

FILED

May 13, 2016

Court of Appeals
Division III
State of Washington

NO. 33425-2-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ISMAEL SOTO-VALDEZ

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
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TABLE OF CONTENT

I. IDENTITY OF RESPONDENT 1

II. RELIEF REQUESTED 1

III. STATEMENT OF FACTS..... 1

IV. ARGUMENT..... 1

 A. THE TRIAL COURT PROPERLY GAVE THE
 REASONABLE DOUBT INSTRUCTION MAN-
 DATED BY THE WASHINGTON SUPREME
 COURT..... 1

 B. THE COURT DID NOT ABUSE ITS DISCRETION
 IN IMPOSING LEGAL FINANCIAL OBLIGATIONS... 5

V. CONCLUSION 9

TABLE OF AUTHORITIES

CASES

1000 Virginia Ltd. Partnership v. Vertecs Corp., 158
Wn.2d 566, 578, 146 P.3d 423 (2006) 3

State v. Baldwin, 63 Wn.App. 303, 310, 818 P.2d 1116,
837 P.wd 646 (1991) 8

State v. Bennett, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007)..... 3

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011)..... 7, 8

State v. Duncan, 180 Wa.App. 245, 327 P.3d 699 (2014) 5, 6

State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)..... 3

State v. Lizarraga , 191 Wn.App. 530, 567, 364 P.3d 810 (2015)... 5

State v. Nabors, 8 Wn.App. 199, 505 P.2d 162 (1973)..... 4

State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988) 2

State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959) 4

State v. Thompson, 13 Wn. App.1, 533 P.2d 395 (1975)..... 3, 4

OTHER AUTHORITIES

WASHINGTON PATTERN JURY INSTRUCTIONS:
CRIMINAL 4.01 (WPIC) (3d Ed 2008) 2, 3, 4, 5

RULES

RAP 2.5(a)(3)..... 5

I. IDENTITY OF RESPONDENT

The State of Washington, Respondent, by Shawn P. Sant, Franklin County Prosecuting Attorney, by and through David W. Corkrum, Deputy Prosecuting Attorney, asks for the relief designated in Part II.

II. RELIEF REQUESTED

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction of Appellant by jury trial and the Judgment and Sentence of Appellant imposed by the Superior Court in the above-entitled case

III. STATEMENT OF FACTS

Respondent accepts and relies upon the Appellant's statement of facts and requests it be incorporated within respondent's motion.

IV. ARGUMENT

- A. THE TRIAL COURT PROPERLY GAVE THE REASONABLE DOUBT INSTRUCTION MANDATED BY THE WASHINGTON SUPREME COURT.

The appellant challenges the reasonable doubt instruction given by the trial court. However, the instruction given as

Instruction Numbered 3 was simply the standard instruction set forth in WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (WPIC) (3d Ed 2008). It reads as follows:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving every element of each crime beyond a reasonable doubt. The defendant has no burden.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

(CP28)

This instruction has a status that is unusual and possibly unique. Ordinarily, trial courts have discretion to decide how instructions are worded. *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). The Supreme Court has warned against any attempts to improve this instruction:

We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.

State v. Bennett, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007).

The Washington Supreme Court, in the exercise of its inherent supervisory powers, instructed the trial courts to use WPIC 4.01 in every criminal jury trial. *Bennett* at 306. Decisions of the Washington Supreme Court are binding on all lower courts. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Accordingly, the trial court had no choice but to give WPIC 4.01 as its reasonable doubt instruction.

Nonetheless, the Appellant argues that the instruction is erroneous. To change that instruction would require overruling *Bennett*. This court is required to follow controlling precedent from the Supreme Court. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Only the Supreme Court can overrule *Bennett*.

The Court in *State v. Thompson*, 13 Wn. App.1, 533 P.2d 395 (1975), rejected the Appellant's argument. The defendant

there argued that WPIC 4.01 “misleads the jury because it requires them to assign a reason for their doubt, or to acquit.” *Id.* at 5.

The defendant in *State v. Thompson*, challenged this exact same language “arguing rather strenuously that this phrase (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt in order to acquit.” 13 Wn.App. 1, 4-5, 533 P.2d 395 (1975).

Rejecting the challenge, the court stated:

Although we recognize that this instruction has its detractors, it was specifically approved in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959); and also in *State v. Nabors*, 8 Wn.App. 199, 505 P.2d 162 (1973). We are, therefore, constrained to uphold it. We would comment only that it does not infringe upon the constitutional right that a defendant is presumed innocent; but tells the jury when, and in what manner, they may validly conclude that the presumption of innocence has been overcome.

Furthermore, the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

Id.

Most recently in *State v. Lizarraga*, 191 Wn.App. 530, 567, 364 P.3d 810 (2015), the court found the language in WPIC 4.01 which

reads, “A reasonable doubt is one for which a reason exists,” does not undermine the presumption of innocence or relieve the State of its burden of proof. WPIC 4.01 is a correct statement of the law that permits both the State and the defendant to argue their theories of the case.

Because the Appellant’s challenge is being raised for the first time on appeal, he must demonstrate that the trial court’s instruction contained “manifest error affecting a constitutional right.” RAP 2.5(a)(3). The instruction was the standard one that is mandated by the Supreme Court. Giving it was not error.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Appellant challenges the court’s imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay.

The Court of Appeals addressed this challenge in *State v. Duncan*, 180 Wa.App. 245, 327 P.3d 699 (2014). The court held that it would decline to address for the first time on appeal a claim that the record did not support the trial court’s findings regarding ability to pay discretionary LFO’s. The opinion explains that an

offender may decline to challenge the finding at the trial level, because the State's burden of proof is so low. But also an offender has good strategic reasons to waive the issue at the time of sentencing when there are more important issues at stake. At the moment the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful" to portray oneself as perpetually unemployed and irretrievably indigent. *State V. Duncan* at 280. And, in any case, the matter can be readdressed later by a petition for remission at the more pertinent time, i.e. the time of collection.

The record provides sufficient evidence for the court's finding and sentence. The Appellant was a 32 year old, fit man. The record indicates that the Appellant is not burdened by language or competency barriers.

The court found that the Appellant was an adult who was not disabled and had the ability to work and pay his fines at a rate of \$100 per month. CP 12. Considering the small amount of fines imposed and the reasonable payment schedule, the court had sufficient evidence of the Appellant's ability to pay the ordered costs.

The Appellant asks the court to strike the finding 2.5, which is on page 4 of the judgment and sentence, arguing that this would be consistent with the holding in *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). The Appellant argues that since the Court did not inquire further into the Appellant's financial resources or consider the burden payment of LFO's would impose on him. The matter should be remanded for the sentencing court to make an individualized inquiry into the Appellant's current and future ability to pay before imposing LFO's. Brief of Appellant at 21-22. Because, unlike *Bertrand*, there is evidence on the record demonstrating the Appellant's ability to pay, there is no cause to strike the supported finding. The Appellant's request to strike the court's factual finding must be denied. The finding is supported in the record; and the trial court deserves discretion on factual matters.

In *State v. Bertrand*, 165 Wn.App. at 404, the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and, therefore, held that the finding was clearly erroneous. However, the court also noted that the

question was not ripe under *State v. Baldwin*, 63 Wn.App. 303, 310, 818 P.2d 1116, 837 P.wd 646 (1991). *State v. Bertrand*, 165 Wn. App. At 405. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO's. *State v. Bertrand*, 165 Wn. App. At 405.

Note that even if the finding were without basis in the record (which is not the case here), the Appellant's request to strike not just the finding but also the imposition of fines is not the holding in *Bertrand*. Rather the *Bertrand* court struck the finding, but affirmed the imposition of LFO's, noting that the proper time to address the question is "when the government seeks to collect the obligation." *State v. Bertrand*, 165 Wn. App. At 405, *citing State v. Baldwin*, 63 Wn. App. At 310.

This record is sufficient to sustain the finding that the Appellant has the present and future ability to pay court costs. The court did not abuse it's discretion in imposing the legal financial obligations. The case should be affirmed and not remanded to the trial court for further inquiry into the Appellant's current and future ability to pay before imposing LFO's.

V. CONCLUSION

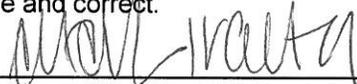
On the basis of the arguments set forth herein, it is respectfully requested that this court affirm the jury's finding of guilt, subsequent conviction, and judgment and sentence imposed by the trial court.

Dated this 13th day of May, 2016.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: 
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Deputy Prosecuting Attorney

Affidavit of Service	David Gasch gaschlaw@msn.com	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated 13th, May 2016, Pasco WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 13th day of May, 2016  Notary Public and for the State of Washington residing at Pasco My appointment expires: September 9, 2018		