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No. 50450-2-II

Lewis County No. 17-1-00098-6

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

STATE OF WASHINGTON,

Respondent,

v.

ALISHA WILSON,

Appellant.

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

The Honorable Joely A. O'Rourke, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The superior court abused its discretion and violated CrR 3.2, the presumption of innocence and state and federal due process by failing to follow the requirements of CrR 3.2 regarding release pending trial.
2. The Court should address the bail issues regardless whether they are technically moot.
3. Appellant assigns error to the Order Setting Conditions of Release, as follows:

THE COURT HAVING DETERMINED that probable cause for the detention of the defendant exists and that release on personal recognizance will not reasonably assure the defendant's appearance, or there is a likely danger that the defendant will commit a violent crime, or seek to intimidate witnesses, or otherwise interfere with the administration of justice. IT IS HEREBY ORDERED that the defendant is committed to the custody of the Lewis County Sheriff with authorization for release under the following conditions:

The Defendant is released on his/her Personal Recognizance, subject to the following conditions of release:

Travel, residence or associations are restricted as follows: Western Washington and/or _____

On posting of cash, or execution of a surety/secured bond, in the amount of \$_____

On execution of an unsecured appearance bond in the amount of \$ 5,000

The bond shall be co-signed by: _____

The defendant shall have no direct or indirect contact with any witness in this case. . . .

The defendant shall have no violation of any criminal laws.

The defendant shall maintain weekly contact with his/her attorney.

The defendant shall not possess any firearms or other deadly weapons.

[x] The defendant shall not drink any intoxicating liquors or use any illegal controlled substances.

CP 7.

B. ISSUES PRESENTED

1. Under CrR 3.2, there is a presumption of release without conditions pretrial. There is also a presumption of innocence under both the state and federal due process clauses. Does a court abuse its discretion and violated due process in failing to follow the mandates of the rule and failing to honor the presumptions?
2. Are the trial court's boilerplate findings in support of detaining an accused person pretrial insufficient to support its decision when there is no evidence to support that decision?
3. Should the Court address the issues even though they are technically "moot," because they are issues of substantial importance upon which this Court should rule?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Alisha Wilson was charged by amended information in Lewis County superior court with first-degree trafficking in stolen property. CP 24-25; RCW 9A.82.050(1). Pretrial hearings were held before the Honorable Judges Joely A. O'Rourke on February 15 and 23, March 9, 26, 23 and 30, 2017, and J. Andrew Toyne on April 13 and May 11, 2017, after which a bench trial was held before Judge O'Rourke on May 18, 2017.¹ 1RP 1; CP 26,

¹The verbatim report of proceedings consists of multiple volumes, all separately paginated. They will be referred to as follows:
the volume containing February 15 and 23, March 9, 16, 23 and 30, May 18 and June 12, 2017, as "1RP;"
the volume containing April 13, May 11, June 29 and July 13, 2017, as "2RP;"
the volume containing May 25, 2017, as "3RP."

42-44.

A continuance was held before the Honorable James W. Lawler on May 25, 2017, after which sentencing was held on June 12, 2017, before Judge O'Rourke. 1RP 1. The judge imposed a standard-range sentence but stayed imposition of the sentence pending appeal. CP 45-52. Ms. Wilson appealed and this pleading follows. See CP 53.

2. Testimony at trial

Michael Cairns was working doing drywall and painting at two duplexes doing "finish" work and showed up to work one morning to find someone had kicked in the doors. 1RP 20-21. He called police. 1RP 23. It took him a day or so to figure out exactly what was taken and make a list for police. 1RP 24.

About a day later, Cairns received a text message on his cellular telephone from his friend, John Kuhn. 1RP 26. Cairns was missing some stilts which had the padding broken off and he recognized the stilts in the picture as his. 1RP 26-27. Kuhn had heard about the break-in from the duplex owner and then saw some tools and stilts for sale which he thought might belong to Cairns when Kuhn signed into his "letgo" account. 1RP 26-40. "Letgo" is an "app" that shows local people selling tools, cars or other items. 1RP 40.

After sending the picture to Cairns, Kuhn started arranging a "meet up" to buy the stilts, with Cairns planning to go along 1RP 27, 41. They also called police, who told them to arrange the meeting at

a local grocery store in Centralia, where officers would wait around the corner. 1RP 27-28, 41. They did so and, at about 10:15 that night, a “truck full” of people arrived. 1RP 28, 41-42. A man got out and pulled the stilts out of the truck. 1RP 29. Kuhn and Cairns looked at them, with Cairns signaling they were his. 1RP 29, 42-44. Kuhn then asked if the man had anything else for sale and the man went and got some lights out, which Cairns recognized as his from the paint and “texture” on them. 1RP 30, 40. Cairns asked “how much” and a woman who had gotten out of the truck at some point then spoke, saying “Dad wants \$40 a piece for them.” 1RP 30, 35.

Kuhn thought he had asked the woman, later identified as Alisha Wilson, if they had anything else but admitted it was the man who then said, “[y]es, we still have the lights. We will do a package deal.” 1RP 47-48. The man then offered to take \$75 for the lights and stilts. 1RP 47.

Centralia Police Department Sergeant James Shannon was in the parking lot near the “meet” that day. 1RP 48-49. Shannon testified that another officer told him that there was “a deal to sell stolen property in the parking lot” and that the same officer asked for police to detain “subjects there and conduct an investigation.” 1RP 49. Shannon said, “once we received an indication that the suspects were there selling stolen property,” he and another officer drove around the corner into view. 1RP 50. The officer said the truck was full of all kinds of different items including some “dry-walling equipment” and personal belongings. 1RP 51.

Shannon contacted Ms. Wilson, who, he said, “was one of the people we were interested in.” 1RP 51. He “discussed” the issue with her, telling her that they were “conducting an investigation into a trafficking of stolen property.” 1RP 51. According to the officer, Wilson “was evasive” and “initially said she didn’t know anything about what was going on” and was asking why police were there. 1RP 51. After Shannon explained it, Wilson denied involvement. 1RP 51-52.

At some point, the sergeant said, he advised her of her constitutional rights and then took a taped statement from her in which Shannon said “she did tell me what was going on that evening.” 1RP 52-53. At trial, he related that Wilson had ultimately said she had entered into an arrangement with her boyfriend to sell property that she knew was stolen and was going to get \$10 for helping with that sale. 1RP 51-53. She was “not specific” about how the items ended up in her truck. 1RP 53.

The officer admitted that, when Wilson was asked how she got the property, she said she “didn’t get it.” 1RP 54-55. She also indicated she did not know how the property got into her truck and that she had awakened that morning and the stuff was in the back. 1RP 55. She identified her boyfriend’s friend, Kyle Davidson, as the person who provided the property to sell. 1RP 57-61.

The officer said, however, that he got the impression from her that “she had used her letgo account to set up this arrangement to sell the property that she knew was stolen.” 1RP 58. In her statement

to the officer, when he asked who told her to sell it, she said it was Davidson. 1RP 61-65. She also said “they” asked her to put her stuff on letgo after she found the items were in her truck that morning. 1RP 65. But both at the beginning of the statement and at the end of the statement she said she knew the property was stolen. 1RP 70.

Alisha Wilson testified about being in an abusive relationship with her boyfriend, Charles Stephens, for about three years, admitting that it meant he and others would use her truck without her having much say. 1RP 82-86. That day, they were staying at a hotel and she had her truck parked there, with some of their belongings in the back. 1RP 83. She saw things that morning under the tarp over the back of the truck but knew that Davidson had just gotten fired from his job. 1RP 83-87. He had also said he had “working tools or whatever” that he had to go pick up. 1RP 86-87.

Wilson said she saw Davidson and Stephens discussing something while standing next to the truck and “[w]ay later that evening,” after which Stephens asked her to put it up for sale on the “app.” 1RP 87-88. Wilson denied being involved in the negotiations, saying she was in the truck, instead, due to nursing painful kidney stones. 1RP 88-95, 102. Wilson asked what was going on when police arrived and Stephens whispered to her, “[t]hey are here because this stuff is all stolen.” 1RP 90-91.

Although Wilson recalled telling the officer that Stephens had asked her to put the property on the website, that was not in the

statement that the officer took. 1RP 95-96. The statement also said nothing about Davidson saying the tools were his and Wilson explained that she could not exactly remember everything that night and “[i]t was all too much.” 1RP 96, 102.

D. ARGUMENT

THE PRETRIAL RELEASE PROCEEDINGS WERE IN VIOLATION OF COURT RULE AND CONSTITUTIONAL RIGHTS AND THIS COURT SHOULD ADDRESS THESE ISSUES

Pretrial, every person accused of a crime enjoys the presumption of innocence. See, State ex rel Wallen v. Judges Noe, Towne, Johnson, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed 481 (1895). Because of the presumption, a person may not be kept in custody by the state pretrial based solely on a charge, which is an unproven accusation. Hudson v. Parker, 156 U.S. 277, 285, 15 S. Ct. 450, 39 L. Ed. 424 (1895); State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014). In fact, the U.S. Supreme Court has held that detention prior to trial should always be “the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095, 96 L. Ed. 2d 697 (1987); see, Barton, 181 Wn.2d at 152.

In our state, CrR 3.2 reflects this constitutional principle, creating a presumption of release without conditions for all accused of any crime except those subject to the death penalty. See Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007). Further, it creates specific requirements for rebutting that presumption, and limits on

setting any financial or other conditions of pretrial release. State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008).

In this case, the lower court failed to follow the requirements of CrR 3.2, in violation of not only the rule but also the presumption of innocence and due process. This Court should address these issues even though they are technically “moot.”

a. Relevant facts

On February 15, 2017, the charges were filed and Ms. Wilson first appeared before the court, Judge O’Rourke, on the matter. 1RP 4-5. The judge established that the prosecutor had spoken to Ms. Wilson regarding the charge and she understood it and was asking for appointed counsel. 1RP 5. The court was also said told Ms. Wilson did not have any “previous contacts.” 1RP 5. The judge appointed counsel, “Mr. Enbody.” 1RP 5.

Judge O’Rourke then said, “I’ll hear from the state on conditions of release.” 1RP 5-6. The prosecutor said, “State is asking for \$5,000 unsecured bail, standard release conditions beyond that.” 1RP 6. Another attorney who was present was asked if he objected. 1RP 6. He had not heard the discussion and the court said, “5,000 unsecured.” 1RP 6. The attorney said, “[a]greed” and the hearing concluded. 1RP 6.

The judge then indicated on a pre-printed Order Setting Conditions of Release as follows, “that release on personal recognizance [x] will not reasonably assure the defendant’s appearance.” CP 7. The order provided conditions of release of

restricting travel to Western Washington, “[x] On execution of an unsecured appearance bond in the amount of \$ 5,000.” with no contact ordered for any witness, no violation of criminal laws, weekly contact with counsel, no possession of firearms or other deadly weapons, and no drinking of “intoxicating liquors” or use of illegal controlled substances. CP 7.

b. The lower court violated CrR 3.2, the presumption of innocence and due process

Under CrR 3.2, in this state, there is a presumption that every person accused of a non-capital (death penalty) crime will be released pretrial without any conditions imposed as a condition of that release. See Butler, 137 Wn. App. at 152-53. CrR3.2(1)(a) provides:

Presumption of Release in Noncapital Cases. Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance . . . be ordered released on the accused’s personal recognizance pending trial unless

- (1) the court determines that such recognizance will not reasonably assure the accused’s appearance, when required, or
- (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

Below, the court did not follow this rule. Release on “personal recognizance” means release “the court takes the defendant’s word he or she will appear for a scheduled matter” or the arrested person

promises, “without supplying a surety or posting bond, to appear.” BLACKS LAW DICTIONARY (10th ed. 2014).

Thus, under CrR 3.2, the presumption in this state is that a person who is charged with a non-capital crime will be released based upon the promise to return, without any conditions placed on that person’s release. Rose, 146 Wn. App. at 450-51. Any other result requires the trial court to first find the presumption was rebutted, by making the specific findings under CrR 3.2(a)(1) (the “appearance” exception) or (2) (the “likely danger” exception). Rose, 146 Wn. App. at 450-51.

Here, on the pre-printed form, the judge selected the box which declared a finding “that release on personal recognizance [x] will not reasonably assure the defendant’s appearance.” CP 7. That finding, however, was unsupported by substantial evidence. The rule requires the court deciding whether the presumption of pretrial release without conditions has been overcome to “on the available information, consider all the relevant facts including, but not limited to,” specific factors. CrR 3.2(b); see Randy Reynolds & Associates, Inc. v. Harmon, 1 Wn. App. 2d 239, 404 P.3d 602 (2017) (“shall” usually denotes a command).

For the “future appearance” exception to the presumption of release without conditions, CrR 3.2(c) provides the following mandatory factors for the lower court to consider:

- (1) The accused's history of response to legal process, particularly court orders to personally appear;
- (2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused's family ties and relationships;
- (4) The accused's reputation, character and mental condition;
- (5) The length of the accused's residence in the community;
- (6) The accused's criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused's ties to the community.

CrR 3.2(c).

The court here made no consideration of or findings on any of these factors. See CP 7. Nor did the state present anything to support a finding under those mandatory factors that Ms. Wilson was at a particular risk for not reappearing - let alone sufficient evidence to rebut the presumption of pretrial release without conditions. Indeed, Ms. Wilson had *no prior criminal convictions*.

CP 45-52; see Rose, 146 Wn. App. at 449 (even with prior criminal history, where there was no history of failing to appear, evidence did not support finding of risk of failure to appear under the Rule).

Further, the lower court did not follow the mandates of the rule in imposing the “unsecured” bail promise to the court. Even if the court made the required finding that the presumption of release without conditions was rebutted, the court is required to impose the least restrictive conditions needed for the governmental purpose the detention is supposed to serve. Butler, 137 Wn. App. at 524. Put simply, “the court may not impose onerous or unconstitutional provisions where lesser conditions are available” to ensure the governmental ends, and imposing anything greater is “an abuse of discretion.” Id.

Indeed, under CrR 3.2(b), if there is a showing of likely failure to appear if released without conditions, “the court shall impose the least restrictive” of the listed conditions “that will reasonably assure that the accused will be present for later hearings.”

Below, the superior court did not make any findings that a financial condition was required because “no less restrictive condition or combination of conditions would reasonably assure the safety of the community.” There was no discussion of less restrictive alternatives, just like there was no discussion of the presumption of release on personal recognizance or the relevant factors and

requirements of CrR 3.2.

It is an abuse of discretion to fail to follow the mandates of CrR 3.2. Butler, 137 Wn. App. at 524. It is also important to note that the bulk of the portions of the rule the court below here specifically ignored were *added* to the rule in 2002 for the very purpose of reducing the unconstitutional, unfair disparities between the pretrial treatment of those with resources and those without. See In the Matter of the Adoption of the Amendments to CrR 3.2, CrR 3.2.1, CrRLJ 3.2 and CrRLJ 3.2.1, Order No. 25700-A-721 (WSR 02-01-025) (Dec. 6, 2001).² The 2002 amendments added the limits on financial conditions and requirements for the court to consider the actual resources of the accused. See id.

Failing to follow the clear requirements of a court rule is not just an abuse of discretion here, it was also a violation of due process. It is an essential part of pretrial due process - even “implicit in the concept of ordered liberty” - that every person is presumed innocent unless and until proven guilty by the state, beyond a reasonable doubt. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 368 (1970). A pretrial detainee, cloaked with the presumption of innocence, is entitled to due process. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1997); State v. Hartzog,

²Available at <http://apps.leg.wa.gov/documents/laws/wsr/2002/02/02-01-025.htm>.

96 Wn.2d 383, 635 P.2d 694 (1981). This Court should soundly reject the lower court's failure to follow the clear mandates of the rule.

Holding to the rule is vital to ensuring the rights of those only accused and not yet convicted of a crime. Pretrial detention has a significant negative impact on people who are kept in custody - "warehoused" despite not having been convicted of the crime:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Barker v. Wingo, 407 U.S. 514, 532-33, 33 L. Ed. 2d 101, 92 S. Ct. 2182

(1972). Further, there is strong evidence that pretrial detention correlates to increased likelihood of conviction and higher sentence.

See Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1165 (2005);

Christopher T. Lowenkamp et. al, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013).³

There can be no question that a person still cloaked with the presumption of innocence suffers significant negative impact on their lives - and their case - when deprived of the presumption of release on personal recognizance set forth in CrR 3.2.

It is "implicit in the concept of ordered liberty" that every

³Available at <https://csgjusticecenter.org/courts/publications/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes/>

person is presumed innocent unless and until proven guilty by the state, beyond a reasonable doubt. Estelle, 425 U.S. at 503. Our state’s highest court has recognized that “[p]re-trial detention is nothing less than punishment. Reanier v. Smith, 83 Wn.2d 342, 349, 517 P.2d 949 (1974), quoting, Culp v. Bounds, 325 F. Supp. 416 (D. N.C. 1971).

CrR 3.2 is clear. The lower court abused its discretion in failing to apply the mandates of the rule and the presumption of pretrial release on personal recognizance.

This Court should address these important, significant issues regarding the failure of the lower court to follow the established rule, even though the case is technically “moot.” A case is moot if the court can no longer provide the appellant “effective relief.” In re Det. of M.W., 185 Wn.2d 633, 648, 374 P.3d 1123 (2016). While in general the Court does not consider such a case, the Court retains discretion to do so if the question is of “continuing and substantial public interest.” See State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

The superior court’s refusal to apply the presumption of personal recognizance and the other provisions and limits of CrR 3.2, and the constitutional implications of those failures, are issues of continuing and substantial interest, likely to arise again but evade review. See, e.g., Federated Publ’ns, Inc. v. Swedberg, 96 Wn.2d 13,

16, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982). To determine if a case meets this standard, the Court considers 1) the public or private nature of the question presented, 2) the desirability of an authoritative determination on the issue for “the future guidance of public officers,” and “the likelihood of future recurrence of the question.” Hunley, 175 Wn.2d at 907.

Matters involving interpretation and proper application of a rule or statute tends to be more public in nature, more likely to arise again and the more likely it is that a ruling would be desirable in order to provide future guidance. See Hart v. Dep’t of Soc. & Health Serv., 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). In addition the Court considers “the likelihood that the issue will escape review because the facts of the controversy are short-lived.” In re the Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004) (quotations omitted).

This case meets all of those requirements. Decisions on pretrial release occur all the time and the failure to properly apply the relevant court rule is an issue of serious public importance. It is desirable for this Court to provide guidance as there are a limited number of cases on the issue but appears to be a lack of understanding and application of the rule.

This Court should address the issue, should roundly decry the lower court’s violations of CrR 3.2 and should hold that the procedures here used violated not only the rule but due process and

the right to the presumption of innocence.

E. CONCLUSION

For the reasons stated herein, this Court should address the bail issue, should condemn the trial court's failure to follow the mandates of CrR 3.2 and should order such compliance in the future.

DATED this 1st day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at Lewis County Prosecutor's Office, and to appellant Alisha Wilson, 537 Ragland Road, Longview, WA. 98632.

DATED this 1st day of March, 2018,

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