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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

BRIEF OF APPELLANT

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A. INTRODUCTION

Gavin Wolf suffers from drug addiction and mental illness. As an alternative to prosecution, he participated in a mental health court program. In exchange for Mr. Wolf giving up significant constitutional rights, the prosecution promised that it would dismiss charges against Mr. Wolf if he successfully completed the program.

After nearly two years, the prosecution sought to terminate Mr. Wolf from the program. The prosecution did not give Mr. Wolf written notice stating its reasons and did not disclose what evidence it was relying on. At the termination hearing, the court did not hear testimony, did not let Mr. Wolf call witnesses or present evidence, and did not let him confront adverse witnesses. Over Mr. Wolf's objection, he was shackled during the hearing. Before terminating Mr. Wolf from the program, the court personally met with the prosecution and other members of the mental health court "team" before the hearing. After terminating, the court did not provide a written statement of the evidence along with the reasons for termination.

This process did not comply with due process. Because Mr. Wolf was terminated from the mental health court program without due process, the termination order must be reversed.

B. ASSIGNMENTS OF ERROR

1. In violation of due process as guaranteed by article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the trial court erred by failing to hold a termination hearing that complied with due process.

2. In violation of due process, the court erred by denying Mr. Wolf's motion to continue the termination hearing. The court erred in terminating Mr. Wolf from mental health court.

3. In violation of due process, the court erred by refusing to let Mr. Wolf call or confront any witnesses at the termination hearing.

4. In violation of due process, Mr. Wolf did not receive written notice of the specific grounds for termination. The court erred in terminating Mr. Wolf from mental health court.

5. In violation of due process, Mr. Wolf did not receive a decision from a neutral decision-maker. The court erred in terminating Mr. Wolf from mental health court.

6. In violation of due process, the court erred by failing to enter adequate written findings of fact and conclusions of law, which should include a written statement of evidence considered.

7. In violation of article I, sections 3 and 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United

States Constitution, the court erred by ordering that Mr. Wolf be restrained during the termination hearing.

8. In violation of due process, cumulative error deprived Mr. Wolf of a fair hearing. The court erred in terminating Mr. Wolf from mental health court.

9. The court erred by imposing a $200 filing fee.

10. The court erred by imposing a $100 DNA fee.

11. The court erred by ordering that Mr. Wolf pay the costs of community custody, including urinalysis or other testing.

12. The court erred in ordering that non-restitution legal financial obligations bear interest.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Before a person is terminated from mental health court, due process requires: written notice and disclosure of the evidence, an opportunity to be heard, including the right to call witnesses and present evidence, confrontation of adverse witnesses, a neutral decision-maker, and, if termination is granted, a written statement of the evidence and reasons for termination. Although Mr. Wolf was terminated from mental health court, he received none of these due process protections. Should the termination order be reversed?

2. Defendants have a constitutional right to appear in court free of restraints. Before permitting restraints, the court must conduct an adequate hearing and the evidence must show the restraints are necessary. Without conducting a proper hearing and in the absence of evidence showing restraint was necessary, the court ordered Mr. Wolf restrained due to speculative concerns about alleged "aggression" outside the courtroom. Did the court err?

3. Did due process errors and the unconstitutional shackling of Mr. Wolf cumulatively deprive Mr. Wolf of a fair hearing?

4. The $200 filing fee is no longer a mandatory legal financial obligation. The filing fee may not be imposed on an indigent person. The change in the law applies to cases on appeal. The fee may also not be imposed on the mentally ill absent the ability to pay. Mr. Wolf is indigent and suffers from mental illness. Should the $200 fee be stricken?

5. The $100 DNA fee is no longer mandatory for persons who have previously had their DNA collected a result of a prior conviction. This fee may also not be imposed on a the mentally ill absent the ability to pay. Mr. Wolf has had his DNA collected as a result of a prior conviction, suffers from mental illness, and is indigent. Should the $100 fee be stricken?

6. As part of community custody, a trial court may waive the requirement that the defendant pay supervision fees. Before imposing discretionary fees, the court must analyze the defendant's ability to pay. The court required that Mr. Wolf pay supervision fees, including the costs of monitoring compliance with drug treatment, but did not analyze his ability to pay. Should this requirement be stricken?

7. As of June 7, 2018, interest no longer accrues on non-restitution legal financial obligations. The judgment and sentence states that interest accrues on all legal financial obligations. Should this provision be stricken?

D. STATEMENT OF THE CASE

Gavin Wolf is a young man with drug related problems and mental health issues. RP 38-41[1]; 1CP 91; 2CP 54. In 2014, the prosecution accused Mr. Wolf of stealing a bag left in a car parked in an attached garage and charged him with numerous offenses arising out of this theft.[2] 1CP 1-6.[3]

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[1] "RP" refers to the transcript containing the hearings from January 30, March 13, April 17, and April 20, 2018. This transcript is part of the record in No. 36089-0-III.

[2] This consisted of six charges: one count of residential burglary; two counts of second degree theft; two counts of second degree identity theft; and one count of first degree trafficking in stolen property. 1CP 1-2.

Mr. Wolf entered into a drug court waiver and agreement. 1CP 7-10. Unfortunately, about a month later, Mr. Wolf had a confrontation with security officers at a hospital when he sought treatment at the emergency room. 2CP 21-39. With the assistance of police, security "trespassed" Mr. Wolf from the premises. 2CP 34. Moments after leaving, Mr. Wolf returned to the entrance and yelled obscenities. 2CP 34. He then left. 2CP 34. But two security officers chased Mr. Wolf and forcibly took him to the ground. 2CP 29, 34. Mr. Wolf suffered an injury to his nose and began to bleed profusely. 2CP 35. Mr. Wolf purportedly blew blood from his nose onto two of the security officers and one of the police officers. 2CP 1-3. Based on this incident, the prosecution charged Mr. Wolf with three counts of third degree assault. 2CP 4.

Mr. Wolf entered into mental health court waivers and agreements in both cases. 1CP 11-16; 2CP 5-10. Like drug courts, mental health courts are a "therapeutic court program."[4] RCW 2.30.010(4). In exchange for successful completion of the program, which involves participation in

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[3] "1CP" refers to the clerk's papers from No. 36088-1-III. "2CP" refers to the clerk's papers from No. 36089-0-III. Although separate, both cases are related.

[4] For an overview and discussion of a drug court program, which appears to be similar to the mental health court program in this case, see State v. Sykes, 182 Wn.2d 168, 171-73, 339 P.3d 972 (2014).

treatment, the prosecution agreed to dismiss the charges with prejudice. 1CP 12-13; 2CP 6-7.

A little less than two years later, Mr. Wolf appeared based on "Mental Health Court warrants." RP 3. The court recounted there had been an allegation that Mr. Wolf had been arrested and charged with malicious mischief. RP 4. The court stated that based on "our normal course of procedure," the court had set a "termination hearing." RP 5. The court stated this had been discussed during its private "staffing" meeting[5] and that the hearing would be set. RP 5. The record does not show that Mr. Wolf was provided any written notice of intent to terminate or a written statement regarding the reasons termination was being sought.

At the termination hearing on March 13, Mr. Wolf was shackled. RP 13-14. Based on vague allegations about statements Mr. Wolf had made while in his jail cell, the transport officer asked that Mr. Wolf remain restrained. RP 14. Over Mr. Wolf's objection, the court ordered that Mr. Wolf remain shackled during the hearing. RP 17.

The court then proceeded with the termination hearing, which the court stated was "not an evidentiary proceeding." RP 18. The court stated

[5] Our Supreme Court has held that the guarantee of open courts provision in article I, section 10 does not apply to adult drug court staffings. Sykes, 182 Wn.2d at 174.

that prior to the hearing, the court had discussed the matter during a private staffing with at least four individuals along with the prosecutor. RP 20.

Defense counsel moved to continue the hearing. RP 21-22. He stated that he was not prepared to defend Mr. Wolf and that Mr. Wolf had provided him the names of people to interview and possibly call as witnesses. RP 21. Defense counsel stated he had only been able to meet with Mr. Wolf the day before and that it was not Mr. Wolf's fault he had been unable to see him until then. RP 21. Mr. Wolf personally echoed his counsel's request for a continuance, stating he wanted some time to prepare and assist defense counsel. RP 22-24. Mr. Wolf reiterated that he had witnesses he wanted the court to hear from. RP 25-26. Mr. Wolf asserted that denying him a continuance would deprive him of due process. RP 23. He remarked that the way the hearing was proceeding was "constitutionally and fundamentally wrong." RP 23.

The court denied the request to continue. RP 27-28. The court stated that notice of the hearing had been provided, that this was "not a trial," and that the court would not be hearing from witnesses. The court remarked that the "call" to terminate rested with the court and that the court was "prepared to do that." The court told Mr. Wolf he was free to "raise" any "constitutional issues" in "an appeal":

> Let's go back to the termination policy one more time just so it is clear: The decision rests solely with the Mental Health Court judge. This is not a trial. This is a hearing. In all hearings you are entitled to notice and the opportunity to be heard. We gave everyone notice of this hearing. And everyone is going to have the opportunity, as they already have, to be heard as to the particular charges.
>
> I'm not going to have witnesses come in today and talk about whether we're going to weigh out whether someone has done well in a living arrangement versus whether they have done well in a courtroom. Again, the call is mine to make as to whether I feel this particular Mental Health Court proceeding should continue on in this court.
>
> So I'm prepared to do that today. I don't see any impediments in proceeding on today. It's – it's certainly interesting. You can talk about constitutional issues and so forth. If somebody wants to raise those on an appeal, that is fine. But -- and I have been in this position for awhile now – I'm unfamiliar with any case law that indicates that there is any constitutional issues with us proceeding in this regard.

RP 27-28.

The court proceeded. The court read notes and made remarks about the history of the case. RP 28-38. The court briefly heard from John O'Neil—the case manager in the program who had worked with Mr. Wolf, defense counsel, and Mr. Wolf. RP 39-48. The court then informed Mr. Wolf the court was reading the police report related to the allegation of arrest on malicious mischief. RP 50-51. According to the court, the report stated that during a ride with Mr. Wolf's mother, Mr. Wolf had stepped out of the car and broken a window of the car. RP 50-51. The

court stated that if Mr. Wolf had acted "volitionally," the court could not have him in mental health court. RP 51. And if Mr. Wolf was unable to control himself, the court could not have him in the program either. RP 51. Although appearing to accept what was in the report as true, the court stated "I'm not adjudicating whether you are guilty or not." RP 52.

The court remarked that the police reports related to the incident at the hospital, for which Mr. Wolf was charged with three counts of assault, showed "aggressive, inappropriate behavior." RP 52. Mr. Wolf asked if the court had viewed the video from incident.[6] RP 52. The court answered "no," stating the court was "not going to adjudicate that right now." RP 52. The court made further comments, including a comment that the court had made itself a note at 4:00 a.m. asking "Why is Gavin so angry?" RP 53-54. After letting Mr. Wolf briefly respond, the court made further comments. RP 55-61.

After remarking that the group in staffing had unanimously stated they were "done," the court concluded by saying it was terminating Mr. Wolf from the program. RP 61.

[6] The reports state that there was body camera footage from a police officer. 2CP 33-34.

At a later hearing, which considered information set out in the police reports, the court adjudicated Mr. Wolf guilty of all the charged offenses in both cases. RP 141-46.

In both cases, the court sentenced Mr. Wolf to a prison based drug offender sentencing alternative (DOSA). 4/24/18RP 11; 1CP 81-82; 2CP 45-46. In both matters, the court further imposed "mandatory" legal financial obligations, along with requirements that Mr. Wolf pay supervision costs. 4/24/11RP 11-12; 1CP 83-85, 87; 2CP 46-48, 50.

E. ARGUMENT

1. Mr. Wolf was terminated from mental health court without being provided the basic guarantees of due process.

a. Before a person is terminated from a therapeutic court, due process affords basic guarantees, including the right to call witnesses and present evidence.

Criminal defendants have the right to due process of law under article I, § 3 of the Washington Constitution and the Fourteenth Amendment to United States Constitution. Const. art. I, § 3; U.S. Const. amend. XIV. Constitutional issues, like questions of law, are reviewed de novo. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

In the context of parole and probation revocations, the United States Supreme Court has held that due process guarantees include, at a minimum: (1) written notice of the claimed violations; (2) disclosure of

the evidence; (3) an opportunity to be heard, including the right to call witnesses and present evidence; (4) a right to confront adverse witnesses; (5) a neutral decision-maker; and, (6) if revocation is granted, a written statement of the evidence and reasons for revocation. Morrissey v. Brewer, 408 U.S. 471, 488–89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). These protections apply when the prosecution seeks to terminate a pre-trial diversion agreement. State v. Marino, 100 Wn.2d 719, 724-27, 674 P.2d 171 (1984); State v. Kessler, 75 Wn. App. 634, 636-37, 879 P.2d 333 (1994). Additionally, the State has the burden to prove noncompliance with the agreement by a preponderance of the evidence. Marino, 100 Wn.2d at 725.

This Court has held these minimal guarantees of due process extend to drug court terminations. State v. Cassill-Skilton, 122 Wn. App. 652, 657-58, 94 P.3d 407 (2004). In Cassill-Skilton, the defendant was admitted into a drug court program. Cassill-Skilton, 122 Wn. App. at 655. After she was charged with a new felony offense, the prosecution asked that she be terminated from the program. Id. The court granted the request. Id. This Court held the defendant had been terminated from the program in violation of due process. Id. at 658. The court reasoned the record did not show the basis for the termination, that the defendant had not been

afforded any opportunity for a hearing on the alleged violations, and that there was a lack of findings showing what evidence the court relied on in concluding the agreement was violated. Id.

b. In being terminated from the mental health court program, Mr. Wolf did not receive due process.

Mr. Wolf entered into the mental health court program with the promise that if he successfully completed the program, the prosecution would dismiss the charges against him. 1CP 13; 2CP 7. In exchange, Mr. Wolf gave up significant constitutional rights and agreed that if he was terminated from the program, the court would adjudicate the charges based on information in police reports. 1CP 11; 2CP 5.

Similar to Cassill-Skilton, Mr. Wolf was terminated from mental health court in violation of due process because he was afforded none of the minimal guarantees provided by due process.

First, the record does not show that Mr. Wolf was provided written notice of the claimed violations.

Second, the record does not show that the prosecution disclosed what evidence the prosecution was relying on in seeking termination.

Third, at the "hearing," Mr. Wolf was not afforded a meaningful opportunity to be heard because he was not permitted to call witnesses or present evidence in his defense. The court overruled Mr. Wolf's request

for a continuance so that his attorney could present witnesses and evidence, ruling that the court was not going to hear from any witnesses or permit testimony. RP 27-28.

Fourth, Mr. Wolf was not given the opportunity to confront or cross-examine adverse witnesses. Instead, the court read from a police report concerning the allegation of malicious mischief, read notes, and relied on information from individuals who met privately with the court at a staffing before the hearing. RP 28-38, 50-54, 61.

Fifth, Mr. Wolf did not receive a decision from a neutral decision-maker. The judge was a participant in the "group" at the private staffing meeting and they had unanimously agreed that they were "done" with Mr. Wolf. RP 61. In addition to being an active participant, the judge had plainly made up his mind prior to the hearing as to whether Mr. Wolf should be terminated. This was not a decision from an objective, disinterested, and impartial judge. See In re Murchison, 349 U.S. 133, 138-39, 75 S. Ct. 623, 99 L. Ed. 942 (1955) ("one-man grand jury" proceeding violated due process due, in part, to the judge's personal participation in the proceeding).

Sixth, the court did not require the prosecution to prove by a preponderance of the evidence that Mr. Wolf had violated the agreement. Nowhere did the court state that the prosecution had this burden, let alone

stated that that the prosecution had met this burden by a preponderance of the evidence.

Finally, the court did not enter findings of fact and conclusions of law recounting the evidence and the reasons for termination. Rather, the court signed a cursory, preprinted order. 1CP 18-19; 2CP 12-13. Checking a line on the order, the court found only that there had been "Re-arrest during the treatment program." 1CP 19; 2CP 13.

In sum, the court erred in overruling Mr. Wolf's objections in refusing to continue the case and by refusing to let Mr. Wolf call witnesses or present evidence. Additionally, as explained above, Mr. Wolf did not receive the other basic due process protections. Accordingly, the hearing did not comport with due process. Cassill-Skilton, 122 Wn. App. at 658.

c. Reversal is required.

The deprivation of due process requires that the termination decision be reversed. Id. The Court should vacate the convictions and instruct that Mr. Wolf be reinstated into the mental health court program. See RAP 12.2.[7] If the prosecution seeks to terminate Mr. Wolf from the program, Mr. Wolf must receive the due process protections required by

[7] "The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require."

our state and federal constitutions. Because the judge who terminated Mr. Wolf has already expressed his views on the appropriate outcome and because that judge participated in the decision to seek termination, this Court should instruct any termination hearing be before another judge. See Murchison, 349 U.S. at 138-39; State v. Sledge, 133 Wn.2d 828, 846 & n.9, 947 P.2d 1199 (1997) (instructing that a new judge preside at disposition hearing because judge had already expressed views).

2. In violation of Mr. Wolf's right to appear free of restraints, the court ordered that Mr. Wolf be restrained during the termination hearing.

a. Unless necessary, criminal defendants have a constitutional right to appear in court without being restrained.

Defendants have the right to stand before the court "with the appearance, dignity, and self-respect of a free and innocent man." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Our state constitution provides that "In criminal prosecutions the accused shall have the right to appear and defend in person." Const. art. I, § 22. This constitutional right entitles an accused person "to appear with the use of not only his mental but his physical faculties unfettered," unless "impelling necessity demands" restraint. State v. Williams, 18 Wash. 47, 50-51, 50 P. 580 (1897).

Thus, it is well recognized that the accused are "entitled to be brought into the presence of the court free from restraints." State v. Damon, 144 Wn.2d 686, 690, 25 P.3d 418 (2001) (citing Williams, 18 Wash. at 50). The use of restraints may deprive the accused of the full use of their facilities and negatively affect their constitutional rights, including the presumption of innocence, the right to testify, and the right to assist counsel. Id. at 691; Deck v. Missouri, 544 U.S. 622, 630-31, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

"[R]egardless of the nature of the court proceeding or whether a jury is present," it is the province of the trial court—not jail or prison staff—to decide if restraints will be used in the courtroom. State v. Walker, 185 Wn. App. 790, 797, 344 P.3d 227 (2015). Restraints are permissible if necessary to prevent injury, disorderly conduct, or escape. Id. at 800. Before ordering restraints, the court must hold a hearing and make findings that justify the restraint as to the particular defendant. Id.

Review is for an abuse of discretion. Id. at 799. A court abuses its discretion if its decision is manifestly unreasonable, or based on untenable grounds. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Making a decision based on an erroneous understanding of the law is necessarily an abuse of discretion. Id.

b. Without an adequate showing that restraints were necessary, the court ordered that Mr. Wolf remain restrained during the termination hearing.

When the court began the hearing, the court noted that Mr. Wolf was restrained and inquired with the transportation officer if there was a "concern" about Mr. Wolf:

> THE COURT: . . . Mr. Wolf is in custody today. And there is -- I believe Mr. Wolf is still cuffed at this point, and I think we need to deal with that issue as we proceed forward. So, Sergeant Purcell is here.
>
> Sergeant, is there a concern that transport has with regard to Mr. Wolf, because obviously I would normally ask that he be uncuffed if we're going to conduct a hearing.
>
> Is there a reason not to do at that today?

RP 13-14. Sergeant Purcell answered with a vague statement that Mr. Wolf had said something in his jail cell that had caused him concern and requested that Mr. Wolf remain restrained:

> TRANSPORT OFFICER Purcell: Morning, Your Honor. There is a reason. Yesterday I 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.
>
> I discussed this with Mr. Wolf, based on some of his charges, the fact that he has some mental health issues. We brought him in waist restraints instead of handcuffs, which are less restrictive, and we would request to keep him secure that way.

RP 14.

After the court inquired with the parties, the prosecutor then remarked, "for the reasons stated by Sergeant Purcell, the state would ask the Court to grant that." RP 14.

Defense counsel opposed the request and asked that the court unshackle Mr. Wolf, stating that the shackles would interfere with Mr. Wolf's ability to assist him:

> [DEFENSE COUNSEL]: . . . I think the Court needs to make an individualized finding regarding Mr. Wolf, whether or not he's a danger or there's a problem. He has a stack of papers here that I know he's going to want to share with me, want to go through, he's going to want to reference throughout the hearing.
>
> I'd ask the Court to release him from his shackles.

RP 14-15.

Mr. Wolf personally asked that he be unshackled, agreeing that he needed the freedom to assist defense counsel and noting he had appeared at many hearings without any problem. He further asked that Sergeant Purcell be sworn in to provide testimony:

> [MR. WOLF]: . . . Your Honor, you had me in your courtroom many times. And I don't think based on experience, both for showing up and my behavior in court, that you have ever seen anything that shows that I would not abide by what is expected of me if released from my cuffs so that I can access my documents and the evidence and notes by myself for this hearing.

> Sergeant Purcell I would like to see put on the stand and questioned so that if he lies about statements I made, he'll be charged with perjury (indicating).
>
> THE COURT: Talk to me, not the sergeant.
>
> [MR. WOLF]: Sorry. I just want to make sure it is on the record.

RP 14-15.

The court began by stating that it had reviewed the record in the case along with reports related to a recent charge of malicious mischief, and that he saw "aggression" and "anger" displayed by Mr. Wolf. RP 16. The court agreed, however, that Mr. Wolf had a history of behaving respectfully in the courtroom. RP 17. Nevertheless, the court ruled Mr. Wolf would remain restrained due concerns about "aggression":

> THE COURT: . . . So quite frankly, Mr. Wolf, you are correct. You have had [sic] appeared before me. And you and I have always had a respectful relationship. I expect that to continue throughout the time that we spend together, whether that be today or future hearings as we walk through this. I expect that from everyone in my courtroom. And to the extent that you behave appropriately, you'll remain in the courtroom and will continue to have hearings as we are right now in a respectful fashion.
>
> On the other hand, I have concerns, Mr. Wolf, about your behavior based on the record that is before me, again that I've just described -- and I can go into it in intricate detail if I need to -- but I am making a record that I have reviewed that, and based on the charges and, again, the record, I have those concerns about aggression that have manifested itself in physical aggression.

> And I've listened to what the sergeant has to say today. And in order to keep us at a level situation today so we don't have any situation that is inappropriate, I am going to indicate that we do have some safety concerns.
>
> And I'm going to allow the belly chain to stay on. As far as the paperwork goes, certainly [defense counsel], if you ask him to – I'll ask him to look in that file or in that sack that you have -- if you need anything pulled out, he can pull it out and lay it before you. And you can certainly reference whatever you need.

RP 17-18. Mr. Wolf requested a compromise where he would have one hand free, but the court denied Mr. Wolf's request.

> [MR. WOLF]: Your Honor?
>
> THE COURT: Yes, Mr. Wolf.
>
> [MR. WOLF]: Perhaps you could take one handcuff off and they could cuff it to the chair, and I can have use of my right hand. I think that would be a reasonable compromise.
>
> THE COURT: I'm not in a position to negotiate with you.
>
> [MR. WOLF]: Just asking.
>
> THE COURT: Thank you.

RP 18. The court subsequently entered a cursory written order in support of its ruling, finding the restraints were warranted because "the court has concerns, based on the records, about [Mr. Wolf]'s behavior and aggression. 1CP 17; 2CP 11.

The court abused its discretion by ruling that Mr. Wolf remain restrained for two reasons. First, the hearing and inquiry by the court was

inadequate. Second, the vague and unsworn concerns about Mr. Wolf's purported behavior and aggression outside the courtroom were inadequate to deprive Mr. Wolf of his constitutional right to appear free of restraints.

A failure by the trial court to address an issue of restraint is an abuse of discretion. State v. Lundstrom, 6 Wn. App. 2d 388, 394-95, 429 P.3d 1116 (2018). Similarly, simply deferring to policies by jails or other administrators on whether a person should be shackled is an abuse of discretion. Id.

Here, the trial court addressed the issue and nominally exercised its discretion. The hearing and the court's inquiry, however, was inadequate to support the court's decision. The court did not hear testimony or receive any sworn declarations. Cf. Walker, 185 Wn. App. at 792 (in support of request to restrain defendant, court received declaration setting out defendant's criminal history, gang affiliation, his lengthy attempt to fight extradition, and various admitted infractions for violence and misconduct in jail). Mr. Wolf requested that Sergeant Purcell provide sworn testimony and sought to challenge Sergeant Purcell's representation of the facts, but the court denied his request. RP 14-15. Given the dispute and that Mr. Wolf's constitutional rights were at stake, the court should have granted Mr. Wolf's request. See In re Ross, 45 Wn.2d 654, 644-55, 277 P.2d 335 (1954) (prejudicial error for trial court to deny party's request that

witnesses be sworn in; statements by witnesses were equivalent to hearsay).

Moreover, in determining that Mr. Wolf had a problem with "aggression" that justified restraining him, the court relied on unadmitted documents related to the allegation of malicious mischief, including a police report. RP 16, 26. These documents were hearsay and it was error for the court to rely on them.[8] See Ross, 45 Wn.2d at 644-65. The court did not even make these documents part of the record. Consequently, this Court is unable to review the evidence the trial court relied on in making its decision.

Because the hearing was inadequate, the court abused its discretion in ordering that Mr. Wolf be restrained.

Setting aside the issues with the hearing, the court's reasons for justifying the restraints were inadequate. The Ninth Circuit Court of Appeals has recognized that in all of its "cases in which shackling has been approved, there has also been evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections

[8] Taking judicial notice of documents in separate judicial proceedings is improper even where they involve the same party. In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003); Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 53-54, 240 P.2d 560 (1952). Doing so may deprive a party of due process. State v. K.N., 124 Wn. App. 875, 877, 882, 103 P.3d 844 (2004).

officials and judicial authorities." Duckett v. Godinez, 67 F.3d 734, 749 (9th Cir. 1995). Here, there was no such evidence. And the evidence is unlike that in Walker, where this Court held the evidence supported the trial court's decision to restrain the defendant at sentencing. Walker, 185 Wn. App. at 801-02. There, the defendant had pleaded guilty to murder and felony assault, had convictions for violent crimes, was affiliated with a gang, had fought in jail, and had a history of flight. Id. The evidence of Mr. Wolf's "aggression" in cases where he had not been convicted of (and was presumed innocent) pales in comparison. See also Finch, 137 Wn.2d at 850-54 (trial court abused discretion in permitting shackling of capital murder defendant given lack of evidence of disruption in court, that he was an escape risk, or was a threat to anyone other than perhaps his ex-wife, who was a witness).

Accordingly, the trial court's decision that Mr. Wolf remain in shackles rests on untenable grounds and is an abuse of discretion.

c. Unconstitutional shackling is structural error. Even if not structural error, the prosecution cannot meet its burden to prove the error harmless beyond a reasonable doubt.

"Structural" errors are not subject to review for harmless error. McCoy v. Louisiana, __ U.S. __, 138 S. Ct. 1500, 1511, 200 L. Ed. 2d 821 (2018). Structural error affects the framework of the proceeding rather

than an error in the process itself. Id. An error may be structural if it protects an interest beyond preventing an erroneous result. Id. An error may also qualify as structural "when its effects are too hard to measure" or if the error "inevitably signal[s] fundamental unfairness." Id.

An error in unconstitutional shackling is structural error. It affects the framework of the proceeding, not its process. Beyond the unfair prejudice caused to defendants by shackling (which could lead to an erroneous result), the rule against unnecessary shackling is grounded in preserving the dignity of both persons and the judicial process. Deck, 544 U.S. at 631; Walker, 185 Wn. App. at 798. Further, it is often too difficult to measure the prejudicial effects from restraining a defendant. Restraint affects the mental processes of the restrained person and also unconsciously affects those who see the restrained person. See People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012) ("the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.").

Because the error in restraining Mr. Wolf is structural error, the order terminating him from mental health court must be reversed.

Alternatively, even if not structural error, reversal is still warranted. Constitutional errors are presumed prejudicial. Lundstrom, 6 Wn. App. 2d at 395 n.2. The prosecution has the burden of proving the error harmless beyond a reasonable doubt. Id.

The prosecution cannot meet its burden. Seeing Mr. Wolf in chains may have influenced the court's thought process as to Mr. Wolf. Because the prosecution cannot rebut the presumption of prejudice, reversal is required.

3. Cumulative error deprived Mr. Wolf of a fair hearing.

Due process entitles criminal defendants to a fair proceeding. An accumulation of errors may deprive a defendant of this right. Chambers, 410 U.S. at 289 n.3; State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997); U.S. Const. amend. XIV; Const. art. I, § 3. 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).

As explained, Mr. Wolf did not receive any of the basic due process protections before he was terminated from mental health court. And he was unconstitutionally restrained during the hearing. Together, these errors deprived Mr. Wolf of a fair hearing, requiring reversal. See, e.g., Salas, 1 Wn. App. 2d at 952; State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). This Court should reverse.

4. Remand is necessary to strike provisions related to legal financial obligations that were erroneously imposed against Mr. Wolf.

a. Remand is necessary to strike the $200 filing fee and $100 DNA fee.

In 2018, the law on legal financial obligations changed. Now, it is categorically impermissible to impose any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). The previously mandatory $200 filing fee cannot be imposed on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). It is also improper to impose the $100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18.

Our Supreme Court recently held that these changes apply prospectively to cases on appeal. State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). Because the defendant in Ramirez was indigent, the Supreme Court ordered the filing fee stricken. Id. at 748-50. Applying the change in the law, our Supreme Court in Ramirez ruled the trial court impermissibly imposed discretionary legal financial obligations, including the $200 criminal filing fee. Id.

Mr. Wolf is indigent. 1CP 95-103; 2CP 62-68. The trial court intended to waive all discretionary legal financial obligations. 4/24/18RP 11; see 1CP 84-85; 2CP 47-48 (not imposing discretionary legal financial

obligations). The court, however, imposed the $200 filing fee and the $100 DNA fee, believing these fees to be mandatory. 1CP 84; 2CP47. As in Ramirez, the change in the law applies to this case because it is on direct appeal and is not final. Accordingly, this Court should strike the $200 filing fee. Because Mr. Wolf has previously had his DNA collected as a result of a prior conviction, this Court should also order the $100 DNA collection fee stricken. See CP 1CP 79; 2CP 43 (listing previous felony convictions).

Separate from the recent change in the law and Ramirez, the court's imposition of the $200 filing fee and the $100 DNA fee violates RCW 9.94A.777(1). Under that provision, if a person suffers from a mental health condition, the court must make an individualized inquiry before imposing legal financial obligations. State v. Tedder, 194 Wn. App. 753, 756-57, 378 P.3d 246 (2016). Mr. Wolf suffers from a mental health condition. RP 38-41. Accordingly, the court should either strike the $200 filing fee and $100 DNA fee or remand for an individualized inquiry into Mr. Wolf's ability to pay. Tedder, 194 Wn. App. at 757.

b. Remand is necessary to strike the requirement that Mr. Wolf pay the costs of community custody.

The court intended to waive all discretionary legal financial obligations. 4/24/18RP 11; 1CP 84-85; 2CP 47-48. Still, the judgment and

sentence orders that Mr. Wolf pay the costs of urinalysis or other testing to monitor drug-free status and pay supervision fees. 1CP 83, 87; 2CP 46, 50. The relevant statute provides that this is discretionary: "Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department."). RCW 9.94A.703(2)(d) (emphasis added). For this reason, costs of community custody, including monitoring costs, are discretionary and are subject to an ability to pay inquiry. Lundstrom, 6 Wn. App. 2d at 396 n.3. The trial court, however, did not inquire into Mr. Wolf's ability to pay. Consistent with the trial court's intent to waive discretionary costs, this Court should strike these requirements form the judgment and sentence. See Ramirez, 191 Wn.2d at 742-46; Tedder, 194 Wn. App. at 757.

c. Remand is necessary to strike the interest accrual provision in the judgment and sentence.

The judgment and sentence also provides that legal financial obligations shall bear interest. 1CP 85; 2CP 48. Effective June 7, 2018, however, financial obligations excluding restitution no longer accrue interest. LAWS OF 2018, ch. 269, §§ 1-2; RCW 3.50.100(4)(b); Ramirez, 191 Wn.2d at 747. This change in the law applies to cases on direct appeal. See Ramirez, 191 Wn.2d at 748-50. Accordingly, this Court

should order the trial court to strike the interest accrual provision. See id. at 749-50.

F. CONCLUSION

Without due process of law, Mr. Wolf was terminated from the mental health court program. This Court should vacate the convictions and order that he be reinstated into the program. Any future termination proceeding should be before a different judge. Alternatively, the Court should correct the sentencing errors related to the imposition of legal financial obligations.

DATED this 22nd day of March, 2019.

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36089-0-III
	)	
GAVIN WOLF,	)	
	)	
APPELLANT.	)	

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