72965-9

FILED
January 12, 2016
Court of Appeals
Division I
State of Washington

NO. 72965-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEE OLSON,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

I. DUE PROCESS WAS VIOLATED WHEN THE STATE PERMITTED ITS AGENT TO DESTROY 911 RECORDINGS THAT HAD BEEN THE SUBJECT OF A TIMELY DISCOVERY REQUEST BY APPELLANT.

Appellant Thomas Olson asserts his due process rights were violated when the State failed to preserve the 911 recording evidence after defense counsel made a proper discovery request indicating their usefulness to the defense. Brief of Appellant (BOA) at 7-11. In response, the State first claims that Olson has not shown "bad faith" on the part of the government because he has not shown "improper motivation." Brief of Respondent (BOR) at 12. The State is incorrect.

The State cites State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994), and State v. Groth, 163 Wn. App. 548, 261 P.3d 183 (2011), to support its proposition that the defendant must prove "improper motivation." However, the State's reliance on these cases is misplaced.

Wittenbarger first invoked the "improper motivation" standard in the context of a challenge to a State policy allowing for the destruction of inspection, repair, and maintenance records from DataMaster breath testing machines used to obtain driving while

intoxicated (DWI) convictions. The defendants contended that the detailed inspection records and maintenance records, which were previously kept but were no longer generated by the State under its new policy, were necessary to their defense. Wittenbarger, 124 Wn.2d at 473-74. The defendants argued, although the State acted in compliance with its established policy, the new procedures themselves constituted a pattern of bad faith designed by the State to systematically deny DWI defendants access to useful evidence. They alleged the State no longer kept certain maintenance and repair records because defense attorneys used them successfully to challenge DWI prosecutions in the past. Id. at 477.

The Washington Supreme Court was unconvinced that there was systemic bad faith. It first concluded the policy was adopted by the State toxicologist in good faith. Id. It further concluded that, the fact that the State had ceased to keep records it kept in the past did not show bad faith. Id. at 478. The Supreme Court explained: "The defendants have failed to convince us the State's reduction in the amount of data retained from the results of the various tests performed on a DataMaster during a QAP inspection was improperly motivated." Id.

Wittenbarger ultimately dealt with a question of systemic motivations in creating a policy that limited the universe of evidence the State maintained in all cases. In that context, it placed the burden on the defense to show improper motivation for the systemic changes in evidence retention. Unlike Wittenbarger, this case does not deal with systemic policies that may or may not be adopted in bad faith. Here the impropriety of motivation comes from the fact that there was no motivation on the part of the State to do what it is obligated to do – preserve potentially useful defense evidence it had within its possession at the time the defense requested it. As such, Wittenbarger's analysis simply does not apply to the circumstances in this case.

Groth is also distinguishable from this case. In 1975, Diana Peterson was murdered. In 2009, James Groth was convicted of the crime. In the interim, most of the physical evidence was destroyed. Groth, 163 Wn. App. at 551.

On appeal, Groth argued that the destruction of physical evidence violated due process and required dismissal. Id. at 556-57. The Court of Appeals rejected his argument and held, while the evidence was potentially useful for Groth, such was not apparent when the evidence was destroyed in 1987. Id. at 558-59. It

concluded: "To the extent any conclusions can be drawn from the record, it appears the sheriffs' office negligently destroyed evidence of which any exculpatory value was not apparent." Id. at 559. Hence, the holding hinged on the fact that – unlike here – the State had no notice of the usefulness of the evidence to Groth at the time it was destroyed.

Olson's case is significantly different than Groth and Wittenbarger. First, unlike in Wittenbarger, there is no allegation of systemic bias or an improperly motivated policy that reduced the amount of data collected in all cases. Instead, the problem here is that the government did have a policy that made the 911 recordings available when they were requested. Had the government simply taken the steps laid out in its own agent's policy for retaining that evidence, the evidence would have been available.

Second, unlike Groth, the government here had notice – at the time the evidence was destroyed – that the evidence was useful to the defense. As explained in detail, the discovery request was filed well before the destruction of the 911 recordings and the government is presumed to be aware of its own agent's retention policy. BOA at 8-11. Hence, the procedural posture of this case is entirely different than that in Groth. Instead, in this case, the

usefulness of the tapes was obvious to the State at the time the 911 recordings were destroyed and it was improper for the State to ignore its own agent's policy for preserving the recordings.

Finally, the State claims that the destruction of the 911 tapes was harmless. However, the State cannot meet the high constitutional standard. An error of constitutional magnitude is harmless when the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Where there is a constitutional error, the court presumes prejudice and places the burden on the State to prove that the error was harmless beyond a reasonable doubt. Guloy, 104 Wn.2d at 425; State v. Stephens, 93 Wn.2d 186, 191, 607 P.2d 304 (1980).

The core issue for determining guilt was whether Olson was actually driving the truck or whether someone else had driven the truck and left the scene in another car. The State relied heavily on eyewitness accounts. The State claims that the defense was able to cross examine the witnesses as to their observations of the driver's identity, so the lack of access and use of the 911 calls was harmless. However, actual contemporaneous statements of what

was happening by eye witnesses often times conflict with what witnesses later say at trial many months later. As explained in detail in appellant's opening brief, having access to the 911 calls certainly would have bolstered the defense theory so as to establish reasonable doubt. BOA at 8-9. Hence, the state cannot carry its burden to show the error was harmless and Olson's conviction should be reversed.

II. APPELLANT'S CHALLENGE TO THE IMPOSED LEGAL FINANCIAL OBLIGATIONS (LFOs) IS RIPE.

The State claims appellant's challenge to the imposition of the DNA-collection fee and the Victim's Penalty Assessment (VPA) is not ripe until the State attempts to collect or impose punishment for failure to pay. BOR at 19-20. However, this same argument was categorically rejected in State v. Blazina, 182 Wn.2d 827, 832, n. 1, 344 P.3d 680, 684 (2015). The same ripeness principles raised in Blazina apply with equal force here. Hence, this Court should reject the State's ripeness argument.

III. APPELLANT'S SUBSTANTIVE DUE PROCESS CHALLENGE IS REVIEWABLE UNDER RAP 2.5(a).

The State claims that review of the LFO order is not appropriate because the issue was waived and the error is not a

manifest constitutional error. BOR at 21-23. As shown below, the State is incorrect.

Pursuant to RAP 2.5(a)(3), a manifest constitutional error may be raised for the first time on appeal. Review is appropriate where the appellant identifies a constitutional error and shows how the alleged error actually affected his rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)). A constitutional error is manifest where there is a showing of actual prejudice. Actual prejudice is established by showing the asserted error had practical and identifiable consequences in the trial or, in this case, the sentencing. Id. at 99, 217 P.3d 756 (quoting Kirkman, 159 Wn.2d at 935).

Olson has identified an error that is of true constitutional dimension. He asserts a substantive due process challenge to RCW 43.43.7541 and RCW 7.68.035 because they authorize sentencing courts to impose the DNA-collection fee and VPA without any consideration of ability to pay. Hence, the scope of his challenge is undoubtedly constitutional.

Second, Olson has established prejudice. On their face, the statutes do not require an ability-to-pay inquiry and mandate the

trial court impose the DNA-collection fee and the VPA in every felony case. The consequence is Olson now has a sentence that imposes these fees without the trial court first determining he has the ability to pay. Given these circumstances, Olson has shown the error he complains of has had practical and identifiable consequences in his sentencing. As such, review is appropriate under RAP 2.5(a)(3).

Alternatively, this Court should exercise its own discretion under RAP 2.5(a) and decide the merits of this case because: (1) it raises a substantial constitutional issue regarding Washington's broken LFO system, (2) the parties have fully brief the issue, and (3) the constitutional error raised here impacts criminal sentencings that take place across the State on a daily basis. Prompt appellate review of this issue therefore is necessary, appropriate, and will ultimately save judicial resources since this issue will likely be repeatedly raised.

For the reasons stated above and in appellant's opening brief, this Court should find the issue reviewable under RAP 2.5(a).

IV. RESOLUTION OF THE LEGAL ISSUE RAISED BY OLSON DOES NOT REST ON WHETHER THE STATE COULD HAVE PROCURED A FINDING THAT OLSON HAD THE ABILITY TO PAY THE FEES.

The State suggests that this Court may resolve the legal issue raised by Olson by simply finding that Olson has the ability or likely future ability to pay the LFOs. BOR at 27. However, this ignores the fact that such a finding must come from the trial court, not the appellate court.

In Washington, Superior Courts are fact finding courts of original jurisdiction. Const. art. 4, § 6. The Court of Appeals is not. Const. art. 4, § 4, 30; see also, Community Care Coalition of Washington v. Reed, 165 Wn.2d 606, 617, 200 P.3d 701 (2009).

The Rules of Appellate Procedure recognize that the constitutional function of a reviewing court is to review facts of record, not to make evidentiary rulings, admit evidence, or to try facts that were not tried below. RAP 9.1 - 9.4. As a consequence, it is not appropriate for the State to be attempting to procure an ability-to-pay finding from this Court.

This case does not present a sufficiency of the evidence claim precisely because there was no legitimate finding regarding ability to pay. Without such a determination, one cannot attempt to

answer the question of whether there was sufficient evidence to support the finding. Such would be completely illogical.

Instead, this case presents a constitutional challenge to a statute that requires the imposition of LFOs regardless of whether there is an ability-to-pay determination. In this context, what facts the State could have proved is irrelevant. Instead, for the purpose of Olson' constitutional argument, the relevant focus must be on the fact that the trial court applied a statute and there was no ability-to-pay determination.

For the reasons stated above, this Court should reject the State's attempt to refocus the issue on what facts might have been proved if there were an ability-to-pay determination below.

V. UNDER CURRY AND BLANK,[1] THE TRIGGER FOR AN ABILITY-TO-PAY-INQUIRY IS WHEN THERE IS ENFORCED COLLECTION OR ADDITIONAL PENALTIES OR FEES.

The State suggests that, under Curry and Blank, an ability-to-pay analysis is not required until a defendant faces imprisonment for non-willful failure to pay. BOR at 20. From this premise, the State argues that the statutes cited by appellant regarding the various enforcement mechanisms for LFOs do not trigger an ability-

[1] State v. Curry, 118 Wn.2d 763, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

to-pay inquiry because the statutes do not contemplate imprisonment. However, the State's premise is wrong.

As discusses in detail in appellant's opening brief, the Washington Supreme Court has made clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any enforced collection; (2) any additional penalty for nonpayment is assessed; or (3) any other sanction for nonpayment is imposed. Blank, 131 Wn.2d at 242. Hence, the State's suggestion that, under Blank and Curry, the only government action that triggers an ability-to-pay-inquiry is when a defendant faces imprisonment is plain wrong.

As Olson discussed in his opening brief, the Legislature has authorized a plethora of enforcement mechanisms that come with additional fees and sanctions and can be imposed without a judicial determination regarding ability to pay. Given this statutory scheme and the Blank and Curry decisions, it is constitutionally necessary for the trial court to consider ability-to-pay at the time it is imposing LFOs.

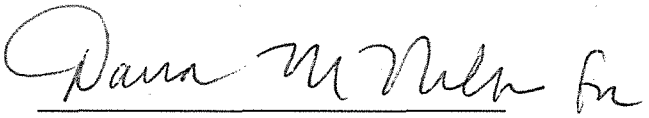
B. CONCLUSION

For the reasons stated above and those set forth in appellant's opening brief, this Court should reverse Olson's conviction or, alternatively, remand for an ability-to-pay determination.

DATED this 12th day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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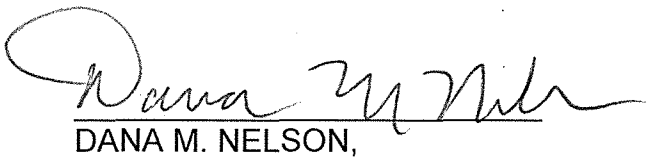

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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS OLSON
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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JANUARY 2016.

X Patrick Mayovsky