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Court of Appeals
Division III
State of Washington

No. 33934-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE GALLO,

Appellant.

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

The Honorable Judge John W. Lohrmann

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in violating Mr. Gallo's constitutional right to represent himself by terminating his pro se status.

2. The trial court erred in imposing the following term of community custody:

That defendant will submit to a polygraph . . . test upon the request of said [Community Supervision] Officer, at defendant's expense.

(CP 129; RP 146).

3. An award of costs on appeal against the defendant would be improper.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in violating Mr. Gallo's constitutional right to represent himself by terminating his pro se status.

Issue 2: Whether the trial court erred in imposing a condition of community custody requiring Mr. Gallo to submit to a polygraph examination at the request of his Community Supervision Officer.

Issue 3: Whether this Court should refuse to impose costs on appeal.

C. STATEMENT OF THE CASE

A Washington State Penitentiary employee found Kevin Lee Gallo on penitentiary property, and then contacted law enforcement. (RP¹ 31-36, 38, 48-51). Law enforcement officers arrived, and Mr. Gallo was

¹ The Report of Proceedings consists of two separate volumes. The first volume, transcribed by Linda Latham, contains two pretrial hearings, trial, and sentencing, and is referred to herein as "RP." The second volume, transcribed by Tina Driver, contains one pretrial hearing, and is referred to herein as "Supp. RP."

arrested on some outstanding warrants. (RP 48-51). A search of Mr. Gallo incident to arrest was conducted. (RP 52). An officer found two items in the pockets of Mr. Gallo's pants: a small baggie containing a substance that later tested positive for methamphetamine, and a glass smoking device containing residue that later tested positive for methamphetamine. (RP 52-58, 60-68, 79-80; State's Exs. 3, 4, 5, 8).

The State charged Mr. Gallo with one count of possession of a controlled substance (methamphetamine) and one count of use of drug paraphernalia.² (CP 12-14, 74-76).

Mr. Gallo was initially assigned defense counsel, Robin Olson. (CP 8). Mr. Olson later withdrew and the trial court appointed Jerry Makus. (CP 8, 36). Mr. Gallo then moved to represent himself. (CP 37-39; Supp. RP 1-15). After conducting an extensive colloquy with Mr. Gallo and entering a written waiver of counsel, trial court Judge M. Scott Wolfram granted Mr. Gallo's request to represent himself and appointed Mr. Makus as stand-by counsel. (CP 37-39; Supp. RP 1-15).

² The State also charged Mr. Gallo with one count of second degree criminal trespass and one count of bail jumping. (CP 12-14, 74-76). Mr. Gallo was acquitted of second degree criminal trespass, and the trial court dismissed the bail jumping count following the State's case-in-chief. (CP 112, 122-123; RP 92-94, 102, 135, 143-144). Therefore, these two charges are not on appeal here.

Approximately one month later, after trial court Judge John W. Lohrmann³ took over the case, the trial court again conducted an extensive colloquy with Mr. Gallo and granted Mr. Gallo's request to represent himself. (RP 6-15). The trial court ruled:

I'm going to go ahead and find that your decision to represent yourself is knowingly, intelligently, and voluntarily made, that you are waiving your right to counsel with the full understanding of what your rights are, and that he has an appreciation of the charges, the consequences of representing himself, and is aware of the danger that he faces, so I'm going to allow it.

(RP 15).

After the trial court granted Mr. Gallo's request to represent himself, Mr. Gallo failed to appear for two court hearings. (CP 40-41, 58-59; RP 21-22). Following each failure to appear a bench warrant was issued, and Mr. Gallo was subsequently arrested at the Benton County Jail. (CP 42-43, 60-61; RP 21).

When Mr. Gallo reappeared in the trial court following his second failure to appear, he informed the trial court he had been held in the Benton County Jail, his legal issues there had been resolved, and he did not have any other outstanding warrants. (RP 21-22). He also informed the trial court he had obtained a drug and alcohol assessment. (RP 21).

³ Judge Lohrmann presided over the remainder of the case, including the trial and sentencing. (RP 3-150).

The trial court then terminated Mr. Gallo's pro se status and re-appointed

Mr. Makus as his attorney, stating:

I'm going to reappoint Mr. Makus to represent you. And I think you are in need of some legal assistance at this point, some specialized legal advice given your situation. I'm going to revoke your pretrial release. Set bail at \$10,000.

(RP 21).

Mr. Gallo responded:

As far as my attorney, [Mr.] Makus, I don't think that's going to work out. I tried to work with him and I just can't do it. Doesn't seem to want to do anything that I want to do and just argues with me and tells me I can't do that. So I don't, I don't -- I think I would need counsel from, you know, [sic] because I haven't found one without a conflict of interest.

(RP 22).

The trial court responded:

Well, I'm going to go ahead and reappoint Mr. Makus. You just don't get your choice of a lawyer who you might get along with, Mr. Gallo. All the attorneys on our defense panel here are extremely capable, I've got to tell you, and successful. And so my suggestion is you listen carefully and listen to the advice on matters of strategy and if you really want to represent yourself, again, we'll deal with that at a later time. And believe me I'm going to inquire very carefully. You haven't shown me that you are really able to represent yourself. I have grave concerns about that.

(RP 22-23).

The case proceeded to a jury trial. (RP 24-135). Witnesses testified consist with the facts stated above. (RP 30-96). Mr. Gallo was found guilty of both counts. (CP 112, 121-131; RP 135, 143-144).

At sentencing, the trial court imposed a term of confinement of 106 days, with credit for 106 days served, and 12 months of community custody, along with conditions. (CP 125-126, 128-130; RP 145-146). The trial court imposed the following condition of community custody, among others:

That defendant will submit to a polygraph . . . test upon the request of said [Community Supervision] Officer, at defendant's expense.

(CP 129; RP 146).

Also as community custody conditions, the trial court ordered Mr. Gallo to obtain a chemical dependency evaluation and complete all program requirements, and participate in an outpatient drug program. (CP 126, 129; RP 140, 145).

The trial court asked Mr. Gallo if he had been working at all. (RP 142-143). Mr. Gallo informed the trial court he has not been able to work since June 2013, as a result of being in and out of jail. (RP 143). He also informed the trial court he is paying other legal financial obligations (LFOs). (RP 143). The trial court acknowledged Mr. Gallo had

previously been found indigent. (RP 143). The trial court imposed only mandatory LFOs. (CP 123; RP 144-145).

The Judgment and Sentence includes the following language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 124).

Mr. Gallo timely appealed. (CP 136-148). The trial court entered an Order of Indigency, granting Mr. Gallo a right to review at public expense. (CP 151-152). Subsequently⁴, Mr. Gallo filed a Report as to Continued Indigency with this Court.

D. ARGUMENT

Issue 1: Whether the trial court erred in violating Mr. Gallo’s constitutional right to represent himself by terminating his pro se status.

A defendant in a criminal case has a constitutional right to represent himself without the assistance of an attorney. *State v. Fritz*, 21 Wn. App. 354, 356-59, 585 P.2d 173 (1978). This right has been conferred by article 1, section 22 of the Washington constitution, and the Sixth Amendment to the federal constitution. *See id.* at 357; *see also State v. Floyd*, 178 Wn. App. 402, 408, 316 P.3d 1091 (2013), *review denied* 180 Wn.2d 1005, 321 P.3d 1206 (2014); *Faretta v. California*, 422 U.S.

⁴ The undersigned counsel filed, with service on the State, Mr. Gallo’s Report as to Continued Indigency, dated July 12, 2016, on the same day this opening brief was filed.

806, 813-14, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). “Courts regard this right as ‘so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.’” *Floyd*, 178 Wn. App. at 408 (quoting *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010)). “Improper denial of the right to proceed pro se requires reversal, whether or not prejudice results.” *Id.* (citing *State v. Vermillion*, 112 Wn. App. 844, 851, 51 P.3d 188 (2002)). The remedy is a new trial. *Madsen*, 168 Wn.2d at 503, 510.

The trial court’s denial of a defendant’s request to represent himself is reviewed for an abuse of discretion. *Madsen*, 168 Wn.2d at 496. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). “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.” *Id.* (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

The right of self-representation must be requested by the defendant, stated unequivocally, timely made, and exercised knowingly and intelligently. *Fritz*, 21 Wn. App. at 359-60. “[A]n unequivocal

request to proceed pro se is valid even if combined with an alternative request for new counsel.” *Madsen*, 168 Wn.2d at 507.

Once a trial court has granted a defendant’s request to represent himself, the court may terminate this right only if the defendant “deliberately engages in serious and obstructionist misconduct.” *Floyd*, 178 Wn. App. at 409 (quoting *Faretta*, 422 U.S. at 834-35 n.46). Such conduct occurs “if a defendant is sufficiently disruptive or if delay becomes the chief motive.” *Id.* (quoting *Madsen*, 168 Wn.2d at 509 n.4).

However:

That a defendant is “obnoxious” and “unfamiliar with legal rules,” . . . does not justify a trial court’s denial of the right to proceed pro se. A court may impose lesser sanctions for failure to adhere to proper procedures, but “must not sacrifice constitutional rights on the altar of efficiency.”

Id. (quoting *Madsen*, 168 Wn.2d at 509) (internal citations omitted).

In *Floyd*, the trial court granted the defendant’s request to represent himself, finding his request “explicit, knowing, and voluntary[.]” *Id.* at 406. The case proceeded to a jury trial. *Id.* at 406. The defendant’s “limited knowledge of court procedures and rules of evidence, as well as his apparent confusion and frustration when the trial court sustained most of the State’s objections, led to many disruptions and repeated admonitions by the court.” *Id.*

The following occurred during closing argument:

[The defendant] referred to several facts not in evidence, drawing repeated objections from the State. After the court admonished [the defendant] again to argue only from evidence properly before the jury, [the defendant] asked questions which demonstrated some confusion as to what the court meant. [The defendant] also attempted to offer additional evidence through his statements at closing.

Id. (internal citations omitted).

The court held a hearing, and over objections by both parties, terminated the defendant's self-representation and appointed stand-by counsel to complete the closing argument. *Id.* at 406-07.

On appeal, the court affirmed the trial court, concluding that the trial court did not abuse its discretion in terminating the defendant's self-representation. *Id.* at 408-12. The court found that the trial court's decision was explicitly based on a finding that the defendant was intentionally disrupting the trial. *Id.* at 409. The court found sufficient evidence in the record to support this finding. *Id.* at 410. The court stated that "the numerous delays and disruptions continuing well into closing argument supply a plausible basis for terminating pro se status" *Id.* at 411.

The court acknowledged that "forcing an unwanted defense on a criminal defendant may in many cases slip into a violation of the Sixth Amendment." *Id.* at 412. The court found, however, that revocation of

the defendant's self-representation did not become manifestly unreasonable under this principle, because "the trial court revoked pro se status only after unabated missteps sufficient to support the finding that the defendant was intentionally disrupting the proceedings." *Id.*

Here, the trial court granted Mr. Gallo's right to represent himself. (CP 37-39; RP 6-15; Supp. RP 1-15). In order to subsequently terminate this right, Mr. Gallo must have "deliberately engage[d] in serious and obstructionist misconduct." *Floyd*, 178 Wn. App. at 409 (quoting *Faretta*, 422 U.S. at 834-35 n.46).

Unlike the defendant in *Floyd*, there is no evidence in the record to establish that Mr. Gallo intentionally disrupted the proceedings. *See Floyd*, 178 Wn. App. at 408-12. Likewise, there is no evidence in the record to establish that Mr. Gallo "deliberately engage[d] in serious and obstructionist misconduct." *Floyd*, 178 Wn. App. at 409 (quoting *Faretta*, 422 U.S. at 834-35 n.46).

Mr. Gallo failed to appear for two court hearings during the pendency of the case. (CP 40-41, 58-59; RP 21-22). The trial court terminated Mr. Gallo's self-representation after his second failure to appear. (RP 21-23). These failures to appear were not intentional disruptions in the trial court courtroom, nor were they deliberate serious and obstructionist misconduct of the trial court proceedings. The reason

Mr. Gallo failed to appear was he was incarcerated in a different county, resolving a different court case. (CP 42-43, 60-61; RP 21-22). There is nothing in the record to show that Mr. Gallo did anything in the trial court courtroom to intentionally disrupt or delay the proceedings. *Cf. Floyd*, 178 Wn. App. at 408-12.

The reasons given by the trial court when terminating Mr. Gallo's self-representation were "I think you are in need of some legal assistance at this point, some specialized legal advice given your situation[,]” and “[y]ou haven't shown me that you are really able to represent yourself.” (RP 21, 23). However, this is the wrong legal standard to terminate pro se status. *See Floyd*, 178 Wn. App. at 409 (quoting *Faretta*, 422 U.S. at 834-35 n.46). Because the trial court applied the wrong legal standard, its decision was an abuse of discretion. *See Rohrich*, 149 Wn.2d at 654 (quoting *Rundquist*, 79 Wn. App. at 793).

The law did not require Mr. Gallo to renew his request to represent himself when he appeared following his second failure to appear. *See, e.g., Madsen*, 168 Wn.2d at 507 (stating “[t]here is no requirement that a request to proceed pro se be made at every opportunity.”). In addition, forcing Mr. Gallo to proceed with Mr. Makus as his attorney, where Mr. Gallo wanted to proceed in a different way than Mr. Makus, violated Mr.

Gallo's constitutional right to represent himself by forcing an unwanted defense on him. *See Floyd*, 178 Wn. App. at 412; *see also* RP 22.

The trial court violated Mr. Gallo's constitutional right to represent himself by terminating his pro se status. Where Mr. Gallo did not intentionally disrupt the proceedings, or otherwise deliberately engage in serious and obstructionist misconduct, the trial court's decision was both manifestly unreasonable and based on untenable grounds. *See Rohrich*, 149 Wn.2d at 654 (defining abuse of discretion) (quoting *Blackwell*, 120 Wn.2d at 830). This Court should order a new trial.

Issue 2: Whether the trial court erred in imposing a condition of community custody requiring Mr. Gallo to submit to a polygraph examination at the request of his Community Supervision Officer.

A defendant may object to community custody conditions for the first time on appeal. *See State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)).

Here, the following community custody conditions, among others, were authorized by statute:

- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]
- ...
- (f) Comply with any crime-related prohibitions.

RCW 9.94A.703(3).

The trial court imposed a condition of community custody requiring Mr. Gallo to submit to a polygraph examination at the request of his Community Supervision Officer. (CP 129; RP 146). This condition should be stricken for two reasons: first, it is not a valid community custody monitoring condition, and two, it is not crime-related.

First, our Supreme Court has held that polygraph testing is a valid community custody monitoring condition for sex offenders, where sex offender treatment is ordered. *See State v. Riles*, 135 Wn.2d 326, 342, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). However, the record here reveals no connection between the drug treatment conditions imposed and the authorization of polygraph testing. (CP 126, 129; RP 140, 145). Therefore, it is not a valid community custody monitoring condition.

Second, in *State v. Flores-Moreno*, a possession of heroin case, the appellate court struck a community custody condition requiring the defendant to submit to polygraph examinations, because the condition was not crime-related. *See State v. Flores-Moreno*, 72 Wn. App. 733, 745-46, 866 P.2d 648, 655 (1994). The court reasoned:

Arguably, a condition requiring a drug offender to submit to polygraph examinations satisfies the statute if it requires the offender to submit to polygraph examinations related to drugs. However, the condition in this case required [the defendant] to submit to polygraph examination on any and all subjects, at the discretion of his community corrections officer. Because it was so broad, it did not directly relate to his crime, and the trial court erred by imposing it.

Id. at 746.

Here, like the condition in *Flores-Moreno*, the community custody allowing polygraph tests is overly broad and does not directly relate to Mr. Gallo's crime. *See id.* Therefore, it is not a valid crime-related community custody condition.

Accordingly, this court should remand this case with an order that the trial court strike the community custody condition requiring Mr. Gallo to submit to a polygraph test upon the request of his Community Supervision Officer. (CP 129; RP 146); *see also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

Issue 3: Whether this Court should refuse to impose costs on appeal.

Mr. Gallo preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Mr. Gallo was found indigent by the trial court and was represented by appointed counsel for purposes of the trial court proceedings. (CP 8, 36; RP 143). At the time of sentencing, Mr. Gallo had not worked in over two years and was paying other LFOs. (RP 143). The trial court imposed only mandatory costs. (CP 123; RP 144-145). The trial court also entered an Order of Indigency, granting Mr. Gallo a right to review at public expense. (CP 151-152).

According to his Report as to Continued Indigency, filed on the same day this opening brief was filed, Mr. Gallo remains indigent and unable to pay costs that may be imposed on appeal. The imposition of costs would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).

In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court

emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3); *see also* CP 307, 834. Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene its reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina*

held was essential before including monetary obligations in the judgment and sentence. This is particularly true where, as here, the trial court imposed only mandatory costs and Mr. Gallo's Report as to Continued Indigency demonstrates a continued inability to pay costs. (CP 123; RP 144-145). Mr. Gallo qualified for indigent appellate counsel upon filing the underlying notice of appeal and remains indigent at this time. (CP 151-152).

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for *Blazina's* recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98

Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The *Blazina* Court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of

continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, acknowledged appellate courts have discretion to deny the State’s requests for costs. *Blank*, 131 Wn.2d at 252-53.

The record demonstrates Mr. Gallo does not have the ability to pay costs on appeal. He was found indigent by the trial court and remains indigent. Mr. Gallo respectfully requests this Court exercise its discretion by denying an award of appellate costs in this case, in the event that the State substantially prevails on appeal.

E. CONCLUSION

This Court should reverse Mr. Gallo’s convictions and remanded for a new trial, because the trial court violated Mr. Gallo’s constitutional right to represent himself by terminating his pro se status.

The case should also be remanded for the trial court to strike the community custody condition requiring Mr. Gallo to submit to a polygraph test upon the request of his Community Supervision Officer.

Mr. Gallo also objects to any appellate costs should the State prevail on appeal. The record does not reflect that Mr. Gallo has the ability to pay.

Respectfully submitted this 29th day of August, 2016.


Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33934-3-III
vs.)
KEVIN LEE GALLO) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 29, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Kevin Lee Gallo
General Delivery
Walla Walla, WA 99362

Having obtained prior permission, I also served the Respondent State of Washington by e-mail at tchen@co.franklin.wa.us using Division III's e-service feature.

Dated this 29th day of August, 2016.



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