74256-6

FILED
July 8, 2016
Court of Appeals
Division I
State of Washington

No. 74256-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEBEDE ABAWAJI,

Appellant.

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

The Honorable John H. Chun

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Kebede Abawaji and his wife had a tempestuous relationship seemingly challenged by trying to integrate traditional Ethiopian mores with modern American society. On one occasion, Mr. Abawaji and his wife became embroiled in an argument where it was alleged he assaulted her, threatened her with a weapon, and threatened to kill her. Mr. Abawaji was charged with assault and unlawful display of a weapon, but not harassment. The charges were dismissed when Mr. Abawaji's wife did not appear for his trial.

Several months later, it was alleged Mr. Abawaji attacked his wife with a hammer. He was subsequently charged with attempted murder and felony harassment for the earlier conduct. His motion to dismiss for a violation of mandatory joinder was denied. Mr. Abawaji urges this Court to reverse this conviction with instructions to dismiss.

B. ASSIGNMENTS OF ERROR

1. The court erred in failing to dismiss the charges as a violation of mandatory joinder.

2. The court erred in finding the "ends of justice" exception to the mandatory joinder rule applied.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Two or more offenses must be joined if they are related offenses, unless the prosecutor did not possess sufficient evidence to warrant trying them together, or the "ends of justice" would be defeated. Arising out of a single incident, Mr. Abawaji was charged with assault and unlawful display of a weapon in municipal court, but the charges were dismissed when the victim failed to appear at trial. Mr. Abawaji was subsequently charged with felony harassment for remarks he made during the assault and the prosecution was aware of these remarks. Did the trial court err in failing to dismiss the harassment count for a violation of mandatory joinder requiring dismissal of that count?

D. STATEMENT OF THE CASE

Tigist Belte and Kebede Abawaji were married in their native country of Ethiopia on October 25, 1999. 9/30/2015RP 497. The couple immigrated to Washington in 2003. 9/30/2015RP 497. The couple had five children, aged five to sixteen years. 9/30/2015RP 496. The relationship suffered from the struggle of meshing traditional mores with modern American society, including the role of women.

In 2011, the couple separated but Mr. Abawaji continued to frequent the family's residence. 9/30/2015RP 502. On November 1,

2014, Ms. Belte and Mr. Abawaji became embroiled in an argument, which resulted in Ms. Belte claiming Mr. Abawaji threatened to kill her. 9/30/2015RP 519. Mr. Abawaji was charged in Seattle Municipal Court with one count of fourth degree assault and one count of unlawful use of a weapon. CP 25; 37. The matter was scheduled for a jury trial on January 20, 2015, but Ms. Belte did not appear. CP 26, 37. As a result, the following day the case was dismissed with prejudice. CP 26, 37.

Mr. Abawaji and Ms. Belte divorced in February 2015. 9/30/2015RP 529. Mr. Abawaji believed that Ms. Belte had become involved with another man, and he believed that in Oromo culture, his life was now in danger. 10/5/2015pmRP 38.[1] On April 1, 2015, Mr. Abawaji went to confront Ms. Belte regarding his suspicions. 10/5/2015pmRP 67. What occurred next was sharply contested.

Ms. Belte testified that she had returned home but had forgotten her purse in the car. 9/30/2015RP 541. As she approached the car, she felt something behind her and turned. 9/30/2015RP 541-42. Ms. Belte saw Mr. Abawaji and she claimed he struck her on the right side of the

[1] Mr. Abawaji explained that in the Oromo culture, if a married woman begins a relationship with another man, the lover may try to kill the husband. 10/5/2015amRP 61.

forehead with a hammer. 9/30/2015RP 542. She subsequently regained consciousness in the hospital. 9/30/2015RP 543.

Mr. Abawaji agreed that he went to confront Ms. Belte. 10/5/2015pmRP 67. Ms. Belte approached Mr. Abawaji and grabbed him. 10/5/2015pmRP 79. He pushed her away, she stumbled, then fell to the ground with Mr. Abawaji on top of her. 10/5/2015RP 82. Mr. Abawaji saw Ms. Belte bleeding and called 911. 10/5/2015pmRP 82-85. When the police arrived, Mr. Abawaji was arrested. 10/5/2015pmRP 90.

Mr. Abawaji was charged with attempted first degree murder, first degree assault, and felony harassment. CP 11-12. Prior to trial, Mr. Abawaji moved to dismiss the felony harassment count as a violation of mandatory joinder under CrR 4.3.1. CP 37-39; 9/23/2015RP 29; 9/24/2015RP 131. The trial court refused to dismiss the count:

> I do note, though, that the fact that they are dealing with Municipal Court versus District Court, we are dealing with two separate prosecuting agencies, does mitigate in favor of denial of the motion. *But my primary reason for denying the motion is based on Criminal Rule 4.3.1(b)(3) where it says that if the motion can be denied for some other reason, the ends of justice would be defeated.*
>
> And one concern that I have is that even though the proceedings that took place in Municipal Court may fall in the definition of "trial" as discussed in *State v. Dixon,* nevertheless, he had not really been tried. There has not

> been a result in connection with the accusation that there was harassment. Of course, harassment was not part of the charges in Municipal Court.
>
> Second, I am concerned, very concerned about the possibility that this issue could never reach trial because of pressure being placed on the alleged victim. That's of great concern to me.
>
> For those reasons, I'm denying the motion to dismiss the harassment charge.

9/24/2015RP 151-52 (emphasis added).

Following a jury trial, Mr. Abawaji was convicted of the lesser degree offense of attempted second degree murder. CP 238. The jury also found Mr. Abawaji guilty of first degree assault and felony harassment. CP 239, 241. At sentencing, the court vacated the assault count as violative of double jeopardy. CP 299; 11/6/RP 2015RP 152.

E. ARGUMENT

1. The conviction for felony harassment violates mandatory joinder and must be dismissed.

a. *CrR 4.3.1 requires all related offenses be joined.*

Generally, the mandatory joinder rule requires the State to charge all related offenses in a single information. If the State fails to timely charge a related offense, the mandatory joinder rule precludes it from later charging that defendant with the related offense arising out of the same conduct "unless the court determines that ... the ends of

justice would be defeated if the motion [to dismiss for failure to join a related offense] were granted." CrR 4.3.1(b)(3).[2]

State v. Gamble, 137 Wn.App. 892, 902, 155 P.3d 962 (2007), *aff'd*, 168 Wn.2d 161, 225 P.3d 973 (2010).

The mandatory joinder rule is founded on Article I, Section 22 of the Washington State Constitution, which provides: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . . ." Under this provision, "an accused must be informed of the charge he or she is to meet at trial, and

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[2] CrR 4.3.1(b), provides in part:

> (1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.
> (2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.
> (3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

cannot be tried for an offense not charged." *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987), *citing State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); *State v. Rhinehart*, 92 Wn.2d 923, 602 P.2d 1188 (1979). "Mandatory joinder is required for related offenses to ensure "a single disposition of all charges arising from one incident." *State v. Harris*, 130 Wn.2d 35, 921 P.2d 1052 (1996).

The remedy for a violation of the when the mandatory joinder rule is dismissal of the additional charges with prejudice. CrR 4.3.1(b)(1); *State v. Dallas*, 126 Wn.2d 324, 329, 892 P.2d 1082, 1086 (1995). The trial court's application of the mandatory joinder rule is reviewed *de novo*. *State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003); *State v. Kenyon*, 150 Wn.App. 826, 833, 208 P.3d 1291 (2009).

b. *The offenses were related offenses thus were required to be joined.*

Offenses are related where they are based on the same conduct. *State v. Lee*, 132 Wn.2d 498, 501, 939 P.2d 1223 (1997). "Same conduct" is "conduct involving a single criminal incident or episode." *Id.*, at 503.

Here all the charges arose of one single incident that occurred on November 1, 2014. During this incident, Ms. Belte alleged that Mr.

Abawaji threatened to kill her after he choked her and threatened her with a knife. 9/30/2015RP 508-523. This was a single episode; a domestic violence incident occurring in the home between Ms. Belte and Mr. Abawaji. At that time, the State had all the facts it needed to charge assault, harassment, and unlawful display of a weapon, but chose not to charge the harassment, despite the requirements of mandatory joinder. The trial court erred in failing to dismiss the harassment count here.

c. *The harassment count should have been dismissed as it was a related offense of the dismissed misdemeanor counts of fourth degree assault and unlawful use of a weapon.*

Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1). Offenses that are related must be charged together or they will be subject to dismissal under CrR 4.3.1(b)(3). Under that rule, a trial court must grant a motion to dismiss made before the second trial unless the State proves that (1) the prosecuting attorney did not previously file the charge because it was unaware of facts constituting the related offense or did not have sufficient evidence to try the offense, or (2) the ends of justice would be defeated if the motion were granted. *Kenyon*, 150 Wn.App. at 831.

The trial court was concerned that the offenses were not related offenses because they were not prosecuted in the same jurisdiction, noting the assault and unlawful display of a weapon were filed in municipal court and the felony harassment was filed in superior court. 9/24/2015RP 151. This Court's decision in *State v. Dixon*, sheds light on this issue. 42 Wn.App. 315, 711 P.2d 1046 (1985).

In *Dixon*, the State prosecuted Mr. Dixon in Seattle District Court on a misdemeanor charge of aiming or discharging a firearm. That charge was subsequently dismissed because the State had not subpoenaed a critical witness. 42 Wn.App. at 316.

The State subsequently charged Mr. Dixon in superior court with being a felon in possession of a firearm. *Id.* The trial court denied Mr. Dixon's motion to dismiss for a violation of mandatory joinder, and he was subsequently convicted. *Id.* This Court reversed the conviction, finding the trial court erred in denying the motion to dismiss. *Id.* at 319. The Court began its analysis by noting:

> Both offenses are within the jurisdiction and venue of King County Superior Court and are based on the defendant's conduct with a pistol on the evening of December 1, 1983.

Dixon, 42 Wn.App. at 317. The Court also rejected the argument that Mr. Dixon had not been tried for the misdemeanor count:

> Although dismissal of the misdemeanor charge was not with prejudice, it would be unfair to say there was no trial. The State had initiated legal proceedings but was unable to present evidence because it had not subpoenaed its only witness. The defendant was present and ready to defend himself. Under these facts, it is implicit in the dismissal that the State did not prove the elements of the offense. *See State v. Alton,* 89 Wash.2d 737, 739, 575 P.2d 234 (1978). At the time of the dismissal, the State did not contemplate a felony charge and made no motion to continue.
>
> The rationale of "issue preclusion" underlying the mandatory joinder rule, *State v. Russell, supra,* also supports the conclusion that Dixon had been tried on the misdemeanor charge. The doctrine of issue preclusion "seeks to prevent relitigation of previously determined issues between the same parties, to promote judicial economy, and to prevent harassment of and inconvenience to litigants." *Malland v. Department of Retirement Systems,* 103 Wn.2d 484, 489, 694 P.2d 16 (1985). The State does not, nor could it reasonably, argue that it was unaware of the facts constituting the felony offense or did not have sufficient evidence to warrant trying this offense at the time of the misdemeanor trial. Both offenses arose out of the same incident and involved the same witnesses. The only additional fact necessary to be known for the felony charge was the defendant's status as a felon. The State cannot avoid the effects of the rule simply by arguing that it was too busy to bring both charges at once. *See State v. Dailey, supra* 18 Wn.App. at 529, 569 P.2d 1215. This type of piecemeal prosecution clearly violates the principles underlying CrR 4.3(c).

Dixon, 42 Wn.App. at 318-19.

Plainly the decision in *Dixon* ends the discussion that municipal court and superior court cannot be the same jurisdiction. Under the rationale of *Dixon*, the trial court erred in refusing to dismiss.

In addition, the decision in *Dixon* also dismisses the trial court's conclusion that Mr. Abawaji had "not really been tried[that there had] not been a result in connection with the accusation that there was harassment. " 9/24/2015RP 151. As *Dixon* concluded, Ms. Belte did not appear and Mr. Abawaji was present and ready to defend himself, thus implicitly, the State failed to prove the elements of the offenses. *Dixon*, 42 Wn.App. at 318-19.

d. *The "ends of justice" exception to the mandatory joinder rule does not apply here.*

The trial court's primary reason for refusing to dismiss the harassment count was that to do so would defeat the ends of justice. 9/24/2015RP 151-52.

To invoke the "ends of justice" exception, the State must demonstrate extraordinary circumstances, extraneous to the court's action, to warrant applying this exception. *State v. Carter*, 56 Wn.App. 217, 783 P.2d 589 (1989). The circumstances must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings. *Dallas*, 126 Wn.2d at 333.

There was nothing here that would justify the court's ends of justice ruling. The court seemed to be persuaded by the fact Ms. Belte did not appear for trial in municipal court because of pressure from the Oromo community. 9/24/2015RP 151-52. Whatever the reason, Ms. Belte did not appear at Mr. Abawaji's trial. There was no evidence that Mr. Abawaji had anything to do with Ms. Belte's non-appearance, thus he should not be penalized for Ms. Belte's failure to appear; the State should bear the burden. *State v. Gamble*, 168 Wn.2d 161, 171, 225 P.3d 973 (2010) ("The mandatory joinder rule is . . . a limit on the *prosecution*.") (emphasis added).

e. *Count III, the felony harassment count, must be dismissed for a failure to join.*

Where two or more offenses are related offenses, the failure to join them must result in the dismissal of the unjoined count. CrR 4.3.1(b)(3); *Kenyon*, 150 Wn.App. at 831. The failure of the trial court to dismiss the felony harassment count where it should have been joined with the other counts arising out of the November 2014 incident must result in the reversal of that count with instructions to dismiss.

2. **This Court should order that no costs be awarded on appeal.**

a. *Mr. Abawaji may seek an order from the Court ordering that no costs be awarded in his Brief of Appellant.*

Should this Court reject Mr. Abawaji's argument on appeal, he asks that this Court to issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency. Such as request is authorized under this Court's recent decision in *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an "individualized inquiry." *Id*. at 391, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

One factor this Court found persuasive in making its determination regarding costs on appeal in *Sinclair* were the trial court's findings supporting its order of indigency for the purposes of the appeal pursuant to RAP 15.2. *Sinclair*, 192 Wn.App. at 392-93. Here, the trial court entered the order of indigency and findings supporting its order. As in *Sinclair*, there is no evidence that Mr. Abawaji's financial situation will improve. *Id*. at 393.

At the time of sentencing, Mr. Abawaji was 24 years of age. CP 66. Mr. Abawaji was sentenced to 201 months in custody. CP 308. In light of the decision in *Sinclair*, given Mr. Abawaji's indigency and imprisonment for the rest of her life, "[t]here is no realistic possibility that [she] will be released from prison in a position to find gainful employment that will allow [him] to pay appellate costs." *Sinclair*, 192 Wn.App. at 393.

Because of his current and continued indigency and likelihood that he will remain so while in prison, Mr. Abawaji asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

b. *Alternatively, this Court must remand to the trial court for a hearing where the court must determine whether Mr. Abawaji has the current or future ability to pay.*

Should this Court determine that it cannot make a finding regarding ability to pay because the record is not complete, due process requires this Court to remand to the trial court for a hearing to determine Mr. Abawaji's present or future ability to pay these costs.

Any award of costs becomes part of the Judgment and Sentence, thus amending that document. RCW 10.73.160 (3) states that: "An award of costs shall become part of the trial court judgment and sentence." A defendant has due process rights where the State seeks to modify or amend a Judgment and Sentence, including:

> (a) written notice (b) disclosure of evidence against him or her; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the court specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body; and (f) a written statement by the court as to the evidence relied on and reasons for the modification.

State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005), *citing Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Since adding any costs that might be requested by the State to Mr. Abawaji's Judgment and Sentence necessarily amends the judgment, due process requires that there be a hearing which complies with *Abd-Rahmann* regarding his present or future ability to pay. As such, Mr. Abawaji requests that, in the absence of a finding by this Court regarding his ability to pay, this Court remand to the trial court for a hearing on his ability to pay.

F. CONCLUSION

For the reasons stated, Mr. Abawaji asks this Court to reverse his harassment conviction with orders to dismiss. Alternatively, Mr. Abawaji asks this Court to refuse to impose costs on appeal should the State seek them.

DATED this 8th day of July 2016.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74256-6-I
v.	)	
	)	
KEBEDE ABAWAJI,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JULY, 2016.

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