

FILED  
Mar 30, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73131-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

MARQUES CRAWFORD,

Appellant.

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

The Honorable Andrea Darvas, Judge

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REPLY BRIEF OF APPELLANT

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CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENTS IN REPLY

1. CRAWFORD'S CHALLENGE TO HIS SENTENCE IS PROPERLY RAISED ON APPEAL.

The State claims Crawford is barred from challenging his sentence on appeal because it is within the standard range, and because "[t]here is no evidence that the court did not follow the proper procedure in imposing sentence, and any conceivable error was clearly harmless." Brief of Respondent (BOR) at 7. The State is wrong.

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). "However, an offender may always challenge the procedure by which a sentence was imposed." State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183, 1186 (2005) (citing State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989), quoting State v. Ammons, 105 Wash.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)).

To appeal a standard range sentence, an appellant "must show either that the trial court refused to consider information mandated by [former] RCW 9.94A. 110,<sup>[1]</sup> or that [he] timely and specifically objected to the consideration of certain information and that no evidentiary hearing

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<sup>1</sup> Former RCW 9.94A.110 was recodified in 2001 as RCW 9.94A.500. Laws of 2001, ch. 10, § 6. RCW 9.94A.500, sets forth the procedures for sentencing, including the need for a hearing.

was held." State v. Mail, 121 Wn.2d 707, 713, 854 P.2d 1042 (1993). Moreover, courts are prohibits from considering charged crimes that have been dismissed. State v. McAlpin, 108 Wn.2d 458, 466–67, 740 P.2d 824 (1987).

Here, it is undisputed that Crawford's counsel objected to the trial court's consideration of the unproved promoting allegation to set the terms of sentence for the rape and delivery. 22RP 17. And despite the State's interpretation of the record to the contrary (BOR at 11, n.4), as discussed in the Brief of Appellant at 13-16, the court overruled counsel's objection and specifically relied on unproved allegation surrounding the promoting charge to impose sentence on the rape and delivery convictions, in violation of RCW 9.94A.530(1). Remand for resentencing is required.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

Crawford filed his opening brief in December 2015. He did not include an argument for why the court should deny appellate costs in his opening brief as detailed in this Court's recent decision in State v. Sinclair, II,<sup>2</sup> because Sinclair,II had not been decided.<sup>3</sup> But, had Crawford known

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<sup>2</sup> State v. Sinclair, II, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 393719 (slip op. filed January 27, 2016).

<sup>3</sup> An Order granting Sinclair's motion for reconsideration, withdrawing opinion, and substituting a published opinion was entered on January 27, 2016.

the inclusion of such an argument was prerequisite to obtaining this court's discretion on the issue of appellate costs, he would have included it. To the extent that a challenge to appellate costs must be raised in the briefs so that the court can exercise discretion in the decision terminating review, Crawford asks this court to do so and deny cost in the event Crawford does not substantially prevail and such a request is made by the State.

In Sinclair, II, this Court exercised its discretion, and denied the State's cost bill. Slip op. at 14. Despite the fact that Sinclair challenged appellate costs for the first time in a motion for reconsideration, this court considered Sinclair's challenge, noting "the issue of appellate costs is systemic in nature[.]" Sinclair, II, slip op. at 4. Sinclair's motion set forth several facts supporting his inability to pay appellate costs, including; the trial court's lack of determination that he was able to pay any amount of trial court LFOs, the trial court's waiver of all nonmandatory LFOs in the judgment and sentence, and the appointment of appellate counsel because of Sinclair's indigency. Sinclair, II, slip op. at 12-13. Noting RAP 15.2(f) established a "presumption of continued indigency throughout review," this Court concluded no facts or trial court order supported a determination that Sinclair's financial condition had improved or was likely to improve. Sinclair, II, slip op. at 13-14. This

Court therefore concluded an award to the State of appellate costs was inappropriate. Sinclair, II, slip op. at 14.

As in Sinclair, II, here several facts show Crawford does not have the present, or future ability, to pay appellate costs. For example, the trial court found Crawford to "lack sufficient funds to prosecute an appeal and applicable law grants defendant a right to review at public expense to the extent defined in this order." CP 30. As such, the court waived the filing fee for appeal, authorized appointment of counsel "wholly at public expense[,]" and authorized production of the relevant record at public expense. CP 30-31 (Order of Indigency). As in Sinclair, II, here the State has failed to submit any evidence which would rebut the "presumption of continued indigency throughout review." Slip op. at 13-14.

Unfortunately, it remains unclear how Sinclair's holding applies to cases such as this one where an opening brief was filed prior to this Court's opinion and thus did not include an anticipatory argument asking that appellate costs be denied. Under such circumstances, may a party object to appellate costs for the first time in a reply brief? Will Court Commissioner's grant an appellant's objections to a cost bill? Or will elected judges exercise appropriate discretion following an indigent party's motion to modify a commissioner's ruling awarding costs? Crawford does not know because this court has not said. As in Sinclair, II,

however, this Court should exercise its discretion, consider Crawford's challenge to the State's anticipated request for appellate costs herein, and find that an award of appellate costs is inappropriate.

Granting Crawford's request also best serves the goals of judicial efficiency. If the court exercises discretion in its decision terminating review, Crawford will not have to a cost bill objection, the commissioner will not have to rule on the issue of costs, Crawford will not need to move to modify the commissioner's ruling, and a panel of judges will not need to decide whether or not to exercise its discretion when ruling on the motion to modify. The exercise of discretion now would at least streamline and simplify the process for making a determination on the issue of appellate costs. Crawford asks that this Court exercise discretion by denying appellate costs in its decision terminating review in the event Crawford does not prevail on appeal.

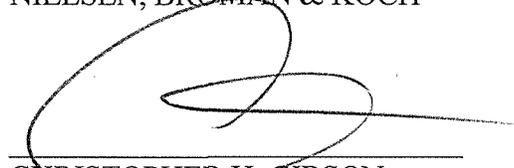
D. CONCLUSION

For the reason stated here and in the opening brief, Crawford respectfully request this Court to reverse and remand for resentencing.

DATED this 30<sup>th</sup> day of March 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'CHRISTOPHER H. GIBSON', written over a horizontal line.

CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73131-9-1
	)	
MARCQUES CRAWFORD,	)	
	)	
Appellant.	)	

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**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 30<sup>TH</sup> DAY OF MARCH, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARCQUES CRAWFORD  
DOC NO. 379492  
COYTOE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF MARCH 2016.

x *Patrick Mayovsky*