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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36314-7-III

STATE OF WASHINGTON, Respondent,

v.

TOMMY D. CANFIELD, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

After Tommy Canfield's conviction for obstructing a police officer was reversed on appeal, the State moved, unopposed, to amend the information to add additional charges based upon the same incident. Because the mandatory joinder rule prohibits the State from bringing additional related charges in a successive prosecution that it did not bring in the initial trial, Canfield's counsel was ineffective for failing to object to the amendment of the information or move to dismiss the amended charges. Further, the facts cited by the trial court to support the obstructing charge constituted only passive resistance to detention consistent with Canfield's duty not to comply. Accordingly, Canfield's convictions for obstructing police, making a false statement, and evidence tampering should be vacated and dismissed. Alternatively, sentencing errors should be corrected on remand.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Canfield received ineffective assistance of counsel when his attorney did not object to amending the information or move to dismiss additional charges filed after remand when they were "related offenses" under CrR 4.3.1(b)(3).

ASSIGNMENT OF ERROR NO. 2: Insufficient evidence supports the conviction for obstructing a law enforcement officer.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in imposing discretionary legal financial obligations (“LFOs”) without conducting the required inquiry into Canfield’s ability to pay.

ASSIGNMENT OF ERROR NO. 4: The provision of the judgment and sentence assessing interest on Canfield’s unpaid LFOs should be stricken.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the charges of making a false statement to a police officer and tampering with evidence were “related offenses” to the original charge of obstructing a police officer that was reversed on appeal.

ISSUE NO. 2: Whether, when the mandatory joinder rule provides that a motion to dismiss subsequently added charges “shall be granted” unless the prosecutor shows new facts, new evidence, or obstruction of the ends of justice, it was ineffective and prejudicial for trial counsel to fail to move to dismiss the amended charges.

ISSUE NO. 3: Whether the findings that Canfield feigned sleep and reached for his keys when police approached, refused to comply with orders, and resisted handcuffing by stiffening his arms constitute only

passive resistance to detention, and therefore cannot constitute obstructing as a matter of law?

ISSUE NO. 4: Whether the sentencing court complied with the applicable enabling statutes and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) in imposing LFOs in this case.

IV. STATEMENT OF THE CASE

The State tried Tommy Canfield on charges of possessing methamphetamine with a firearm enhancement, unlawfully possessing a firearm in the second degree, possessing a stolen firearm, and obstructing a law enforcement officer. CP 70-73, 74. All of the charges arose out of events that occurred on April 18, 2016 in Asotin County. CP 70-73. Police arrested Canfield on a warrant and alleged that he provided them with a false name and resisted handcuffing. CP 85-86. On the way to the jail, the transporting officer observed him squirming in the back seat. During a search at the jail, police found ammunition and controlled substances in his pocket. CP 86. Although Canfield denied having a gun, police recovered a loaded gun from the floor of the police car. CP 86.

At trial, the State alleged that Canfield committed the crime of obstructing a police officer during the arrest and transport to jail in three ways: (1) by lying about his identity, (2) by trying to hide the firearm, and

(3) by resisting being handcuffed. CP 87. The jury convicted Canfield and he appealed, asserting among other errors that the State's reliance upon multiple acts to prove the charge of obstructing a police officer required a unanimity instruction. CP 88-89. The Court of Appeals agreed that the absence of a unanimity instruction deprived Canfield of a unanimous verdict and reversed the conviction for obstruction. CP 94.

Following remand, the State moved to amend the information to add additional charges of making a false statement to a public official and tampering with evidence. CP 20-23. Canfield's attorney did not object to the amendment or move to dismiss the additional charges under RAP 4.3.1(b)(3). RP 3. Canfield waived his right to a jury and the case was tried to the bench. CP 19, 36. Thereafter, the trial court entered findings of fact detailing the process of Canfield's arrest and transport to jail, identifying as instances of obstruction Canfield (1) feigning sleep, (2) reaching for his keys when police made contact with him, (3) disregarding a deputy's commands on several occasions, and (4) stiffening up and locking his hands to make it hard to handcuff him. CP 37. It also found that Canfield gave a false name to police officers to support the charge of making a false statement, and that he committed the crime of attempted tampering with evidence by trying to conceal the gun in the police car. CP 38-39.

At sentencing, the State asked the court to reimpose the seven-month sentence it had originally imposed on the obstructing charge, along with an additional seven months for the false statement charge and an additional 45 days for the tampering. RP 83, 87. The State argued that since Canfield was now convicted of three crimes rather than one, the punishment should not be the same; and further, the State contended, Canfield's decision to take the charges to trial should carry a greater sanction. RP 86-87.

The State also requested fines and various legal financial obligations ("LFOs") totaling \$3,060. RP 83. In response, Canfield's attorney stated that Canfield had not worked for a long time and he was not sure about Canfield's ability to pay. RP 84-85. The trial court conducted no further inquiry.

The trial court imposed four months on the obstructing charge and 7 months on the false statement charge, running the terms consecutive. It also imposed 45 days on the attempted evidence tampering charge but ran that term concurrent. The sentence totaled 185 months, an increase of 4 months above Canfield's initial sentence before remand. RP 89, CP 44, 78. The trial court also imposed \$3,060 in LFOs that included a \$200 criminal filing fee, \$260 in sheriff's service fees, a \$100 DNA collection

fee, and a \$2,000 VUCSA fine. RP 90; CP 42. Although the trial court acknowledged that interest would no longer accrue on any non-restitution LFOs, the judgment and sentence contained a notation stating, “The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments.” RP 90; CP 43.

Canfield now appeals and was found indigent for appeal based upon his lack of income, assets, and employment. CP 50, 63, 65-66.

V. ARGUMENT

Under the mandatory joinder rule, CrR 4.3.1(2)(b), the State was barred from charging Canfield with additional crimes arising from the same conduct after his successful appeal resulting in reversal of his conviction for obstruction. Because a motion to dismiss the new charges of making a false statement to a public official and tampering with evidence would have been granted under that rule, Canfield’s trial attorney was ineffective for failing to oppose the additional charges. Accordingly, the convictions for making a false statement and attempting to tamper with evidence should be vacated and dismissed.

Additionally, the trial court’s findings of fact fail to support the conviction for obstructing a law enforcement officer. The facts cited

establish only passive resistance to arrest and failure to cooperate with detention, similar to the facts found insufficient to establish obstruction in *State v. D.E.D.*, 200 Wn. App. 484, 402 P.3d 851 (2017). Thus, the obstructing charge should also be vacated and dismissed.

In the event any convictions survive, the LFOs imposed without an inquiry that comports with *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), or contrary to the terms of the enabling statutes prohibiting their imposition on indigent defendants, and the provision of the judgment and sentence requiring interest on the unpaid balance, should be stricken.

1. Canfield's trial attorney was ineffective for failing to oppose the amendment of the information to add related charges that the State did not allege in Canfield's first trial, contrary to the mandatory joinder rule.

Both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution guarantee every criminal defendant the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel for a defendant is ineffective when his or her performance falls below an objective standard of reasonableness, and when counsel's poor work prejudices the defendant. *State v. McFarland*,

127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel was effective at the trial level, but this can be overcome by showing that trial counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and article I, section 22. *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992), *review denied*, 121 Wn.2d 1006 (1993).

Actions by trial counsel which constitute “legitimate trial strategy or tactics” cannot serve as a basis for a claim of ineffective assistance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). While failures to object that consist of strategy or trial tactics do not constitute deficient performance, when the court cannot discern a legitimate reason not to object, deficient performance is shown. *Hendrickson*, 129 Wn.2d at 77-78.

In the present case, after Canfield’s conviction for obstructing was reversed on appeal, the State moved to amend the information to add additional charges against Canfield that were based upon the same conduct forming the basis of the original obstructing charge. Under CrR 4.3.1(b)(3), the mandatory joinder rule, when a defendant has been tried for one offense, a charge brought later for a related offense must be dismissed unless the prosecuting attorney was unaware of the facts

constituting the related offense, lacked sufficient evidence to try the new offense at the time of the first trial, or for some other reason, the ends of justice would be defeated by dismissing the subsequent charges. Here, the new charges arose from the same series of events arising from Canfield's arrest and transport to jail on April 18, 2016 that were the subject of his original obstruction charge. RP 12; CP 21, 67, 85-86, 87-88.

Accordingly, they were "related offenses" within the meaning of CrR 4.3.1(b)(1): "Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct." *See also State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997) (holding that "same conduct" for purposes of determining application of mandatory joinder is "conduct involving a single criminal incident or episode," including the same series of physical acts.).

Consequently, when a conviction is reversed after a trial, the prosecutor may not retry the defendant on new or additional charges based upon the same conduct unless the charges are lesser included offenses, or one of the exceptions to mandatory joinder applies. *State v. Gamble*, 168 Wn.2d 161, 168, 225 P.3d 973 (2010). As the *Gamble* Court stated:

The mandatory joinder rule is intended as a limit on the prosecutor, and its purposes are to protect defendants from

(a) successive prosecutions that can act as a hedge against the risk of an unsympathetic jury at the first trial, (b) a “hold” on the defendant after the defendant has been sentenced, or (c) harassment of the defendant through multiple trials.

Id.

Under the plain language of CrR 4.3.1(b)(3), a motion to dismiss a charge for a related offense made before the second trial “shall be granted” unless certain exceptions apply. Here, the charges were based upon no new facts or evidence that were unavailable during the first trial; they simply alleged different theories of criminal liability based upon the same course of events. Nor does the case present any extraordinary circumstances outside of the State’s control that render the ends of justice exception to mandatory joinder applicable. *See Gamble*, 168 Wn.2d at 169. Accordingly, the State was required to bring the additional charges of tampering with evidence and making a false statement to a police officer during the first trial, or not at all.

Because a timely-brought motion to dismiss the additional charges was required to be granted under the mandatory joinder rule, trial counsel’s failure to object to the amendment of the information or move to dismiss the additional charges falls below an objective standard of reasonableness and lacks any strategic justification. *See In re Yung-Cheng*

Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015) (“Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient.”) Further, Canfield suffered actual prejudice from the omission because he was improperly tried on two additional charges and received a longer sentence. *See State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (prejudice is shown when there is a reasonable probability that the outcome of the proceeding would have differed, but for the deficient conduct).

The remedy for untimely amendment of the information is dismissal of the late-filed charges with prejudice. *State v. Dallas*, 126 Wn.2d 324, 326, 892 P.2d 1082 (1995). The court should vacate and dismiss Canfield’s convictions for tampering with evidence and making a false statement to a police officer, and remand the case for resentencing.

2. Insufficient evidence supports the conviction for obstructing a law enforcement officer when the findings establish only passive resistance to detention.

Sufficient evidence supports a conviction if, after viewing the evidence and drawing all reasonable inferences from it in favor of the State, a rational trier of fact could find each element of the crime beyond a

reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). After a bench trial, the Court of Appeals reviews the trial court's findings of fact for substantial evidence and considers whether the findings support the conclusions of law. *State v. Yallup*, 3 Wn. App. 2d 546, 552, 416 P.3d 1250, *review denied*, 191 Wn.2d 1014 (2018). The trial court's legal conclusions are reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Here, Canfield does not challenge the trial court's factual findings, only the conclusions drawn from those facts; thus, review is *de novo*.

In *State v. D.E.D.*, 200 Wn. App. 484, 487, 402 P.3d 851 (2017), this court determined that under the facts present, passive resistance to an investigatory stop was not a crime. In that case, a patrol officer attempted to detain a youth who resisted contact with the officer, pulled his arm away from handcuffs, and stiffened his body to resist cuffing. *Id.* at 487-88. Concluding that the defendant's acts failed to sustain a conviction for obstructing, the court noted that, in general, there is no duty to cooperate with a police investigation. *Id.* at 489, 495. Consequently, the obstructing statute cannot be employed in a manner that seeks to compel cooperation. *Id.* at 496. Thus, "[p]assive resistance consistent with the lack of a duty to cooperate . . . is not criminal behavior." *Id.*

The facts found by the trial court in support of the obstructing conviction in this case are analogous to the facts present in *D.E.D.* As in *D.E.D.*, police were investigating a tip they received that Canfield was present at the Zip Trip store.¹ CP 37. As in *D.E.D.*, Canfield passively resisted the detention by feigning sleep, reaching for his ignition keys upon the initial approach of police,² disobeying unspecified orders, and stiffening in response to handcuffing. CP 37. As in *D.E.D.*, Canfield's acts were consistent with declining to assist the police in detaining him. Because application of the obstructing statute in this case served to compel Canfield's cooperation when he had no duty to cooperate, the facts alleged by the State and found by the trial court fail to establish the crime of obstruction.

Accordingly, consistent with *D.E.D.*, the trial court's findings of fact establish merely passive resistance to detention that is insufficient to prove obstruction as a matter of law. Consequently, the obstructing conviction should be vacated and dismissed.

¹ The record does not reflect the point at which the initial detention escalated into Canfield's arrest on the outstanding warrant. However, Canfield was not identified until after the events in question, indicating that he was detained for confirmation of his identity at all pertinent times. RP 13-17.

² The record further does not reflect when the officers identified themselves as law enforcement to Canfield, who apparently had a hat over his eyes when they first approached. RP 13-15. Canfield also suffers from impaired hearing. RP 20-21, 85.

3. The trial court erred in imposing various LFOs and in providing for interest to accrue on the unpaid balances.

Trial courts may not impose discretionary LFOs 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. *Blazina*, 182 Wn.2d at 838-39. This inquiry must examine the defendant's present employment and past work experience, income, assets and other financial resources, monthly expenses, and debts, including other LFOs, medical costs, or student loans. *Ramirez*, 191 Wn.2d at 744.

Additionally, prior to Canfield's sentencing, the legislature amended certain statutes concerning LFOs in several ways pertinent to this case. First, it prohibited sentencing courts from assessing costs if the defendant is indigent at the time of sentencing. RCW 10.01.160(3). Second, it provided that the \$200 criminal filing fee may not be imposed against indigent defendants. RCW 36.18.020(2)(h). Third, it modified the DNA database fee to exempt it from assessment when the defendant's DNA has already been collected due to a prior conviction. RCW

43.43.7541. Lastly, it eliminated interest on nonrestitution LFOs. RCW 10.82.090(1).

Here, the trial court failed to inquire to any of the factors required under *Blazina* and *Ramirez* before imposing a \$200 criminal filing fee, \$260 sheriff service fees, a \$2,000 VUCSA fine, and a \$100 crime lab fee. At the time of sentencing, Canfield was represented by a public defender who told the court,

My client did state earlier in previous sentencing that he had done some work. He has not done work in a long time. And I'm not quite certain about his ability to pay in the future; I'll ask him to address that.

RP 85. The sentencing court then asked Canfield to allocate, saying, "Mr. Canfield, anything you want to tell me about your case or anything else."

RP 85. Canfield addressed the court but did not volunteer any information about his financial circumstances. RP 85-86, 87-88. The court thereafter imposed its sentence without further inquiry. RP 88-90. It found Canfield indigent for appeal one week later. CP 63-64.

Under *Ramirez*, the trial court's inquiry was inadequate to support the imposition of discretionary LFOs such as the sheriff's service fee. Moreover, the court was precluded from imposing the \$200 criminal filing fee against an indigent defendant. The record reflects that Canfield was

convicted of prior felonies in Washington that required DNA collection, such that a subsequent \$100 fee for DNA collection should not be assessed. CP 52. Lastly, the court imposed a \$2,000 VUCSA fine under RCW 69.50.430, which allows the fine to be suspended when the defendant is found to be indigent. Canfield had been found indigent for purposes of having an attorney appointed to represent him. CP 98. Accordingly, the fine should not have been imposed without consideration of Canfield's financial circumstances.

Because only the \$500 victim assessment was a mandatory LFO, the remaining LFOs should not have been imposed without an inquiry into, and consideration of, Canfield's ability to pay. Additionally, although the trial court apparently recognized during the sentencing hearing that interest may no longer accrue on nonrestitution LFOs, its judgment and sentence provides for the accrual of interest on all unpaid LFOs. RP 90; CP 54. Thus, both the non-mandatory LFOs and the provision requiring the accrual of interest should be stricken from the judgment and sentence.

VI. CONCLUSION

For the foregoing reasons, Canfield respectfully requests that the court VACATE and DISMISS his convictions, or alternatively, STRIKE the non-mandatory LFOs imposed and the provision imposing interest on unpaid nonrestitution LFOs, and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 25 day of February, 2019.

TWO ARROWS, PLLC

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

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

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 them 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 this 25 day of February, 2019 in Kennewick, Washington.



Andrea Burkhart

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