

FILED
Court of Appeals
Division II
State of Washington
11/9/2017 9:59 AM

No. 49968-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

BLAKE CROY, Respondent.

Appeal from the Superior Court of Cowlitz County
The Honorable Stephen Warning
No. 15-1-00292-6

**BRIEF OF RESPONDENT
BLAKE CROY**

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Is appellant's assignment of error waived because it is not supported by argument and because appellant did not challenge any of the findings of fact and conclusions of law?
2. Is an affidavit of prejudice that is not brought to the court's attention waived permanently, even after the court is aware of it, or is the waiver limited to actions taken by the court when the court is unaware of the affidavit?
3. Does a court abuse its discretion when it dismisses a case after the parties enter into a drug court agreement, the defendant waives rights, attempts to comply with the agreement, but due to the State's affidavit of prejudice, compliance is impossible?

II. STATEMENT OF THE CASE

On March 18, 2015, Croy was charged with DV theft in the second degree, trafficking in stolen property in the first degree, and theft in the third degree. CP 1-2. On the same day, the State filed an affidavit of prejudice against Judge Bashor. CP 3-4.

On April 4, 2016, Croy and the State signed an Agreement for

Entry into Drug Court. CP 5-9. Croy agreed to waive several rights, including his right to a speedy trial, pay fees, and comply with the requirements of drug court. CP 5-9. In exchange, the State agreed to dismiss the charges upon successful completion. CP 5-9. If he did not successfully complete drug court, he would be sentenced to 12+-14 months. CP 5-9. The contract indicates that the length of the drug court program is discretionary. CP 5-9. As part of his admission into drug court, Croy also provided a written confession. CP 11-12. Croy was admitted into drug court on that date; the order was signed by Judge Haan. CP 11-13.

Judge Bashor presided over drug court and Croy appeared in front of him ten times from when he entered drug court in April of 2016 through September of 2016. RP 2-25. During that time, Croy was mostly in compliance. RP 2-25.

In October of 2016, Judge Bashor became aware of the affidavit. CP 16. Since that time, Judge Bashor has not participated in Croy's case. CP 17.

On December 14, 2016, Judge Warning reviewed this matter and entered an order dismissing the case with prejudice, finding that Judge Bashor could not preside over Croy's hearings, there was not another judge available to preside over drug court, Croy had waived rights and

made admissions in reliance on his entry into drug court and would be prejudiced by not being allowed to continue in drug court, and the State was not prejudiced because dismissal would have been the result of successful completion. CP 16-18.

The State appeals the dismissal in this case.

III. ARGUMENT

1. The State Has Waived Its Assignment of Error and Not Challenged Any of the Findings of Fact or Conclusions of Law; Therefore, This Court Should Decline to Consider this Matter on Appeal.

An assignment of error not argued in the brief is waived. *Erdmann v. Henderson*, 50 Wn.2d 296, 298, 311 P.2d 423 (1957). “[A]rgument unsupported by an assignment of error does not present an issue for review.” *Rutter v. Rutter’s Estate*, 59 Wn.2d 781, 787-88, 370 P.2d 862 (1962), citing *Boyle v. King County*, 46 Wash.2d 428, 282 P.2d 261 (1955).

The sole assignment of error by the appellant is, “The trial court erred in entering sua sponte an order of dismissal.” Brief of Appellant at 1. However, there is no argument or facts presented that the court entered the dismissal sua sponte, or if it did, why that constitutes error. Instead, appellant argues that the trial court erred by dismissing the case, based in part, on a finding that the affidavit of prejudice had not been waived.

However, this argument is not supported by an assignment of error.

Therefore, the assignment of error is waived and should not be considered.

Unchallenged findings are verities on appeal. *State v. Balch*, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002), citing *State v. Broadway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Unchallenged conclusions of law become the law of the case and will not be disturbed on appeal. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993), citing *State v. Slanaker*, 58 Wn. App. 161, 791 P.2d 575, review denied, 115 Wn.2d 1031, 803 P.2d 324 (1990). The appellant did not challenge any of the trial court's findings of fact or conclusions of law. Brief of Appellant at 1. Therefore, they are verities on appeal. Given that none of the findings have been challenged, there are no issues properly before this court.

Even if this court considers the appellant's arguments, the dismissal should be affirmed for the reasons stated below.

2. The State Did Not Waive the Affidavit of Prejudice.

By statute, any party may file an affidavit of prejudice, thereby disqualifying a judge from a case. "Any party to or any attorney appearing in any action or proceeding in a superior court may disqualify a judge from hearing the matter" RCW 4.12.050(1). The statute lists some limitations to the use of an affidavit of prejudice. RCW 4.12.050.

“A judge who has been disqualified under this section may decide such issues as the parties agree in writing or on the record in open court.”

RCW 4.12.050(c). There is no record that the parties agreed to waive the affidavit. In fact, the record indicates that the State sought to “selectively waive their Affidavit of Prejudice, precluding Judge Bashor from hearing some portions of [the] case but allowing him to hear others.” Conl. of Law 3 at CP 17. Such a waiver is not supported by statute or case law, and certainly Croy would not agree to such a waiver.

An affidavit of prejudice can be waived when the party does not make the court aware of the affidavit. However, such waiver is limited to actions taken by the court while it is unaware of the affidavit. In *Smith*, the judge revoked the defendant’s probation a year after an affidavit of prejudice was filed, and when the judge was unaware of the affidavit. *State v. Smith*, 13 Wn.App. 859, 539 P.2d 101 (1975). The court of appeals held that the failure to bring the affidavit to the court’s attention constituted a waiver for purposes of the revocation hearing. *Id.* at 861. The *Smith* court specifically addressed the revocation hearing that occurred before the court was aware of the affidavit of prejudice. In *Bargreen*, our Supreme Court similarly held that an affidavit of prejudice was waived when it was not brought to the court’s attention prior to trial in a civil matter. *Bargreen v. Little*, 27 Wash. 2d 128, 177 P.2d 85 (1947).

The State argues that the affidavit of prejudice, filed by the State, against Judge Bashor, was waived because it was not brought to the court's attention. The trial court correctly held that "[a]ll actions and decisions by Judge Bashor in this case, prior to being made aware of the existence of that affidavit, were proper and binding on the parties." *Smith* and *Bargreen* both held that the actions taken by the trial court when the court was not aware of the affidavit were lawful. However, neither court held that proceeding without knowledge of the affidavit constituted a permanent waiver for all future proceedings. Therefore, in this case, the court acted lawfully and the State waived any rights under its affidavit for all hearings that occurred before the court was aware of the affidavit of prejudice. However, once the court was aware of the affidavit, the court was prohibited from taking any further action in this matter.

3. The Trial Court Did Not Abuse Its Discretion by Dismissing the Charges in this Case.

Agreements in criminal cases, such as plea agreements, are analogous to civil contracts. *See State v. Armstrong*, 109 Wn. App. 458, 35 P.3d 397 (2001). Due process requires that the State adhere to the terms of their agreements in criminal cases. *Id.* at 461, citing *State v. Sledge*, 133 Wash.2d 828, 839, 947 P.2d 1199 (1997); *see also* U.S. CONST. amend. V, XIV, WASH. CONST. art. I § 3. When there is a

violation, the non-breaching party may rescind the agreement or seek specific performance. *Id.* at 462, citing *State v. Thomas*, 79 Wash. App. 32, 37, 899 P.2d 1312 (1995).

The court has the authority to dismiss charges when it finds that the defendant made reasonable attempts to comply with an agreement with the State. In *State v. Sonneland*, our Supreme Court affirmed the trial court's dismissal where the trial court found that the defendant had substantially complied with a contract with the State. 80 Wn.2d 343, 494 P.2d 469 (1972). Sonneland was charged with felony possession of marijuana. *Id.* at 345. He entered a contract with the State to provide information leading to the arrest of three dealers who would be in possession of marijuana and heroin. *Id.* If he complied, the State would dismiss the charge. *Id.* Sonneland provided information on one dealer, which led to the arrest of three people who were in possession of marijuana. *Id.* at 348-9. Sonneland testified that the three were dealers; the State argued they were not. *Id.* The court granted the motion and dismissed the charge. *Id.* at 345-6. The trial court held:

[T]his young man made reasonable efforts to make the deal, although he hasn't right to the tooth and toe of it, he hasn't fulfilled it. We don't have it in writing. We don't have the contract in writing, but I think he's made a substantial effort here.

Id. at 350. The Supreme Court affirmed the dismissal finding, among other things, that “the defendant had substantially complied with the agreement.” *Id.* at 348.

In this case, the State entered an agreement with Croy to enter drug court, waive rights, and upon completion, agreed to dismiss the charges. The State also filed an affidavit of prejudice, barring the drug court judge from hearing Croy’s case, thus making compliance impossible. Croy would be significantly prejudiced if he rescinded the drug court agreement after he waived his rights, especially his right to a speedy trial after several months of being in drug court, and made admissions to the crimes charged. Specific performance, in terms of remaining in drug court, is not a possibility. However, specific performance, in terms of requiring dismissal of the charges, which is what the State agreed to upon completing of drug court, is appropriate and the only possible remedy to protect Croy’s rights. Croy made reasonable efforts to comply with drug court, but due to the State’s affidavit and the court’s inability to secure a different judge for his hearings, he cannot fully comply. Therefore, the trial court did not abuse its discretion by dismissing the charges in this case.

IV. CONCLUSION

In conclusion, the appellant has waived the assignment of error and not challenged any findings of fact or conclusions of law; therefore, this court should decline to consider the issues raised in this case. Furthermore, this court should affirm the dismissal in this case because the State did not waive its affidavit of prejudice and the court did not abuse its discretion in dismissing this case.

Dated this 9th day of November, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Appellant,)	NO. 49968-1-II
vs.)	
)	CERTIFICATE OF SERVICE
BLAKE CROY,)	
)	
Respondent.)	
)	

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.



Mary Benton
Signed November 9, 2017 at Tacoma, Washington.

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November 09, 2017 - 9:59 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49968-1
Appellate Court Case Title: State of Washington, Appellant v. Blake Croy and Alondra Trujillo, Respondents
Superior Court Case Number: 15-1-00292-6

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