# State v. Garcia

134 Wash.App. 1004 (2006) | Cited 0 times | Court of Appeals of Washington | July 18, 2006

JUDGES: Concurring: Dennis J. Sweeney, Philip James Thompson.

UNPUBLISHED OPINION

The district court set aside a restitution order because Jose Luis Aparicio Garcia was not informed that he may be required to pay restitution as a direct consequence of pleading guilty to driving under the influence of alcohol (DUI). The superior court upheld the decision. Discretionary review was granted under RAP 2.3(d)(1). But the State failed to provide the record of the district court hearing. We conclude the record is insufficient for review and affirm.

FACTS

Mr. Aparicio Garcia was charged with DUI on August 2, 2002. He pleaded guilty to the charge on October 25. A judgment and sentence was entered on November 8, in which the district court judge ordered that he make restitution 'in the amount of $24,000 or an amount determined by the probation officer.' Clerk's Papers (CP) at 29. On May 8, 2003, the court entered a restitution order based on 'evidence and/or other information presented in support of the application' that imposed an additional $292,000 in restitution to be paid in various amounts to three victims. CP at 26.

On March 26, 2004, Mr. Aparicio Garcia challenged the restitution order on the ground he was not informed restitution could be imposed as a consequence of his guilty plea. The State argued that the motion for relief was time barred by RCW 10.73.090. The district court found Mr. Aparicio Garcia's challenge timely and vacated the restitution orders. The superior court upheld the decision on the State's RALJ appeal. Because a commissioner felt the decisions of the lower courts were in conflict with State v. Dorenbos, 113 Wn. App. 494, 60 P.3d 1213 (2002),[1] discretionary review was granted pursuant to RAP 2.3(d)(1).

DISCUSSION

As a matter of due process, Mr. Aparicio Garcia was entitled to be informed of the direct consequences of pleading guilty to the criminal charge. In re Pers. Restraint of Peters, 50 Wn. App. 702, 704, 750 P.2d 643 (1988). The requirement to pay restitution is such a direct consequence. State v. Cameron, 30 Wn. App. 229, 233, 633 P.2d 901 (1981).

'{A} sentencing court may not impose restitution upon a defendant who pleads guilty, unless {the}

defendant is advised of that possibility prior to entering his plea.' Id. at 234. The appropriate remedy is to strike the restitution order. Id. A constitutional defect renders a judgment void and subject to collateral attack under CrRLJ 7.8(b)(4). State v. Olivera-Avila, 89 Wn. App. 313, 319, 949 P.2d 824 (1997). We review a trial court's decision on a motion for relief of a judgment or order pursuant to CrRLJ 7.8(b) for abuse of discretion. Id. at 317; State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005); In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). '{A} much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial.' State v. Brent, 30 Wn.2d 286, 290, 191 P.2d 682 (1948).

We note at the outset that the State did not supply a complete record. Neither party raises this issue. We generally decide cases on the basis of the issues raised in the parties' briefs, but we have the authority to decide whether a matter is properly before us. RAP 12.1(b). We may raise an issue sua sponte and rest our decision on that issue, as we do here. RAP 12.1(b); State v. Aho, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999).

Specifically, the State failed to submit a report of the district court proceedings as required by RALJ 6.3.1(a), RALJ 6.4, RAP 9.1(b), and RAP 9.2(a)-(b). The absence of the record is compounded by the absence of a written order of the district court's action. Failure to provide an adequate record is fatal to the State's appeal.

In City of Seattle v. Boulanger, 37 Wn. App. 357, 359-60, 680 P.2d 67 (1984), Division One of this court refused to review an electronic record of a hearing and declined to order the transcript itself, but it asked the city to perfect the appeal by transcribing the record. The court held that because the city failed to provide the municipal court's report of proceedings after discretionary review was accepted, the court could not determine if evidentiary error was harmless in a DUI case and dismissed the city's appeal. While this case involves the analysis of pleadings to determine facial invalidity under RCW 10.73.090(1), an appellate court cannot determine whether the court abused its discretion without the record. 'In matters in which the trial court is vested with discretion, error is never presumed, but to be available must appear on the face of the record.' State v. Van Waters, 36 Wash. 358, 361, 78 P. 897 (1904). See also Kennedy v. Sundown Speed Marine, Inc., 97 Wn.2d 544, 548, 647 P.2d 30 (1982) (holding that the decision to vacate a judgment for being void will not be disturbed unless an examination of the entire record makes it appear plainly that the trial court abused its discretion).

The State, as the appellant, bears the burden of providing the court with a record adequate for review. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). We are not required to order supplementation of an incomplete record, and we may decline to consider an alleged error if the appellant does not provide a complete record on a material issue. Id. at 465-66; see RAP 9.10. It is

critical that the party seeking review order a report of proceedings when the trial court's reasoning is at issue. E.g., Wade, 138 Wn.2d at 464-65. If the party fails to meet its burden to provide a complete record on an issue, we will decline review. In re Det. of Halgren, 156 Wn.2d 795, 804-05, 132 P.3d 714 (2006). Because the State has failed to provide the report of proceedings, we affirm the decision below.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, J.

WE CONCUR:

Sweeney, C.J.

Thompson, J. Pro Tem.

1. In Dorenbos, 113 Wn. App. at 498, the court held that a defendant could not collaterally attack a restitution order because although the judgment and restitution order indicated that restitution was untimely fixed beyond the 60-day time limit, that time limit can be waived, a fact that cannot be determined from the face of the restitution order and judgment.