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Court of Appeals  
Division III  
State of Washington  
4/26/2018 9:30 AM

NO. 35479-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTONIO COOK,

Appellant.

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

The Honorable Raymond F. Clary, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY<sup>1</sup>

THE TRIAL COURT ERRED BY ORDERING COOK TO PAY A \$200 CRIMINAL FILING FEE WITHOUT INQUIRING INTO WHETHER HIS MENTAL HEALTH CONDITION IMPACTED HIS ABILITY TO PAY.

Cook takes antipsychotic medication, was held in contempt of court because of his emotional outbursts during trial, and based on the trial court's recognition that Cook appeared to suffer from mental health issues, was ordered to undergo a mental health evaluation. Brief of Appellant (BOA) at 1-6. Despite these facts, the State contends "[T]here was no evidence produced, either during trial or afterward, that the defendant had been diagnosed with a mental disorder" the satisfies a finding under RCW 9.94A.777(1). Brief of Respondent (BOR) at 9-10. In support of this argument, the State cites State v. Catling, \_\_\_ Wn. App. \_\_\_, 413 P.3d 27 (2018). BOR at 10-11. This Court should reject such a factual comparison.

Catling addressed whether a passing remark by Catling's mother triggered an obligation for the trial court to inquire further about his ability to pay LFOs under RCW 9.94A.777(1). 413 P.3d at 28-29, 31-32. His mother told the court that Catling had been receiving disability payments

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<sup>1</sup> The State's arguments regarding the ineffectiveness of Cook's counsel at sentencing have been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

for more than 10 years. When asked about her son's condition, she described it as "based mostly on medical, but also some mental issues." Catling, 413 P.3d at 29. She explained that Catling had had multiple surgeries to address a medical problem which caused Catling pain and prevented him from working. Catling, 413 P.3d at 31-32.

This Court concluded that the "offhand remark" by Catling's mother did not put the court on notice that a mental disability affected Catling's ability to pay or that he was prepared to establish that fact. Catling, 413 P.3d at 31. As this Court noted, the statement from Catling's mother indicated that mental health was a small part of his problem and his disability was "based mostly on medical". Catling, 413 P.3d at 29. This Court also noted that there was no indication Catling's unidentified condition prevented him from participating in gainful employment. Catling, 413 P.3d at 31-32.

Unlike Catling, here the evidence of Cook's mental health condition was based on much more than just a passing remark by a third party. As noted above, and fully discussed in the opening brief, the evidence that Cook suffered from mental health conditions that required the use of antipsychotic medication was not disputed by the trial court, prosecutor, or defense counsel. BOA at 2-6. While the trial court declined to order a competency evaluation for Cook, whether he had the

capacity to understand the proceedings and to assist counsel in his defense, is a much different inquiry than inquiring into whether Cook's mental health condition impacted his ability to pay LFOs. See State v. Marshall, 144 Wn.2d 266, 277, 281, 27 P.3d 192 (2001) (setting forth the constitutional standard for competence to stand trial).

Despite this plethora of evidence regarding Cook's mental health, the State nonetheless argues that there is no evidence that Cook's mental health prevented him from being employed. BOR at 10. The State relies on defense counsel's statement at sentencing that Cook "wants to get back into" cutting hair. BOR at 10 (citing RP 409). Such an argument overlooks the obvious: desiring to be employed and actually being employed, or capable of employment, are very different inquiries. The State's argument also ignores Cook's own acknowledgment at sentence that he was not presently employed. Moreover, as discussed in the opening brief, whether Cook could hold future employment does not change the analysis under RCW 9.94A.777(1). See State v. Tedder, 194 Wn. App. 753, 757, 378 P.3d 246 (2016) (recognizing that "while he [Tedder] self-reported past employment, there was no independent verification that he was actually employed or employable in those positions.").

The State cites to Tedder only once in its response brief and makes no attempt to distinguish Cook's reliance on it. See BOR at 9. Where, as here, the respondent fails to respond to arguments made by the appellant, the respondent concedes those issues. See In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (“Indeed, by failing to argue this point, respondents appear to concede it.”).

The State also argues that Cook can not challenge the imposition of LFOs under RCW 9.94A.777(1) for the first time on appeal. BOR at 9. Again, the State ignores Cook's analysis in the opening brief that Tedder and State v. Clark,<sup>2</sup> both stand for the proposition that a challenge under RCW 9.94A.777(1) may be raised for the first time on appeal. BOA at 5-6. Cook accordingly requests that this Court exercise its discretion under RAP 2.5(a), reverse the imposition of the LFOs at issue, and remand for an individualized inquiry into Cook's ability to pay based on his mental health condition. See State v. Kelly, \_\_ Wn. App. \_\_, 2018 WL 418156 (Wash. Ct. App. Jan. 16, 2018)<sup>3</sup> (exercising discretion under RAP 2.5(a) and remanding for consideration of whether Kelly has a mental health condition and, if so, whether he has the ability to pay the DNA fee).

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<sup>2</sup> 197 Wn. App. 1037 (2017),<sup>2</sup> rev. denied, 188 Wn.2d 1007, 393 P.3d 351 (2017). Under GR 14.1, Cook cites to this unpublished, non-binding opinion solely for its persuasive value.

<sup>3</sup> Under GR 14.1, Cook cites to this unpublished, non-binding opinion solely for its persuasive value.

Unlike in Catling, here the evidence clearly showed that Cook suffered from mental health conditions requiring the use of medication. As in Tedder and Clark, remand is required so the trial court can inquire into whether Cook's mental health conditions prevent him from paying LFOs under RCW 9.94A.777(1).

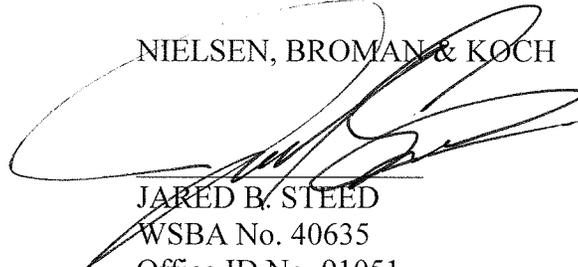
D. CONCLUSION

For the reasons discussed above, and in the opening brief, remand is required so the trial court may reconsider imposition of the \$200 court costs fee after inquiring into whether Cook's mental health conditions impact his ability to pay that LFO.

DATED this 26<sup>th</sup> day of April, 2018.

Respectfully submitted,

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