

FILED
Mar 16, 2016
Court of Appeals
Division I
State of Washington

NO. 73919-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS GRANT,

Appellant.

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

The Honorable Deborra Garrett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in failing to recognize its discretion to waive portions of a fine it imposed for driving under the influence (DUI).

2. The sentencing court erred in ordering portions the DUI fine that apply to cases sentenced in district and municipal courts only.

3. Defense counsel was ineffective for failing to alert the court to the non-mandatory and statutorily unauthorized portions of the fine.

Issues Pertaining to Assignments of Error

1. Despite appearing to agree that the appellant was indigent and unable to pay discretionary fines, the sentencing court failed to recognize discretion under various statutes to waive portions of the DUI fine based on indigence. Did the sentencing court err in failing to recognize its discretion and in ordering portions of the DUI fine under the mistaken impression it could not waive the fines based on indigence?

2. Where the appellant was tried and sentenced for DUI in the superior court, did the sentencing court err in ordering portions the fine that only applied to district and municipal courts?

3. Was defense counsel ineffective for failing to alert the sentencing court to the non-mandatory and statutorily unauthorized portions of the fine?

B. STATEMENT OF THE CASE¹

The State charged Travis Grant with possession of heroin, possession of methamphetamine, and driving under the influence of a drug.² CP 6-7. According to the State, police stopped Grant after security at the BP Cherry Point refinery reported that their cameras had captured a male using drugs in his car and then driving to a nearby location. CP 4.

Following a Franks evidentiary hearing³ and a hearing under CrR 3.6, the court denied Grant's motion to suppress the evidence discovered in the car he was driving. CP 9-41 (defense motions); 1RP 70-78, 81-82, 85 (oral ruling).

¹ The record in this case consists of the following consecutively paginated volumes: 1RP – 8/17/15; 2RP – 8/18/15; 3RP – 8/19/15; 4RP – 8/20/15; 5RP – 8/26/15 (sentencing); and 6RP – 8/17/15 (jury selection).

² RCW 46.61.502(1)(c) (prohibiting driving while “under the influence of or affected by intoxicating liquor, marijuana, or any drug”). The State presented evidence that Grant was under the influence of a drug or drugs, but not alcohol. 2RP 204, 235.

³ Franks v. Delaware 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Grant argued one of the arresting officers misrepresented what he saw in the BP security video when testifying in support of the warrant to search the car Grant was driving. CP 9-13.

The case was tried to a jury, and Grant was found guilty as charged. CP 94.

The court sentenced Grant to a standard range sentence of 20 months each on the drug charges, both felonies, and to 200 days on the DUI charge, a gross misdemeanor. The court ran the sentences concurrently. CP 104.

At sentencing, Grant's counsel argued his client was indigent and therefore the court should waive discretionary fines. 5RP 392-93. Grant had lost his job as well as a startup business after being incarcerated on the charges. 5RP 393. Grant also had significant financial obligations from previous convictions and no source of income. 5RP 392-93.

The court imposed legal financial obligations (LFOs) including \$800 in mandatory fees, such as the \$500 victim penalty assessment. CP 105-06; 5RP 396. But, recognizing Grant's indigence, the court stated it would not impose discretionary fees. 5RP 395. For example, the court stated it would waive the jury demand fee of \$250 the State was requesting. 5RP 395; CP 105. Despite the State's request that Grant pay \$1,800 for court-appointed counsel, the court reduced the fee to \$100. 5RP 396; CP 106.

However, the court stated it had “no discretion” regarding the \$941 “mandatory” DUI fee the State was requesting, and it ordered Grant to pay the full amount. 5RP 395.

Grant timely appeals. CP 112.

C. ARGUMENT

1. THE SENTENCING COURT ERRED IN FAILING TO RECOGNIZE ITS DISCRETION TO WAIVE PORTIONS OF THE FINE IMPOSED FOR DRIVING UNDER THE INFLUENCE AND IN ORDERING PORTIONS THE FINE APPLICABLE ONLY TO DISTRICT AND MUNICIPAL COURTS.

At sentencing, the prosecutor represented that Grant must pay a “mandatory” DUI fine of \$941, and the court stated it had “no discretion” but to impose it. 5RP 383, 395. A closer look at the fine, however, reveals that it is not a monolithic “mandatory” fine. Rather, certain portions of the fine may be waived for indigence. In addition, certain portions of the fine apply only when an offender is sentenced in district or municipal courts. For both of these reasons, the sentencing court’s imposition of the entire fine was error, and remand is required.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). Specifically, a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed

to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996). Moreover, a trial court’s failure to exercise discretion constitutes an abuse of discretion. State v. Fliieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).

Washington Practice itemizes the so-called “mandatory minimum” DUI fine as follows:

[1] Minimum fine (not suspendable unless indigent) (RCW 46.61.5055(1)(a)(ii))	\$350
[2] Public Safety and Education Assessment (PSEA) (RCW 3.62.090)	245 (70% of 350)
[3] Alcohol Violator’s Fee (RCW 46.61.5054)	200
[4] Criminal Conviction Fee (RCW 3.62.085)	43
[5] Criminal Justice Funding Penalty (RCW 46.64.055)	50
[6] Subject to PSEA (RCW 3.62.090(1))	35 (70% of 50)
[7] Subject also to PSEA (RCW 3.62.090(2))	17.50 (50% of 35)
Total	\$940.50

32 Wash. Prac., Wash. DUI Practice Manual § 1:10 (2015-16 ed.).

Under the statutes authorizing the fine, however, the “mandatory minimum” fine described above does not reflect the mandatory minimum Grant was required to pay.

Initially, the second, fourth, sixth and seventh portions of the fine apply to municipal and district courts only. RCW 3.62.090.⁴ Grant was, however, tried and sentenced in the superior court. The court erred in imposing the inapplicable portions of the fine.

⁴ RCW 3.62.090 provides that:

(1) There shall be assessed and collected in addition to any fines, forfeitures, or penalties assessed, other than for parking infractions, *by all courts organized under Title 3 or 35 RCW* a public safety and education assessment equal to seventy percent of such fines, forfeitures, or penalties, which shall be remitted as provided in chapters 3.46, 3.50, 3.62, and 35.20 RCW. The assessment required by this section shall not be suspended or waived by the court.

(2) There shall be assessed and collected in addition to any fines, forfeitures, or penalties assessed, other than for parking infractions and for fines levied under RCW 46.61.5055, and in addition to the public safety and education assessment required under subsection (1) of this section, *by all courts organized under Title 3 or 35 RCW*, an additional public safety and education assessment equal to fifty percent of the public safety and education assessment required under subsection (1) of this section, which shall be remitted to the state treasurer and deposited as provided in RCW 43.08.250. The additional assessment required by this subsection shall not be suspended or waived by the court.

(3) This section does not apply to the fee imposed under RCW 46.63.110(7), the penalty imposed under RCW 46.63.110(8), or the penalty assessment imposed under RCW 10.99.080.

(Emphasis added). Title 3 and Title 35 courts are district and municipal courts.

As for the remaining three portions of the fine, it appears that at least two of the three may be waived based on the indigence of the convicted person.

As for the first fine listed above, an individual who has had no prior offenses under RCW 46.61.502 or .504 in seven years and whose blood alcohol tests under 0.15⁵ must pay a “fine of not less than three hundred fifty dollars nor more than five thousand dollars. *Three hundred fifty dollars of the fine may not be suspended unless the court finds the offender to be indigent.*” Former RCW 46.61.5055 (1)(a)(ii) (2014) (emphasis added). Thus, the plain language of the statute indicates that even the minimum fine is not “mandatory” but may be suspended for indigence.

The third fine listed above arises under former RCW 46.61.5054 (2011), which provides that:

(1)(a) In addition to penalties set forth in RCW 46.61.5051 through 46.61.5053 until September 1, 1995, and RCW 46.61.5055 thereafter, a two hundred dollar fee shall be assessed to a person who is either convicted, sentenced to a lesser charge, or given deferred prosecution, as a result of an arrest for violating RCW 46.61.502, 46.61.504, 46.61.520, or 46.61.522. This fee is for the purpose of funding the Washington state toxicology laboratory and the Washington state patrol for grants and activities to increase the conviction rate and decrease the

⁵ Grant tested negative for alcohol. 2RP 235.

incidence of persons driving under the influence of alcohol or drugs.

(b) Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay.

(Emphasis added.) The statute does not define “verified petition.” However, this section does not appear to prohibit the imposition of the \$200 fine, but rather provides for future relief based on indigence. See, e.g., RCW 10.01.160(4) (“A defendant who has been ordered to pay costs . . . may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof.”). Thus, it appears the sentencing court did not err in imposing this portion of the fine.

Related to the fifth portion of the fine, RCW 46.64.055, provides in part that:

In addition to any other penalties imposed for conviction of a violation of this title, [“Motor Vehicles,”] that is a misdemeanor, gross misdemeanor, or felony, the court shall impose an additional penalty of fifty dollars. The court may not reduce, waive, or suspend the additional penalty unless the court finds the offender to be indigent.

RCW 46.64.055(1) (emphasis added). Again, the plain language of the statute indicates the fine may be waived on the indigence of the convicted person.

Thus, despite the fact that two of the three title 46 RCW fines may be waived based on indigence, the court failed to recognize that it had the discretion to do so. This too was error.

In summary, four portions of the DUI fine apply only to cases sentenced in district and municipal courts, but Grant was sentenced in the superior court. Two other portions permit waiver based on the offender's indigence, but the court failed to recognize it had discretion to waive a portion of the fine based on indigence.⁶

This Court should therefore remand for the court to exercise its discretion, Flieger, 91 Wn. App. at 242, and to strike the portions of the fine that exceed the sentencing court's statutory authority, Moen, 129 Wn.2d at 543-48.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ALERT THE COURT TO THE NON-MANDATORY AND UNAUTHORIZED PORTIONS OF THE DUI FINE.

In the alternative, counsel was deficient for failing to alert the court that \$741 of the \$941 fine was not, in fact, mandatory. Counsel's deficiency was prejudicial to Grant.

The federal and state constitutions guarantee a criminal defendant the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22

⁶ The court clearly found Grant indigent, requiring him to pay only \$100 of the \$2,050 in discretionary fines the State requested. 5RP 395-96.

(amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the person. Id. at 225-26 (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Counsel was ineffective for failing to object to the portions of the DUI fine that do not apply in superior court. Counsel was also ineffective for failing to alert the court that the plain language of the statutes allowed the court discretion to waive two portions of the fine based on indigence. Reversal is required because failure to object to these LFOs prejudiced Grant. See State v. Duncan, 180 Wn. App. 245, 255, 327 P.3d 699 (2014), (recognizing ineffective assistance of counsel is "an available course for redress" when defense counsel fails to address a defendant's inability to pay LFOs), review granted, 183 Wn.2d 1013 (2015).

RCW 10.01.160(3) permits the sentencing court to order a defendant to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. There was no reasonable strategy for not researching the components of the DUI fine and not requesting the sentencing court to comply with the requirements of RCW 10.01.160(3) as to the portions that could be waived by the court. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

For similar reasons, counsel was deficient in failing to object to the portions of the fine that plainly did not apply in superior courts.

As for the second Strickland prong, counsel's failure to object to the inapplicable and discretionary portions of the DUI fine prejudiced Grant. The sentencing court indicated it was willing to waive the lion's share of discretionary fees based on Grant's financial situation. 5RP 395-96. Thus, had the court realized that not all of the DUI fine was mandatory, it was likely to have waived the non-mandatory portions, just as it waived the other discretionary fees requested by the State. Moreover,

it is clear that, had the court been alerted that portions of the fine were unauthorized in the superior court, the court would not have imposed those sums. Based on the foregoing, there is a reasonable probability the outcome would have been different but for defense counsel's deficient conduct.

Grant's constitutional right to effective assistance counsel was violated, and remand is required for this reason as well.

3. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

Finally, if Grant does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations. State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes any award of appellate costs would be unwarranted in this case. Here, at sentencing, recognizing the appellant's dire financial straits, the trial court imposed \$100 of the fees it regarded as discretionary, waiving the other \$1,950 requested by the State. 5RP 395-96.

The trial court then found Grant to be indigent and found that he could not contribute anything to the costs of appellate review. Supp. CP ___ (sub no. 63C, Order of Indigency); see also Supp. CP ___ (sub no. 63B, Motion and Affidavit for Order of Indigency). Indigence is presumed to continue throughout the appeal. State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 at *7 (Jan. 27, 2016) (citing RAP 15.2(f)).

In summary, in the event that Grant does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court to consider the matter.

D. CONCLUSION

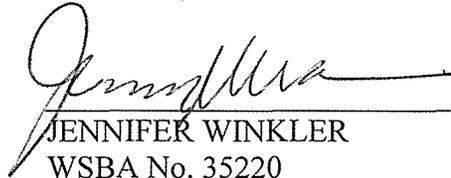
This Court should remand for reduction of the DUI fine consistent with the controlling statutes.

Should Grant not prevail on appeal, however, this Court should decline to award the costs of appeal based on his indigence.

DATED this 16th day of March, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 73919-1-I
)	
TRAVIS GRANT,)	
)	
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 16TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TRAVIS GRANT
DOC NO. 735208
REYNOLDS WORK RELEASE
410 FOURTH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF MARCH 2016.

X *Patrick Mayovsky*