FILED
Nov 07, 2016
Court of Appeals
Division III
State of Washington

NO. 34222-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

DEREK ROLAND WILLIAMS,

Appellant.

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

The Honorable James Triplet, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the requirements of RCW 9.41.047(1)(a) when it did not notify Mr. Williams orally and in writing at the time of conviction that he must immediately surrender any concealed pistol license and that he may not possess a firearm unless his right to do so is restored by a court of record.

2. If the state substantially prevails on appeal, any request for appellate costs should be denied.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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2. Should Derek Williams have to pay appellate costs if he does not substantially prevail on appeal and the state requests costs?

C. STATEMENT OF THE CASE

1. Procedural History

The Spokane County prosecutor charged Mr. Williams with four crimes: residential burglary, theft of a motor vehicle (2 counts), and theft of a firearm. CP 1-2. A jury acquitted him of all charges except for one count of theft of a motor vehicle (count III, Ford Focus). CP 3-6.

At the return of the verdict, the court did not notify Mr. Williams orally or in writing he must immediately surrender any concealed pistol license and that he could not legally possess a firearm unless a court of record reinstated his firearm rights. RP II[1] 321-33.

At sentencing, the court imposed a Drug Offender Sentencing Alternative (DOSA) requiring Mr. Williams to serve 19 months in DOC custody and 19 months closely supervised on community custody. RP II 236-66; CP 11-13.

The court told Mr. Williams he could not possess a firearm, RP II 367, but said nothing about the requirement to immediately surrender any concealed pistol license or that he could not legally possess a firearm unless a court of record restored his possession rights. RP 334-72. Only a

[1] There are two volumes of verbatim report of proceedings designated herein as "RP I" and "RP II."

written notification in the judgment and sentence advised Mr. Williams of these important obligations and rights. CP 18.

Mr. Williams appeals all portions of his judgment and sentence. CP 22-38.

2. Trial Testimony

Christieann Schuchnan is a methamphetamine addict. RP II 209. Mr. Williams took her in and gave her a place to stay at his home. RP II 213.

Late one night, Ms. Schuchnan entered a house through an open sliding glass door without permission. RP II 211. She stole property from inside the house to include a key to a van. She stole the van too and returned to the home she shared with Mr. Williams. RP II 211-12. Once there, she told Mr. Williams she wanted to go back to the house and steal a Ford Focus. RP II 215. Mr. Williams tried to talk her out of it but she was committed to stealing the car. Mr. Williams drove her and Michael Gray to the house and dropped them off. RP II 215-16. Ms. Schuchnan and Mr. Gray stole the Ford Focus. RP II 216. Ms. Schuchnan testified Mr. Williams had nothing to do with the burglary of the residence, the theft of the van, or the theft of the gun from the Ford Focus. RP II 225-27.

Michael Gray is a friend of Ms. Schuchnan. RP I 170-71. He met Mr. Williams for the first time that night. Id. 171, 173. He testified Mr. Williams drove him and Ms. Schuchnan to the house so they could steal a car. Ms. Schuchnan had the keys for the car. RP I 175. On the drive, Mr. Williams implied he wanted to steal the car because the owner "owed him money." RP I 176. Mr. Williams dropped them near the house and left. RP I 177. Later, Mr. Gray met with Mr. Williams. Mr. Williams took him to see Christian Bravo, aka "Interest." RP I 174. Mr. Bravo gave Mr. Gray methamphetamine in exchange for the gun. RP I 174, 177-78.

Mr. Williams agreed he had taken in Ms. Schuchnan but disclaimed any involvement in the burglary, the vehicle thefts, or the gun theft and sale. RP II 240-46, 256.

D. ARGUMENT

1. The trial court failed to orally admonish Mr. Williams as required that he must immediately surrender any concealed pistol license and that a court of record must restore his firearm rights to make such possession legal.

At the time a person is convicted of an offense making the person ineligible to possess a firearm, the convicting court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that a court of record must restore

firearm rights before it is legal to possess a firearm. RCW 9.41.047(1)(a). A person loses their right to possess a firearm if convicted in this state or elsewhere of any felony. RCW 9.41.040(2)(i). "Felony" means any felony offense under Washington law or any federal or out-of-state offense comparable to a felony offense under Washington law. RCW 9.41.010(6). Theft of a motor vehicle is a Class B felony. RCW 9A.56.065(2).

The trial court did not give Mr. Williams any oral or written admonishment about his firearm or concealed pistol right at the time the jury returned its verdict. RP II 324-33.

At sentencing, the trial court did not notify Mr. Williams orally that he (1) must immediately surrender any concealed pistol license and (2) that a court of record must restore his firearm rights before he could legally possess a firearm. RP II 334-72. Instead, the court's only oral notification to Mr. Williams about his firearm rights was to say to him at sentencing, "You can't possess firearms." RP II 367.

The judgment and sentence included correct written advisement.

> 5.5a Firearms. You must not own, use, or possess any firearm, and under the federal law any firearm or ammunition unless your right to do so is restored by the court in which you are convicted or the superior court of Washington State where you live, and by federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable

> identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41. 047.

CP 18.

As noted per the statute though, written notification alone is not sufficient notification of losing these important rights. RCW 9.41.047(1)(a). The statute is unequivocal in its mandate. *State v. Breitung*, 173 Wn.2d 393, 403, 267 P.3d 1012 (2011). This Court should remand to the trial court for a hearing in compliance with the statutory firearm notifications.

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Mr. Williams does not substantially prevail on appeal, he requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the state is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . may require an adult . . . to pay appellate costs."). Imposing costs against indigent defendants raises problems well documented in *Blazina*: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *State v.*

Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

The trial court found Mr. Williams qualified for indigent defense at trial and on appeal. Supplemental Designation of Clerk's Papers, Notice of Appearance (trial); Motion of Indigency (appeal); Motion for Indigency (appeal); Order of Indigency (appeal). At sentencing, the court struck all discretionary legal financial obligations (LFOs). CP 13-14. Importantly, there is a presumption of continued indigency throughout the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Mr. Williams's financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393.

Mr. Williams served a 19 month DOC sentence and is currently closely monitored by DOC while completing 19 months of community custody. CP 11. He is 56 years old. He has eight felony convictions and 73 misdemeanor convictions.[2] CP 7, 9; RP II 253.

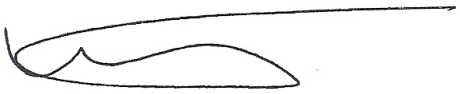
[2] Thirty-three of the misdemeanor convictions are for third degree driving on a suspended driver's license and are, as the trial court noted, crimes of poverty. RP II 341.

Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise it discretion by denying the state's request for appellate costs in this appeal involving an indigent appellant.

E. CONCLUSION

Mr. Williams's case should be remanded to the trial court for a resentencing hearing consistent with the requirement of RCW 9.41.047(1)(a).

Respectfully submitted November 6, 2016.



LISA E. TABBUT/WSBA 21344
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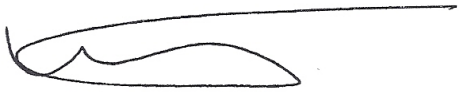
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Spokane County Prosecutor's Office, at SCPAAppeals@spokanecounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Derek Roland Williams/1024 East Courtland, Spokane, WA 99207.

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

Signed November 6, 2016, in Winthrop, Washington.



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