

CLERK OF SUPERIOR COURT
COWLITZ COUNTY

11 MAY -9 AM 2014
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

NO. 41604-2-II

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

STATE OF WASHINGTON,
Respondent,
v.
DANIEL GRILE,
Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

11-9-5 link

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 3

 1. THE SENTENCING COURT ERRED IN IMPOSING COMMUNITY CUSTODY IN ADDITION TO A 60-MONTH TERM OF CONFINEMENT..... 3

 2. THE TRIAL COURT ERRED IN IMPOSING LEGAL FINANCIAL OBLIGATIONS IN EXCESS OF THAT PERMITTED BY STATUTE AND WHICH WERE NOT SUPPORTED BY THE RECORD 5

 3. THE COURT’S FINDINGS IN THE JUDGMENT AND SENTENCE SUPPORTING THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE 7

E. CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court

<u>Cherry v. Municipality of Metro. Seattle</u> , 116 Wn.2d 794, 808 P.2d 746 (1991)	3
<u>In re the Personal restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009)	4
<u>In re the Personal Restraint Petition of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980)	3, 5
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)	8
<u>State v. Chester</u> , 133 Wn.2d 15, 940 P.2d 1374 (1997)	3
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992)	7, 8, 9

Washington Court of Appeals

<u>State v. Hathaway</u> , __ Wn.App. __, (2011 WL 1652203, 9)	5, 6
--	------

United States Supreme Court

<u>Fuller v. Oregon</u> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)	7, 9
--	------

Statutes

RCW 10.01.160	passim
RCW 43.43.690	1, 5
RCW 9.94A.701	1, 3, 4, 5
RCW 9.94A.760	1, 6
RCW 9A.20.021	3, 4
RCW 9A.44.079	4

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing a term of community custody on Daniel Grile.

2. The trial court erred exceeded its sentencing authority in imposing certain costs as a part of its judgment.

3. The court's order that Mr. Grile pay the costs of incarceration violates RCW 9.94A.760.

4. Finding 2.5 in the Judgment and Sentence is unsupported by substantial evidence in the record.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 9.94A.701(9) requires a trial court to reduce any term of community custody that in combination with the term of confinement exceeds the statutory maximum for the crime. Where the combined term of community custody and confinement imposed for Mr. Grile exceeds the statutory maximum for his Class C offenses did the trial court err?

2. RCW 43.43.690(1) limits the imposition for costs for analysis performed by a state crime laboratory to \$100 for each conviction. Where Mr. Grile was convicted of only two counts, did the trial court err in imposing an \$800 "crime lab fee?"

3. The trial court imposed costs for a host of items such as a jail-incarceration fee, court-appointed counsel and a sheriff's fee. The State did not present any evidence from which the court could find any of these costs or amounts were actually incurred. In the absence of proof of the actual costs incurred, did the trial court err in imposing these costs?

4. The Due Process and Equal Protection Clauses of the Fourteenth Amendment prevent the imposition of costs on a defendant following a criminal trial where the defendant lacks the present and/or future ability to pay those costs. More specifically, RCW 10.01.160(3) requires a court make such a determination prior to imposing of costs. In the absence of any evidence of his ability to pay, the trial court made such a finding and imposed costs as a part of its judgment. Does the imposition of court costs deprive Mr. Grile his rights to equal protection and due process

C. STATEMENT OF THE CASE

Mr. Grile pleaded guilty to two Class C felonies, and stipulated to the existence of two aggravating factors. CP 11-23; RP 36-38. For each offense Mr. Grile's standard range was 60 months. CP 26. The court imposed an exceptional sentence for the two offenses, imposing 60 months on the first and 24 on the

second. CP 27-28. In addition, the court imposed a term of community custody of 36 months on each offense. CP 28. The court ordered the sentences be served consecutively. Id.

D. ARGUMENT

1. THE SENTENCING COURT ERRED IN IMPOSING COMMUNITY CUSTODY IN ADDITION TO A 60-MONTH TERM OF CONFINEMENT

“A trial court only possesses the power to impose sentences provided by law.” In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Where a statutory term, phrase or directive is unambiguous, its meaning must be taken from its plain language. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)).

RCW 9.94A.701(1)(a) authorizes a three-year term of community custody for Mr. Grile's offense. However, RCW 9.94A.701(9) requires:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Mr. Grile was convicted of two Class C Felonies. CP 24; RCW 9A.44.079(2). The statutory maximum for a Class C felony is five years. RCW 9A.20.021(1)(c).

Despite these clear statutory limitations, on Count I, the trial court imposed a sentence of 60 months confinement with an additional 36 months community custody. That sentence plainly violates RCW 9.94A.701.

The judgment includes preprinted boilerplate that states the “[t]otal incarceration time . . . plus community custody . . . are not to exceed the statutory maximum.” However, there is no statutory authority for such a sentence. Instead, RCW 9.94A.701(9) specifically requires a reduction of the term of community custody, at the time the sentence is imposed, to ensure the total does not exceed the maximum.

Prior to the enactment of RCW 9.94.A.701(9) a different result was permissible. The Supreme Court concluded language similar to that used in the present judgment complied with then-existing statutes, primarily former RCW 9.94A.715. In re the Personal restraint of Brooks, 166 Wn.2d 664, 672, 211 P.3d 1023 (2009). As Brooks itself recognized, that statute was repealed even while Brooks was pending. Id. at 672, n.4. With the repeal of RCW

9.94A.715, Brooks recognized that newly enacted RCW 9.94A.701(9) would control the issue. Brooks, 166 Wn.2d at 672 n. 4. Thus, the parenthetical employed by the court here does not remedy the error.

In addition, as part of its exceptional sentence, the court imposed 84 months total confinement on the two offenses with an additional combined term of 72 months community custody. CP 27-28. That total term of 156 months plainly exceeds the combined statutory maximums of 120 months.

Pursuant to RCW 9.94A.701(9) this court must reverse the sentence and remand for the trial court to strike the 36 month term of community custody on Count I.

2. THE TRIAL COURT ERRED IN IMPOSING LEGAL FINANCIAL OBLIGATIONS IN EXCESS OF THAT PERMITTED BY STATUTE AND WHICH WERE NOT SUPPORTED BY THE RECORD.

“A trial court only possesses the power to impose sentences provided by law.” Carle, 93 Wn.2d at 33. RCW 10.01.160(1) permits the imposition of costs on a person convicted of a crime. A trial court errs when it imposes costs beyond those allowed by statute. State v. Hathaway, __ Wn.App. __, (2011 WL 1652203, 9).

RCW 43.43.690(1) provides:

When a person has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted.

Mr. Grile was convicted of two offenses. CP 24. Nonetheless, the trial court imposed a “Crime lab fee” of \$800. CP 30. That fee exceeds the trial court’s sentencing authority and must be stricken. Hathaway, at 9.

Costs that may be imposed on a criminal defendant must be “expenses specially incurred by the state in prosecuting” and convicting the defendant. RCW 10.01.160(2). The judgment and sentence requires Mr. Grile to pay \$150 for the “Incarceration fee” and cites to RCW 9.94A.760(2). CP 30. That statute provides:

If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration . . . the court may require the offender to pay the actual cost of incarceration per day of incarceration, if incarcerated in a county jail. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration.

RCW 9.94A.760(2). The judgment and sentence does not specify that Mr. Grile spent any time in jail prior to sentencing. CP 28.

There was no evidence before the court to establish the actual cost

of incarceration. In the absence of any evidence to establish the actual cost of incarceration the court must strike the jail fee in its entirety.

Similarly there is no evidence in the record that the actual cost of appointed counsel in this case was \$773.69. The same is true of the \$240 "Sheriff service fee". Each of these amounts were preprinted on the Judgment and Sentence as if they are imposed as a matter of routine rather than based on the amounts actually incurred. See CP 30. Because there is no evidence in the record to establish the actual costs, the trial court erred in imposing the jail fee, the cost of counsel, the filing fee, and the sheriff service fee.

3. THE COURT'S FINDINGS IN THE JUDGMENT AND SENTENCE SUPPORTING THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty.

Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution “direct[a court] to consider ability to pay.” Id. at 915-16. In fact RCW 10.61.160(3) specifically states, “The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.”

Here, the court made an express and formal finding that Mr. Grile had the ability to pay. CP 27 (Finding 2.5). A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). Here, there is no evidence in the record to support a finding that Mr. Grile had the ability to pay the \$2863.69 in costs imposed.

The court did not inquire into Mr. Grile's present financial ability. The trial court's finding that Mr. Grile had the ability to pay legal financial obligations is unsupported by the record and should

be stricken. Moreover, because the record does not support a finding that Mr. Grile has the present or future ability to pay costs, legal financial obligations may not be imposed. RCW 10.01.160(3); see also, Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

E. CONCLUSION

For the reasons above the court should reverse Mr. Grile's sentence and remand for the trial court to strike the term of community custody on Count I and to strike the improper costs.

Respectfully submitted this 6th day of May, 2011.


GREGORY C. LINK – 25228
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 41604-2-II
v.)	
)	
DANIEL GRILE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 6TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SUSAN IRENE BAUR COWLITZ COUNTY PROSECUTING ATTORNEY () 312 SW 1 ST AVE () KELSO, WA 98626-1739		(X) U.S. MAIL HAND DELIVERY _____
[X] DANIEL GIRLE (X) 838112 () AHCC () PO BOX 2049 () AIRWAY HEIGHTS, WA 99001		U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF MAY, 2011.

X _____ 

MAY 9 2011
STATE OF WASHINGTON
BY 
DEPUTY CLERK

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711