FILED
April 25, 2012
Court of Appeals
Division III
State of Washington

NO. 29974-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID ALLYN DODD,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF REPLY

Mr. Dodd's conviction for attempting to elude a police vehicle should be reversed because the trial court failed to provide a requested instruction defining the technical term willfully. Though trial counsel requested the instruction be provided, if a further objection was necessary to preserve that request, trial counsel was ineffective for failing to object to the omission. The State's arguments that the conviction should be affirmed are unavailing. However, if the Court affirms Mr. Dodd's conviction, the discretionary fees and costs imposed as part of his sentence should be stricken because they are not based on a supportable finding that Mr. Dodd had or will have the ability to pay. This claim is ripe because the trial court is required to consider the defendant's financial status before entering a finding that he has the ability to pay. The evidence does not support the trial court's boilerplate finding, which should be stricken.

B. ARGUMENT IN REPLY

1. Mr. Dodd requested the trial court provide a jury instruction defining 'willfully'; trial counsel's failure to take exception to the court's instructions, which lacked the requested instruction, constituted ineffective assistance of counsel requiring reversal of the conviction.

As argued in Mr. Dodd's opening brief, his conviction should be reversed because the trial court failed to provide a requested instruction defining the technical term "willfully" and trial counsel provided ineffective assistance by failing to object to the lack of instruction. Op. Br. at 6-14. The State's responsive arguments are unavailing.

Mr. Dodd requested the court instruct the jury on the definition of "willfully." Under Criminal Rule 6.15(a), the filing of written proposed jury instructions constitutes a request for an instruction. CrR 6.15(a). The State cites no further requirement that the request be renewed orally. *See* CrR 6.15(c) (providing procedures for objecting to, but not requesting, jury instructions). Mr. Dodd requested an instruction defining the term "willfully" by filing proposed jury instructions that included such an instruction. CP 118 (citing WPIC 10.05). The requested instruction correctly stated the law. *Compare* CP 118 *with* RCW 9A.08.010.

The trial court assembled the court's instructions and provided trial counsel an opportunity to state objections on the record. RP 229 (requesting exceptions or objections to instructions "given or not given by the Court"). The court's instructions failed to include any definition of the term "willfully."[1] *See* CP 140-62. Though this omission was erroneous, trial counsel did not object to the lack of an instruction defining "willfully." *State v. Flora*, 160 Wn. App. 549, 553-54, 249 P.3d 188 (2011) (error to fail to provide definition of "willfully" in trial for attempting to elude police vehicle); *see* RP 229-30. Contrary to the State's contention, "willfully" has a technical meaning in the context of attempting to elude a police vehicle. *Flora*, 160 Wn. App. at 553-54 ("willfully" has a technical meaning in relation to the crime of attempting to elude a police vehicle) *with* Resp. Br. at 14-15 (claiming "willfully" is not technical in this context).

Trial counsel's failure to object to the denial of his request to provide a necessary instruction constituted ineffective assistance of

[1] Notably, in *Flora*, this Court did not specify what steps trial counsel took to preserve for review the trial court's failure to provide a "requested" jury instruction defining the term "willfully." In that case, this Court only stated that trial counsel "asked the court to give the jury a definition of 'willfully'" and "requested the pattern instruction." 160 Wn. App. at 553. If trial counsel in *Flora* was not required to specifically object to the lack of instruction after requesting it, that requirement also should not be imposed here.

counsel. Op. Br. at 10-14; CrR 6.15(c) (setting forth procedure for stating objections); *Seattle v. Rainwater*, 86 Wn.2d 567, 571-72, 546 P.2d 450 (1976) (discussing need to take exception to disagreeable jury instructions); *State v. Powell*, 150 Wn. App. 139, 152-58, 206 P.3d 703 (2009) (counsel's failure to request reasonable belief instruction in second degree rape case constituted ineffective assistance where the evidence supported the defense, the instruction would have been provided if requested and there was no tactical reason for the failure to request).

Trial counsel's deficient performance prejudiced Mr. Dodd. Op. Br. at 14. Had trial counsel taken exception to the lack of instruction, a definitional instruction should have been provided. *Flora*, 160 Wn. App. at 553-56. Moreover, contrary to the State's argument, Mr. Dodd's defense to that element was not "futile." Resp. Br. at 15-16. Nor did defense counsel make a strategic determination in declining to except to the instruction. Mr. Dodd presented evidence that he did not know that the pursuing police vehicle was signaling him to stop. He testified he was not aware the law enforcement vehicle was behind him until he turned into the Fred Meyer parking lot and was not aware the vehicle was trying to pull him over until he reached the back of the

store. RP 189, 213; *see* RP 191-92, 208 (Dodd thought officer was signaling another vehicle or responding to emergency when lights initially engaged then turned off). Officer Marshall testified he did not have his lights or sirens engaged for much of the time he followed Mr. Dodd's vehicle. RP 95-97, 143-45, 190. Based on this evidence, the jury could have found Mr. Dodd's conduct was not willful.

Accordingly, Mr. Dodd's conviction for attempting to elude a police vehicle should be reversed and remanded for a new trial.

2. To impose discretionary costs, the court must find by substantial evidence at the time of sentencing that the defendant has or likely will have the future ability to pay.

Mr. Dodd argued in his opening brief that the court's boilerplate finding that he had or likely would have the future ability to pay discretionary costs and fees was clearly erroneous because the only evidence regarding his financial capacity showed he lacked income, means of employment, and any savings. Op. Br. at 15-18. In response, the State argues the issue is not ripe because the State has not attempted to collect the discretionary fees and costs. Resp. Br. at 20-22.

Mr. Dodd seeks review of the trial court's basis for imposing discretionary costs in the first instance. The constitution and statutes require the sentencing court to find the defendant has an ability to pay

by substantial evidence. *State v. Curry,* 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). That substantial evidence must be presented at sentencing. *See* RCW 10.01.160(3).

Mr. Dodd's ability to ask for the costs to be reduced once payment is enforced does not justify the court's imposition of discretionary fees and costs absent evidence Mr. Dodd has or will have a likely ability to pay such costs. As discussed in his opening brief, the State presented no evidence regarding Mr. Dodd's ability to pay discretionary costs. On the other hand, Mr. Dodd had lost the ability to earn a living as a result of the charges filed against him. RP 306-07. He was found indigent for purposes of appeal. CP 265-66. And he was sentenced to 62-months confinement. CP 246. Substantial evidence does not support the court's boilerplate finding that Mr. Dodd has or will likely have the ability to pay discretionary costs. *Cf. Curry*, 62 Wn. App. at 683 (affirming imposition of discretionary costs where evidence before trial court showed likely future ability to pay). Accordingly, the discretionary costs were erroneously imposed and this Court should strike that portion of the judgment and sentence.

Though the State argues "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the

obligation," the State ignores the plain language of RCW 10.01.160(3), which requires the court "court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." *Compare* RCW 10.01.160(3) *with* Resp. Br. at 20-21 (quoting *State v. Baldwin*, 63 Wn. App. 312, 310-11, 818 P.2d 1116 (1991)). Moreover, the *Baldwin* court, in the part of the opinion cited to by the State, considered the necessity for formal findings of fact prior to the imposition of attorney's fees. 63 Wn. App. at 309-11. Unlike that issue, RCW 10.01.160(3) specifically requires the sentencing court to consider the defendant's ability to pay prior to imposing costs. RCW 10.01.160(3). In *Baldwin*, furthermore, the presentence report specified that the defendant stated he was "employable" and argued for the imposition of costs without any objection. 63 Wn. App. at 311. Here, on the other hand, the evidence showed Mr. Dodd was not employed, would be unemployable for at least another 62 months and lacked financial resources.

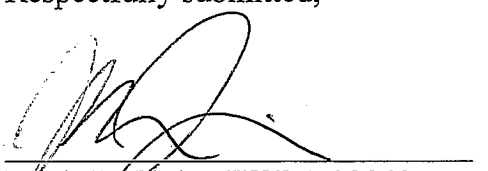
Because the sentencing court erred in imposing discretionary costs and fees upon Mr. Dodd without specifically finding he had the ability to pay, the fees and costs should be stricken.

C. CONCLUSION

As set forth above and in his opening brief, Mr. Dodd's conviction for attempting to elude a police vehicle should be reversed because the jury was not instructed on the technical definition of "willfully," as requested, and because trial counsel was ineffective in failing to preserve his request for such an instruction. If the conviction is upheld, the Court should strike the discretionary costs imposed because the finding that Mr. Dodd has the present or likely future ability to pay is clearly erroneous.

DATED this 25th day of April, 2012.

Respectfully submitted,



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STATE OF WASHINGTON,	)	
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v.	)	NO. 29974-1-III
	)	
DAVID DODD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 25TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF APRIL, 2012.

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