was legal error by providing a record that shows the trial court failed to comply with RCW 10.01.160 and, thus, was without statutory authority to order the LFOs. See, BOA at 16-19 (outlining the legal error). Arnold is not collaterally attacking his sentence. As in Wilson, it is unclear why the State believes the four-corners rule applies in this case. Under Wilson, the rule does not apply and the legal error Arnold asserts may be reviewed for the first time on appeal.

Next, the State suggests the trial court's failure to legally comply with RCW 10.01.160(3) is not reviewable for the first time on appeal because it is not manifest error of constitutional magnitude. BOR at 15. However, the State ignores the fact that Washington case law firmly establishes that illegal or erroneous sentences may be challenged for the first time on appeal, regardless of whether the error is statutory or constitutional. See, State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal); see, also, BOA at 12 (citing numerous other cases).

Finally, the State argues the trial court met its duty under RCW 10.01.160(3) by including the generic, pre-printed, default language in the judgment and sentence that states the trial court considered the defendant's ability to pay. BOR at 18. the State suggests this language is compelling evidence that the trial court actually undertook its legal obligation to independently consider Arnold's ability to pay LFOs. Yet, this generic language exists in sentencing forms regardless of what actually transpires. See, BOA at 18-19 (discussing the inadequacy of the generic, boilerplate finding contained in Arnold's judgment and sentence).

To pretend that there is any substance behind this generic finding, when the record shows otherwise, advances form over substance. The Legislature could not have intended the requirements of RCW 10.01.163 to be treated as mere hoops to be jumped through, without any need for an individualized inquiry into a particular defendant's actual financial situation and burdens. The statute undoubtedly requires a more substantive inquiry before LFOs are to be ordered – an inquiry which never took place here.

The absence of an actual inquiry into Arnold's financial circumstances and ability to pay makes the LFO order an illegal sentencing condition. As such, not only is it reviewable, it is reversible.

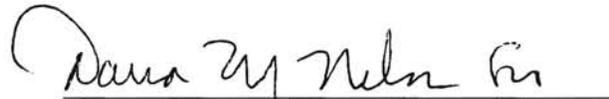
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court should reverse the conviction or remand the case for resentencing.

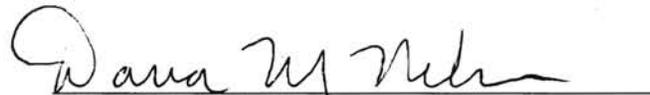
DATED this 20th day of August, 2014

Respectfully submitted,

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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF AUGUST 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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X Patrick Mayovsky

2014 AUG 21 PM 4:19
COURT OF APPEALS
STATE OF WASHINGTON