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APR 08, 2013

Court of Appeals
Division III
State of Washington

No. 31154-6-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID BRUCE GUNKEL-RUST,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Carrie L. Runge, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecution failed to prove beyond a reasonable doubt that Ms. Bleichner was the protected party in a no contact order.

2. The record does not support the implied finding that the defendant has the current or future ability to pay Legal Financial Obligations.

3. The trial court erred in imposing a variable term of community custody as part of the sentence for violation of post-conviction protection order—felony.

4. The Judgment and Sentence contains a scrivener’s error that should be corrected.

Issues Pertaining to Assignment of Error

1. The prosecution was required to prove that Kali May Bleichner was the protected party in a restraining order. Here, the prosecutor did not present independent evidence (beyond identity of first and last names) establishing beyond a reasonable doubt that “Kali Bleichner”—who did not testify at trial—was the same " Kali May Bleichner " named in the restraining order introduced into evidence at trial. Did Mr. Gunkel-Rust’s conviction infringe his Fourteenth Amendment right to due process because it was based on insufficient evidence?

2. Should the implied finding that the defendant has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

3. Did the sentencing court lack statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody?

4. The Judgment and Sentence states that “If the crime is a drug offense, the type of drug involved is: [X] as charged in the Amended Information.” The crime here is not a drug offense and is not charged as such in the original, Amended and Second Amended Informations. Should this scrivener’s error be corrected?

B. STATEMENT OF THE CASE

The state charged the defendant, David Bruce Gunkel-Rust, with violation of post-conviction protection order—felony. The allegation was that on July 11, 2012, he encountered and spoke to Kali Bleichner in a park, in violation of a court order. CP 9.

At trial, the state produced evidence that a Domestic Violence No Contact Order was in effect, listing “Kali May Bleichner” as the protected party, and Mr. Gunkel-Rust as the restrained party. 9/20/12 RP 14, 48.

Jordan Brosius testified she was at Keewaydin Park with Kali Bleichner when Mr. Gunkel-Rust, a mutual friend, approached and had some words and physical contact with Ms. Bleichner. At some point Ms. Brosius became concerned and called 9-1-1. 9/20/12 RP 31–40.

Kennewick Police Officer Eleanor Grant responded to the park, and eventually spoke to someone named “Kali” whose last name the officer could not remember. 9/20/12 RP 40–48.

Kali Bleishner did not testify at trial. 9/20/12 RP *passim*.

The state produced evidence that Mr. Gunkel-Rust had at least twice been previously convicted for violating the provisions of a court order. 9/20/12 RP 14–30. The jury convicted Mr. Gunkel-Rust as charged. 9/20/12 RP 88–89.

The sentencing court imposed the following term of community custody:

(A) The defendant shall be on community placement or community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1), (2); or

(2) the period imposed by the court, as follows:

... 12 months;

CP 66 at ¶ 4.5.

The court also ordered a total amount of Legal Financial Obligations (“LFOs”) of \$2,420. CP 64, 70. The court made no express finding that Mr. Gunkel-Rust had the present or future ability to pay the LFOs. 9/20/12 RP 90–94; *see* CP 63–64 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the court:

¶ 2.5 Ability to Pay Legal Financial Obligations. 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.

CP 63. The court made no inquiry into Mr. Gunkel-Rust’s financial resources and the nature of the burden that payment of LFOs would impose. 9/20/12 RP 90–94. The court ordered that Mr. Gunkel-Rust begin making monthly payments on the LFOs commencing immediately and that he pay up to \$50 per month to be taken from any income earned while in DOC custody. CP 65 at ¶ 4.1.

This appeal followed. CP 73.

C. ARGUMENT

1. Mr. Gunkel-Rust's conviction violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove the essential elements of the charged crime beyond a reasonable doubt.

a. Standard of review. Constitutional questions are reviewed de novo. State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010).

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

b. The Fourteenth Amendment's due process clause requires the state to prove the crime charged beyond a reasonable doubt. The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

c. The prosecution failed to establish beyond a reasonable doubt that Ms. Bleichner was the protected party named in the restraining order.

The State carries the burden of proving each element of the charged crime beyond a reasonable doubt. State v. Borrero, 147 Wn.2d 353, 364, 58 P.3d 245 (2002). In this case, the State had to prove that on or about July 11, 2012, Mr. Gunkel-Rust willfully had contact with Ms. Kali May Bleichner, knowing that such contact was prohibited by a no contact order. RCW 26.50.110; 11 Washington Pattern Jury Instructions: Criminal 36.51.02 (3d ed. 2008); 9/20/12 RP 48.

The state has the burden of proving identity through relevant evidence. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.” State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

“To sustain this burden when criminal liability depends on the accused's being the person to whom a document pertains ...the State must

do more than authenticate and admit the document; it also must show beyond a reasonable doubt ‘that the person named therein is the same person on trial.’ Because ‘in many instances [people] bear identical names,’ the State cannot do this by showing ‘identity of names alone.’ Rather, it must show, ‘by evidence independent of the record,’ that the person named therein is the defendant in the present action. State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (citations and footnotes omitted).

At issue in State v. Huber was whether the state produced insufficient evidence to show that person on trial for bail jumping was same person who earlier had failed to appear in court. The issue here is conceptually similar—whether the state produced insufficient evidence to show that the person protected under a certain no contact order was the same person whom Mr. Gunkel-Rust contacted on this occasion.

Here, the prosecution failed to prove that the protected party named in the order-" Kali May Bleichner"¹-was the “Kali Bleichner” whom witness Jordan Brosius testified was her friend in need at the Keewaydin Park incident (9/20/12 RP 31–40) and/or the “Kali” encountered by

¹ 9/20/12 RP 48.

responding Kennewick Police Officer Eleanor Grant and whose last name the officer could not remember. 9/20/12 RP 46, 40–48.

There was no testimony as to “Kali Bleichner’s” or “Kali’s” date of birth. Even the jury inquired, unsuccessfully, as to Kali Bleichner’s age. CP 57. There was no testimony as to “Kali Bleichner’s” or “Kali’s” middle name. Nor was there evidence that “Kali Bleichner” or “Kali” was the protected party of any protection order. The subject of the protection order—Kali May Bleichner—did not appear in court to testify.

Because the prosecution failed to follow the requirements of Huber, *supra*, the evidence was insufficient as a matter of law to establish that the person referred to at trial—Ms. Kali Bleichner—was the person protected by the no contact order. Accordingly, the evidence was insufficient to find Mr. Gunkel-Rust guilty of violating that order. The conviction violated Mr. Gunkel-Rust's Fourteenth Amendment right to due process. Winship, *supra*. The conviction must be reversed and the case dismissed with prejudice. Smalis, *supra*.

2. The implied finding that Mr. Gunkel-Rust has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.”² RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of

² It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. *See* RCW 13.40.192.

costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's implied finding that Mr. Gunkel-Rust has the present and future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” Id. at 915-16.

Here, the court considered Mr. Gunkel-Rust’s “past, present and future ability to pay legal financial obligations” but made no express finding that he had the present or likely future ability to pay those LFOs. However, the finding is implied because the court ordered that all payments on the LFOs be paid “commencing immediately” and in the amount of \$50.00 per month *after* it considered “the total amount owing, the defendant's 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.” CP 63 at ¶ 2.5; CP 65 at ¶ 4.1.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). 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, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (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 took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Gunkel-Rust's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding in ¶¶ 2.5 and 4.1 that Mr. Gunkel-Rust has the present or future ability to pay LFOs. The record instead supports the opposite conclusion: the trial court found Mr. Gunkel-Rust indigent for purposes of pursuing this appeal. 9/20/12 RP 92–93. The implied finding that he has the present or future ability to pay LFOs that is implicit in the directive to make payments commencing immediately and at a rate of up to \$50.00 per month is simply not supported in the record. It is clearly erroneous and the directive must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where the court made no inquiry and there is no evidence in the record to support such findings.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual 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, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); 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 at 1289–92.

Mr. Gunkel-Rust is not challenging *imposition* of the LFOs; rather, the trial court made the implied finding that he has the present and future ability to pay them and, and since there is no evidence in the record to

support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Gunkel-Rust until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

3. The sentencing court did not have statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

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 and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

RCW 9.94A.701(3) provides that:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

(a) Any crime against persons under RCW 9.94A.411(2);

...

RCW 9.94A.701(3)(a). Violation of post-conviction protection order—felony is a Class C felony under RCW 26.50.110(4) and (5), and a crime

against persons under RCW 9.94A.411(2). Thus, the court had authority to impose a 12-month term of community custody.

However, “[u]nder [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing.” State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, the trial court imposed the following term of community custody:

(A) The defendant shall be on community placement or community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1), (2); or

(2) the period imposed by the court, as follows:

... 12 months;

CP 66 at ¶ 4.5.

The trial court did not have the statutory authority to sentence Mr. Gunkel-Rust to a variable term of community custody contingent on the amount of earned release. Under RCW 9.94A.701 it could only sentence him to a finite term of 12 months. Therefore, the variable term of community custody imposed by the trial court was improper.

4. The Judgment and Sentence contains a scrivener's error that should be corrected.

The Judgment and Sentence states that “If the crime is a drug offense, the type of drug involved is: [X] as charged in the Amended Information.” CP 61. However, the crime here is not a drug offense and is not charged as such in the original, Amended and Second Amended Informations. CP 1–3, 7–8, 9–10. Therefore, this court should remand the case for correction of the Judgment and Sentence to remove this incorrect finding. *See, e.g., State v. Nallieux*, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

D. CONCLUSION

For the reasons stated, the conviction should be reversed and dismissed. In the alternative the matter should be remanded for resentencing with instructions to impose a finite term of 12 months community custody, and to remove the incorrect finding and to strike the implied finding of present and future ability to pay legal financial obligations from the Judgment and Sentence.

Respectfully submitted on April 8, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 8, 2013, 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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