

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

STATE OF WASHINGTON,)	No. 64473-4-I
)	
Respondent,)	
)	
v.)	
)	
ERIC O'GRADY,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 31, 2011
)	

Ellington, J. — Eric O'Grady appeals his sentence on two counts of second degree assault and one count of third degree rape, contending his sentence exceeds the statutory maximum. O'Grady also claims the sentencing court improperly imposed legal financial obligations. We accept the State's concession of error regarding the terms of community custody and remand for correction of the judgment and sentence. But because O'Grady fails to demonstrate error in the trial court's imposition of financial obligations and fails to provide grounds for relief in his additional assignments of error, we affirm.

BACKGROUND

In 2007, a jury found Eric O'Grady guilty of second degree rape and violation of a no contact order. On appeal, this court affirmed the conviction for the no contact order violation but reversed the rape conviction and remanded for a new trial.

Following remand, O'Grady pleaded guilty to two counts of second degree assault and one count of third degree rape. The sentencing court imposed a standard range sentence of 29 months confinement on each assault and 18 to 36 months of community custody. The court imposed 54 months confinement for the rape with 36 to 48 months community custody.

At the sentencing hearing, defense counsel asked the court to waive all nonmandatory financial obligations because O'Grady was indigent, had only an 8th grade education, had no significant work history, and would likely have difficulty making money in the future given his criminal history. The court stated, "At the time of sentencing I don't waive those financial obligations because I don't know what Mr. O'Grady's situation will be when he gets out. I don't know what his employment is or what his financial obligations will be."¹ The judgment and sentence states, "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 that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein."² The sentencing court imposed a \$500 victim assessment, \$450 in court costs, and a \$100 DNA collection fee.

O'Grady appeals.

DISCUSSION

¹ Report of Proceedings (RP) (Oct. 29, 2009) at 44.

² Clerk's Papers at 26.

O'Grady first contends that the sentence imposed on the third degree rape count, a class C felony, exceeds the statutory maximum of 5 years or 60 months.³ The sentencing court imposed 54 months confinement and 36 to 48 months community custody. O'Grady also assigns error to the community custody term of 18 to 36 months imposed on the assault counts.

The State concedes that the proper term of community custody for the rape is 36 months rather than a range,⁴ and that the judgment and sentence must be clarified so that it is clear that the total period of confinement and community custody cannot exceed the statutory maximum. The State also concedes that the community custody term on the assaults should be 18 months.⁵

Where, as here, a court imposes a sentence with a term of confinement and community custody with the potential to exceed the statutory maximum for the crime, "the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum."⁶ We accept the State's concession and remand for amendment of the judgment and sentence to reflect the proper term of community custody for each count and to explicitly state that the total term of confinement and community custody cannot exceed the statutory maximum.

O'Grady also challenges the legal financial obligations imposed by the

³ RCW 9A.44.060; RCW 9A.20.021(1)(c).

⁴ See RCW 9.94A.701(1)(a).

⁵ Former RCW 9.94A.701(2) (Laws of 2009, ch. 375, §§ 5, 20) (amendments effective August 2009 and apply retroactively).

⁶ In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

sentencing court. He claims that (1) the court's finding that he had the present or future ability to pay legal financial obligations is not supported by sufficient evidence; (2) the court lacked authority to impose a jury demand fee when he pleaded guilty; and (3) nonmandatory fees should not be imposed without a specific determination on the record of ability to pay.⁷

Under RCW 10.01.160(3), a court may order the defendant to pay costs incurred by the State in its prosecution if the defendant "is or will be able to pay them." But the sentencing court is not required to enter formal, specific findings regarding a defendant's ability to pay.⁸ Instead, inquiry into the offender's ability to pay comes at "the point of collection and when sanctions are sought for nonpayment."⁹ O'Grady's arguments regarding his ability to pay are therefore premature.

⁷ Although O'Grady and the State refer to the \$100 fee listed on the judgment and sentence as a "crime lab fee" authorized by RCW 43.43.690, the \$100 fee listed on the judgment and sentence is actually labeled "Felony DNA Collection Fee," apparently referring to the mandatory fee authorized by RCW 43.43.7541. See Clerk's Papers at 27. O'Grady does not argue or establish any error in the assessment of this fee.

⁸ State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). We also grant the State's motion to strike references in O'Grady's brief to a study performed by the Washington State Minority and Justice Commission regarding the impact of legal financial obligations on criminal offenders. No authority requires a sentencing court to consider or make findings regarding such material before imposing fees and O'Grady did not ask the court to consider the study before sentencing.

⁹ State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997); State v. Smits, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) (determination of whether defendant has or will have ability to pay is "clearly somewhat 'speculative'").

Moreover, the record contains sufficient evidence to support the court's finding that O'Grady has the "ability or likely future ability to pay" \$1,050 in fees. As the State points out, the court considered presentence reports indicating that O'Grady had been employed in the past, albeit for limited time periods, as a hotel worker, a caddy, a dishwasher, a landscape gardener, a shipping clerk, and an inventory clerk. Although defense counsel claimed that O'Grady's criminal convictions would make it "difficult for him to get money in the future,"¹⁰ nothing in the record precludes a determination that O'Grady may be capable of obtaining employment upon his release.

As to the jury demand fee, RCW 10.01.160(2) specifically allows assessment of costs for "jury fees under RCW 10.46.190" and provides that "[c]osts imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant." Here, the State initially tried O'Grady before a jury and obtained convictions on two charges, only one of which was reversed. The fact that O'Grady chose to plead guilty to other charges after remand and was ultimately sentenced here on only one conviction obtained by a jury verdict does not deprive the court of authority to impose the jury fee. O'Grady fails to demonstrate any abuse of discretion in the sentencing court's imposition of the jury demand fee.

In his statement of additional grounds for review, O'Grady first presents several claims arising from his original trial, including deficient police investigation, prosecutorial misconduct in presentation of evidence and argument to the jury, and ineffective assistance of counsel in failure to make objections and present certain

¹⁰ RP (Oct. 29, 2009) at 32.

evidence and argument. Each argument appears relevant only to the rape charge reversed in O'Grady's original appeal. Because such claims appear to be moot, we need not address them.

O'Grady also challenges community custody conditions imposed by the trial court. We review sentencing conditions for abuse of discretion.¹¹

Citing In Re Detention of Hawkins, O'Grady asks this court to strike the conditions requiring him to obtain a sexual deviancy evaluation and treatment and submit to a sexual history and periodic polygraph and/or plethysmograph assessments.¹² Hawkins involved interpretation of statutes related to sexually violent predator commitment proceedings and is not relevant here. O'Grady pleaded guilty to third degree rape, a sex offense, and the sentencing court had authority to impose the conditions.¹³ In this context, such testing may be properly used to monitor compliance with treatment.¹⁴

O'Grady next assigns error to the special sentence requirement directing the Department of Corrections (DOC) to release the presentence investigation report to the Sheriff's Department for the purpose of sex offender classification. But his challenge appears to concern DOC's risk assessment rather than the condition imposed by the trial court. Because our review is limited to the trial court's imposition

¹¹ State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009).

¹² 169 Wn.2d 796, 238 P.3d 1175 (2010).

¹³ RCW 9.94A.030(45)(a)(i); RCW 9A.44.060(1)(a); former RCW 9.94A.700(5)(c) (2003).

¹⁴ State v. Combs, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000).

of conditions in the judgment and sentence, we do not address this issue.¹⁵

O'Grady next describes a condition imposing restrictions on his dating behavior and requiring discussion with his therapist or community corrections officer before escalating a relationship to sexual activity as "an abomination," "unbelievable", "unthinkable" and "degrading." But O'Grady's distress over the condition does not establish error.

O'Grady also challenges the requirement that he obtain a chemical dependency evaluation and comply with any recommended treatment, arguing that the crime did not involve drugs or alcohol. But O'Grady agreed in his plea statement that the trial court could review the police reports and statements of probable cause to establish a factual basis for his plea. The probable cause statements indicate that O'Grady convinced the victim and her friends to go to bars with him and bought alcoholic drinks for the victim and others and attempted to convince the victim to smoke marijuana with him. Under these circumstances, O'Grady fails to establish error in the trial court's order for an evaluation.

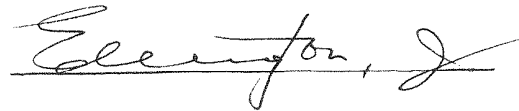
O'Grady also complains at length about DOC's actions since he has been released to community custody. But none of these claims are properly before this court in this appeal of the judgment and sentence.¹⁶ For that reason, we also deny O'Grady's motion to add documents to his statement of additional grounds for

¹⁵ State v. McFarland, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251 (1995) (on direct appeal, review is limited to the appellate record; a personal restraint petition is the appropriate means of having the appellate court review matters outside the record).

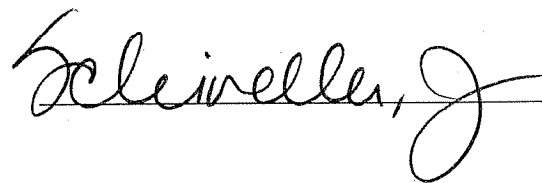
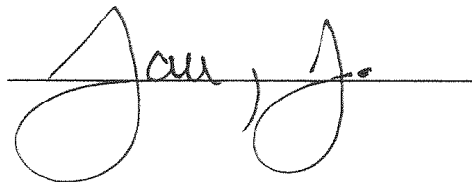
¹⁶ Id.

review.¹⁷ Because he fails to adequately inform the court of the nature and occurrence any alleged errors in the trial court's imposition of sentence and fails to support any claim of error with credible evidence in the record properly on appeal, O'Grady is not entitled to relief.¹⁸

Affirmed in part and remanded.



WE CONCUR:



¹⁷ O'Grady has filed hundreds of pages of documents to support his statement of additional grounds for review, including transcripts of interviews, correspondence regarding medical care, a psychological report regarding some other criminal case, copies of postconviction motions apparently prepared for filing in superior court, and numerous pages of his own argument. The vast majority of the documents are not in the appellate record and are therefore not properly considered in this appeal. Moreover, his arguments mainly concern the facts underlying the initial charges, the charges following remand, or the conditions of his supervision, all of which are beyond the scope of this appeal.

¹⁸ RAP 10.10(c).