

FILED
Court of Appeals
Division II
State of Washington
1/22/2019 8:00 AM

NO. 51211-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES HARTZELL,

Appellant.

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

The Honorable Keith C. Harper, Judge

REPLY BRIEF OF APPELLANT
AND SUPPLEMENTAL BRIEF
ON LEGAL FINANCIAL OBLIGATIONS

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A.	ARGUMENT IN REPLY	1
1.	EVIDENCE SEIZED FOLLOWING THE UNLAWFUL IMPOUNDMENT AND PRETEXTUAL INVENTORY SEARCH MUST BE SUPPRESSED.....	1
2.	THE PROSECUTOR’S MISCONDUCT PREJUDICED HARTZELL’S RIGHT TO A FAIR TRIAL, AND THE COURT ERRED IN DENYING THE MOTION FOR MISTRIAL.....	3
B.	SUPPLEMENTAL BRIEF ON LEGAL FINANCIAL OBLIGATIONS.....	7
	STATUTORY AMENDMENTS PROHIBITING IMPOSITION OF CERTAIN LEGAL FINANCIAL OBLIGATIONS APPLY TO HARTZELL’S CASE, AND THOSE LFOS MUST BE STRICKEN...	7
D.	CONCLUSION.....	9

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Babcock</i> , 145 Wn. App. 157, 185 P.3d 1213 (2008)	3, 4, 5
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1998)	4
<i>State v. Bowen</i> , 48 Wn. App. 187, 738 P.2d 316 (1987)	5
<i>State v. Escalona</i> , 49 Wn. App. 251, 742 P.2d 190 (1987)	4, 5, 6
<i>State v. Froehlich</i> , 197 Wn. App. 831, 391 P.3d 559 (2017)	1
<i>State v. Gamble</i> , 168 Wn.2d 161, 225 P.3d 973 (2010)	4
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	4
<i>State v. Hill</i> , 68 Wn. App. 300, 842 P.2d 996 (1993).....	2
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014)	4
<i>State v. Perrett</i> , 86 Wn. App. 312, 936 P. 2d 426, <i>review denied</i> , 133 Wn.2d 1019 (1997)	5
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	8
<i>State v. Tyler</i> , 177 Wn.2d 690, 302 P.3d 165 (2013).....	1, 2
<i>State v. Weber</i> , 99 Wn.2d 158, 659 P.2d 1102 (1983).....	3

Statutes

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018).....	7, 8
RCW 10.01.160(3).....	7
RCW 36.18.202(2)(h)	7
RCW 43.43.7541	8

Constitutional Provisions

U.S. Const. amend. IV	1
U.S. Const. amend. VI	3
U.S. Const. amend. XIV	3
Wash. Const. art. I, § 22.....	3
Wash. Const. art. I, § 7.....	1

A. ARGUMENT IN REPLY

1. EVIDENCE SEIZED FOLLOWING THE UNLAWFUL IMPOUNDMENT AND PRETEXTUAL INVENTORY SEARCH MUST BE SUPPRESSED.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. *State v. Froehlich*, 197 Wn. App. 831, 837, 391 P.3d 559 (2017). One exception to the warrant requirement is a noninvestogatory, good faith inventory search of a lawfully impounded vehicle. *Froehlich*, 197 Wn. App. at 837 (citing *State v. Tyler*, 177 Wn.2d 690, 700–01, 302 P.3d 165 (2013)). The burden of establishing this exception rests on the State. *Tyler*, 177 Wn.2d at 698.

Law enforcement may lawfully impound a vehicle: (1) as evidence of a crime, (2) under the community caretaking function, or (3) when the driver has committed a traffic offense for which the legislature has expressly authorized impoundment. *Froehlich*, 197 Wn. App. at 838. “But even if one of these reasons exists, an officer may impound a vehicle only if there are no reasonable alternatives.” *Id.* “Therefore, an officer must consider alternatives to impoundment,” although the officer need not exhaust all possible alternatives. *Id.* The reasonableness of an

impoundment is assessed in light of the facts of the case. *Tyler*, 177 Wn.2d at 699. “[I]f ... a reasonable alternative to impoundment exists, then it is unreasonable to impound a citizen's vehicle.” *Id.* at 698.

In this case, it is undisputed that the deputies never considered any alternatives to impoundment. CP 266. They did not attempt to contact the registered owner, and, although Deputy Anderson had significant contact with Hartzell prior to towing, he made no attempt to ask Hartzell what he wanted to do with the car. CP 265-66.

The State argues in its brief that because impoundment was authorized under RCW 46.55.113, officers were not required to consider alternatives to impoundment. Br. of Resp. at 6. The Washington Supreme Court has recognized, however, that “even when authorized by statute ‘impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties’; ‘in Washington, impoundment is inappropriate when reasonable alternatives exist.’” *Tyler*, 177 Wn.2d at 698-99 (quoting *State v. Hill*, 68 Wn. App. 300, 305, 306, 842 P.2d 996 (1993)).

Because the State did not establish that there were no reasonable alternatives to impoundment, the impoundment was not lawful, and the inventory search was not authorized. *See Froehlich*, 197 Wn. App. at 840, 845-46. Because the deputies were not lawfully conducting an inventory

search, they had no valid justification for being in the car and moving the backpack in order to spot the baggie of methamphetamine. The plain view exception does not apply in this case, and all evidence discovered as a result of the warrantless search of the car must be suppressed.

2. THE PROSECUTOR’S MISCONDUCT PREJUDICED HARTZELL’S RIGHT TO A FAIR TRIAL, AND THE COURT ERRED IN DENYING THE MOTION FOR MISTRIAL.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. The erroneous denial of a motion for mistrial violates that right. *See State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity “prejudiced the jury, thereby denying the defendant his right to a fair trial.”).

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). A trial court’s denial of a motion for mistrial is reviewed for abuse of discretion. *Id.* Denial of a motion for mistrial must be overturned when there is a substantial

likelihood the prejudice affected the verdict. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

When a motion for mistrial is based on prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudicial. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). "A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1998). It is also improper for a prosecutor to violate a pre-trial ruling. *State v. Gregory*, 158 Wn.2d 759, 865-66, 147 P.3d 1201 (2006).

The appellate court determines the prejudicial effect of a trial irregularity by examining (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. *Babcock*, 145 Wn. App. at 163; *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Here, the prosecutor repeatedly asked the defense expert witness on cross examination about Hartzell's criminal history, saying she "read something in [the expert's report] about a drug cartel," and continued her pursuit of that topic in violation of the court's explicit ruling that the evidence was inadmissible under ER 404(b). RP 767, 775-79. This trial irregularity succeeded in placing prior bad acts evidence before the jury

and was thus extremely serious. Improper references to a defendant's prior criminal conduct tend to "shif[t] the jury's attention to the defendant's propensity for criminality, the forbidden inference. . . ." *State v. Perrett*, 86 Wn. App. 312, 320, 936 P. 2d 426 (quoting *State v. Bowen*, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), *review denied*, 133 Wn.2d 1019 (1997).

Moreover, the information presented to the jury as the result of the prosecutor's misconduct was not cumulative. This factor also weighs in favor of mistrial. *See Babcock*, 145 Wn. App. at 164; *Escalona*, 49 Wn. App. at 255.

Finally, a curative instruction would have been ineffective to remedy the prejudice caused by the prosecutor's misconduct. RP 783. While the State suggests that prejudice from the prosecutor's misconduct was cured by the general instruction that jurors should not speculate whether excluded evidence would have favored one party or the other¹, it is well recognized that admission of evidence concerning a crime similar to the charged offense is inherently difficult to disregard, and no instruction can remedy the effects of such inherently prejudicial testimony. *Babcock*, 145 Wn. App. at 164-65; *Escalona*, 49 Wn. App. at 255-56.

¹ Br. of Resp. at 11.

Hartzell's defense was that he possessed the methamphetamine and heroin found in the backpack for personal use. He had severe addictions to both substances, and the quantities in his possession would last him about a week and a half. RP 753, 757. The jury found Hartzell guilty of the lesser offense of possession of methamphetamine, rather than the charged offense of possession with intent to deliver². But with the heroin charge, the jury found him guilty of possession with intent to deliver, despite the fact that he possessed a significantly larger amount of methamphetamine. RP 409. The prosecutor's questions about what happened to Hartzell in Mexico, prior drug offenses and Hartzell's criminal history undoubtedly planted in the jurors' minds the idea that because Hartzell had a history with the Mexican drug cartel, he most likely possessed the heroin with intent to deliver. *See Miles*, 73 Wn.2d at 70 (prejudice from witness's reference to police report predicting defendant would commit crime could not be cured by instruction); *see also Escalona*, 49 Wn. App. at 256.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." *Miles*, 73 Wn.2d at 70. The prosecutor's misconduct exposed the jury to inherently prejudicial evidence and deprived Hartzell

² The State erroneously claims in its brief that Harzell was found guilty of the offenses as charged. Br. of Resp. at 2.

of a fair trial, and the trial court abused its discretion by refusing to grant a mistrial. This Court should reverse Hartzell's conviction of possession of heroin with intent to deliver and remand for a new trial.

B. SUPPLEMENTAL BRIEF ON LEGAL FINANCIAL OBLIGATIONS

STATUTORY AMENDMENTS PROHIBITING IMPOSITION OF CERTAIN LEGAL FINANCIAL OBLIGATIONS APPLY TO HARTZELL'S CASE, AND THOSE LFOS MUST BE STRICKEN.

In March 2018, the Legislature enacted Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018), modifying Washington's system for imposing and collecting LFOs. Under this bill, statutory amendments prohibit the imposition of costs if the defendant is indigent at the time of sentencing,³ prohibit imposition of the \$200 criminal filing fee on an indigent defendant⁴, and prohibit imposition of the \$100 DNA fee if the State has previously collected the

³ "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

⁴ "Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 36.18.202(2)(h).

offender's DNA as a result of a prior conviction.⁵ Laws of 2018, ch. 269 § 6, 17, 18. These amendments went into effect on June 7, 2018. *Id.*

The Washington Supreme Court recently held that the statutory amendments enacted by House Bill 1783 apply to cases pending on direct appeal when the amendments went into effect. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Because these amendments pertain to costs imposed upon conviction, and Hartzell's case was not yet final when the amendments were enacted, he is entitled to benefit from this statutory change. *Ramirez*, 191 Wn.2d at 749.

At sentencing, the court imposed legal financial obligations, including the \$200 criminal filing fee and the \$100 DNA collection fee. CP 241. An order of indigency was entered authorizing appeal at public expense. CP 260-61. Because the statutory amendments expressly prohibit courts from imposing the criminal filing fee on indigent defendants, the filing fee must be stricken from the judgment and sentence. In addition, because Harzell has prior convictions which resulted in the collection of his DNA⁶, the court was prohibited from imposing a DNA collection fee. That fee must be stricken as well. *See*

⁵ "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law...." RCW 43.43.7541.

⁶ CP 238.

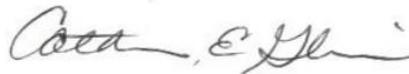
Ramirez, 919 Wn.2d at 749 (remedy is to remand for trial court to strike improperly imposed LFOs).

D. CONCLUSION

The warrantless search of the vehicle violated Hartzell's rights under the Fourth Amendment and article I, section 7 of the state constitution. All evidence seized as a result of the unlawful search must be suppressed. In addition, prosecutorial misconduct violated Hartzell's right to a fair trial, and his conviction for possession with intent must be reversed and remanded for a new trial. Finally, the improperly imposed legal financial obligations must be stricken.

DATED January 21, 2019.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Reply Brief and Supplemental Brief on Legal Financial Obligations in *State v. Charles Hartzell*, Cause No. 51211-4-II as follows:

Charles Hartzell DOC# 810910
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
January 21, 2019

GLINSKI LAW FIRM PLLC

January 21, 2019 - 1:43 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51211-4
Appellate Court Case Title: State of Washington v. Charles C. Hartzell, IV
Superior Court Case Number: 17-1-00028-6

The following documents have been uploaded:

- 512114_Briefs_20190121134159D2260301_7583.pdf
This File Contains:
Briefs - Appellants Reply - Modifier: Supplemental
The Original File Name was 51211-4 State v Hartzell Reply and Supp Brief.pdf

A copy of the uploaded files will be sent to:

- haaslaw@protonmail.com
- lmikelson@co.jefferson.wa.us

Comments:

Reply and Supplemental Brief on LFOs

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20190121134159D2260301