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Court of Appeals
Division III
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NO. 35752-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE M. QUINTERO,

Appellant.

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

The Honorable John W. Lohrmann, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR……..…1

1. The court denied Quintero his right to fully cross-examine two key state's witnesses about the full extent of their plea agreement, to include help on immigration issues, with the state made in exchange for their testimony against Quintero……1

2. The trial court erred in ordering Quintero to pay a criminal filing fee and a DNA collection fee……..1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR……..1

1. The right to a fair trial includes the right to adequately cross-examine witnesses for the prosecution. The court prohibited Quintero from cross-examining two key prosecution witnesses about the promised immigration assistance made part of their plea bargain. Did the court's failure to allow Quintero to fully explore the plea agreements in front of the jury undermine Quintero's right to a fair trial by jury?.....1

2. The recent amendments to the statutes addressing legal financial obligations (LFOs) apply prospectively to all cases on direct appeal. Those amendments prohibit the imposition of a filing fee upon indigent criminal defendants and the imposition of a DNA collection fee upon an offender whose DNA has already been collected pursuant to a previous felony conviction. Must this court vacate the trial court order requiring Quintero, who is indigent, to pay a $200 criminal filing fee plus a $100 DNA collection fee when his DNA has already been collected in the past?.....1

C. STATEMENT OF THE CASE…….2

D. ARGUMENT……7

Issue 1: Remand for retrial is required because the court erred in refusing to allow Quintero to impeach key witnesses with the state's offer of help on immigration issues……..7

Issue 2: Recent changes in the law regarding discretionary filing fees and DNA fees require remand to strike the fees from Quintero's judgment and sentence……..14

E. CONCLUSION……..17

CERTIFICATE OF SERVICE……18

TABLE OF AUTHORITIES

Page

Washington Supreme Court Cases

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) 14, 15
State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002) 9
State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010)..... 11
State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971) 8
State v. Ramirez, 426 P.3d 714, 2018 WL 4499761 (September 20, 2018) 14, 15, 16

Washington Court of Appeals Cases

State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998)..... 9

Federal Cases

Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) 8
Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).. 9, 11, ……12
Dowling v. United States, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990)..... 8
Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)..... 8
Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) . 8

Statutes

RCW 10.01.160..... 14, 15
RCW 36.18.020..... 15, 16
RCW 43.43.754..... 15, 16
RCW 43.43.7541..... 15

Other Authorities

GR 34..... 15
House Bill 1783 15
LAWS OF 2018..... 15, 16
U.S. Const. amend. 14..... 8
U.S. Const. amend. 6..... 9
Wash. Const. art. I, § 21..... 8
Wash. Const. art. I, § 22..... 8, 9
Wash. Const. art. I, § 3..... 8

A. ASSIGNMENTS OF ERROR

1. The court denied Quintero his right to fully cross-examine two key state's witnesses about the full extent of their plea agreement, to include help on immigration issues, which the state made in exchange for their testimony against Quintero.

2. The trial court erred in ordering Quintero to pay a criminal filing fee and a DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to a fair trial includes the right to adequately cross-examine witnesses for the prosecution. The court prohibited Quintero from cross-examining two key prosecution witnesses about immigration assistance made as part of their plea bargain. Did the court's failure to allow Quintero to fully explore the plea agreements in front of the jury undermine Quintero's right to a fair trial by jury?

2. The recent amendments to the statutes addressing legal financial obligations (LFOs) apply prospectively to all cases on direct appeal. Those amendments prohibit the imposition of a criminal filing fee upon indigent criminal defendants and the imposition of a DNA collection fee upon an offender whose DNA has already been collected pursuant to a previous felony conviction. Must this court vacate the trial court order

requiring Quintero, who is indigent, to pay a $100 DNA collection fee when his DNA has already been collected in the past and a $200 criminal filing fee?

C. STATEMENT OF THE CASE

Around midnight on August 8, 2015, neighbors in the Walla Walla's East Walnut neighborhood heard gunshots RP2 607, 629; RP3 1242.

Walla Walla police officers and detectives responded to the shots fired call. RP2 534, 952. The police arrived to find Janette Rojas Balderas dead on the lawn outside her home and her boyfriend Jon Cano breathing his last breaths. RP2 536, 777, 953.

Both Rojas and Cano had multiple gunshots wounds. RP2 560-61, 579-80. Both died due to the wounds. RP2 577, 580.

The police had no suspects. RP2 962. As part of their investigation, they collected gun shell casings at the shooting scene and took into evidence bullets recovered during the autopsy. RP2 580, 955, 976, 978-79.

At the time of her death, Rojas had been working as a confidential informant with the Walla Walla Police Department. RP2 959-60. She had

participated in 15 controlled purchases of drugs in exchange for leniency on a pending shoplifting charge. RP2 960-61.

Five of the people she engaged in drug sales with, people prosecuted by the state, were still at large in the community when Rojas died. RP2 964-66. One person, Charley Lozano, likely knew the name of the informant. The state charged Lozano with selling drugs, and his defense case had reached the stage where the informant's name – Janette Rojas - had been revealed to Charley Lozano's defense attorney and, presumptively, by the attorney to Charley Lozano. RP2 966.

Charley Lozano was a member of the 18th Street Gang. RP2 660. On the night of Rojas' and Cano's deaths, there was a going away party for Charley Lozano, hosted by other gang members, as he was due in court for sentencing. RP3 1136-37.

Several months after the shooting, the police learned of a possible suspect in the shooting. In the fall of 2015 to the spring of 2016, Jose Quintero was incarcerated in the Walla Walla County Jail. RP2 1126. During his incarceration, Quintero was housed at separate times with inmates Birzaut Carmona Hernandez and Diego Bante. Hernandez and Bante belonged to the same gang as Ontiveros, the 18th Street Gang. RP2 640; RP3 1127-1127. Both Hernandez and Bante told the police that

Quintero told them he and Charley Lozano shot Rojas and Cano because Rojas was a snitch. RP2 648-651; RP3 1126-30.

The state had charged Birzaut Carmona Hernandez with first-degree murder, first-degree assault, and intimidating a witness related to an unrelated gang shooting at the Green Lantern Tavern. RP2 642, 646-47. After giving information against Quintero, he was allowed to plead guilty to fourth-degree assault and criminal mischief. RP2 602. Hernandez did not want to plead to any felony charges because felonies are particularly concerning for immigration consequences. RP2 602. The state also offered to assist Hernandez with immigration issues in exchange for his plea. RP1 90-92.

Diego Bante ended up in jail with Quintero after being charged for his involvement with a drive-by shooting committed with Quintero. RP3 1144. He too was offered immigration assistance by the state in exchange for his testimony against Quintero on the Rojas-Cano homicides. RP3 1154. The state agreed to provide him a letter to help him apply for a certain sort of VISA, a U Visa. RP1 92; RP3 1153-54.[1]

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[1] Bante left the gang after being shot by his fellow gang members because they thought he snitched to the police about the Rojas-Cano shooting. RP3 1133. The shooting left him paralyzed from the chest down. RP3 1134.

Over objection, the court refused to allow Quintero to impeach Bante or Hernandez with information about the state's offered assistance on their immigration matters. RP1 105, 107; RP3 1154.

The court maintained "given the political climate" the immigration topic was too prejudicial even to mention. RP3 1155. As such, the jury did not hear about Hernandez's and Bante's motivation for providing information against Quintero.

Hernandez testified to having been in custody with Quintero around December 2016. He claimed Quintero told him that he, Quintero, did the shooting. RP2 650-51. Hernandez also provided the police with written rap lyrics he claimed were created and written by Quintero. RP2 680-83. The lyrics purportedly described shooting ratas – snitches. RP2 683.

Bante was also housed in custody with Quintero. He too claimed that Quintero told him that he, Quintero, shot Rojas and Cano. RP3 1127-31.

The only other connection Quintero had to the shooting was that both of the guns used in the shooting were used in an August 5, 2015, shooting in Milton Freewater, Oregon, at the Taj, a gas station and convenience store. RP2 795, 803. Quintero exchanged gunfire with Cisco

Gonzalez, a Florencio 13 gang member. RP2 718-19, 724-728, 798, 804, 838-40, 913.

Washington State Patrol Forensic scientists Brian Smelser assessed the casings recovered at and around the Taj. He compared them to the casings recovered from the Walnut double homicide. He concluded the 9 mm casings recovered at the Taj shooting matched the casings recovered at the Walnut homicide and, therefore, the same gun was used at each shooting. RP3 1004. He analyzed the same .25 caliber casings recovered from both shootings and similarly concluded the same .25 caliber was used at both shootings. RP3 1010.

The state charged Quintero with two counts of murder in the first degree for the shooting, both with firearm enhancements, and a single charge of unlawful possession of a firearm in the first degree.

After an initial period of deliberation, the court disqualified and removed Juror Number 3 who had early-stage dementia. RP3 1293, 1399-1400. The court reconstituted the jury with an alternate juror and told to begin deliberation anew. RP3 1402.

The jury returned verdicts finding Quintero guilty of both first-degree murders and the unlawful possession of a firearm in the first

degree. CP 191. The jury did not find Quintero armed with a firearm as to either murder charge. CP 192.

At sentencing, Quintero asked the court to consider his youth, just 21, as a mitigating sentencing factor. RP3 1448; CP 193-98. The court declined to do so. RP3 1472.

The court imposed a standard range sentence of 780 months. RP 1474; CP 203.

The court found Quintero indigent but ordered he pay a $200 criminal filing fee and a $100 DNA fee. RP3 1472; CP 201.

Quintero had a 2016 felony conviction in Walla Walla County for possession of a stolen firearm. CP 200.

Quintero appeals all portions of his judgment and sentence. CP 212.

D. ARGUMENT

Issue 1: Quintero's convictions should be reversed and his case remanded for retrial because the court denied him his constitutional right to impeach key witnesses with the state's offer of help on immigration issues.

The court denied Quintero a fair trial by restricting Quintero's impeachment of the state's key witness, Diego Bante and Birzaut Carmona

Hernandez on the full extent and nature of their plea agreements with the state.

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22. The right to a fair trial includes the right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). It includes the right to present a defense, which means, "at a minimum... the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990) (improper evidentiary rulings deprive a defendant of due process where it is so unfair as to "violate [ ] fundamental conceptions of justice").

Likewise, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," and the court may not improperly restrict the accused's cross-examination.

Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); U.S. Const. amend. 6; art. I, § 22. Errors in failing to allow Quintero to fully explore the plea agreements of key witnesses Diego Bante and Birzaut Carmona Hernandez, to include favorable immigration recommendations, denied Quintero his right to a fair trial. Both Diego Bante and Birzaut Carmona Hernandez were essential to the state's case. Without their testimony, the jury's verdict would not survive a sufficiency of evidence challenge.

Meaningful cross-examination of the prosecution's witnesses is the "primary and most important component" of the constitutional right to confront witnesses. *State v. Darden,* 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Testing the credibility of witnesses includes detailing the benefits they may receive from testifying. *Davis,* 415 U.S. at 315-16; see *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). When the right to confront a prosecution witness is at stake, "any error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." *Johnson*, 90 Wn. App. at 69.

Hernandez testified to having shared a jail cell with Quintero for about ten days in October 2015. RP2 643-44. Both were members of the

18th Street Gang. RP2 644. He testified Quintero told him about shooting Rojas and Cano with Charley Lozano. RP2 651. He and Lozano parked a few houses away and walked up on Rojas and Cano. RP2 651. He, Quintero, used a 9 mm and Lozano used a .25 caliber. RP2 653. They drove the Lozano family van to and from the shooting. RP 657. Quintero shot the couple because Rojas testified against Charley Lozano. RP2 658.

Hernandez provided the police with "gang lyrics" he claimed were written by Quintero. RP2 666. Walla Walla Police Detective Saul Reyna reviewed the lyrics. They did not refer specifically to a homicide, but the lyrics suggested approval of "what was going on." RP2 934.

The state allowed Hernandez to plea to significantly reduced charges. RP2 602, 647. The state also agreed to write a letter to the immigration authorities to assist him in allowing to stay in the country. RP1 93-96, 102; RP3 1154, 1441. The court excluded the immigration consequences of the plea agreement because it was too toxic. RP1 109.

Bante testified to having been in custody with Quintero for about two and a half months. RP3 1132. He and Quintero were in the same gang. RP3 1127. While in jail together, Quintero told him that he and Charley Lozano shot Rojas and her boyfriend. RP3 1127. He shot her because she was a snitch and she had done a controlled buy on Charley Lozano. It was

part of the gang culture to kill snitches. RP9 1131. Quintero used the 9 mm, and Charley Lozano used the .25 caliber. RP9 1130.

Like Hernandez, the state offered to write a letter to the immigration authorities to allow Diego Bante to stay in the country. RP3 1154. The court excluded the immigration consequences of the plea agreement because it was too hot given the current political climate. RP3 1154.

"A defendant may impeach a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness's testimony." *State v. Ish*, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). A witness's motivation in testifying is "a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17. It is "always relevant" to discredit a witness based on exploring his bias and partiality. *Id*.

Here the court denied Quintero his right to fully explore Hernandez's and Bante's motivation for testifying against him. Instead, in both instances, the court's ruling deprived Quintero his constitutional right to fully explore the motivation of both witnesses. The "agreements or promises made by the State in exchange" for their testimony were relevant and admissible to impeach their credibility. *See Ish*, 170 Wn.2d at 198.

Neither Hernandez nor Bante wished to be compelled to leave the country. The state agreed to help them avoid deportation. The jury was entitled to hear their strong motivation in saying whatever they needed to say against Quintero in exchange for the free immigration assistance they desperately wanted.

When both witnesses testified, they had pled guilty and served their sentences. They hoped to stay in the country with the promised assistance of the state. Their testimony was the final step in assuring the state's promised assistance. It was in both witnesses' self-interest to maintain their version of events to assure the immigration assistance. Yet, the jury did not learn both witnesses' vulnerable status and their significant personal investment in testifying against Quintero. *Davis*, 415 U.S. at 318. Barring the defense from questioning Hernandez and Bante about their plea bargains and positive immigration assistance denied Quintero his right to meaningfully cross-examine these important witnesses for the prosecution.

The essence of the state's case was Janette Rojas and Jon Cano were shot to death in Rojas' front yard late at night. No witnesses to the actual shooting immediately came forward. No one from the neighborhood provided any clues as to the shooters' identities. What

remained was the tangential link of the shell casings left behind at the Taj shooting, a known shooting where Quintero engaged in a gun fight with a rival gang member. RP2 913. But no one identified Quintero as the person having exclusive access to the guns used at the Taj shooting and the Walnut shooting. Law enforcement provided no testimony that gang members, and especially Quintero, are known for their loyalty to a particular gun.

Bante and Hernandez were the two gang members who turned state's witnesses for considerable plea reduction and positive immigration recommendations in exchange for testimony against Quintero.

The state may pick and choose who they make deals with. They can make generous offers in exchange for testimony to improve their chances of securing a conviction. But there is a constitutional obligation to the defendant to be allowed to explore the deals. Quintero was not allowed to do so. Per the court, the topic of immigration was simply too toxic. But Quintero is serving a 780 month - 65 year - sentence. That is a lot of toxicity for Quintero.

The state should not be able to misrepresent the extent of a witness' negotiated plea agreement simply because the agreement touches on a controversial issue – here, immigration. In reality, the

"toxicity" inherent in the plea agreement is a sweet deal made sweeter by the court's refusal to allow it to be explored.

Quintero's convictions should be reversed and his case remanded for a fair retrial.

Issue 2: Recent changes in the law regarding discretionary filing fees and DNA fees requires remand to strike the fees from Quintero's judgment and sentence.

The trial court found Quintero indigent and held he had no ability to pay discretionary legal financial obligations. RP3 1473. Yet, the court imposed a $200 criminal filing fee and a $100 DNA collection fee. CP 201. Recent changes in the law require Quintero's case should be remanded to the trial court to strike the filing and DNA fee.

The legislature mandated that a court "'shall not order a defendant to pay costs unless the defendant is or will be able to pay them.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)). *Blazina's* dictate was recently reiterated in *State v. Ramirez*, __ Wn. 2d __, 426 P.3d 714, 718 (2018).

Blazina's imperative language prohibits a trial court from ordering discretionary LFOs absent an individualized inquiry into the person's ability to pay. *Ramirez*, 427 Wn.2d at 716. The *Blazina* court suggested that an indigent person likely could never pay LFOs. *Blazina*, 182 Wn.2d at 836-37.

("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs"). It is difficult to imagine that Quintero, who entered prison as an indigent person, will emerge from prison, perhaps in his 80s after serving a long sentence, as a well-to do person ready to dive into the employment arena with in-demand marketable skills.

At sentencing, the judge indicated he would impose only mandatory LFOs. RP3 1473; CP 332-333. Under former RCW 36.18.020(2)(h), applicable at Quintero's sentencing, an adult criminal defendant was liable for a filing fee of $200. Under former RCW 43.43.7541, every sentence imposed for a crime specified in RCW 43.43.754 had to include a fee of $100 for the DNA identification database.

The court imposed the requisite $100 DNA database fee and a $200 filing fee, which at the time of imposition were statutorily mandated. CP 201; RP3 1473.

House Bill 1783 modified Washington's system of legal financial obligations. *State v. Ramirez*, 426 P.3d 714, 2018 WL 4499761 (September 20, 2018). It amended former RCW 10.01.160(3) to expressly prohibit a court from imposing discretionary costs on indigent defendants. LAWS OF

2018 ch. 269 §6 (3). The formerly mandatory criminal filing fee became a discretionary cost. LAWS of 2018 269 § 17 (2)(h).

Under former RCW 36.18.020(2)(h), upon conviction or a plea of guilty, an adult criminal defendant was liable for a filing fee of $200. The formerly mandatory criminal filing fee became a discretionary cost. LAWS of 2018, ch. 26. The LAWS OF 2018 ch. 26 § 18 provides too that crimes specified in RCW 43.43.754 must include a DNA collection fee of $100 hundred dollars unless the state has collected the offender's DNA because of a prior conviction.

The statute's effective date was June 7, 2018. LAWS OF 2018 at ii (see (5)(a) setting out the effective date.). Our Supreme Court held that individuals whose case was not final at the statute's effective date were entitled to the benefit of the amended criminal filing fee statute. *Ramirez*, 426 P.3d 714.7 (2)(h).

Quintero had been convicted as an adult of possession of a stolen firearm in 2016. CP 200. As Quintero has a history of a prior conviction in Washington State, his DNA is on file.

The trial court found Mr. Quintero indigent. His case is on direct appeal and therefore, not final. He is entitled to the benefit of the

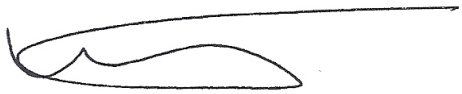
amended statute. The $100 DNA fee and the $200 filing fee should be stricken.

E. CONCLUSION

Quintero's convictions should be reversed and remanded for retrial.

In the alternate, his case should be remanded to strike the filing fee and the DNA collection fee.

Respectfully submitted November 20, 2018.



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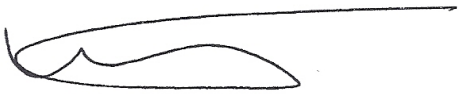
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Walla Walla County Prosecutor's Office, at jnagle@co.walla-walla.wa.us; (2) Teresa Chen, /franklin County Prosecutor's Office, at tchen@co.franklin.wa.us; (3) the Court of Appeals, Division III; and (3) I mailed it to Jose M. Quintero, DOC#388625, Clallam Bay Corrections Center, 1830 Eagle Crest Way Clallam Bay, WA 98326.

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

Signed November 20, 2018, in Winthrop, Washington.



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