

FILED  
Court of Appeals  
Division II  
State of Washington  
10/30/2018 2:45 PM

NO. 51935-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JOHNATHAN GOULDING-BOOTH,

Appellant.

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BRIEF OF APPELLANT

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it expelled the defendant from the courtroom and did not send him to an available location where he could observe the proceedings without interrupting the trial.
2. The trial court erred when it imposed a second DNA fee and when it imposed a filing fee upon appellant because he is indigent.

### ***Issues Pertaining to Assignment of Error***

1. Does a trial court violate Washington Constitution, Article 1, § 22, if it expels a contemptuous defendant from the courtroom and does not send that defendant to an available location where he or she can observe the proceedings without interrupting the court proceedings?
2. Does a trial court err if it imposes a second DNA fee and when it imposed a filing fee upon an indigent defendant?

## STATEMENT OF THE CASE

### *Factual History*

At about 1:00 am on December 30, 2017, Cowlitz County Sheriff's deputies Aguilar, Patteson and Enbody were called out to a house in the 1900 block of North Pacific Avenue in Kelso on the report of someone running through the neighborhood carrying a gun. RP 4/26/18 239-241; RP 4/27/18 40-44<sup>1</sup>. When the first deputy arrived he spoke with the residents at 1914 North Pacific Avenue as one of the other deputies walked up to the house. RP 4/26/18 242-243; RP 4/27/18 40-43, 45. As the second deputy walked down the driveway of the reporting party he heard and then saw the defendant Johnathan Goulding-Booth sitting in a car under a temporary carport. RP 4/27/18 45. He and the other deputy then ordered the defendant to get out of the vehicle and keep his hands in sight. RP 4/26/18 244-246; RP 4/27/18 48-49. After the defendant exited the vehicle, one of the deputies asked him for his name. *Id.* The defendant twice responded

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<sup>1</sup>The record on appeal includes four volumes of verbatim reports of proceedings. The first two volumes are continuously numbered and cover the CrR 3.5 hearing and the first day of trial on April 26, 2018. They are referred to herein as "RP 4/26/18 [page #]." The third and fourth volumes are continuously numbered but begin with a new page 1. They cover the second day of trial on April 26, 2018 and the sentencing held on May 17, 2018. They are referred to herein as "RP 4/27/18 [page #]" and "RP 5/17/18 [page #]" respectively.

that he was Erik Ryan Thompson. RP 4/27/18 50-52.

Part of the reason the defendant used a false name was that he knew that there was an active DOC warrant for his arrest. RP 4/27/18 126-127. At about this time the third deputy arrived at the scene. RP 4/27/18 35-38. He was acquainted with the defendant and told the other deputies that he was fairly sure that the defendant's name was Johnathan Goulding-Booth. *Id.* At this point the deputies again asked the defendant who he was and he eventually admitted his correct name. RP 4/27/18 50-52. The deputies then ran the defendant's name, confirmed the existence of the DOC warrant, placed the defendant under arrest, and took him to the Cowlitz County jail for booking. *Id.* Deputy Enbody later claimed that the defendant repeatedly threatened him and his parents with harm, one set of threats being made at the scene of his arrest and one set of threats during the booking process at the jail. RP 4/27/18 53-63.

#### ***Procedural History***

By information filed January 4, 2018, the Cowlitz County Prosecutor charged the defendant Johnathan Michael Goulding-Booth with one count of felony harassment for the threats Deputy Enbody stated the defendant made towards him and his parents, one count of first degree criminal impersonation, and one count of second degree vehicle prowling. CP 6-7.

The court later dismissed the third count on the state's motion. RP 4/26/18 49. On January 31, 2018, the court ordered a competency evaluation. CP 8-14. The report of the subsequent examination by experts from Western State Hospital indicated that while the defendant suffered from severe methamphetamine use disorder and was diagnosed with antisocial personality traits, he was competent to stand trial. CP 8-14, 16-27, 28-38. By agreement of the parties the court signed an Order of Competency on April 26, 2018, although the court entered it "Nunc Pro Tunc to 2/14/18."

Following entry of the competency order the court held a CrR 3.5 hearing, and then proceeded directly to the beginning of a jury trial. RP 4/26/18 100-214. During trial the state called the three responding deputies as its only witnesses and the defendant testified as the sole witness for the defense. RP 4/26/18 238; RP 4/27/18 35, 40, 109. They testified to the facts set out in the preceding factual history. See Factual History, *supra*.

At the beginning of the trial the defendant repeatedly complained that (1) his right to speedy trial had been violated, and (2) his attorney was deficient in failing to move to dismiss for the speedy trial violation. RP 4/26/18 18-48. After a lengthy colloquy with the court the defendant confirmed that although he did not believe counsel was representing him

correctly, he did not want to represent himself. RP 4/26/18 48. He later changed his mind and stated that he wanted to represent himself. RP 4/26/18 226-228. The court denied the motion as untimely. RP 4/27/18 90-93.

The court thereafter expelled the defendant from the jury trial on four separate occasions for his contemptuous behavior, most of which was either making comments to testimony or statements or arguing with the court. RP 4/26/18 149-154; RP 4/27/18 19-24, 90-93, 203-204. On the first three occasions the court had the defendant taken to Courtroom 7 where he could watch the proceedings on a video. RP 4/26/18 149-154; RP 4/27/18 19-24, 90-93. On the fourth occasion, which was in the middle of defense counsel's closing arguments, the court had the defendant removed and he was taken back to the jail since the court wasn't sure that the jury would not be able to hear the defendant yelling from the other courtroom. RP 4/27/18 205.

Following defense counsel's closing and the state's rebuttal the jury retired for deliberation. RP 4/27/18 205-231. Once the jury reached verdicts the court had the jail guards return the defendant to Courtroom 7, where he was able to watch the reading of the verdicts. RP 4/27/18 238-240. In fact, the jury returned a verdict of "not guilty" on the felony

harassment charge and “guilty” on the first degree criminal impersonation charge. RP 4/27/18 231-237; CP 91-92.

The court later sentenced the defendant within the standard range. CP 94-106. In addition, the court imposed a DNA fee and a filing fee. CP 100-102. The defendant had previously been assessed a DNA fee as part of his prior convictions. CP 96-97. Following imposition of sentence the defendant filed timely notice of appeal. CP 116. The court then entered an order of indigency. CP 113-115.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT EXPELLED THE DEFENDANT FROM THE COURTROOM AND DID NOT SEND HIM TO AN AVAILABLE LOCATION WHERE HE COULD OBSERVE THE PROCEEDINGS WITHOUT INTERRUPTING THE TRIAL.

Under Washington Constitution, Article 1, § 22, a defendant in a criminal case has the right to “to appear and defend in person.” This constitutional guarantee is embodied in the rule that a defendant has the right to be present at “every critical stage of a criminal proceeding.” *In re the Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). In *State v. Chappel*, 145 Wn.2d 210, 36 P.3d 1025 (2001), the Washington Supreme Court stated this rule as follows:

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment. The Washington State Constitution also provides a criminal defendant with “the right to appear and defend in person.” Wash. Const. Art. I, § 22. Additionally, Washington’s criminal rules state that “[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown.” CrR 3.4(a).

*State v. Chapple*, 145 Wn.2d at 318.

At a minimum, “critical stages” in a criminal trial include any hearing at which “evidence is being presented or whenever the defendant’s presence has a relation, reasonably substantial, to the opportunity to

defend against the charge.” *State v. Bremer*, 98 Wn.App 832, 991 P.2d 118 (2000).

Our case law recognizes two fact patterns under which a defendant can be deemed to have waived the right to be present at a critical stage of the proceeding: (1) when the defendant voluntarily absents himself or herself from the proceeding, and (2) when the defendant acts in a contemptuous and disruptive manner. *See State v. Garza*, 110 Wn.2d 360, 77 P.3d 347 (2003), and *State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991). However under the first exception, the trial court cannot simply presume a waiver from mere absence, and under the second exception, the trial court must use the least restrictive alternative available and allow a defendant to return to the courtroom if he or she promises to behave. *Garza, supra; DeWeese, supra.*

The hallmark of both these exceptions to the defendant’s right to be present at any critical stage of the proceedings is that it is the defendant’s own improper conduct that results in exclusion, and that the defendant always has the power to return to the proceeding upon a promise of good conduct.

In the case at bar the trial court had the defendant taken from the courtroom on four separate occasions because he either made statements

during the presentation of evidence or argued with the court. On three of these occasions the court had the defendant taken to another courtroom where he could view the proceeding on a video monitor. However, on the fourth occasion the court had the defendant taken to jail, even though the other courtroom was apparently available. The court's reason for not allowing the defendant to view the proceedings via video was that the court was unsure whether or not the jury would be able to hear the defendant should he start yelling. However, the court had a lesser restrictive alternative to having the defendant taken to jail. She could have first found out whether or not the defendant was going to continue yelling and determined whether or not the jury would be able to hear it. Second, the court could have ordered the defendant gagged so he could not yell out. Instead of taking either of these alternatives, the court simply had the defendant taken to the jail. By not using the least restrictive alternative the court violated the defendant's rights under Washington Constitution, Article 1, § 22. Consequently, this court should vacate the defendant's conviction and remand for a new trial.

**II. THE TRIAL COURT ERRED WHEN IT IMPOSED A SECOND DNA FEE AND WHEN IT IMPOSED A FILING FEE UPON APPELLANT BECAUSE HE IS INDIGENT.**

Effective March 27, 2018, the legislature amended the statute requiring the imposition of a DNA fee upon convicted felons to preclude a second imposition of this legal financial obligation. The following quotes the first two lines of this statute and underlines the added sentence.

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 (first two lines showing amendment).

This amendment applies to all DNA fees imposed following its effective date as well as all previously imposed DNA fees imposed for cases on appeal as of the effective date. *State v. Ramirez*, WL 4499761 at 6 (September 20, 2018) (“We hold that House Bill 1783 applies prospectively to Ramirez because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and Ramirez’s case was pending on direct review and thus not final when the amendments were enacted.”).

In the case at bar the defendant has prior felony convictions in which the court imposed DNA fees. Thus, the trial court erred when it imposed a \$100.00 DNA fee.

In addition, effective June 7, 2018, the legislature amended RCW 36.18.020(2)(h) to prohibit the imposition of a filing fee upon an indigent defendant following conviction. The following quotes this section of the statute with the modifications underlined.

(2) Clerks of superior courts shall collect the following fees for their official:

. . . .

(h) 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 36.18.020(2)(h) (showing amendments underlined).

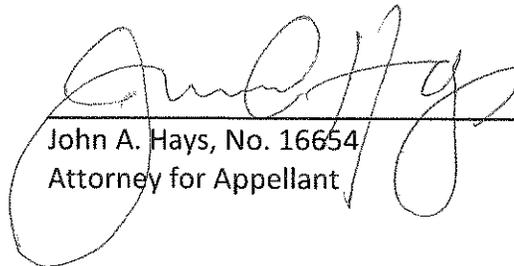
As with the DNA fee, the Washington Supreme Court has also held that this amendment applies to all cases still on appeal when it became effective. *See Ramirez, supra*. Thus, in this case the trial court also erred when it imposed a filing fee because the defendant is indigent. Consequently, this court should remand this case to the trial court to strike these two legal financial obligations.

## CONCLUSION

The trial court denied the defendant his right to be present during every critical stage in the proceedings under Washington Constitution, Article 1, § 22, when it had him taken from the courtroom during trial and did not give him the opportunity to view the proceedings on an available video in another courtroom. In addition, the trial court erred when it imposed a second DNA fee and when it imposed a filing fee as part of the defendant's legal-financial obligations.

DATED this 30<sup>th</sup> day of October, 2018.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

## APPENDIX

### WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**RCW 36.18.020(2)(h)**  
**Clerk's fees, surcharges**

(2) Clerks of superior courts shall collect the following fees for their official services:

. . .

(h) 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 43.43.7541**  
**DNA identification system – Collection of biological samples – Fee**

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. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754. This fee shall not be imposed on juvenile offenders if the state has previously collected the juvenile offender's DNA as a result of a prior conviction.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,  
Respondent,  
  
vs.  
  
JOHNATHAN GOULDING-BOOTH,  
Appellant.

NO. 51935-6-II  
  
AFFIRMATION  
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Ryan Jurvakainen  
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2. Johnathan Goulding-Booth  
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Dated this 30<sup>th</sup> day of October, 2018, at Longview, WA.

  
\_\_\_\_\_  
Diane C. Hays

**JOHN A. HAYS, ATTORNEY AT LAW**

**October 30, 2018 - 2:45 PM**

**Transmittal Information**

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**Appellate Court Case Number:** 51935-6  
**Appellate Court Case Title:** State of Washington, Respondent v. Johnathan Goulding Booth, Appellant  
**Superior Court Case Number:** 18-1-00003-1

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