

FILED

SEP 13, 2013
Court of Appeals
Division III
State of Washington

NO. 31180-5-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

HEATHER L. MERCADO,

Defendant/Appellant.

SUPPLEMENTAL APPELLANT'S BRIEF,

Dennis W. Morgan WSBA #5286
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ARGUMENT

A Commissioner's Ruling was entered on August 28, 2013. The ruling directed counsel to file supplemental briefing on the issue raised in Heather L. Mercado's original brief. In particular, the ruling requires Ms. Mercado to address appealability.

"The general rule is that a party may not raise an issue for the first time on appeal that it did not raise below." *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996).

The general rule is permissive in nature. It does not automatically preclude the introduction of an issue on appeal. The issue is whether or not the trial court exceeded its statutory authority when it imposed a requirement of HIV testing.

"When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." *State v. Hale*, 94 Wn. App. 46, 53, 971 P.2d 88 (1999); *see also State v. Bennett*, 154 Wn. App. 202, 209, 224 P.3d 849 (2010); and *State v. Winborne*, 167 Wn. App. 320, 330 (2012).

The trial court clearly exceeded its statutory authority by requiring HIV testing. The record is devoid of any reference to hypodermic needles.

Even though the guilty plea statement and the judgment and sentence reference RCW 70.24.340, there was no specific discussion by the

trial court as to the underlying facts that would support imposition of the testing. Where the underlying facts are not discussed, the applicability of a statute is called into question. *See: Welfare of B.R.S.H.*, 141 Wn. App. 39, 45, 169 P.3d 40 (2007).

Finally, the invited error doctrine was addressed in Ms. Mercado's reply brief. It is inapplicable. Any issue of waiver is also inapplicable.

This court has repeatedly held that "an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law." *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004) ... [Citations omitted.] A defendant simply "cannot empower a sentencing court to exceed its statutory authorization." *State v. Eilts*, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980). The fact that a defendant agreed to a particular sentence does not cure a facial defect in the judgment and sentence where the sentencing court acted outside its authority.

...

... Washington courts have held that even where a defendant clearly invited the challenged sentence by participating in a plea agreement, to the extent that he or she "can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review." *Phelps* [*State v. Phelps*, 113 Wn. App. 347, 57 P.3d 624 (2002)] at 354

Personal Restraint of West, 154 Wn.2d 204, 213-14, 110 P.3d 1122

(2005).

The issue before the Court is ripe for review. Ms. Mercado urges the Court to issue a decision in accord with the line of authorities set forth in her respective briefs.

DATED this 13th day of September, 2013.

Respectfully submitted,

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NO. 31180-5-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) WALLA WALLA COUNTY
 Plaintiff,) NO.12 1 00145 3
 Respondent,)
) **CERTIFICATE OF SERVICE**
 v.)
)
 HEATHER L. MERCADO,)
)
 Defendant,)
 Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 13th day of September, 2013, I caused a true and correct copy of the *SUPPLEMENTAL APPELLANT'S BRIEF* to be served on:

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