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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36094-6-III

STATE OF WASHINGTON, Respondent,

v.

AARON T. MACK, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

The day before trial, the State produced chemical test results to the defense for the first time. The test results interjected new facts in the case that defense counsel was unprepared to meet. Because the trial court abused its discretion by refusing to exclude the late-produced evidence or continue the trial to permit the defense time to evaluate it, a new trial should be granted. Alternatively, certain legal financial obligations should be stricken due to Aaron Mack's indigency.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in denying Mack's motion to exclude test results that were not produced until the day before trial.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in imposing a \$200 criminal filing fee and a \$100 DNA collection fee due to Mack's indigency and prior felony conviction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the late-produced evidence materially affected the defense.

ISSUE NO. 2: Whether the late production prejudiced the defense in investigating and presenting its case.

ISSUE NO. 3: Whether Mack's indigency and prior felony conviction precluded imposition of the \$200 criminal filing fee and the \$100 DNA collection fee.

IV. STATEMENT OF THE CASE

A state trooper stopped Aaron Mack's car for a headlight violation. RP 101. He was ultimately arrested for driving with a suspended license and for outstanding warrants. RP 104. A search incident to arrest of his pocket produced a piece of balled up plastic containing a dark sticky residue that Mack identified as THC oil. RP 48, 104. Another trooper recovered two pen tubes and some pieces of tin foil that Mack said he used to smoke the THC oil. RP 48-49, 104-05.

The State submitted the items to the toxicology lab for testing. RP 107. Initially, the lab tested only the piece of plastic with residue and determined it contained heroin. RP 6, 26-27, 132. Accordingly, the State charged Mack with possessing heroin. CP 1. Mack contended that his possession was unwitting. CP 23.

Subsequently, about two weeks before trial, the State requested that the lab also test the pen tubes and tin foil, without apparently disclosing to the defense that the additional testing had been requested. RP 5, 7, CP 50. The day before trial, the State provided a report of the results to the defense. RP 4. Those results showed that one of the pen tubes also contained heroin. RP 5, 73.

The day of trial, defense counsel moved to exclude the late-disclosed test results. RP 5. He argued that earlier in the case, he had requested independent testing of the items seized from Mack and his request had been denied. RP 4-5. Had the new results been disclosed earlier, he contended, he would have renewed his motion for retesting. RP 11. Because Mack contended that he used the pen tubes to smoke THC oil, testing the pen tube had significantly different implications if it returned positive for THC than for heroin. RP 17. Counsel contended that his trial preparation would have been significantly changed had the test results been timely provided, and that plea negotiations were likely affected as well. RP 18.

The trial court denied Mack's motion to exclude the evidence, indicating that additional testing was "not necessary" because it "wouldn't show anything different, from my knowledge of the information, than the

testing so far.” RP 42-43. It pointed out that Mack could argue to the jury that the second pen tube, which was not tested, could have been used to consume THC oil. RP 41.

The trial proceeded accordingly, and Mack testified on his own behalf. RP 132. He acknowledged telling the officers they could take the paraphernalia items and that he used them to smoke THC oil. RP 134. He claimed to have smoked hash oil from one of the tubes the day he was stopped. RP 136. He denied recollection of where he obtained the small amount of residue that was in his pocket but stated that he never knowingly possessed heroin. RP 137, 138. The State primarily rebutted his account with testimony from a police drug expert that heroin is generally smoked off a heated piece of foil with a tube, while THC oil is usually cooked or vaped through an electronic cigarette. RP 153. However, the witness did not testify that THC oil could not be consumed as Mack described, and he acknowledged that although there are visual and olfactory differences between heroin and THC oil, he could not identify the substance involved in this case. RP 159.

The jury convicted Mack. RP 202. At sentencing, the parties acknowledged Mack had a prior conviction for possessing methamphetamine from 2010. RP 215, CP 30. The court imposed a four

month jail sentence. RP 32, CP 218. After observing that Mack had around \$18,000 outstanding in prior fines and fees, and conducting no other inquiry, the court imposed \$800 in LFOs that it apparently believed were mandatory, which included a \$200 criminal filing fee and a \$100 DNA collection fee. RP 218-19, CP 33-34.

Subsequently, Mack moved for a new trial on the basis of the late-disclosed evidence used at trial. CP 48-49. He argued that defense counsel would have advised the defendant differently about the risks of the case had he known that additional scientific testing was forthcoming. CP 52. He also pointed out that prior to trial, there had been opportunities to resolve the case for no jail or a short jail sentence. RP 225. When the first testing was completed, only one item out of five had been tested. RP 225. Accordingly, because the defense believed the absence of testing of the other items would establish a reasonable doubt, the strategic decision was made to proceed to trial. RP 226. When the additional testing results were disclosed on the eve of trial, Mack contended it gave him no opportunity to evaluate the new evidence and possibly reconsider the trial decision. RP 229.

The trial court denied the motion, holding that Mack was not prejudiced by the additional testing while at the same time acknowledging

the new evidence decreased the chance of acquittal. RP 236, 239. However, out of concern that it not appear to be punishing Mack for electing to exercise his right to a trial, the court reduced the term of confinement from four months to three. RP 237-38.

Mack now appeals and has been found indigent for that purpose. CP 55, 57.

V. ARGUMENT

A. The trial court erred in denying the motion to exclude evidence produced the day before trial when the evidence injected material new facts into the case.

Trial by ambush is “both irrational and archaic – a hangover from a more immature era in our evolving Anglo-American system of jurisprudence.” *State v. Thompson*, 54 Wn.2d 100, 109, 338 P.2d 319 (1959) (Finley, J., concurring). In the present case, Mack was not informed until the day before trial that the State intended to introduce against him evidence that significantly undermined his defense. Because the additional testing injected material new facts into the case and because Mack was prejudiced in his ability to prepare to defend against the charge, the evidence should have been excluded.

Under CrR 4.7(a)(iii), the prosecuting attorney is required to disclose to the defense any reports of experts made in connection with the case, including the results of scientific testing. When the State fails to act with due diligence such that material facts are not disclosed until shortly before trial, misconduct is shown. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 433, 403 P.3d 45 (2017). Misconduct does not require a showing of bad faith by the prosecutor, but only simple mismanagement. *Id.* at 434. Suppression of late-disclosed evidence as a remedy for State misconduct is available under CrR 8.3 as an intermediate sanction less extreme than dismissal. *See id.* at 460-31. A trial court has discretion to determine how to deal with discovery violations; accordingly, its ruling is reviewed for abuse of that discretion. *State v. Berry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014); *Salgado-Mendoza*, 189 Wn.2d at 427.

Late disclosure of material evidence prejudices a defendant's fundamental rights by forcing him to choose between a timely trial and an attorney who has had time to adequately prepare a defense. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). In the present case, the assigned deputy prosecutor left for new employment about 10 days¹ before trial and

¹ The record suggests the substitution took place somewhat earlier, as the toxicologist testified that the item was submitted to her from Spokane on a rush request and she received the item in Seattle on March 9th, completing her testing on March 20th, the day before trial. RP 28-29. Because 11 days elapsed between the lab receiving the evidence

the elected prosecutor took over the case. CP 49. After conferring with the law enforcement witnesses, the prosecutor decided to have the additional items tested. CP 49. However, the prosecutor never advised the defense or the court that the testing had been requested for trial until it received the new report the day before. *See* CrR 4.7(h)(2) (imposing a continuing duty to “promptly notify the other party” of new material or information subject to disclosure). Nor did the State provide any explanation why it had not requested the additional testing earlier in the case, as the record reflects that Mack was arrested on September 17, 2016 but the case was not tried until March 2018, a year and a half later. RP 4, 101. These facts are adequate to show mismanagement by the prosecutor in preparing the case for trial.

The report was material both because it established an alternative basis to convict Mack for possessing heroin and because it undermined Mack’s defense that he did not know the substance he possessed was heroin. Because Mack admitted that he smoked THC oil from the pen tubes, the presence of heroin in the pen tube raised significant questions about his knowledge, as a juror could reasonably question whether Mack would notice that the substance was not what he expected when he

and completing the additional testing, the request for additional testing must have been made more than 11 days before trial.

consumed it. With less than 24 hours to prepare, Mack now had to defend not only the charge that a small amount of residue in his pocket contained heroin, but also that a piece of paraphernalia that he had admitted using was tainted as well. This is a substantial new fact to learn within hours of trial commencing.

Furthermore, although the trial court acknowledged that the new evidence diminished Mack's chances of acquittal under the defense theory of unwitting possession, it nevertheless concluded that he was not prejudiced in his defense. This conclusion is nonsensical. Defense counsel plainly stated that he had not had adequate time to review the report or consider how to respond to it in the short time since he had received it. At the very least, the new information warranted time to investigate whether Mack could have inadvertently consumed heroin in the pen tube without knowing it, or whether the amount of heroin detected could be quantified in some fashion to determine if the dosage was more consistent with purposeful consumption or adulteration.

“[L]ate disclosure of material facts can support a finding of actual prejudice.” *Salgado-Mendoza*, 189 Wn.2d at 432 (citing *Price*, 94 Wn.2d at 814). In *Salgado-Mendoza*, the court concluded that the State's failure to identify which particular toxicologist it intended to call until the

morning of trial constituted mismanagement, but the defense was not prejudiced because it could have investigated all nine who were disclosed and the testimony would have been similar regardless of which individual toxicologist presented it. *Id.* at 433, 437-39. Here, by contrast, the defense was completely unaware that the additional testing was underway and lacked any notice of the need to prepare for it.

The prejudice determination considers not whether the defendant ultimately received a fair trial, but whether he was prejudiced in preparing for it. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 589, 220 P.3d 191 (2009). Here, the surprise interjection of new material evidence that undermined the sole defense deprived Mack of a reasonable opportunity to prepare to meet the State's allegations. Because no reasonable judge could conclude that Mack had a fair opportunity to evaluate the new evidence and adjust the defense strategy in 24 hours, the ruling denying exclusion of the evidence was an abuse of the trial court's discretion and should be reversed.

B. The trial court erred in imposing the criminal filing fee and the \$100 DNA collection fee because they are no longer mandatory obligations.

Trial courts may not impose discretionary legal financial obligations unless a defendant has the likely present or future ability to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). To make this determination, the trial court must make an individualized inquiry into a defendant's ability to pay discretionary LFOs before imposing them, and the inquiry must, at a minimum, consider the effects of incarceration and other debts, as well as whether the defendant meets the GR 34 standard for indigency. *Blazina*, 182 Wn.2d at 838-39; *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018).

Under recently-enacted House Bill 1783, trial courts may not impose the \$200 criminal filing fee on defendants who are indigent under RCW 10.101.010(3)(a)-(c). *Ramirez*, 191 Wn.2d at 747; RCW 36.18.020(2)(h). Additionally, the \$100 DNA collection fee is not to be imposed when the State has previously collected the defendant's DNA. RCW 43.43.7541. Although House Bill 1783 became effective on June 7, 2018, after Mack was sentenced, because his case is pending on appeal he

is entitled to its application in his case. Laws of 2018, ch. 269; *Ramirez*, 191 Wn.2d at 749.

Here, the trial court did not engage in the inquiry required under *Ramirez* and *Blazina* before imposing the criminal filing fee. Under the revised RCW 36.18.020(2)(h), the criminal filing fee may not be imposed on an indigent defendant. Mack was determined to be indigent for appeal. CP 55. The trial court apparently believed, erroneously, that the criminal filing fee was mandatory. RP 219. Because the court imposed the filing fee without determining that Mack had the ability to pay it, the case should be remanded for reconsideration of the fee.²

Likewise, the trial court apparently believed the \$100 DNA collection fee was mandatory, but it may not be imposed when the State has already collected the defendant's DNA. RCW 43.43.7541. The record reflects that Mack was convicted of a felony drug offense in 2010. CP 30. Thus, the State has already collected Mack's DNA, and the fee should not have been imposed. *See* Laws of 2008, c. 97, § 2 (requiring

² Appellate counsel for Mack inadvertently failed to designate for the record the motion for indigency, which may include sufficient information about Mack's financial status to determine whether he is indigent as defined under RCW 10.101.010(3)(a)-(c). Counsel has filed a supplemental designation including the motion. In the event the motion shows that Mack's indigency is due to one of the reasons specified in RCW 10.101.010(3)(a)-(c), then the criminal filing fee should simply be stricken and no remand is required. Although Mack was appointed counsel for trial, there is no docket entry reflecting the filing of a financial statement that could be designated for the appellate record.

collection of the DNA of any person convicted of a felony effective June 12, 2008). Accordingly, this court should strike the \$100 DNA collection fee.

VI. CONCLUSION

For the foregoing reasons, Mack respectfully requests that the court REVERSE his conviction and REMAND the case for a new trial; or, alternatively, STRIKE the \$200 criminal filing fee and the \$100 DNA collection fee from his judgment and sentence.

RESPECTFULLY SUBMITTED this 30 day of May, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 30 day of May, 2019 in Kennewick, Washington.


Andrea Burkhart

BURKHART & BURKHART, PLLC

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