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49492-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JOHN ALLEN BOOTH JR.,

Appellant.

---

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

The Honorable Richard Brosey, Judge

# PETITION FOR REVIEW

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Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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### COURT RULE

## A. IDENTITY OF PETITIONER

Petitioner, John Booth, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

## B. DECISION OF THE COURT OF APPEALS

Booth seeks review of the unpublished opinion of the Court of Appeals in cause number 49492-2-II, 2019 WL 5704636, filed November 5, 2019. A copy of the decision is in the Appendix A at pages A-1 through A-18. Petitioner filed a motion for reconsideration that was denied on December 12, 2019. Appendix B.

## C. ISSUES PRESENTED FOR REVIEW

1. A defendant has the constitutionally protected right to counsel which carries the right to confer and consult with counsel during the entirety of the criminal proceeding. The State violates the right to counsel when it eavesdrops on these confidential conversations. Dismissal of the proceeding is the proper remedy where the State violates the right to counsel by listening into these confidential attorney-client communications. Should this Court accept review where the State engaged in a pattern of eavesdropping on Booth's communications with his attorneys and with defense investigators?

2. Should this Court accept review where the trial court truncated Booth's testimony regarding his lack of confidence in his trial counsel after the State's repeated deliberate and egregious intrusion into privileged communication with his attorneys and defense investigator, where the issue of lack of confidence in one's counsel is a critical factor when assessing the issue of prejudice in governmental eavesdropping cases?

## D. STATEMENT OF THE CASE

A jury convicted Booth of two counts of murder in the first degree, one count of murder in the second degree, one count of attempted murder in the first degree, one count of attempted extortion in the first degree, and one count of unlawful possession of a firearm in the first degree. He was convicted of all counts and he appealed his convictions, which were affirmed in an unpublished opinion filed August 12, 2014. ***State v. Booth***, 2014 WL 3970707. Booth filed a motion to either vacate and dismiss the judgment and sentence or hold an evidentiary hearing pursuant to CrR 7.8.

Booth appealed his the denial of his CrR 7.8, challenging many of the court's findings of fact on the basis that substantial evidence does not support them, and on the basis that he received ineffective assistance of counsel, and that the eavesdropping by the jail staff violated his rights to counsel and to due process. By unpublished opinion filed November 5, 2019, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion.

Booth now petitions this Court for discretionary review pursuant to RAP 13.4(b).

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

### 1. THE STATE ENGAGED IN AN EGREGIOUS, PERVASIVE PATTERN OF EAVESDROPPING ON BOOTH'S CONVERSATIONS WITH HIS ATTORNEYS AND DEFENSE INVESTIGATOR IN VIOLATION OF BOOTH'S RIGHT TO COUNSEL AND TO DUE PROCESS

An accused person has a constitutional right to confer privately with defense counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; which provides, inter alia, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, . . ." ***State v. Cory***, 62 Wn.2d 371, 373, 382 P.2d 1019, (1963); ***State v. Peña-Fuentes***, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." ***United States v. Zolin***, 491 U.S. 554, 562, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989) (quoting ***Upjohn Co. v. United States***, 449 U.S. 383, 389, 66 L. Ed. 2d 584 (1981)). This right is fundamental and is not a luxury. ***United States v. Cronic***, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). So fundamental is this right that it has been

recognized as the right to effective assistance of counsel. ***McMann v. Richardson***, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). This right to effective assistance cannot be disregarded by the State. ***Reece v. Georgia***, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955). "Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process." ***State v. Garza***, 99 Wn. App. 291, 296, 994 P.2d 868 (2000).

Eavesdropping on an attorney-client conversation is presumptively prejudicial. ***State v. Peña-Fuentes***, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). Dismissal is mandatory unless the prosecution proves, beyond a reasonable doubt, "there is no possibility of prejudice." ***Peña-Fuentes***, 179 Wn.2d at 819-20. State intrusion into those private conversations is a blatant violation of a foundational right even when no information is communicated to the prosecutor. ***Peña-Fuentes***, 179 Wn.2d at 819. In "those rare circumstances where there is no possibility of prejudice," the State bears the burden of showing "beyond a reasonable doubt that the defendant was not prejudiced." *Id.*, at 810-820.

Here, the State engaged in a deliberate, egregious pattern of eavesdropping on Booth when communicating with his attorneys and defense investigator using three distinct methods. A defendant cannot receive effective assistance of counsel without the right to confer with defense counsel in private. ***Cory***, 62 Wn.2d at 373-74. The opportunity to confer is necessary to provide access to counsel. ***State v. Sargent***, 49 Wn.App. 64, 75, 741 P.2d 1017 (1987), rev'd on other grounds, 111 Wn.2d

641, 762 P.2d 1127 (1988). The Fifth and Sixth Amendments "'unqualifiedly guard the right to assistance of counsel, without making the vindication of the right depend upon whether its denial resulted in demonstrable prejudice.'" ***Cory***, 62 Wn.2d at 376, quoting ***Coplon v. United States***, 89 U.S. App. D.C. 103, 191 F.2d 749, 759 (1951). The fact that the attorney visitation booths were not soundproofed and that conversations could be easily heard outside the booths was known to law enforcement as early as 2008. Investigators took advantage of this by stationing two officers outside the visitation room during every meeting with Booth's attorney or investigator. The Lewis County jail staff was consistently stationed outside the attorney visitation booth at the jail when he met with counsel in order to overhear his privileged communication with counsel. This was done to capitalize on a known flaw in the attorney client booths that allowed conversations to be heard outside the booths. This eavesdropping resulted in Officer Lamping overhearing a statement by Mr. Booth that "[t]he guy had a gun so I had to shoot him." 1RP at 181. Officer West testified that "Mr. Booth stated that he did kill the kid and the kid had a gun." 1RP at 101.

Regarding telephone calls to counsel, Officer Haskins, testified that he listened to part of a call that he recognized as being to one of Mr. Booth's

attorneys, confirming that least one attorney call was recorded. The officer stated he reported this incident to Lt. Pea, a report which he subsequently denied receiving. More disturbingly, the State admitted that it was recording calls to Booth's investigator at Run Down Investigations if made via his number at his bail bond company. Officer Haskins confirmed that he refused to stop recording the calls. More alarmingly, Lt. Pea testified that he did not believe inmate calls to a defense investigator was confidential.

Officers West, Harper, Sullivan and Lamping were responsible for regularly transporting Booth. RP at 98-99, 181, 429. Officer West testified that when the officers outside the visitation booth could hear conversations between Booth and his attorneys, they moved away. RP at 100-01. Officer West testified that he did in fact overhear one conversation between Booth and his attorney in which Booth made a highly inculpatory statement. RP at 101-02. In Section 1.C of its unpublished opinion, the Court addressed the instances of eavesdropping alleged by Booth during meetings between Booth and his attorneys while in visitation booths at the Lewis County Jail. Booth, slip. op. at *11. As the Court noted in its opinion, the trial court found that when jail officers including "Lamping overheard Booth's conversation in the visitation room, they immediately distanced

themselves. It also found that West, Lamping, and the other transport COs had a "self-imposed gag order" where they would not and did not share any information inadvertently overheard." Booth, slip. op. at *12. CP 354; RP at 549).

The Court's findings also overlooks the testimony from multiple witnesses that it had been widely "known that there was noise that could be heard" from the visitation booths at the jail, that the booths were not soundproofed and that conversations could be heard not only outside the door, but in adjoining booths, and that had been the condition of the visitation area for several years. RP at 50, 52, 56, 101, 113, 116, 244-45, 249-50, 284. Although Officer West said that the officers moved away from the door shortly after hearing convictions by Booth, the Court's ruling overlooks the testimony Officer Sullivan that even when they were "down the hall" from the door of the visitation booth in use, "you could hear him muffled." RP at 432. The testimony does not support the conclusion that by merely removing themselves from the immediate vicinity of the booth, conversations could not be heard by jail staff.

In addition, although it was Officer Lamping's and West's testimony that the officers did not report what they overheard during Booth's attorney meeting, the trial court's assessment that the officers had

what the judge termed a "self-imposed gag order" is not supported by the record. RP at 549. By affirming the court's finding of fact regarding the court's sua sponte finding of a so-called "gag order," this Court overlooked Officer Sullivan's testimony that there was no "code of silence" among the four transport officers. RP at 441, 442. Respectfully, this Court's reliance on the trial court's finding of a "self- imposed gag order" is not supported by the record.

***State v. Cory***, *supra* is controlling authority. In ***Cory***, jail staff surreptitiously recorded ***Cory*** and his attorney's confidential consultations in a jail conference room. Once the recordings came to light, the trial court refused to dismiss the action but agreed to exclude from trial the confidential conversations and any evidence derived from the illegal eavesdropping. ***Cory***, 62 Wn.2d at 372. There was no evidence the deputy told the prosecutor about it, but the court presumed some information would have been conveyed and the defendant could not know if the State used it to shape the investigation or prosecution. *Id.* at 377 n.3. "If the prosecution gained information which aided it in the preparation of its case" then the violation of the attorney-client relationship infected the proceedings. *Id.* at 377. Furthermore, once the State interfered with "the defendant's right to private consultation" with his lawyer, "that

interference is as applicable to a second trial as to the first," and therefore the court reversed the conviction and dismissed the charge. *Id.*

The Supreme Court stated:

> It is our conclusion that the defendant is correct when he says that the shocking and unpardonable conduct of the sheriff's officers in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be dismissed.

***Cory***, 62 Wn.2d at 371. See also ***State v. Granacki***, 90 Wn.App. 598, 959 P.2d 667 (1998) (when detective views defendant's notes about attorney communications, State irreparably intruded into attorney-client privilege even if information not given to prosecutor). In a case where the jail seized and read defendant's legal documents which included private communications with his attorney, Division Three followed the ***Cory*** decision and found the jail guard's actions violated the defendant's right to counsel. ***State v. Garza***, 99 Wn.2d 291, 296-97, 994 P.2d 868, review denied, 141 Wn.2d 1014 (2000).

Just as was the case in ***Cory***, law enforcement in this case gained critical information from confidential meetings, albeit instead of using an electronic recording device, obtained the information in a less sophisticated, low tech way by stationing officers outside the door to exploit the lack of soundproofing. As a result of their eavesdropping, the

officers both stated they overheard what can only be described as a pivotal inculpatory statement by Mr. Booth.

The State's conduct here was especially egregious. While the jail guards were ostensibly assigned to act as security, the guards' presence directly outside the visitation booth resulted in the blurring of "security" into the corrosive role of eavesdropping on the confidential conversations between attorneys, investigator and Mr. Booth regarding the upcoming triple homicide trial. The claim that the officers were stationed outside the booth is belied by the clear, consistent testimony that even in the visitation room, Mr. Booth remained chained to a metal stool bolted to the floor. In short, Mr. Booth was securely in the room; the two guards stationed in close proximity were not for the purpose of security but were stationed there to eavesdrop on confidential communication.

The second method of governmental intrusion was in the courtroom during pre-trial hearings; Det. Riorden effectively blocked Mr. Booth's last avenue of confidential communication with his attorney by sitting approximately two feet directly behind the defense table during hearings. Government intrusion into a defendant's private communications with his attorney will not automatically be deemed a per se prejudicial violation of the defendant's Sixth Amendment right to counsel, but prejudice will be

presumed where the government's actions are purposeful and without justification. ***Garza***, 99 Wn. App. at 298-301; ***Weatherford v. Bursey***, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

Here, Det. Riorden's presence during court hearings was an egregious and purposeful intrusion in order to listen to confidential conversation between Mr. Booth and Mr. Hunko and to observe notes. Det. Riorden's claim that he was providing "rear security" is belied for two reasons: (1) he was an investigator in the case; security was provided by the corrections bureau of the Sheriff's Office, and (2) after the detective was expelled from the courtroom, his "security" position in the courtroom was not replaced. The security was provided by officers stationed at the rear of the courtroom, a practice that continued during the post-trial motion hearing. Detective Riordan was told by his superior to sit in the courtroom directly behind Booth at counsel table. This Court found that at "no point during his time as security did Riordan overhear or intend to overhear conversations between Booth and his lawyer." Booth, slip. op. at *12. The Court overlooks, however the trial court judge's stated basis for taking the extraordinary step of banishing Detective Riorden from the courtroom during a hearing on November 4, 2011, and from future hearings: that the detective was either eavesdropping or gave every indication of

eavesdropping on privileged communication. At the hearing, Booth told the court that Riorden was sitting behind the defense table and that he was eavesdropping when Booth tried to talk with his attorney, Mr. Hunko. The court stated: I observed that and I made sure that's not going to happen again. RP (11/4/11) at 7. The court said that Detective Riorden was excluded from the courtroom in the future, stating that he did not want the detective to taunt Booth nor interfere with his communication with Hunko. The court stated:

> Well, that isn't going to happen again because I've directed that he's not to be in here. And, again, I don't want you attacking the transport officers for doing their jobs, and I 'm going to see to it that somebody that you have a beef with isn't here in the courtroom, at least not in a position where he's able to sit behind you and taunt you or interfere with what you believe to be the ability to communicate with your attorney.
>
> RP (11/4/11) at 8.

The Court concluded that substantial evidence supports the trial court's findings and that its findings support its conclusion that no violation of Booth's right to effective representation or due process occurred. ***Booth***, slip op. at 11-12. The court's conclusion, however, overlooks testimony by defense counsel Hunko that Booth was objecting because "Detective Riorden was evidently over behind my back reading the notes or listening to what we were saying." RP at 125. Hunko's testimony was not a robust

assertion that he was able to communicate freely with his client; Hunko stated that he had to speak in lower volume due to potential of eavesdropping, that he "hope[d]" he was able to represent Booth effectively, and that he "suppose[d]" his trial strategy and preformation was not affected by the fact that officers were outside the interview room door. RP at 135. He stated that he was unaware of any effect the presence of the officers had on Booth. RP at 135.

The intrusion was even more blatant during *voir dire*, when Officer West was actually inside a meeting room with Mr. Booth and his attorney Mr. Hunko and his investigator while they discussed jury questionnaires and trial strategy. 3RP at 499.

The timing of the pervasive eavesdropping activity greatly increased the conclusion that Booth was prejudiced by the intrusions. Had police listened in after all matters had concluded, the likelihood of prejudice would have been diminished. Cf. ***Peña-Fuentes***, supra, (post-trial eavesdropping could not have affected trial, but may have affected defendant's motion for a new trial). Instead, police recorded and listened to all calls made prior to trial, a time when Mr. Booth and his attorney undoubtedly had extensive discussions about the facts and the defense strategy.

The trial court's Finding of Fact 1.26 that Officer West "did not overhear any of the conversation between Mr. Hunk and Mr. Booth" is unsupported by the record. Similarly, Finding of Fact 1.29 that Mr. Hunko did not express that he felt his ability to represent Mr. Booth was impacted by the presence of Officer West in the meeting room. The question of undermined confidence is not held by the attorney, but by the defendant. Therefore, Mr. Hunko's level of confidence regarding the confidentiality of his communication with Mr. Booth is irrelevant; the privilege is held by Mr. Booth.

"The United States Supreme Court has expressly rejected a per se prejudice rule for such eavesdropping, holding that when an eavesdropper did not communicate the topic of the overheard conversations and thereby create ['Jat least a realistic possibility of injury to [the defendant] or benefit to the State, there can be no Sixth Amendment violation.['J" ***Pena-Fuentes***, 179 Wn.2d at 818 (quoting ***Weatherford v. Bursey***, 429 U.S. 545, 557–58, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

In this case, when addressing his challenge to the effectiveness of his counsel during the CrR 7.8 hearing, this Court found that the question of whether Booth's calls were recorded was of minimal importance, and that "[i]nstead, the critical inquiry at Booth's hearing was whether jail staff

shared the content of the overheard attorney-client conversation." ***Booth***, slip. op. at 15-16 (citing ***Pena-Fuentes***, 179 Wn.2d at 819-20). Booth submits that the Court overlooks the language of ***Pena-Fuentes***, which specifies that the "topic" be transmitted, not the contents. Here, Officer Haskins testified that he told Lieutenant Pea that he was listening to conversations and was "going towards legal questions, legal manner." RP at 352. The "topic" of the convictions—that it involved legal matters—was submitted to Lt. Pea. RP at 352. The language contained in Fuentes does not require that specific "contents" be transmitted find a Sixth Amendment violation, only that the topic be disclosed. Here, Booth submits that it is clear that the topic was in fact legal matters related to the defense.

Here, the actors at issue are both jail guards and detectives, who infringed upon Booth's Sixth Amendment right, and therefore prejudice must be presumed. As noted above, after the presumption is established, "the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced." ***Peña-Fuentes***, 179 Wash.2d at 819-20, (citing ***Granacki***, 90 Wash. App. at 602 n.3. Where State intrusion into privileged attorney-client communications is at issue, "the defendant is hardly in a position to show prejudice when only the State knows what was

done with the information gleaned." ***Peña-Fuentes***, 179 Wash.2d at 820, 318 P.3d 257. Therefore, because the State is "the party that improperly intruded on attorney-client conversations," it is the State that "must prove that its wrongful actions did not result in prejudice to the defendant." ***Peña-Fuentes***, 179 Wash.2d at 820.

Moreover, the State has not rebutted the presumption of prejudice arising from the evidence presented that the State intruded into privileged attorney-client communications. After the presumption is ascertained, "the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced." ***Peña-Fuentes***, 179 Wash.2d at 819-20, 318 P.3d 257 (citing ***Granacki***, 90 Wash. App. at 602 n.3, 959 P.2d 667).

This Court has instructed that a presumption of prejudice must follow from a State actor's infringement upon a defendant's Sixth Amendment right to counsel. ***Peña-Fuentes***, 179 Wash.2d at 818-20; ***Cory***, 62 Wash.2d at 377-78. The lower court erred by not holding the State to its burden to prove the absence of prejudice beyond a reasonable doubt. The court's failure to grant Booth's CrR 7.8 motion, is reversible error meriting dismissal. ***Peña-Fuentes***, 179 Wn.2d 808, ***Cory***, 62 Wn.2d 371. The lower court has overlooked the thrust of the numerous decisions by appellate courts and by this Court as well, that prejudice must follow from

the State's infringement upon a defendant's right to counsel. Here, the pattern of infringement is clear; the State frustrated Booth's ability to communicate with his attorneys in all respects, including in-person visitation in the jail as well as during hearings. Moreover, Booth tried to emphasize during the CrR 7.8 hearing that his lost his faith and confidence in his attorney due his the State's action, as well as his attorney's seeming inability to do anything about the intrusions. This was made particularly clear during testimony by Mr. Hunko, who appeared untroubled and aloof to the State's transgression. Accordingly, this Court should accept review.

### 2. THE TRIAL COURT ERRED BY REFUSING TO ALLOW BOOTH TO COMPLETE HIS TESTIMONY REGARDING LOSS OF CONFIDENCE IN HIS TRIAL ATTORNEY

During direct examination counsel asked Mr. Booth if he had confidence in his trial attorney, Roger Hunko. 3RP at 494. Mr. Booth answer "[a]bsolutely not," and the State objected to the answer, arguing that it was irrelevant. 3RP at 494. After discussion, the court sustained the objection, stating that it was "apparent to me that there was discord between Mr. Booth and his primary counsel." 3RP at 494. Defense counsel stated that he wished to elicit that Mr. Booth, despite making complaints regarding detectives and jail staff listening to confidential commination, his attorney did not address that to the court. 3RP at 495. The trial court,

misapprehending the gravamen of anticipated testimony regarding Mr. Booth's confidence in counsel, stated:

> We've already heard from Mr. Hunko, and assuming for the sake of argument Mr. Booth is going to offer some statements to the effect that he complained to his attorney—I assume if he was concerned about the issues, he probably complained to his attorney. But I don't see how that has anything to do with this 7.8 motion.

3RP at 495.

The court's ruling denied Mr. Booth the right to a fully-informed decision on the CrR 7.8 motion to dismiss the convictions and the ability to make the requisite record for appellate review of the decision to deny the motion.

Defense counsel attempted to elicit testimony the Mr. Booth's confidence in Mr. Hunko was undermined due the State's successful efforts to interfere with every means of communication through eavesdropping and recording his conversations with his attorneys and investigator. Judge Brosey prevented Mr. Booth from testifying regarding that aspect of the case. Loss of confidence in counsel is a vital factor for establishment of prejudice in cases involving eavesdropping by state agents. In ***Garza***, Division 3 noted destruction of confidence in counsel due to government intrusion is a demonstration of prejudice.

> [E]ven if there is no presumption of prejudice, the defendants still may demonstrate prejudice by demonstrating (1) that evidence

> gained through the intrusion will be used against them at trial; (2) that the prosecution is using confidential information pertaining to defense strategies; (3) that the intrusions have destroyed their confidence in their attorneys; or (4) that the intrusions will otherwise give the State an unfair advantage at trial.

***Garza***, 99 Wash.App. at 301 (citing ***United States v. Irwin***, 612 F.2d 1182, 1197 (9th Cir.1980)).

A trial court judge may not properly make credibility determinations before hearing a witness's testimony. The trial court's inherent power to insure the orderly and efficient operation of the courts does not permit the court to make uninformed decisions merely because that judge believes the testimony is unnecessary. Here, the court believed that Booth was frustrated with Mr. Hunko because he filed a bar complaint, although no evidence of a bar complaint was introduced at the hearing. Even assuming a complaint was filed, without knowing the basis for the complaint, it is impossible to know whether the complaint stemmed from a lack of confidence in Mr. Hunko or if it was based on some other allegation unrelated to the issue of confidence in counsel. The court improperly sustained the objection and prevented Mr. Booth from testifying regarding his confidence or lack thereof in Mr. Hunko. Therefore, Judge Brosey did not have the evidence that was needed to make an informed decision on the motion. This Court should accept review and the

case be remanded for a new hearing to consider Mr. Booth's full and complete testimony.

## F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: January 10, 2020.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for John Booth

CERTIFICATE OF SERVICE

The undersigned certifies that on January 10, 2020, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

Ms. Sara Beigh
Lewis County Prosecutors Office
345 W Main St. Fl 2
Chehalis, WA 98532-4802
appeals@lewiscountywa.gov

Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. John Allen Booth Jr.
DOC# 779999
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272
**LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 10, 2020.

PETER B. TILLER

# APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 5, 2019

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JOHN ALLEN BOOTH, JR.,<br><br>Appellant. | No. 49492-2-II<br>Consolidated with<br>No. 49499-0-II<br>No. 49519-8-II<br>No. 49512-1-II<br>No. 49509-1-II<br>No. 49502-3-II<br><br>UNPUBLISHED OPINION |

MELNICK, J. — John Booth appeals the denial of his motion to vacate his convictions, which he based on allegations that the State overheard protected attorney-client communications and used them against him. After a hearing on Booth's motion, the trial court found that Booth had received a fair trial and denied his motion. Booth also appeals from the court's ruling that vacated some, but not all, of his outstanding legal financial obligations (LFOs). He makes numerous arguments in support of his position.

We affirm.

## FACTS

### I. CONVICTION

In 2010, Booth shot four people while attempting to collect a drug debt. Three of the victims died. After the shooting, Booth fled to Spokane where the police later found him. Booth awaited trial at the Lewis County Jail. While there, the police listened to a call made by Booth to his friend in Spokane. Through the call, the police were able to locate the murder weapon.

A jury convicted Booth of two counts of murder in the first degree, one count of murder in the second degree, one count of attempted murder in the first degree, one count of attempted extortion in the first degree, and one count of unlawful possession of a firearm in the first degree. He appealed, and we affirmed his convictions.

II. MOTION TO VACATE

Booth then filed a motion to either vacate and dismiss the judgment and sentence or hold an evidentiary hearing. He filed the motion pursuant to CrR 7.8. Booth alleged that the State engaged in a pattern of eavesdropping during the preparation of his murder trial which intruded into his attorney-client communications. The trial court scheduled a hearing.

A. Motion to Compel

Prior to the hearing, but after being appointed counsel, Booth filed a motion to compel the State to produce telephone records in its possession.[1] Booth alleged the State had documents that would show it had a blanket policy of listening to inmates' attorney-client phone conversations or, at the least, had a plan to listen to his attorney-client conversations. Booth requested, among other documents, "every document with [his] name anywhere in it in the possession of any branch of the law enforcement of [L]ewis [C]ounty or state controlled agency related to [his motion] in any way." Clerk's Papers (CP) at 243.

The court held a hearing on the motion to compel, but Booth was not present. At the hearing, the State argued that it had given Booth all relevant documents in its possession as part of discovery and that the jail had fully responded to Booth's Public Records Act (PRA) request. Booth presented no additional evidence.

[1] Although Booth personally filed the motion, it appears that his lawyer adopted it. The lawyer argued the motion.

At one point in the hearing, the court asked Booth's attorney whether Booth could identify any specific "items of discovery . . . with sufficient particularity that [the court] could actually direct the jail in the event that [it] found [Booth] was correct." 1 Report of Proceedings (RP) at 11. Booth's attorney responded that Booth "maintains that there is going to be some sort of documentation or meeting between staff members that they either collaborated or conspired with one another to listen to his conversations with his attorney." 1 RP at 11. The court denied Booth's motion.

B. Evidentiary Hearing[2]

Booth alleged four separate instances of misconduct to support his motion to vacate. First, he alleged that the State listened to telephone calls he had with his attorney and those he had with his private investigator. Second, he alleged that jail staff and detectives listened to attorney-client conversations that occurred in the visitation rooms. Third, he alleged that a detective sat behind him in court and listened to attorney-client conversations that occurred there. And fourth, he alleged that a correctional officer (CO) overheard attorney-client conversations in a courthouse conference room.

1. Jail's Phone System

The Lewis County Jail detained Booth for approximately 16 months. During that time, Global Tel Link (GTL) operated the jail's inmate phone system. A sign posted above the phone in the jail indicated that phone calls were monitored. However, GTL did not record known attorney-client phone calls. Lawyers provided their phone numbers to the jail. Jail staff then

[2] The court entered findings of fact and conclusions of law. Because Booth challenges many of them, we include the relevant evidence presented.

inputted the numbers and GTL did not record any calls from those numbers. Booth's attorney at the time of his murder trial did not regularly practice in Lewis County.

At one point, CO Jack Haskins, whose job was to listen in on all recorded inmate phone calls, inadvertently overheard a conversation between Booth and his attorney. He did not intend to listen to any of Booth's attorney-client conversations. However, while listening to a call, the subject matter started "going towards legal questions, legal manner." 2 RP at 352. At that point, Haskins stopped listening and told his supervisor. He did not tell his supervisor the content of the conversation. The supervisor told Haskins to tell Booth what happened, which he did. Additionally, Haskins asked Booth to clarify what numbers Booth needed added to the attorney list.

Haskins did not tell anyone about the incident except Booth and his supervisor. No detective or prosecutor assigned to Booth's murder case had knowledge that Haskins overheard a phone call between Booth and his attorney.

Additionally, during his time at the jail, Booth lodged grievances alleging that the jail was improperly monitoring his phone calls to John Wickert,[3] the private investigator assisting his lawyer. The problem arose because Wickert ran both a bail bond company and a private investigation company. Booth would sometimes call the phone number associated with Wickert's bail bond company when he could not reach Wickert on the private investigation phone number. Initially, the jail refused to add the bail bond phone number to the do-not-record list. No detective or prosecutor assigned to Booth's case knew the jail heard any of Booth's conversations with Wickert or any of the substance of those conversations.

[3] Wickert did not testify at Booth's hearing.

At one point during the hearing, Booth attempted to introduce a document that appeared to indicate which conversations of his the jail recorded and monitored; he obtained the document from a PRA request. The State objected, arguing that the document was inadmissible because it had not been properly authenticated by a custodian of GTL. The court sustained the objection.

2. Jail's Visitation Rooms

During Booth's detention, the Lewis County Jail did not have completely soundproof attorney-client visitation rooms. At one point, a local attorney knocked on Booth's visitation room while Booth was meeting with his attorney to tell them that he could hear them. Based on complaints, the jail began making improvements. It appears some of the improvements occurred while Booth was detained at the jail.

According to the COs who transported Booth from his cell to meet with his lawyer, they secured him in the visitation room and then stood in the hallway adjacent to the room. On one occasion, CO Vernon West heard Booth say "that he did kill the kid and the kid had a gun." 1 RP at 101. After hearing the statement, he and the other transport CO "immediately moved away." 1 RP at 102. On subsequent meetings between Booth and his attorney, West stood at the end of the hall. Booth could see the COs if he turned around while in the visitation room.

CO Curtis Lamping also heard Booth tell his lawyer something like, "The guy had the gun, so I had to shoot him." 1 RP at 181. After hearing the statement, Lamping moved to the other end of the hall so he would not be able to hear Booth.

According to West and Lamping, Booth seemed to speak particularly loud when he made the statements that they overheard.

Neither West nor Lamping intended to listen to Booth's conversations. They also did not convey the substance of the conversation to anyone besides their fellow transport COs. No other transport CO remembered learning that West or Lamping overheard Booth's conversations.

Roger Hunko, Booth's lawyer during his murder trial, did not know that Booth had concerns about his representation based on the fact that COs potentially overheard conversations in the visitation rooms. Additionally, Hunko felt that he could communicate freely with Booth regarding his murder trial, and jail conditions did not affect his trial strategy.

3. Detective's Presence in Courtroom

Daniel Riordan, a detective on Booth's murder trial, worked as extra security in the courtroom during Booth's court appearances. Riordan's supervisor told him to sit in the pew directly behind Booth.

At one point during a pretrial hearing, Booth accused Riordan of listening to his attorney-client conversations. Booth informed the court of his concerns, and the court excluded Riordan from the courtroom. After the incident, Riordan no longer worked as extra security in the courtroom.

At no point during his time as security did Riordan overhear or intend to overhear conversations between Booth and his lawyer. He also did not see any notes written by Booth or his attorney.

4. Court Conference Room

On one occasion when West transported Booth to court, the court gave Booth and his attorney a conference room to meet. During the meeting, West sat in the room on the far side.[4] According to Hunko, West's presence or the fact that he could potentially overhear their conversation did not affect his trial strategy.

5. Jail Policy

Lewis County had a policy that COs were not to actively listen in on attorney-client conversations.

No jail supervisor ever instructed a CO to listen to conversations between inmates and attorneys, or between Booth and his attorney. Besides the COs who directly overheard Booth's attorney-client conversations, no one knew the contents of any of Booth's conversations with his attorneys.

6. Excluding Booth's Testimony

At one point during the hearing, Booth was asked whether he had lost faith in his attorney during the preparation of his murder trial because of the State's intrusions into his attorney-client communications. The State objected, and the court sustained the objection as irrelevant. The court continued, discussing it had knowledge of discord between Booth and Hunko during his murder trial, evidenced by the bar complaint that Booth had filed.

[4] Neither party asked questions of West related to this incident. However, West testified that, aside from the incident in which he overheard Booth's conversation in the attorney-client visitation room, he did not learn anything else between Booth and his attorneys that he shared with anyone. He also actively avoided hearing inmates' conversations with their attorneys.

7. Findings of Fact and Conclusions of Law

At the conclusion of the evidence, the court denied Booth's motion. It then entered the following relevant findings of fact:

> 1.1. There was no pattern of eavesdropping on conversations between the defendant and his attorney.
>
> . . . .
>
> 1.5. After Mr. Booth was placed in the attorney visitation booth, the corrections staff would proceed down the hallway so that the inmate side of the interview room was still in view.
>
> . . . .
>
> 1.7. On the two occasions where corrections staff inadvertently overheard Mr. Booth yell to his lawyer, they immediately took steps to distance themselves away from the attorney/client booths where the conversations took place.
>
> 1.8. Lewis County corrections staff were never instructed, either by their own command staff, a detective assigned to the case, or the prosecutor's office, to eavesdrop on conversations between Mr. Booth and his lawyer.
>
> 1.9. No communication between Mr. Booth and his lawyer that may have been inadvertently heard by corrections staff was ever passed on to jail command staff, law enforcement, the criminal investigation side of the sheriff's office, or the prosecutor's office.
>
> 1.10. The members of the corrections staff doing transport of Mr. Booth had what the court referred to as a "self-imposed gag order" on any communication between Mr. Booth and his lawyer that might have been inadvertently overheard by transport officers.
>
> . . . .
>
> 1.14. There was nothing done intentionally, by anyone in the Lewis County corrections staff, law enforcement, or the prosecutor's office, to unlawfully compromise Mr. Booth's defense of his case.
>
> . . . .
>
> 1.16. Mr. Booth's assertion that he was intimidated or lost confidence in Mr. Hunko due to the condition of the attorney visitation booths was not supported by Mr. Hunko's testimony.
>
> 1.17. It is not beyond the scope of the court's imagination that Mr. Booth may have deliberately raised his voice when speaking with his lawyer, with the intention of raising the issue of the lack of soundproofing of the attorney visitation booths on appeal.
>
> . . . .
>
> 1.19. If a defense attorney gives the jail his/her phone number, that number is blocked in the jail phone call system so it cannot be recorded or intercepted.
>
> . . . .

> 1.22. Officer Haskins did not report to anyone the content of [Booth's] phone call. Officer Haskins did not report the call to the law enforcement side of the Sheriff's office, the detectives, or the prosecutor's office.
>
> . . . .
>
> 1.26. Officer West did not overhear any of the conversation between Mr. Hunko and Mr. Booth while he was in the conference room in the courthouse with Mr. Hunko and Mr. Booth.
>
> . . . .
>
> 1.29. At no time did Mr. Hunko express to the court that he felt, in any way, that his ability to represent Mr. Booth thoroughly and completely in the court of this case was impacted as a result of corrections staff being in the conference room with him and his client.

CP at 352-56. The court concluded that Booth received a fair trial and was not denied due process.

C. Motion to Expand the Record

A few months after the hearing, the court held a hearing that addressed, among other motions, Booth's motion to expand the record from the evidentiary hearing. Booth asked the court to include in the record a jail handbook indicating that "calls to your attorneys will not be recorded." 3 RP at 589.

The court denied the motion stating that sufficient testimony offered at the hearing already established that the jail did not record known attorney-client calls. Booth contested the court's characterization of the testimony. The court replied to Booth, stating, "[Y]our claims as to what actually happened and what the evidence showed are not accurate." 3 RP at 595.

D. Motion to Vacate LFOs

Booth also filed a motion to vacate his outstanding LFOs. The State agreed that it could not collect from Booth's 1996, 1998, and 1999 cause numbers. The court then signed orders stating that the State's ability to collect on these cases had expired. The court also vacated all discretionary LFOs from Booth's 2003, 2004, and 2010 cases.

Booth argued that because he could only make, at most, $15 per month while he was incarcerated and because he would be incarcerated the rest of his life, the remaining mandatory LFOs violated his rights under the Eighth Amendment to the United States Constitution. The court rejected his argument. Booth appeals.

## ANALYSIS

### I. RIGHT TO COUNSEL AND DUE PROCESS

Booth argues that the eavesdropping by the jail staff violated his rights to counsel and to due process. Booth assigns error to numerous findings of fact, contending that substantial evidence does not support the findings. Additionally, Booths argues that the court's findings do not support its conclusion. We disagree.

#### A. Legal Principles

We review a trial court's decision on a CrR 7.8 motion for an abuse of discretion. *State v. Smith*, 159 Wn. App. 694, 699, 247 P.3d 775 (2011). We review a trial court's factual findings for substantial evidence. *State v. Ieng*, 87 Wn. App. 873, 877, 942 P.2d 1091 (1997). Substantial evidence is a sufficient quantity of evidence to persuade a rational, fair-minded person that a finding is true. *State v. Schultz*, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). Unchallenged findings of fact are verities on appeal. *State v. Pippin*, 200 Wn. App. 826, 834, 403 P.3d 907 (2017). We defer to the trial court on credibility issues. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

We review a trial court's conclusions of law de novo to see if they are supported by the findings. *Ieng*, 87 Wn. App. at 877.

A defendant's right to counsel is protected by the United States and Washington constitutions. U.S. CONST. amend. V, VI; WASH. CONST. art. I, § 22. Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process. *State v. Cory*, 62 Wn.2d 371, 374-75, 382 P.2d 1019 (1963). When the State eavesdrops on a defendant's attorney-client privileged communication, we presume prejudice. *State v. Peña Fuentes*, 179 Wn.2d 808, 819-20, 318 P.3d 257 (2014). However, this presumption is rebuttable by the State if it can "show beyond a reasonable doubt that the defendant was not prejudiced." *Peña Fuentes*, 179 Wn.2d at 820.

B. Substantial Evidence Supports the Challenged Findings

Booth challenges approximately 13 of the court's findings of fact on the basis that substantial evidence does not support them. We have reviewed the record and disagree with Booth. Substantial evidence supports the challenged findings.

Booth also assigns error to seven additional findings of fact; however, he does not provide argument as to why these findings are deficient. RAP 10.3(a)(6). We conclude that these findings are verities. *Pippin*, 200 Wn. App. at 834.

C. Findings Support the Court's Conclusions

Booth's argument on how the trial court misapplied the law is not entirely clear. It appears that Booth is arguing that the State's intrusion does not have to be intentional to raise the rebuttable presumption of prejudice, and thus, the State must prove harmlessness beyond a reasonable doubt even if it only inadvertently overheard attorney-client communications. We conclude that, regardless of Booth's inadvertence argument, the State did in fact carry its burden and that the trial court's conclusions are supported by its findings.

Here, the court found that when Booth and Lamping overheard Booth's conversation in the visitation room, they immediately distanced themselves. It also found that West, Lamping, and the other transport COs had a "self-imposed gag order" where they would not and did not share any information inadvertently overheard. CP at 354. Haskins similarly did not share the content of the attorney-client telephone call that he inadvertently overheard. The court also found that West did not overhear anything while he was in the courthouse conference room with Booth and Hunko. Finally, "[n]o communication between Mr. Booth and his lawyer that may have been inadvertently heard by corrections staff was ever passed on to jail command staff, law enforcement, the criminal investigation side of the sheriff's office, or the prosecutor's office." CP at 353.

Therefore, we conclude that the trial court's findings support the conclusion that Booth was not prejudiced.[5]

Based on all of the above, we conclude that substantial evidence supports the trial court's findings and that its findings support its conclusion that no violation of Booth's right to effective representation or due process occurred.

## II. MOTION TO COMPEL

Booth argues that the trial court abused its discretion when it denied his motion to compel, which sought various evidence. We disagree.[6]

---

[5] Because we conclude that the State showed beyond a reasonable doubt that Booth was not prejudiced, we do not decide whether the inadvertent overhearing of confidential attorney-client communications is a Sixth Amendment violation. Booth argues in the alternative that we should remand this issue to the trial court for additional fact finding. Because of our resolution of this issue, we disagree with Booth.

[6] We reject the State's argument that we should not consider Booth's argument based upon his failure to accurately cite the record.

CrR 4.7 governs criminal discovery. However, "prisoners seeking postconviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief." *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 391, 972 P.2d 1250 (1999).

We review a trial court's denial of a motion to compel discovery for an abuse of discretion. *State v. Norby*, 122 Wn.2d 258, 268, 858 P.2d 210 (1993). A trial court abuses its discretion when it decides a matter on untenable grounds or reasons, or when no reasonable judge would have reached the same conclusion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *State v. Lusby*, 105 Wn. App. 257, 262, 18 P.3d 625 (2001).

Here, Booth's motion sought a voluminous amount of records, including "every document with [his] name anywhere in it in the possession of any branch of the law enforcement of [L]ewis [C]ounty or state controlled agency related to [his CrR 7.8 motion] in any way." CP at 243. The State responded that it had provided all relevant documents.

At a hearing on the motion, the court asked Booth whether he could identify specific "items of discovery . . . with sufficient particularity that [the court] could actually direct the jail in the event that [it] found [Booth] was correct." 1 RP at 11. Booth could not comply with the court's request.

Given the broad scope of Booth's request, coupled with his inability to refine his request, we conclude that the trial court did not abuse its discretion in denying Booth's motion to compel.

## III. EXCLUDING BOOTH'S PROFFERED EVIDENCE

Booth argues that the trial court abused its discretion when it prevented him from testifying about his lack of confidence in his attorney. We disagree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is generally admissible. ER 402. Yet, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

Here, it seems clear that the trial court viewed Booth's proposed testimony, indicating he had lost faith in his attorney during the preparation of his murder trial, as the "needless presentation of cumulative evidence." ER 403. It recognized that Booth had filed a bar complaint against Hunko, and it was aware that Booth had been unsatisfied with Hunko's representation. Viewing the totality of testimony, we conclude that the trial court did not abuse its discretion in limiting Booth's testimony.

## IV. MOTION TO EXPAND THE RECORD

Booth argues that his post-hearing request to expand the record, made months after the evidentiary hearing, amounted to a motion to reopen the case and that the trial court abused its discretion in denying his motion. We disagree.

"Generally, the issue of whether to allow a party to reopen its case to present further evidence is a matter within the discretion of the trial court." *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). "A trial court's actions in regard to reopening of a case will be upheld except upon a showing of manifest abuse of discretion and prejudice resulting to the complaining party." *Brinkley*, 66 Wn. App. at 848.

Here, Booth essentially asked the court to reconsider its ruling in light of newly proffered evidence, namely a jail handbook which indicated that the jail would not record calls by inmates to their attorneys. The court denied the motion, finding the evidence cumulative. Numerous witnesses testified at trial that once the jail registered an attorney's number in their phone-system database, all calls to that number would not be recorded. Thus, the purpose for which Booth offered the jail handbook was merely cumulative to testimony already in the record. Therefore, we conclude that the trial court did not abuse its discretion in refusing to reopen the case.

## V. INEFFECTIVE ASSISTANCE OF COUNSEL

Booth argues that he received ineffective assistance of counsel when his counsel failed to obtain a GTL records custodian to authenticate phone records. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

There is a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Representation is deficient if, after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*,

171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We do not consider matters outside the trial record. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

To show prejudice, a defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Booth has not shown how he was prejudiced. Booth's proffered evidence appeared to indicate which conversations of his were recorded and monitored. However, besides Haskins, who overheard a portion of Booth's phone call, every witness who was asked whether they were aware that someone had overheard a phone call between Booth and his attorney answered no. Thus, whether Booth's calls were recorded, which the State agreed they were, was of minimal importance. Instead, the critical inquiry at Booth's hearing was whether jail staff shared the content of the overheard attorney-client conversation. *See Peña Fuentes*, 179 Wn.2d at 819-20. They testified that they did not. It appears Booth's proffered evidence would not have rebutted this testimony. Therefore, we conclude that Booth's ineffective assistance of counsel claim fails.

VI. LFOs

Booth argues that the LFOs imposed on him violate RCW 10.01.160, the Eighth Amendment to the United States Constitution, and article I, § 14 of the Washington Constitution. We reject Booth's argument.

A. Legal Principles

We generally review a decision imposing LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A trial court abuses its discretion when it exercises discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). "We review constitutional challenges de novo." *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015).

B. The Court Did Not Abuse Its Discretion

Because Booth's case was final prior to 2018, when the legislature made changes to the LFO statutes, those changes do not affect him. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

Here, the court vacated all discretionary LFOs from Booth's 2003, 2004, and 2010 cases. However, it did not vacate the crime victim penalty assessments, criminal filing fees, DNA database fees, and restitution because it did not have the discretion to do so, as they were mandatory. Former RCW 7.68.035(1)(a) (2003, 2004, 2010); former RCW 9.94A.753(5) (2003, 2004, 2010); former RCW 36.18.020 (2003, 2004, 2010); former RCW 43.43.7541 (2003, 2004, 2010); *see also State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Therefore, we conclude that the trial court did not abuse its discretion by continuing to impose mandatory LFOs on Booth.[7]

ATTORNEY FEES

Booth requests that this court not award the State appellate costs under RAP 14.

[7] Booth makes other challenges to his LFOs; however, because they were final in 2018, this appeal is not the proper forum to raise them.

The State does not request costs or otherwise respond. It is premature for us to address this issue at this time.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, C.J.

Glasgow, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

December 12, 2019

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JOHN ALLEN BOOTH, JR.,<br><br>Appellant. | No. 49492-2-II<br>Consolidated with<br>No. 49499-0-II<br>No. 49519-8-II<br>No. 49512-1-II<br>No. 49509-1-II<br>No. 49502-3-II<br><br>UNPUBLISHED OPINION |

Appellant, John Allen Booth, Jr., moves this court to reconsider its November 5, 2019 opinion. After consideration, we deny the motion.

IT IS SO ORDERED.

Panel: Jj. Maxa, Melnick, Glasgow

FOR THE COURT:

Melnick, J.

## THE TILLER LAW FIRM

## January 10, 2020 - 4:06 PM

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| **Superior Court Case Number:** | 96-8-00501-1 |

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