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Court of Appeals
Division III
State of Washington
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NO. 35479-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO COOK,

Appellant.

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

The Honorable Raymond F. Clary, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred by ordering appellant to pay \$200 in court costs without first inquiring whether his mental health condition impacted his ability to pay the legal financial obligations (LFOs).

2. Appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. RCW 9.94A.777(1) requires that a trial court determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, mandatory or discretionary. As the trial court recognized, appellant suffers from mental health issues. Did the trial court err by ordering appellant to pay \$200 in court costs without first analyzing whether his mental health issues impacted his ability to pay the discretionary fee?

2. Did defense counsel provide ineffective assistance for failing to bring RCW 9.94A.777(1) to the trial court's attention?

B. STATEMENT OF THE CASE

The Spokane County prosecutor charged appellant Antonio Cook by amended information with one count of first degree attempted robbery with a deadly weapon, and two counts of second degree assault with a

deadly weapon for an incident alleged to have occurred on April 6, 2017. CP 8-9, 15-16; RP¹ 23-26.

During trial, Cook had several emotional outbursts. RP 134, 138-39, 144-45. At one point, Cook appeared for trial dressed in a tie and his jail jumpsuit. RP 218-19, 274. The trial court held Cook in contempt of court because of his outbursts. RP 133-34, 144-47, 227-28; CP 17-18.

As a result of Cook's behavior, defense counsel also moved mid-trial for a competency evaluation for Cook, noting that he was on antipsychotic medications including Xprexa and Prozac. CP 19-24; RP 224-27, 239. Although the trial court recognized that Cook appeared to have some mental health issues, it denied defense counsel's request for a competency evaluation. RP 222, 238-39.

A jury acquitted Cook of first degree attempted robbery convicted as charged. RP 294; CP 54. The jury also returned special verdicts finding that Cook was not armed with a deadly weapon during any of the charged incidents. RP 395-96; CP 55, 58, 61. The jury was unable to reach a verdict as to either count of second degree assault and instead convicted Cook of two counts of fourth degree assault. RP 394-98; CP 56-57, 59-60. Cook was sentenced to nine months imprisonment with

¹ This brief refers to the consecutively paginated verbatim reports of proceedings as follows: RP -- June 26, 27, 30 & July 3, 2017.

credit for time served on the first count of fourth degree assault and a suspended sentence of 364 days on the second count of fourth degree assault. CP 66-71; RP 413.

The trial court imposed \$700 in legal financial obligations, including \$500 in victim assessment fees and \$200 in court costs. CP 66-71; RP 416. The trial court also ordered Cook to undergo a mental health evaluation and comply with all treatment recommendations. CP 66-71; RP 413-17.

Cook timely appeals. CP 78-79.

C. ARGUMENT

THE TRIAL COURT ERRED BY ORDERING COOK TO PAY \$200 IN COURT COSTS WITHOUT FIRST INQUIRING INTO WHETHER HIS MENTAL HEALTH ISSUES IMPACTED HIS ABILITY TO PAY.

As the trial court correctly recognized, Cook clearly suffers from mental health issues. RP 222, 415-16. Indeed, the trial court ordered Cook to undergo a mental health evaluation and comply with all treatment recommendations as a condition of sentencing. RP 413; CP 66-71. The trial court found Cook indigent, and imposed \$200 in court costs and a \$500 victim assessment fee. CP 66-71, 76-77; RP 416. The trial court erred however, in imposing the \$200 court cost fees without first inquiring

into whether Cook's mental health conditions impacted his ability to pay the fee.

“RCW 9.94A.777(1) requires that a trial court determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, mandatory or discretionary.” State v. Tedder, 194 Wn. App. 753, 756, 378 P.2d 246 (2016). The statute provides:

Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

RCW 9.94A.777(1) (emphasis added).²

This language stands in contrast to that of other statutes permitting the imposition of LFOs upon anyone who has the present ability to pay or will be able to pay in the future. See e.g. RCW 10.01.160(3) (“The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the

² For the purposes of the statute, “mental health condition” is defined as: “a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant’s enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.” RCW 9.94A.777(2).

defendant and the nature of the burden that payment of costs will impose.”)

In cases involving a defendant with mental health conditions however, the court must determine whether he has the ability to pay any LFOS at the time of sentencing. RCW 9.94A.777(1). The requirement that a judge "must first determine" that the offender has the ability to pay also imposes a more concrete duty than RCW 10.01.160(3), which only requires the court to consider whether the person can pay. RCW 9.94A.777(1).

State v. Tedder, 194 Wn. App. 753, 378 P.3d 246 (2016), is instructive. Tedder challenged the trial court's imposition of mandatory and discretionary LFOs against him for the first time on appeal. Tedder, 194 Wn. App. at 756. He argued that because the trial court knew he suffered from significant mental health conditions, it erred in imposing LFOs against him without first determining whether he had the ability to pay as required by RCW 9.94A.777(1) and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Tedder, 194 Wn. App. at 757.

Division Two agreed. The Court noted that it was obvious from the evidence before the trial court that Tedder suffered from a mental health condition. Tedder, 194 Wn. App. at 756-57. Based on that evidence, the Court concluded the trial court should have inquired into

whether Tedder's mental health history potentially prevented him from holding future employment before imposing LFOs. Tedder, 194 Wn. App. at 754, 757-58.

Similarly, in State v. Clark, 197 Wn. App. 1037 (2017),³ rev. denied, 188 Wn.2d 1007, 393 P.3d 351 (2017), citing Tedder, Division One remanded for mandatory consideration of the defendant's ability to pay under RCW 9.94A.777(1), where the record revealed the defendant's history of mental illness, even though the issue was raised for the first time on appeal.

The same outcome is appropriate here. Like Tedder and Clark, here Cook clearly suffers from serious mental health conditions which require medication. CP 19-24; RP 224-27, 239. Neither the trial court nor the prosecutor disputed this. RP 222, 415-16. Based on Cook's courtroom outbursts, defense counsel's declaration and motion for a competency evaluation, and Cook's own acknowledgment of paranoia and medication treatment, the trial court should have inquired into whether Cook's mental health conditions prevented him from paying the \$200 in court costs.

Cook anticipates the State will, nonetheless, speculate that Cook could potentially hold future employment. Such an argument fails for two

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

reasons. First, as Cook acknowledged, he was not employed at the time of trial. RP 296. Second, whether Cook could hold future employment does not change the analysis. See Tedder, 194 Wn. App. 757 (recognizing that "while he [Tedder] self-reported past employment, there was no independent verification that he was actually employed or employable in those positions.").

Alternatively, if necessary to raise this issue, this Court should find defense counsel ineffective for failing to ensure the trial court fulfilled his statutory obligation under RCW 9.94A.777. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 LEd. 2d 674 (1984)). To satisfy the first prong, the defendant must show counsel's performance fell below an objective standard of reasonableness. To satisfy the second prong, the defendant must show prejudice, meaning a reasonable probability that but for counsel's performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 847, 15 P.3d 145 (2001).

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Counsel’s failure to find and apply statutes relevant to a client’s case, without any legitimate tactical purpose, is constitutionally deficient performance. In re Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

Defense counsel was aware of Cook's mental health issues, yet counsel failed to bring RCW 9.94A.777 to the court’s attention. This was deficient performance. Moreover, Cook suffered prejudice. Given Cook’s mental health issues and indigency, there is a reasonable probability the trial court would have stricken the \$200 in court costs. Thus, ineffective assistance of counsel provides another basis on which to hear the claim and remand the matter to the trial court.

The trial court erred in imposing the \$200 in court costs without first inquiring into whether Cook's mental health condition impacted his ability to pay the fee as required under RCW 9.94A.777(1).

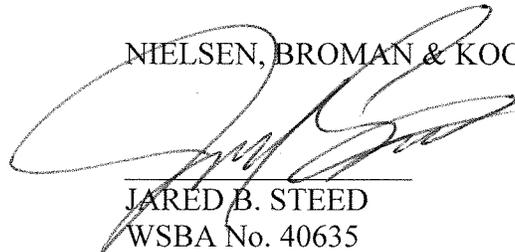
D. CONCLUSION

For the reasons discussed above, the trial court erred in ordering Cook to pay \$200 in court costs without first inquiring whether his mental health condition impacted his ability to pay the LFO. Remand is required so the trial court may reconsider imposition of those LFOs under RCW 9.94A.777(1).

DATED this 20th day of February, 2018.

Respectfully submitted,

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