

FILED
JUL 01, 2014
Court of Appeals
Division III
State of Washington

NO. 31907-5-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

RICHARD CHARLES HARRIS,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The Judgment and Sentence improperly imposes special costs in the amount of \$2,748.26.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does imposition of special costs by a court clerk violate RCW 10.01.160(1) when there is no underlying documentation in the record to support the imposition of those costs and the trial court delegates the determination of those costs to the clerk?

STATEMENT OF CASE

M.C. is fifteen (15) years old. Richard Charles Harris is her former stepfather. (Munoz RP 1057, ll. 2-10; 1164, ll. 1-2).

Kristina Middleton is M.C.'s mother. She moved to Richland from Granger and M.C. joined her in January 2008. (Munoz RP 1055, ll. 10-21; RP 1063, ll. 3-10)

While the family was living in Granger in 2005 the Granger Police Department and CPS received a complaint of sexual abuse involving M.C.

(Munoz RP 875, ll. 23-24; RP 877, ll. 1-16; RP 916, l. 25 to RP 917, l. 2; RP 920, l. 19 to RP 921, l. 1; RP 954, ll. 21-25; RP 955, ll. 12-16; RP 956, ll. 21-25)

M.C. was interviewed on January 11, 2006. No accusations were made against Mr. Harris. Rather, an individual named Jerry Ford (“Little Gary”) was identified as the suspect. (Munoz RP 922, ll. 20-25; RP 923, ll. 20-22; RP 929, ll. 14-18; RP 947, ll. 3-19; RP 966, ll. 18-19; RP 973, ll. 10-15; RP 1317, l. 23 to RP 1318, l. 3)

On May 4, 2008 Officer Garcia of the Richland Police Department contacted Ms. Middleton at her home. He was looking for Mr. Harris. She advised him Mr. Harris was not present. Mr. Harris fled through a back window and was later arrested. (Munoz RP 1025, ll. 18-19; RP 1026, ll. 2-23; RP 1027, ll. 1-16)

In 2010 M.C. disclosed to her mother that Mr. Harris had been sexually abusing her for a number of years. The abuse started in Granger. M.C. told her mother that while Mr. Harris was watching her in May of 2008 that he again sexually abused her. This information was revealed only after M.C. was discovered sexually abusing her sister A.H. (Munoz RP 1065, ll. 2-21; RP 1066, ll. 9-12; RP 1073, ll. 4-9; RP 1118, ll. 12-21)

Mr. Harris, when engaging in sexual intercourse, uses a latex band and/or a hair tie around the base of his penis. This was confirmed by

Tammy Pearson and Ms. Middleton. (Munoz RP 863, ll. 20-25; RP 1074, ll. 2-9)

Mr. Harris wrote a letter to Sheila Scheibe. Ms. Scheibe gave the letter to Nancy McGillen. Ms. McGillen is a neighbor of Mr. Harris's father. The letter asked Ms. Scheibe to make sure that Mr. Harris's investigator was aware that he used the latex band for incontinence due to a prior accident. (RP 1031, ll. 5-17; RP 1244, l. 7 to RP 1245, l. 19; Exhibit 7A)

An Information was filed on February 4, 2011 charging Mr. Harris with first degree child rape. (CP 1)

Conditions of release were imposed on February 10, 2011. The conditions included \$30,000.00 bail. Mr. Harris filed a bail bond on March 30, 2011. (CP 5; CP 7)

Mr. Harris's jury trial was originally scheduled for April 25, 2011. Numerous continuances were granted until the commencement of trial on May 20, 2013. (CP 12; CP 14; CP 15; CP 16; CP 20; CP 21; CP 121; CP 127; CP 129; CP 301; 4/18/13 RP 12, ll. 2-9; Munoz RP 143, ll. 4-23)

An ER 404(b) hearing was conducted on January 9, 2012 and March 9, 2012. The trial court determined that the prior sexual abuse of M.C. was admissible at trial. (Munoz RP 93, ll. 17-25; RP 95, ll. 13-21; RP 111, l. 21 to RP 116, l. 8)

Mr. Harris filed a declaration claiming ineffective assistance of counsel and requesting dismissal of his case on January 11, 2013. Supporting declarations were provided by his sister and father. (CP 279; CP 288; CP 292)

Mr. Harris retained a new attorney who appeared on January 18, 2013. (CP 299)

The State filed an Amended Information on April 18, 2013. It added one (1) count of child molestation in the first degree and two (2) aggravating factors. The trial court later denied the amendment for child molestation in the first degree; but allowed the aggravating factors. (CP 306; Munoz RP 232, ll. 10-15)

At trial, M.C. testified that Mr. Harris began abusing her in Granger. He would rub her vagina and insert his finger. He performed oral sex on her. He had anal sex with her. He had her perform oral sex on him and it made her gag. Semen came out and it tasted salty. He would wear a rubber band on his penis. (Munoz RP 1165, ll. 1-4; RP 1166, ll. 4-21; RP 1167, ll. 9-12; RP 1168, ll. 15-21; RP 1171, ll. 5-22; RP 1173, ll. 3-5)

While living in Granger, R.H., Mr. Harris's son, saw his father and M.C. naked. He was moving up and down on her. He also saw them per-

forming oral sex a number of times. (Munoz RP 795, ll. 15-16; RP 799, ll. 18-21; RP 805, ll. 11-23; RP 806, l. 21 to RP 807, l. 25)

T.H., Mr. Harris's daughter, also observed interactions between M.C. and her father. This included seeing M.C. on her knees in the shed with Mr. Harris standing upright. Additionally, when Mr. Harris and M.C. were in the bedroom she heard M.C. say "Stop, it hurts." (Munoz RP 847, ll. 20-21; RP 849, ll. 14-15; RP 850, ll. 18-25; RP 851, ll. 10-17)

In May 2008 Mr. Harris climbed into the bathtub with M.C. He pulled her head down and put his penis in her mouth. He then took her into the bedroom and had anal sex. He also performed oral sex on her and put his fingers in her vagina. This occurred in Richland, Washington. (Munoz RP 1176, l. 19 to RP 1177, l. 4; RP 1177, ll. 11-18; RP 1178, ll. 1-6; ll. 14-17)

A cost bill was filed on June 19, 2013. The cost bill is incorporated in the Judgment and Sentence by reference. (CP 689; CP 739)

Mr. Harris was found guilty with both aggravating factors. Judgment and Sentence was entered on August 6, 2013. An exceptional sentence of one hundred and eighty (180) months to life was imposed. (CP 682; CP 683; CP 723)

Defense counsel made an oral motion to set aside the verdict due to a lack of evidence concerning the element of marriage. The oral motion

was formalized by a motion to arrest judgment which was filed on August 2, 2013. (CP 715; Munoz RP 1487, ll. 3-8)

Mr. Harris filed his Notice of Appeal on August 29, 2013. (CP 743)

SUMMARY OF ARGUMENT

A trial court does not have authority to delegate imposition of costs to a court clerk. The trial court is required to determine if costs should be imposed on a criminal defendant and, if so, how much.

The trial court record does not contain the necessary documentation to support the imposition of so-called special costs.

ARGUMENT

RCW 10.01.160(1) states:

The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, ... or costs imposed upon a defendant for preparing and serving a warrant for a failure to appear.

RCW 10.01.160(2) provides, in part:

Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. ... They cannot include expenses

inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. ... Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars.

Mr. Harris contends that there is no authority under RCW 10.01.160 for a sentencing court to delegate the determination of costs to a court clerk.

RCW 9.94A.760(1) provides, in part:

Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. **The court must**, on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments

(Emphasis supplied.)

Recently, in *State v. Lundy*, 176 Wn. App. 96, 103 (2013), it was determined that

If a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider a defendant's present or likely future ability to pay.

It is the Court that must consider a defendant's ability to pay. A court clerk does not have that authority.

Moreover, the documentation in the record is insufficient to support the imposition of the special costs set forth in the cost bill.

CONCLUSION

The trial court's failure to comply with statutory mandates relating to imposition of costs requires that the special costs set forth on a cost bill, which does not specify the nature of the costs, be removed from the Judgment and Sentence.

DATED this 1st day of July, 2014.

Respectfully submitted,

s/ Dennis W. Mlorgan

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NO. 31907-5-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	BENTON COUNTY
Plaintiff,)	NO. 11 1 00119 2
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
RICHARD CHARLES HARRIS,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 1st day of July, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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