

FILED  
Court of Appeals  
Division III  
State of Washington  
10/9/2018 3:12 PM

NO. 36016-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ALBERT HICKMAN,

Appellant.

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

The Honorable Bruce Spanner, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to move for a mistrial after a police officer violated a pretrial ruling and revealed that appellant had criminal history.

2. The \$200 criminal filing fee and \$100 DNA fee should be stricken from appellant's judgment and sentence.

Issues Pertaining to Assignments of Error

1. The trial court granted a defense motion prohibiting evidence of prior bad acts evidence. Despite this ruling, a police officer testified that appellant had a warrant for his arrest. In response, defense counsel failed to move for a mistrial. Was appellant denied his right to effective representation and a fair trial?

2. Appellant is indigent. Under the Supreme Court's recent decision in State v. Ramirez,<sup>1</sup> must the filing fee and DNA fee be stricken?

B. STATEMENT OF THE CASE

The Benton County Prosecutor's Office charged Albert Hickman with Unlawful Possession of a Controlled Substance (methamphetamine). CP 1-2.

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<sup>1</sup> State v. Ramirez, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.2d \_\_\_, 2018 WL 4499761 (September 20, 2018).

Prior to trial, defense counsel moved under ER 404(b) to prohibit any evidence that Hickman had engaged in prior bad acts. CP 19-20; RP<sup>2</sup> 77. The motion was granted. CP 20; RP 77. Defense counsel also successfully moved for an order requiring the prosecuting attorney to inform his witnesses of this ruling and ensure all witnesses clearly understood what had been excluded. CP 20; RP 78-79.

The State's primary trial witness was Richland Police Officer Todd Woodhouse. RP 92-93. Officer Woodhouse testified that he was on patrol around 10:00 a.m. on April 1, 2016 when he spotted Hickman riding a bicycle on a two lane road, weaving back and forth into the opposite lane of travel. RP 95-96. After Hickman failed to stop at a stop sign, Officer Woodhouse decided to stop him and activated the overhead lights on his marked police vehicle. RP 96-97.

According to Woodhouse, Hickman looked back over his shoulder, saw the police vehicle, and pedaled faster in a different direction. RP 97. Woodhouse followed and watched as Hickman reached into his left pocket, pulled out what appeared to be a glass

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<sup>2</sup> "RP" refers to the consecutively paginated verbatim report of proceedings for August 30, 2017, April 18, 2018, April 23, 2018, and May 2, 2018.

pipe commonly used for methamphetamine, and threw it down on the ground. RP 97-98. Hickman continued another 100 to 200 yards before finally stopping. RP 98.

Officer Woodhouse explained the reason for the stop and asked Hickman why he had thrown the pipe to the ground; Hickman did not answer. RP 98. Hickman provided valid identification from his wallet, and Officer Woodhouse told him to stay where he was while Woodhouse returned to his vehicle and ran his name through dispatch. RP 99.

According to Officer Woodhouse, while seated in his vehicle, he watched as Hickman again reached into his pocket, pulled out another glass pipe, briefly held it over his head and, while staring directly at Woodhouse, threw it to the ground, causing it to disintegrate on impact with the concrete below. RP 99. Officer Woodhouse placed Hickman in handcuffs. RP 100.

Although the trial court had excluded any bad acts evidence, and the prosecutor had promised to inform all witnesses of this prohibition, it was violated during the subsequent exchange between the prosecutor and Officer Woodhouse:

Q: And at that point did you put him under arrest?

A: Yes. At that point he was - - it was pending arrest.

There were multiple things that were pending there.

Q: Okay. At some point you put him under arrest?

A: Yes, at some point I did.

Q: And did he agree to speak with you?

A: Yes. *After the return came back I found he had a warrant for his arrest as well, and I read him his Miranda rights and he agreed to speak to me waiving his rights.*

RP 100 (emphasis added). Defense counsel did not object to this evidence of the warrant for Hickman's arrest or take any other action concerning it. RP 100.

Officer Woodhouse testified that, after initially denying ownership of the glass pipes, Hickman admitted they were his and he had used them to smoke methamphetamine. RP 100. Although Woodhouse was unable to retrieve any portion of the second glass pipe, he returned to the location where the first pipe was discarded, recovered pieces from it, and placed them into evidence. RP 101-105, 108-109, 114-115. A forensic scientist from the state crime lab testified that material found on a piece of the recovered glass testified positive for the presence of methamphetamine. RP 122-123.

Concerned about jurors drawing any improper inferences from Hickman's arrest, defense counsel obtained an instruction directing them that the fact of Hickman's arrest could not be used to infer his guilt or prejudice him in any way. RP 130; CP 25, 35.

Jurors found Hickman guilty, and the Honorable Bruce Spanner imposed a standard range sentence of 45 days in jail. CP 45, 50. Judge Spanner also ordered Hickman to pay a \$200 criminal filing fee and a \$100 DNA fee. CP 49, 55.

At the sentencing hearing, defense counsel explained that Hickman had no job and qualified for food stamps. RP 161-162. Moreover, in a motion to declare Hickman indigent for purposes of appeal, Hickman swore under penalty of perjury that he had no assets. CP 59. Judge Spanner entered an order of indigency. RP 164; CP 60-61.

Hickman timely filed a Notice of Appeal. CP 56-57.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL.

Defense counsel recognized the risks associated with jurors hearing evidence of other bad acts with which Hickman was associated, properly obtaining an order prohibiting prosecution

witnesses from testifying to these acts. CP 19-20. Counsel was even concerned about the fact of Hickman's arrest, obtaining a jury instruction prohibiting jurors from using the arrest to conclude Hickman was guilty. CP 35.

Counsel's concern about prior bad acts was warranted. A defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952). Moreover, under 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

Given that defense counsel successfully excluded all prior bad acts evidence, and assuming the prosecutor informed Officer Woodhouse of this ruling (as Judge Spanner ordered him to do), Officer Woodhouse's revelation that there was an outstanding warrant for Hickman's arrest before the encounter of April 1, 2016 is best described as a "trial irregularity" because such irregularities include the jury seeing or hearing that which it should not. See State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997)

(spectator misconduct); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (outburst from defendant's mother); State v. Mak, 105 Wn.2d 692, 700-701, 718 P.2d 407 (answer to improper question), cert. denied, 479 U.S. 995 (1986); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (statement that defendant had a "record").

While defense counsel properly moved to exclude such evidence, counsel's subsequent failure to move for a mistrial in light of this serious trial irregularity denied Hickman his right to effective representation.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

No reasonable attorney would have failed to move for a mistrial. Evidence police were already searching for Hickman

based on an outstanding warrant from another case was not relevant for any proper purpose at trial and highly improperly prejudicial as it informed jurors that Hickman was a criminal type, with a propensity for crimes, and therefore more likely to have committed the charged offense. Counsel's failure to act upon Officer Woodhouse's disclosure, after previously recognizing the dangers associated with this evidence, was deficient.

Moreover, Hickman suffered prejudice. Had counsel moved for a mistrial, the trial court would have been obligated to grant the motion. When examining a trial irregularity, the question is whether the incident so prejudiced the jury that the defendant was denied his right to a fair trial. If it did, a mistrial was required. Escalona, 49 Wn. App. at 254. Courts examine (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)); Escalona, 49 Wn. App. at 254.

First, the irregularity was very serious. A police officer told jurors this was not Hickman's first encounter with law enforcement. A previous encounter, for a different criminal offense, had resulted

in a warrant for Hickman's arrest.

The second factor, whether the irregularity involved cumulative information, also supported a mistrial. Officer Woodhouse's testimony was not cumulative of any properly admitted trial evidence. Indeed, his testimony had been excluded.

The third factor is whether the trial court instructed the jury to disregard what they heard. There was no request for such an instruction. But the trial court would have been required to examine whether an instruction *could* cure the prejudice. Escalona, 49 Wn. App. 254-55. In Escalona, this Court noted that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). As in Escalona, Officer Woodhouse's disclosure was inherently prejudicial and incapable of removal merely with a jury instruction.

In State v. Bourgeois, the Supreme Court concluded that a curative instruction sufficiently mitigated any prejudice resulting from an irregularity – a spectator who had glared at a prosecution witness and made a hand gesture as if pointing a gun at the witness. Bourgeois, 133 Wn.2d at 397-398, 408. In so finding, the

Court focused on the fact most jurors were apparently unaware of either incident prior to rendering their verdicts. Bourgeois, 133 Wn.2d 398, 408-410. The opposite is true here. Every individual deciding Hickman's fate necessarily heard Officer Woodhouse testify about the warrant for Hickman's arrest, since Woodhouse was on the stand at the time and the focus of juror attention.

Because Officer Woodhouse's testimony was a serious irregularity, not cumulative of any proper evidence, heard by all jurors, and could not be sufficiently mitigated with a jury instruction, the trial court would have been required to grant a defense motion for mistrial. Therefore Hickman has established a reasonable probability counsel's failure to act affected the trial outcome, and this Court should order a new trial.

2. THE \$200 FILING FEE AND \$100 DNA FEE MUST BE STRICKEN BASED ON INDIGENCY.

In State v. Ramirez, the Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, WL 4499761 at \*3, 6-8.

HB 1783 "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 as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, at \*6 (citing LAWS of 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (2018) ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)."). Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance (including food stamps), 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.

HB 1783 also amends RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. This amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, at \*8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Hickman is indigent under RCW

10.101.010(3). CP 58-61; RP 161-162. Because HB 1783 applies prospectively to his case, the sentencing court lacked authority to impose the \$200 filing fee.

The \$100 DNA fee also must be stricken. HB 1783 amends RCW 43.43.7541 to read, "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.*" Laws of 2018, ch. 269, § 18 (emphasis added). HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, at \*6.

Prior to sentence being imposed in this case, Hickman pleaded guilty to a felony drug offense under a different cause number, and Judge Spanner also imposed a \$100 DNA fee in that other case. RP 157-160, 164. Moreover, Hickman was required to provide a DNA sample as a result of either conviction. See RCW 43.43.754(1)(a) (a sample must be collected from every adult or juvenile convicted of a felony).

This Court should find that because Hickman's DNA sample had to be collected as a consequence of the other conviction, and a \$100 fee also was imposed for that conviction, the DNA fee in the

case now on appeal is no longer mandatory under RCW 43.43.7541. The fee is discretionary. And, under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. Therefore, the \$100 DNA fee imposed under this cause number should be stricken.

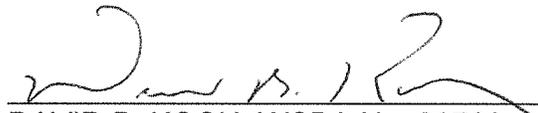
D. CONCLUSION

Defense counsel was ineffective for failing to move for a mistrial. Hickman's conviction should be reversed and his case remanded for a new trial. The \$200 filing fee and \$100 DNA fee should be stricken.

DATED this 9<sup>th</sup> day of October, 2018.

Respectfully submitted,

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**October 09, 2018 - 3:12 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36016-4  
**Appellate Court Case Title:** State of Washington v. Albert B. Hickman  
**Superior Court Case Number:** 16-1-00706-0

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