

68063-3

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

STATE OF WASHINGTON,
Respondent,
v.
GENE CAMARATA,
Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 3

 1. The trial judge lacked jurisdiction to amend the judgment
 because Mr. Camarata had timely filed an affidavit of prejudice
 and the judge originally recused himself from the case..... 3

 2. The court erred in imposing discretionary costs and fees
 because Mr. Camarata is indigent and lacks the ability to pay..... 5

E. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Harbor Enterprises, Inc. v. Gudjonsson, 116 Wn.2d 283, 803 P.2d 798
(1991)..... 5

Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 845 P.2d
1331 (1993)..... 6

State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006)..... 6

State v. Cockrell, 102 Wn.2d 561, 689 P.2d 32 (1984) 4

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992)..... 5

Washington Court of Appeals Decisions

State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991)..... 6

State v. Richardson, 105 Wn. App. 19, 19 P.3d 431 (2001)..... 6

Statutes

RCW 10.01.160 5

RCW 4.12.040 1, 3, 4

RCW 4.12.050 1, 4

A. ASSIGNMENTS OF ERROR

1. The trial judge lacked jurisdiction to amend the judgment.
2. The sentencing court erred in ordering Mr. Camarata to pay

discretionary fees and costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 4.12.040 and RCW 4.12.050 allow a party move for a change of judge before the judge has issued any discretionary rulings. So long as a party complies with the terms of these statutes, the judge is divested of authority to proceed and loses all jurisdiction over the case. Gene Camarata timely filed an affidavit of prejudice requesting the recusal of Judge Michael Cooper. Judge Cooper recused himself from the case, and a different judge presided over the guilty plea and sentencing hearings. However, on remand following direct appeal, Judge Cooper signed and entered an order modifying the judgment and sentence. Did Judge Cooper lack jurisdiction to sign the order amending judgment?

2. Courts may not impose costs on defendants unless they have a present or future ability to pay. Here, the court imposed attorney costs and filing fees upon Mr. Camarata, even though the evidence showed he was on public assistance at the time of sentencing, had only performed day labor, had mental health issues which made holding a job difficult, and qualified for court-appointed counsel. Did the sentencing court err in

ordering Mr. Camarata to pay the filing fee and costs of court-appointed counsel?

C. STATEMENT OF THE CASE

Gene Camarata was charged with multiple crimes in Kittitas County, and he filed an affidavit of prejudice requesting Judge Michael Cooper's recusal. CP 1. Because he had not issued any discretionary rulings, Judge Cooper recused himself and Judge James Lust presided over all subsequent hearings. CP 7; CP 15; 3/20/08 RP; 4/7/08 RP; 5/12/08 RP; 6/26/08 RP; 9/3/08 RP. Mr. Camarata ultimately pled guilty to one count of misdemeanor harassment and one count of witness tampering. CP 3-19. At sentencing, the court imposed a sentence condition requiring him to shut down his websites, and also imposed \$1,400 in legal financial obligations despite evidence that Mr. Camarata was indigent, homeless, mentally ill, and unemployed.

Mr. Camarata appealed, and this Court ruled that the condition requiring Mr. Camarata to shut down his websites and domains should be stricken. CP 23. Following the mandate, the case was remanded to Kittitas County Superior Court, where Judge Cooper signed an order amending the judgment and sentence. CP 25. Because he was homeless and his appellate counsel could not find him, Mr. Camarata had not been informed of the trial court proceedings or his associated rights.

Approximately two years later, Mr. Camarata became aware of the status of the case, and filed a notice of appeal. This Court granted his motion to enlarge the time to file the notice.

D. ARGUMENT

1. **The trial judge lacked jurisdiction to amend the judgment because Mr. Camarata had timely filed an affidavit of prejudice and the judge originally recused himself from the case.**

RCW 4.12.040 provides, in part, “No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.” RCW 4.12.040(1). The next section sets the time limits for filing a motion for change of judge, or “affidavit of prejudice”:

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving

discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

RCW 4.12.050(1). Together, these provisions guarantee that if a litigant timely files an affidavit of prejudice before the judge makes any discretionary rulings, the trial court must grant the motion for a change of judge. RCW 4.12.040, .050; *State v. Cockrell*, 102 Wn.2d 561, 565-67, 689 P.2d 32 (1984). At this point, “the judge loses all jurisdiction over the case.” *Cockrell*, 102 Wn.2d at 565.

Mr. Camarata timely filed an affidavit of prejudice asking Judge Cooper to remove himself from the case. CP 1. Judge Cooper properly recused himself at that point and lost jurisdiction over the case; Judge Lust presided over all subsequent hearings. CP 7; CP 15; 3/20/08 RP; 4/7/08 RP; 5/12/08 RP; 6/26/08 RP; 9/3/08 RP.

But after Mr. Camarata prevailed in his appeal and the case was remanded, Judge Cooper signed the order amending the judgment and sentence. CP 25. This occurred despite the court's awareness that Judge Cooper did not have jurisdiction over the case. CP 26-27. An order entered without jurisdiction is void. *Harbor Enterprises, Inc. v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991). This Court should hold that the amended judgment entered in Mr. Camarata's case is void because it was entered by a court that lacked jurisdiction.

2. The court erred in imposing discretionary costs and fees because Mr. Camarata is indigent and lacks the ability to pay.

The sentencing court imposed legal financial obligations ("LFOs") totaling \$1,400. CP 12. Although the \$100 DNA fee and \$500 Victim Penalty Assessment ("VPA") are mandatory, it was improper for the court to impose \$600 in attorney costs and a \$200 filing fee given Mr. Camarata lacks the present and future ability to pay.

Courts may not require an indigent defendant to reimburse the state for the costs unless the defendant has or will have the means to do so. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing costs. *Id.* This requirement is both constitutional and statutory. *Id.* 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 sentencing court erred in imposing attorney costs and fees upon Mr. Camarata because substantial evidence does not support a finding that he has or will have the ability to pay. On the contrary, at the sentencing hearing the evidence showed Mr. Camarata was on public assistance and before that had performed only day labor. 6/26/08 RP 18. He has mental health issues which would make holding a job difficult. 6/26/08 RP 10, 17-18. He remained homeless after he served his prison sentence. 9/3/08 RP 25. Because of his indigence, he qualified and continues to qualify for court-appointed counsel. CP 20-21, 29-30.

This case stands in contrast to others in which this Court has affirmed the imposition of costs. In *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because the Presentence Report “establishe[d] a factual basis for the defendant’s future ability to pay.” *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991). But unlike the defendant in *Richardson*, Mr. Camarata is not employed. And unlike in *Baldwin*, the record in this case indicated a *lack*

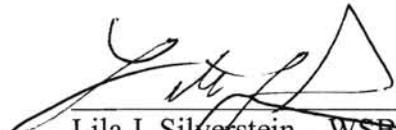
of ability to pay. Thus, this Court should strike the discretionary costs and fees imposed.

E. CONCLUSION

For the reasons set forth above, Mr. Camarata respectfully requests that this Court vacate his judgment and remand for a new hearing before a judge with jurisdiction at which discretionary costs and fees will be waived.¹

DATED this 1st day of November, 2012.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

¹ Mr. Camarata wishes to be present at this hearing. He is homeless but may be reached at his e-mail address, genescases@yahoo.com.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 68063-3-I
)	
GENE CAMARATA,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GREGORY ZEMPEL, DPA KITTITAS COUNTY PROSECUTOR'S OFFICE 205 W 5 TH AVE STE 213 ELLENSBURG, WA 98926	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] GENE CAMARATA CONFIDENTIAL E-MAIL ADDRESS	() () (X)	U.S. MAIL HAND DELIVERY E-MAIL PER CLIENT PREFERENCE

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF NOVEMBER, 2012.

X _____ 

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