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66978-8

66978-8

NO. 66978-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LUIS COSGAYA-ALVAREZ,

Appellant.

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

REPLY BRIEF OF APPELLANT

Elaine L. Winters
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

LUIS MAY CHALLENGE THE STATUTORY
AUTHORITY OF THE SENTENCING COURT TO
IMPOSE RESTITUTION FOR FUTURE CHILD
SUPPORT PAYMENTS

Luis Cosgaya-Alvarez challenges the order requiring him to pay restitution of \$100,200 for the victim's future child support payments. The State agrees that the superior court's power to order restitution is statutory. Brief of Respondent at 7 (citing State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007)). The State nonetheless asserts that Mr. Cosgaya-Alvarez cannot argue that the restitution imposed exceeded the court's statutory authority, claiming he waived this argument because his defense counsel challenged the amount of restitution requested and not the statutory authority to impose it. Brief of Respondent at 2-3, 4-6. This Court should reject the State's argument, as Luis may challenge an illegal restitution order for the first time on appeal.

Appellate courts normally address issues that were raised in the trial courts, but have the discretion to address other issues as well. RAP 2.5(a); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). In Washington, illegal or erroneous sentences may always be addressed for the first time on appeal. Ford, 137 Wn.2d at 477-

78, 484-85; State v. Moen, 129 Wn.2d 535, 546-48, 919 P.2d 69 (1996) (appellate may raise timeliness of restitution order for first time on appeal); State v. Hunter, 102 Wn.App. 630, 633-64, 9 P.3d 872 (2000), rev. denied, 142 Wn.2d 1026 (2001); State v. Paine, 69 Wn.App. 873, 884, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024 (1993) (and cases cited therein).

Sentencing is a critical stage in a criminal proceeding. Permitting defendants to challenge an illegal sentence on appeal helps ensure that sentences are in compliance with the sentencing statutes. Moen, 129 Wn.2d at 546-47. Moreover, the rule inspires confidence in the criminal justice system and is consistent with the Sentencing Reform Act's goal of uniform and proportional sentencing. RCW 9.94A.010(1)-(3); Ford, 137 Wn.2d at 478-79, 484.

The State argues that Mr. Cosgaya-Alvarez cannot now challenge the ordered restitution as outside the sentencing court's statutory authority because his attorney contested the amount of the child support payments but not whether child support was authorized by the restitution statute. Brief of Respondent at 2-3, 4-6. This argument ignores the duty and power of a court, including this Court, to correct an illegal sentence upon discovery. Personal

Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001); Ford, 137 Wn.2d at 477 (quoting State v. Loux, 69 Wn.App. 855, 858, 420 P.2d 693 (1966), overruled in part, Moen, 129 Wn.2d at 545); see Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) (defendant cannot agree to punishment in excess of court's sentencing authority).

The State argues this case is controlled by Young, where Division Two held a defendant could not challenge a restitution order for child support payments under the invited error doctrine in a second appeal. State v. Young, 63 Wn.App. 324, 330, 818 P.2d 1375 (1991). The invited error doctrine, however, applies only when the defendant has engaged in "knowing and voluntary actions to set up the error." Call, 144 Wn.2d at 328. That is not the case here.

The State also incorrectly relies upon Goodwin, where the Washington Supreme Court clarified that an offender cannot waive his right to challenge a sentence based upon a legal error, but may waive an error based upon an agreement to facts. Goodwin, 146 Wn.2d at 874.

While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the

alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.

Id. (emphasis in original). Here the argument Luis makes for the first time on appeal is a legal one: that the SRA does not authorize the sentencing court to order restitution for unpaid child support. He is not challenging the underlying facts, such as the existence of the child support orders. Thus, this Court may address Luis's challenge to the order requiring him to pay \$100,200 for future child support.

B. CONCLUSION

As argued in the Brief of Appellant, the order requiring Luis Cosgaya-Alvarez to pay restitution of \$100,200 for future child support payments is not authorized by the SRA and must be vacated. In the alternative, the order must be vacated because the trial court abused its discretion by awarding the lump sum payment.

DATED this 19th of March 2012.

Respectfully submitted,



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

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LUIS COSGAYA-ALVAREZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN MCDONALD, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] LUIS COSGAYA-ALVAREZ	(X)	U.S. MAIL
342730	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13 TH AVE		
WALLA WALLA, WA 99362		

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MARCH, 2012.

X _____ 

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710