

FILED
Court of Appeals
Division III
State of Washington
12/17/2018 4:17 PM

NO. 35805-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BLAKE ANDREW ZAHN,

Appellant.

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

REPLY BRIEF OF APPELLANT

KATE R. HUBER
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katehuber@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

A. ARGUMENT 1

1. Mr. Zahn did not make an unequivocal request to proceed pro se and did not knowingly and intelligently waive his right to counsel. 1

2. The State impermissibly commented on Mr. Zahn’s constitutional right to remain silent..... 3

3. The court’s unconstitutional comments on the evidence requires reversal. 5

4. This Court should strike the imposition of certain costs from Mr. Zahn’s judgment and sentence..... 7

F. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 4

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 1

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 8, 9

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963) 6, 7

State v. Breedlove, 79 Wn. App. 101, 900 P.2d 586 (1995)..... 3

State v. Curry, 191 Wn.2d 475, 423 P.3d 179 (2018)..... 1

State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991) 2

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)..... 4

State v. Glover, ___ Wn. App. 2d ___, 423 P.3d 290 (2018) 9

State v. Gonzalez, 2 Wn. App. 2d 96, 408 P.3d 743 (2018) 6

State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004)..... 4

State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006)..... 6, 7

State v. Lampshire, 74 Wn.2d 888, 447 P.2d 727 (1969)..... 6

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006)..... 6

State v. Lundstrom, ___ Wn. App. ___, 429 P.3d 1116 (2018)..... 9

State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010) 1

State v. Perrett, 86 Wn. App. 312, 936 P.2d 426 (1997)..... 5

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 8, 9

State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002)..... 3, 4, 5

<i>State v. Silva</i> , 108 Wn. App. 536, 31 P.3d 729 (2001)	3
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)	3

Statutes

RCW 10.01.160	7
RCW 10.82.090	8
RCW 36.18.020	8
RCW 43.43.7541	8
RCW 69.50.4013	6

Other Authorities

U.S. Const. amend 5	4
U.S. Const. amend 6	1
U.S. Const. amend 14	1
Const. art. I, § 9.....	4
Const. art. I, § 22.....	1
Const. art. IV, § 16.....	5

A. ARGUMENT

1. Mr. Zahn did not make an unequivocal request to proceed pro se and did not knowingly and intelligently waive his right to counsel.

A waiver of the right to counsel must be timely and unequivocal and the court must determine it is knowingly, intelligently, and voluntarily made. Const. art. I, § 22; U.S. Const. amends. 6, 14; *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Curry*, 191 Wn.2d 475, 482-83, 423 P.3d 179 (2018). Courts must deny equivocal requests and must presume defendants do not intend to waive counsel. *Curry*, 191 Wn.2d at 486; *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

The inquiry into whether an individual knowingly, intelligently, and voluntarily waives his right to counsel necessarily occurs at the time of the alleged waiver; that is, *before* the individual actually proceeds pro se. A retrospective inquiry cannot accurately ensure the individual knowing, intelligent, and voluntary waived the right to counsel at the time the court declared the defendant pro se. *Madsen*, 168 Wn.2d at 504 (noting court must determine if request to proceed pro se is voluntary, knowing, and intelligent waiver of counsel “when a defendant requests pro se status”).

Here, the court declared Mr. Zahn was representing himself and relieved appointed counsel without any inquiry into whether Mr. Zahn's single comment stating he wanted to represent himself was an unequivocal request to proceed pro se. RP 6-8. The one statement from Mr. Zahn was not an unequivocal request to proceed pro se. *See* Br. of Appellant at 13-18. In addition, the court made no inquiry from which to determine Mr. Zahn knowingly, intelligently, and voluntarily waived his right to counsel.

At the time the court relieved his attorney and declared Mr. Zahn pro se, the court did not verify Mr. Zahn understood "the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense." *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). The court made no inquiry whatsoever into whether Mr. Zahn knowingly, intelligently, and voluntarily waived his right to counsel.

The State only addresses the court's inquiry of Mr. Zahn occurring several court dates *after* the court had already relieved counsel and declared Mr. Zahn pro se and ignores the complete failure of the court to conduct a timely inquiry. Br. of Respondent at 18. The court's eventual colloquy with Mr. Zahn, occurring after he had been appearing pro se for several court dates, failed to establish Mr. Zahn knowingly, intelligently,

and voluntarily waived his right to counsel at the time the court declared him pro se and relieved the attorney appointed to represent him.

The deprivation of counsel is not subject to a harmless error analysis and requires reversal. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-50, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *State v. Silva*, 108 Wn. App. 536, 542, 31 P.3d 729 (2001); *State v. Breedlove*, 79 Wn. App. 101, 110, 900 P.2d 586 (1995). Therefore, for these reasons and the reasons in Mr. Zahn's Opening Brief, this Court should reverse the conviction and remand for a new trial.

2. The State impermissibly commented on Mr. Zahn's constitutional right to remain silent.

The State impermissibly commented on Mr. Zahn's constitutional right to silence in both the prosecutor's opening statement and Sergeant Arnold's testimony. RP 127, 143. These impermissible comments served no legitimate purpose other than to inform the jury Mr. Zahn asserted his constitutional right to remain silent and deprived Mr. Zahn of a fair trial. The State fails to rebut the presumption of prejudice resulting from this constitutional error, and reversal is required. *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002).

Contrary to the State's argument, Sergeant Arnold's testimony could not have left the jury with the impression that a "conversation"

between Sergeant Arnold and Mr. Zahn simply ended. Br. of Respondent at 21. Sergeant Arnold testified he Mirandized Mr. Zahn, questioned him, and that, after answering one question, Mr. Zahn “didn’t want to talk to me anymore.” RP 142-43. This informed the jury Mr. Zahn asserted his right to silence. It did not suggest to the jury an innocuous end of a “conversation” that had simply run its course. The jury had no conclusion to draw from the testimony other than that Sergeant Arnold’s interrogation ended because Mr. Zahn exercised his constitutional right. This is precisely the sort of comment on a defendant’s right to remain silent that the Fifth Amendment and article I, section 9, prohibit. “[A]ny direct police testimony as to the defendant’s refusal to answer questions is a violation of the defendant’s right to silence.” *Romero*, 113 Wn. App. at 792 (emphasis in original).

Direct comments on the right to silence are constitutional errors. *Chapman v. California*, 386 U.S. 18, 19-20, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004); *Romero*, 113 Wn. App. at 790. Moreover, reviewing courts must presume this constitutional error prejudicial. *Chapman*, 386 U.S. at 22-24; *State v. Easter*, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996).

Here, the testimony and comment had “no discernable purpose other than to inform the jury that the defendant refused to talk to the police

without a lawyer.” *Romero*, 113 Wn. App. at 789. As Mr. Zahn argued in his opening brief, particularly considering the cumulative impact of the multiple constitutional errors in this case, the State has failed to establish its burden of proving beyond a reasonable doubt this constitutional error was harmless. Br. of Appellant at 29, 31 (arguing cumulative constitutional error of impermissible comment on right to silence and impermissible comment on evidence require reversal); *State v. Perrett*, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997) (finding police testimony defendant “said he had nothing to say” constituted improper comment on defendant’s right to silence and was one of three errors contributing to cumulative error depriving defendant of fair trial and necessitating reversal).

3. The court’s unconstitutional comments on the evidence requires reversal.

The State acknowledges the court’s repeated comments to and in front of the jury regarding the exhibits were an impermissible comment on the evidence in violation of Mr. Zahn’s constitutional rights. Const. art. IV, § 16; Br. of Respondent at 22. Therefore, for the reasons in his Opening Brief and as the State acknowledges, this Court should find the court’s remarks were an impermissible comment on the evidence. Br. of Appellant at 30-37.

Courts must presume prejudice from judicial comments on the evidence. *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Reviewing courts must reverse the conviction and remand for a new trial unless the State affirmatively proves no error resulted from judicial comments on the evidence. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006); *State v. Bogner*, 62 Wn.2d 247, 256, 382 P.2d 254 (1963). The State fails to rebut this presumption.

The State was required to prove beyond a reasonable doubt that what Mr. Zahn possessed was a controlled substance. RCW 69.50.4013. This was an essential element of the offense. *See State v. Gonzalez*, 2 Wn. App. 2d 96, 105-110, 408 P.3d 743 (2018). The court's repeated comments to the jury that the exhibits were "actual drugs" communicated to the jury the court's opinion that the evidence was, in fact, a controlled substance. RP 224-25. It is difficult to construe these impermissible comments as anything other than "[a] remark that has the potential effect of suggesting that they jury need not consider an element of an offense." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

The State argues these impermissible comments did not prejudice Mr. Zahn because the evidence the substance was a controlled substance was uncontested and overwhelming. Br. of Respondent at 24-26. But Mr. Zahn's failure to introduce affirmative evidence disputing the identity of

the substance is not dispositive. *Jackman*, 156 Wn.2d at 743-45 (finding State failed to rebut presumption of prejudice even where victim's age was not in dispute and where defense did not challenge this element). Further, Mr. Zahn did challenge the identity of the substance at issue, albeit inartfully. *See, e.g.*, RP 151 (cross examining Sergeant Arnold on the fact he is not a drug recognition expert), 158-60 (voir dire of Dr. Stenzel on chain of custody, testing procedures), 171 (cross examining Dr. Stenzel on whether he personally tested substance).

This Court must consider the impact of these unconstitutional comments together with the other constitutional error in Mr. Zahn's trial. In addition, the timing of the court's unconstitutional comments – occurring immediately before the jury began deliberations – increases its prejudicial effect. Here, it cannot be said “it affirmatively appears that the jury could not have been influenced by the comments of the trial judge.” *Bogner*, 62 Wn.2d at 256. Therefore, Mr. Zahn is entitled to reversal.

4. This Court should strike the imposition of certain costs from Mr. Zahn's judgment and sentence.

RCW 10.01.160(3) clearly prohibits a sentencing court from imposing costs on indigent defendants and “requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay

discretionary costs.” *State v. Ramirez*, 191 Wn.2d 732, 738-39, 426 P.3d 714 (2018). Courts must conduct an individualized inquiry into a person’s current and future ability to pay before it may impose discretionary LFOs or set a payment schedule. *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). This includes an inquiry not only into past and future employment, but income, assets, financial resources, living expenses, and debts. *Ramirez*, 191 Wn.2d at 743. Appellate courts review de novo the adequacy of the trial court’s inquiry. *Id.* at 741-42.

In addition, pursuant to recent amendments to the LFO statutes, courts may not impose criminal court filing fees on indigent defendants (RCW 36.18.020(2)(h)), may not impose a DNA fee where the State previously collected a DNA sample from the defendant (RCW 43.43.7541), and may not impose interest except on restitution. RCW 10.82.090(1). Although the amendments took effect June 7, 2018, *Ramirez* holds these amendments apply prospectively to all defendants whose cases are pending on direct appeal. 191 Wn.2d at 746-50. Therefore, Mr. Zahn is entitled to the benefits of the amended statutes.

Here, the court imposed \$2, 210.50 of costs. CP 10-11; RP 249. This Court should strike all but the \$500 Victim Assessment Fee. The court asked Mr. Zahn a total of two questions, only about his employment history and intent, before imposing costs. RP 246. The court did not

inquire as to Mr. Zahn's incarceration, other debts, or restitution. This inquiry was inadequate. *Ramirez*, 191 Wn.2d at 743-46; *Blazina*, 182 Wn.2d at 838-39 (outlining nonexhaustive list of factors court must consider before imposing costs). The State does not argue otherwise. Br. of Respondent at 16 n.3 ("The State takes no position on appeal regarding the imposition on [sic] LFO's.")

Because sufficient facts exist in the record to conclude Mr. Zahn was indigent (*see* Opening Br. at 41), a resentencing hearing is unnecessary, and this Court may remand with a directive that the LFOs be stricken from the judgment and sentence. *Ramirez*, 191 Wn.2d at 749-50 (reversing and remanding for trial court to amend judgment and sentence to strike criminal court filing and DNA fees, as well as discretionary LFOs); *State v. Lundstrom*, ___ Wn. App. ___, 429 P.3d 1116, 1121 (2018) (following *Ramirez* and reversing imposition of criminal court filing and DNA fees and remanding). Alternatively, this Court should find the sentencing court conducted an inadequate individualized inquiry and remand for a resentencing hearing. *See State v. Glover*, 4 Wn. App. 2d 690, 694-96, 423 P.3d 290 (2018) (finding inquiry inadequate where court asked only about work history but not debts, assets, and overall financial situation, and reversing and remanding for hearing on LFOs).

F. CONCLUSION

The court declared Mr. Zahn pro se without determining he knowingly, intelligently, and voluntarily waived his right to counsel and without an unequivocal request. This constitutional error requires reversal. In addition, the State commented on Mr. Zahn's right to silence and the commented on the evidence. These constitutional errors individually and collectively denied Mr. Zahn a fair trial, and the State fails to rebut the presumption of prejudice, requiring reversal. The court must also strike the discretionary LFOs or remand for the court to conduct a proper an individualized inquiry into Mr. Zahn's ability to pay costs.

DATED this 17th day of December 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a stylized flourish at the end.

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorneys for Appellant
katehuber@washapp.org
wapofficemail@washapp.org

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35805-4-III
)	
BLAKE ZAHN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> ARIAN NOMA [anoma@co.okanogan.wa.us] OKANOGAN COUNTY PROSECUTOR'S OFFICE PO BOX 1130 OKANOGAN, WA 98840-1130	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> BLAKE ZAHN PO BOX 778 METHOW, WA 98834	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2018.

X _____ 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

December 17, 2018 - 4:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35805-4
Appellate Court Case Title: State of Washington v. Blake Andrew Zahn
Superior Court Case Number: 17-1-00343-1

The following documents have been uploaded:

- 358054_Briefs_20181217161453D3611634_2048.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.121718-04.pdf
- 358054_Motion_20181217161453D3611634_8277.pdf
This File Contains:
Motion 1 - Other
The Original File Name was washapp.121718-03.pdf

A copy of the uploaded files will be sent to:

- anoma@co.okanogan.wa.us
- l.drangsholt@co.island.wa.us
- sfield@co.okanogan.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Kate Huber - Email: katehuber@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20181217161453D3611634