

FILED
MAY 11, 2016
Court of Appeals
Division III
State of Washington

NO. 33573-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

SHANE ROBERT HUGHES,

Appellant.

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

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Amended Information, charging a single count of Possession of a Stolen Vehicle, omits an essential element of the crime.

2. The trial court erred under RCW 43.43.754 in ordering Hughes to submit a DNA sample.

3. Appendix 4.6 to the Judgment and Sentence ordering Hughes to report to DOC supervision contradicts the court's order that Hughes not serve a term of community custody.

4. The appendix to the Judgment and Sentence ordering Hughes to make monthly payments of \$100 within 30 days of the date on the Judgment and Sentence contradicts the court's order that Hughes pay no costs.

5. Given Hughes's indigency, this Court should not impose appellate costs if the State substantially prevails.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused has a protected constitutional right to be informed of the criminal charges when hauled into court, so he can prepare and mount a defense. Is the information charging possession of a stolen vehicle defective in failing to allege that Hughes withheld or appropriated a stolen vehicle to the use of someone other than the owner or person entitled thereto?

2. RCW 43.43.754 expressly states a defendant need not provide a DNA sample upon sentencing if he has already provided a sample under the statute. Where the record sufficiently shows Hughes already provided a DNA sample, did the trial court abuse its discretion when it ordered him to submit yet another sample?

3. Hughes did not have to serve a term of community custody. Yet, the judgment and sentence directs Hughes to report to DOC and abide by certain conditions. Should this scrivener's error be stricken from Hughes's judgment and sentence?

4. Hughes's appendix to the Judgment and Sentence ordered him to make monthly payments of \$100 starting within 30 days of the judgment and sentence. But the trial court struck all of Hughes's financial obligations from the Judgment and Sentence. Should this scrivener's error, the appendix, be stricken from Hughes's judgment and sentence?

5. Given that the trial court found Hughes indigent and his indigency is presumed to continue throughout review, should this court disallow appellate costs if the State substantially prevails on appeal?

STATEMENT OF THE CASE

Shane Hughes admitted to taking a blue Dodge pickup parked at the Yakima Valley residence of Otto Sieber. RP¹ 41, 158. Sieber's house and yard were in shambles. No one had lived there for years. RP 41, 145. Hughes believed Sieber was dead, his family lived in Japan, and the truck was abandoned. RP 162. In reality, Sieber lived in a care facility and had done so for years after suffering a traumatic brain injury in a car accident. RP 117, 139. The injury left Sieber unable to communicate or recognize his teenage son or ex-wife. Although Sieber owned the truck and property, he did not have the mental wherewithal to make any decisions. RP 138, 140.

That Hughes and Cody Magruder took the truck from Sieber's yard in January 2014 came to light when, after being arrested, Hughes's cousin, Miranda Roseberg, shared information with Kittitas County Sheriff's Sergeant Rob Hactor in hope of leniency on her own criminal matters. RP 30-31, 52-53, 128-29. The truck was on another cousin's property near Ellensburg. RP 32-33, 78. The truck was being dismantled to be sold for parts. RP 35, 108-09, 158, 161. After receiving confirming paperwork

¹ The verbatim report of proceedings in this appeal are referenced as follows: RP 12/1/14 Omnibus; RP Opening Statement 6/23/15; and "RP" meaning the two consecutively numbered volumes for the trial heard on June 23 and 24, 2015.

from Sieber's representative that the truck was indeed stolen, the Kittitas County Sheriff's Office impounded the truck. RP 111.

By Amended Information, the Kittitas County Prosecutor charged Hughes with "knowingly possess[ing] a stolen vehicle ... a Dodge Ram ... belonging to Otto Sieber ... thereby committing the felony crime of POSSESSION OF A STOLEN VEHICLE ... contrary to [RCW] 9A.56.068." CP 1. Hughes did not challenge the sufficiency of the Amended Information.

Hughes did not testify and presented no defense witnesses. RP 193. A jury found Hughes guilty. RP 227; CP 2.

At sentencing, Hughes did not contest his criminal history or his offender score calculation of 38 points. RP 233-35; CP 5. Hughes, born in 1982, has 22 felony convictions for crimes committed between 1996 and 2015. CP 3, 5. The court imposed a high end sentence of 57 months and ran the sentence consecutive to his sentence in Kittitas County cause number 14-1-00294-6. CP 6, 7. Hughes's sentence did not include a term of community custody but an appendix to the judgement and sentence requires him to report for post-release DOC supervision and abide by certain conditions. CP 7, 14-15. The court struck all of Hughes's legal financial obligations including the \$100 DNA fee but did not strike the boilerplate language requiring Hughes provide a DNA sample. CP 9, 10.

Hughes did not object to giving a sample and there was no discussion on the record about Hughes having previously given a sample on any of his 22 prior felony convictions. RP 232-37.

Hughes appeals all portions of his judgment and sentence. CP 17.

Hughes was represented at trial by court-appointed counsel. He is represented by court-appointed counsel on appeal. Supplemental Designation of Clerk's Papers, Order of Indigency (sub. nom. 82).

ARGUMENT

1. Hughes's conviction must be reversed because the amended information fails to allege all of the essential elements of Possession of a Stolen Vehicle.

A. Hughes's charging document must inform him of all the essential elements of the charged offense.

A criminal defendant has the constitutional right under both the federal and the state constitution to be informed of the criminal charges against him so he may mount a defense. *State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). The Sixth Amendment to the United States Constitution requires that "[i]n all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation...." The Washington State Constitution, Article 1, § 22 (amend. 10) further requires that "[i]n all criminal prosecutions the accused shall have the right ... to demand the nature and cause of the action against him...." When an information omits a statutory element of a charged crime, it is

constitutionally insufficient because it fails to state an offense. *State v. Holt*, 104 Wn.2d 315, 320-21, 704 P.2d 1189 (1985).

An information must contain every essential element of the charge, and along with all supporting facts must be put forth with clarity. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). To satisfy constitutional requirements, a charging document must state both the statutory and non-statutory essential elements of the crime charge. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

“An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992).

An appellate court reviews allegations of a constitutionally infirm information de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

- B. Under the controlling authority of *State v. Satterthwaite*, the Amended Information on which Hughes was tried is defective because it omitted an essential element.

Hughes's Amended Information reads,

He, the said SHANE R. HUGHES, in the State of Washington, on or about the month of January 2014, did knowingly possess a stolen vehicle, to wit: Dodge Ram, license plate #B80949H, belonging to Otto Sieber; thereby committing the felony crime of POSSESSION OF A STOLEN VEHICLE; contrary to Revised Code of Washington 9A.56.068.

CP 1.

Two statutes provide the essential elements of possession of a stolen vehicle. RCW 9A.56.068(1) provides, "A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle." RCW 9A.56.140(1) provides, "Possessing stolen property means to knowingly receive, retain, possess, conceal, or dispose of stolen property knowing it has been stolen and to *withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.*" (emphasis added).

The Amended Information alleged only that Hughes "did knowingly possess a stolen vehicle." CP 1. An essential element of the crime of possession of a stolen vehicle is to "*withhold or appropriate the same to the use of any person other than the true owner or person entitled*

thereto.” *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738 (2015)² (quoting RCW 9A.56.140).

The *Satterthwaite* court reasoned: “It is the withholding or appropriating of a stolen item of property to the use of someone other than the owner that ultimately makes the possession illegal, thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use, or dispose of known stolen property.” *Satterthwaite*, 186 Wn. App. at 364. By failing to list the “withhold or appropriate” element, the Amended Information failed to apprise Hughes of the charge. Merely citing to a statute cannot apprise a defendant to the essential elements of the crime with which he is charged. *Zillyette*, 178 Wn.2d at 162; *Vangerpen*, 125 Wn.2d at 787. Defendants should not have to search for the rules or regulations they are accused of violating. *City of Auburn v. Brooke*, 119 Wn.2d 623, 627, 836 P.2d 212 (1992).

Under *Kjorsvik*, the test for the sufficiency of a charging document challenged for the first time on appeal is:

1. Do the necessary facts appear in any form, or by fair construction can they be found in the charging document; and if so

2. Can the defendant show that he was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

² The Supreme Court accepted the *Satterthwaite* decision for review in *State v. Porter*, 188 Wn. App. 1051, 2015 WL4252605. (See No. 92060-5 set for oral argument May 24, 2016).

Kjorsvik, 117 Wn.2d at 105-10.

Where the defendant satisfies the first prong of the *Kjorsvik* test, the court presumes prejudice and reverses without reaching the second prong. *Zillyette*, 178 Wn.2d at 162. Here, because the necessary facts of the essential elements of “withhold or appropriate” do not appear in the charging document, prejudice is presumed.

C. Hughes’s conviction must be reversed.

The remedy for a defective information, as controlled by *Satterthwaite*, and *Zillyette*, is reversal of the conviction and remand for further proceedings in the trial court. *Satterthwaite*, 186 Wn. App at 366; *Zillyette*, 178 Wn.2d at 163. That remedy should be afforded Hughes.

2. The trial court erred when it ordered Hughes to submit to another collection of his DNA.

The sentencing court ordered Hughes to submit to DNA collection pursuant to RCW 43.43.754(1). CP 10.³ Yet, the record strongly supports that Hughes’s DNA was already collected under that statute. Given the record, the trial court abused its discretion when it ordered Hughes to submit to yet another collection of his DNA.

A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds” or made for “untenable

³ See Judgment and Sentence Section 4.4. CP 10.

reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

RCW 43.43.754(1) requires a biological sample “must be collected” when an individual is convicted of a felony offense. However, RCW 43.43.754(2) expressly provides: “If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required.” The trial court has discretion whether to order the collection of an offender’s DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant’s DNA to be collected under RCW 43.43.754(1) where the record adequately supports that the defendant’s DNA has already been collected. The Legislature clearly recognized that collecting more than one DNA sample from an individual is unnecessary. RCW 43.43.754(2). Moreover, it is an utter waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders. The plain fact is multiple DNA collections are wasteful and pointless.

The record strongly supports the fact that Hughes's DNA has been collected under RCW 43.34.754(1). *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642 (2015). Thornton is distinguishable in this regard. On appeal Thornton challenged the imposition of a DNA collection fee contending the requirement had already been fulfilled because of her prior 2014 delivery of a controlled substance offense included in her offender score. *Thornton*, 188 Wn. App. At 373-74. When the trial court asked if a DNA sample had already been collected on the 2014 case, the prosecutor responded in the negative. Thornton did not dispute the State's assertions. *Id.* at 374. Citing this fact, the court concluded RCW 43.43.754(2) did not apply and imposition of a \$100 collection fee was appropriate. *Id.* at 374.

Unlike *Thornton*, the criminal history agreed to by the parties established Hughes had been convicted of 14 prior adult felonies between 2000 and 2015 and 8 juvenile felonies between 1996 and 1999. RP 232-36, CP 5. The State started collecting DNA samples for some offenses as early as 1990. Former RCW 43.43.754 (1989). Moreover, there was no evidence suggesting Hughes's DNA had not been collected and placed into the DNA database. If Hughes was declined the opportunity to provide a DNA sample on all of his prior 22 felonies, the collection system is broken. No one mentioned historic systemic problems in collecting and retaining DNA samples. Also, the court actively struck from the judgment

and sentence Hughes's obligation to pay a \$100 DNA collection fee. CP 9. By contrast, the DNA collection requirement at Judgment and Sentence section 4.4 consists of boilerplate language that persists in the judgment and sentence unless the court notices it and marks out the paragraph. CP 10. Together, these facts create a strong inference that Hughes's DNA was in the database and, thus, he fell within the parameters of RCW 43.43.754(2). Hence, it was manifestly unreasonable for the sentencing court to impose the requirement. The DNA collection order must be reversed.

3. Judgment and Sentence Appendix 4.6 should be stricken because the trial court did not impose community custody.

As the trial court imposed no term of community custody, Judgment and Sentence Appendix 4.6 which requires Hughes to report to DOC within 72 hours of the commencement of community supervision and abide by conditions of supervision should be stricken. CP 7. The judgment and sentence and not the appendix accurately comports with what the court ordered.

A trial court may correct a clerical error in a judgment and sentence at any time under CrR 7.8(a).⁴ *State v. Snapp*, 119 Wn. App. 614,

⁴ CrR 7.8(a). Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any

626, 82 P.3d 252 (2004). A clerical error is one in which “the judgment, as amended, embodies the trial court’s intentions, as expressed in the record at trial.” *Snapp*, 119 Wn. App. at 627 (quoting *Presidential Estates Apartment Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). If an error is clerical, the amended judgment and sentence should correct the language to reflect the court’s intention or add the language that the court inadvertently omitted. *Snapp*, 119 Wn. App. at 627. In *Snapp*, the court concluded that omitting a treatment program condition from a judgment and sentence was clerical error because the clerk’s minutes reflected the court had intended to impose the condition. *Snapp*, 119 Wn. App. at 627.

In Hughes’s case, the court did not impose community supervision. CP 7. It is error for the judgment and sentence to order Hughes to report to community custody and abide by terms of his community custody. CP 14. Hughes’s case should be remanded to the trial court to amend the judgment and sentence to reflect the court’s intent.

time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

4. The Judgment and Sentence requirement that Hughes pay \$100 each month to the Kittitas County Clerk's Office must be stricken as it contradicts the court's ruling at sentencing.

By the Judgment and Sentence, Hughes must make \$100 payments to the Kittitas County Clerk's Office within 30 days of the date on his Judgment and Sentence. CP 16. But at sentencing, the court struck all financial obligations from the Judgment and Sentence. CP 9. Since the appendix to the judgment and sentence contradicts what the court ordered, the appendix must be stricken. CP 16. There is no basis under which Hughes must pay the clerk's office \$100 per month.

5. Any request that costs be imposed on Hughes for this appeal should be denied because the trial court determined he cannot pay legal financial obligations.

This Court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 386, 367 P.3d 612 (2016). The defendant's inability to pay appellate costs is an important consideration to consider in deciding whether to disallow costs. *Id.* at 391. Here, the trial court found Hughes is indigent and cannot pay legal financial obligations. Supp. DCP, Motion to Seek Review at Public Expense (sub. nom 80); Supp. DCP, Order of

Indigency (sub. nom. 82). This Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

The Rules of Appellate Procedure allows the State to request appellate costs if it substantially prevails. RAP 14.2 A “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court held that it allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, *RAP 14.2 affords the appellate court latitude in determining if costs should be allowed*; use of the word “will” in the first sentence appears to remove discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but *that rule allows for the appellate court to direct otherwise in its decision.*

Nolan, 141 Wn.2d at 626 (emphasis added).

Likewise, the controlling statute provides that the appellate court has discretion to disallow an award of appellate costs. RCW 10.73.160(1) states, “The court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added).

In *Sinclair*, the Court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the Court

should exercise in appropriate cases. *Sinclair*, 192 Wn. App. at 391. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” *Id.* at 388. Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *Id.* at 389. Thus, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *Id.* at 389-90. Under 14.2, the Court may exercise its discretion in a decision terminating review. *Id.* at 386.

The Court should deny an award of appellate costs to the State in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, at 393. Imposing costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Sinclair*, 192 Wn. App. at 391 (citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)). “It is entirely

appropriate for an appellate court to be mindful of these concerns.”
Sinclair, 192 Wn. App. at 391.

In *Sinclair*, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at State expense, finding Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review,” and “the defendant cannot contribute anything toward the cost of appellate review.” *Sinclair*, 192 Wn. App. at 392. Given Sinclair’s poverty, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he could pay appellate costs. *Sinclair*, 192 Wn. App. at 393. The Court ordered that appellate costs not be awarded. *Id.*

Similarly, here, Hughes is indigent and lacks an ability to pay. At sentencing, the trial court refused to impose discretionary legal financial obligations, finding “the defendant lacks the present and future ability to pay them.” CP 9; RP 236. The court also entered an order authorizing Hughes to appeal in forma pauperis. Supp. DCP, Order of Indigency (sub. nom 82). This finding is supported by the record. Although he is only 38 years old, Hughes already has a lengthy felony criminal history, which will hinder any future attempts to obtain gainful employment. CP 5. The trial court ordered Hughes’s sentence be consecutive with Kittitas County 14-1-00296-6. That case is on appeal before this court under #33574-7-III.

The trial court ordered Hughes serve 218 months. If Hughes is unsuccessful on both appeals, he will be released as a much older man after having spent much of his life incarcerated. Given these factors, it is unrealistic to think Hughes will be able to pay appellate costs.

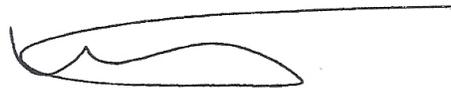
This Court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail.

CONCLUSION

Hughes possession of a stolen vehicle should be reversed and remanded to the trial court for further action.

Lacking that remedy, the court should vacate the court's order authorizing the collection of Hughes's DNA, strike the community supervision reporting requirement and conditions, strike the obligation to pay the county clerk \$100 per month, and not impose appellate costs.

Respectfully submitted May 11, 2016.



LISA E. TABBUT/WSBA 21344
Attorney for Shane Robert Hughes

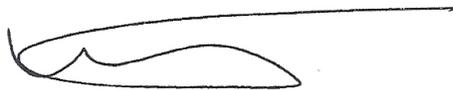
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Kittitas County Prosecutor's Office, at prosecutor@co.kittitas.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Shane Robert Hughes/DOC#816666, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 11, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Shane Robert Hughes, Appellant