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NO. 36010-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

MIKHAIL BARBAROSH,

Appellant.

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

The Honorable Shea Brown, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct during closing argument denied appellant a fair trial.

2. Appellant was denied his Sixth Amendment right to effective representation.

3. Because the to-convict jury instruction did not identify the controlled substance appellant possessed, his case must be remanded for imposition of a misdemeanor sentence.

4. The criminal filing fee and DNA fee imposed at sentencing should be stricken under the Supreme Court's recent decision in State v. Ramirez.¹

Issues Pertaining to Assignments of Error

1. Appellant was accused of possessing methamphetamine while in the Benton County Jail. No drugs were found on appellant, and the State theorized he had given them to another inmate found to have methamphetamine in his pocket. There has long been a prohibition on prosecutors expressing their personal opinions on a defendant's guilt. During closing arguments, however, the prosecutor expressed his personal

¹ State v. Ramirez, ___ Wn.2d ___, ___ P.3d ___, 2018 WL 4499761 (September 20, 2018).

opinion that the evidence presented had established appellant's guilt. Did this misconduct deny appellant his right to a fair trial?

2. Defense counsel failed to object to the prosecutor's misconduct. Did this failure deny appellant his right to effective representation?

3. Does the failure to identify in the to-convict instruction the substance appellant possessed require resentencing for a misdemeanor?

4. Under the Supreme Court's recent decision in Ramirez, must the \$200 criminal filing fee and \$100 DNA fee be stricken from appellant's judgment and sentence?

B. STATEMENT OF THE CASE

The Benton County Prosecutor's Office charged Mikhail Barbarosh with possession of a controlled substance (methamphetamine), which included a 12-month sentence enhancement under RCW 9.94A.533(5)(c) because the crime occurred while Barbarosh was serving time in the county jail. CP 7-8.

Evidence at trial revealed that, on November 4, 2017, Corrections Officer Cynthia Young – while working master control over the locked doors at the Benton County Jail – watched on a

real-time video monitor as Barbarosh approached a door leading to the jail kitchen. RP 41-42, 44. Barbarosh was a laundry trustee, which afforded him greater freedom within the jail, including access to some people entering and exiting the facility. RP 42, 46, 58-59, 61-62. Officer Young watched Barbarosh bend down near the door, a violation of jail rules. RP 42, 60, 65. There were two kitchen trustees on the other side, and one of them bent down on the opposite side of the door, stood up, and put something in his shirt pocket. RP 42, 44-45, 49-52; exhibit 1. Young contacted Corrections Officer Terry Blumenthal and asked him to investigate. RP 45.

Officer Blumenthal searched inmate Daniel Kapitula, the kitchen trustee seen placing something in his pocket. RP 69-71. Blumenthal pulled several items from Kapitula's pocket, including a folded white piece of paper wrapped with blue painter's tape that Blumenthal located at the very bottom of Kapitula's pocket and under the other items. RP 71-72, 76-77, 79-81. Officer Blumenthal brought the items to Officer Boris Draskovic, who was in charge of all trustees. RP 75, 106. When Draskovic unwrapped the taped paper, which he identified as a smashed white pill cup used for medical purposes in the jail, he discovered a crystal like substance

inside. RP 75, 106-107, 120. Strip searches of Kapitula, Barbarosh, and the kitchen trustee with Kapitula revealed no additional contraband. RP 78-79, 107-108, 111-112, 117. Nor was anything found in Barbarosh's clothing, despite a careful search. RP 112.

Officer Draskovic gave the suspected drugs to Corporal Dallas Murray, who gave them to Deputy Bruce Surplus, who placed them into evidence in his office. RP 76, 87-88, 118-119. The amount of substance involved was so small, Surplus did not even attempt to weigh it for fear of losing it. RP 89-91. Surplus later sent the substance to the state crime lab, where the unweighed "residue" was found to contain methamphetamine. RP 98, 102-103. By then, however, someone had placed the substance in a small plastic bag, and the crushed paper cup in which it was originally found wrapped in blue tape had been misplaced or discarded. RP 99-103, 111, 120-124.

During closing arguments, the prosecutor argued there was sufficient circumstantial evidence for jurors to find that Barbarosh had possessed the methamphetamine before passing it under the door to Kapitula. RP 146-152. In response, defense counsel pointed out there was no direct evidence that Barbarosh possessed

the substance (since it was impossible to see what, if anything, was passed beneath the kitchen door). Moreover, because the original smashed cup was missing, jurors could not even be sure the substance tested was the substance found on Kapitula. RP 153-159.

In the prosecutor's rebuttal closing, he responded:

[Barbarosh] possessed a controlled substance. He passed that to another inmate. He violated the rules of the trustee to do so, and ultimately Kapitula's found with that substance moments later. I'm satisfied. I'm confident that you will be satisfied considering everything that's been presented to you, and I ask you to find the defendant guilty of the crime of Unlawful Possession of a Controlled Substance and answer "yes" to the Special Verdict Form.

RP 160-161 (emphasis added).

The to-convict instruction used at trial provides:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 4, 2017, the defendant possessed a controlled substance; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 28. Another instruction told jurors, "Methamphetamine is a controlled substance. CP 25.

Jurors convicted Barbarosh and found the sentencing enhancement proved. CP 34-35; RP 168. The verdict form indicates: "We, the jury, find the defendant MIKHAIL S. BARBAROSH, Guilty of the crime of Unlawful Possession of a Controlled Substance as charged in Count I." CP 34.

The Honorable Jackie Shea Brown imposed a residential Drug Offender Sentencing Alternative. CP 58-59; RP 177. Judge Shea Brown also imposed \$800 in legal financial obligations, including a \$200 criminal filing fee and a \$100 DNA database fee. CP 56-57, 64; RP 180-181.

Barbarosh timely filed a Notice of Appeal. CP 66-67. Defense counsel moved for an order of indigency based on the fact Barbarosh fell below the poverty guidelines under RCW 10.101.010 and federal law. CP 68. Judge Shea Brown found Barbarosh to be indigent and lacking sufficient funds to prosecute an appeal without public funds. CP 69-70.

C. ARGUMENT

1. BARBAROSH WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR EXPRESSED HIS PERSONAL OPINION THAT BARBAROSH WAS GUILTY.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a “heated partisan.” State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). A prosecutor is required to seek a verdict free of prejudice and based on reason. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 2d 787 (1969).

The law in Washington is well established: it is misconduct for a prosecutor to express his personal opinion that the defendant is guilty. State v. Lindsay, 180 Wn.2d 423, 437-438, 326 P.3d 125 (2014); In re Glasmann, 175 Wn.2d 696, 706-707, 286 P.3d 673 (2012) (citing multiple cases). Yet, this is precisely what the trial deputy did at Barbarosh’s trial when he told jurors he was satisfied that the evidence established Barbarosh was guilty of possessing methamphetamine.

Because defense counsel did not object to the improper argument, generally the misconduct is waived unless it was so flagrant and ill intentioned that that an instruction would not have cured the resulting prejudice. Glasmann, 175 Wn. App. at 704. The proper focus is less on the prosecutor's motivations and more on whether the prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

Previously, the Supreme Court has deemed violations of well-established prohibitions, like the one prohibiting personal opinions on the defendant's guilt, flagrant and ill intentioned. Glasmann, 175 Wn.2d at 707. Given the violation of this same established prohibition at Barbarosh's trial, this Court also should deem the violation flagrant and ill intentioned.

Moreover, once jurors heard the prosecutor's personal opinion on the matter, a curative instruction would not have sufficed. This was an otherwise close case. No one saw precisely what, if anything, Barbarosh slipped under the door. No drugs were

found on Barbarosh, and it is unknown who Kapitula met with or had access to prior to discovery of the drugs. Kapitula may have already had the substance for some time given that it was found at the bottom of his shirt pocket and underneath other items. Moreover, officers lost the original materials (the flattened pill cup and tape) in which Kapitula was concealing the methamphetamine. Therefore, as defense counsel argued, there was reason to question whether the crime lab had even tested the correct substance. Unfortunately for Barbarosh, however, these deficiencies in the State's proof were less likely to lead to a finding of reasonable doubt once the prosecuting attorney shared his personal view of Barbarosh's guilt, a personal view jurors would not simply forget with an attempted curative instruction.

If this Court is not inclined to reverse under the above standards because it believes a curative instruction would have remedied the impact of the misconduct, it should do so under the standards applicable to ineffective assistance of counsel. See In re Pers. Restraint of Lui, 188 Wn.2d 525, 560-562, 397 P.3d 90 (2017) (failure to object to prosecutorial misconduct in closing argument assessed under standards for ineffective assistance);

State v. Horton, 116 Wn. App. 909, 921-922, 68 P.3d 1145 (2003) (same).

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection would likely have been sustained; and (3) the jury verdict would have been different with a proper objection. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

There was no legitimate strategy behind counsel's failure to object. Defense counsel understood the importance of preventing jurors from considering an improper opinion on guilt, successfully obtaining a pretrial ruling prohibiting *witnesses* from expressing an opinion that Barbarosh had committed a crime. CP 6; RP 12-15. Yet, when the prosecutor himself expressed for jurors that he was satisfied the charged crime had been proved, defense counsel did

nothing. Competent counsel would have objected and moved to strike the offending opinion. The failure to object was deficient.

Moreover, a defense objection would have been sustained. As discussed above, the prohibition on personal opinions of guilt is well established. Had counsel lodged a timely objection, the opinion would have been stricken and jurors would have been prohibited from considering it.

Finally, the jury verdict would have been different. To show prejudice, Barbarosh need not demonstrate counsel's performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability the outcome would have been different but for counsel's mistake, *i.e.*, "a probability sufficient to undermine confidence in the reliability of the outcome." In re Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Strickland, 466 U.S. 668). As previously discussed, no drugs were found on Barbarosh and no one could definitively say what, if anything, he slipped under the kitchen door. It was not unreasonable to believe that Kapitula previously obtained the methamphetamine found in the *bottom* of his pocket elsewhere. There is a reasonable probability the

prosecutor's improper opinion – offered immediately before jurors left to deliberate – affected the outcome.

Whether under the standards for prosecutorial misconduct or ineffective assistance of defense counsel, Barbarosh should receive a new and fair trial.

2. THE FAILURE TO IDENTIFY IN THE TO-CONVICT INSTRUCTION THE SUBSTANCE BARBAROSH POSSESSED REQUIRES REMAND FOR IMPOSITION OF A MISDEMEANOR SENTENCE.

A to-convict instruction must contain all essential elements of the charged crime, and reviewing courts may not rely on other instructions to supply a missing element. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). “When the identity of a controlled substance increases the statutory maximum sentence which the defendant may face upon conviction, that identity is an essential element.” State v. Clark-EI, 196 Wn. App. 614, 618, 384 P.3d 627 (2016) (citing State v. Goodman, 150 Wn.2d 774, 778, 83 P.3d 410 (2004); State v. Sibert, 168 Wn.2d 306, 311-312, 230 P.3d 142 (2010) (plurality opinion)). Moreover, omission of this element from the to-convict can be raised for the first time on appeal. Id. at 619.

In Clark-EI, the defendant was charged and convicted of delivering methamphetamine, although the to-convict instruction simply required proof that he “delivered a controlled substance” without identifying that substance. Id. at 618-619. This Court held:

When a defendant is charged with delivering a controlled substance, the identity of the substance is an essential element that must be stated in the to-convict instruction if it increases the maximum sentence the defendant will face upon conviction. In such a case, omission of the essential element is subject to harmless error analysis as to the conviction but not as to the sentence.

Id. at 617. Because methamphetamine was the only controlled substance proved, jurors could only have based their verdict on that substance, and the failure to identify it in the to-convict was deemed harmless as to Clark-EI’s conviction. Id. at 620. However, because delivery of a substance other than methamphetamine could result in conviction for a class C felony (rather than the class B for delivering methamphetamine), the error was not harmless as to sentencing, and the case was remanded for resentencing on a class C felony. Id. at 624-625.

In State v. Leonel Gonzalez, 2 Wn. App. 2d 96, 408 P.3d 743, review denied, 190 Wn.2d 1021, 418 P.3d 790 (2018), Clark-EI’s reasoning and holding for *delivery* cases were extended to cases

involving *possession* of a controlled substance. Like Barbarosh, Gonzalez was charged with possession of methamphetamine under RCW 69.50.4013. Gonzalez, 2 Wn. App. 2d at 101. In pertinent part, the to-convict instruction at his trial provided:

To convict the defendant of the crime of possession of a controlled substance, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 21st day of September, 2015, the defendant possessed a controlled substance; and
- (2) That this act occurred in the State of Washington.

Id. at 104. Gonzalez's jury also was instructed that it is a crime to possess a controlled substance and that methamphetamine is a controlled substance. Id. The jury found Gonzalez guilty. Id.

In finding the to-convict instruction inadequate, this Court reasoned:

[L]ike the unlawful delivery statute, RCW 69.50.4013 does not impose the same maximum sentence for the possession of *all* controlled substances. The effect of RCW 69.50.4013(2)'s reference to RCW 69.50.4014 is to establish that the unlawful possession of 40 grams or less of marijuana is considered a misdemeanor, with a statutory maximum sentence of 90 days, rather than a class C felony, with a statutory maximum sentence of 5 years. See RCW 9A.20.021(1)(c), (3). And the effect of RCW

69.50.4013(3) and (5) is to exclude certain categories of possession of marijuana from punishment altogether.

Id. at 109-110.

Because the evidence that Gonzalez had possessed methamphetamine was uncontroverted and there was no evidence he had possessed 40 grams or less of marijuana or lawfully possessed recreational or medical marijuana, the failure to identify the substance in the to-convict was deemed harmless as to the conviction for possessing a controlled substance. Id. at 113. However, as to sentencing, “[w]ithout a finding regarding the nature of the controlled substance, the jury’s verdict did not provide a basis upon which the trial court could impose a sentence based on possession of methamphetamine,” authorizing only the lowest possible sentence for possession of a controlled substance. Id. at 114 (citing Clark-EI, 196 Wn. App. at 624). Therefore, Division Two remanded for imposition of a misdemeanor sentence for Gonzalez’s crime.² Id.

Barbarosh’s case is indistinguishable from Gonzalez. This Court should remand for resentencing on Barbarosh’s conviction for

² One judge dissented, reasoning that, because the to-convict referenced the charging document, and the charging document identified the substance as methamphetamine, the element was incorporated into the to-convict instruction. See id. at 114 n.10. There is no similar language referencing the charging document in the to-convict used at Barbarosh’s trial. See CP 28.

possession of a controlled substance and imposition of a misdemeanor sentence not to exceed 90 days.

3. THE CRIMINAL FILING AND DNA FEES SHOULD BE STRICKEN.

a. \$200 Criminal Filing Fee

In State v. Ramirez, an appellant challenged discretionary legal financial obligations (LFOs) on the grounds that the trial court had not engaged in an appropriate inquiry regarding his ability to pay under State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Ramirez, 2018 WL 4499761 at *2. The Supreme Court agreed, setting forth detailed instructions regarding the appropriate inquiry. Id. at *4-6.

Importantly, however, based on watershed statutory amendments that took effect while Ramirez's appeal was pending, the Supreme Court ultimately granted relief on statutory grounds. The Court explained that Laws of 2018, ch. 269, § 6(3) ("House Bill 1783") made substantial modifications to several facets of Washington's LFO system. In doing so, the legislature "address[ed] some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction." Ramirez, 2018 WL 4499761 at *6.

For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction, and provides that a court may not sanction an offender for failure to pay LFOs *unless* the failure to pay is willful. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, §§ 1, 18, 7). It also amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, § 6(3)). And, it prohibits imposing the \$200 filing fee on indigent defendants. Ramirez, 2018 WL 4499761 at *6 (citing Laws of 2018, ch. 269, § 17).

As Ramirez further noted, a trial court “shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 2018 WL 4499761 at *7 (quoting Laws of 2018, ch. 269, § 6(3)). Thus, indigency may be established by three objective criteria. “Under RCW 10.101.010(3)(a) through (c), a person is ‘indigent’ if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives

an annual income after taxes of 125 percent or less of the current federal poverty level.” Ramirez, 2018 WL 4499761 at *7.³

Crucial to this case, the Court also held that the House Bill 1783 amendments applied prospectively to cases not yet final on appeal. Ramirez, 2018 WL 4499761 at *7-8 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)). The Supreme Court concluded that the trial court impermissibly imposed discretionary LFOs, as well as the \$200 criminal filing fee, on Ramirez. The Court remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. Ramirez, 2018 WL 4499761 at *8.

Here, the record indicates Barbarosh is indigent under RCW 10.101.010(3) and the federally established poverty level. CP 68-70. Because House Bill 1783 applies prospectively to his case, this Court should remand for the \$200 filing fee to be stricken.

³ If none of these criteria apply, only then must the trial court engage in an individualized inquiry into current and future ability to pay. Ramirez, 2018 WL 4499761 at *7.

b. \$100 DNA Fee

This Court also should strike the \$100 DNA fee under House Bill 1783 and Ramirez.

RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was amended under House Bill 1783. The statute now provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

RCW 43.43.7541 (emphasis added.); Laws of 2018, ch. 269, § 18.

Barbarosh has recent felony criminal history. CP 55. Clearly, the State has previously collected his DNA. Because Barbarosh's case is not yet final, the new statute applies. Ramirez, 2018 WL 4499761 at *7-8. As a result, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. Thus, the DNA fee should be stricken.

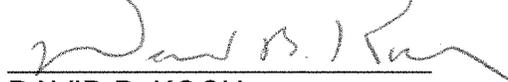
D. CONCLUSION

Prosecutorial misconduct and ineffective assistance of counsel require reversal of Barbarosh's conviction. The failure to identify a controlled substance in the to-convict instruction requires sentencing for a misdemeanor. Moreover, the filing fee and DNA fee were not properly imposed.

DATED this 17th day of October, 2018.

Respectfully submitted,

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