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Court of Appeals
Division III
State of Washington
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No. 36089-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

GAVIN WOLF,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Mr. Wolf's termination from mental health court violated due process.

a. Mr. Wolf's claimed errors are properly before this Court because his claims are either preserved or qualify as manifest constitutional error.

Before a person is terminated from a therapeutic court program, due process requires: (1) written notice of the claimed violations that warrant termination; (2) disclosure of the evidence in support; (3) an opportunity to be heard, including the right to call witnesses and present evidence; (4) the opportunity to confront adverse witnesses; (5) a neutral decision-maker; (6) proof of the claimed violation by a preponderance of the evidence; and (7); if termination is granted, a written statement of the evidence and reasons for termination. Br. of App. at 11-12; State v. Cassill-Skilton, 122 Wn. App. 652, 657-58, 94 P.3d 407 (2004). The prosecution agrees this is the law. Br. of Resp't at 16-17.

In this case, Mr. Wolf was terminated from mental health court, a type of therapeutic court program, in violation of every one of the foregoing seven basic guarantees of due process. Br. of App. at 13-15.

The prosecution concedes that Mr. Wolf preserved for appeal his claimed due process violation as it pertains to the trial court's ruling denying Mr. Wolf his right to call witnesses and present evidence. Br. of

Resp't at 12, 17. The prosecution contends that the remainder of the claimed violations are unpreserved and are not properly before this court as matter of right under the manifest constitutional error exception to issue preservation. RAP 2.5(a)(3); Br. of Resp't at 12-13. This Court should reject the prosecution's arguments because any unpreserved claimed error qualifies as manifest constitutional error.

Manifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right. RAP 2.5(a)(3); State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015). In analyzing a claim of manifest constitutional error, the appellate court asks: (1) is the error of constitutional magnitude, and (2) is the error manifest? State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Here, the claimed errors are all plainly constitutional. They are also "manifest." To be "manifest," there must be a showing of "actual prejudice," meaning "that the claimed error had practical and identifiable consequences." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). This standard is satisfied when "the record shows that there is a fairly strong likelihood that serious constitutional error occurred." Id. The appellate court may examine whether the trial court could have corrected the error. Kalebaugh, 183 Wn.2d at 583. The analysis previews the claim and should not be confused with establishing an actual violation. Lamar,

180 Wn.2d at 583. The determination of whether the error is harmless or prejudicial “is a separate inquiry.” Kalebaugh, 183 Wn.2d at 585. Once RAP 2.5(a)(3) is satisfied, the appellate court then reviews the claimed error on the merits as if it had been preserved and, if there was error, engages in the traditional “prejudice” or “harmless error” analysis. Lamar, 180 Wn.2d at 586, 588; Kalebaugh, 183 Wn.2d at 584-85.

As an initial matter, it is important to recognize that this Court in Cassill-Skilton addressed the same claimed violations of due process even though there was no objection in the trial court. See Cassill-Skilton, 122 Wn. App. at 658. This indicates that the due process violations at issue generally qualify as manifest.

Analyzing the violations separately yields the same result. Starting with the lack of written notice on the grounds that the prosecution (or the court)¹ sought termination for and the lack of disclosure of evidence in support, these related errors are manifest. “[P]roper notice must set forth all alleged . . . violations so that a defendant has the opportunity to marshal the facts in his defense.” State v. Dahl, 139 Wn.2d 678, 684, 990 P.2d 396 (1999) (citing Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct.

¹ The record indicates that it may have been the court that was seeking termination because it set the “termination hearing.” RP 5. If so, that is a due process violation as well because the court cannot serve as both accuser and neutral arbitrator. In re Murchison, 349 U.S. 133, 138-39, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

2593, 33 L. Ed. 2d 484 (1972)). Here, the record shows that Mr. Wolf did not receive either written notice or disclosure of the evidence to be relied upon. Contrary to the prosecution's contentions, that a bench warrant was issued for Mr. Wolf's arrest does not provide notice that the prosecution would be seeking to terminate Mr. Wolf based on "re-arrest." Br. of Resp't at 6 n.3, 14-15.

The prosecution argues that the hearing only concerned Mr. Wolf's re-arrest, not his compliance with treatment or whether he would benefit from continuing in mental health treatment. Br. of Resp't 14. But how was Mr. Wolf to know this without notice? This is why due process demands written notice. The court should conclude that the failure by the prosecution to file a written document alleging the grounds for termination is manifest constitutional error. See In re Dependency of A.M.M., 182 Wn. App. 776, 790-91 & n.8, 332 P.3d 500 (2014) (manifest constitutional error to terminate a person's parental rights based on a deficiency for which parent did not receive notice); State v. Harris, 102 Wn. App. 275, 279, 6 P.3d 1218 (2000) (claimed breach of plea agreement by prosecutor qualified as manifest constitutional error), affirmed, State v. Sanchez, 146 Wn.2d 339, 46 P.3d 774 (2002).

On confrontation, this error is preserved because over Mr. Wolf's objection, the court ruled it would not be hearing from any witnesses

because the court was conducting a “hearing,” “not a trial.” RP 27-28.

This ruling impliedly excluded cross-examining any witnesses relied on by the prosecution (perhaps those heard from privately at the “staffing”). RP 27-28.

Even if not preserved, this error is manifest. The trial court’s failure to hold an evidentiary hearing where witnesses would present sworn testimony was obvious error. Contrary to the prosecution’s argument, Br. of Resp’t at 18 n.5, Mr. Wolf’s confrontation claim is not akin to when a defendant fails to object to hearsay from a testifying witness at an actual trial.² See State v. Burns, __ Wn.2d __, 438 P.3d 1183, 1192 (2019).

The lack of a neutral decision-maker generally qualifies as manifest constitutional error. See State v. Lemke, 7 Wn. App. 2d. 23, 27-28, 434 P.3d 551 (2018) (judge’s expressions of personal animus towards defendant deprived defendant of a fair hearing as required by due process; no indication of objection by defendant). The record plainly shows that the trial court had prejudged the matter and had decided during the private “staffing” that it would be terminating. RP 61. The trial court could have

² If Burns had involved convicting a person at a bench trial where the prosecution called no witnesses and the court stated it would not be hearing from any witnesses (which of course would be blatantly unconstitutional), then Burns might be analogous.

avoided the error by following normal adversarial procedures instead of “staffing” the issue privately. The purpose of having these private staffing procedures is to provide a non-adversarial, collaborative setting which will help the participant graduate from the therapeutic court. See State v. Sykes, 182 Wn.2d 168, 177, 339 P.3d 972 (2014). When the prosecution seeks termination, the adversarial process has resumed and this demands a neutral decision-maker and return to normal court procedures. The court’s decision to resolve the issue of termination at an informal, off the record, “staffing” rendered the court a partial and biased decision-maker. See In re Murchison, 349 U.S. 133, 138-39, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The error is manifest.

As for the burden of proof, a misapplication as to the burden of proof generally qualifies as manifest constitutional error. Kalebaugh, 183 Wn.2d at 583-85 (reviewing error related to burden of proof for first time on appeal); In re A.W., 182 Wn.2d 689, 700 n.10, 344 P.3d 1186 (2015) (same). Here, it is unclear what standard the trial court was applying.³ See In re Schley, 191 Wn.2d 278, 287, 421 P.3d 951 (2018) (discussing the “some evidence” standard, a standard requiring less evidence than the preponderance of the evidence standard). It appears the court thought it

³ It is also unclear exactly what evidence the trial court was relying on.

could terminate Mr. Wolf from the program simply on its own whim, rather than proof by a preponderance of the evidence that Mr. Wolf had materially violated the agreement. RP 27-28. This is obvious error that the trial court could have corrected. It is manifest.

Finally, the court's failure to enter a written statement of the evidence and reasons for termination is manifest. "Due process requires that judges articulate the factual basis of [its] decision." Dahl, 139 Wn.2d at 689. "Where the trial judge fails to do so, the decision is not amenable to judicial review." Id. Here, instead of entering written findings recounting the evidence for its decision, the court simply checked a line on a pre-printed form stating the reason for termination was "Re-arrest during the treatment program." 1CP 19; 2CP 13. Contrary to the prosecution's claim, this is insufficient because it does not account for the evidence relied on by the trial court. Dahl, 139 Wn.2d at 689. This is obvious error that the trial court could have corrected.

The Court should reject the prosecution's arguments that the foregoing errors are not manifest. Regardless, the Court has discretion to address the claimed errors. State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015) (courts have discretion to review unpreserved errors); RAP 2.5(a). Here, despite the obvious due process errors, the trial court expressed, "I'm unfamiliar with any case law that indicates that there is

any constitutional issues with us proceeding in this regard.” RP 27-28.

Thus, notwithstanding Cassill-Skilton, guidance is evidently needed. RP 27-28.

b. The prosecution correctly concedes error. The prosecution has failed to prove this error or the other due process errors harmless beyond a reasonable doubt.

The prosecution concedes that Mr. Wolf was deprived of his due process right to present evidence and call witnesses. Br. of Resp’t at 12 n.4, 17. The concession should be accepted. Indeed, the trial court rejected the very notion that it was holding an evidentiary hearing. RP 18 (stating hearing was “not an evidentiary proceeding”); RP 27-28 (“This is not a trial.”). Thus, the court did not hear from any witnesses or consider any actual evidence.⁴

As constitutional error, the error is presumed prejudicial and the prosecution has the burden of proving the error harmless beyond a reasonable doubt. State v. DeLeon, 185 Wn.2d 478, 488, 374 P.3d 95

⁴ Mr. Wolf sought a continuance so that his lawyer could effectively represent him and so that he could call witnesses. RP 21-26. Based on its erroneous determination that Mr. Wolf did not have a right to call witnesses or present evidence, the court denied Mr. Wolf’s request. RP 27-28. This was necessarily an abuse of discretion because the decision was predicated on a misunderstanding of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); see State v. Lyons, 199 Wn. App. 235, 241, 399 P.3d 557 (2017) (in hearing on whether to forcibly medicate a defendant, trial court abused discretion in denying a continuance so that defendant could call expert witness).

(2016). To conclude the error harmless, this Court must be able to conclude that any reasonable judge would have terminated, despite the error. See id. at 487. The prosecution does not meet this burden.

The prosecution's argument presupposes that because Mr. Wolf was re-arrested, termination was a foregone conclusion. Setting aside that Mr. Wolf did not receive notice from the prosecution that this was the reason termination was being sought,⁵ the argument incorrectly assumes re-arrest mandated termination. To be sure, the agreement permitted re-arrest as a basis for terminating, but re-arrest did not require the court to terminate Mr. Wolf from mental health court. For example, if Mr. Wolf showed the arrest was unlawful or that mitigating circumstances explained the incident, the court could have decided to not terminate Mr. Wolf.⁶ Mr. Wolf's witnesses may have shown this. Mr. Wolf should at least had the opportunity to make his case to the court. Without the ability to present evidence, call witnesses, or cross-examine the witnesses against him (whoever they may have been), Mr. Wolf was deprived of the opportunity to make his case for why the court should not terminate him from the

⁵ To reiterate, the re-arrest rationale was only made clear by the court only *after* the hearing when the court signed a boilerplate form and checked the line stating the "re-arrest" was the basis for termination.

⁶ Indeed, Mr. Wolf had been arrested before, but was terminated.

program. Unless the prosecution is conceding that the judge was biased and had prejudged the matter before hearing from Mr. Wolf (another due process violation), it is purely speculative for the prosecution to hypothesize that actual evidence or sworn testimony would not have made any difference.

The foregoing error is compounded by the other due process violations. Because Mr. Wolf had no notice of the reason or reasons why termination was being sought (let alone the evidence that would be relied upon), Mr. Wolf was unable prepare a defense. To reiterate, the prosecution's claim that the "termination hearing was solely to determine whether Mr. Wolf was re-arrested" is not supported by the record. Br. of Resp't at 18.

On the confrontation error, because the Court heard no sworn testimony and no exhibits were admitted, it is plain that the Court was relying on hearsay⁷ to find there had been a "re-arrest." This abridged Mr. Wolf's "due process right to confrontation by considering hearsay allegations . . . without good cause." Dahl, 139 Wn.2d at 687. Because the decision to terminate was based on hearsay for which Mr. Wolf did not

⁷ ER 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

have the opportunity to confront, the due process error is not harmless. Id. at 688-89 (confrontation violation at hearing that revoked Special Sex Offender Sentencing Alternative was not harmless because decision to revoke was based on hearsay).

As for the standard of proof and the lack of findings, this is prejudicial. As explained, the court may have terminated based on something less than a preponderance standard. And the lack of adequate findings or reasons for the decision hinders Mr. Wolf's right to appellate review. Dahl, 139 Wn.2d at 689.

Finally, unlike the other errors, the lack of a neutral arbitrator is per se prejudicial. See Murchison, 349 U.S. at 139; Lemke, 7 Wn. App. 2d. at 28.

Mr. Wolf did not receive due process. The due process errors are not harmless. The Court should vacate the convictions and order that Mr. Wolf be reinstated in the mental health court program. Any termination proceeding must be before a different judge. See State v. Sledge, 133 Wn.2d 828, 846 & n.9, 947 P.2d 1199 (1997).

2. Without conducting a fact finding hearing and relying on hearsay, the court ordered that Mr. Wolf be restrained during the termination hearing. This was an abuse of discretion, requiring reversal.

Persons appearing in court have the right to appear unrestrained absent proof of necessity. Br. of App. at 16-17; State v. Walker, 185 Wn. App. 790, 800, 344 P.3d 227 (2015). Before a court orders restraints, the court must hold a hearing and find that the restraints are justified. Walker, 185 Wn. App. at 800. The prosecution appears to agree on the relevant law. Br. of Resp't at 19-20.

The prosecution, however, fails to address Mr. Wolf's primary argument that the trial court abused its discretion in ordering Mr. Wolf to be shackled because the court failed to hold a proper hearing and conduct the necessary inquiry. Compare Br. of App. at 22-23 with Br. of Resp't at 21-22. While the court heard argument from the parties, the court failed to hear testimony or receive any sworn declarations on the issue. Br. of App. at 22-23. This was important because Mr. Wolf was contesting Sergeant Purcell's unsworn statements. RP 14-15. Mr. Wolf specifically asked that Sergeant Purcell provide sworn testimony. RP 14-15. It was also unclear what Sergeant Purcell's basis of knowledge was for his assertion about what Mr. Wolf purportedly said in his jail cell. RP 14. He represented that he "received information that Mr. Wolf made statements in his jail cell

similar to that he was anxious to see what was going to happen in court when the deputies tried to put his handcuffs back on him.” RP 14. This was hearsay.

In these kinds of circumstances, a “trial court may not rely on mere assertions but must develop a factual record to support” shackling or other measures that impinge the presumption of innocence. State v. Jaime, 168 Wn.2d 857, 866, 233 P.3d 554 (2010). Thus, in Jaime, where trial was held in a jail building rather than a courthouse, our Supreme Court reasoned that the unverified representations by the prosecutor that the defendant presented a security concern and escape risk were inadequate to justify the alternative arrangement. Id. at 866. Without fact-finding by the trial court, its decision was an abuse of discretion. Id. at 865-86.

The same flaw is present in this case. The court failed to conduct a fact finding hearing and simply relied on the unverified representation by Sergeant Purcell and the allegations related to the recent charges against Mr. Wolf. RP 17-18; Br. of App. at 22-23. As in Jaime, the trial court’s failure to hold a fact finding hearing was an abuse of discretion. See also Walker, 185 Wn. App. at 792 (court received declarations and these declarations supported trial court’s decision that restraints were necessary).

The error is necessarily prejudicial because unconstitutional shackling is structural error. Br. of App. at 25. Even if not structural error, the State has failed to rebut the presumption of prejudice and prove the error harmless beyond a reasonable doubt. The court's decision to terminate Mr. Wolf from the mental health program may have been unconsciously influenced by seeing Mr. Wolf in restraints.⁸ Br. of App. at 25. "Judges are human," not robots. In re Estate of Hayes, 185 Wn. App. 567, 598, 342 P.3d 1161 (2015). Given this reality, the prosecution has failed to prove the error harmless beyond a reasonable doubt. Reversal is required.

3. Cumulative error requires reversal.

Reversal is warranted for cumulative error when the combination of errors denies the defendant a fair proceeding, even if each individual error is harmless by itself. State v. Salas, 1 Wn. App. 2d 931, 952, 408 P.3d 383 (2018).

Together, the due process errors related to the termination hearing, including the unconstitutional shackling, deprived Mr. Wolf of a fair hearing. Br. of App. at 26. The prosecution argues none of the errors

⁸ To reiterate, the issue was not simply whether Mr. Wolf had been arrested. This did not require termination and Mr. Wolf was not notified before the hearing that his arrest was the reason termination was being sought.

matter because the court terminated Mr. Wolf based on an arrest, which was grounds for termination. Br. of Resp't at 24-25. To repeat, the issue at the termination hearing was not simply whether Mr. Wolf had been arrested. And his arrest did not mandate termination. Thus, the errors did matter and the sum of the errors deprived Mr. Wolf of a fair hearing. This Court should reverse.

4. As the prosecution concedes, remand is necessary to remedy errors related to the imposition of legal financial obligations.

As part of legal financial obligations, the trial court imposed a \$200 filing fee and a \$100 DNA fee. The court ruled interest would accrue on legal financial obligations. And the court ruled that Mr. Wolf must pay the costs of community custody. Mr. Wolf challenges all of these determinations. Br. of App. at 27-29. The prosecution concedes error on all three challenges. Br. of Resp't at 25-26. This Court should accept the concessions and remand to strike the challenged fees, the interest accrual provision, and the provision requiring that Mr. Wolf pay the costs of community custody.

B. CONCLUSION

In order to enter mental health court and on the promise that the charges against would be dismissed if he were successful, Mr. Wolf gave up significant constitutional rights, including his right to trial by jury.

Without being afforded any of the basic due process protections, Mr. Wolf was terminated from the program. Based on Mr. Wolf's agreement giving up his constitutional rights, Mr. Wolf was summarily convicted on the charges. Because Mr. Wolf was terminated from mental health court without due process, he respectfully asks this Court to vacate his convictions and instruct he be reinstated in the mental health court program.

Respectfully submitted this 25th day of June, 2019.

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GAVIN WOLF,)	
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APPELLANT.)	

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