

FILED  
January 26, 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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID ALLYN DODD,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

David. Dodd was charged with attempting to elude a police vehicle, which among other things requires the State to prove a driver willfully failed to bring his vehicle to a stop after being given a visual or audible signal to do so. The technical meaning of willful in this context is identical with knowledge. Upon request, trial courts must give an instruction defining the term. Mr. Dodd's trial counsel requested an instruction that accurately defined "willfully." The trial court erred when it failed to give the requested instruction, and Mr. Dodd's conviction should be reversed.

In the alternative, the discretionary fees and costs imposed as part of Mr. Dodd's sentence should be stricken because they are not based on a supportable finding that Mr. Dodd had or will have the ability to pay.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to provide a jury instruction defining the term "willfully" in the attempting to elude a police vehicle count.

2. To the extent required to preserve Mr. Dodd's rights, trial counsel provided ineffective assistance of counsel by failing to take exception to the court's proposed instructions.

3. In the absence of substantial evidence, the sentencing court erred in finding Mr. Dodd "has the ability or likely future ability to pay the legal financial obligations imposed [in the judgment and sentence]." CP 245.

4. The sentencing court erred in imposing discretionary costs and fees.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the defendant requests a jury instruction defining the term "willfully" as required to find a defendant guilty of attempting to elude a police vehicle, it is error for a trial court to fail to provide the instruction. Should Mr. Dodd's conviction be reversed where the trial court failed to define willful, though an appropriate instruction was requested, and where the error was not harmless?

2. Did defense counsel provide ineffective assistance by failing to specifically take exception to the court's instructions?

3. Courts may not impose discretionary costs on defendants unless they have a present or future ability to pay. Here, the court

imposed discretionary costs and fees upon Mr. Dodd totaling \$950. The court ordered payment to begin immediately, even though Mr. Dodd began serving a 62-month prison term and was found indigent for purposes of appeal. The court relied on no specific evidence in entering a generic finding that Mr. Dodd had the present or future ability to pay. Did the sentencing court err in ordering Mr. Dodd to pay discretionary fees and costs?

D. STATEMENT OF THE CASE

On October 19, 2010, Officer James Marshall of the East Wenatchee Police Department was positioned in his marked vehicle at the entrance to the George Sellar Bridge from State Route 28. RP 84, 86. While stationed there on an unrelated matter, Officer Marshall learned that law enforcement in a neighboring jurisdiction was checking the driving status of David Dodd, who was reported driving a pickup truck towards the George Sellar Bridge. RP 86-87. Dispatch reported Mr. Dodd had a suspended driver's license. RP 87.

A couple minutes later, Officer Marshall viewed the described vehicle come across the bridge. RP 88-89. Officer Marshall testified he saw Mr. Dodd driving the car, and recognized him from prior

interactions. RP 89. Mr. Dodd saw the parked police vehicle as he drove by. RP 190.

After Mr. Dodd had passed him, Officer Marshall activated his overhead lights and made a U-turn into traffic. RP 91-92. He then turned off his lights. RP 143-44. Though Officer Marshall testified Mr. Dodd's driving behavior seemed to become reckless after the police vehicle entered the roadway, Officer Marshall did not have radar activated and did not pace Mr. Dodd. RP 92-93. Mr. Dodd testified he did not notice the police vehicle behind him on SR 28 and saw no activated lights. RP 190-91.

When Mr. Dodd approached the intersection of SR 28 and Grant Road, he made a right turn onto Grant Road. RP 94-95. Officer Marshall testified he activated his lights again at this point. RP 94-95. Officer Marshall further testified Mr. Dodd drove to the left of a stopped vehicle to make the right-hand turn without stopping. RP 94-95.

After Mr. Dodd turned onto Grant Road, Officer Marshall activated his siren and proceeded to catch up with Mr. Dodd. RP 95-97. Mr. Dodd then turned into the Fred Meyer store parking lot, and Officer Marshall followed him. RP 97. Mr. Dodd testified he was

driving 15 miles per hour; however, Officer Marshall testified Mr. Dodd was traveling at about 25 miles per hour through the Fred Meyer parking lot. RP 99, 194.

Mr. Dodd testified that he noticed the police vehicle behind him for the first time at this point. RP 189. There were other vehicles around, and Mr. Dodd did not know the police vehicle was in pursuit of him. RP 192-93, 208.

Mr. Dodd testified he did not know the police vehicle was trying to stop him until he turned into an area behind the store. RP 213. Mr. Dodd then stopped his vehicle and exited with his arms raised. RP 99, 102-03.

Mr. Dodd was charged with attempting to elude a police vehicle under RCW 46.61.024. CP 4. At trial, the jury was shown video from Officer Marshall's in-car camera, which depicted the head-on view from Officer Marshall's vehicle as he followed Mr. Dodd. RP 90, 120.

The jury convicted Mr. Dodd of attempting to elude a police vehicle.<sup>1</sup>

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<sup>1</sup> The jury found by special verdict that Mr. Dodd threatened injury or harm to others during the course of the attempted eluding. CP 166. The jury acquitted Mr. Dodd of felony harassment. CP 167. Mr. Dodd also pled guilty to second degree driving with a suspended license. RP 131.

## E. ARGUMENT

### 1. **The trial court erred in not providing the requested jury instruction defining the legal term ‘willfully.’**

“Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.”  
*State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011) (quoting *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)).

To prove the offense of attempting to elude a police vehicle, the State must show that the defendant acted “willfully.” “Willfully” has a technical meaning in the context of the eluding statute, RCW 46.61.024. *Flora*, 160 Wn. App. at 553-54.

RCW 46.61.024(1) defines the crime of attempting to elude a police officer as follows:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

The statute “requires that the defendant willfully fail and refuse to stop his vehicle while attempting to elude a pursuing police vehicle.” *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981). The willful requirement of the attempting to elude offense is further defined by RCW 9A.08.010, which provides that willfulness is satisfied “if a person acts knowingly with respect to the material elements of the offense.” RCW 9A.08.010(4).

Because the term “willfully” has a technical meaning, it must be defined for the jury upon the request of a party. “Without a definition, the jury is left to come up with its own understanding of a technical term for a culpable mental state.” *Flora*, 160 Wn. App. at 554 (citing *State v. Allen*, 101 Wn.2d 355, 362, 678 P.2d 798 (1984)).

Mr. Dodd requested the jury be instructed on the meaning of willfully by proposing the pattern instruction. In the proposed defense instructions, Mr. Dodd included the following instruction from the Washington Pattern Jury Instructions: “Instruction L: ‘A person acts willfully when he or she acts knowingly.’” CP 118; WPIC 10.05. This requested instruction was a correct statement of the law. RCW 9A.08.010; *see Flora*, 160 Wn. App. at 553. Nonetheless, the court did

not provide a definition of “willfully” when it instructed the jury. *See* CP 140-62.

A similar error resulted in reversal of the underlying conviction in *Flora*. In that case, Flora was charged with attempting to elude a police vehicle. 160 Wn. App. at 551-52. At trial, Flora requested a jury instruction that properly defined the term “willfully.” *Id.* at 553. The trial court refused to provide the instruction. *Id.* On appeal, this Court held the trial court erred. Because the term has a technical meaning, it should have been defined for the jury on request. *Id.* at 551, 553-54. This Court further held that the error was not harmless because there was evidence to support Flora’s theory that he did not know the vehicle chasing him was a police vehicle. *Id.* at 555. But Flora had no instruction defining “willfully” to support his argument that he had to know a police officer was giving him a signal to stop and the officer was pursuing him. *Id.* Thus, Flora’s conviction was reversed on appeal. *Id.* at 556.

In his trial for the same offense as Flora, Mr. Dodd proposed an instruction similar to that requested by Flora. CP 118 (proposing WPIC without optional bracketed language). Like in *Flora*, the court

failed to give the requested instruction. *See* CP 140-62.<sup>2</sup> Because the requested instruction defined a legal term, it should have been given to the jury upon request by Mr. Dodd.

Moreover, like in *Flora*, the court's failure to provide the willful instruction was not harmless error. Whereas in *Flora* evidence disputed the element that the defendant knew the vehicle was a police vehicle, here the evidence disputed the element requiring knowledge the police was signaling Mr. Dodd to stop. RCW 46.61.024(1); *Flora*, 160 Wn. App. at 555 (driver must know he is being signaled to stop).

Mr. Dodd presented evidence that he did not know that the pursuing police vehicle was signaling him to stop. Mr. Dodd testified he was not aware the law enforcement vehicle was behind him until he turned into the Fred Meyer parking lot; he was not aware the vehicle was trying to pull him over until he reached the back of the store. RP 189, 213. He did not notice the police vehicle behind him on SR 28 and there were no lights activated. RP 190.

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<sup>2</sup> Here, unlike in *Flora*, the trial court provided no explanation for its failure to provide the requested instruction. *See Flora*, 160 Wn. App. at 553 (trial court refused to provide instruction because pattern instruction for attempting to elude does not suggest definition for "willfully" and cases cited by defense relied on pre-amendment version of statute).

Further, Officer Marshall testified he did not have his lights or sirens engaged for much of the time he followed Mr. Dodd's vehicle. RP 143-45. Though he turned the lights on as he initially turned into traffic, he turned them off immediately and did not re-engage until Mr. Dodd had already turned right onto Grant Road. RP 95-97 (officer was not directly behind Dodd as he made turn and on initial section of Grant Road), 143-45. Mr. Dodd noticed the lights and sirens engaged while on Grant Road, but thought the officer was signaling another vehicle on the road or responding to an emergency at the store. RP 191-92, 208.

Mr. Flora's defense—that he did not know he was being signaled to stop—was not supported by a jury instruction defining the term willful to mean knowing. In light of the evidence at trial, the absence of an instruction defining willfully may have affected the verdict. *See Flora*, 160 Wn. App. at 555-56. Accordingly, Mr. Dodd's conviction for attempting to elude a police vehicle should be reversed and remanded. *See id.* at 556.

**2. To the extent trial counsel was required to take exception to the court's instructions, counsel was ineffective for failing to do so.**

Though trial counsel properly proposed an instruction accurately defining "willfully," counsel did not take exception to the court's

instructions, which did not include the requested “willful” instruction. To the limited extent trial counsel’s failure to take exception to the court’s instructions bars Mr. Dodd’s ability to raise the error here, trial counsel was ineffective.

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011); *State v. A.N.J.*, 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010).<sup>3</sup> “[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *A.N.J.*, 168 Wn.2d at 98.

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<sup>3</sup> The Sixth Amendment provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

The Fourteenth Amendment states in part, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .”

Article I, Section 22 provides in part, “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .”

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland v. Washington*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland*, 466 U.S. at 698.

Trial counsel's failure to ensure a jury instruction that supports the defense theory and would have been provided if adequately requested can constitute ineffective assistance. *E.g.*, *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).

“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. The focus is on whether counsel’s decision “was itself reasonable.” *Wiggins v. Smith*, 539 U.S. 510, 523, 125 S. Ct. 2527, 176 L. Ed. 2d 471 (2003). For example, if it can be concluded that counsel’s omission “resulted from inattention, not reasoned strategic judgment” then it was not reasonable. *Id.* at 526.

There is no strategic judgment that justifies trial counsel’s failure to preserve his same-day request for an instruction defining “willfully.” Trial counsel proposed a separate instruction defining “willfully” in his proposed instructions to the court. CP 118. As noted above, that same day, Mr. Dodd presented evidence disputing the element of willfully failing to stop when he knew the police vehicle was signaling him. After this testimony, the court asked trial counsel for exceptions to the court’s proposed instructions, which failed to include a definition of “willfully.” RP 229. There is no conceivable strategic basis for trial counsel’s failure to take exception to the court’s omission. If exception was necessary to preserve Mr. Dodd’s request for the instruction, the failure to do so was simply oversight. *See, e.g., State v. Bertrand*, No. 40403–6–II, \_\_\_ Wn. App. \_\_\_, 2011 WL

6097718, \*3 (Dec. 8, 2011) (finding error in jury instruction not preserved where defendant did not object below because trial court did not have opportunity to correct instructional error); *State v. O'Brien*, No. 65824-7-I, 164 Wn. App. 924, \_\_ P.3d \_\_, 2011 WL 5830447, \*1, 3 (Nov. 21, 2011) (argument waived where defendant did not object to trial court's refusal to give requested duress jury instruction).

Trial counsel's omission was deficient performance that prejudiced Mr. Dodd. Mr. Dodd was entitled to a jury instruction defining "willfully" upon request. *Flora* specifically holds that where a defendant requests an instruction defining willfully, it must be provided. 160 Wn. App. at 551, 553-54. Therefore, if trial counsel was required to take additional measures beyond specifically requesting that the instruction be given, such further objection would have resulted in the provision of the instruction (or a plain error on the part of the trial court requiring reversal on appeal). Mr. Dodd was prejudiced by trial counsel's failure to preserve his request for an instruction defining "willfully."

**3. The sentencing court erred in finding Mr. Dodd had the present or future ability to pay and in imposing discretionary fees and costs.**

An additional error occurred in the judgment and sentence. The sentencing court imposed \$1,550 in legal financial obligations (“LFOs”). CP 248. Of that amount, \$600 was for mandatory fees—a victim assessment and DNA collection fee. *See State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (victim assessment mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory). The court also imposed \$250 for a jury demand fee, \$200 for a “criminal filing fee,” and \$500 pursuant to RCW 9A.20.021 (setting forth maximum sentence for class C felony). CP 248. The court further ordered that payment of these costs was to begin immediately. CP 249.

The court did not make an oral finding that Mr. Dodd had the ability to pay these costs. In fact, the State presented no evidence at sentencing that Mr. Dodd had or would have the ability to pay these costs. The judgment and sentence contains only boilerplate language stating under finding 2.5 that:

The Court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including defendant’s financial resources and the likelihood that the defendant’s status

will change. The Court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 245.<sup>4</sup> Although mandatory fees were properly imposed, it was improper for the court to impose an additional \$900 in costs and fees, and to set payments commencing immediately, because Mr. Dodd lacks the present and future ability to pay.

Courts may not require a defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *Curry*, 118 Wn.2d at 915-16; RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing discretionary costs. *Id.* This requirement is both constitutional and statutory. *Id.* Additionally, a trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

The sentencing court erred in imposing discretionary costs and fees upon Mr. Dodd without specifically finding he had the ability to pay. Substantial evidence did not support the court's boilerplate

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<sup>4</sup> The court's boilerplate finding as to Mr. Dodd's resources and ability to pay is factual and should be reviewed under the clearly erroneous standard. *Bertrand*, 2011 WL 6097718, at \*4; *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991).

finding. Contemporaneous to the imposition of these costs, Mr. Dodd was found indigent for purposes of appeal. CP \_\_ (Sub #119 (order of indigency filed June 14, 2011)). He was on the verge of serving a 62-month prison sentence. Mr. Dodd testified he had lost the ability to earn a living as a result of the charges filed against him. RP 306-07. The court did not take Mr. Dodd's financial status into account at all, instead imposing the costs and fees without any reference to Mr. Dodd's present or future ability to pay. RP 313.

This case stands in contrast to others in which this Court has affirmed the imposition of costs. In *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because a presentence report "establishe[d] a factual basis for the defendant's future ability to pay." *Baldwin*, 63 Wn. App. at 311.

But unlike the defendant in *Richardson*, Mr. Dodd is not employed and will not be able to obtain employment in the near future because he is serving a 62-month prison term. Unlike in *Baldwin*, the State did not submit a presentence report that established a factual basis for Mr. Dodd's future ability to pay. On the contrary, all evidence

presented showed that Mr. Dodd was indigent at the time of sentencing and likely to remain so. Thus, the court's finding that Mr. Dodd had the ability to pay was clearly erroneous and this Court should strike the discretionary costs imposed.

F. CONCLUSION

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. To the extent trial counsel was required to preserve his request for the instruction, trial counsel was ineffective in failing to do so.

In the alternative, 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 26th day of January, 2012.

Respectfully submitted,



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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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

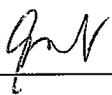
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JOSEPH ALVARADO, STATE THAT ON THE 26<sup>TH</sup> DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING 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 26<sup>TH</sup> DAY OF JANUARY, 2012.

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