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NO. 70002-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK ELDEN HARDTKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
SAN JUAN COUNTY, STATE OF WASHINGTON

Superior Court No. 12-1-05015-2

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly required Hardtke to bear the cost of pre-trial electronic monitoring as a condition of release where there is no statutory authority for the expenditure of public funds for this purpose?

2. Whether, having agreed to the provision to reimburse the county for the costs of alcohol monitoring in his plea agreement, Hardtke is precluded from challenging the provision on appeal?

II. STATEMENT OF THE CASE

Frederick Elden Hardtke was charged by information filed in San Juan County Superior Court with two counts of second-degree rape, second-degree assault, two counts of fourth-degree assault, and malicious mischief, all involving domestic violence. CP 1, 88.

On June 28, 2012, the trial court found probable cause and entered a release order. CP 1. The court also found that there existed a substantial danger that the defendant would commit a violent crime, and that the defendant had used, displayed, or threatened to use a firearm in a felony. CP 1, RP 3. The court therefore imposed various conditions of release and that Hardtke post a performance bond of $15,000. CP 1-2. One of the conditions was that Hardtke refrain from the use of alcohol. CP 2. The

crimes occurred while Hardtke was drunk and involved assaults with firearms. CP 86-88. Hardtke asserted that he was intoxicated at the time of the offenses to the point that he had no memory of them. CP 82.

On July 11, 2012, Hardtke moved to modify his conditions of release. CP 3. Hardtke acknowledged that the valid concern was his alcohol use and suggested that a less restrictive alternative to the $15,000 bond would be a transdermal alcohol detection bracelet. RP 4. The State submitted that if monitoring were ordered, Hardtke should bear the cost. RP 4.

The court modified the terms of release by lowering the performance bond to $3000, on the condition that Hardtke wear and pay for a transdermal alcohol monitoring ankle bracelet. CP 7-8, RP 4. Hardtke was given until July 20 to either post a $15,000 bond or arrange for the monitoring. CP 8, RP 4. The court then reserved until the twentieth whether Hardtke would have to pay the cost of monitoring. RP 4.

On July 20, 2012, Hardtke appeared in court and the release order was modified to delete reference to the $15,000 bond and stipulate that Hardtke wear the monitoring bracelet at all times. CP 10. The court ordered that Hardtke bear the cost of monitoring. CP 10, RP 5. The order

also authorized law enforcement to arrest Hardtke if he violated any of the conditions of release. CP 10.

On August 9, 2012, the State moved to revoke release and forfeit the performance bond. CP 11. The monitoring bracelet showed that Hardtke had consumed alcohol on at least three occasions between August 4 and August 8 at 7:00 a.m. CP 12. When Hardtke was taken into custody shortly before noon on the eighth, breath testing showed BAC readings over 0.05. CP 12.

Hardtke admitted the violations. RP 6. The court revoked release and forfeited the $3000 performance bond. CP 22, RP 6. It then entered a new order of release on the same terms as the previous one, but with the performance bond increased to $10,000. CP 24-25, RP 6.

On February 15, 2013, Hardtke pled guilty to amended charges of third-degree rape and second-degree assault. CP 41, 63. No firearms enhancements were alleged. CP 63.

The plea agreement was incorporated into the Statement of Defendant on Plea of Guilty. The State recommended an agreed exceptional sentence of 24 months. CP 70-71, 73. One of the recommended terms of community custody was that Hardtke reimburse

the county for the costs of transdermal monitoring. CP 73. Hardtke agreed to all recommendations. CP 75.

The court accepted the plea. CP 81. Despite his plea agreement to pay the cost of alcohol monitoring, Hardtke again argued that he should not have to pay it. RP 7. The court declined to revisit that issue and followed the agreed recommendation of the parties. RP 7. It imposed a sentence of 24 months, CP 27-28, and required Hardtke to reimburse the county for the cost of the transdermal monitoring. CP 33, RP 7.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN REQUIRING HARDTKE TO BEAR THE COST OF PRE-TRIAL ELECTRONIC MONITORING AS A CONDITION OF RELEASE WHERE THERE IS NO STATUTORY AUTHORITY FOR THE EXPENDITURE OF PUBLIC FUNDS FOR THIS PURPOSE.

Hardtke argues that the trial court abused its discretion in requiring him to bear the cost of the electronic monitoring imposed as a condition of his release. This claim is without merit because there is no statutory authority permitting the expenditure of public funds to pay for such monitoring.

As Hardtke correctly notes, the interpretation of court rules is a

question of law reviewed de novo. *State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012). The meaning of a statute is a question of law also reviewed de novo. *State v. Gray*, 174 Wn.2d 920, 927,280 P.3d 1110 (2012).

Hardtke cites no authority that holds that a defendant may not be required to pay the costs of a pre-trial release condition granted in lieu of, or in reduction of, bail. Although CrR 3.2(d)(9) does not explicitly require the defendant to pay the costs of monitoring it also does not prohibit it.

There is no suggestion in the rule that the Supreme Court intended that the State or the county bear the cost of such monitoring. Moreover, given that court rules are limited to procedural matters, it is difficult to see how such a requirement could be promulgated without statutory authority. *See* Const. art. 8, § 4 ("No moneys shall ever be paid out of the treasury of this state ... except in pursuance of an appropriation by law"); *State v. Perala*, 132 Wn. App. 98, 115, 130 P.3d 852, <u>*review denied*</u>, 158 Wn.2d 1018 (2006) ("The purpose of this constitutional prohibition is to prevent the expenditure of public funds without legislative direction and without the sanction of a legislative body); *In re J.H.*, 75 Wn. App. 887, 880 P.2d 1030 (1994), <u>*review denied*</u>, 126 Wn.2d 1024 (1995) (Juvenile court lacked authority to order Department of Social and Health Services to pay

housing costs of mother and dependent children, when there was no budgetary appropriation for those expenditures). Hardtke cites no statute requiring the State or county to bear the costs of electronic monitoring ordered under CrR 3.2. As such, the trial court would have no basis for ordering the State pay this cost.

While the courts have limited inherent power to compel funding, this power is subject to a high standard:

> The court must show by clear, cogent, and convincing proof that the funds sought are reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment of constitutional duties. *Id.* at 250–51. This power can be exercised only when established methods fail or when an emergency arises. *Id.* at 250.

Perala, 132 Wn. App. at 118 (*citing In re Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976)). Hardtke fails to show that State funding of electronic monitoring falls within these limited exceptions for the judicial disbursement of public money without legislative authorization.

Moreover, the requirement that the defendant pay the cost of the monitoring is no different than requiring the defendant to pay the cost of a bail bond. According to the Washington Department of Licensing consumer information site:

> Bonds cost a minimum of $50 plus other applicable bonding fees may be added. Bonds over $1,000 usually cost 10% of the bond. For example, if bail is set at $9,000,

> the premium would be $900 and other bonding fees may be added to the 10%. ... The fees that you pay are called premiums and aren't refundable.

See http://www.dol.wa.gov/business/bailbonds/bbconsumer.html (last visited on Nov. 14, 2013). Nothing in CrR 3.2 explicitly requires the defendant to pay these costs. Yet no one would seriously argue that the rule's silence on the matter obligates the State to pay the defendant's bond premium and fees.

Furthermore, where the Legislature has spoken on the matter, payment of such costs are explicitly required for pretrial release. For example, when a defendant is held pre-trial for certain driving offenses, the court is *required* to order as a condition of release that the defendant have an ignition interlock device or comply with "24/7 sobriety program monitoring" or both. RCW 10.21.055(1). The 24/7 program specifically contemplates that the participant will pay the fees associated with testing. RCW 36.28A.320; RCW 36.28A.330(4)(c); RCW 36.28A.360(2).

There is nothing in CrR 3.2 that requires public funding of electronic monitoring. Nor is there the constitutionally necessary statutory authorization for such a provision. This claim is without merit and should be rejected.

B. HAVING AGREED TO THE PROVISION TO REIMBURSE THE COUNTY FOR THE COSTS OF ALCOHOL MONITORING IN HIS PLEA AGREEMENT, HARDTKE CANNOT CHALLENGE THE PROVISION ON APPEAL.

Hardtke next claims that the trial court erred in requiring him to reimburse the county for the costs of his pre-trial alcohol monitoring. This claim is without merit because Hardtke agreed to the payments as part of his plea deal.

Hardtke was originally charged with two counts of second-degree rape, second-degree assault, two counts of fourth-degree assault, and malicious mischief, all involving domestic violence. The facts of the case would also have justified the imposition of firearm enhancements. The standard range for the original charges would have been 120 to 158 months. *See 2012 Washington State Adult Sentencing Guidelines Manual*, at 43, 54, 180. If firearm enhancements were sought on the three felony counts, up to an additional 96 months could have been added to the sentence. *Id.*, at 170.

In exchange for Hardtke's plea agreement, the State agreed to reduce the charges to one count each of third-degree rape and second-degree assault, with no firearm enhancements, which bore a standard range of 12-14 months. CP 27. As part of this agreement, Hardtke agreed

to an exceptional sentence of 24 months "agree[d] to all recommendations" that the State made regarding sentencing. CP 75. Among the explicit recommendations in the plea agreement to which Hardtke agreed was that he "[r]eimburse San Juan County for cost of transdermal monitoring." CP 73.

"[T]he defendant, like the State, must be bound by a valid plea agreement which is accepted by the trial court." *In re Breedlove*, 138 Wn.2d 298, 307, 979 P.2d 417, 423 (1999). Thus regardless of the fact that Hardtke essentially violated the terms of the agreement by arguing against a provision he had agreed to at sentencing, he should be held to his agreement. This his particularly true where the State held up its end of the bargain and followed the agreement of the parties.

IV. CONCLUSION

For the foregoing reasons, Hardtke's conviction and sentence should be affirmed.

DATED November 19, 2013.

Respectfully submitted,
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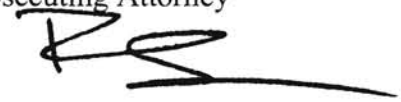

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SERVICE	Stephen A. Brandli P. O. Box 850 Friday Harbor, WA 98250-0850	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 19, 2013, Port Orchard, WA **Original filed at the Court of Appeals; Copy to counsel listed at left.**