

FILED
Jan 30, 2012
Court of Appeals
Division III
State of Washington

No. 30121-4-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID AARON SOTO,
Defendant/Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a firearm enhancement as part of the sentence.

2. The record does not support 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.

Issues Pertaining to Assignments of Error

1. Does a sentencing court lack 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?

2. Should 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 be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?

B. STATEMENT OF THE CASE

David Aaron Soto was found guilty after a bench trial of animal cruelty in the first degree and unlawful possession of a firearm in the first degree. CP 42. Following the State's case, the court had earlier dismissed Count I, drive-by shooting. RP 130, 155. The court found that Mr. Soto

was armed with a firearm when he committed the crime of animal cruelty in the first degree. CP 43 at ¶ 5. The court imposed a 12 months base sentence on the animal cruelty conviction to run concurrent with a 48 months base sentence on the firearm possession conviction, both of which would run consecutive to the 18 months firearm enhancement, for a total term of confinement of 66 months. CP 54.

At sentencing, defense counsel had challenged imposition of the firearm enhancement based upon lack of statutory authority to impose it on the unranked offense of animal cruelty as charged. After hearing argument, the trial court rejected the challenge. RP 162–65.

As conditions of sentence, the court made the following findings:

¶ 2.7 Financial Ability: 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 present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

CP 53.

¶ 4.D.4. Costs of Incarceration: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed \$100.00 per day of incarceration (the rate in 2011 is \$79.75 per day), and orders the defendant to pay such costs at the

statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).

¶ 4.D.5 Costs of Medical Care: In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP 55.

This appeal followed. CP 59.

C. ARGUMENT

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.

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's

discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law which is reviewed de novo. Matter of the Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007), citing Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). “A trial court may impose a sentence that is only authorized by statute.” Leach, 161 Wn.2d at 184, citing In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). “This court applies unambiguous statutes according to their plain language and construes only ambiguous statutes.” Leach, 161 Wn.2d at 185, citing State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). When interpreting a statute, a court must first assume that the legislature means exactly what it says. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Thus, if the statute is clear on its face, its meaning is derived from the statutory language alone. State v. Watson, 146 Wn.2d 947, 51 P.3d 66 (2002). In State v. Hall, the court stated this rule as follows:

Where the meaning of a statute is clear on its face, this court assumes that the Legislature “means exactly what it says” and we give effect to the plain language without regard to rules of statutory

construction. State v. Warfield, 103 Wn. App. 152, 156, 5 P.3d 1280 (2000).

State v. Hall, 112 Wn. App. 164, 48 P.3d 350 (2002).

The statute authorizing the superior court to impose a firearm enhancement is RCW 9.94A.533, which provides in pertinent part:

RCW 9.94A.533. Adjustments to standard sentences.

- (1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.
- (2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.
- (3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(3);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

...

RCW 9.94A.533 (in pertinent part).

At the outset, the legislature has confined application of firearm enhancements¹ “to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.” RCW 9.94A.533(1). The statute is clear on its face. RCW 9.94A.510 (Table 1) provides a grid consisting of seriousness level rankings for offenses, and the offender's criminal history, or offender score. RCW 9.94A.517 (Table 3) provides a similar grid applicable specifically to drug offenses. Using the grid, “the intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)).” RCW 9.94A.530(1).

¹ As well as other adjustments of sentences provided for in the statute. RCW 9.94A.533.

In this case, however, Mr. Soto's standard sentence range is not determined by RCW 9.94A.510 or 9.94A.517. His sentence range is instead determined by RCW 9.94A.505(2)(b). The offense of animal cruelty in the first degree as charged under RCW 16.52.205(1) and of which he was convicted is not assigned a seriousness level², and is therefore an unranked offense. Unranked offenses are not found on the grid(s), and carry a standard range of 0 to 12 months. RCW 9.94A.505(2)(b);³ *see also* In Re Pers. Restraint of Acron, 122 Wn. App. 886, 888, 95 P.3d 1272 (2004). Because Mr. Soto's sentence range is determined by RCW 9.94A.505(2)(b), the provisions of RCW 9.94A.533 are inapplicable.⁴ The sentencing court had no authority to impose a firearm enhancement upon his conviction for the unranked offense of first

² See RCW 9.94A.515. Table 2--Crimes included within each seriousness level.

³ RCW 9.94A.502(b) provides as follows:

“If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 not to exceed one year; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement and a community custody term under RCW 9.94A.701 if the court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.”

⁴ See also 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).”).

degree animal cruelty under RCW 16.52.205(1), and the matter must be remanded for resentencing without the enhancement.⁵

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 record does not support the trial court's judgment and sentence "findings" that Mr. Soto has (1) the current or future ability to pay LFOs and (2) the means to pay costs of incarceration and (3) the means to pay costs of medical care. CP 54 at ¶ 2.4, 55 at ¶¶ 4.D.4 and 4.D.5. The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, ___ Wn. App. ___, 2011 WL 6097718, *4 (Dec. 18, 2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge

⁵ Cf., RCW 16.52.205(3), sexual conduct or sexual contact with an animal, *is* assigned a seriousness level of III and *is* considered a ranked felony. RCW 9.94A.515; 2011 Washington State Adult Sentencing Guidelines Manual, Part Two – Page 77, and Part Two – Page 192 (offender scoring form).

took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard (bracketed material added) (internal citation omitted).” Bertrand, 2011 WL 6097718, *4, citing Baldwin, 63 Wn. App. at 312.

The record here does not show that the trial court took into account Mr. Soto's financial resources and the nature of the burden of imposing LFOs and costs of incarceration and medical care on him. In fact, the record contains no evidence to support the trial court's findings in ¶ 2.7 that Mr. Soto has the present or future ability to pay LFOs, in ¶ 4.D.4 that he has the means to pay costs of incarceration⁶, and in ¶ 4.D.5 that he

⁶ The sentencing court imposed a total term of confinement of 66 months. The costs of incarceration at \$50/day would roughly total \$100, 375. In pertinent part, RCW 9.94A.760, Legal Financial Obligations, provides as follows:

(2) 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 for the cost of incarceration at a rate of fifty dollars per day of incarceration, if incarcerated in a prison, or 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. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department

has the means to pay costs of medical care⁷. The findings are therefore clearly erroneous and must be stricken from the Judgment and Sentence.

Bertrand, 2011 WL 6097718, *5.

⁷ In part, RCW 70.48.130, Emergency or necessary medical and health care for confined persons--Reimbursement procedures--Conditions—Limitations, provides as follows:

As part of the screening process upon booking or preparation of an inmate into jail, general information concerning the inmate's ability to pay for medical care shall be identified, including insurance or other medical benefits or resources to which an inmate is entitled. This information shall be made available to the department, the governing unit, and any provider of health care services.

The governing unit or provider may obtain reimbursement from the confined person for the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. As part of a judgment and sentence, the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.

To the extent that a confined person is unable to be financially responsible for medical care and is ineligible for the department's medical care programs under chapter 74.09 RCW, or for coverage from private sources, and in the absence of an interlocal agreement or other contracts to the contrary, the governing unit may obtain reimbursement for the cost of such medical services from the unit of government whose law enforcement officers initiated the charges on which the person is being held in the jail: PROVIDED, That reimbursement for the cost of such services shall be by the state for state prisoners being held in a jail who are accused of either escaping from a state facility or of committing an offense in a state facility.

D. CONCLUSION

For the reasons stated, 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 January 30, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 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 brief of appellant:

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