

NO. 73804-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD WASHINGTON,

Appellant.

FILED
Aug 26, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Brian Gain, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

APPELLATE COSTS SHOULD BE DENIED

Without mentioning State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, review denied, 185 Wn.2d 1034, ___ P.3d ___ (2016), the State asks this court not to “foreclose the State’s option to seek appellate costs in this case, should it prevail, because the record is too limited to make such a determination at this stage.” Br. of Resp’t at 11. This ignores that Washington is presumed indigent through this review “unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f); Sinclair, 192 Wn. App. at 393 (applying RAP 15.2(f) presumption).

The State complains that it has not had an opportunity to create a record showing Washington’s ability to pay appellate costs and that it “did not have the right to obtain information about the appellant’s financial situation.”¹ Br. of Resp’t at 12. “This is not a persuasive assertion. The State merely needs to articulate the factors that influenced its own discretionary decision to request costs in the first place.” Sinclair, 192 Wn. App. at 391. The State provides no reason why it would exercise its own

¹ The State cites CP 47 for this proposition, which contained one of the defense’s proposed jury instructions. Br. of Resp’t at 12. The State likely intended to cite the order authorizing the appeal in forma pauperis. CP 122-24 (Sub No. 47). Contrary to the State’s assertion, the indigency order does not preclude the State from obtaining information about Washington’s finances.

discretion to seek appellate costs here. The State is welcome to investigate Washington's finances and seek to supplement the record with this information. Indeed, the State can provide whatever financial information it wishes to the trial court to show Washington's "financial condition has improved to the extent that [he] is no longer indigent." RAP 15.2(f). The State's failure to do so here indicates it has no good faith basis to believe Washington is or will be able to pay thousands of dollars in appellate costs.²

In any event, King County Prosecutor's office has no real financial interest here. It stands to recover a very small amount of money for preparing a 13-page brief. Should it seek appellate costs, King County's true purpose will be punishing Washington's for exercising his rights to counsel and to appeal under article I, section 22 of the Washington Constitution. For this additional reason, appellate costs should be denied.

The real party in interest is not King County but the Washington State Office of Public Defense, which will stand to collect thousands of dollars from Washington if appellate costs are awarded. Because the Office of Public Defense, not the King County Prosecutor's office, is the real beneficiary of the appellate costs at issue, if this court is considering

² The State's position on appeal is also inconsistent with its position in the trial court. The State never requested that the trial court impose any amount in discretionary legal financial obligations. 4RP 12 (requesting only mandatory LFOs). It is incongruous that the same prosecutor now requests the option of assessing significantly more money in appellate costs against Washington without providing any explanation for taking a drastically different position.

imposing costs, it should first ask the Office of Public Defense to weigh in. See RAP 10.6(c) (“The appellate court may ask for an amicus brief at any stage of review, and establish appropriate timelines for the filing of the amicus brief and answer thereto.”). Doing so would allow this court to obtain input from the party who has a real and legitimate interest in the imposition of appellate costs.

B. CONCLUSION

Because the jury was not required to unanimously decide which telephone call constituted felony harassment, Washington asks that this court reverse his conviction and remand for a new trial. In the event Washington does not prevail, appellate costs should be denied.

DATED this 20th day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

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