

NO. 35004-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH MANSON,

Appellant.

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

The Honorable M. Scott Wolfram, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MANSON WITHDRAWS HIS ARGUMENTS RELATED TO THE CASH IN MANSON'S WALLET—PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

Based on the documentation provided, Manson incorrectly believed that the cash which was found in Manson's wallet when he was arrested was presented to the jury. In his opening brief, Manson asserted that the admission of the cash was prosecutorial misconduct and that defense counsel's failure to object to the admission of the cash constituted ineffective assistance of counsel. Br. of Appellant at 8-13. In fact, while Manson's wallet and "its contents" were admitted as evidence, Manson concedes the cash appears to have been removed before admission. See Ex. 5. Thus, Manson acknowledges the state's response and withdraws both arguments related to its admission.

2. EVIDENCE OF MANSON'S PRIOR CONTACT WITH OFFICERS AND HIS ACTIVE WARRANT WAS INADMISSIBLE UNDER A *RES GESTAE* THEORY OF RELEVANCE, WAS NOT PROBATIVE, AND WAS UNFAIRLY PREJUDICIAL

Contrary to the state's claim on appeal, evidence of Manson's prior contact with police and his active DOC warrant was not relevant under a *res gestae* theory and was unfairly prejudicial. Counsel's failure to object, attempt to exclude, or stipulate to the lawful stop and search of Manson constituted ineffective assistance of counsel.

The state argues that evidence of Manson's past dealings with police and active DOC warrant was admissible under a *res gestae* theory of relevance because this information "made several consequential facts more probable." Br. of Resp't at 9. But the state fails to elaborate on the consequential facts to which it refers. Certainly, admission of evidence that Manson had an active DOC warrant made one *inconsequential* fact more probable: that there was a valid basis to stop Manson. But the basis for the stop was not challenged at trial. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. The basis for stopping Manson was not of consequence to the determination of whether he was in possession of the contraband in question and such evidence was irrelevant.

The state also argues that information regarding past dealings with Manson and his warrant demonstrated to the jury that officer actions were reasonable and not arbitrary. Br. of Resp't at 10. The state cites no portion of the record demonstrating that Manson alleged that the stop or the search, to which he consented, were arbitrary. In this respect, information about Manson's past still provided no probative value whatsoever.

Admission of the evidence was irrelevant and unfairly prejudicial. While the specific bases for officers' familiarity with Manson and for the

warrant were never specified, as noted by the state, Officer Huxoll testified that he sought Manson's consent to search the vehicle because he worked in undercover narcotics and knew Manson from previous contacts. RP 417. Based on this testimony, jurors were unlikely to guess that officers may simply know Manson "as a witness or complainant," and much more likely to draw a connection between Manson and the contraband at issue because of his apparent past involvement with narcotics. Br. of Resp't at 11. Evidence of prior acts is not admissible to show propensity of a person to commit a crime. ER 404(b); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Because officers' basis for requesting permission to search the vehicle was not at issue, the only purpose that admission of this evidence could possibly serve was to show propensity, or establish a connection between Manson's past narcotics involvement and the contraband in question. Coupled with the information that Manson had an active warrant out for his arrest, which again served no valid purpose, admission of this evidence was unfairly prejudicial to Manson.

Counsel's failure to attempt to exclude or object to its admission and failure to offer to stipulate to the validity of the stop and search of the vehicle was objectively deficient and prejudiced Manson. Because Manson received ineffective assistance of counsel, this court should reverse.

3. THE STATE'S ARGUMENTS ON APPELLATE COSTS
ARE FRIVOLOUS AND ENCOURAGE THIS COURT
TO VIOLATE THE LAW

Manson is entitled to a continuing presumption of indigency based on the trial court's finding of indigency unless a preponderance of the evidence demonstrates that Manson's "financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Neither Manson nor the state has put forth any evidence indicating that Manson's financial circumstances have significantly improved since he was last found indigent. Thus, under the rule, appellate costs may not be awarded.

The state's argument to the contrary is frivolous. It asks that appellate costs be awarded yet fails to support its request with either a factual or legal basis to establish a significant improvement in Manson's financial circumstances. An argument is frivolous where there is no debatable issue over which reasonable minds could differ. Goad v. Hambridge, 85 Wn. App. 98, 105, 931 P.2d 200 (1997). That is certainly the case here. Manson was found indigent. The applicable rule on appellate costs states that his indigency presumptively continues unless a preponderance of evidence shows that the offender's financial circumstances have improved. The state hasn't so much as attempted to argue or demonstrate any change in Manson's financial circumstances, likely because Manson has been and

continues to be incarcerated and thus the state could not possibly show any change in circumstances. Instead, the state urges this court to violate the applicable court rule by awarding appellate costs anyway. Because it has no factual or legal basis, the state's request for appellate costs is entirely frivolous.

The state also disputes that there is a conflict of interest in the appellate cost scheme. But the state does not dispute that most of the money in an appellate cost award is earmarked for the Office of Public Defense or that, if Manson loses on appeal, the Office of Public Defense, through which undersigned counsel represents Manson, will attempt to collect Manson's money to fund undersigned counsel's work simply because undersigned counsel did not prevail. By way of illustration, if counsel were to request additional funding from the Office of Public Defense to be more fairly compensated based on his work in this or any other appointed case, any award of additional funding counsel receives would be passed directly to the client in a cost bill. Appointed defense counsel is thus forced to make a choice between advancing their own financial interests to the detriment of their client's and protecting their client's financial interest to the detriment of counsel's. Because the appellate cost scheme directly pits the lawyer's financial interests against the client's, it creates a repugnant conflict of interest that has no place in a so-called justice system.

And Walla Walla County is not the real party in interest because it would stand to recover next to nothing if appellate costs were awarded. See, e.g., State v. Sinclair, 192 Wn. App. 380, 386, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016) (cost bill required \$6,923.21 to be paid to the Office of Public Defense and only \$59.98 to the county prosecutor). The real party in interest is indisputably the Office of Public Defense. Because the Office of Public Defense is the real beneficiary of the appellate cost scheme, the Office of Public Defense's interests with respect to appellate costs are adverse to Manson's. Should the court have any question about the conflict of interest created by Washington's infirm appellate cost system, it should invite the Office of Public Defense to weigh in on this issue. See RAP 10.6(c) ("The appellate court may ask for an amicus brief at any stage of review, and establish appropriate timelines for the filing of the amicus brief and answer thereto."). Doing so would greatly assist the court in considering the conflict of interest claim Manson advances.

Finally, the state claims Manson has "unclean hands" because he did not provide information regarding his employment history and job skills. Br. of Resp't at 18. While Manson indicated he had previously worked full-time at a family landscaping business, the record does not support that this full-time job is "available to him" upon release, as the state asserts. See RP 513.

The report of continued indigency requests information about employment in the last three years and Manson indicated in the report that he has not been employed within this timeframe.¹ Motion on Appellate Costs, Appendix at 2. Manson's hands are not unclean.

The state also claims that Manson has "failed to provide the record relating to the superior court's original determination of indigency." Br. of Resp't at 19. But Manson filed a declaration of indigency to support the appointment of counsel on appeal. CP 76-77. And the trial court determined Manson lacked sufficient funds for appeal and was "entitled to counsel for review wholly at public expense." CP 75. Contrary to the state's claims, Manson has provided a record of his continued presumptive indigency pursuant to RAP 14.2. Again, it is the state that has failed to put forth any factual or legal basis to rebut presumption of continued indigency under the applicable law. Appellate costs must be denied.

¹ Manson inarticulately stated he "has no work history" in the report of continued indigency. Motion on Appellate Costs at 8. Manson wishes to clarify that, consistent with this report as to continued indigency, he has no work history to report in the last three years.

B. CONCLUSION

For the reasons stated here and in his opening brief, this court should reverse and remand for a new trial. Because the State provides nothing but frivolous arguments (and no facts at all) to establish that Manson's financial circumstances have significantly improved to support its request for appellate costs, appellate costs must be denied.

DATED this 20th day of September, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Kellman" or similar, written over a horizontal line.

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