

FILED
COURT OF APPEALS

NO. 40276-9-II

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

DARRYL KOENEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00122-5

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED August 2, 2010, Port Orchard, WA *[Signature]*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT2

 A. THIS COURT SHOULD DECLINE TO CONSIDER THE MERITS OF KOENEN’S APPEAL BECAUSE, BY FAILING TO PROVIDE TRANSCRIPTS FROM THE TRIAL COURT HEARINGS ON THE MOTION AT ISSUE, KOENEN HAS FAILED TO PERFECT THE RECORD SO THAT THE REVIEWING COURT HAS BEFORE IT ALL THE EVIDENCE RELEVANT TO THE ISSUES.2

 B. EVEN WITH THE LIMITED RECORD BEFORE THIS COURT, KOENEN HAS FAILED TO SHOW THAT THE TRIAL COURT ERRED IN DENYING HIS CLAIM FOR REIMBURSEMENT FOR THE BAIL BOND AND FOR LOST WAGES BECAUSE: (1) THE TRIAL COURT CORRECTLY HELD THAT A BAIL BOND IS NOT AN EXPENSE THAT IS “INVOLVED IN” A CRIMINAL DEFENSE PURSUANT TO RCW 9A.16.110(2); AND, (2) KOENEN FAILED TO CARRY HIS BURDEN OF SHOWING LOST WAGES AND/OR FAILED TO REASONABLY MITIGATE HIS DAMAGES.....4

IV. CONCLUSION.....10

TABLE OF AUTHORITIES
CASES

Bender v. Seattle,
99 Wn. 2d 582, 664 P.2d 492 (1983).....5

State v. Anderson,
72 Wn. App. 253, 863 P.2d 1370 (1993).....5, 6, 9

State v. Lough,
70 Wn. App. 302, 853 P.2d 920 (1993).....2

State v. Wheaton,
121 Wn. 2d 347, 850 P.2d 507 (1993).....2

Sutton v. Shufelberger,
31 Wn. App. 579, 643 P.2d 920 (1982).....7, 8

STATUTES

RCW 9A.16.110(2).....1, 2, 4, 5, 6, 10

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court should decline to consider the merits of Koenen’s appeal when, by failing to provide transcripts from the trial court hearings on the motion at issue, Koenen has failed to perfect the record so that the reviewing court has before it all the evidence relevant to the issues?

2. Whether, even with the limited record before this Court, Koenen has failed to show that the trial court erred in denying his claim for reimbursement for the bail bond and for lost wages when: (1) the trial court correctly held that a bail bond is not an expense that is “involved in” a criminal defense pursuant to RCW 9A.16.110(2); and when, (2) Koenen failed to carry his burden of showing lost wages and/or failed to reasonably mitigate his damages?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY AND FACTS

Darryl Koenen was charged by amended information filed in Kitsap County Superior Court with one count of assault in the second degree with a deadly weapon enhancement. CP 48-49. A jury found Koenen not guilty of the charged offense and returned a special verdict finding that Koenen had acted in self-defense. CP 49. Koenen then moved for an order awarding him costs pursuant to RCW 9A.16.110. CP 50. The trial court awarded Koenen some of his claimed costs, but denied others. CP 53. This appeal followed.

III. ARGUMENT

- A. **THIS COURT SHOULD DECLINE TO CONSIDER THE MERITS OF KOENEN'S APPEAL BECAUSE, BY FAILING TO PROVIDE TRANSCRIPTS FROM THE TRIAL COURT HEARINGS ON THE MOTION AT ISSUE, KOENEN HAS FAILED TO PERFECT THE RECORD SO THAT THE REVIEWING COURT HAS BEFORE IT ALL THE EVIDENCE RELEVANT TO THE ISSUES.**

This court should decline to entertain the issues raised in Koenen's appeal because Koenen has failed to provide a transcript from the hearings where the parties argued the issues regarding the appropriate award of costs pursuant to RCW 9A.16.110(2), and thus Koenen had failed to meet his burden of perfecting the record so that the reviewing court has before it all the evidence relevant to the issues on appeal.

In the present case, Koenen has not provided this Court with either of the transcripts from the two hearings where the Court heard argument and issued its rulings on the issue of the appropriate amount of the award pursuant to RCW 9A.16.110(2). Under Washington law, the appellant has the burden of perfecting the record so that the reviewing court has before it all the evidence relevant to the issues, and an appellate court may decline to consider the merits of an issue when appellant does not meet this burden. *See, e.g.*, RAP 9.2(b); *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993); *State v. Lough*, 70 Wn. App. 302, 335, 853 P.2d 920 (1993).

Although the trial court in the present case did issue written findings of fact and conclusions of law, Koenen argues in his appeal that at least some of the trial court's findings were not supported by sufficient evidence. *See*, Amended Brief of Appellant at 7. Without the transcripts from the hearings, however, the record on appeal is inadequate for review as to the sufficiency of the evidence because this Court cannot determine what evidence and arguments (or concessions or invited error, etc) were before the trial court.¹ As this Court cannot fully review the trial court's ruling in the absence of the record of the hearings, this Court should decline to entertain the issues raised in the present appeal.

¹ For instance, the clerk's minutes from the hearing below on July 10, 2010 on the amended motion regarding payment of costs shows that Koenen's attorney, Mr. Longacre, "Concedes to State, found no case law, only matter remaining is lost wages." A transcript of this July 10, 2009 hearing therefore, is necessary in order for this Court to fully review the trial court's ruling, especially in light of the fact that it appears Koenen made a "concession" at the hearing. *See*, Clerk's Minutes July 10, 2009, State's Supplemental Designation of Clerk's Papers (TBD) (attached as Appendix A). In addition, although Koenen's initial cost bill included a request for \$10,000 for his bail bond, the amended cost bill did not include a request for bail bond. *See* CP 21, 35. The transcript from the hearing, therefore, is necessary to determine whether Koenen abandoned his claim regarding the bail bond.

B. EVEN WITH THE LIMITED RECORD BEFORE THIS COURT, KOENEN HAS FAILED TO SHOW THAT THE TRIAL COURT ERRED IN DENYING HIS CLAIM FOR REIMBURSEMENT FOR THE BAIL BOND AND FOR LOST WAGES BECAUSE: (1) THE TRIAL COURT CORRECTLY HELD THAT A BAIL BOND IS NOT AN EXPENSE THAT IS “INVOLVED IN” A CRIMINAL DEFENSE PURSUANT TO RCW 9A.16.110(2); AND, (2) KOENEN FAILED TO CARRY HIS BURDEN OF SHOWING LOST WAGES AND/OR FAILED TO REASONABLY MITIGATE HIS DAMAGES.

Koenen argues that the trial court erred in failing to order that he be reimbursed for the money he spent on a bail bond and for lost wages. This claim (even with the limited record before this Court) is without merit because: (1) the trial court correctly held that a bail bond is not an expense that is “involved in” a criminal defense pursuant to RCW 9A.16.110(2); and, (2) Koenen failed to carry his burden of showing lost wages and/or failed to reasonably mitigate his damages.

RCW 9A.16.110(2) provides that when a defendant such as Koenen is found not guilty by reason of self-defense, the defendant is entitled to be reimbursed “for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense.” The plain language of the statute, therefore, only allows for the recovery costs “involved in” a criminal defense.

There have been relatively few reported Washington cases on this statute. In *State v. Anderson*, 72 Wn. App. 253, 863 P.2d 1370 (1993), however, this Court did provide some guidance for trial courts regarding application of this statute. In *Anderson*, the defendants claimed that they should be reimbursed for the time they had spent in jail before trial under the theory that they were entitled to be paid for the value of every hour of every day that were incarcerated (as their time itself had value for several reasons including the fact that it gave them the “opportunity to be free to enjoy life”). *Anderson*, 72 Wn. App. at 260-61. This court, however, rejected this claim and explained that the “loss of opportunity to enjoy life” is not compensable under RCW 9A.16.110(2). Specifically, this Court noted that:

We hold that the State is not required to indemnify or reimburse for loss of “the opportunity to be free to enjoy life.” RCW 9A.16.110(2) mandates “an award of reasonable costs,” including “loss of time” and other “expenses”. It does not establish “an independent cause of action,” and it does not incorporate all of the various rules that would govern damages in an independent action. We assume that loss of the opportunity to enjoy life is an aspect of loss of liberty, and thus compensable in a tort action for false arrest or false detention. *See Bender v. Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983) (gist of an action for false arrest or false imprisonment is violation of right to personal liberty). By no stretch of the imagination, however, is loss of opportunity to enjoy life a “cost” or “expense,” and it is not compensable under RCW 9A.16.110(2).

Anderson, 72 Wn. App. at 261-62.

In the present case, Koenen claims that the trial court should have ordered that he was to reimbursed for the money he spent posting his bail bond. The trial court denied this request, citing *Anderson*, and held that the costs associated with the defendant's need to "be free to enjoy life" were not recoverable under RCW 9A.16.110(2).

Koenen has failed to show that the trial court improperly denied his request to be reimbursed for his bail bond, as Koenen has cited no authority (either in the trial court or on appeal) that holds that the money spent on a bail bond constitutes an expense "involved in" the presentation of a criminal defense. To the contrary, this Court in *Anderson* explained that while the loss of liberty and the loss of opportunity to enjoy life outside of a jail may be compensable in a tort action, such costs are "by no stretch of the imagination" compensable under RCW 9A.16.110(2).²

Koenen also claims that the trial court improperly denied his request for lost wages. As this Court noted in *Anderson*, a claimant generally has the burden of proving the facts necessary to sustain his or her claim. *Anderson*, 72 Wn. App. at 260. Thus, while it is true that a defendant is to be reimbursed for earnings the defendant would have received but for being

² In addition, the record before this Court is insufficient to appropriately address the issue regarding the bail bond, since Koenen's amended cost bill contained no request for the bail bond, and Koenen has failed to provide a transcript of the July 10, 2009 hearing where the trial court addressed the amended cost bill.

prosecuted, the burden is on the defendant to prove exactly what wages were lost.

In the present case the trial court found that Koenen, who was self-employed, had submitted evidence that he had lost a job because of his trial. CP 52. The trial court noted, however, that the job would have taken more time to complete than just the time that Koenen was in court. CP 54. The trial court also held that Koenen failed to mitigate his loss and stated that Koenen should not have accepted the job knowing that he was going to be in trial (and would not be able to complete the job within the time allotted in the contract). CP 54-55.

Under Washington law, mitigation of damages is often required and the courts have explained that when one person has committed a legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages, and the person wronged cannot recover for any item of damage which could thus have been avoided. *See, Sutton v. Shufelberger*, 31 Wn. App. 579, 581-82, 643 P.2d 920 (1982), *citing In Young v. Whidbey Island Bd. of Realtors*, 96 Wn.2d 729, 732, 638 P.2d 1235 (1982). Stated another way,

One who sustains an injury for which another is liable is not entitled to recover any damages arising after the original (injury) (occurrence) which are proximately caused by failure of the injured person to exercise ordinary care to avoid or

minimize such new or increased damage.

Shufelberger, 31 Wn. App. at 582, *citing* WPI 33.01.

In the present case, Koenen's affidavit to the trial court explained that he had taken job only three days prior to trial. Cp 25, 35. In addition, as the trial court noted, the job at issue would have taken more time to complete than the time Koenen was in court. CP 54. Furthermore, although the agreement indicates that the job was to be finished on April 30th, Koenen's declaration does not reveal why he could not have mitigated his damages by completing the job after the trial was over on May 1. Finally, Koenen's declaration provides no insight into why he was unable to complete the job once the trial was over or whether there were other factors that prohibited him from completing the job after the trial. This issue was particularly relevant since Koenen's own declaration shows that Mr. Ericcson did not seek to be released from the work agreement until June 3 (a month after Koenen's trial ended). Thus, the evidence before the trial court supported a conclusion that Koenen sought to maximize, rather than mitigate, his damages. Given all of these facts the trial court did not err in denying Koenen's request of reimbursement because Koenen failed to mitigate his damages.

Furthermore, even if Koenen was not required to mitigate his damages, Koenen's claim was still insufficient because it failed to specify

what “lost wages” or dollar amounts equivalent to lost wages he actually lost solely due to his criminal prosecution. For instance, although Koenen stated that the total price for the job was approximately \$13,000, he failed to explain what portion of that job would have been performed during the days he was in trial. See CP 25, 35. In addition, Koenen failed to explain what his costs would have been if he had completed the job, thus the trial court was unable to determine what portion of the total contract price would have been the equivalent of lost wages.

Koenen, however, had the burden of proving the facts necessary to sustain his or her claim,³ and his claim (which failed to provide the trial court with the information the court needed to adequately determine what loss what actually incurred as a result of the criminal prosecution) was insufficient to carry this burden.

Given all of these facts the trial court did not err in denying Koenen’s request of reimbursement because Koenen failed to carry his burden of showing lost wages and because Koenen failed to reasonably mitigate his damages.

³ *Anderson*, 72 Wn. App. at 260.

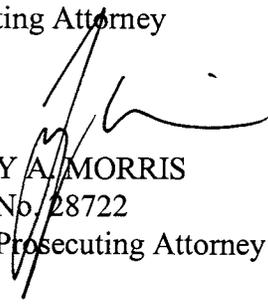
IV. CONCLUSION

For the foregoing reasons, the trial court's order regarding Koenen's reimbursement under RCW 9A.16.110(2) should be affirmed.

DATED August 2, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney


JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1

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Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

Hon. JEANETTE DALTON

THE STATE OF WASHINGTON

Reporter ANDREA RAMIREZ

vs

Court Clerk KEN SCHONAUER

Date JULY 10, 2009

DARRYL KOENEN

No. 09-1-00122-5

Defendant(s).

The State of Washington represented by C. Enright, Deputy Prosecuting Attorney.
The Defendant(s) appearing No, represented by C. Longacre of counsel.
The Defendant is in custody not in custody. CCO Present _____

The matter before the court is: Omnibus 3.5/3.6 Restitution/Order on costs
 Motion Amended Motion + Order Re: Payment of Cost Bill
 Motion re no contact order

Mr. Longacre - Concedes to State, Found No Case Law, Only matter remaining is lost wages.
State - Filed Brief
Court - Previously ruled + is not changing this ruling
Court - Denies Motion

The Court signs Omnibus/3.5 Stipulation as presented The Court rules Statements are admissible
The Court sets a hearing for _____ on _____ at _____ AM/PM.

Courtroom polled No response Time _____ am/pm
 Bench warrant ordered/quashed Bail set at \$ _____ To be held until _____

Written and Oral Notice given to defendant for date set.

The Court granted ~~granted~~ denied the motion.
 The Court takes the matter under advisement.
 Order signed as presented. Order to be presented.
 Pleadings/File taken from this hearing by _____

The matter is continued to _____ at _____ AM/PM for _____

This matter stricken
 Court Scheduler advised

482