

FILED

JUL 26 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 294617-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

KAM ALAN MILLS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 06-1-00044-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

BRENDAN M. SIEFKEN, Deputy
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ISSUES PRESENTED

1. **Did the defendant waive his right to appeal the imposition of legal financial obligations by failing to object at sentencing?**
2. **Is the defendant precluded from appealing again the imposition of his legal financial obligations by the 'law of the case' doctrine?**
3. **Did the trial court err when it found the defendant has the ability or likely future ability to pay and imposed legal financial obligations against the defendant?**
4. **Was the restitution order improper?**

STATEMENT OF THE CASE

Kam Mills was convicted of Child Molestation in the First and Second Degree, and sentenced on October 18, 2006. (CP 5-14). The Court of Appeals affirmed the convictions but remanded the case back to the Benton County Superior Court for resentencing, due to the improper inclusion of a charge in his offender score calculation. *State v. Mills*, 142 Wn. App. 1017, (2007) (Unpublished Opinion). (RP 9/29/10, 2).

The trial court issued a new judgment and sentence that included an order to pay \$5,149.20 in restitution to the Benton County Prosecuting Attorney's Office, as the Office had reimbursed the victims for travel expenses related to the case. (CP 26; RP 10/18/06, 109, 126). This

restitution amount was identical to the restitution amount in the original judgment and sentence entered on October 18, 2006. (CP 7-8, 28-29). Mr. Mills was also order to pay \$4,790.75 in costs and fees. (CP 28-29, 35, 39).

ARGUMENT

A. MR. MILLS WAIVED HIS RIGHT TO APPEAL BOTH THE RESTITUTION, AND THE COSTS BILL.

In order to raise an issue on appeal, the general rule is that an individual must have allowed the trial court a chance to correct that error, whether through an objection at the time, or a motion for a new trial. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). The reason for this rule is to prevent a defendant from going before a finder of fact in circumstances he finds acceptable, receiving a verdict he does not approve of, and then attack the trial court's judgment for an error it could have corrected. *Id.* Such attempts to game the system are disfavored, and heavily frowned upon. RAP 2.5 lays out when an Appellate Court must ignore this rule, due to the grave concerns underlying each: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5 (a). No allegation has been made that Benton County Superior Court lacked jurisdiction, or that there were insufficient facts to justify the

conviction of Mr. Mills. Mr. Mills also alleges no Constitutional violations. His assignments of error deal with issues of statutory interpretation, and do not invoke a constitutional right. Thus, there is no manifest constitutional error.

Mr. Mills did not object to the order for restitution and costs at either sentencing. During the resentencing hearing that occurred on September 29, 2010, Mr. Mills actively participated by discussing past income, the imposed costs, and the calculation of interest with counsel and the court. (RP 9/29/10, 6, 12-16). Mr. Mills indicated to the court that he had been helping his mother out financially prior to his arrest. (RP 9/29/10, 5-6). Mr. Mills did request that the court waive the accrued interest, but that in no way preserves any objections he might have had as to the amounts of the restitution or costs imposed. During the discussion of Mr. Mills Legal Financial Obligations, the Judge even asked about an objection, and none was made. (RP 9/29/10, 15). Mr. Mills cannot claim that he was unaware of the restitution or costs bill, or that he was given no chance to object. Mr. Mills has waived his objections, and under RAP 2.5, this Court should dismiss his appeal.

B. MR. MILLS IS BARRED FROM ARGUING ABOUT HIS INDIGENT STATUS BY THE ‘LAW OF THE CASE’ DOCTRINE.

Mr. Mills is barred from arguing that the court erroneously declared him capable of paying the costs associated with his trial due to the established ‘law of the case doctrine.’ The law of the case doctrine is rather complicated, covering three distinct rules:

The term “law of the case” means different things in different circumstances. In one sense, it refers to “the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand.” The term also refers to the “rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law.” Finally, “the term is employed to express the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination.”

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992).

The Washington Supreme Court has given a further definition of the concept of ‘rule of the case’ as “an issue decided on a prior appeal in the same matter is the law of the case, and the issue may not be reconsidered on a subsequent appeal unless the first decision was clearly erroneous and will result in manifest injustice.” *State v. Gossage*, 165 Wn.2d 1, 9, 195 P.3d 525 (2008); *see also State v. Clark*, 143 Wn.2d 731, 745, 24 P.3d 1006 (2001).

Mr. Mills has already had the issue of his indigence heard by this Court. Mr. Mills' first appeal contained a great number of other claimed errors. The Court of Appeals addressed them in the unpublished opinion produced in response to his first appeal. Unpublished opinions may be cited in few cases, one of them being an exception for the 'rule of the case' doctrine. *State v. Sanchez*, 74 Wn. App. 763, 765, 875 P.2d 712 (1994)(FN 1). As such, it is cited here not as a precedential authority, which RAP 14.1 would expressly forbid. However, it establishes the 'rule of the case' that Mr. Mills is bound by. *State v. Mills* discusses Mr. Mills' indigent status in the section noted as 'Additional Grounds' subsection 'restitution.' The State will simply quote the Courts finding:

3. Restitution: Mr. Mills contends the court erred in ordering him to pay restitution without first considering his ability to pay. Under RCW 10.01.160(3), a sentencing court is required to consider the defendant's ability to pay costs. Here, the presentence investigation report shows Mr. Mills was receiving \$1,289 from his United States Army pension. And, no actual collection effort is currently before us.

State v. Mills, 142 Wn.App. 1017, (2007).

While that subheading deals with restitution compared to costs, the true issue is Mr. Mills' protest of the court refusing to extend his indigent status beyond his jail time. This applies to both his argument about costs, and about the restitution imposed, as the underlying appraisal of indigency is the same in either case. This

issue has been settled, and Mr. Mills must accept the prior ruling of the appeals court.

C. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE DEFENDANT WOULD HAVE THE LIKELY FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.

The trial court used the facts and circumstances known to it when it imposed the costs, fines, fees, and restitution against the defendant. There is no requirement for a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). The imposition of fines is within the trial court's discretion, and protection is provided from an abuse of that discretion. *Id.* at 916. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified. *Id.* The Washington State Supreme Court has stated as such: "If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault of his own, to repay, the statute allows for remission of the costs award." *State v. Blank*, 131 Wn.2d 230, 253, 930 P.2d 1225 (1997). Mr. Mills has suffered no harm as a result of the imposition of costs or restitution. When the state attempts to collect such from him, he will be given a chance to be heard, and make arguments about his ability to pay. The

court has made it clear: “There is no reason at this time to deny the State's cost request based upon speculation about future circumstances.” *Id.* at 253.

Mr. Mills’ Judgment and Sentence, Finding 2.5 simply indicates that the Court believes that Mr. Mills may be able to pay his Legal Financial Obligations. (CP 28). Both RCW 10.01.160 and RCW 9.94A.753 ask the court to look to the defendant’s current and future ability to pay. The court did agree that Mr. Mills is currently not able to pay. (RP 9/29/10, 12). However, the court also entered Finding 2.5 on the Judgment and Sentence. (CP 28). These two facts are in no way opposed.

Finding 2.5 provides:

The court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 28).

Mr. Mills may not be able to pay at the current point in time, but the court had confidence that Mr. Mills would be able to pay in the future. The following exchange between counsel and Judge Matheson may highlight why the Judge believed Mr. Mills would be able to pay:

THE COURT: I certainly would sign an order that would eliminate any interest between the date of July 9th of 2008 apparently when I signed that, and today's date.

And then I also would just tell Mr. Mills that is you get out and make regular payment and pay off the principle amount, I don't know that I'll be available then to tell YOU the truth, but I think most judges would waive the interest. You know, it's so rare when people do that. On the other hand, we feel like we should apply the law fully if people don't make an effort. I have a suspicion that Mr. Mills will get out and pay it. That's what I think.

MR. THOMPSON: He will, you honor....

.....

THE COURT: The only people who ever really worry about the interest are people who are actually going to pay it.

(RP 9/29/10, 14-15).

Judge Matheson indicated firmly his belief that the defendant would be able to pay his Legal Financial Obligations. Counsel for the defendant provided assurances that the defendant would, and Mr. Mills received a reduction on the interest owed in exchange for that. The court believed Mr. Mills would be able to pay the costs and fees assessed, and stated on the record that if he did so, he believed interest would be waived. After all this, the defendant now comes and argues that the he will not ever be able to repay any portion of his Legal Financial Obligations.

The judgment of whether Mr. Mills would ever be capable of paying his Legal Financial Obligations is made by the trial court. Judge

Matheson believed the defendant would be capable of paying, and found such. When the State attempts to collect from Mr. Mills, the court may examine the facts again. Furthermore, as the Court of Appeals stated in Mr. Mills original appeal: “Here, the presentence investigation report shows Mr. Mills was receiving \$1,289 from his United States Army pension.” *State v. Mills*, 142 Wn.App. 1017. This is not an insignificant amount and would be available to Mr. Mills in paying off his legal financial obligations.

D. PROPER REMEDY IF THE COURT REACHES THE MERITS.

It is the State’s position that Mr. Mills waived his right to appeal on the restitution when he made no objection at sentencing and willingly participated in the discussion of costs and fees. However, if this Court reaches the merit of his argument, the State would concede that the restitution order was improperly entered.

The costs associated with transporting witnesses to and from their homes are not within the scope of RCW 9.94A.120, and not a proper matter for restitution. However, Mr. Mills has suffered no prejudice associated with this assessment. Assessments of the costs associated with transporting witnesses against a criminal defendant are entirely proper. *State v. Birch*, 183 Wash. 670, 680-681, 49 P.2d 921 (1935). The

assessments are not exercises of the States power under RCW 9.94A.120, but are properly considered court costs under RCW 10.01.120. Mr. Mills has not alleged that the expenses were not fully and fairly explained, nor that he did not waive any objections to them. Thus, there are no factual issues in contention, and no discretionary matters for the Court to consider.

The only thing needed to do on remand would be to enter an amended Judgment and Sentence, reflecting that the restitution amount in Finding 4.1 should have been filed as costs associated with the litigation. As such, this Court should remand for a ministerial hearing in which this administrative issue can be changed. Mr. Mills has suffered no impairment of his rights, and there is no need for or right to a contested hearing on the issue, as there is nothing to dispute.

CONCLUSION

For the reasons stated above, the Judgment and Sentence should be affirmed, or in the alternative, remanded for clerical correction by removing the restitution for transporting witnesses, and adding that amount to the cost bill.

RESPECTFULLY SUBMITTED this 25th day of July 2011.

ANDY MILLER

Prosecutor

Handwritten signature of Andy Miller in black ink.

BRENDAN M. SIEFKEN, Deputy

Prosecuting Attorney

Bar No. 41219

OFC ID NO. 91004

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 294617

vs.

DECLARATION OF SERVICE

KAM ALAN MILLS,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on July 25, 2011.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on July 25, 2011.



PAMELA BRADSHAW