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Court of Appeals
Division III
State of Washington

No. 30336-5-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

DARRELL MCCARTER,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

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I. INTRODUCTION

Darrell McCarter was charged by citation in District Court with Driving Under the Influence and Driving with License Suspended in the First Degree. McCarter twice failed to appear for court and each time a bench warrant was issued. The State subsequently determined that McCarter's criminal history allowed for him to be charged with Felony Driving under the Influence. On the State's motion, the case was dismissed without prejudice and re-filed in Superior Court under a theory of Felony DUI. Certain warrant costs survived the dismissal of the District Court case. McCarter asserted that these costs are actually fines which should have prevented his Superior Court prosecution on double jeopardy grounds. The Superior Court found that the District Court fees were, in fact, warrant costs pursuant to RCW 10.01.160 and not fines. The Superior Court refused to dismiss the case. McCarter was subsequently convicted at trial of both Felony DUI and Driving with License Suspended in the First Degree. McCarter now appeals his conviction on double jeopardy grounds.

Because the warrant costs were not punishment, as determined by pertinent caselaw, double jeopardy protections do not apply. McCarter's conviction should be affirmed.

II. ISSUE

Did the District Court's assessment of warrant costs trigger jeopardy and prevent the Superior Court prosecution?

III. STATEMENT OF THE CASE

On April 4th, 2010 Ephrata police officer Patrick Canady observed the Defendant, Darrel McCarter, driving a van. 2RP[1] 200-04. The van was leaking fluids, crossing the fog line, and traveling well under the speed limit. 2RP 202. Canady stopped the van and noticed the odor of alcohol on McCarter's breath. 2RP 204. Canady also noticed that McCarter's eyes were bloodshot, watery and droopy. *Id.* Canady conducted a series of field sobriety test and concluded that McCarter was under the influence. 2RP 206-14. Canady placed McCarter under arrest and then handed him off to Washington State Patrol Trooper Ryan Raymond. 2RP 215.

Trooper Raymond transported McCarter to the Grant County Jail for a BAC test. 2RP 170. McCarter gave two breath samples. 2RP 182. The BAC results were .132 and .131. 2RP 311. McCarter had four DUI "prior offense" convictions in the preceding ten years. 2RP 318-20.

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[1] In an attempt to track with Appellant's citations, Respondent will be citing to the Transcript of Proceedings covering 3/6/11 to 10/10/11 Superior Court proceedings as "1RP." The Report of Proceedings covering the Superior Court trial starting on 9/14/11 will be cited as "2RP." The Supplemental Transcript of Proceedings relating to District Court proceedings on 3/16/11 will be cited as "3RP." Clerk's papers will be "CP."

McCarter was charged by citation in Grant County District Court with Driving Under the Influence (DUI) and Driving with License Suspended in the First Degree (DWLS) under case number C750435. CP 105. He was also charged with Operating Vehicle without Ignition Interlock in case number C750436. CP 116.

McCarter failed to appear for his April 5, 2010 arraignment and a bench warrant was issued. CP 105. McCarter appeared on October 11, 2010 and had the warrant quashed. CP 107. On December 16, 2010, McCarter again failed to appear and another warrant was issued. CP 110. McCarter was arrested on the warrant on February 22, 2011. CP 111.

On March 16, 2012 the State moved to dismiss the charges without prejudice. CP 104, 113, 3RP 4. The District Court imposed warrant costs of $250 on C750435 and $271 on C750436. CP 104, 113, 115, 124, 1RP 43, 3RP 4.

The State immediately filed an information in Grant County Superior Court charging McCarter with Felony DUI (based on the four prior offenses) and DWLS in the 1st degree. CP 1-3. McCarter moved to dismiss the Superior Court case on the grounds that the warrant costs assessed to him in District Court constituted fines and therefore jeopardy had attached. CP 42-46.

The Superior Court denied the motion, ruling that (1) the district court matter was dismissed before McCarter was placed in jeopardy, (2) the warrant costs were administrative in nature, (3) the fee was not "punishment" within the meaning of the double jeopardy clauses, and (4) if the district court exceeded its authority in imposing the costs, McCarter's remedy lay in that court. 1RP at 81-82. McCarter was subsequently convicted of Felony DUI and DWLS in a jury trial. CP 215, 217.

IV. ARGUMENT

A. The Monetary Charges Assessed by the District Court Were Warrant Costs

The fees at issue in this case are clearly warrant costs. McCarter twice failed to appear for court and each time the docket entry shows the addition of a $100 fee. CP 106, 111. The docket notes reflect that the warrant fees somehow became $250 rather than $200 as the case progressed towards the dismissal. CP 105-14. When the case was dismissed on March 16 2011, the District Court judge stated "there is a $250 warrant fee on the DUI matter." 3RP 4.

The minute sheet reflecting the dismissal contains the word "Fine" with a blank line next to it. CP 104. Below that is a line labeled "WAR"

with "250" handwritten on it. *Id.* This was noted by the Superior Court judge below. 1RP 43. The "250" is difficult to see because it is partially obscured by a handwritten note indicating that the case was dismissed without prejudice. *Id.*, CP 104. On the bottom of the minute sheet is a line for Total Fines with "250.00" written on it. *Id.* But this "total" could only logically be comprised of the $250 warrant cost indicated above it. It is also important to note this minute sheet is an item filled out by the court clerk. Nowhere does it contain the judge's signature. Indeed when the judge verbally addressed the monetary assessment on the record, she referred to it as a "warrant fee." 3RP 4

Also, McCarter could not have been *fined* $250. DUI sentences contain certain mandatory fines. RCW 46.61.5055. McCarter's fine, had he been convicted in District Court of gross misdemeanor DUI, would have been a minimum of one thousand dollars because of his prior convictions. RCW 46.61.5055(3)(a). This amount would have been compounded by certain other fees and assessments applicable in District Court. *See* RCW 3.62.090 and CrRLJ 4.2 ("DUI Sentencing Grid"). Any fine would have been accompanied with a minimum jail time of at least 90 days as well as numerous other ramifications. RCW 46.61.5055. The DWLS charge would have also carried a mandatory minimum jail

sentence of 180 days. RCW 46.20.342(1)(a). But the District Court did not impose any of those terms, because the case was dismissed.

The District Court record is not illuminative as to why McCarter's warrant costs totaled $250 rather than $200 ($100 per warrant.) However, that only indicates, at worst, a mathematical error on the part of the District Court. The fact that there may have been an "overcharge" does not change the fundamental administrative character of the costs.

B. The Assessment of Warrant Costs is Permissible Under Relevant Law Even When the Case is Dismissed

Under Washington law, warrant costs survive a dismissal of the underlying action. RCW 10.01.160 governs a court's ability to require a defendant to pay warrant costs. Most costs can only be imposed on a convicted defendant. Exceptions include, *inter alia*, "costs imposed upon a defendant for preparing and serving a warrant for failure to appear." RCW 10.01.160(1). However, "[c]osts for preparing and serving a warrant for failure to appear may not exceed one hundred dollars." RCW 10.01.160(2). Warrant "costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant," unless the defendant is actually acquitted. *Id.*

McCarter cites *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976) for the proposition that costs may only be imposed on a convicted defendant. But *Barklind* shines no light on RCW 10.01.106 because the statute was enacted while *Barklind* was pending. *Id.* at 818. Furthermore, *Barklind* dealt with a different type of costs: public defender recoupment fees imposed upon convicted defendants. *Barklind* creates guidelines for when these fees are permitted, but that analysis does not apply to the type of administrative costs at issue here.

McCarter also cites *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 165 P.3d 399 (2007) for the proposition that costs may only be imposed on a convicted defendant. But *Utter* is not applicable in this case. The costs at issue in *Utter* were costs accrued by the Department of Social and Health Services in an attempt to restore Utter's competency. *Id.* at 298. But those were "expenses specially incurred by the state in prosecuting the defendant" as described in RCW 10.01.160(2). Unlike warrant costs, the costs described in *Utter* may only be imposed on a convicted defendant. RCW 10.01.160(1).

McCarter has cited no legal authority that prohibits the assessment of warrant costs in a dismissed case. To the contrary, RCW 10.01.160 is quite clear that warrant costs are permitted in this situation.

C. Double Jeopardy Principles Do Not Apply in this Case Because the Assessment of Warrant Costs Was Not a Punishment

It is well established under Washington law that in order for double jeopardy protections to apply there must be successive punishments. *State v. McClendon*, 131 Wn.2d 853, 862, 935 P.2d 1334 (1997). The courts uses a two-part test to determine whether an action is punitive. *In re Pers. Restraint of Forbis*, 150 Wn.2d 91, 100 74 P.3d 1189 (2003), *Harris v. Charles*, 171 Wn.2d 455, 467, 256 P.3d 328 (2011). The court first looks at the express or implied intent of the sanction. *Id.* "If its intent is not punitive, then the analysis turns on whether the sanction's purpose or effect nevertheless is so punitive as to negate that intent." *Id. citing State v. Catlett*, 133 Wn.2d 355, 366, 945 P.2d 700 (1997). "A defendant must present *clear proof* that a sanction not labeled as punitive is still so punitive as to be subject to the double jeopardy prohibition against multiple penalties." *Harris* at 470 (emphasis added.)

Here, the assessment of warrant costs was not intended as punishment. The purpose of the warrant costs provision in 10.01.160 was to prevent the warrant costs from being unfairly passed on to the taxpayers. S.B. REP. on S.B. 6065, 53rd Leg., Reg. Sess. (Wash. 1994). They allow the court system (and therefore the taxpayers) to recoup funds expended in the preparation and service of warrants.

The issue then becomes whether the assessment's purpose or effect was so punitive as to negate the intent. Here, the costs at issue are directly tied to the recovery of funds expended by the District Court due to McCarter's failures to appear. The amount in question is only $250. McCarter has not provided any proof that the costs were overly punitive. The fees at issue in this case were warrant costs and not fines of a punitive nature. Because the warrant costs were not a punishment, double jeopardy does not apply.

V. CONCLUSION

The fees assessed to McCarter in District Court were warrant costs. Under RCW 10.01.160, warrant costs survive the dismissal of the underlying case. Warrant costs are not punishment because their only purpose is to allow the government to recoup funds expended in the issuance of warrants for failure to appear. Since the assessment of warrant costs was not punishment, double jeopardy protections are not implicated. McCarter's conviction should be affirmed. If McCarter was overcharged by the District Court, he should seek a remedy there.

DATED this 8th day of August, 2012

Respectfully submitted:

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent. v. DARRELL McCARTER, Appellant.	))))))))))	No. 30336-5-III DECLARATION OF MAILING

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and Susan F. Wilk of Washington Appellate Project, attorney for Appellant, containing a copy of the Brief of Respondent in the above-entitled matter.

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Kaye Burns

Declaration of Mailing.