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Division III
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No. 36803-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS CURTIS JR.,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The court conducted part of jury selection at an unmemorialized sidebar. This violated the constitutional right of a public trial, requiring reversal.**

Mr. Curtis had a constitutional right to a public trial, where the public could observe the proceedings and understand how the proceedings were conducted. State v. Whitlock, 188 Wn.2d 511, 519, 396 P.3d 310 (2017). During a sidebar that was not memorialized, the court struck a juror for a cause and may have heard other challenges for cause. Br. of App. at 10-14. Because this violated Mr. Curtis' right to a public trial and a violation of the public trial right is structural error, the conviction must be reversed. Br. of App. at 17.

The prosecution appears to largely agree with Mr. Curtis on the law, except for on one key point. The prosecution appears to contend that so long as a courtroom remains open to the public, no public trial violation can occur. Br. of Resp't at 4. In other words, even if the proceedings are functionally inaccessible to the public despite the courtroom being physically open, no violation occurs. Br. of Resp't at 4. This contention should be rejected because it would permit key portions of a trial to occur in silence and effectively in secret even if the courtroom is physically open.

For example, imagine if an examination of witnesses occurred via text message. The witnesses and examining party are in court, but instead of the ordinary verbal examination, the parties write their questions to the witnesses and the witnesses write their answers out. This could be done electronically in open court, but if the messages were not displayed or recorded, the proceeding would be effectively inaccessible to the public. Such proceedings would violate the public trial right. See State v. Effinger, 194 Wn. App. 554, 568-69, 375 P.3d 701 (2016) (Bjorgen, J., dissenting).

Further, the prosecution's broad rule contravenes precedent holding that the right to a public trial extends to jury selection. State v. Marks, 185 Wn.2d 143, 145, 368 P.3d 485 (2016). Our Supreme Court has held that while the public trial right is implicated when peremptory challenges are conducted at a sidebar or on paper, this does not constitute a public trial violation if the challenges are exercised in open court and a public record is made of the peremptory challenges. Id.

After significant scrutiny, the record indicates that juror 14 was dismissed for cause at a sidebar before peremptory challenges occurred. Br. of App. at 13-14. Inexplicably, this was not announced in open court and juror 14 was passed over without comment when filling the seats in

the jury box. Br. of App. at 13. Rather, that juror 14 had been dismissed appears to have been kept a secret.

The prosecution concedes “the court never explicitly stated on the record that Juror 14 was removed for cause.” Br. of Resp’t at 2-3. The prosecution also acknowledges that despite apparently excusing juror 14 for cause, “the court did not excuse Juror 14 until the conclusion of the peremptory challenges.” Br. of Resp’t at 3.

Still, the prosecution claims it is “pure speculation” to conclude that part of jury selection occurred at a sidebar. Br. of Resp’t 3. The prosecution contends there “is absolutely no evidence that Juror 14 was discussed in the sidebar before the peremptories.” Br. of Resp’t at 3. This is false given the record. The only time the juror could have been struck would have been at the sidebar, which was to discuss challenges for cause. Further, if the sidebar had been memorialized, as the law requires, there would be the evidence the prosecution complains about.

The prosecution asserts juror 14 was struck before the sidebar. Br. of Resp’t at 14. But the transcript does not show this. The transcript shows the court dismissing juror 8, but not juror 14 before peremptory challenges. RP 29-30, 101-21. Therefore, given that the jury selection sheet shows juror 14 being dismissed for cause, the challenge or dismissal must have occurred at the sidebar.

Hearing challenges for cause at a sidebar implicated the public trial right. The sidebar was not memorialized. Because Mr. Curtis establishes a public trial violation and this is structural error, this Court should reverse his conviction.

2. The offense of unlawful possession of a controlled substance should be read to have a knowledge element. Otherwise, the statute is unconstitutional.

Mr. Curtis reiterates his arguments that the drug possession statute should be read to have a knowledge element. Br. of App. at 18-25. Otherwise, the statute should be declared unconstitutional in violation of due process. Either way, Mr. Curtis' conviction should be reversed.

The prosecution contends the Supreme Court settled this issue in State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004) and State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). Those decisions, however, did not consider the constitutional argument raised by Mr. Curtis or the canon of construction that demands statutes be interpreted to avoid placing its constitutionality in doubt. Accordingly, they are not dispositive. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014); State v. Granath, 200 Wn. App. 26, 35, 401 P.3d 405 (2017), affirmed, 190 Wn.2d 548, 415 P.3d 1179 (2018).

Our Supreme Court has impliedly recognized this by accepting review of this very issue. State v. Blake, 194 Wn.2d 1023, 456 P.3d 395

(2020). As framed by the commissioner's office, the issue in Blake is "[w]hether requiring a defendant charged with possession of a controlled substance to prove the affirmative defense of unwitting possession violates due process principles."

https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf (last accessed March 20, 2020).

As argued, unlawful possession of a controlled substance has a knowledge element. This element was erroneously omitted from the to-convict instruction. The prosecution has not met its burden to rebut the presumption of prejudice and prove this error harmless beyond a reasonable doubt, requiring reversal. State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014).

If determined to not have a knowledge element, the statute is unconstitutional. Mr. Curtis' conviction must be reversed because unconstitutional statutes are void. City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

- 3. The condition restricting Mr. Curtis' association with "persons known to have a felony criminal background or known to use controlled substances" is unconstitutionally overbroad and vague.**

Mr. Curtis was convicted of simple drug possession. As a condition of community custody, the court forbade Mr. Curtis from

associating “with persons known to have a felony criminal background or known to use controlled substances without the prior approval of the Department of Corrections.” CP 30. Because this condition is both unconstitutionally overbroad and vague, it should be stricken or ordered reformed. Br. of App. at 28-33. The restriction is overbroad because it unnecessarily restricts Mr. Curtis’ association with anyone convicted of a felony, regardless of the age of the felony conviction, the type of felony, or whether the person with the felony has reformed. Br. of App. at 29-30. It is also overbroad because it forbids association with persons who legally use controlled substances with a prescription. Br. of App. at 30-31. The condition is vague because the language used in the condition is indefinite and permits arbitrary enforcement. Br. of App. at 31-33.

If not stricken, the condition should be reformed with new language. Br. of App. at 33. Mr. Curtis suggests the following language: “Mr. Curtis shall not knowingly associate with persons involved in the unlawful use, sale, and/or possession of controlled substances.” Br. of App. at 33.

The prosecution does not explain why it is reasonably necessary to forbid Mr. Curtis from associating with every person ever convicted of a felony. Neither does the prosecution contest Mr. Curtis’ argument that the

condition as written forbids him from associating with persons who legally use controlled substances.

Rather, the prosecution cites caselaw that concerned different arguments than the ones advanced here. These cases also involved conditions with different language or restrictions on association with a different class of persons. For these reasons, the precedent relied on by the prosecution is unhelpful.

In arguing that the condition forbidding contact with persons convicted of a felony is appropriate, the prosecution cites State v. Coombes, 191 Wn. App. 241, 253-54, 361 P.3d 270 (2015). But that case declined to address a challenge to a condition forbidding association or contact with known gang members. Coombes, 191 Wn. App. 241, 253-54. That is a different issue, and one that Court did not address. Similarly, in Weathermax, this Court addressed a condition restricting association with gang members, not felons, and held the condition in that case was unconstitutionally vague. State v. Weatherwax, 193 Wn. App. 667, 677, 681, 376 P.3d 1150 (2016), rev'd on other grounds, 188 Wn.2d 139, 392 P.3d 1054 (2017).

The unpublished caselaw cited by the prosecution is similarly unhelpful because they concerned different issues or arguments. State v. Knott, 35546-2-III, 2019 WL 1422675, at *4 (Wash. Ct. App. Mar. 28,

2019) (unpublished) (noting that defendant did not argue that condition restricting association with persons with felony convictions should be narrowed only to persons convicted of drug offenses); State v. Swearingen, No. 32299-8, at *3-4, noted at 183 Wn. App. 1041 (2014) (unpublished) (addressing only a vagueness challenge rather than an overbreadth challenge)

As for the cases cited involving restrictions on associating with persons who use drugs, these cases did not address Mr. Curtis's argument that the condition as written unnecessarily restricts contact with persons who legally use controlled substances with a prescription. State v. Hearn, 131 Wn. App. 601, 608-09, 128 P.3d 139 (2006); State v. Llamas-Villa, 67 Wn. App. 448, 454, 836 P.2d 239 (1992). Thus, they are not dispositive. Stockwell, 179 Wn.2d at 600; Granath, 200 Wn. App. at 35.

Because the condition is unconstitutionally vague and overbroad, this Court should order it stricken or reformed.

4. The requirement that Mr. Curtis pay supervision fees and the costs of drug screens should be stricken along with the provision stating that legal financial obligations accrue interest.

A provision in the judgment and sentence provides that interest accrues on legal financial obligations. The prosecution correctly concedes that this provision is erroneous and should be stricken. Br. of Resp't at 10. The concession should be accepted.

The prosecution, however, fails to concede that the provisions requiring Mr. Curtis pay the costs of supervision fees and any drug screens should also be stricken.

Contrary to the prosecution's contention, supervision fees are a discretionary legal financial obligation and should not be imposed on an indigent person who does not have the ability to pay. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). For this reason, this Court has ordered provisions requiring a defendant pay supervision stricken if the record shows that defendant is indigent and that the trial court otherwise intended to waive discretionary legal financial obligations. State v. Dillon, ___ Wn. App. 2d ___, 456 P.3d 1199, 1209 (2020); State v. Lee, No. 79094-3-I slip op. (Wash. Ct. App. Mar. 17, 2020).¹ As in Dillon and Lee, the record shows the defendant is indigent and that the trial court intended to waive all discretionary legal financial obligations. Thus, the provision should be stricken.

For the same reason, the requirement that Mr. Curtis pay the costs of drug screens, such as random urinalysis, should also be stricken. The prosecution argues otherwise, citing RCW 9.94A.703(4)(b)(i). But that provision only applies to persons "convicted of an alcohol or drug-related

¹ Lee was initially an unpublished opinion, but was ordered published after the prosecution moved for publication.

traffic offense.” RCW 9.94A.703(4)(b)(i) (emphasis added). Mr. Curtis was convicted of unlawful possession of a controlled substance. That crime is not included in the definition of a “alcohol or drug-related traffic offense.” RCW 9.94A.703(4)(b)(ii). Because imposing the costs of drug screens was discretionary and the trial court intended to waive all discretionary costs, this Court should order the provision stricken. See Dillon, 456 P.3d at 1209.

B. CONCLUSION

Mr. Curtis’ conviction should be reversed. If not reversed, the Court should order remand to remedy the errors related to the conditions of community custody and legal financial obligations.

DATED this 23rd day of March 2020.

Respectfully submitted,



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DIVISION THREE**

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THOMAS CURTIS, JR.,)

Appellant.)

NO. 36803-3-III

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