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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33209-8-III

STATE OF WASHINGTON, Respondent,

v.

LONNIE DEAN GLEIM, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....3

VI. CONCLUSION.....8

CERTIFICATE OF SERVICE.....9

AUTHORITIES CITED

Cases

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005).....6

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....5, 6, 7

State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012).....5

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).....6

State v. Hudnall, 116 Wn. App. 190, 64 P.3d 687 (2003).....4

State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008).....4

State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004).....4

Stedman v. Cooper, 172 Wn. App. 9, 292 P.3d 764 (2012).....7

Statutes

RCW 7.06.060.....7

RCW 9A.20.021(1)(b).....4

RCW 9.68A.070(1)(b).....3

RCW 9.94A.505(5).....4

RCW 9.94A.701(9).....5

RCW 10.01.160.....7

Court Rules

GR 34(3)(A)(v).....7

RAP 2.5(a)(2).....6, 8

I. INTRODUCTION

Following entry of his guilty plea, the trial court sentenced Lonnie Dean Gleim to 102 months' incarceration and 36 months' community custody, the combined total of which exceeds the 10-year maximum sentence for the charge of possessing depictions of a minor engaged in sexually explicit conduct in the first degree. The trial court also imposed legal financial obligations without conducting an adequate inquiry on the record into Gleim's ability to pay them, when evidence in the record indicated Gleim received only $200 per month income and food stamps, and was on the verge of bankruptcy.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in imposing a sentence in which the total period of incarceration and community custody exceed the statutory maximum.

ASSIGNMENT OF ERROR 2: The trial court erred in imposing legal-financial obligations without conducting an individualized inquiry into Gleim's ability to pay.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is the trial court's sentence unlawful under RCW 9.94A.701(9)?

ISSUE 2: What is the appropriate remedy when the trial court imposes a sentence in which the combined term of incarceration and community custody exceeds the statutory maximum?

ISSUE 3: Was the trial court's inquiry adequate to satisfy the requirements of *Blazina* to consider the defendant's total financial circumstances in evaluating his ability to pay?

ISSUE 4: When there are insufficient facts supporting the trial court's imposition of legal financial obligations, is review appropriately granted under RAP 2.5(a)(2)?

IV. STATEMENT OF THE CASE

Lonnie Dean Gleim pleaded guilty to four counts of possessing depictions of a minor engaged in sexually explicit conduct in the first degree in exchange for a joint sentence recommendation of an exceptional downward sentence of 36 months. CP 10-19. At sentencing, the trial court rejected the recommended sentence and imposed the high end of the range of 102 months for each charge, as well as 36 months' community

custody. CP 46. Nothing in the judgment and sentence stated that the combined total period of incarceration and community custody could not exceed the ten year maximum for the crimes. CP 40-49. The trial court additionally imposed $1,639.10 in legal financial obligations, including discretionary assessments, but did not conduct a reasonable individualized inquiry into Gleim's likely future ability to pay them, asking only:

> Court: Financial obligations, between court costs, victim's assessment and fees, totals $1,639.10. When you are employed, what is it that you do?
>
> Defendant: Various general labor.
>
> Court: Okay. Payments will be not less than $50 per month, and that will commence 90 days after release.

RP at 12. Information presented to the court in the presentence investigation indicated that Mr. Gleim was earning only $200 per month, was receiving food stamps, and was considering filing bankruptcy as the result of having multiple medical bills in collections. CP 32-33.

V. ARGUMENT

I. The trial court's sentence facially exceeds the statutory maximum for the crime and violates RCW 9.94A.701(9).

Possessing depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony. RCW 9.68A.070(1)(b). As such, the maximum penalty that can be imposed upon conviction is ten

years' incarceration. RCW 9A.20.021(1)(b). The trial court here imposed a sentence of 102 months' incarceration together with 36 months' community custody, for a total term of 138 months. This exceeds the statutory maximum for the crime and violates the Sentencing Reform Act. *See* RCW 9.94A.505(5).

Under earlier iterations of the Sentencing Reform Act, sentences thus exceeding the statutory maximum were upheld provided that the judgment and sentence specifically stated the maximum sentence and stated that the total combination of incarceration and community custody cannot exceed the maximum. *State v. Sloan*, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004). Alternatively, trial courts were allowed to impose less than the statutorily required 36 month term of community custody as an exceptional sentence to ensure the maximum term was not exceeded. *State v. Hudnall*, 116 Wn. App. 190, 197, 64 P.3d 687 (2003).

This line of authority, however, gave rise to the question whether such provisions effectively rendered the sentence indeterminate because it purported to delegate to the Department of Corrections the authority to calculate the length of the sentence, contrary to the Sentencing Reform Act. *See State v. Linerud*, 147 Wn. App. 944, 949-50, 197 P.3d 1224 (2008) (opinion withdrawn and superseded, 154 Wn. App. 1001 (2010)).

Consequently, the legislature revised the Sentencing Reform Act by adopting RCW 9.94A.701(9), which states,

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Since the enactment of RCW 9.94A.701(9), the Washington Supreme Court has required the trial court, rather than the Department of Corrections, to correct the judgment and sentence to avoid exceeding the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). In *Boyd*, the case was remanded to the trial court to either amend the community custody term or resentence the defendant. *Id.*

Boyd is directly applicable here. The trial court's sentence exceeds the statutory maximum by 18 months. Accordingly, as in *Boyd*, this court should remand the case for either resentencing or reduction of the community custody term to comply with RCW 9.94A.701(9).

B. The trial court failed to conduct an adequate inquiry into Gleim's likely ability to pay discretionary legal-financial obligations before imposing them.

In March 2015, the Washington Supreme Court decided *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), in which it held that to

comply with RCW 10.01.160, trial courts must conduct an individualized inquiry into the defendant's ability to pay. Under *Blazina*, entry of a sentence with boilerplate language is insufficient; the record must demonstrate that the court considered "the financial resources of the defendant and the nature of the burden that payment of costs will impose," including the defendant's incarceration and other debts. *Id.* at 838. The *Blazina* Court further recognized that if a defendant meets the GR 34 standard for indigency, "courts should seriously question that person's ability to pay LFOs." *Id.* at 839.

Notably, the *Blazina* Court did not criticize the Court of Appeals' decision declining discretionary review of the issue when no objection to the imposition of LFOs were raised below. 182 Wn.2d at 834. Here, no objection to the LFOs was raised at sentencing. However, because review is appropriate under RAP 2.5(a)(2), this court should decide the issue.

RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges "failure to establish facts upon which relief can be granted." The exception "is fitting inasmuch as '[a]ppeal is the first time sufficiency of evidence may realistically be raised.'" *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (*quoting State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)). RAP 2.5(a)(2)

has been applied to review of remedies imposed following a substantive trial, including a party's entitlement to attorney fees. *Stedman v. Cooper*, 172 Wn. App. 9, 24-25, 292 P.3d 764 (2012). *Stedman* is directly analogous to the imposition of legal financial obligations following a guilty plea when there is no stipulation as to the defendant's ability to pay. Where, as here, insufficient facts support the trial court's determination that the defendant has the likely ability to pay LFOs, the statutory requirements to impose LFOs under RCW 10.01.160 are not met. Likewise, in *Stedman*, insufficient facts supported the imposition of attorney fees because they failed to show the requirements of RCW 7.06.060 were met. As in *Stedman*, review should be granted here.

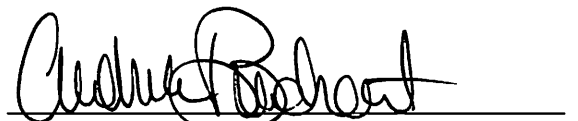
Applying the standard set forth in *Blazina*, the trial court plainly failed to conduct the required individualized determination into Gleim's circumstances in evaluating his likely future ability to pay discretionary LFOs, such as attorney fees and Sheriff fees. CP 44. Despite evidence before the court that even before his extensive term of incarceration and his requirement to register as a sex offender, Gleim was earning only $200 per month, the trial court ordered him to pay 25% of that entire amount every month to satisfy the judgment. CP 32-33, 44. Under GR 34(3)(A)(v), a party is determined to be indigent if he receives benefits from the Food Stamp Program, which the record further indicates that

Gleim was receiving at the time of his arrest. CP 32. Neither the trial court's sole inquiry – what Gleim does when he works – nor Gleim's answer – general labor – satisfied the *Blazina* requirements or established an adequate factual basis that Gleim had the likely future ability to pay discretionary LFOs.

Because there are insufficient facts in the record supporting the imposition of LFOs, review should be granted under RAP 2.5(a)(2) and the case should be remanded for the discretionary LFOs to be stricken from the judgment and sentence.

VI. CONCLUSION

RESPECTFULLY SUBMITTED this 24th day of June, 2015.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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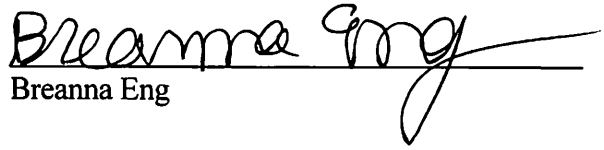
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 24th day of June, 2015 in Walla Walla, Washington.



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