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Court of Appeals
Division III
State of Washington
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No.36314-7-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

TOMMY D. CANFIELD, Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The basic facts of this case were thoroughly described in the prior appeal: State v. Canfield,¹ No. 34881-4-III, 2018 WL 1617072 (Div. III, April 3, 2018) (*Unpublished*). Therein the Court of Appeals affirmed all of the convictions except the Obstructing a Law Enforcement Officer. In regards to that charge, the Court specifically found that the actions of the Appellant, from initial contact up to and including his actions while in transit to the jail, were not “part of a continuing course of conduct. State v. Canfield, No. 34881-4-III, 2018 WL 1617072, at *5 (Div. III, Apr. 3, 2018). The Court then remanded this matter to the trial court for further proceedings as to the Obstructing charge.

Upon remand to the trial court level the State moved to amend the information to specify the criminality of the Appellant’s separate acts. Clerk’s Papers 20 - 23 (*hereinafter* CP). The resulting charges were: Making a False or Misleading Statement to a Public Servant, Obstructing a Law Enforcement Officer, and Tampering with Physical Evidence. *Id.*

¹ Mindful of General Rule 14.1, this is an unpublished opinion and so may only be cited in certain circumstances. One such exception is that “unpublished opinions may be cited for evidence of facts established in earlier proceedings in the same case involving the same parties.” In re Personal Restraint of Davis, 95 Wn.App. 917, 920 n. 2, 977 P.2d 630 (1999), *aff’d*, 142 Wn.2d 165, 12 P.3d 603 (2000).

After bench trial, the Appellant having waived his right to a jury trial (Report of Proceedings page 4 - *hereinafter* RP 4), the trial court found the Appellant guilty of Making a False or Misleading Statement to a Public Servant and Obstructing a Law Enforcement Officer. RP 79. As for the Tampering with Physical Evidence charge the court found that although the Appellant had clearly acted with the intent to conceal the pistol, he had failed to do so. RP 78. Accordingly, the court found the Appellant guilty of a Criminal Attempt to commit that crime. RP 79.

The Appellant has appealed, asserting that his trial counsel was ineffective for not asserting mandatory joinder as an objection to amended charges, that the evidence does not support the verdict as to the Obstructing charge, and that the financial obligations imposed by the court are not proper.

II. ISSUES

- A. WAS DEFENSE COUNSEL INEFFECTIVE IN FAILING TO OBJECT TO AMENDMENT OF THE INFORMATION BASED ON THE MANDATORY JOINDER RULE?
- B. WAS SUFFICIENT EVIDENCE PRODUCED TO SUPPORT THE OBSTRUCTION CONVICTION?
- C. WERE THE NONMANDATORY FINANCIAL OBLIGATIONS PROPERLY IMPOSED.

III. ARGUMENT

- A. BASED UPON FACTS OF THE CASE, MANDATORY JOINDER DOES NOT APPLY TO THE MISDEMEANOR CHARGES.
- B. THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT'S ACTIONS FAR EXCEEDED PASSIVE RESISTANCE AND LEGALLY SUPPORTED THE OBSTRUCTION CONVICTION.
- C. THE STATE CONCEDES ERROR IN REGARDS TO NONMANDATORY FINANCIAL OBLIGATIONS.

DISCUSSION

- A. BASED UPON FACTS OF THE CASE, MANDATORY JOINDER DOES NOT APPLY TO THE MISDEMEANOR CHARGES.

The Appellant's first assignment of error is that the failure of Defense Counsel to object to the amendment of the Information after remand constituted ineffective assistance of counsel. This argument fails based upon the well-established case law and the prior factual determination made by this very Appellate Court in its prior decision:

State v. Canfield, No. 34881-4-III, 2018 WL 1617072 (Div. III, April 3, 2018) (*Unpublished*).

In that unpublished opinion this Court specifically found that the actions of the Appellant which gave rise to the Obstructing, False Statement, and Tampering charges were NOT “part of a continuing course of conduct.” *Id.* at page 5. Despite this unequivocal ruling, the Appellant now argues that his trial counsel was ineffective for failing to assert mandatory joinder as a basis to object to the amendment of the charges.

The mandatory joinder rule is embodied in Criminal Rule 4.3.1 and by its own terms is only applicable to “related offenses.” Related offenses in turn are limited to those which are “based on the same conduct” or arise from “conduct involving a single criminal incident or episode.” State v. Lee, 132 Wn. 2d 498, 503, 939 P.2d 1223, 1226 (1997). The mandatory joinder rule is not applicable to “a series of acts connected together or constituting parts of a single scheme or plan.” *Id.* at 501. The Courts have held that in such circumstances mandatory joinder is not implicated:

The rule providing for dismissal of certain related offenses for failure to join does not extend to offenses which are part of a common plan.

Id. at 502. The facts of the present case, especially in light of the prior determination by the Court of Appeals, clearly place the charges herein outside of the category of a single incident or a continuing

course of conduct. As such, the mandatory joinder rule cannot apply to this case.

The mandatory joinder rule has narrow confines and “requires joinder only when the offense is based on the same conduct as that alleged in other counts.” State v. Thompson, 36 Wn. App. 249, 253, 673 P.2d 630, 633 (1983) (*citing* CrR 4.3(c)(1)). As the Thompson Court went on to explain:

We choose to follow State v. Mitchell, 30 Wn.App. 49, 631 P.2d 1043 (1981). State v. Mitchell held that CrR 4.3 sets forth different provisions for permissive and mandatory joinder. CrR 4.3(a) deals with permissive joinder if the offenses are "of the same or similar character", or "are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." On the other hand, CrR 4.3(c) mandates joinder if the offenses are "related offenses," in other words, "based on the same conduct."

Id. at 254. The Thompson Court’s analysis was cited with approval by the Supreme Court: “As the court in Thompson correctly observed, the permissive joinder provisions should not be turned into a mandatory test.” State v. Lee, *supra* at 502.

Applying this rule to the facts of our case, one cannot argue that making a false statement is the same conduct as feigning sleep, refusing to comply with orders, reaching for ignition keys, or resisting handcuffing pursuant to the execution of an arrest warrant. Trial counsel throughout the long history of this case argued that making a false statement CANNOT be the same conduct as Obstruction.

Now appellate counsel seeks to argue the opposite. The facts do not support this claim.

As for the Evidence Tampering charge, by all accounts this occurred well after, and in a different locale than the Obstruction. The “intent” was different as well. The Appellant, in his obstructive behavior and his false statement, sought to hinder or delay his arrest. That arrest was a *fait accompli* before the Appellant began his efforts to conceal the pistol. His intent therein was to avoid additional criminal charges, not to effect the arrest. The mandatory joinder rule’s narrow requirements are not met in the present case.

Moreover, purposes of the rule, as identified by the Supreme Court are as follows:

[T]o 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.

State v. Gamble, 168 Wn. 2d 161, 168, 225 P.3d 973, 978 (2010).

None of these concerns are implicated in the case at hand. We are not talking about successive prosecutions as a prosecution tactic; the matter was ordered to be re-tried by the Court of Appeals. The Appellant had been convicted of all of the more serious offenses in his first trial - and those convictions were affirmed by the Court of Appeals. Those charges were not subject to re-trial. No additional hold was anticipated or effected by the re-trial. And finally, there can

be no claim of harassment when the matter was retried in accord with the appellate court's order. None of the mandatory joinder rule's purposes would be served by barring the amendment of the charges, and the facts of the case place it outside of the reach of the rule.

An assertion of ineffective assistance premised on counsel's failure to seek dismissal of charges can only stand where "there is a reasonable probability that the charges would have been dismissed had trial counsel sought a dismissal." State v. Johnston, 143 Wn. App. 1, 18, 177 P.3d 1127, 1136 (2007). Based upon the trial court's verdicts following bench trial, and based upon the Appellate Court's determination that the facts did not constitute a single criminal episode, it is clear that a motion to dismiss on the basis of mandatory joinder would not have been granted. Defense counsel cannot be faulted for recognizing these facts and forgoing a futile motion to dismiss.

B. THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT'S ACTIONS FAR EXCEEDED PASSIVE RESISTANCE AND LEGALLY SUPPORTED THE OBSTRUCTION CONVICTION.

The Appellant's second claim of error is an assertion that the trial court erred in finding that the Appellant's actions rose to the level necessary to satisfy the elements of the crime of Obstructing a Law Enforcement Officer. As a beginning point on this issue it should be

noted that the elements of this crime, as charged in this matter are as follows:

That on or about the 18th day of April 2016, in Asotin County, Washington, the Defendant willfully hindered, delayed or obstructed a law enforcement officer in the discharge of his or her official powers or duties.

Second Amended Information, Count 2, *see also*: RCW 9A.76.020.

The Appellant has never contested any of these elements: the date; jurisdiction; the fact that officers involved were discharging their official duties; or even that his actions were wilful. Rather, he argues that his actions did not constitute obstruction because they were nothing more than “passive resistance.” Brief of Appellant, page 12. This, he claims, cannot satisfy the requirements of the Obstruction statute. To support this position the Appellant relies on his reading of State v. D.E.D., 200 Wn. App. 484, 496, 402 P.3d 851, 857 (2017).

This argument cannot stand up to analysis, and fails on both legal and factual bases. First, and foremost, the evidence presented in the present case established that the Appellant did far more than passively resist the officers efforts to execute the arrest warrant and take him into custody. Two of the arresting officers testified that the Appellant feigned sleep and would not respond to their commands. Deputy Frary testified that these actions did in fact “slow or hinder” the Deputies execution of the arrest warrant. RP page 14. Sheriff Hilderbrand similarly testified. RP page 29.

Both officers described how when the Appellant was ordered to show his hands and exit the vehicle he did not comply. RP page 14. Further, not only did the Appellant “passively” refuse to follow the officers’ orders, he actively disobeyed. As Deputy Frary testified:

A: Yes, he appeared to be reaching for keys or -- the ignition. I had to draw my duty weapon due to the fact I was right in front of the vehicle.

Q: And did his act of reaching for the keys constitute a hindrance or delay in -- in your execution of the warrant?

A: Yes.

RP page 14. The deputy explained that the Appellant’s actions were more than just noncompliance “the -- appearance of looking for keys, going for the ignition -- enough to cause me to draw my duty weapon.”

RP page 26. The Sheriff testified similarly: “He was reaching to the ignition, which -- gave me -- the alarm that he was going for the -- the ignition to start the vehicle.” RP page 33.

Finally, the arresting officers testified concerning the Appellant’s wilful disobedience with requests and his struggles to prevent being handcuffing:

A: When he -- place his hands behind his back he -- locked -- locked an arm, to where she -- was not unable to pry them apart to secure the handcuffs.

Q: Did that hinder or delay the handcuffing operation?

A: It -- it did.

RP page 32.

It is **black letter law** that by challenging the sufficiency of the evidence the Appellant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. State v. Imokawa, 4 Wn. App. 2d 545, 560, 422 P.3d 502 (2018). All of the Appellant's obstructive actions were well-supported by the evidence presented at trial. Applying the rule to the present case, the Appellant in effect admits that he committed all of the actions described above, and the inference that he did so wilfully with the intent to obstruct the officers as well.

The prosecution never characterized the Appellant's actions as passive and during summation pointed out that the actions constituted more than "passive resistance." The trial court concurred and relied upon by the evidence presented to reach its verdict:

Obstructing, that was a no-brainer. In this court's opinion there was plenty of conduct that was testified to by all officers who took the stand here that Mr. Canfield was engaging in -- behavior that was designed to delay or hinder his apprehension, most likely to slow things down while he considered his options, which admittedly were not many at that particular point. But still, clearly, -- case of obstructing. Case law in our jurisdiction indicates that any interference with the officer's attempt to arrest can be obstructing, disobeying the officer's orders to put your hands up or to exit -- vehicle -- clearly support obstructing. So, those things are all present in this case.

RP page 79. To now attempt to characterize the Appellant's actions as "passive resistance" is not supported by the evidence presented or the facts as found by the trier of fact in this case.

Not only does the Appellant's argument fail on the facts, it is not supported in the law. The sole legal support provided for the argument advanced by the Appellant is State v. D.E.D., *supra*. The problem with his reliance on D.E.D. is that it can easily be distinguished, and by its own express terms, is inapplicable to the case now at bar. D.E.D. involved an "investigatory stop" and the individual contacted by law enforcement was specifically advised that he was not under arrest at the time that he was detained. State v. D.E.D., at 487, 488.

In stark contrast, in the present case the officers contacted the Appellant with the distinctly stated purpose of arresting him pursuant to a valid arrest warrant. The D.E.D. Court pointedly limited the application of its findings to those cases where there was no arrest, and unambiguously rejected any efforts to expand the holding to cases like the present one:

We caution against extending our narrow holding, which is simply that resisting handcuffing when a suspect is not under arrest does not constitute obstructing a public servant.

State v. D.E.D., at 496. The Appellant cannot cite to any case where a court has ignored this warning and applied D.E.D. to a case like ours. As has often been noted:

Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give

consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken.

DeHeer v. Seattle Post-Intelligencer, 60 Wn. 2d 122, 126, 372 P.2d 193, 195 (1962). The Appellant does not cite to any such case, because no such case exists.

On the other hand, there is a wealth of case law which supports the State's position and the trial court's verdict. In State v. Steen, 164 Wn. App. 789, 265 P.3d 901, (2011), *as amended* (Dec. 20, 2011), the Court found that a defendant's failure to comply with a command to exit a trailer constituted Obstruction. Steen at 799. In State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998) the Court ruled that when the defendant disobeyed the officer's orders to put his hands up and exit the car he committed the offense of Obstruction. Contreras at 316. Both of these cases were cited by the D.E.D. Court with favor, and the fact pattern in these cases is on all fours with the current case.

The trial court's finding that the Appellant's actions rose beyond passive resistance was well-supported by the facts of the case based upon the evidence admitted at trial, and is in accord with the law. The sole authority cited by the Appellant is inapplicable to the present case, and in fact, stands in direct opposition to the Appellant's argument raised herein.

C. THE STATE CONCEDES ERROR IN REGARDS TO NONMANDATORY FINANCIAL OBLIGATIONS.

In light of the current trend in jurisprudence and recent legislative changes the State cannot prevail in any argument concerning the imposition of legal financial obligations. In the face of the inevitable, the State concedes error and requests the Court remand this aspect of the case to allow the trial court to strike all nonmandatory financial assessments.

IV. CONCLUSION

Based upon the facts of this case, as proven at trial and the clear dictates of the law, this Court should reject the Appellant's claim of ineffective assistance and his challenge to the sufficiency of the evidence. The Court should affirm the verdict of guilty as to all charges. The Court should remand the matter of financial assessments to the trial court.

Dated this 29th day of July, 2019.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

TOMMY D. CANFIELD,

Appellant.

Court of Appeals No: 348814-4-III.

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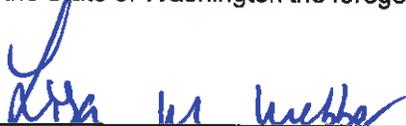
DECLARATION

On July 29, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

ANDREA BURKHART
andrea@burkhartandburkhart.com

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

Signed at Asotin, Washington on July 29, 2019.



LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTOR'S OFFICE

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