

FILED
June 27, 2016
Court of Appeals
Division I
State of Washington

No. 73762-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MARKNSEN,

Appellant.

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

The Honorable Dean Lum

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The decision in *State v. Case* controls the outcome here.**

The State's response is an attack on Division Two's decision in *State v. Case*, 189 Wn.App. 422, 358 P.3d 432 (2015), *review granted*, 185 Wn.2d 1001 (2016).¹ The State's arguments should be rejected as the decision in *Case* is well-reasoned and a logical extension of this Court's decision in *State v. Carmen*, 118 Wn.App.655, 77 P.3d 368 (2003), *review denied*, 151 Wn.2d 1039 (2004).

As argued in the Brief of Appellant, the decision in *Case* is indistinguishable from Mr. Marknsen's matter. As in *Case*, the defendant stipulated, as did Mr. Marknsen, that

The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law.

Case, 189 Wn.App. at 425. This evidence was all the State produced; it did not provide any evidence to the trial court that the two prior convictions involved court orders issued under one of the stated RCW chapters in RCW 26.50.110(5).

¹ As the State accurately notes, the Supreme Court heard argument in the *Case* matter on June 21, 2016, and a decision is pending.

Division Two found this evidence to be insufficient for the trial court to determine *as a matter of law* whether the predicate convictions were issued under one of the specified RCW chapters listed in RCW 26.50.110(5). *Case*, 189 Wn.App. at 429. In coming to this decision, the Court relied on the decision in *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), and this Court’s decision in *Carmen*, *supra*.

In *Miller*, the court held that the *existence* of a domestic violence no-contact order is an element of the crime of violating such an order, while the validity of underlying orders is a question of law for the trial court to decide as part of its “gate-keeping function.” *Id.* at 24. The Court cited with approval, the decision in *Carmen*. *Id.* at 30.

The Court in case grounded its decision in *Case* on *Miller* and *Carmen*. *Case*, 189 Wn.App. at 426-30. *Case* is a logical extension of those cases, and as such is well-reasoned and should be followed.

2. Appellate costs should not be imposed.

- a. *Mr. Marknsen is presumed to be indigent for the purposes of appeal.*

Under RAP 15.2(f), there is a presumption of continued indigency. *State v. Sinclair*, 192 Wn.App. 380, 393, 367 P.3d 612 (2016). Mr. Marknsen was found to be indigent for the purposes of

trial. Thus, for the purposes of the appeal, there was a presumption that Mr. Marknsen was indigent that continued. Thus, the State's arguments regarding the trial court's finding of indigency for the purposes of Mr. Marknsen's appeal should be rejected.

b. Alternatively, Mr. Marknsen has a right to a hearing regarding the imposition of costs on appeal.

As argued in the Brief of Appellant, any award of costs on appeal modifies the Judgment and Sentence. RCW 10.73.160(3).

Where the trial court modifies the Judgment and Sentence, the defendant is entitled to a hearing. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005); *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

Should this Court impose recoupment of costs on appeal, Mr. Marknsen is entitled to hearing.

B. CONCLUSION

Mr. Marknsen asks this Court to reverse his convictions with instructions to dismiss. Alternatively, in the chance that the Court rejects Mr. Marknsen's arguments, he asks that this Court refuse to award costs on appeal.

DATED this 27th day of June 2016.

Respectfully submitted,

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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY 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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