

FILED

OCT 6 8 2012

Consol. No. 30605-4-III

Consolidated with

COURT OF APPEALS

No. 30606-2

DIVISION III

No. 30607-1

No. 30608-9

No. 30609-7

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT HURLEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Andrew J. Metts
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The court below lacked statutory authority to penalize appellant's failure to report as directed to the county clerk as a violation of a sentencing condition.
2. The court below lacked statutory authority to penalize appellant's failure to complete and return financial assessment form to the county clerk as a violation of a sentencing condition. [sic]
3. The court below lacked statutory authority to penalize appellant's failure to notify the clerk's office of a change in circumstances as a violation of a sentencing condition.
4. The court erred by finding appellant had committed a condition of sentence violation without being notified in writing of the nature of the violation.
5. The court erred by finding appellant violated the sentencing condition requiring him to notify the clerk's office of any change in circumstances.
6. The evidence was insufficient to support the finding that appellant violated the sentencing condition requiring him to complete and return a financial assessment form.

7. The court erred in denying appellant's motion to reconsider. The State is unable to find any in the defendant's brief on a motion to reconsider.

II.

ISSUES PRESENTED

- A. DID THE STATUTES IN EFFECT AT THE TIME OF THE SENTENCING GIVE THE TRIAL COURT THE AUTHORITY TO COLLECT DATA FOR THE PURPOSE OF DETERMINING WHETHER THE DEFENDANT WAS MAKING PAYMENTS OR IF THERE WAS A CHANGE IN THE DEFENDANT'S FINANCIAL STATUS?
- B. DO THE FINANCIAL REPORTING STATUTES VIOLATE THE "SEPARATION OF POWERS" DOCTRINE?
- C. WERE THE DEFENDANT'S DUE PROCESS RIGHTS VIOLATED BY A LACK OF WRITTEN NOTICE?
- D. IS THE FINANCIAL REPORTING STATUTE UNCONSTITUTIONALLY VAGUE?
- E. DID THE TRIAL COURT ERR BY FINDING A VIOLATION WITHOUT FACTUAL SUPPORT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

- A. THE SENTENCING COURT HAD AUTHORITY UNDER THE STATUTES (OPERATIVE AT THE TIME OF THE CRIME) TO REQUIRE THE DEFENDANT TO REPORT HIS FINANCIAL STATUS AS WELL AS ANY CHANGE IN STATUS.

The defendant begins by claiming that the court had no authority to order the defendant to report, complete a financial form and notify the clerk of any change in circumstances. Brf. of App. 11. Under RCW 9.94A.145(1), the trial court may order payment of a legal financial obligation as part of a sentence. By the defendant's arguments, the trial court would have to accept whatever the defendant's status might be at the time of sentencing. Further, according to the logic of the defendant, the sentencing court would be unable to determine the amount of any payments made by the defendant. In other words, by the defendant's arguments, the defendant could be sentenced to certain financial repayments, but the sentencing court would have no ability to monitor the

defendant's situation. This line of argument is not only illogical, it is not in harmony with the statutes in effect at the time of sentencing.

The 2002 version of RCW 9.94A.145(5) reads: In order to assist the court in setting a monthly sum that the offender must pay during the period of supervision, the offender is required to report to the department for purposes of preparing a recommendation to the court.” RCW 9.94A.145(5). The section goes on to require the defendant to report truthfully and honestly to all questions concerning present, past and future earning capabilities and the location of all property or financial assets. RCW 9.94A.145(5). Clearly, the statute in effect at the time required the defendant to report to the department of corrections and the department of corrections would then be responsible to prepare reports for the court. The defendant will, no doubt, point out that the statute refers to the department of corrections, not the clerk's office.

By the time the violation hearing in this case became extant, the statutes had changed somewhat. RCW 9.94A.760(7)(b) authorized the clerk's office to present reports to the sentencing court. The sentencing court would use such data as was collected by the clerk's office and make its own ruling regarding necessity for a hearing, violations, etc. So, depending on exactly the date one might be investigating, it would be either the department of corrections or the clerk's office's responsibility to create reports and forward them to the sentencing court

for whatever action the court deemed necessary. The defendant's claim that the trial court lacked authority to collect data from other agencies is simply wrong.

The defendant cites to RCW 9.94A.760(7)(b) in his brief and complains that in this case there was only a "generic notification." By the time the case has progressed in time from its original sentencing to the point where the clerk's office assumes collection duties, several years had passed. The defendant was surely sitting in the courtroom when the judge ordered the original assessment. The defendant now attempts to convince this court that that any notification was inadequate. The defendant had to know the amount the sentencing judge assessed as the defendant signed the Judgment and Sentence.

The defendant jumps from statute to statute in his arguments. The operative statute at the time of sentencing was RCW 9.94A.145. Under that statute the sentencing court had the authority to receive recommendations from the department of corrections regarding collections. RCW 9.94A.145(7). It is logical that the statute empowers the department of corrections to make reports to the sentencing court as listed in RCW 9.94A.145(8), (9) .

The defendant jumps to a discussion of RCW 9.94A.760. The defendant claims that RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13) violate the separation of powers doctrine because the legislation gives power to county clerks to collect legal financial obligations without providing adequate standards.

RCW 9.94A.760(4) states in part:

For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The department of corrections shall supervise the offender's compliance with payment of the legal financial obligations for ten years following the entry of the judgment and sentence, or ten years following the offender's release from total confinement, whichever period ends later. The department is not responsible for supervision of the offender during any subsequent period of time the offender remains under the court's jurisdiction.

RCW 9.94A.760(4).

In other words, for the first ten years following the entry of the judgment and sentence (or ten years after release) the department of corrections is to monitor the defendant's compliance. After the ten years period, the county clerk assumes monitoring of the defendant's legal financial obligation status.

RCW 9.94A.760(7).

The defendant couches many of his arguments in terms of the authority of the clerk's office, lack of authority to require reporting, etc. The defendant's arguments along these lines fail. The clerk's office is not statutorily authorized to run amuck with no oversight by the sentencing court. In fact, the clerk's office only supplies information to the sentencing court for the convenience of the court. The clerk's office only requests reports from the defendant and requests status reports from defendants for the purpose of keeping the trial court informed. The

fact that the clerk can recommend a violation to the court does not violate anything. The defendant is told at the time of sentencing what his duties will be. If the defendant chooses to ignore the duties placed on him, that is what activates any consequences.

B. NONE OF THE STATUTES IN QUESTION VIOLATE THE "SEPARATION OF POWERS" DOCTRINE.

The defendant includes a complete argument alleging a "separation of powers" violation, but there is no similar section listed in the Assignments of Error.

The defendant argues that RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13) violate the separation of powers doctrine. The defendant raises issues that have no application to this case and appears to be simply taking random attacks aimed at the statutes which give authority to the court clerk's office to monitor defendant's LFO status and make reports to the sentencing court. The defendant is arguing statutes that did not exist at the time the defendant was sentenced. Without saying so, the defendant is imbuing later statutes with the powers they did not have at the time the defendant was sentenced.

The State maintains that the defendant cannot argue statutes that did not exist in their current form at the time the defendant was sentenced. The defendant makes several arguments regarding the authority and lack of controls on the

county clerk. The defendant misses the point that he was sentenced before the county clerk related statutes came into effect. In any event, any statute which currently authorizes the clerk to monitor the LFO status of a defendant is nothing but a provision to continue to provide financial data to the sentencing court. It is the sentencing court that evaluates the incoming data, decides whether to hold a hearing and decides on what sanctions are appropriate.

The defendant bases his arguments on the perceived lack of controls on the clerk's office. Since the clerk's office is nothing but a reporting information source for the sentencing court, the "lack of controls" argument is without substance. Anything that happens to a defendant as a result of the information produced by the clerk's office will be a result of actions of the sentencing court.

More to the point, the defendant fails to note that at the time the defendant was sentenced, the court clerk's office is hardly mentioned in the statutes. The main data collection and reporting agency was the department of corrections. RCW 9.94A.145(9)

- C. THE DEFENDANT CLAIMS THAT HIS "DUE PROCESS" RIGHTS WERE VIOLATED BECAUSE HE WAS FOUND TO HAVE COMMITTED A VIOLATION OF A CONDITION OF HIS SENTENCE WITHOUT WRITTEN NOTIFICATION OF THE NATURE OF THE VIOLATION.

The defendant claims his "due process" rights were violated because he did not receive written notice regarding the failure to report violation. The

defendant cites to no authority requiring notification for a failure to report allegation. The defendant's arguments are somewhat confusing as the defendant clearly understood his need to report. RP 20-21; 27-28. Written notice would not have affected the situation as the defendant already knew what his responsibilities were. RP 20-21; 27-28. The defendant obviously got notice of the impending hearing as he was incarcerated at a point two days prior to the hearing and the defendant filled out (but did not sign) the required reporting form. RP 14. At that time, the defendant was represented by counsel who met with the defendant to deal with the notification form. It is not reasonable to assume that being put in custody would not have given the defendant notice as to his continuing failure to complete the required forms. The defendant does not attempt to argue that his defense counsel did not discuss the legal situation with him.

On cross-examination, the prosecutor asked the defendant about three prior appearances for failure to pay and other items. RP 21. The prosecutor asked, "So you had plenty of warning?" To which the defendant replied, "Absolutely." RP 21.

The defendant had known for years about the requirements to report and pay his legal financial obligations. RP 18. The defendant is using a chimera in an attempt to cover for concrete facts.

D. THE SENTENCING CONDITION REQUIRING THE DEFENDANT TO NOTIFY THE CLERK'S OFFICE OF ANY CHANGE IN CIRCUMSTANCES IS NOT UNCONSTITUTIONALLY VAGUE.

Again, the defendant makes an argument that is not in the Assignments of Error. The State responds below to the defendant's arguments but is unsure exactly what the defendant terms this section.

By the language of the defendant's own citation to *Valencia*, the defendant's vagueness arguments fail.

As stated in *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010), "Because the condition might potentially encompass a wide range of everyday items, it "...does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Valencia, supra*. One thing that must exist in the defendant's mind in order to make the notification requirement "vague" would be a convenient dullness of thought. The entire purpose from the time of his sentencing to the time of his violation has been a focus on having the defendant return the value of the stolen items.

The defendant was told initially at the time of sentencing that recovery of money was part of the court's goals and even the defendant admitted he had been notified many times of the purpose of the reporting system. RP 20-22.

Since the defendant was more than well aware that he was supposed to be paying money to the clerk's office, any assessment form, communication, hearing, etc. could only be interpreted in one way: "The court wants the defendant to pay restitution and fines to repay victims and to recover some of the expenses." The *Valencia* case noted that because it was a drug case, a defendant might use sandwich bags, or paper for some purpose other than a drug related activity. Since the case at bar only involved money and the recovery of same, there could be no "vagueness" at all. The reporting requirements could have only one purpose: determination of the financial situation of the defendant.

E. THE DEFENDANT'S FAILURE TO COMPLETE A VIOLATION ASSESSMENT FORM WAS CLEARLY SUPPORTED BY THE FACTS.

The defendant makes a claim that he did complete a financial assessment form and returned it to the clerk of the court two days prior to the violation hearing on January 6, 2012.

The record does not support the defendant's claim. According to the record, the defendant did not sign the financial assessment form. RP 13. During his testimony, the defendant claimed that he did not sign the document because he did not have a pen. RP 13. This claim seems shaky, at best, considering the defendant was in the attorney/inmate room at the jail. It strains credulity to

believe that the defense counsel or someone else at the jail would not, or could not, supply the defendant with a pen.

An unsigned document was all but worthless. There is no way to tell if the information was authentic without a signature.

It is interesting that the defendant is able to supply the required amounts of money needed to be released from jail, but he refuses to make regular monthly payments. RP 16. This sort of behavior demonstrates the earmarks of a person who either wishes to “game” the system. On direct examination at the revocation hearing, the defendant stated:

When I originally took my plea deal years ago, they weren't incarcerating you for not paying your LFO. It's something you knew you had to do, and as a man, I accept my responsibilities, and I wish to pay my bills, but if I had known that they were going to, I mean, especially this time here make me miss my entrance date to school, which is my own fault ultimately, I would have never taken that plea deal. I would have cost the State a lot more money going to trial because things happen that you cannot perceive, that you cannot see in the future.

RP 18.

In other words, if the defendant had known that the State was serious about collecting funds for victims and court costs, he would not have taken the plea bargain and he would have gone to trial instead, in an effort to cost the State more money.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 8th day of October, 2012.

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