

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 66794-7-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
MARY KAY DYER,)	
)	
Appellant.)	FILED: July 23, 2012

Grosse, J. — A defendant may not appeal the duration of a sentence imposed by the trial court where the duration of the sentence does not exceed the statutorily authorized maximum. Here, the defendant was sentenced to 60 days, well within the standard range. The defendant was not denied due process by the fact that the trial judge delayed imposition of the sentence to afford the defendant an opportunity to reduce her sentence by 30 days by making full restitution. The trial court is affirmed.

In December 2009, Mary Kay Dyer gave the keys to her Chevrolet Trailblazer to her son, Christopher Cousins, who took the car to a rural area and set fire to it. Dyer then filed a stolen vehicle report with the police and submitted a claim to her insurance company. Dyer's insurance company paid her \$14,594.83.

The State charged Dyer with first degree theft and making false statements to a public servant. On November 30, 2010, a jury found Dyer guilty on both counts. At sentencing, the State asked the court to impose 60 days for the first degree theft and

365 days for the false statement to an officer, with 305 days suspended on the false statement. The State also sought an order of restitution in the amount of \$15,044.83. The defense argued for a sentence of 30 days. In rejecting the request for a 30-day sentence, the court orally stated:

I can't justify anything less than what the prosecutor is recommending. Like I say, \$14,000 for a month in jail, I'll bet you 80 percent of the population out there if you said hey, would you sit in jail for 60 days for \$15,000, they would jump at the opportunity. In fact, I'm surprised the State's recommending as little as they are. First offense or not. That's a large sum of money.

I'm going to accept the recommendation and I'm going to impose the sentence that's recommended by the State. I'm going to sentence you to 365 days with 305 days suspended as to the false statement. On the theft in the first degree I will sentence you to 60 days in the Whatcom County Jail. I'm going to order the restitution, the \$15,044.83. I will have the standard monetary obligations and the \$500 fine.

The judge informed Dyer that when she was released and employed, she would have to begin making payments on the restitution. Dyer responded by stating that she was hoping to sell a house that she had with a former husband and pay the restitution from those proceeds. The trial court then opined that it would be willing to reconsider the sentence and order the 30 days in jail if Dyer made restitution. The trial court gave Dyer the option of commencing the 60-day sentence now or waiting 30 days, giving her the opportunity to make restitution and thereby reduce her sentence. Dyer chose to wait the 30 days. The trial court reset sentencing for 30 days.

On February 10, 2011, Dyer returned to court requesting another delay in sentencing to afford her additional time to raise funds from other possible sources and also to deal with a medical problem. The trial court stated that it was abiding by its

earlier decision and imposed a sentence of 60 days. Dyer appeals.

Under the Sentencing Reform Act of 1981 (SRA), a sentence within the correct standard range is not appealable.¹ But a defendant may appeal a sentence imposed on an improper basis.² Dyer argues that the trial court's imposition of a mid standard range sentence of 60 days violated her right to due process of law under the state and federal constitutions. Dyer argues that the trial court increased her sentence by an additional 30 days because she could not pay the restitution. Dyer asserts it is fundamentally unfair to imprison defendants solely because of their inability to pay court-ordered fines, citing State v. Curry³ and State Bower.⁴ But those cases are inapposite. In Curry, the court refused to consider the argument that imprisonment for an unpaid fine was unconstitutional, because no defendant had been incarcerated for failure to pay.⁵ Likewise in Bower, the issue was the amount of penalty and restitution. There, defendant argued that the imposition of an order to pay restitution and a victim penalty assessment was illegal without concomitant findings that he had the ability to pay. This court upheld the imposition of the fines because there were adequate safeguards existing to protect defendants such as a show cause hearing.⁶

Here, Dyer is not being imprisoned because of her inability to pay the court ordered fine. Rather, she is being imprisoned for the crime for which she was convicted. The trial court clearly indicated that it was the amount of money stolen that

¹ RCW 9.94A.585(1); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993).

² State v. Garcia-Martinez, 88 Wn. App. 322, 328, 944 P.2d 1104 (1997).

³ 118 Wn.2d 911, 829 P.2d 166 (1992).

⁴ 64 Wn. App. 808, 827 P.2d 308 (1992).

⁵ Curry, 118 Wn.2d at 918.

⁶ Bower, 64 Wn. App. at 813.

was the reason for the 60-day sentence. Should Dyer not be able to pay the restitution amounts after her release, adequate safeguards exist to prevent any unjust imprisonment.

The trial court did not abuse its discretion in offering a possible reduction in sentence where, as here, it was Dyer who offered to pay the restitution. State v. Sandefer is instructive.⁷ There, the State recommended an exceptional sentence that exceeded two earlier plea offers that Sandefer had refused. Sandefer objected to the recommendation, arguing that it penalized him for going to trial. The trial court sentenced Sandefer at the high end of the standard range. In response to Sandefer's objection, the court explained that defendants who enter guilty pleas are frequently given more lenient sentences than those defendants who proceed to trial. The court stated that because Sandefer did not plead guilty, it would not give him the "break" of a more lenient sentence.⁸ On appeal, this court held that the trial court's remarks did not indicate an improper consideration of Sandefer's right to stand trial, but rather were "nothing more than a fair response to Sandefer's objection to the State's recommendation."⁹ The trial courts remarks, here, though somewhat inartful, do not indicate that the 60-day sentence was based on Dyer's inability to pay. The trial court's willingness to reduce the sentence based on Dyer's statements that she could pay the restitution was nothing more than a "break" that the trial court was willing to afford Dyer.¹⁰

⁷ 79 Wn. App. 178, 900 P.2d 1132 (1995).

⁸ Sandefer, 79 Wn. App. at 180.

⁹ Sandefer, 79 Wn. App. at 184.

¹⁰ See also State v. Morgan, 8 Wn. App. 189, 504 P.2d 1195 (1973) (restitution may be a condition of a suspended sentence).

We affirm the judgment and sentence.

Grosse, J.

WE CONCUR:

Demp, J.

Cox, J.