COA NO. 41458-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL DANIELS,

Appellant.

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

The Honorable Thomas McPhee, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. VIOLATION OF THE RIGHT TO AN EXPRESSLY UNANIMOUS VERDICT REQUIRES REVERSAL OF THE CONVICTION.

The State maintains second degree burglary is not an alternative means crime, citing State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). Brief of Respondent (BOR) at 4-5.

Bergeron is inapposite because it does not address whether burglary is an alternative means crime. This is the issue in Bergeron: "Is the intent to commit a specific crime inside the burglarized premises an 'element' of the crime of burglary?" Bergeron, 105 Wn.2d at 4. The Court answered no: "The intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises." Id.

Unlike Bergeron, the issue in Daniels' case is not whether the State needed to prove the intent to commit a *specific crime* inside the burglarized premises as an *element* of its case. The issue here is whether entry with intent to commit any crime against a person or entry with intent to commit any crime against property are *alternative means* of committing the burglary offense for juror unanimity purposes. Bergeron does not address that question. What constitutes the elements of a crime and whether that crime may be committed by alternative means are distinct

questions. State v. Peterson, 168 Wn.2d 763, 768, 771, 230 P.3d 588 (2010).

"In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Furthermore, cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

In arguing no unanimity is required, the State also relies on State v. Johnson, 100 Wn.2d 607, 626, 674 P.2d 145 (1983), overruled in part, State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). BOR at 6. The Court in Johnson stated "At least with respect to the different intents which may be present, the burglary statute seems to us to describe a single offense and jury unanimity on the underlying intent is therefore unnecessary." Johnson, 100 Wn.2d at 626. It also said the unanimity requirement "does not extend to offenses which include as an element mere intent to commit an underlying crime." Id.

The court's discussion of unanimity is dicta because it was unnecessary to the court's holding that the trial court errs in failing to specify and define the crime or crimes allegedly intended. Id. at 625-26. Comments on an issue are dicta if resolution of the case does not turn on the issue. State v. Halgren, 137 Wn.2d 340, 346 n. 3, 971 P.2d 512 (1999); see also In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta lack precedential value. Campbell v. Reed, 134 Wn. App. 349, 359, 139 P.3d 419 (2006).

Moreover, dicta are often ill considered and should not be transformed into a rule of law. State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989); State ex rel. Hoppe v. Meyers, 58 Wn.2d 320, 329, 363 P.2d 121 (1961). Such is the case with Johnson. Contrary to its dicta, the presence of a single offense is a necessary predicate for the conclusion that a given crime may be committed by alternative means. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982) (citing State v. Arndt, 87 Wn.2d 374, 377-78, 553 P.2d 1328 (1976)).

Johnson cites State v. Bonds for the proposition that the "jury need not be unanimous as to what crime was intended in felonious entry to commit rape." Johnson, 100 Wn.2d at 626 (citing State v. Bonds, 98

Wn.2d 1, 17, 653 P.2d 1024 (1982)). But Bonds held no such thing. In addressing intent to commit an underlying crime, Bonds applied the proposition "where a single offense is committable in more than one way, it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged, provided there is substantial evidence to support each of the means charged." Bonds, 98 Wn.2d at 17 (citing Franco, 96 Wn.2d at 823).

The law is clear that jury unanimity is required for alternative means when one of those means is unsupported by sufficient evidence. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). The only case that addresses whether entry with intent to commit a crime against a person or property represents an alternative means of committing the crime of burglary is this Court's decision in State v. Tresenriter, 101 Wn. App. 486, 490-92, 4 P.3d 145, 14 P.3d 788 (2000), review denied, 143 Wn.2d 1010, 21 P.3d 292 (2001). The State misreads Tresenriter in claiming to the contrary.

Tresenriter argued "the manner of committing a crime, whether against a person or against property, is an element of the crime and so must be stated in the information. He argues that the information charged only one means of committing the crime of burglary, i.e., with intent to commit a crime against a person. Thus, according to Tresenriter, the court

erred in allowing the jury to consider the alternative means, i.e., with intent to commit a crime against property." Tresenriter, 101 Wn. App. at 490. This Court agreed. Id. at 489, 492. The information, in relation to the burglary count, was deficient because it alleged a crime against a person, but not a crime against a property. Id. at 489.

If burglary were not an alternative means crime, it would not have mattered that the information only alleged entry with intent to commit a crime against a person rather than a crime against property. Cf. State v. Williamson, 84 Wn. App. 37, 39, 44-45, 924 P.2d 960 (1996) (information alleging crime of obstructing public servant failed to provide adequate notice of the alternative means ultimately considered by the trier of fact at trial).

The State also argues the unanimity error was harmless because there was ample proof of intent to commit a crime against property and none of intent to commit a crime against a person. BOR at 7 (citing State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007), overruled on other grounds, State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009)). The Supreme Court has not accepted this rationale for avoiding reversible error for jury unanimity violations involving alternative means. It has plainly held "if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means

submitted to the jury, the conviction will not be affirmed." Ortega-Martinez, 124 Wn.2d at 708. More recently, the Supreme Court reiterated "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld *only if* sufficient evidence supports each alternative means." State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (emphasis added). Daniels asks that this Court follow controlling Supreme Court precedent and reverse his burglary conviction because insufficient evidence supports one of the alternative means.

2. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE JURY COSTS.

In State v. Hathaway, this Court remanded for correction of a jury fee that exceeded the statutory maximum. State v. Hathaway, 161 Wn. App. 634, 639, 651, 251 P.3d 253 (2011). It did so because "review of this purely legal question at this time will facilitate justice and likely conserve future judicial resources[.]" Hathaway, 161 Wn. App. at 652 (citing RAP 1.2(c)).

The State requests that this Court decline to follow Hathaway on this point. BOR at 12. Granting the State's request, however, would be capricious. This Court ordered correction of the illegal jury fees in

Hathaway's case and there is no principled basis on which to deny Daniels that same relief.

Requiring Daniels to file a motion for discretionary review on the issue rather than have it decided as part of this direct appeal would be an absolute waste of limited judicial resources. Requiring Daniels to file a petition in the trial court to waive imposition of a legal financial obligation that is illegal would also be a waste of time and resources. The State has already conceded the jury fee imposed here is unlawful. BOR at 8. No legitimate purpose is served by not dealing with it now. Appellate courts frown upon unnecessary piecemeal ligation. See, e.g., Brown v. General Motors Corp., 67 Wn.2d 278, 282, 407 P.2d 461 (1965); Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977, 986, 478 P.2d 761 (1970).

The State asserts "Remanding cases to the trial court to correct errors not brought to its attention at the time they occurred is an expensive and inefficient method of correcting those errors." BOR at 12. That assertion beggars belief. A simple remand to strike the unlawful jury fee is far more efficient than full-blown termination hearing at the trial court level under RCW 10.01.160(4). Appellate relief also avoids the potential danger that Daniels, without the benefit of counsel, will lack the wherewithal to pursue the matter on his own outside of this direct appeal or successfully argue it to a trial court.

That being said, Hathaway was wrongly decided on the issue of whether imposition of a jury fee that exceeds the court's statutory authority could be raised for the first time on appeal as a matter of right. Hathaway, 161 Wn. App. at 651-52.

"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

Erroneous imposition of legal financial obligations (LFO's) without statutory authority falls within this established rule. Moen, 129 Wn.2d at 543-48 (challenge to untimely restitution order may be raised for first time on direct appeal);[1] see also State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000), review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001) (challenge to the sentencing court's authority to impose drug fund contribution, which constitutes a legal financial obligation, reviewable for first time on appeal).

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[1]Restitution is a legal financial obligation. RCW 9.94A.030(29).

The justification for this rule is that it tends to bring sentences into conformity and compliance with existing sentencing statutes. State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024, 866 P.2d 39 (1993); Moen, 129 Wn.2d at 545-47. Also, it avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Paine, 69 Wn. App. at 884; Moen, 129 Wn.2d at 545-47. Furthermore, challenges to the imposition of LFO's raised for the first time on appeal do not present the same potential for abuse, speculation, and waste of time and resources as do belated challenges to alleged trial errors. Moen, 129 Wn.2d at 547.

Hathaway cannot be reconciled with the Supreme Court's decision in Moen, which recognized the imposition of a LFO without statutory authority is a sentencing error that may be raised for the first time on appeal. Moen, 129 Wn.2d at 543-48.

Hathaway and the State rely on State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) for the proposition that a challenge to statutorily unauthorized costs cannot be raised for the first time on appeal. Hathaway, 161 Wn. App. at 651; BOR at 10.

Smits is inapposite because the judgment and sentence in that case contained no error. The asserted error in that case arose when the trial court denied the offender's post-trial motion to terminate the lawful legal

financial obligations. Smits, 152 Wn. App. at 517. The LFO's imposed in Smits as part of the judgment and sentence were statutorily authorized and were therefore not subject to the established rule that erroneous sentences may be challenged for the first time on appeal. Fleming, 129 Wn.2d at 532; Moen, 129 Wn.2d at 543-48.

In Smits, there could be no appeal from the trial court's denial of a motion to terminate statutorily authorized LFO's because "the order to pay LFO's as part of the judgment and sentence is conditional." Smits, 152 Wn. App. at 523. A statutorily authorized LFO is conditional in the sense that its continued existence is dependent upon an offender's ability to pay. Id. at 522-24.

But here, the order to pay the statutorily unauthorized jury fee is in no sense "conditional" because the order itself is void. See State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006) ("If the trial court exceeds its sentencing authority, its actions are void."). We are concerned here with an existing order that has been entered by the court without statutory authority, not the speculative future financial condition of a defendant and his future ability to pay.

Smits involved the factual determination of whether a defendant has the ability to pay a cost, not whether the court completely lacks authority to enter the cost order altogether as part of the judgment and

sentence. Smits, 152 Wn. App. at 522-24. That is an important distinction. Fleming recognized sentencing errors could be raised in a personal restraint petition where the petitioners "could never have been legally sentenced as they were." Fleming, 129 Wn.2d at 530, 533-34 (citing In re Pers. Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991) (sentencing court never had authority to impose life without the possibility of parole); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (sentencing court imposed enhanced sentence not authorized for defendant's first degree robbery convictions)).

Daniels likewise could never have been legally sentenced as he was in relation to the jury fees because that portion of the sentence is void. If a person can raise such a challenge for the first time in a personal restraint petition, it necessarily follows that he can do so for the first time on direct appeal.

Smits is further distinguishable because it decided the question of whether a defendant has a right to appeal a decision denying a motion to terminate legal financial obligations. Smits, 152 Wn. App. at 519. Daniels, on the other hand, has directly appealed from his sentence, which constitutes a final judgment. CP 117-28.

RAP 2.2(a)(1) allows for direct appeal as a matter of right of the "final judgment entered in any action or proceeding, regardless of whether

the judgment reserves for future determination an award of attorney fees or costs. "[I]n a criminal proceeding, a final judgment ends the litigation, leaving nothing for the court to do but execute the judgment." In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 949, 162 P.3d 413 (2007) (internal quotation marks omitted) (quoting State v. Taylor, 150 Wn.2d 599, 601-02, 80 P.3d 605 (2003)); see also State v. Siglea, 196 Wn. 283, 285, 82 P.2d 583 (1938) ("As a prerequisite to an appeal in a criminal case, there must be a final judgment terminating the prosecution of the accused and disposing of all matters submitted to the court for its consideration and determination.") (cited by Skylstad, 160 Wn.2d at 950).

"In criminal cases, '[t]he sentence is the judgment.'" Skylstad, 160 Wn.2d at 950 (quoting Berman v. United States, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204 (1937)). "Final" means "the imposition of the sentence." Skylstad, 160 Wn.2d at 950 (quoting Flynt v. Ohio, 451 U.S. 619, 620, 101 S. Ct. 1958, 68 L. Ed. 2d 489 (1981)). The unauthorized jury costs at issue here are indisputably part of Daniels' sentence. CP 133-34. As such, they are part of a "final judgment" under RAP 2.2(a)(1).

Daniels is an aggrieved party under RAP 3.1. For a party to be aggrieved, the decision must adversely affect that party's property or pecuniary rights, or a personal right, or impose on the party a burden or obligation. Mestrovic v. Dep't of Labor & Indus., 142 Wn. App. 693, 704,

176 P.3d 536 (2008). The unlawful imposition of unauthorized jury costs, if left untouched as part of this appeal, imposes on Daniels the burden and obligation to seek their removal as part of a motion in the trial court. His pecuniary interest is also affected. Daniels is not free to save, spend and manage his financial resources as he sees fit, but instead is required by the judgment and sentence to pay unauthorized costs immediately. CP 134.

The issue is also ripe for review. Again, we are concerned here with an existing order that has been entered by the court without statutory authority, not the speculative future financial condition of a defendant. A pre-enforcement challenge to a community custody condition is ripe for review on direct appeal "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." State v. Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (quoting State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)).

There is no sound reason why the same criteria should not apply to a pre-enforcement challenge to the imposition of legal financial obligations. The question of ripeness revolves around an issue's suitability for judicial review. Bahl, 164 Wn.2d at 748. This matter is in all respects ready for review. The issue is primarily legal: does the sentencing court have the authority to impose jury fees in excess of the statute? Second, this question is not fact-dependant. Either the fee order is grounded in

statutory authority or it is not. The issue does not require further factual development because the order is not legal under any set of factual circumstances. Third, the challenged order is final because Daniels has been sentenced under it. Valencia, 169 Wn.2d at 789.

This court has a duty to correct illegal sentences when brought to it attention. Carle, 93 Wn.2d at 33-34. There is no sound reason why that broad principle should not apply to the error asserted here. Requiring Daniels to wait is senseless. The record is complete. The void nature of the sentencing condition remains regardless of the procedural posture of the challenge against it.

B. CONCLUSION

The conviction should be reversed. In the event this Court declines to reverse the conviction, the challenged jury costs should be struck from the judgment and sentence.

DATED this 9th day of September 2011

Respectfully Submitted,

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

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	)	
Respondent,	)	
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vs.	)	COA NO. 41458-9-II
	)	
PAUL DANIELS,	)	
	)	
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 9TH DAY OF SEPTEMBER, 2011, 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] PAUL DANIELS
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SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF SEPTEMBER, 2011.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 09, 2011 - 2:01 PM

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