FILED
MAR 18, 2016
Court of Appeals
Division III
State of Washington

NO. 32970-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JUDE JOSEPH ORTIZ SR., Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Was defense counsel's performance objectively reasonable when he did not challenge the execution of the search warrant?

2. Did the trial court properly impose legal financial obligations?

B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. There was sufficient evidence to prove that defense counsel's performance was objectively reasonable when he did not challenge the execution of the search warrant.

2. The trial court properly imposed legal financial obligations.

II. STATEMENT OF THE CASE

The Appellant, Jude Joseph Ortiz Sr. was convicted of manufacture a controlled substance, marijuana, with a school zone enhancement and involving a minor in an unlawful controlled substance transaction with a school zone enhancement after a jury trial. The charges stem from the following facts:

In July 2011, Ortiz' neighbor called the police to report that they could see a marijuana plant in Ortiz' yard. RP at 220. Officer Mike Deccio responded to Ortiz' residence located at 304 North Harding Avenue in Wapato, Washington to investigate. *Id.* at 144-45; 220-21. Once he arrived,

he saw what he believed to be a marijuana plant in the backyard and passed this information along to Sergeant Robert Hubbard of the Law Enforcement Against Drugs task force (task force) to follow up. *Id.* at 220-21.

On August 2, 2011, Sergeant Hubbard went to 304 North Harding Avenue in Wapato, Washington to follow up on the information provided by Officer Deccio. *Id.* at 144. He was unable to see any marijuana plants at Ortiz' residence as he drove by. *Id.* at 145-46. Sergeant Hubbard then contacted Ortiz' neighbor who gave permission to go into his backyard. *Id.* From the neighbor's backyard, Sergeant Hubbard saw two plants he believed were marijuana plants based on his training and experience (at trial testimony revealed Sergeant Hubbard completed numerous state and federal trainings on drug identification and had encountered marijuana at least 100 times during the course of his 11-year law enforcement career). *Id* at 145-48. Based on what he saw, Sergeant Hubbard applied for and obtained a warrant to search Ortiz' residence. *Id.* at 148.

Search Warrant

On August 11, 2011 at about 6:47 in the morning, Sergeant Hubbard and eight members of the task force executed the search warrant at Ortiz' residence. *Id.* at 149; 194. Sergeant Hubbard testified that he was part of the entry team. *Id.* 149-50. In this role, Sergeant Hubbard knocked on the door of Ortiz' residence and announced "police search warrant, open the

door." *Id.* at 150. No one answered the door and no noises were heard from inside of the residence. *Id.* at 150-51.

Sergeant Hubbard explained the task force's standard procedure of knocking and announcing police presence. *Id.* at 150-51. He explained that first members of the task force knock on the door three times and announce "police search warrant, open the door." *Id.* at 151. Then they wait one to two seconds before completing the same process a second time. *Id.* Finally, they wait another one to two seconds before completing the same process a third time unless they hear "crashing" or other movement that would suggest evidence was being destroyed. *Id.*

With respect to August 11, 2011, Sergeant Hubbard testified that he followed the task force's standard knock and announce procedure when the search warrant was executed at Ortiz' residence. *Id.* He also testified that he did not hear any noises coming from inside Ortiz' residence. *Id.*

After no one came to the door and no noises were heard, officers forced entry into Ortiz' residence by breaching the front door. *Id.* Once inside the residence, task force members performed a visual sweep and detained individuals they found as a safety precaution. *Id.* at 152. Five individuals were found inside the residence. *Id.* at 153. These individuals included an adult female, two small children, and two teenage males. *Id.* One of the teenage males was identified as Ortiz' 15-year-old son, J.O. *Id.*

at 156. After all of the individuals in the residence were identified, Sergeant Hubbard read the search warrant to them at around 7:07 in the morning. *Id.* at 155. Sergeant Hubbard next advised the individuals of their *Miranda* rights, which included the juvenile warnings for the teenagers. *Id.* at 156-58.

Next, task force members searched the residence. *Id.* at 158. They found 26 marijuana plants growing inside of a camp trailer on the property and 15 marijuana plants growing in the backyard. *Id.* at 159. The search of the residence also yielded marijuana growing manuals, timers, grow lights, a scale, currency, and mail addressed to Ortiz inside of a locked bedroom. *Id.* at 158; 160; 182; 194.

After the task force completed their search of Ortiz' residence, Sergeant Hubbard spoke with Ortiz. *Id.* at 186. The State was prohibited from eliciting testimony that Ortiz was in custody on a community custody violation pursuant to the defense's motion in limine. *Id.* at 69. Sergeant Hubbard testified that he advised Ortiz of his *Miranda* rights and that Ortiz agreed to speak with him. *Id.* at 185-86. Ortiz told Sergeant Hubbard that his mother informed him about the search warrant being served at his residence while he was out of town. *Id.* at 186. Ortiz also told Sergeant Hubbard that he and his son were growing marijuana, that he and his son

watered the marijuana plants daily, and that he planned to pay his son for helping him with the marijuana plants. *Id.* at 186-88.

Evidence collected during the search of Ortiz' house was submitted for forensic analysis. Two marijuana plants with complete root systems were submitted to the Washington State Crime Laboratory for testing. *Id.* at 199. A forensic scientist determined that the plants were in fact marijuana. *Id.* at 183-84; SE 2.

In support of the school zone enhancements, the State presented testimony from the retired assistant transportation director of the Wapato School District. She testified that each year the school district updates it school bus stops and shares this information with Yakima County. RP at 246-50. The director of the Yakima County GIS Department also testified that there was a school bus stop within 1,000 feet of Ortiz' residence. *Id.* at 273-76; SE 26.

After deliberating, the jury returned a guilty verdict on both counts and also found the school zone enhancement on both counts. RP at 389; CP at 62-65. The trial court then scheduled sentencing for November 21, 2014. *Id.* at 398.

Sentencing

The State urged the trial court to impose a top of the range sentence of 120 months plus a 24 month school zone enhancement for a total of 144

months imprisonment based on Ortiz' extensive history of felony drug convictions. *Id.* at 404-05; 430; CP at 69. The State explained that the school zone enhancement did not apply to the involving a minor charge. CP at 69. The State advised the trial court that Ortiz had an offender score of eight and had a standard range of 12 months and one day to 24 months for the manufacturing charge and 100 months and one day to 120 months for the involving a minor charge. RP at 404-05; 430; CP at 75. Ortiz asked the trial court to give him his freedom back. RP at 420. Defense counsel requested an exceptional sentence of 12 months and one day to run concurrent on both counts in addition to 24 months on the school zone enhancement that was required by statute to run consecutive. *Id.* at 425; 429; CP at 72.

After considering the statements of the parties, the court sentenced Ortiz to 100 months and one day. RP at 435. This equated to 12 months and one day plus a 24 month school zone enhancement on the manufacturing charge to be served concurrently with 100 months and one day on the involving a minor charge. *Id.* at 441. The case was then reset for presentation of the judgment and sentence.

On December 12, 2014, the State presented the judgment and sentence. The trial court inquired whether Ortiz was on disability and he indicated that he was. *Id.* at 440. The court capped the costs of incarceration

at zero dollars and imposed legal financial obligations totaling $4,010. *Id.* at 442. The legal financial obligations (LFOs) included a: $500 crime penalty assessment; $200 criminal filing fee; $600 court attorney recoupment fee; $100 DNA collection fee; $200 warrant fee; $60 sheriff service fee; $2,000 narcotics fine; $250 drug enforcement fund; and $100 crime lab fee. CP at 78.

This timely appeal then followed.

III. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS THAT DEFENSE COUNSEL'S FAILURE TO CHALLENGE THE EXECUTION OF THE SEARCH WARRANT WAS OBJECTIVELY REASONABLE AND DID NOT PREJUDICE ORTIZ BECAUSE THE KNOCK AND ANNOUNCE RULE WAS NOT VIOLATED.

Washington follows the test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) when evaluating ineffective assistance of counsel claims. This Court reviews ineffective assistance of counsel de novo. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Defendants challenging the effectiveness of counsel first have to overcome the strong presumption that counsel's performance was reasonable. *State v. Grier*, 172 Wn.2d 17, 33, 246 P.3d 1260 (2011). In order to prevail on an ineffective assistance of counsel claim here, Ortiz must demonstrate that defense counsel's performance was deficient and that defense counsel's deficient

performance prejudiced him. *Strickland*, 466 U.S. at 687; *see also State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Deficient performance occurs when the performance of defense counsel falls below an objective standard of reasonableness. *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). Prejudice, on the other hand, occurs when there is a reasonable probability the outcome of the proceedings would have been different, but for the deficient performance of defense counsel. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Ortiz has not demonstrated that defense counsel performed deficiently or that he was prejudiced by defense counsel's performance.

1. Defense counsel's decision not to challenge the execution of the search warrant was based on legitimate strategic or tactical reasons.

Defense counsel's failure to challenge the execution of the search warrant was soundly based on his understanding that the knock and announce rule was not violated. The knock and announce rule has two components mirroring RCW 10.31.040. The first component requires that law enforcement knock and announce their identity as well as their purpose. *State v. Alldredge*, 73 Wn. App. 171, 174-75, 868 P.2d 183 (1994). The second component requires a waiting period. *Id.* Washington courts have not yet clearly articulated how long the waiting period must be.

Authority directly on point to the inquiry here is *State v. Lomax*, 24 Wn. App. 541, 603 P.2d 1267 (1979) where the court held that knocking and announcing three times was sufficient to satisfy the knock and announce rule. In *Lomax*, law enforcement obtained a search warrant for the defendant's apartment. *Id.* at 543. First, they knocked and announced their presence, waited 10 or 12 seconds, and then heard a noisy stereo or television inside the apartment. *Id.* Next, they knocked and announced a second time and waited 10 or 12 seconds. Finally, they knocked and announced a third time and waited a few seconds before forcing entry. *Id.* The court reasoned that the noises heard inside the apartment gave officers reason to believe that someone was inside and not going to let them in. *Id.* Here, although the task force did not hear any noises, they were not required to wait for an "affirmative refusal" of entry. *Id.* at 543; *see also State v. Jones*, 15 Wn. App. 165, 168, 547 P.2d 906 (1976) (recognizing that ". . . it matters not that the record reveals ten, fifteen, or twenty seconds, for the true rule rejects time alone, even 'an exceedingly short time,' such as ten seconds, as the decisive factor . . . .").

While the waiting period in *Lomax* was 10 or 12 seconds after each knock and announce, the length of time officers must wait before entering a residence depends on the circumstances of each case. *See State v. Johnson*, 94 Wn. App. 882, 889-91, 974 P.2d 855 (1999) (finding a five to

ten second delay a reasonable waiting period before police forced entry after hearing suspects making noises).

The length of the waiting period is evaluated according to its reasonableness under the circumstances. *Alldredge*, 73 Wn. App. at 177. The reasonableness requirement is derived from a constitutional mandate that search warrants are reasonably executed. U.S. CONST. amend. IV; WASH. CONST. art. 1, § 7. In *Alldredge*, the court clarified that:

> Reasonableness does not require that police wait, if to do so would serve purpose. Thus, from a constitutional perspective the rule's waiting period ends not later than when the rule's purposes have been fulfilled.

73 Wn. App. at 176. Helping courts assess whether warrants have been reasonably executed is the underlying purpose of the knock and announce rule.

The intended purpose of the knock and announce rule is to forestall violence, protect privacy, and avoid unnecessary property damage. *Id.* at 176-77. In this case, the task force clearly furthered the purposes of the knock and announce rule. They also complied with the constitutional requirements that searches are reasonably executed. The record below demonstrates that the task force knocked and announced their presence three times before forcing entry into Ortiz' residence. RP at 150-51. Sergeant Hubbard testified that he did not hear any noises from inside Ortiz'

residence. *Id.* As a member of the entry team, Sergeant Hubbard was in the best position to discern whether any noises could be heard from inside the residence. It was then reasonable under these circumstances for the task force to assume that they would not be granted entry into Ortiz' residence.

Accordingly, Ortiz cannot demonstrate that defense counsel's failure to challenge the execution of the search warrant was not based on legitimate strategic or tactical reasons. It was reasonable for defense counsel not to challenge the execution of the search warrant when substantial evidence supports that the knock and announce rule was not violated. Ortiz, therefore, is unable to rebut the presumption that defense counsel acted reasonably in not challenging the execution of the search warrant.

2. The trial court would likely not have suppressed the evidence obtained from the search of Ortiz' residence as a violation of the knock and announce rule even if defense counsel had raised it below.

Ortiz relies on persuasive authority from Florida and Idaho to support a very strained interpretation of the knock and announce rule. *See* Brief of Appellant at 13-14. It is widely recognized that "[d]ecisions of the federal circuit courts are 'entitled to great weight' but are not binding on state courts." *W.G. Clark Constr. Co. v. Pac. Nw. Re'l Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014) (quoting *Home Ins.*

Co. of N.Y. v. N. Pac. Ry. 18 Wn.2d 798, 808, 140 P.2d 507 (1943)). In the event that Washington's interpretation of the knock and announce rule was not well settled, it would be helpful to understand the treatment of the rule in federal jurisdictions. That is not the case here. As the discussion above illustrates, the requirements of the knock and announce rule in this state are quite clear.

Apart from persuasive authority, Ortiz applies an overly expansive view of *State v. Garcia-Hernandez*, 67 Wn. App. 492, 837 P.2d 624 (1992). In *Garcia-Hernandez*, police obtained a search warrant for a defendant's residence. *Id.* at 494-95. The narcotics team arrived at the defendant's residence at around 1:30 in the morning and found the door open. *Id.* The team yelled "Seattle police, search warrant" and waited five seconds before entering the apartment and yelled "Seattle police, search warrant" again before entering the defendant's bedroom where they found him sitting on his bed. *Id.* at 495. On review, the court found that the knock and announce rule was complied with and that the five-second delay was reasonable under the circumstances. *Id.* at 497.

Ortiz argues that because exigent circumstances were not present in this case, the task force should have waited longer before entering his residence. *See* Brief of Appellant at 12-13. This argument fails. The *Garcia-Hernandez* Court explicitly recognized that "[w]hen the police have

satisfied the Fourth Amendment's probable cause and warrant requirements, the occupant's right of privacy is severely limited because the police have the authority to enter the home regardless of the occupant's wishes." *Id.* at 497-98. Ortiz had a diminished expectation of privacy based on the fact that the task force obtained a valid search warrant for his residence. Ortiz did not challenge the validity of the search warrant below nor is he challenging it on appeal. Instead, he is only challenging the execution of the search warrant.

Meriting further discussion is the fact that this case is distinguishable from *State v. Schmidt*, 48 Wn. App. 639, 740 P.2d 351 (1987). Ortiz relies upon *Schmidt* to support his claim that the execution of the search warrant was unreasonable. In *Schmidt*, law enforcement only waited three seconds after announcing their presence before pushing in the door to gain entry. Here, on the other hand, the task force knocked and announced their presence three different times and waited one to two seconds after each announcement before entering Ortiz' residence. RP at 150-52. The facts in this case bear little similarity to those in *Schmidt*.

B. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS.

1. This Court should deny review of Ortiz' legal financial obligations and ability to pay because this issue was not raised at the trial court level.

Ortiz relies on *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) to support discretionary review of LFOs and concedes that this issue was never raised below. Brief of Appellant at 17. It is commonly accepted that a party may not raise a new argument on appeal that was not raised before the trial court. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); RAP 2.5(a). Post-*Blazina* courts have held that failure to object to the imposition of LFOs at sentencing waives the issue on appeal unless the appellate court utilizes its discretion to permit review of the issue. *State v. Lyle*, 188 Wn. App. 848, 853, 355 P.3d 327 (2015). This Court recently identified several reasons to decline to address issues not raised at the trial court level which are compelling.

> Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

State v. Stoddard, 192 Wn. App. 222, 227 (2016) (internal quotations omitted). Even the *Blazina* Court recognized that: "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." 182 Wn.2d at 832. Ortiz did not challenge LFOs below, and he should not be allowed to do so now. In the event that this Court exercises discretionary review, the record demonstrates that the trial court properly assessed Ortiz' current and future ability to pay mandatory LFOs.

2. The trial court properly imposed mandatory LFOs.

Stoddard makes it clear that a trial court is not required to assess a defendant's ability to pay mandatory LFOs. In no uncertain terms, this Court held "[t]rial courts must impose such fees regardless of a defendant's indigency." *Stoddard*, 192 Wn. App. at 225. Thus, Ortiz' reliance on *Blazina* to challenge the imposition of mandatory LFOs is misplaced.

The mandatory LFOs imposed by the trial court included the: $500 crime penalty assessment; $200 criminal filing fee; $100 DNA collection fee; $2,000 narcotics fine; and $100 crime lab fee. CP at 78. Each one of these fees are authorized by statutes. The narcotics fine is also authorized by statute. The crime penalty assessment of $500 is mandated by RCW 7.68.035(1)(a). The DNA collection fee is mandated by RCW 43.43.7541.

The criminal filing fee is mandated by RCW 36.18.020(2)(h). The crime lab fee is mandated by RCW 43.43.690. And, the narcotics fine is mandated by RCW 69.50.430. Consistent with *Stoddard*, the trial court properly imposed mandatory LFOs. Additionally, the trial court was not required under *Stoddard* to determine Ortiz' present and future ability to pay before imposing mandatory LFOs.

3. If review is granted under RAP 2.5(a), Respondent agrees to strike discretionary LFOs in order to avoid the continued costs of litigation.

What then remains after *Stoddard* is whether the trial court's imposition of discretionary LFOs was proper. Both *Blazina* and RCW 10.01.160(3) require trial courts to assess a defendant's present and future ability to pay discretionary LFOs at sentencing. The extent of what is required in the trial court's "individualized inquiry" is disputed. *Blazina*, 182 Wn.2d at 838.

The discretionary LFOs imposed by the trial court included: the $600 court appointed attorney recoupment fee; $200 warrant fee; $60 sheriff service fee; and $250 drug enforcement fund fee. CP at 78.

While not conceding this issue, Respondent agrees to strike discretionary LFOs in order to avoid the continued costs of litigation if review is accepted.

IV. CONCLUSION

First, Ortiz has not met his burden in proving that defense counsel's performance fell below an objective reasonableness when he did not challenge the execution of the search warrant of Ortiz' residence. Ortiz also has not demonstrated that defense counsel's performance prejudiced him. Second, since Ortiz did not challenge the imposition of LFOs below, Ortiz should not now be allowed to do so under RAP 2.5. If discretionary review is granted, *Stoddard* supports that the trial court's imposition of mandatory LFOs was proper. However, with respect to discretionary LFOs, Respondent agrees to strike discretionary LFOs in order to avoid the continued costs of litigation.

Respectfully submitted this 18th day of March, 2016

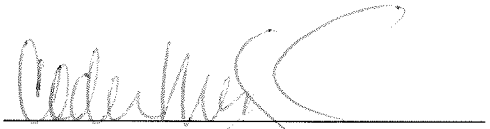
CODEE L. MCDANIEL WSBA #42045
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on March 18, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. David Gasch at gaschlaw@msn.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of March, 2016 at Yakima, Washington.



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