FILED

JUL 01, 2013

Court of Appeals
Division III
State of Washington

No. 31260-7-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DAVID WAYNE HALLS,

Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Robert G. Swisher, Judge, Guilty Plea Hearing
Honorable Carrie L. Runge, Judge, Sentencing Hearing

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions and Statutes

A. ASSIGNMENTS OF ERROR

1. The court erred in finding Mr. Halls guilty of "tampering with a witness, with a domestic violence allegation".

2. The court erred in entering a finding in the judgment and sentence that "domestic violence was pled and proved".

3. The court erred in imposing a domestic violence fine.

4. The court erred in imposing court costs.

5. The court erred in entering the following finding in the Domestic Violence No-Contact Order:

> … 2. The court further finds that the defendant's relationship to a person protected by this order is … [X] current or former cohabitant as intimate partner [X] current or former dating relationship … as defined in RCW 10.99

6. The court erred in entering a Domestic Violence No-Contact Order, pursuant to RCW 10.99 *et seq.*

Issues Pertaining to Assignments of Error

1. Was Mr. Halls' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove beyond a reasonable doubt that the tampering with a witness offense had a domestic violence component?

2. Does a sentencing court lack statutory authority to impose a domestic violence fine where the evidence was insufficient to establish the crime of conviction involved domestic violence.

3. Should the imposition of discretionary court costs be stricken from the judgment and sentence where the record does not reveal that the trial court took Mr. Halls' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160?

4. Does a sentencing court lack statutory authority to impose a Domestic Violence No-Contact Order that is not crime related?

B. STATEMENT OF THE CASE

David Wayne Halls was charged in Benton County Cause No. 12-1-00610-9 with the crime of tampering with a witness on or about February 9, 2012, pursuant to RCW 9A.72.120(1)(b). The State alleged a domestic violence component that at the time he "was a family or household member, to-wit: being over the age of 16 and currently or previously engaged in a dating relationship," pursuant to RCW 10.99.020. CP 1.

At the guilty plea hearing, Judge Robert Swisher engaged Mr. Halls in a colloquy concerning the proposed plea including the rights he

would be giving up—which Mr. Halls said he understood. 9/12/12 RP 2–5. The court addressed the charge:

> [COURT]: Okay. You're charged with tampering with a witness, the elements of which are attempting to induce a person you believe who is about to be called as a witness in a trial to absent themselves from the proceedings. So that's what the State would have to prove to convict you of the crime you're charged with here. Do you understand that?
>
> [MR. HALLS]: Yes.

9/12/12 RP 5. The court confirmed Mr. Halls understood his offender score, the standard range, statutory maximum, the state's recommendation to the low end of 51 months to run concurrent with the sentence in another cause number, and that the sentencing judge would not have to follow the recommendation. 9/12/12 RP 5–7; *see* CP 40 at ¶ 6(g).

Mr. Halls had reviewed the Statement of Defendant on Plea of Guilty with his attorney. 9/12/12 RP 7. The Statement of Defendant recites, in part:

> I Have Been Informed and Fully Understand That:
>
> > … (b) I am charged with: Tampering with a Witness.
> > The elements are: Attempting to induce a person you believe about to be called as a witness in a trial to absent themselves from such proceedings.

CP 37 at ¶ 4.

The court took Mr. Halls' plea:

> [COURT]: … To the charge of tampering with a witness as set forth in Count I of the Information, how do you plead?
>
> [MR. HALLS]: Guilty.

9/12/12 RP 7. The court confirmed Mr. Halls' understanding of what he had done wrong:

> [COURT]: Your statement is, "On February 9th, 2012, I sent a letter to the victim asking her to make herself unavailable as a witness at my trial in Benton County Superior Court." Is that what happened?
>
> [MR. HALLS]: Yes.

9/12/12 RP 7–8; CP 44 at ¶ 11. The court agreed to incorporate the probable cause statement. 9/12/12 RP 8; *see* CP 3–4.

The court accepted the plea, finding it was made "knowingly, intelligently and voluntarily … with an understanding of the charges and consequences … and that there is a factual basis for it." 9/12/12 RP 8.

A different judge, Judge Carrie L. Runge, presided over sentencing. The court followed the agreed recommendation. 10/9/12 RP 7–9. The Judgment and Sentence contains a finding that "domestic violence was pled and proved. RCW 10.99.020." CP 48. The court issued a Domestic Violence No-Contact Order pursuant to RCW 10.99 *et seq*. 10/9/12 RP 9–10; CP 58–60. The court imposed a domestic violence penalty assessment of $100 pursuant to RCW 10.99.080. CP 51 at ¶ 4.1.

The court also ordered Mr. Halls to pay a total of $2,060 in legal financial obligations (LFOs), including $860 as discretionary court costs. CP 51, 57. The court entered a boilerplate finding stating that it had considered Mr. Hall's circumstances and ability to pay the LFOs:

> **¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS**. 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.

CP 50 (bolding in original). The court made no inquiry into Mr. Halls' financial resources and the nature of the burden that payment of LFOs would impose on him. 10/9/12 RP 7–10.

This appeal followed. CP 65.

C. ARGUMENT

1. Mr. Halls' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove beyond a reasonable doubt that the tampering with a witness offense had a domestic violence component.[1]

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution,

[1] Assignment of Error 1, 2.

Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in Winship: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." In re Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. Substantial evidence must support the trial court's findings of guilt. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). The court's findings must support the conclusions of law. State v. Avila, 102 Wn. App. 882, 895-96, 10 P.3d 486 (2000), *rev. denied*, 143 Wn.2d 1009 (2001). "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." State v.

Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

Tampering with a witness[2] is a domestic violence crime when committed against a family or household member. RCW 10.99.020(5)(d). "Family or household members" means, in part:

> … persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, …

RCW 10.99.020(3).[3]

Herein, the State presented no evidence Mr. Halls' crime was committed against a "family or household member". *See* 9/12/12 RP 3–8. Although the State did ask the court to incorporate the probable cause statement (9/12/12 RP 8), the statement provides no evidence of a 'family

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[2] As charged in this case, RCW 9A.72.120 provides in pertinent part:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding … to: …
>
> (b) Absent himself or herself from such proceedings; …

[3]) The full text is as follows: "'Family or household members' means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren." RCW 10.99.020(3).

or household" relationship. *See* CP 3–4. And although the statement references "police reports", no police reports were made part of the record. CP 3; CPs *passim*. The evidence was insufficient to support the finding that "domestic violence was pled and proved. RCW 10.99.020." CP 48. Findings that are unsupported in the record must be stricken. *See* State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011).

2. The trial court lacked statutory authority to impose a domestic violence fine where the evidence was insufficient to establish Mr. Halls' offense of tampering with a witness involved domestic violence.[4]

"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 196 P.3d 670 (2008).

A domestic violence penalty may only be imposed on a person who is convicted of a crime involving domestic violence. RCW 10.99.080(1). For purposes of the penalty assessment, "convicted" means a "finding of guilt." RCW 10.99.080(4). As discussed in the preceding issue, the State

[4] Assignment of Error 3.

presented zero evidence of a domestic relationship between Mr. Halls and the "witness". The court therefore erred in imposing a domestic violence fine of $100. CP 10. The matter must be remanded to strike the imposition of the penalty assessment.

3. Since the record does not reveal that the trial court took Mr. Halls' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary court costs must be stricken from the judgment and sentence.[5]

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48,94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

Mr. Halls did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. State v. Calvin, No. 67627–0–I, 2013 WL 2325121 at *11 (Wash.Ct.App. May 28, 2013), citing Ford, 137 Wn.2d at 477. A court's determination as to

[5] Assignment of Error 4.

the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. Id.

Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation."[6] RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." But,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. *See* Curry, 118 Wn.2d at 916. Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. Bertrand, 165 Wn. App. at 404. Where

[6] It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. *See* RCW 13.40.192.

the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). Calvin, No. 67627–0–I, 2013 WL 2325121 at *11.

Here, after considering Mr. Halls' "past, present and future ability to pay legal financial obligations" (in boilerplate language), the court imposed discretionary court costs of $860. CP 50, 51, 57. At a minimum the imposition of discretionary costs represents an implied finding that Mr. Halls is or will be able to pay them. However, the record reveals no balancing by the court through inquiry into Mr. Halls' financial resources and the nature of the burden that payment of LFOs would impose on him. 10/9/12 RP 7–10. Further, there was no evidence of Mr. Halls' past, present or future employment, his financial resources or employability. *See* Calvin, No. 67627–0–I, 2013 WL 2325121 at *11. In sum, the record does not show that the trial court took Mr. Hall's financial resources and ability to pay into account as required by RCW 10.01.160(3). The implied finding of ability to pay is unsupported by the record and clearly erroneous. The court's imposition of discretionary court costs without compliance with the requirements of RCW 10.01.160(3) was an abuse of

discretion. The remedy is to strike the imposition of court costs. Id. at *12; Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

4. The sentencing court lacked statutory authority to impose a Domestic Violence No-Contact Order that was not crime related, and the order must be vacated.[7]

The imposition of crime-related prohibitions is reviewed for an abuse of discretion. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A court abuses its discretion when its decision is manifestly unreasonable or has an untenable basis. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

A sentencing court has the discretion to impose crime-related prohibitions. *See* RCW 9.94A.030(13), RCW 9.94A.505(8), and RCW 9.94A.715(2)(a). Crime-related prohibitions include no-contact orders. Armendariz, 160 Wn.2d at 119. The imposition of a no-contact order prohibits conduct that relates directly to the circumstances of the crime charged. RCW 9.94A.030(13).

Chapter 10.99 RCW applies to no-contact orders that protect victims of domestic violence. RCW 10.99.020(8) defines a "[v]ictim" as "a family or household member who has been subjected to domestic

[7] Assignment of Error 5, 6.

violence." "Domestic violence" is a crime committed by one family or household member against another. RCW 10 .99.020(5).

When a sentencing court imposes a domestic violence protection order, it must base its decision only on the information the offender admits in a plea agreement, acknowledges at the time of sentencing, or that the State establishes before the court. *See* RCW 9.94A.530(2). When an offender disputes material facts, the sentencing court must either not consider the contested facts, or grant an evidentiary hearing. RCW 9.94A.530(2).

Here, the court violated the real facts doctrine. The State did not establish that the tampering with a witness offense had a domestic violence component. It presented no evidence to that effect either at the guilty plea hearing (*see* argument, *supra*) or in connection with Mr. Halls' sentencing. 9/12/12 RP 3–8; 10/9/12 RP 7–8. Further, Mr. Halls refused to sign his criminal history and therefore did not acknowledge anything listed therein. 10/9/12 RP 10. Moreover, in the plea agreement, Mr. Halls admitted only that he understood he was charged with and pled guilty to the offense of tampering with a witness, because he had "sent a letter to the victim asking her to make herself unavailable as a witness at my trial in Benton County Superior Court." 9/12/12 RP 5, 7–8; CP 37 at ¶ 4; CP

44 at ¶ 11. The sentencing court had no basis under this cause number (Benton County Cause No. 12-1-00610-9, tampering with a witness) to make the finding that Mr. Halls had *any* relationship to the protected person much less that his relationship was that of "current or former cohabitant as intimate partner" or "current or former dating relationship"[8].

The State presented insufficient evidence that Mr. Halls' offense of tampering with a witness was one of domestic violence. Under the real facts doctrine of RCW 9.94A.530(2), the court had no authority to impose a domestic violence no-contact order in Benton County Cause No. 12-1-00610-9 because it was not related to the crime. The court abused its discretion in entering the order. The order must be vacated.

[8] Assignment of Error 5.

D. CONCLUSION

For the reasons stated, the matter should be remanded to vacate the domestic violence no-contact order and to strike the domestic violence finding and penalty, and discretionary costs from the judgment and sentence.

Respectfully submitted on July 1, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 1, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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