73761-9

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Court of Appeals
Division I
State of Washington

73761-9-I
NO. 73761-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERRY J. CAVER,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The trial court denied the defendant's request to wear jail garb at trial despite his claim that it was a tactical decision to let the jury know he was incarcerated and not a danger. Did the defendant have a constitutional right to wear jail garb to trial and, if so, was any violation of his rights cured when he testified he was incarcerated?

2. The defendant called 911 to ask for mental health and drug treatment. He was permitted to raise an unwitting possession defense based on a claim that he would not have called 911 if he had known he still had drugs in his pocket. The court admitted testimony that he had made ongoing attempts to receive treatment in custody but excluded more specific questioning. Was that testimony properly excluded it had no bearing on the issues of possession or unwitting possession?

II. STATEMENT OF THE CASE

On May 13, 2015, the defendant called 911 and asked to be taken for treatment for what he called his "habits". The defendant had been released from a Compass Health triage clinic a few days earlier and relapsed on methamphetamine, causing what he described as a "mental health breakdown." 1 RP 165-169. He was

high on meth when he called 911, having smoked some earlier that day. He thought he had smoked all of his meth but, in fact, the baggie was still in his pocket. 1 RP 172

911 dispatched Everett Police Officers O'Hara and Wallace to a mental health/welfare check. 1 RP 130. When they arrived, the defendant approached them with his hands in his pockets. Officer O'Hara, trained in drug recognition, noted that the defendant was paranoid, sweating, and fidgeting, all signs of being under the influence of meth. The defendant also showed signs of having mental health issues. 1 RP 130-31, 148.

When the defendant showed his hands, he had an open pocket knife. Officers detained and frisked him for weapons, finding instead a residue-encrusted meth pipe. In a search incident to arrest for possession of drug paraphernalia, they found .14 grams of methamphetamine. 1 RP 136, 138-39, 162.

The defendant told officers he wanted to go to triage for his mental health and drug issues. Instead, officers decided to book him into the Snohomish County Jail, knowing that the jail had available mental health professionals and separate housing for inmates with issues. 1 RP 151-52.

On May 27, the State charged the defendant with possession of a controlled substance, methamphetamine. CP 91. He was still in custody when his trial commenced on July 21.

On the morning of trial, defense counsel said the defendant had two issues he wanted to raise, one for a continuance so he, himself, could further prepare for trial, and the other for permission to wear jail garb to trial. Defense noted that she was prepared for trial and had told the defendant to dress in civilian clothing. 1 RP 2.

In regard to clothing, the court found that allowing the defendant to wear jail garb would cause the jury "to speculate about why the defendant is such dressed and why he's in jail and does he present a danger to them and so forth and so on." 1 RP 2-3. The defendant said jail clothing would "represent that I'm in here, that I'm not on the street... what's really going on in my life. I don't want these people thinking I'm on the streets." The court did not change its ruling. 1 RP 4.[1]

The State moved to exclude the defendant's statements to 911 regarding his desire to receive treatment. Supp. CP ___ (sub.no. 23, State's trial brief). It argued that the 911 calls were relevant only to explain that officers had responded. It argued that

raising the defendant's desire for treatment might cause unwarranted jury sympathy. 1 RP 20, 26-27. Defense argued that the 911 statements were relevant to both the *res gestae* of the crime and to his unwitting possession defense. Defense argued that no reasonable person would call 911 for help if he knew he had meth in his pocket so the statements would show that the defendant must not have known he had meth in his pocket. CP 56-58; 1 RP 21-24.

The court questioned whether the facts supported an unwitting possession defense. 1 RP 24. It ruled that the availability of drug treatment in jail was inadmissible and irrelevant as it went to punishment. 1 RP 28. The defendant's statements and reasons for calling 911 were likewise irrelevant. 1 RP 33, 35. When both sides continued to argue about statements, the court said,

> And so both of you could tell your little stories that you tell until we get down to the real issue is, did he have methamphetamine in his pocket...
>
> ... if the State wants to sanitize it to its ability, it's only fair game that the defense have an opportunity to tell its side of the story as well.
>
> So, I'm kind of thinking that this case is either very limited in the information... [or] if the State wants to

[1] The record does not reflect what the defendant wore or whether he was in his own or borrowed clothing.

present more than that, then you open the door for the defense.

1 RP 38-39. The court clarified that it was reversing its ruling. The court said that if Officer O'Hara testified about his meth-related observations, the defense should "get a shot at that, too." Both sides could offer the defendant's 911 statements. 1 RP 40, 42.

Officer O'Hara, a State Patrol forensic scientist, and the defendant testified at trial. During cross examination of Officer O'Hara, defense established that the defendant said he wanted to go to "triage", a facility that could help him with both mental health and drug issues. 1 RP 151. On redirect, Officer O'Hara explained that he had booked the defendant because the Snohomish County Jail also had mental health professionals and drug treatment options. 1 RP 151.

The State did not object when the defendant testified that his continued pursuit of treatment options was unsuccessful but did object to the relevance of his specific attempts at obtaining treatment. 1 RP 170. The court sustained the objection. Id.

When the testimony ended, defense proposed WPIC 52.01, the unwitting possession instruction. CP 53. The court said that the defense was not really unwitting possession but rather, "I

thought I used them all up... but I was out of my mind." 2 RP 178. Nonetheless, it gave the instruction. CP 40.

Before argument, the State said it would argue that the jury could find the defendant knowingly possessed methamphetamine on May 13 because he admitted he had possessed and smoked it before he called 911. 2 RP 2. The court agreed that the defendant had admitted to those facts. 2 RP 4-5. Nonetheless, the court said that the focus had been on methamphetamine the police found in the pants and that that would have to be the basis for the conviction. 2 RP 5-6.

III. ARGUMENT

A. THERE WAS NO CONSTITUTIONAL VIOLATION AND NO PREJUDICE IN ORDERING THE DEFENDANT TO WEAR CIVILIAN CLOTHING AT TRIAL.

Criminal defendants have the constitutional right to appear at trial and defend in person. U.S. Const. amendments Sixth and Fourteenth; Washington Const. section 22, art. 1; State v. Finch, 137 Wn.2d 792, 842-45, 975 P.2d 967 (1999). They are entitled be present in at trial with the "appearance, dignity, and self-respect of a free and innocent man." Finch at Id. When a defendant is required to wear prison garb to trial, there is a "substantial danger of destruction" of the presumption of innocence and a danger that

the jury will infer that the defendant is so dangerous he must be separated from the rest of the community. Id.

Wearing jail garb is inherently prejudicial. Estelle v. Williams, 425 U.S. 501, 508-09, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Being required to wear civilian clothing is not analogous to being required to wear prison clothing. State v. Gilcrist, 91 Wn.2d 603, 610, 590 P.2d 809 (1979). That is because there is nothing offensive or inherently prejudicial about being required to wear civilian clothes.

Being required to wear civilian clothing is not analogous to being forcibly medicated. Forcing medications can substantially interference with a person's liberty. State v. Mosteller, 162 Wn. App. 418, 425, 254 P.3d 201, review denied, 172 Wn.2d 1025 (2011). Medications can interfere with a person's demeanor or mental state. Id., citing Riggins v. Nevada, 539 U.S. 134-35, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). Side effects of medication can affect not only appearance but the ability to testify or communicate with counsel. Riggins, 504 U.S. at 137.

In Riggins, the U.S. Supreme Court found error when the court permitted the defendant to be forcibly medicated without accounting for the impact of the side effects on his liberty interest.

539 U.S. at 137-38. There was testimony at trial that the drugs he was given caused drowsiness, confusion, and impacted his mental state. Id. at 130, 135.

In Mosteller, the court found no constitutional error in part because there was no objection. But even if there had been an objection, there was no evidence of how the medications, which appeared to benefit him, might have prejudiced him at trial. Id. at 428-29.

Insofar as medication cases can be analogized to the present case, Mosteller controls. Our record, like the record there, was bare of any prejudicial effect flowing from the claimed error. There is no evidence of any sort that the defendant was denied his right to stand trial cloaked in innocence and in possession of his full faculties.

Trial management decisions are subject to an abuse of discretion review standard. State v. Jaime, 168 Wn.2d 857, 865, 233 P.3d 554 (2010). Closer scrutiny is appropriate when the court takes measures that are inherently prejudicial, such as using a jail courtroom or forcing a defendant to wear jail clothing. Id. Wearing civilian clothing is not inherently prejudicial.

In the present case, the trial court's decision was based on its concern about the inherent prejudice of jail clothing and jury speculation about dangerousness. Those are not untenable or manifestly unreasonable grounds. A decision that seeks to avoid inherent prejudice, maintain the presumption of innocence, and curb improper jury speculation is not an abuse of discretion.

The defendant claims that wearing jail garb was a tactical decision. His stated purpose was to inform that jury what was going on in his life. He satisfied that objective through trial testimony. The defendant told the jury exactly where he was and what was going on in his life: he was in jail seeking treatment. Thus, there was no prejudice to his ability to reach his tactical goal.

Even if a constitutional error occurred, it was harmless beyond a reasonable doubt. An error is harmless if the reviewing court finds beyond a reasonable doubt that the error did not affect the verdict. Estelle v. Williams, 425 U.S. 501, 506, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). For example, if a person is being tried for a crime that occurred in prison, wearing prison garb might make no difference because the jury would necessarily learn of his incarceration. Id.

If there was constitutional error in the present case, it was harmless beyond a reasonable doubt because it could not have contributed to the verdict. There is no inherent prejudice caused by civilian clothing as there is in jail garb. The record does not offer even a hint that the defendant was in borrowed clothes or in clothing in which he felt comfortable. His stated tactical goal was to let the jury know he was incarcerated something that he did through his testimony. If an error occurred, it could not have contributed to the verdict and was harmless beyond a reasonable doubt.

B. EXCLUSION OF EVIDENCE OF SPECIFIC ATTEMPTS TO OBTAIN ONGOING TREATMENT DID NOT IMPACT THE UNWITTING POSSESSION DEFENSE.

Every defendant had a Sixth Amendment right to present a defense but the right is not absolute. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 834, 17 L.Ed.2d 705 (1967); State v. Jones, 168 Wn.2d 713, 720, 230 P.2d 576 (2010). A defendant has "no constitutional right to introduce *irrelevant* evidence." Jones at Id. (quoting State v. Gregory, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006)); State v. Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence... more probable or less

probable than it would be without the evidence". ER 401; Kim, at Id.

A denial of the right to present a defense is reviewed *de novo*. Jones, at 719. The decision to exclude evidence is reviewed for a manifest abuse of discretion, that is, whether it is based on untenable or manifestly unreasonable grounds. Kim, at Id.

As the trial court noted, whether this was, in fact, an unwitting possession case was questionable. The unwitting possession affirmative defense "ameliorates the harshness of a strict liability crime." State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). The instruction must be given when there is evidence to support the theory. State v. George, 146 Wn. App. 906, 915, 193 P.3d 693 (2008). As the trial court noted, this was not really a case where the defendant was saying he did not *know* he had drugs in his pocket. Rather, in this case the defendant claimed he did not know he *still* had drugs in his pocket.

Nonetheless, the defendant was permitted to present his unwitting possession defense in its entirety. He testified he did not know he had drugs in his pocket. He testified that he called 911 looking for help and would not have done so had he known he had

drugs in his pocket. He testified that he had smoked all of his meth and that there should not have been any more left in his pocket.

The defendant was also permitted to introduce evidence that was marginally-at-best related to his defense. He was permitted to testify about his ongoing attempts while incarcerated to secure ongoing drug treatment. It is difficult to see how that is relevant to his knowledge of the drugs in his pocket on May 13. It is impossible to imagine how testimony about his specific attempts to obtain treatment could be related to his knowledge on May 13. The exclusion of that testimony did not interfere with his ability to present his defense.

In Kim, a vehicular homicide case, the defendant argued that she had not been able to present her defense when the trial court excluded testimony about a date-rape drug she might have been given. 134 Wn. App. 27. Division One disagreed and affirmed. affirmed. It found that the evidence was properly excluded because there was no actual evidence of the drug having been administered or of its causal relationship to her driving. Id. at 43.

That same reasoning controls in the present case. The defendant's specific in-custody requests for treatment were not causally related to the underlying crime or his unwitting possession

defense. They occurred after his arrest on May 13 and could not have had anything to do with his knowledge on May 13. His specific attempts to secure treatment were relevant to no issue in dispute at trial.

The defendant's reliance on Jones is misplaced. 168 Wn.2d 713. Jones was charged with forcibly raping his niece and wanted to raise a consent defense. His wanted to testify and question her about his version of events which was that she had consented to sex with him and two other men during a "nine-hour alcohol- and cocaine-fueled party". Id. The trial court disallowed his testimony and line of questioning and said its decision did not deprive him of his right to present a defense. Id. at 717-18.

The Supreme Court disagreed and reversed. Id. at 721-22. The evidence was not only highly probative but was, in fact, the entire defense. Id. The testimony consisted of "essential facts of high probative value." Id.

That reasoning applies in the present case and supports the trial court's decision to exclude the testimony. Here, the defendant had already introduced his entire defense, unwitting possession, and testified to all facts relevant to his claim, that he did not know there were drugs in his pocket and would not have called 911 had

he known. He had already introduced marginally relevant testimony in his statements to 911. He was even permitted to testify about his failure to set up ongoing treatment after his arrest. He was never denied the right to present his defense.

The trial court did not abuse its discretion when it excluded this irrelevant evidence that did not make the existence of any material fact more or less probable. The excluded evidence was entirely unrelated to the defendant's knowledge of the drugs in his pocket on May 13. The trial court's decision was not an abuse of discretion because it was manifestly reasonable. .

C. THE DEFENDANT SHOULD BE REQUIRED TO PAY COSTS ON APPEAL.

The authority to recover costs stems from the legislature. State v. Nolan, 141 Wn.2d 620, 627, 8 P.3d 300 (2000). The Rules of Appellate Procedure (RAP) direct courts of appeal to determine costs after filing a decision that terminates review (except for voluntary withdrawals). RAP 14.1(a). The panel of judges deciding the case has discretion to refuse costs in the opinion or order. RAP 14.1(c) and 14.2. If the panel does not do so, costs are awarded by a clerk or commissioner to the party that substantially prevails." RAP 14.2. A party may object by filing a motion to modify. RAP

14.6(b) and 17.7.

Ability to pay is not the only relevant factor. State v. Sinclair, __ Wn. App. __, __ P.2d __ (2016) (72102-0-I). The court may consider whether the defendant will have the ability to pay if and when the State attempts to sanction a failure to pay. State v. Blank, 131 Wn.2d 230, 246-47, 930 P.2d 1213 (1997). If a defendant is unable to repay costs in the future, the statute contains a mechanism for relief. Id. at 250.

In the present case, the trial court found the defendant indigent for purposes of appeal. Supp. CP __ (sub.no. 36, Order of Indigency). That order was based on a declaration by trial counsel that the defendant was unemployed, had no assets, no liabilities, no children, and had been found indigent by the public defenders organization with no ability to pay to launch an appeal. Supp. CP __ (sub.no. 35, Motion and Declaration). This court has no information about the defendant's work history or ability to otherwise support himself. It has no information about his future ability to pay.

The defendant is only 52 years old. CP 91-92. His sentence was 90 days in jail. CP 21. His legal financial obligations totaled $600. CP 23. There is no reason to believe that the defendant is

not already employed and able to pay costs. The costs statute contemplates that a defendant who has no current ability to pay may be required to pay costs if he becomes able to do so. Blank, 131 Wn.2d at 253.

The present case is very different from Sinclair where the defendant was 66 years old and sentenced to a minimum of 280 months in custody. __ Wn. App. at __. Here, the defendant is only 52 and has already been released from custody.

Without a sufficient factual basis, the defendant's request that no costs be imposed is premature and should be denied.

IV. CONCLUSION

There was no constitutional violation when the defendant was dressed in civilian clothing for trial. The exclusion of irrelevant evidence did not affect the defendant's right to present his unwitting possession claim. The request not to impose appellate costs should be denied.

Respectfully submitted on February 4, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. TERRY J. CAVER, Appellant.	No. 73761-9-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 10th day of February, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Jan Trasen, Washington Appellate Project, jan@washapp.org; and wapofficemail@washapp.org.

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

Dated this 10th day of February, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office