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Court of Appeals
Division II
State of Washington
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COA No. 52036-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN SHANE INGALSBE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY

The Honorable J. Andrew Toynbee
The Honorable Joley A. O'Rourke

APPELLANT'S OPENING BRIEF

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A. SUMMARY

Justin Ingalsbe was wrongly denied his right to represent himself, and then at sentencing, the trial court exceeded its authority when it imposed the \$200 filing fee, the \$100 crime lab fee, and the \$100 DNA collection fee as Legal Financial Obligations.

B. ASSIGNMENTS OF ERROR

1. In Justin Ingalsbe's trial on a VUCSA drug possession charge, the defendant's right to self-representation under the Sixth Amendment and Wash. Const. art. I, § 22 was violated.¹

2. The trial court exceeded its sentencing authority when it imposed certain Legal Financial Obligations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court violate Mr. Ingalsbe's right to represent himself when it held that his request to do so could not be deemed unequivocal where it was paired with expressions of dissatisfaction with counsel?

2. Did the trial court exceed its sentencing authority when it imposed the \$200 filing fee on an indigent defendant?

¹ The Sixth Amendment to the United States Constitution renders self-representation a right. U.S. Const. amend. VI; Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Washington Constitution guarantees the right to self-representation. Wash. Const. art. I, § 22.

3. Did the trial court exceed its sentencing authority when it imposed the \$100 crime lab fee on an indigent defendant?

4. Did the court exceed its sentencing authority when it imposed the \$100 DNA collection fee on a defendant who had previously had his DNA collected pursuant to a prior Washington conviction?

D. STATEMENT OF THE CASE

According to the State's allegations, Morton Police Officers Cole Cournyer and Clarence Lupo were, or had been, interacting with Mr. Ingalsbe at the Buck Snort Bar and Grill in Morton on May 19, 2017. CP 4-5; 5/15/18RP at 88. At some point, Ingalsbe needed to be taken to the hospital for treatment of pain caused by a recent knee surgery. Ingalsbe was on crutches at the time, and also appeared intoxicated. 5/15/18RP at 89-91. When an ambulance arrived, Mr. Ingalsbe was asked by medical personnel where his medication was. Mr. Ingalsbe stated that he did not know, so the medics searched him for his pain medication and for identification. They found a small baggie containing a white powder which later was determined to be methamphetamine. 5/15/18RP at 90-95, 107-08.

Mr. Ingalsbe had recently undergone surgery and had been given 50 pills of pain medication. On the date in question, he was out of the

pills. 5/15/18RP at 111-14. At some point, police officers were walking him to his motel room, after speaking with him in front of the Buck Snort bar. Mr. Ingalsbe did not ask to be taken to the hospital, but EMT's arrived, and they put their hands in his pockets and removed a baggie of white powder. 5/15/18RP at 112-15. Mr. Ingalsbe honestly stated that the pants he was wearing were his, despite his chaotic living situation, but he had never seen the baggie before.² 5/15/18RP at 114-15.

The jury was instructed on unwitting possession. 5/15/18RP at 129; CP 20. It found Mr. Ingalsbe guilty, however. CP 25; 5/15/18RP at 142-44. He was sentenced to a standard range term of 9 months incarceration. CP 26-34.

² Based on a WSPCL lab report, the parties stipulated that the substance was methamphetamine. 5/15/18RP at 27-28, 99.

E. ARGUMENT

(1). MR. INGALSBE’S SIXTH AMENDMENT AND STATE CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF WAS VIOLATED WHEN THE COURT WRONGLY HELD THAT A REQUEST TO PROCEED PRO SE, IF ACCOMPANIED BY EXPRESSIONS OF DISSATISFACTION WITH COUNSEL, IS NECESSARILY EQUIVOCAL.

(a). Mr. Ingalsbe clearly asserted a desire for self-representation.

(i). The court denied the request because it was accompanied by expressions of dissatisfaction with counsel.

On May 14th 2018, Mr. Ingalsbe indicated to the court that he wanted “to represent myself because I feel that I’m not represented.” 5/14/18RP at 9. Mr. Ingalsbe noted that he had previously requested a new lawyer. 5/14/18RP at 9. However, he reiterated that his request today was for self-representation, stating “So I’m here today because I want to represent myself.” 5/14/18RP at 9.

The court told Mr. Ingalsbe that his request to represent himself was not unequivocal, because it was premised on the fact that he was dissatisfied with his lawyer, and because Mr. Ingalsbe apparently believed that he was faced with a choice of going to a trial with an attorney he did not like, and representing himself. 5/14/18RP at 11-12. The court therefore denied the request. 5/14/18RP at 14.

(ii). But Mr. Ingalsbe had a right to choose to represent himself, and it was not per se disqualifying that the defendant was unhappy with his lawyer.

Criminal defendants have a right to self-representation under the Washington Constitution and the United States Constitution. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing Wash. Const. art. I, § 22 (“the accused shall have the right to appear and defend in person”)); Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975)); State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). Because of the tension between this right, and the important right to counsel, a defendant must unequivocally request to proceed pro se before he or she will be permitted to do so. DeWeese, 117 Wn.2d at 376.

Here, Mr. Ingalsbe’s request was, unequivocally, to exercise his right to represent himself. It is true that Mr. Ingalsbe did state that he wanted to do so because he did not feel like he was being fairly represented, and he also complained that he had been misinformed about the case by his lawyer. 5/14/18RP at 9-10. However, he also stated that he had previously been involved in a jury selection, and he was comfortable with doing jury selection on his own, in this case. 5/14/18RP at 10-11.

(b). This was error because expressions of unhappiness with one's present lawyer do not categorically render a request for self-representation equivocal.

Mr. Ingalsbe plainly understood what he was asking for, and he was plainly asking for it. When the court told Mr. Ingalsbe that his request to represent himself was not unequivocal because it was premised on dissatisfaction with his lawyer, this was an erroneous basis upon which to deny the request. 5/14/18RP at 11-12.

The court is required to assess whether a defendant's request for self-representation is unequivocal on a case-by-case basis, considering the circumstances, the defendant, and the request. State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003). A request that is equivocal must indeed be denied. State v. Woods, 143 Wn.2d 561, 587-88, 23 P.3d 1046 (2001), cert. denied, 534 U.S. 964 (2001). However, the question of equivocality focuses on the nature of the request itself - if, when, and how the defendant made his request for self-representation - not on the motivation or purpose behind the request. State v. Curry, ___ Wn.2d ___, 423 P.3d 179, 186 (Wash. 2018) (citing Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989)).

Here, Mr. Ingalsbe's request was made formally at a hearing. His then lawyer extensively introduced the matter to the court, and then

asked that the court hear from the defendant. 5/14/18RP at 7-9. This shows unequivocal. See State v. Luvenc, 127 Wn.2d 690, 903 P.2d 960 (1995); State v. Modica, 136 Wn. App. 434, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). His request was no mere outburst.

Further, dissatisfaction with counsel does not necessarily disqualify a request for pro se status:

[I]f the defendant makes an explicit request to proceed pro se, that request is not necessarily rendered equivocal simply because it is motivated by a purpose other than a desire to represent him - or herself, such as frustration with the speed of trial or an attorney's performance.

State v. Curry, 423 P.3d at 186 (citing Modica, 136 Wn. App. at 434).

The trial court in this case was wrong to categorically rule that a request for self-representation could not be unequivocal if the defendant was also expressing unhappiness with his lawyer. Specifically, the court stated,

My concern, Mr. Ingalsbe, is that in order for you - for me to allow you to represent yourself, it has to be what's called an unequivocal request, and the reason I don't think it's unequivocal is it's premised on the fact that you don't think your lawyer is doing the job that you want him to do. So to me, my interpretation is that you believe you're faced with a choice of going to trial with an attorney you don't think is doing the job you want him to do and doing it yourself.

5/14/18RP at 111-12.

This ruling was legal error. Mr. Ingalsbe's request was explicit, despite being motivated by unhappiness with his lawyer. Thus in DeWeese, the trial court did not abuse its discretion by allowing the defendant to represent himself, even though the defendant's request was motivated by frustration with the attorney's performance and was accompanied by a request that counsel be replaced, because his request was unequivocal and otherwise proper, just like Mr. Ingalsbe's was here. DeWeese, 117 Wn.2d at 377; compare Woods, 143 Wn.2d at 587 (defendant's statement was merely an expression of frustration when he uttered that he would "be prepared to proceed . . . with this matter here without counsel").

Mr. Ingalsbe was clearly making "an explicit choice between exercising the right to counsel and the right to self-representation[.]" United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994). The trial court erred in not allowing him to make that choice. This violated his right to represent himself under the federal and state constitutions. Reversal is required for structural error. State v. Woods, 143 Wn.2d at 585-86; State v. Breedlove, 79 Wn. App. 101, 110, 900 P.2d 586 (1995); see United

States v. Gonzalez–Lopez, 548 U.S. 140, 148-49, 126 S.Ct. 2557, 165

L.Ed.2d 409 (2006).

(2). THE TRIAL COURT IMPROPERLY IMPOSED CERTAIN LEGAL FINANCIAL OBLIGATIONS.

At sentencing, the trial court imposed Legal Financial Obligations on Mr. Ingalsbe, in the form of the \$200 filing fee, and the \$100 DNA collection fee. 5/29/18RP at 153; CP 30. The court also imposed the discretionary crime lab fee. CP 30; see State v. Smith, No. 50264-0-II, 2018 WL 5278258, at *1, *4 (Wash. Ct. App. Oct. 23, 2018) and State v. Nunez- Nunez, No. 76634-1-I, 2018 WL 1256608, at *1 (Wash. Ct. App. Mar. 12, 2018) (crime lab fee is not mandatory) (both cited as non-binding authority pursuant to GR 14.1 only).

However, Mr. Ingalsbe was indigent. CP 49-51. The court specifically credited his declaration for his order of indigency, in which he noted he had no income and no savings. CP 45-48.

In addition, Mr. Ingalsbe had multiple Lewis County prior convictions pursuant to which his DNA was already collected, CP 27; see RCW 43.43.7541.

These financial obligations must be stricken. The legislature recently changed the law as to legal financial obligations. Now, the \$200 filing fee and other discretionary fees, cannot be imposed on

indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). It is also improper to impose the \$100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18. Finally, a defendant with no ability to pay cannot be required to pay discretionary financial obligations, and this Court should review the merits of the issue because of the importance of ensuring that indigent defendants are not financially hobbled by persistent, unsatisfiable monetary obligations. State v. Blazina, 182 Wn.2d 827, 835-36, 344 P.3d 680 (2015).

Our Supreme Court recently held that the statutory changes apply prospectively to cases on appeal, such as Mr. Ingalsbe's. State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714 (Slip Op. at *6) (Wash. Sept. 20, 2018). Applying the change in the law, the Ramirez Court ruled that the trial court had impermissibly imposed legal financial obligations, including the \$200 criminal filing fee. Id. at *8.

Here, the defendant is indigent. The trial court nonetheless imposed the \$200 filing fee. As in Ramirez, the change in the law applies to the present case because it is on direct appeal and not final. Accordingly, this Court should strike the \$200 filing fee. Ramirez, at *8. Further, because the defendant has been through the process of DNA

collection as a result of prior Washington convictions, the Court should also order the \$100 DNA collection fee stricken. Finally, for multiple reasons, the Court should order the crime lab fee to be stricken. Blazina, supra.

Appellant respectfully asks that this Court order the legal financial obligations as set forth supra to be stricken.

F. CONCLUSION

Based on the foregoing, this Court should reverse Justin Ingalsbe's judgment and sentence.

Respectfully submitted this 21ST day of November, 2018.

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DIVISION TWO**

STATE OF WASHINGTON,)	
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JUSTIN INGALSBE,)	
)	
Appellant.)	

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