

No. 30121-4-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

FILED  
AUG 31, 2012  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

DAVID AARON SOTO,  
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT  
Honorable David Elofson, Judge

---

REPLY BRIEF OF APPELLANT

---

SUSAN MARIE GASCH  
WSBA No. 16485  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY .....1

1. A sentencing court lacks statutory authority to impose a firearm enhancement upon a conviction for a Class C unranked felony where RCW 9.94A.533, the statute permitting adjustments to standard sentences, does not apply to unranked felonies.....1

2. The findings that Mr. Soto has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.....5

B. CONCLUSION.....8

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<u>In Re Pers. Restraint of Acron</u> , 122 Wn. App. 886, 95 P.3d 1272 (2004).....	2, 3, 4
<u>State v. Baldwin</u> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	7
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	5, 6, 7
<u>State v. Gurske</u> , 155 Wn.2d 134, 118 P.3d 333 (2005).....	1
<u>State v. Lohr</u> , 164 Wn. App. 414, 263 P.3d 1287 (2011).....	7
<u>State v. Rainford</u> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	1
<u>State v. Souza</u> , 60 Wn. App. 534, 805 P.2d 237, <i>reconsideration denied, review denied</i> , 116 Wn.2d 1026 (1991).....	6–7

<u>State v. Taylor</u> , 97 Wn.2d 724, 649 P.2d 633 (1982).....	4
<u>Yacobellis v. Bellingham</u> , 55 Wn. App. 706, 780 P.2d 272 (1989), <i>rev. denied</i> , 114 Wn.2d 1002 (1990).....	5

**Statutes**

RCW 9.94.041.....	1
[former] RCW 9.94A.310(5)(c).....	1
RCW 9.94A.505(2)(b).....	2, 4
RCW 9.94A.510.....	2
RCW 9.94A.515.....	3
RCW 9.94A.517.....	2
RCW 9.94A.533.....	1, 4
RCW 9.94A.533(1).....	2
RCW 9.94A.533(3)(f).....	1
RCW 9.94A.533(5)(c).....	1
RCW 16.52.205(1).....	2, 4
RCW 16.52.205(2).....	2, 4
RCW 16.52.205(3).....	3

**Other Resources**

2011 Washington State Adult Sentencing Guidelines Manual..	3
--	---

A. ARGUMENT IN REPLY

**1. A sentencing court lacks statutory authority to impose a firearm enhancement upon a conviction for a Class C unranked felony where RCW 9.94A.533, the statute permitting adjustments to standard sentences, does not apply to unranked felonies.**

The issue whether sentence enhancements permitted under RCW 9.94A.533 apply to unranked felonies appears to be one of first impression. However, at least one Justice of our Washington State Supreme Court and one division of the Court of Appeals agree with Soto that such enhancements do *not* apply to unranked felonies. State v. Gurske, 155 Wn.2d 134, 153 fn.1, 118 P.3d 333 (2005) (Chambers, J., concurring) (“The statute exempts certain firearms offenses and does not address unranked felonies. RCW 9.94A.533(3)(f).”); State v. Rainford, 165 Wn. App. 393, 267 P.3d 511 (Div. II, 2011) (“RCW 9.94.041 [possession of controlled substances by prisoners] is an unranked felony under the Sentencing Reform Act of 1981 and is not subject to enhancement for possession within a correctional facility under [former] RCW 9.94A.310(5)(c) [now RCW 9.94A.533(5)(c)].”)

Soto incorporates as if set forth fully herein his argument set forth in Brief of Appellant, pp. 3–9.

In its fifteen pages of responding argument and some fifty-seven pages of appendices,<sup>1</sup> the State disregards the opening directive of the statute at issue: “The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.” RCW 9.94A.533(1). The language is clear and unambiguous. Under the *principle expressio unius est exclusion alterius*, “where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.” In Re Pers. Restraint of Acron, 122 Wn. App. 886, 890, 95 P.3d 1272 (2004). Soto’s unranked offense of animal cruelty<sup>2</sup> is instead governed by the standard sentence range of 0 to 12 months set forth in RCW 9.94A.505(2)(b). The inference required by the rule is that the legislature intended this omission, and thus that the legislature intended to omit Soto’s unranked animal cruelty offense from application of a firearm enhancement. *See, Acron*, 122 Wn. App. at 890.

First degree animal cruelty offenses under RCW 16.52.205(1) and (2) are unranked. The conclusion that unranked felonies were intentionally omitted from application of firearm enhancements is bolstered by the legislature’s treatment of the separate first degree animal

---

<sup>1</sup> Brief of Respondent (“BOR”), pp. 1–15, 22–26, Appendix A, Parts I, II.

<sup>2</sup> Soto was charged under RCW 16.52.205(1).

cruelty offense of “sexual conduct or sexual contact with an animal”. RCW 16.52.205(3). The legislature *included* that offense as a ranked felony and it is therefore subject to application of a firearm enhancement. RCW 9.94A.515; 2011 Washington State Adult Sentencing Guidelines Manual, Part Two – Page 77, and Part Two – Page 192 (offender scoring form). Ranking one version of animal cruelty while leaving two versions unranked indicates a deliberate legislative decision to distinguish between ranked and unranked felonies.<sup>3</sup>

Even if the legislature did not intend to omit unranked felonies from application of the sentencing enhancement statute, the matter must be left to the legislature to correct the error. Acron, 122 Wn. App. at 891. “Appellate courts do not supply omitted language even when the legislature’s omission is clearly inadvertent, unless the omission renders the statute irrational. . . . [W]here the legislature’s omission ‘did not undermine the purposes of the statute [but] simply kept the purposes from being effectuated comprehensively,’ we will not read omitted language

---

<sup>3</sup> “The Sentencing Guidelines Commission recommends rankings to the legislature, and does not recommend that all offenses be ranked: ‘The Commission decided not to rank certain felonies which seldom occur.... If, in the future, a significant number of persons are convicted of offenses not included in the Seriousness Level Table, the Commission will recommend appropriate seriousness levels to the Legislature for those crimes.’” In re Acron, 122 Wn. App. at 890, citing WASHINGTON STATE SENTENCING GUIDELINES COMMISSION ADULT SENTENCING GUIDELINES MANUAL at II-57 (1993).

into a statute. Id., quoting State v. Taylor, 97 Wn.2d 724, 729, 649 P.2d 633 (1982).

Here, omitting unranked felonies from application of the sentencing enhancement statute does not undermine either statute. The first degree animal cruelty offenses under RCW 16.52.205(1) and (2)—as well as all other unranked felonies—can still be enforced; violations can still be punished. The statute permitting adjustments to standard sentences continues to be part of the sentencing scheme, which is not made irrational by the exclusion of unranked felony offenses.

Because Soto's sentence range is determined by RCW 9.94A.505(2)(b), the provisions of RCW 9.94A.533 are inapplicable. The sentencing court had no authority to impose a firearm enhancement upon his conviction for the unranked offense of first degree animal cruelty under RCW 16.52.205(1), and the matter must be remanded for resentencing without the enhancement.

**2. The findings that Mr. Soto has the current or future ability to pay LFOs and the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.**

The State concedes the record does not support the specific findings that Soto has the

... present ability or likely future ability to pay the financial obligations imposed herein ...

... means to pay for the costs of incarceration ..., and

... means to pay for any costs of medical care ...

CP 53, 55; BOR, pp. i, 15.

The State contends that since “no actual costs [of incarceration and medical care were] assessed” in the judgment and sentence, Soto’s issue as to incarceration and medical care is moot. BOR, p. 15–16. However, Soto does not challenge the *imposition* of costs of incarceration or medical costs. Rather, the trial court made two specific findings that he has the means to pay such costs. There is no evidence in the record to support the findings. The lack of evidence is not “purely academic” and this court can “provide effective relief” by striking the findings as clearly erroneous.

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011); *see*

Yacobellis v. Bellingham, 55 Wn. App. 706, 709, 780 P.2d 272 (1989),  
*rev. denied*, 114 Wn.2d 1002 (1990).

The State appears to similarly misunderstand Soto’s argument regarding the “umbrella” finding that he has the current or future ability to pay LFOs—comprised not only of costs of incarceration and medical care, but also the \$3,700 (restitution, costs, assessments, and fine) listed at ¶ 4.D.3 (CP 55) of the judgment and sentence. Soto is not challenging the *imposition* of these costs. He is disputing the entry of a factual finding—made without supporting evidence—that he has the present or future ability to pay these costs. Bertrand is clear: where there is no evidence to support the trial court’s findings regarding ability and means to pay, the findings must be stricken.

Without citation to relevant authority, the State urges this Court to “maintain jurisdiction, remand this allegation to the trial court and allow the parties to address this finding in a timely and cost effective manner.” BOR, p. 16–20. There is nothing to address. The trial court made findings unsupported by any evidence. Bertrand simply says the findings must be stricken. Counsel is aware of no authority holding that it is appropriate to send a finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf. State v. Souza*

(vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *reconsideration denied, review denied*, 116 Wn.2d 1026 (1991); State v. Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d 1287, 1289–92 (2011).

Furthermore, “[t]he meaningful time to examine [Soto’s] ability to pay is when the government seeks to collect the obligation.”<sup>4</sup> If and when the Department of Corrections or the county clerk decides to enforce collection of costs will be the meaningful time to examine Soto’s ability to pay. Until then, the finding of ability to pay any LFOs must be stricken from the judgment and sentence.

---

<sup>4</sup> Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, this Court should remand the matter for resentencing without the firearm enhancement and to strike the findings as to ability and means to pay legal financial obligations and costs of incarceration and medical care.

Respectfully submitted on August 30, 2012.

---

s/Susan Marie Gasch, WSBA  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 30, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

David A. Soto (#843728)  
Washington State Penitentiary  
1313 North 13<sup>th</sup> Avenue  
Walla Walla WA 99362

**E-mail:** [trefrylaw@wegowireless.com](mailto:trefrylaw@wegowireless.com)  
David Brian Trefry  
Special Deputy Prosecuting Attorney  
P. O. Box 4846  
Spokane WA 99220-0846

---

s/Susan Marie Gasch, WSBA #16485