

64473-4

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NO. 64473-4-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC O'GRADY,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 AUG 20 PM 4:37

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT	1
B. ASSIGNMENTS OF ERROR.....	1
C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
D. STATEMENT OF THE CASE.....	3
E. ARGUMENT	4
1. THE SENTENCE IMPOSED BY THE COURT EXCEEDS THE STATUTORY MAXIMUM AND IMPERMISSIBLY EXTENDS THE TERM OF COMMUNITY CUSTODY CONTRARY TO STATUTE	4
a. The sentence imposed for third degree rape exceeds the statutory maximum	4
b. The community custody terms imposed for second degree assault exceed the court’s statutory authority ..	5
2. THE COURT IMPROPERLY IMPOSED INVALID LEGAL FINANCIAL OBLIGATIONS AND IMPERMISSBLY DECLARED MR. O’GRADY ABLE TO PAY	7
a. There is insufficient evidence to support the trial court’s finding that Mr. O’Grady had the present or future ability to pay legal financial obligations.....	7
b. The court lacked authority to impose a “jury demand fee” when Mr. O’Grady pleaded guilty	11
c. The non-mandatory filing fee should not be imposed without a specific, and accurate, determination on the record of Mr. O’Grady’s ability to pay	12
F. CONCLUSION	14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re: Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023
(2009) 4, 6

Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 845
P.2d 1331 (1993)..... 8

State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006) 8

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992)..... 7, 10

United States Supreme Court Decisions

Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642
(1974) 7, 10

Washington Constitution

RCW 9.94A.701 5, 6

Statutes

RCW 10.01.160 7, 11

RCW 43.43.690 10

RCW 7.68.035 10

RCW 9.94A.753 9

RCW 9.94A.760 10

Other Authorities

Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State (2008)..... 13, 14

Washington State Sentencing Guidelines Commission, Adult Sentencing Manual, I-vii (2008)..... 13

A. SUMMARY OF ARGUMENT.

After Eric O'Grady pled guilty, the court ordered him to serve a sentence for a class C felony that substantially exceeded the 60-month statutory maximum. The court also imposed terms of community custody far in excess of the length permitted by statute. Further, the court expressly refused to consider Mr. O'Grady's poverty when imposing legal financial obligations and ordered that he pay costs to the court, such as a jury fee, despite the lack of evidence that the state had incurred such costs.

B. ASSIGNMENTS OF ERROR.

1. The court imposed a sentence that exceeded the statutory maximum for a class C felony.

2. The court imposed terms of community custody that are not authorized by statute.

3. The court lacked authority to impose legal financial obligations for court fees without evidence that the State actually incurred these costs.

4. The court's finding that Mr. O'Grady had the financial resources to pay legal financial obligations is not supported by the record.

5. The court lacked authority to impose non-mandatory court fees without taking into account Mr. O'Grady's inability to pay court fees due to poverty.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The sentencing court may not exceed its statutory authority when imposing a sentence. The court sentenced Mr. O'Grady to a term of community custody that far exceeded the 60-month statutory maximum for third degree rape when combined with the 54-month prison sentence imposed. It also imposed terms of community custody for two other offenses in excess of that permitted by statute. Must this Court correct the legally erroneous sentence imposed on Mr. O'Grady?

2. A court lacks authority to impose legal financial obligations unless it first determines that the individual has some ability to pay and assesses the actual cost of the items for which the defendant is required to pay. Here, the court imposed numerous legal financial obligations despite affirmative evidence that Mr. O'Grady lacked the ability to pay and did not ascertain whether the requested costs were actually incurred during the trial. Did the court lack authority to impose non-mandatory legal financial

obligations for expenses not specifically incurred in the instant prosecution?

D. STATEMENT OF THE CASE.

Eric O'Grady pled guilty to two counts of second degree assault and one count of third degree rape. On October 29, 2009, the court imposed a sentence of 29 months in custody and 18 to 36 months of community custody for the two counts of assault. CP 29. The court ordered Mr. O'Grady serve a sentence of 54 months for third degree rape, along with 36 to 48 months of community custody for that offense. CP 28-29.

Mr. O'Grady explained that he was, and was likely to remain, indigent, but the court also imposed various non-mandatory court fees. 10/29/09RP 31-32, 44. The court did not make any findings that the state actually incurred these costs, such as a jury demand fee. CP 26-27. Mr. O'Grady timely appeals.

E. ARGUMENT.

1. THE SENTENCE IMPOSED BY THE COURT EXCEEDS THE STATUTORY MAXIMUM AND IMPERMISSIBLY EXTENDS THE TERM OF COMMUNITY CUSTODY CONTRARY TO STATUTE.

- a. The sentence imposed for third degree rape

exceeds the statutory maximum. The statutory maximum for an offense sets the ceiling of punishment that may be imposed. In re: Personal Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009); RCW 9A.20.021. A term of community custody must be authorized by the legislature. Id. The controlling statute instructs the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. Id.; RCW 9.94A.701; Former RCW 9.94A.505 (2006) (repealed in 2009).

Third degree rape is a class C, nonviolent felony, with a five year statutory maximum. RCW 9A.44.060; RCW 9A.20.021(1)(c); RCW 9.94A.030(30), (50). The sentencing court imposed a prison term of 54 months in custody, along with a community custody term of 36 to 48 months, for this offense. CP 28-29. This sentence violates the 60-month statutory maximum. See Brooks, 166 Wn.2d at 675.

The legislature amended RCW 9.94A.701 to add:

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.

RCW 9.94A.701(8) (recodified in Laws 2010 ch. 224, § 5 as RCW 9.94A.701(9)).

The community custody imposed for third degree rape must be "reduced by the court" so Mr. O'Grady is not required to serve any additional time beyond the 60 months permitted under the statutory maximum where the combination of the prison sentence and community custody term exceed the statutory maximum.

RCW 9.94A.701(8) (2009).

b. The community custody terms imposed for second degree assault exceed the court's statutory authority. Mr. O'Grady was also convicted of two counts of second degree assault, and received two concurrent prison terms of 29 months for each count. CP 28. The court imposed 18 to 36 months community custody for these offenses. CP 29. At sentencing, the court ignored the revisions to the community custody statute enacted in 2009 when setting the length of the term of community custody.

Assault in the second degree is a class B, violent offense. RCW 9.94A.030(50); RCW 9A.36.021. Under RCW 9.94A.701(2), the community custody term for a violent offense that is not labeled a “serious violent offense,” such as second degree assault, may not exceed 18 months. The amendments to RCW 9.94A.701 took effect August 1, 2009, and are imposed retroactively to apply to all cases in which a community custody term was imposed and has not yet been completed. Laws 2009 ch. 375, §20.¹

Accordingly, the community custody term of 18 to 36 months imposed by the court is not authorized by statute. The sentencing court was obligated to follow the dictates of RCW 9.94A.701 at the October 2009 sentencing hearing, which it failed to do. The terms of community custody imposed must be reduced upon resentencing. Brooks, 166 Wn.2d at 675.

¹ The Legislature expressly declared when making these changes to community custody:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

Laws 2009 ch. 375, §20

2. THE COURT IMPROPERLY IMPOSED
INVALID LEGAL FINANCIAL OBLIGATIONS
AND IMPERMISSIBLY DECLARED MR.
O'GRADY ABLE TO PAY

Courts may require an indigent defendant to reimburse the state for only certain authorized costs and 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). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty. Id.

a. There is insufficient evidence to support the trial court's finding that Mr. O'Grady had the present or 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 constitution “direct [a court] to consider ability to pay.” Id. at 915-16. RCW 10.01.160(3) provides,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In

determining the amount and method of payment of 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.

Here, the court made an express and formal finding that Mr. O'Grady had the ability to pay. CP 26.² But a finding 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)).

Mr. O'Grady's attorney explained that Mr. O'Grady was and remained indigent. 10/29/09RP 31-32. He had an eighth grade education, no significant work history, and would be a registered sex offender with convictions that would make it hard for him to be employed. Id. Mr. O'Grady's family had retained an attorney to assist Mr. O'Grady when his court-appointed counsel was found to have rendered ineffective assistance of counsel, but Mr. O'Grady had no resources to pay an attorney and had not contributed any

² In what appears to be a boilerplate section of the Judgment and Sentence, the court's findings include the statement:

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 the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

money to pay for his retained attorney. 10/29/09RP 31; CP 122-29. Mr. O'Grady had been found indigent when the court appointed counsel upon the inception of the case. Motion, Declaration and Order to Proceed In Forma Pauperis on Appeal, p. 2. The court affirmed that finding in the motion for indigency filed for purposes of appeal. Id., p. 5.

When confronted with evidence of Mr. O'Grady's actual indigence, the court declared that as a matter of course, it would not consider Mr. O'Grady's financial circumstances until he had served his prison term because perhaps he might become able to pay fees and costs once he was released from prison. 10/29/09RP 44. Although the court was supposed to determine whether a person was able to pay before it imposed costs, and the judgment and sentence purports to include such a finding; the court decided to find Mr. O'Grady was able to pay even though all available evidence indicated he had no such ability. Id.; CP 26.

The court's finding regarding Mr. O'Grady's ability to pay cites RCW 9.94A.753 as the pertinent statutory authority. CP 26. RCW 9.94A.753 pertains to the court's authority to impose

CP 17.

restitution, and does not speak to other fees paid to the courts or county or fines imposed as punishment. One important difference between restitution and other fees or fines is that restitution is mandatory. Under RCW 9.94A.753(1) & (3), “the court shall order restitution in all cases where the victim is entitled to benefits,” and the offender’s ability to pay is considered when setting the monthly payment schedule. This restriction does not apply to the largely discretionary legal financial obligations, of which only a small portion are mandatory. See RCW 9.94A.760(1) (court “may” impose a legal financial obligation); see also RCW 43.43.690 (Mandatory DNA collection fee); RCW 7.68.035 (mandatory victim penalty assessment).

The trial court’s explicit finding that Mr. O’Grady had the ability to pay legal financial obligations is contrary to the record and should be stricken. Moreover, because the record does not support a finding that Mr. O’Grady has the present or future ability to pay costs, non-mandatory legal financial obligations may not be imposed. Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

b. The court lacked authority to impose a “jury demand fee” when Mr. O’Grady pleaded guilty. Costs that may be imposed on a criminal defendant must be “expenses specially incurred by the state in prosecuting” and convicting the defendant. RCW 10.01.160(1), (2). “Costs may be imposed only upon a convicted defendant,” and therefore, costs incurred when a defendant is not convicted may not be imposed. RCW 10.01.160(1).

Mr. O’Grady pled guilty, before trial, without summoning a jury. 10/21/09RP 3, 7. Accordingly, the State did not specially incur a jury demand fee in garnering Mr. O’Grady’s conviction. The court’s imposition of the \$250 jury demand fee must be stricken. CP 26.

Although Mr. O’Grady had previously been convicted following a jury trial, the Court of Appeals reversed that conviction and Mr. O’Grady pled guilty to a different offense than that which he was previously convicted. CP 41-42, 53, 119, 129. He should not be punished for prevailing on appeal, and his willingness to negotiate his case rather than demanding a jury should reduce his legal financial obligations, as they also reduced the State’s own financial expenditures.

c. The non-mandatory filing fee should not be imposed without a specific, and accurate, determination on the record of Mr. O'Grady's ability to pay. The judgment and sentence required Mr. O'Grady to pay a \$200 "Criminal filing fee." CP 26. This amount was preprinted on the judgment and sentence as if they are imposed as a matter of routine rather than based on the amounts actually incurred. Id. Because there is no evidence in the record to establish the actual costs, the trial court erred in imposing the filing fee.

Similarly, the court imposed a \$100 Crime lab fee under RCW 43.43.690. But this statute directs that the court may suspend part or all of the fee if the person is indigent. Id. Indeed, the judgment and sentence contains an unchecked box for the court to decline to impose this cost due to hardship. Here, the court insisted on imposing costs and fees notwithstanding uncontested evidence of Mr. O'Grady's indigence. 10/29/09RP 31-32, 44.

One of the goals of the Sentencing Reform Act is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Washington State Sentencing Guidelines Commission, Adult Sentencing Manual, I-vii

(2008). But the amount of fines and fees imposed upon conviction vary greatly by “gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced.” See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008). This study found that, three years post-sentencing, less than 20 percent of the fees, fines and restitution had been paid for roughly three quarters of the cases in the study. Id. at 20.

The court’s imposition of legal financial obligations without giving any weight to the person’s ability to pay exacerbates the problems that those released from confinement must face and may, in fact, lead to increased recidivism.

It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

The court's imposition of substantial legal financial obligations by virtue of its declared intent to ignore Mr. O'Grady's inability to pay constitutes significant punishment that violates the right to equal protection of the law, is contrary to statute, and must be reconsidered on remand, giving attention to his poverty.

F. CONCLUSION.

For the foregoing reasons, Mr. O'Grady respectfully requests this Court strike the legally incorrect terms of community custody and the unauthorized as well as unsupported legal and financial obligations.

DATED this 23rd day of August 2010.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)
)
 Respondent) NO. 64473-4
)
 v.)
)
 ERIC O'GRADY,)
)
 Appellant.)

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 20TH DAY OF AUGUST, 2010, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

[X] Jeffrey D Sawyer
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311 Grand Ave Ste 201
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[X] Eric O'Grady
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SIGNED IN SEATTLE, WASHINGTON THIS 20th DAY OF AUGUST, 2010

x *Ann Joyce*

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