

NO. 48226-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ZACKARY BRAME, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando, Judge

No. 15-1-02478-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly include cross-references to defendant's felony sentencing conditions in his related misdemeanor judgement document when those cross-references alert readers to the existence of a companion felony judgement without imposing impermissible conditions through the misdemeanor judgement?

B. STATEMENT OF THE CASE.

1. Procedure

On June 29, 2015, Zackary A. Brame ("defendant") was charged by Information with Count I (Theft of a Motor Vehicle), later amended to add Count II (Making or Possessing Motor Vehicle Theft Tools) and Count III (Felony Harassment). CP 1, 3-4. On September 30th, 2015, the case proceeded to a jury trial before the Honorable James Orlando. 1RP 1-3.¹ The jury returned a guilty verdict on Counts I and II. 5RP 306; CP 53-6, 68-71. Defendant was acquitted on Count III. *Id.* Defendant's convictions in the instant case resulted in termination of a previous Drug Offender Sentence Alternative sentence, cause number 14-1-00008-3. CP 82; 5RP

¹ The Verbatim Reports of Proceedings are contained in 5 volumes referred to herein as 1RP (Vol 1); 2RP (Vol 2); 3RP (Vol 3); 4RP (Vol 4); 5RP (Vol 5).

314. Two judgements were entered; one felony judgement on Count I and one misdemeanor judgement on Count II. CP 66-80, 81-5.

In the felony judgement, which is not challenged in this appeal, defendant was sentenced to 50 months of incarceration on Count I. CP 72; 5RP 317-8. The court prohibited defendant from having contact with the car theft victim for ten years. CP 70, 73; 5RP 317-8. All non-mandatory Legal Financial Obligations (LFOs) were waived by the court due to defendant's inability to pay. CP 70-1; 5RP 317-8. Defendant was ordered to pay mandatory LFOs totaling \$800. *Id.*

The misdemeanor judgement imposed a 364 day sentence to run concurrently with the felony sentence. CP 81-4. No other sentencing conditions were imposed on the misdemeanor sentence. *Id.* The misdemeanor judgement contains the phrases "see felony J&S" under section 3, and "see felony Judgement and Sentence for other conditions" under "Further Conditions." CP 83-4.

In this appeal, defendant claims that the phrases "see felony J&S" and "see felony Judgement and Sentence for other conditions" are improper. Brief of Appellant at 2-3. According to defendant, these phrases essentially incorporate all felony conditions into the misdemeanor judgement by reference. *Id.* Defendant perceives this to be error because, if incorporated into the misdemeanor judgement, the felony no contact order would be improper because it exceeds the statutory maximum sentence for a misdemeanor. Brief of Appellant at 3; RCW 9A.20.021(2).

2. Facts

On June 25th, 2015, defendant was in James Taylor's home as a guest of his housemate. 4RP 103-4. Mr. Taylor awoke to find defendant rummaging through his desk drawers. 4RP 101-2. Defendant, who was not closely acquainted with Mr. Taylor, said he was looking for the keys to Mr. Taylor's Jeep Cherokee. 4RP 101. Mr. Taylor maintained possession of the keys and emphatically denied defendant permission to use his Jeep. 4RP 102. Mr. Taylor testified that a "tussle" took place after defendant attempted to wrest the Jeep keys from him. 4RP 102, 117, 127. A few minutes after this exchange, Mr. Taylor observed defendant driving the Jeep away from his home. 4RP 102-3. Mr. Taylor reported the vehicle stolen shortly after defendant fled with it. 4RP 118; Ex. 19, 20.

A few days later, Puyallup Police Officers David Beerbower and Jason Visnaw discovered the stolen vehicle at the Review RV Park in Puyallup, Washington when responding to a suspicious persons call. CP 57-8; 4RP 206-7. Officers arrested defendant after finding him hiding in a bathroom stall. 4RP 213-4. Defendant told police he borrowed the Jeep, but instead of keys he had been using a screwdriver to start the vehicle. 4RP 215-6. Officer Beerbower observed the Jeep's ignition had been hollowed out and a screwdriver was found in the driver's side door. 4RP 209-210, 216. Defendant was in possession of a number of shaved keys used to steal vehicles and identification cards belonging to Mr. Taylor at the time of his arrest. 4RP 215-7.

C. ARGUMENT.

1. DEFENDANT’S MISDEMEANOR JUDGEMENT AND SENTENCE DOCUMENT REFERENCES CONDITIONS IMPOSED ON HIS FELONY CONVICTION, BUT DOES NOT IMPOSE THOSE CONDITIONS AS PART OF HIS MISDEMEANOR SENTENCE IN THE COMPANION JUDGEMENT.
 - a. The challenged reference to the felony conditions included in the misdemeanor judgement did not incorporate them into the misdemeanor sentence by reference.

Defendant’s convictions resulted in two judgement documents; one for each; the Count I felony and the Count II misdemeanor conviction. *See*, CP 66-80, 81-5. Defendant alleges language in the misdemeanor judgement cross-referencing felony sentencing conditions incorporates those conditions as part of his misdemeanor sentence. Under this theory, defendant erroneously argues the allegedly incorporated felony conditions augment his misdemeanor sentence so that it exceeds the statutory maximum sentence for a misdemeanor conviction, thereby rendering his misdemeanor sentence invalid. Brief of Appellant at 3. He does not assign error to the conditions of the felony judgement. *Id* at 1. Defendant’s claims are without merit.

A judgement and sentence order, like other judicial decrees, is interpreted using the general rules of statutory interpretation. *See, Kruger*

v. Kruger, 37 Wn. App 329, 331, 679 P.2d 961 (1984); *Callan v. Callan*, 2 Wn. App 446, 448-9, 468 P.2d 456 (1970). Language is ambiguous when it is open to more than one reasonable meaning. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the language of the document is ambiguous, a reviewing court discerns and implements the trial court's intent. *See, J.P.*, 149 Wn.2d at 450. Orders should be construed as a whole and should not be interpreted in a manner that provides an absurd result. *See Stokes v. Polley*, 145 Wn.2d 341, 346-7, 37 P.3d 1211 (2001); *J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

During sentencing the court articulated the exact conditions of defendant's sentence. SRP 316-7. The court imposed separate concurrent terms of incarceration for both convictions, but only imposed additional sentencing conditions on the felony conviction. *Id.* The felony judgement reflects all of the non-custodial sentencing terms. CP 70-4. It can be fairly deduced from the court's oral recitation of the sentencing conditions and their presence in the felony judgement that the court intended to impose those conditions only as part of defendant's felony sentence.

The court logically intended the misdemeanor judgement's cross-references to the felony judgement to facilitate the administration of defendant's sentence by alerting the reader that defendant was convicted on another related count with other sentencing conditions. The section of the misdemeanor judgement that is concerned with pecuniary consequences, section 3, directs the reader to "see felony J+S" if he or she wishes to find

the total financial cost imposed on defendant. CP 83-4. Additionally, the “Further Conditions” section of the misdemeanor judgement reads:

- 364 days imposed with 0 days suspended
- Time to run concurrent to felony charge, under this cause number, credit for time served per DOC
- See felony Judgement & Sentence for other conditions
- Time to be served consecutive to #14-1-00008-3 [Defendant’s prior DOSA conviction]

CP 84.

These references seek to inform interested parties, such as the Department of Corrections, that multiple documents must be referenced in order to understand and enforce defendant’s entire sentence. It does not impose additional conditions on the misdemeanor conviction. It merely notifies the reader that defendant is subject to certain conditions as a result of his felony sentence. Defendant’s contention that the language referencing the felony judgement in the misdemeanor judgement incorporates the felony conditions to his misdemeanor conviction is frivolous. Brief of Appellant at 2-3; CP 81-5.

- b. If the inclusion of language cross-referencing the felony judgement found in the misdemeanor judgement is error, it is clerical error and the proper remedy is to remand for entry of corrected judgement.

A clerical error in a judgement can be corrected by remanding the document to the trial court for the entry of a corrected judgement. *See State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005). A clerical error is

one that, when amended, would correctly convey the intention of the court based on other evidence. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011); *See* CrR 7.8(a). Correcting the claimed errors in the misdemeanor judgement would eliminate the issue without altering the sentences intended by the trial court, as discussed above. If the court finds the cross-referencing language to be error, the proper remedy would be to remand for entry of a corrected misdemeanor judgement without the challenged language.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's misdemeanor judgement, or alternatively, if error is found, remand for entry of a corrected misdemeanor judgement.

DATED: June 14, 2016.

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