NO. 46754-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT WADE NAILLON,

Appellant.

RESPONDENT'S BRIEF

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1. Did the trial court abuse its discretion when it denied Mr. Naillon's pro se motion for the appointment of an expert witness?

2. Did the trial court violate Mr. Naillon's due process rights when it allowed a court officer to stand near him while he testified?

3. Did the trial court err when imposing legal financial obligations upon the Appellant?

II. SHORT ANSWERS

1. No, the court did not abuse its discretion.

2. No, the court did not violate Mr. Naillon's right to due process.

3. No. The Appellant did not object to the imposition of legal financial obligations at the time of sentencing; therefore, this court is not obligated to review this claim.

III. FACTS

On June 17, 2014, Alissa Shipley and her daughter Olivia observed a man entering a Cadillac that was parked at a church on 30th Ave in Longview, WA. 2A RP 204-206. Alissa Shipley called the police to report her observations. She then contacted the man, whom she identified as Robert Naillon. 2A RP 206. Mr. Naillon told Alissa Shipley that the Cadillac was his brother's car. 2A RP 207. Alissa Shipley observed that Mr. Naillon had a watch in his hand. 2A RP 207. Alissa Shipley told Mr. Naillon to put anything that did not belong to him back inside of the Cadillac. Mr. Naillon then put the watch inside of the Cadillac and walked

across the street. 2A RP 207. The owner of the Cadillac, Kurt Henthorn, did not give Mr. Naillon permission to enter his Cadillac. 2A RP 211.

Shortly thereafter, Longview Police Officers Chris Trevino and Shawn Close arrived to the scene and contacted Mr. Naillon. 2A RP 228-30. Mr. Naillon initially denied being inside of the Cadillac, but later changed his story, claiming that he thought the Cadillac belonged to his mother. 2A RP 230. Longview Officer Zachary Ripp arrived to Officer Close's location with Olivia Shipley, who positively identified Mr. Naillon as the man she and her mother had seen inside of Mr. Henthorn's Cadillac. 2A RP 222. Officer Close then arrested Mr. Naillon for vehicle prowling in the second degree. 2A RP 231-32.

Officer Close searched Mr. Naillon incident to his arrest and located a glass pipe in his back jeans pocket. 2A RP 232. Officer Close recognized the glass pipe as an item commonly used to ingest methamphetamine. 2A RP 232. The glass pipe contained residue of a crystalline substance that Officer Close believed to be methamphetamine. 2A RP 233. The residue was later testified by the Washington State Patrol Crime Lab and found to be methamphetamine. 2A RP 251.

The State charged Mr. Naillon with Violation of Uniform Controlled Substances Act – Possession of Methamphetamine and Vehicle Prowling in the Second Degree. CP 23-25.[1]

On July 25, 2014, at Mr. Naillon's pre-trial hearing, Mr. Naillon indicated that he wanted the State's lab results because "I want my own tests done on that." 1RP 12. No motion for retesting was filed with the court at that hearing. The court did not address Mr. Naillon's request.

On August 5, 2014, at Mr. Naillon's pre-trial hearing, Mr. Naillon again indicated that he wanted a separate lab to test the methamphetamine. 1RP 27. Josh Baldwin, who was originally appointed as Mr. Naillon's trial counsel, indicated that, as a strategic decision, he did not want to have the methamphetamine retested by a separate lab. 1RP 30. Mr. Naillon filed a pro se motion for dismissal. CP 13-22. Within his motion, Mr. Naillon requested that the methamphetamine be retested. CP 17. Mr. Naillon did not specify why he wanted the retesting, who was to do the retesting, or how the retesting would aid in his defense. At the time Mr. Naillon filed his motion, he was represented by Mr. Baldwin. 1RP 29-30.

[1] Mr. Naillon was additionally charged with Theft in the Third Degree for some items that he had in his possession at the time of his contact with Officer Close. This charge was later amended to Possession of Stolen Property in the Third Degree. Ultimately, the State dismissed this count. 2A RP 157.

On September 2, 2014, after an evidentiary hearing, Mr. Naillon's motion to suppress was denied. 1RP 87-144. Bruce Hanify, Mr. Naillon's appointed trial counsel[2], indicated to the court and the State that Mr. Naillon's defense at trial would be unwitting possession – that he was unaware that he had the methamphetamine pipe in his possession. 1RP 146-47. The court also denied Mr. Naillon's request to have the methamphetamine retested. 1RP 148.

Mr. Naillon trial began on September 18, 2014. 2A RP 157. At trial, Mr. Naillon testified that he was unaware that the methamphetamine pipe was in possession. 2A RP 273-74, 290, 292. The jury found Mr. Naillon guilty of VUCSA – Possession and Vehicle Prowling in the Second Degree. CP 48-49. Mr. Naillon timely appealed his convictions. CP 65-79.

IV. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MR. NAILLON'S PRO SE MOTION FOR THE APPOINTMENT OF AN EXPERT WITNESS.

a. Standard of review

CrR 3.1 establishes that an indigent defendant has the right to the appointment and payment of expert services when necessary to an adequate

[2] Mr. Baldwin had previously withdrawn due to a conflict. 1RP 48-57.

defense. CrR 3.1; *State v. Young*, 125 Wn.2d 688, 888 P.2d 142 (1995) (citing *State v. Mines*, 35 Wn. App. 932, 671 P.2d 273 (1983), *review denied*, 101 Wn.2d 1010 (1984)). "The determination of whether such services are necessary for an adequate defense is in the sound discretion of the trial court and will not be overturned on appeal unless the appellant clearly establishes substantial prejudice." *Mines*, 35 Wn. App. at 935 (citing *State v. Stamm*, 16 Wn. App. 603, 559 P.2d 1 (1976)). The trial court's decision will not be overturned unless there is an abuse of discretion, which occurs when its ruling is "manifestly unreasonable or based on untenable grounds." *State v. Cuthbert*, 154 Wn. App. 318, 225 P.3d 407 (2010) (citing *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006); *State v. Mee Hui Kim*, 134 Wn. App. 27, 139 P.3d 354 (2006)).

b. Mr. Naillon did not establish that the appointment of an expert was necessary to an adequate defense.

Mr. Naillon's defense at trial was unwitting possession, specifically that he was unaware that the methamphetamine pipe was in his pocket. 1RP 146-47 ("It was in my back pocket, I didn't know it was there..."); 2A RP 273-74 ("...I don't know if somebody put something in my pocket..."); 2A RP 290 ("Question: Mr. Naillon were you aware that you had that glass object in your back pocket when the officer found it?" Answer: "No. No.");

2A RP 292 ("I'll say it magically appeared."). He did not contest whether the substance inside of the pipe was methamphetamine.

In review of his pro se motion, Mr. Naillon requested to have the methamphetamine residue retested by a private lab. CP 17. However, Mr. Naillon did not state why he was requesting the retesting, who would perform the retesting, or how it would be necessary for his defense. Mr. Naillon is incorrect in stating that his trial counsel "called laboratories" to have the methamphetamine retested. Appellant's Brief at 10. Instead, he indicated that he was *intending on contacting* different laboratories. 1RP at 65. Mr. Naillon's trial counsel later indicated that he had an order for retesting prepared. 1RP 85. However, this order was never filed; thus, we do not know (a) whether he had actually contacted a laboratory and arranged for the methamphetamine to be retested, (b) who would be preforming this retesting, and (c) how this would help establish that he did not know the methamphetamine pipe was in his possession.

State v. Heffner, 126 Wn. App. 803, 110 P.3d 219 (2005) is directly on point with the present matter. In *Heffner*, the trial court denied the defendant's request for the appointment for an expert witness. "[T]he court denied the motion because Mr. Heffner did not identify the expert witness he wished to present, or the cost of services, and he could not state with any specificity why an expert was needed. *Heffner*, 126 Wn. App. at 809. "Mr.

Heffner does not claim there was any likelihood that an expert would have materially assisted defense counsel in the preparation or presentation of his case." *Id.*

The trial court's decision to deny Mr. Naillon's request for additional lab testing was not manifestly unreasonable or based upon untenable grounds because Mr. Naillon never established that additional testing was necessary to his defense. The requested additional testing was not consistent with his defense. He was not claiming that he did not know the substance inside of the pipe was methamphetamine. Instead, he simply denied knowing the pipe was in his possession. The lack of an expert did not prevent him from denying knowledge that he was in possession of the methamphetamine pipe. Likewise, the lack of an expert did not prevent or inhibit his trial counsel from making that exact argument to the jury. Therefore, the lack of independent testing was not necessary for him to present an adequate defense.

2. THE TRIAL COURT DID NOT VIOLATE MR. NAILLON'S DUE PROCESS RIGHTS BY ALLOWING A COURT OFFICER TO STAND NEAR MR. NAILLON DURING HIS TESTIMONY.

a. The record in insufficient to establish any error occurred.

"A defendant has the right to appear before the jury free of shackles or other restraints." *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061

(1998) (citing *Wilson v. McCarthy*, 770 F.2d 1482, 1484 (9th Cir. 1985)." "The trial court has broad discretion to provide for order and security in the courtroom and to shackle the defendant if such measures are necessary." *State v. Breedlove,* 79 Wn. App. 101, 900 P.2d 586 (1995).

> ...the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the offices are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt in violence. Indeed, *it is entirely possible that jurors will not infer anything at all from the presence of the guards.*

Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (*emphasis added*).

Here, the record is simply insufficient to establish that the presence of the court officer while Mr. Naillon testified had any effect upon the jury. There is nothing that would even remotely indicate that the jury even observed the court officer standing near the witness stand. The record does establish that the jury did not see Mr. Naillon escorted by the court officer to the witness stand because they had previously been excused from the courtroom. 2A RP 265. Likewise, the record establishes that the jury did not see Mr. Naillon escorted back to counsel table because they, again, had been excused from the courtroom. 2A RP 293.

Simply put, Mr. Naillon assumes and speculates that (a) the jury saw the court officer while Mr. Naillon was testifying, and (b) that the court officer's presence had an effect on Mr. Naillon's presumption of innocence. These assumptions and speculation are without merit. Mr. Naillon was not seen in shackles. Mr. Naillon was not seen "in-custody" of the court officers. Mr. Naillon was not seen being escorted by the court officers. The party seeking review has the burden of perfecting the record so that the reviewing court has all relevant evidence before it. *Bulzomi v. Dept't of Labor & Inds.*, 72 Wn. App. 522, 864 P.2d 996 (1994). Review of alleged errors is precluded if the record on appeal is insufficient. *Id.*

b. Alternatively, any error in Mr. Naillon's restraint was harmless.

"A claim of unconstitutional shackling is subject to harmless error analysis." *Hutchinson*, 135 Wn.2d at 888. Thus, Mr. Naillon was must show that his restraint "had a substantial or injurious effect or influence on the jury's verdict." *Id.* Again, as stated above, Mr. Naillon's argument is based upon assumption and speculation. The jury did not see him escorted by the court officer. Nothing in the record establishes that the jury was even aware the court officer was in Mr. Naillon's presence while he testified. "Because the jury never saw the Defendant in shackles, he cannot show prejudice." *Id.* Therefore, Mr. Naillon cannot show that he was prejudice.

As such, any error in the trial court allowing the court officer to remain near Mr. Naillon while he testified was harmless.

c. Mr. Naillon's trial counsel did not object to the court officer's presence; thus, he did not preserve this issue for appeal.

Mr. Naillon's trial counsel did not object to the presence of the court officer during testimony. Although Mr. Naillon disagreed with the presence of the court officer, no formal objection was ever made. Thus, even if we were to assume that the jury observed the court officer standing near Mr. Naillon while he was testifying and that this had a profound effect upon his presumption of innocence, he must establish that this was a manifest error that affected a constitutional error. RAP 2.5(3). Failure to do so will prevent Mr. Naillon from raising this issue for the first time on appeal. *State v. Lamar*, 180 Wn.2d 576, 327 P.3d 46 (2014).

"The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences at trial." *Id* at 583 (citing *State v. Davis*, 175 Wn.2d 287, 290 P.3d 43 (2012); *State v. Gordon*, 172 Wn.2d 671, 260 P.3d 884 (2011); *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)). As stated above, there is nothing in the record to show that the jury ever observed or noticed the court officer. Likewise, nothing in the record

suggests that the court officer's presence affected the jury. Mr. Naillon cannot establish any actual prejudice here.

3. THE COURT IS NOT OBLIGATED TO REVIEW THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.

For the first time on appeal, the Defendant challenges the court's imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay. Recently, the Washington Supreme Court decided *State v. Blazina*, 344 P.3d 680 (2015). It held that it is not error for a Court of Appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *Id.* at 682. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Id.* at 684. The decision to review is discretionary on the reviewing court under RAP 2.5. *Id.* at 681.

This Court should continue to apply its initial decision in *State v. Blazina,* 174 Wn. App. 906, 301 P.3d 492 (2013) ("Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal."). This is supported by this Court's recent holding in *State v. Lyle*, COA No. 46101-3-II (July 10, 2014) ("Our decision in *Blazina*, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim

of error on appeal."). Ms. Brooks was sentenced on November 6, 2014, well after the decision in *Blazina.* CP 53-64.

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott,* 110 Wn.2d 682, 757 P.2d 492 (1988). The Appellant did not object to the legal financial obligations at the time of sentencing. The State respectfully requests this court not review the Appellant's claim.

4. THE APPELLANT'S PERSONAL RESTRAINT PETITION SHOULD BE DENIED.

A petitioner may request relief through a PRP when he is under an unlawful restraint. RAP 16.4(a) - (c). Our Supreme Court has limited collateral relief available through a PRP "because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders." *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 823 P.2d 492 (1992)). For a personal restraint petition to succeed, it must prove either a "(1) constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers.*

Restraint of Monschke, 160 Wn. App. 479, 251 P.3d 884 (2010) (quoting *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 101 P.3d 1 (2004)). "Additionally, the petitioner must prove the error by a preponderance of the evidence. *Monschke,* 160 Wn. App. at 488 (citing *In re Pers. Restraint of Lord,* 152 Wn.2d 182, 94 P.3d 952 (2004)).

When a personal restraint petition is based on matters outside the appellate record, a petitioner must show that he has competent, admissible evidence to support his arguments. *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 72 P.3d 182 (2003). The evidence must be more than speculation, conjecture, or inadmissible hearsay. *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (1999), *cert. denied*, 528 U.S. 1009, 120 S.Ct. 507, 145 L.Ed.2d 392 (1999).

> The evidentiary prerequisite enables courts to avoid the time and expense of a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must

> present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.
>
> *In re Pers. Restraint of Rice,* 118 Wn.2d 876, 828 P.2d 1086 (1992) (emphasis in the original).

Mr. Naillon has four arguments. His first argument is in regards to his request to have the methamphetamine retested. The State addressed this issue in his direct appeal. The State requests this court not review this argument since it is a part of his direct appeal.

Mr. Naillon's next claims that because the field test of the methamphetamine was not done in front of him, the chain of custody was not established. Mr. Naillon does not provide any authority to support that the field test of the methamphetamine is required to be performed in his presence. Mr. Naillon also does not provide any factual basis to challenge the chain of custody in this matter. In fact, the State did establish the chain of custody through Officer Close and Martin McDermot. 2A RP 233-37, 245-251. Therefore, Mr. Naillon cannot establish any error, prejudice, or miscarriage of justice.

Mr. Naillon also argues that he could not access the law library because he was electrocuted by the law library kiosk. However, Mr. Naillon does not provide any facts or evidence to support these contentions. Mr.

Naillon's claims are unsupported by the record and do not establish any constitutional error, prejudice, or miscarriage of justice.

Mr. Naillon also claims that his speedy trial rights were violated. Mr. Naillon was arraigned on July 1, 2014. 1RP 1. Mr. Naillon's original trial counsel, Mr. Baldwin, moved to withdraw from Mr. Naillon's case on August 5, 2014. 1RP 26. Mr. Baldwin claimed that a conflict arose that prevented himself and Mr. Naillon from being able to communicate; thus, he would be unable to competently represent Mr. Naillon. 1RP 29-31. Mr. Naillon initially objected to Mr. Baldwin's motion to withdraw. 1RP 28. Mr. Naillon later changed his mind and did not objection to Mr. Baldwin's motion to withdraw. 1RP 35, 38. Mr. Baldwin later filed a sealed affidavit explaining the nature of the conflict. 1RP 48. On August 7, 2014, the court allowed Mr. Baldwin to withdraw from Mr. Naillon's case. 1RP 48.

Kevin Blondin was appointed to represent Mr. Naillon on August 7, 2014. 1RP 53. Mr. Naillon objected to the resetting of his jury trial. 1RP 52. The court reset Mr. Naillon's jury trial to September 8, 2014. 1RP 56-57. On August 12, 2014, Mr. Blondin moved to withdraw from Mr. Naillon's case due to a conflict with a State's witness. Mr. Blondin informed the court that he had a personal and professional relationship with the victim, thereby preventing him from representing Mr. Naillon. 1RP 58. The court granted Mr. Blondin's motion to withdraw and appointed Bruce

Hanify to represent Mr. Naillon. 1RP 64. The trial date of September 8, 2014 was not changed.

Under the court rules, the time for trial for an in-custody defendant is sixty days from the arraignment. CrR 3.3(b)(1)(i); CrR 3.3(c)(1). The commencement of speedy trial resets upon the disqualification of counsel. CrR 3.3(c)(2)(vii). In this case, Mr. Naillon's original trial counsel, Mr. Baldwin, was disqualified on August 7, 2014. Mr. Naillon claims to have objected to the Mr. Baldwin's withdrawal. He also agreed to the withdrawal. By court rule, Mr. Naillon's speedy trial time commencement began on that date. His speedy trial time ended on October 6, 2014. Thus, there was no speedy trial violation.

Mr. Naillon also claim's ineffective assistance of counsel. He first states that his trial counsel failed to provide him discovery until two days before the trial. There is no indication in the record that Mr. Naillon ever requested discovery in this case. Thus, this matter is outside of the record and is unsupported by any evidence.

Mr. Naillon also claims that Mr. Hanify was ineffective for failing to give effective arguments or cross-examination. "Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004). Mr. Naillon cannot establish that the

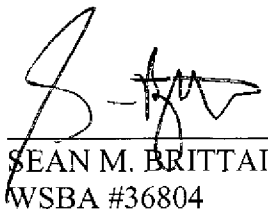
reasonable possibility that the outcome of his trial would have been different had Mr. Hanify made different/additional arguments or cross-examined the witnesses differently. The record is clear that Mr. Hanify argued Mr. Naillon's defense, that he did not know the methamphetamine pipe was in his pocket, and that he cross-examined the witnesses the State presented.

V. CONCLUSION

The trial court did not abuse its discretion in denying Mr. Naillon's request to have the methamphetamine pipe retested. Mr. Naillon's right to due process was not violated by the presence of a court officer during his testimony. The Court does not have to review Mr. Naillon's legal financial obligation issue because he did not object at the time of sentencing. Finally, Mr. Naillon does not establish any constitutional error, substantial prejudice or manifest injustice. Therefore, the Court should affirm his convictions and dismiss his personal restraint petition must be denied.

Respectfully submitted this 20th day of August, 2015

RYAN P. JURVAKAINEN
Prosecuting Attorney



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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on this 20th day of August, 2015.

Hannah Bennett-Swanson

COWLITZ COUNTY PROSECUTOR

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