

**NO. 46350-4-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS FLOYD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 10-1-00019-6

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**Brief of Respondent**

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether, where Defendant has provided no evidence of any seized property, has claimed no possessory interest in such property, and has not shown the property was not contraband, the record is insufficient to review whether the re-sentencing court had statutory authority to order forfeiture of any items seized.

B. STATEMENT OF THE CASE.

1. Procedure

On March 10, 2011, Thomas Floyd, hereinafter referred to as “Defendant,” was charged by second amended information with second degree assault, a domestic violence incident, and six counts of violation of a no contact order – presentence, a domestic violence incident. CP 9–12; RCW 9A.36.021(1)(a); RCW 10.99.020; RCW 26.50.110(1).

Following a jury trial, Defendant was found guilty as charged. CP 13, 17–22. The jury also found, by special verdict, that Defendant and the victim were members of the same household. CP 14, 23–28. Defendant was sentenced to a standard range sentence of 20 months, to be served consecutively with a total of three years imposed on the gross misdemeanor counts. CP 309.

On Defendant's first direct appeal, this Court in an opinion, published in part, found that the sentencing court had improperly included a 1972 conviction in the offender score calculation. CP 370. Therefore, the case was remanded for resentencing. CP 371.

## 2. Facts

Defendant's resentencing took place on May 5, 2014, in front of the Honorable Frank Cuthbertson. (5/5/14)RP 1-2.<sup>1</sup> When discussing the conditions on sentencing, the forfeiture of property was not discussed or objected to. (5/5/14)RP 11-12, 22. Defendant was sentenced to a standard range sentence of 14 months, to be served consecutively with 12 months imposed for the gross misdemeanors. (5/5/14)RP 22; CP 383. The judgment and sentence, section 4.4, included the following handwritten orders: "Forfeit items seized. Domestic violence evaluation and treatment per CCO." CP 382.

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<sup>1</sup> The verbatim report of proceedings will be referred to by the date, RP, and page number, (XX/XX/XX)RP #.

C. ARGUMENT.

1. THIS COURT SHOULD DECLINE REVIEW OF DEFENDANT’S FORFEITURE CONDITION BECAUSE THE RECORD IS INSUFFICIENT FOR REVIEW.

- a. The record is insufficient for review because Defendant has failed to identify what—if any—property was seized, that the property was not contraband, or that Defendant is the rightful owner of the property.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. McWilliams*, 177 Wn. App. 139, 150, 311 P.3d 585 (2013) *review denied*, 179 Wn.2d 1020, 318 P.3d 279 (2014) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). The court reviews *de novo* whether the sentencing court had the statutory authority to impose a sentencing condition. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, if the record is insufficient for review, the court may decline to review a particular issue. *Washington Pub. Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 898, 86 P.3d 835 (2004) (citing *Bulzomi v. Dep’t of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994)).

There are three reasons a court may refuse to return seized property no longer needed for evidence: (1) the defendant is not the rightful owner, (2) the property is contraband, or (3) the property is subject to forfeiture pursuant to statute. *McWilliams*, 177 Wn. App. at 150 (citing

*City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 244, 262 P.3d 1239 (2011)). A defendant may file a motion pursuant to CrR 2.3(e) for the return of unlawfully seized property. *McWilliams*, 177 Wn. App. 150-151; CrR 2.3(e). CrR 2.3(e) requires an evidentiary hearing to determine the right to possession between the defendant and the State. *State v. Marks*, 114 Wn.2d 724, 734–735, 790 P.2d 138 (1990).

In the present case, Defendant on appeal makes no claim of ownership to any seized property. In fact, Defendant does not identify any property seized. Defendant also failed to object to the imposition of the condition at sentencing. Therefore, it is not evident from the record that Defendant is the rightful owner, that the alleged property is not contraband, or that the alleged property is not subject to forfeiture pursuant to statute. Defendant has also not made a CrR 2.3(e) motion, which would have been accompanied by a full evidentiary hearing. With these deficiencies in the record, this court should decline to review Defendant's challenge.

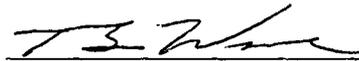
D. CONCLUSION.

The record is insufficient to show that the trial court acted without authority to order forfeiture of seized items. Defendant has not identified any items seized, Defendant has not claimed any possessory interests in

any alleged items, and Defendant has not shown the alleged items were not contraband. Therefore, it cannot be properly evaluated whether the sentencing court acted without statutory authority. The State respectfully requests this court affirm Defendant's sentence.

DATED: April 20, 2015.

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Jordan McCrite  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.20.15   
Date Signature

# PIERCE COUNTY PROSECUTOR

**April 20, 2015 - 4:08 PM**

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