

NO. 53453-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANGELA VALDOVINOS,

Appellant.

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

The Honorable Amber L. Finlay, Judge

BRIEF OF APPELLANT - CORRECTED

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A. ASSIGNMENTS OF ERROR

1. Inclusion in the judgment and sentence of DUI fines which the court intended to waive is a clerical error which must be corrected.

2. To the extent the court failed to recognize its authority to waive DUI fines due to appellant's indigence, the court abused its discretion.

3. The court lacked authority to impose district court assessments.

Issues pertaining to assignments of error

1. Appellant pled guilty to two counts of driving under the influence, in addition to other offenses. The record established that she was indigent, and the defense asked the court to waive all non-mandatory legal financial obligations. Although the court stated at sentencing that it would impose only mandatory LFOs and would not assess fines, DUI fines were included in the judgement and sentence forms. Must this clerical error be corrected by striking the unintended fines?

2. Although the statutes establishing DUI fines provide that they can be waived if the defendant is indigent, the parties referred to the fines as mandatory. If the court included the DUI fines in the legal

financial obligations under the mistaken belief they could not be waived, did the court abuse its discretion?

3. The DUI fines imposed by the court included assessments to be collected upon conviction in district court. Where appellant was convicted and sentenced in superior court, must these district court assessments be vacated?

B. STATEMENT OF THE CASE

On April 1, 2019, Appellant Angela Valdovinos pled guilty to multiple offenses in five cause numbers in Mason County Superior Court. CP 6-22, 51-61, 83-99, 125-134, 159-168. The offenses included two counts of driving under the influence, committed on June 18, 2018 and September 1, 2018. RCW 46.61.502(1); CP 15, 92. The plea agreements indicated that the State would request the mandatory minimum fine, and an attached DUI sentencing grid indicated that the mandatory minimum fine for a DUI with no prior offenses was \$990.50, and the mandatory minimum for a DUI with one prior offense was \$1245.50. CP 17.

After her pleas were entered, Valdovinos participated in a risk assessment evaluating her for a drug offender sentencing alternative. Supp. CP (Confidential Report filed 4/18/19, Cause No. 18-1-00177-23). The assessment noted that Valdovinos had no source of income, as she

was fired from her job at Subway for drug use. That job was her only work experience. *Id.* at 2. She had no means of legal income and had outstanding crime-related fines and court fees. *Id.*

Although the risk assessment recommended a DOSA, the court denied the defense request for that sentencing alternative. *Id.* at 3; RP 23, 26. The court concluded it could not order a DOSA because Valdovinos's convictions for possession of heroin with intent to deliver did not involve a small amount of controlled substances. RP 26-27. It imposed standard range sentences on all counts. CP 23-41, 62-75, 100-118, 135-153, 169-186.

Defense counsel asked the court to waive all non-mandatory legal financial obligations, although he told the court he believed the DUI fines could not be waived. RP 24. The court stated it would impose only the mandatory minimum LFOs and would not assess the fines. RP 30. Nonetheless, the judgment and sentence forms include DUI fines of \$990.50 on the June 2018 offense and \$1245.50 on the September 2018 offense. CP 30, 107.

Valdovinos filed a notice of appeal in each cause number. CP 42, 76, 119, 154, 187. In a motion for order of indigency she certified that she still had no source of income and had outstanding debts amounting to

\$17,500. Supp. CP (Motion for Indigency filed 7/15/19, Cause No. 18-1-00177-23). The court entered an order of indigency for appeal. CP 43-44.

C. ARGUMENT

THE JUDGMENTS DO NOT REFLECT THE COURT'S STATED INTENTION TO WAIVE THE DUI FINES, AND THEY MUST BE CORRECTED.

Following the defense request that the court impose only mandatory fines due to Valdovinos's indigency, the court below indicated it was waiving any legal financial obligations that could be waived, and it would not impose fines. RP 24, 30. Nonetheless, the judgments entered by the court include DUI fines of \$990.50 and \$1245.50. CP 30, 107.

Although the judgment and sentence does not specify the statutes upon which the DUI fine is based, the plea statement includes a DUI sentencing grid setting out the "minimum fines" that were imposed in this case. CP 17. This same grid appears in the DUI Practice Manual, which indicates that the minimum DUI fine is calculated as follows:

Minimum fine (RCW 46.61.5055(1)(a)(ii))	\$350/\$500
Public Safety and Education Assessment (RCW 3.62.090)	\$245/\$350
Alcohol Violator's Fee (RCW 46.61.5054)	\$250
Criminal Conviction Fee (RCW 3.62.085)	\$43
Criminal Justice Funding Penalty (RCW 46.64.055)	\$50
Subject to PSEA (RCW 3.62.090(1))	\$35
Subject also to PSEA (RCW 3.62.090(2))	\$17.50

32 Wash. Prac., Wash. DUI Practice Manual §§ 1:10, 1:20 (2019-2020 ed.).

- a. Penalties assessed under Title 46 RCW must be vacated.

The first amount included in the DUI fine is established in the penalty schedule for alcohol and drug violators, RCW 46.61.5055. That statutory provision sets the fine for a first DUI offense in seven years at not less than \$350 nor more than \$5000 but provides that even the minimum fine may be suspended if the court finds the offender to be indigent. RCW 46.61.5055(1)(a)(ii)¹. Similarly, the fine for a second

¹ RCW 46.61.5055(1)(a) provides:

(1) No prior offenses in seven years. Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has no prior offense within seven years shall be punished as follows:

(a) Penalty for alcohol concentration less than 0.15. In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than one day nor more than three hundred sixty-four days. Twenty-four consecutive hours of the imprisonment may not be suspended unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended, the court shall state in writing the reason for granting the suspension and the facts upon which the suspension is based. In lieu of the mandatory minimum term of imprisonment required under this subsection (1)(a)(i), the court may order not less than fifteen days of electronic home monitoring or a ninety-day period of 24/7 sobriety program monitoring. The court may consider the offender's pretrial 24/7 sobriety program monitoring as fulfilling a portion of posttrial sentencing. The offender shall pay the cost of electronic home monitoring. The county or municipality in which the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device or other separate alcohol monitoring device to include an alcohol detection breathalyzer,

offense in seven years, \$500 to \$5000, may be suspended upon a finding of indigency. RCW 46.61.5055(2)(a)(ii)².

An additional alcohol violators fee of \$250 must be imposed for anyone convicted as a result of an arrest for violating RCW 46.61.502.

and the court may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring; and
(ii) By a fine of not less than three hundred fifty dollars nor more than five thousand dollars. Three hundred fifty dollars of the fine may not be suspended unless the court finds the offender to be indigent; ...

² RCW 46.61.5055(2)(a) provides:

(2) One prior offense in seven years. Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has one prior offense within seven years shall be punished as follows:

(a) Penalty for alcohol concentration less than 0.15. In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than thirty days nor more than three hundred sixty-four days and sixty days of electronic home monitoring. In lieu of the mandatory term of imprisonment and electronic home monitoring under this subsection (2)(a)(i), the court may order a minimum of four days in jail and either one hundred eighty days of electronic home monitoring or a one hundred twenty-day period of 24/7 sobriety program monitoring pursuant to RCW 36.28A.300 through 36.28A.390. The court may consider the offender's pretrial 24/7 sobriety program monitoring as fulfilling a portion of posttrial sentencing. The court shall order an expanded alcohol assessment and treatment, if deemed appropriate by the assessment. The offender shall pay for the cost of the electronic monitoring. The county or municipality where the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device include an alcohol detection breathalyzer or other separate alcohol monitoring device, and may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring. Thirty days of imprisonment and sixty days of electronic home monitoring may not be suspended unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended, the court shall state in writing the reason for granting the suspension and the facts upon which the suspension is based; and

(ii) By a fine of not less than five hundred dollars nor more than five thousand dollars. Five hundred dollars of the fine may not be suspended unless the court finds the offender to be indigent; ...

RCW 46.61.5054(1)(a)³. Upon petition, the court may suspend this fee as well if it finds the person does not have the ability to pay. RCW 46.61.5054(1)(b).

The criminal justice penalty is established in RCW 46.64.055, which requires the court to impose a \$50 penalty for any conviction under that title. This fee may also be waived if the court finds the offender to be indigent. RCW 46.64.055(1)⁴.

Under RCW 10.101.010(3)(c), a person who receives “an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level” is indigent. Valdovinos’s indigency was established in the risk assessment prepared for sentencing, and it was uncontested by the State and unquestioned by the court.

³ RCW 46.61.5054 provides:

(1)(a) In addition to penalties set forth in *RCW 46.61.5051 through 46.61.5053 until September 1, 1995, and RCW 46.61.5055 thereafter, a two hundred fifty dollar fee shall be assessed to a person who is either convicted, sentenced to a lesser charge, or given deferred prosecution, as a result of an arrest for violating RCW 46.61.502, 46.61.504, 46.61.520, or 46.61.522. This fee is for the purpose of funding the Washington state toxicology laboratory and the Washington state patrol for grants and activities to increase the conviction rate and decrease the incidence of persons driving under the influence of alcohol or drugs.

(b) Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay.

⁴ RCW 46.64.055(1) provides:

(1) In addition to any other penalties imposed for conviction of a violation of this title that is a misdemeanor, gross misdemeanor, or felony, the court shall impose an additional penalty of fifty dollars. The court may not reduce, waive, or suspend the additional penalty unless the court finds the offender to be indigent. If a community restitution program for offenders is available in the jurisdiction, the court shall allow offenders to offset all or a part of the penalty due under this section by participation in the community restitution program.

Each of the fines imposed under Title 46 RCW may be waived if the court finds the offender indigent. At sentencing the court stated its intention to impose only mandatory financial obligations due to Valdovinos's indigency, and it would not impose the fines. RP 30. The fines are nonetheless included on the judgment and sentence forms. This is a scrivener's error which must be corrected.

A scrivener's error is a clerical mistake that, when amended, would correctly convey the court's intention, as expressed in the record at sentencing. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011); *see also Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). “[T]he amended judgment should either correct the language to reflect the court's intention or add the language that the court inadvertently omitted.” *State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252 (2004). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016).

It is also possible, though the record at sentencing indicates otherwise, that the court believed it was required to impose the DUI fines despite Valdovinos's indigency. If the court imposed the fines because it failed to recognize its authority to waive them, imposition of the fines constitutes an abuse of discretion. *In re Mulholland*, 161 Wn.2d 322, 333,

166 P.3d 677 (2007) (sentencing court's mistaken belief that it lacked discretion provided in statute reversible error); *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (sentencing court's failure to exercise discretion is abuse of discretion). The fines must be vacated.

- b. Penalties assessed under Title 3 RCW must be vacated.

The calculated DUI fines also include four assessments established under Title 3 RCW. These assessments may only be ordered when sentence is imposed in district or municipal court, however. RCW 3.62.090(1) ("There shall be assessed and collected ... by all courts organized under Title 3 or 35 RCW a public safety and education assessment..."); RCW 3.62.090(2) ("There shall be assessed and collected... in addition to the public safety and education assessment required under subsection (1) of this section, by all courts organized under Title 3 or 35 RCW, an additional public safety and education assessment..."); RCW 3.62.085 ("Upon conviction or a plea of guilty in any court organized under this title or Title 35 RCW, a defendant in a criminal case is liable for a fee of forty-three dollars, except this fee shall not be imposed on a defendant who is indigent ...").

Since Valdovinos was convicted and sentenced in Superior Court, the court lacked authority to impose all the assessments established in

Chapter 3.62 RCW. A trial court's sentencing authority is limited to the authority granted by statute. *State v. Moen*, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996) (citing *State v. Paine*, 69 Wn. App. 873, 850 P.2d 1369, *review denied*, 122 Wn.2d 1024 (1993)). Where a trial court exceeds that authority, its order may be corrected at any time. *Paine*, 69 Wn. App. at 883; *see also State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (An erroneous or illegal sentence may be challenged for the first time on appeal). The Title 3 RCW assessments imposed in this case must be vacated.

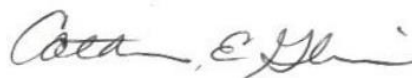
D. CONCLUSION

For the reasons addressed above, the DUI fines must be vacated.

DATED November 6, 2019.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant -
Corrected in *State v. Angela Valdovinos*, Cause No. 53453-3-II as follows:

Angela Valdovinos/DOC#415270
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
November 6, 2019