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FILED
December 30, 2015
Court of Appeals
Division I
State of Washington

No. 73761-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TERRY CAVER,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it forced Mr. Caver to wear borrowed “professional” clothing to his trial, in violation of his Sixth Amendment rights under the United States Constitution and Article I, Section 22 of the Washington Constitution.

2. The trial court denied Mr. Caver his right to present a defense in violation of the Sixth Amendment and Article I, Section 22 by limiting his ability to testify.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a fundamental due process right to appear and to a fair trial. In general, criminal defendants cannot be forced to appear in a particular manner in court. Where the trial court did not conduct a colloquy or enter findings concerning Mr. Caver’s attire, but ordered him to stand trial in borrowed civilian clothing, did the court violate Mr. Caver’s due process rights, requiring reversal?

2. The Sixth Amendment’s guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. Where the trial court permitted the State to introduce evidence related to available drug treatment in county jail, but prohibited Mr. Caver from

testifying about his inability to actually obtain such treatment, did the court violate Mr. Caver's Sixth and Fourteenth Amendment rights, as well as his rights under Article I, section 22?

C. STATEMENT OF THE CASE

On May 13, 2015, Terry Caver called 911 for medical assistance because he "was having a mental breakdown and ... was scared." RP 128, 166 (describing his apparent hallucinations and paranoia).¹ Mr. Caver, seeking assistance for his mental health difficulties, walked into the Everett Foot Clinic and asked for help. RP 166. An employee at the clinic suggested he call 911, which he did – three times. RP 145, 166.

When Everett Police Officers Timothy O'Hara and his partner responded, they found Mr. Caver leaving the clinic with his hands in his jacket pockets. RP 128. Officer O'Hara later said he approached the 911 call as a mental health concern or a welfare check, and verified that nobody at the clinic had stated they felt threatened by Mr. Caver. RP 128, 147.

When Officer O'Hara approached Mr. Caver, he still had his hands shoved in his pockets, and seemed very afraid and paranoid. RP 131. The officer ordered him to remove his hands from his pockets, but Mr. Caver

¹ The verbatim report of proceedings consists of two volumes: the volume from July 20, 2015 is referred to as "RP." The volume from July 21, 2015 is referred to as "2RP."

did not immediately comply. RP 131. When he did, Mr. Caver had an open pocket knife in his hand, which he dropped when the police asked him to. RP 131-32. Officer O'Hara and his partner, Officer Wallace, detained Mr. Caver at gunpoint, handcuffing him and frisking him for other weapons. RP 134-36. Officer O'Hara felt what he recognized to be a glass pipe in Mr. Caver's pants pocket. Id. Mr. Caver was placed under arrest for possession of drug paraphernalia. RP 136. During a search incident to arrest, officers found a small plastic baggie containing apparent residue of methamphetamine. RP 139.² The weight of the alleged controlled substance found on Mr. Caver was approximately .14 grams (.003 oz.). RP 139.³

Mr. Caver was charged with possession of a controlled substance. CP 91-92. Officer O'Hara said it was clear that Mr. Caver had mental health problems, as well as substance abuse issues. RP 148. Mr. Caver also begged the officers to take him to "triage," where he could receive psychiatric and rehabilitation services. RP 143-44. Officer O'Hara admitted that triage is always an option for law enforcement; however,

² At trial, Mr. Caver moved to suppress these items under CrR 3.6. The trial court denied suppression of the pipe and the baggie, but suppressed Mr. Caver's statements under CrR 3.5. The court's findings and conclusions can be found at CP 15-17.

³ The State's forensic scientist testified that the weight of the substance he tested was .06 grams. He clarified, "as a matter of policy, we don't report

officers decided to book Mr. Caver into the Snohomish County Jail instead. RP 151-52.

At trial, Mr. Caver moved for permission to wear his jail uniform, explaining that his jail clothes “represent that I’m in here, that I’m not on the street.” RP 4. The court denied Mr. Caver’s motion without a hearing, simply stating, “it causes much mischief if the defendant is clothed in regular jail garb.” RP 2-3.

Mr. Caver testified at trial that he had no idea that the small bag of methamphetamine was in his pocket at the time of his arrest. RP 172-73. He stated that had he known, he would never have called 911 for assistance on that day. *Id.*

Following a jury trial, Mr. Caver was found guilty as charged. 2RP 32; CP 29.

D. ARGUMENT

1. MR. CAVER’S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT DID NOT ALLOW HIM TO WEAR HIS CLOTHING OF CHOICE TO TRIAL.

- a. The due process clause guarantees an accused person the right to appear at his or her own trial.

The due process protections of the Sixth and Fourteenth Amendments, as well as the Article I, Section 3 of the Washington

weights under 1/10 of a gram. So my report simply says less than 1/10th of a gram.” RP 163.

Constitution, protect the right of every criminal defendant to be present and the right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The right to a fair trial is a fundamental liberty interest and requires courts to vigilantly protect against factors that may undermine the fairness of the fact-finding process. Estelle, 425 U.S. at 503.

Our courts have recognized that the right to be present at trial can be undermined when the trial court permits changes to a defendant's appearance that interfere with the jury's assessment of him in the courtroom. For example, upon objection, a defendant may not be tried while he or she "is required to wear prison garb, is handcuffed or is otherwise shackled." State v. Finch, 137 Wn.2d 792, 844-45, 975 P.2d 967 (1999) (emphasis added) (citing cases).

A defendant may, however, make an affirmative choice to wear a jail uniform at his trial. Felts v. Estelle, 875 F.2d 785, 786 (9th Cir. 1989). "A defendant, as a trial tactic, may choose to dress in jail clothes." Id. In Felts, The Ninth Circuit noted that if a defendant had civilian clothes available and elected not to wear them at trial, the court may reasonably infer his decision was tactical. Id.

This requirement of “compulsion” is important, and evolved from the seminal case, Estelle v. Williams, 452 U.S. at 508. “The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments.” Id. (citing cases). For this reason, the Court explained, an accused must object to being tried in jail clothing, “just as he must invoke or abandon other rights.” Id.⁴ The Estelle Court concluded that because nothing in the record indicated the defendant was compelled to stand trial in jail garb, there was insufficient evidence of compulsion to establish a constitutional violation. Estelle, 425 U.S. at 512-13.

There are many analogous circumstances in which a trial court may attempt to alter or interfere with a defendant’s ability to appear. In each, the court must follow a strict protocol. For example, when a criminal defendant moves to appear pro se, the court is required to engage in a colloquy with the defendant, in order to assess his ability to proceed in this manner, and to knowingly and intelligently waive the panoply of rights that are associated with appearing with counsel. See, e.g., State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010) (“Courts must not

⁴ The Court contrasted the waiver of civilian clothing in Estelle with the relinquishment of the right to counsel, which could not be waived absent a showing of the conscious surrender of a known right. Id. at 508 n.3 (citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.2d. 1461 (1938)).

sacrifice constitutional rights on the altar of efficiency”); Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Similarly, a defendant may not be forcibly medicated in order to stand trial, unless the court makes specific findings. See Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Riggins v. Nevada, 504 U.S. 127, 134-35, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992); Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

In Riggins, the Supreme Court held the involuntary administration of antipsychotic drugs represents an interference with a person’s right to privacy, right to produce ideas, and ultimately the right to a fair trial. 504 U.S. at 134-35.⁵ Thus, the Sell Court held that in order to forcibly medicate a defendant, the State must show: (1) “that important government interests are at stake”; (2) “that involuntary medication will significantly further those concomitant state interests”; (3) “that involuntary medication is necessary to further those interests”; and (4) that administration of the drugs is medically appropriate.” 539 U.S. at 180-83 (emphases in original).

⁵ In Riggins, the defendant had moved to suspend antipsychotic medications prior to trial, stating the drugs’ effects on his demeanor infringed upon his freedom and mental state, and thus denied him due process. 504 U.S. at 130.

In each of these analogous situations in which a criminal defendant's right to appear at trial is altered or affected, our courts have determined these decisions are scrutinized, and must only be made -- or waived -- with accompanying judicial findings on the record. See, e.g., Estelle, 452 U.S. at 508; Madsen, 168 Wn.2d at 504; Sell, 539 U.S. at 180-83.

- b. The trial court's failure to honor Mr. Caver's request to be tried in his choice of clothing -- instead requiring him to stand trial in borrowed civilian clothing -- violated Mr. Caver's due process rights.

Mr. Caver requested to stand trial in the clothing he wore daily at the time of his trial, which was his Snohomish County Jail uniform. RP 2. Mr. Caver explained the reason he wanted to wear his uniform to trial was in order to be as honest as possible with the jury about his circumstances:

The reason why I want to wear the jail clothes [is] because the jail clothes represent that I'm in here, that I'm not on the street. It represent[s] what's really going on in my life. I don't want these people thinking that I'm on the streets when I'm not on the streets.

RP 4.

Rather than hold a colloquy or inquire further as to Mr. Caver's willingness to waive his right to stand trial in civilian clothing, the trial court immediately stated it would "overrule his objection" to wearing "professional clothes" at trial. RP 2. The court ruled, "I think it causes much mischief if the defendant is clothed in regular jail garb." RP 3. "It

allows the jury, then, to speculate about why the defendant is such dressed [sic] and why he's in jail and does he present a danger to them, so forth and so on.” RP 3.

Here, the record demonstrates that Mr. Caver’s defense consisted mainly of his own testimony, requiring the jury to assess his credibility, as compared to that of the State’s witnesses. Mr. Caver intended to testify – and did testify – that he called 911 for help in receiving mental health and substance abuse treatment, and that several months later, he had yet to receive either. RP 6-7, 169-71. Mr. Caver’s desire to testify in his jail uniform was related to his defense, as envisioned by the Estelle Court. 425 U.S. at 508 (noting that waiver of the constitutional violation may be tactical); see State v. Maisonet, 166 N.J. 9 (2001) (reversing where defendant’s disheveled physical appearance at trial undermined his credibility, and where defendant’s own testimony and credibility were central issue for jury); see State v. Fergerstrom, 106 Haw. 43, 62, 101 P.3d 652 (Ct. App.) aff’d, 106 Haw. 41, 101 P.3d 225 (2004).

The trial court should have engaged Mr. Caver in a colloquy, in order to assess his ability to waive this fundamental right concerning his attire. Indeed, Mr. Caver’s desire to proceed to trial in his jail uniform was presented to the court through his counsel, along with a motion for a continuance. RP 2. Certainly counsel could have easily assisted Mr.

Caver if such a waiver were conducted by the court.⁶ Instead, the court quickly dismissed Mr. Caver's objection to civilian clothing without conducting a balancing test, with the conclusory statement that it would generally cause "mischief" if he were tried in his jail uniform. RP 3. This undermined Mr. Caver's theory of defense and his attempt to establish his trustworthiness before the jury – a violation of due process and the right to present a defense under the Sixth Amendment. See Estelle, 425 U.S. at 508; Felts, 875 F.2d at 786; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

c. The constitutional error requires reversal.

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). To meet its burden on appeal, the State must prove beyond a reasonable doubt that none of the jurors could have entertained a doubt as to Mr. Caver's guilt, minus the due process violation – that is, without the trial court's unconstitutional interference with his right to appear. The trial court's mandate that Mr. Caver appear in borrowed clothing, rather than in his uniform as he requested,

⁶ The record reflects that neither counsel expressed concerns concerning

undermined Mr. Caver's defense. See Estelle, 425 U.S. at 507-08 (noting "the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire") (emphasis added). The State cannot meet its burden as to the constitutional error standard here, and this Court should reverse Mr. Caver's conviction.

In the alternative, this Court may review the trial court's decision as an abuse of discretion. State v. Jaime, 168 Wn.2d 857, 865, 233 P.3d 554 (2010). Although a trial judge may make decisions necessary to maintain courtroom order, " 'close judicial scrutiny' is required to ensure that inherently prejudicial measures are necessary to further an essential state interest." Finch, 137 Wn.2d at 846 (quoting Estelle, 425 U.S. at 504). A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record, or if it was reached by applying the wrong legal standard. State v. Quismundo, 164 Wn. 2d 499, 504, 192 P.3d 342 (2008) (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal citations omitted).

No essential state interest was served by the court's denial of Mr. Caver's request to proceed in his jail uniform. The trial court neither took into account "specific facts relating to the individual," nor did the court make findings based upon "a factual basis set forth in the record." Jaime,

Mr. Caver's competency to stand trial. RP 2.

168 Wn.2d at 866 (quoting State v. Hartzog, 96 Wn.2d 383, 399-400, 635 P.2d 694 (1981) (emphasis added by Jaime Court)).

As in Jaime, the trial court here failed to develop a factual record that conducting Mr. Caver’s trial in a jail uniform would create a specific prejudice. 168 Wn.2d at 866 (decrying lack of factual record of particular security concerns). “Where the risk of eroding the presumption of innocence is presented, the trial court may not rely on mere assertions but must develop a factual record . . .” Id. (related to jail courtrooms).

The court’s reliance on the generality that the jail garb will cause “much mischief,” in the absence of a full record of the court’s concerns, was an abuse of judicial discretion. Reversal is warranted.

2. THE TRIAL COURT’S EXCLUSION OF
RELEVANT EVIDENCE DENIED MR. CAVER
HIS SIXTH AMENDMENT RIGHT TO
PRESENT A DEFENSE

- a. The Sixth Amendment guarantees an individual the right to present a defense.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019

(1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Jones, 168 Wn.2d at 720. “[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant

“ . . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.”

(Internal citations omitted.) Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

- b. The trial court’s refusal to permit admission of relevant evidence denied Mr. Caver his right to present a defense.

Prior to trial, the State moved to exclude the admission of evidence supporting Mr. Caver’s requests for treatment, rather than incarceration. RP 26-28. The State argued that admission of these statements might lead the jury to feel sympathy for Mr. Caver, and wonder why he was not given treatment and assistance, rather than sent to jail. Id. The deputy prosecutor also conceded:

But then the State is, of course, not allowed to present arguments or evidence about drug treatment that's

available in jail or those types of things that are not really relevant to the issue of what this case is about. Which, as the Court said, is had he possessed the methamphetamine or not?

RP 27.

The trial court ruled that anything related to drug and mental health treatment available in jail was excluded. RP 28. “That deals with the issue of punishment so that's not coming in.” RP 28. The court also found the evidence was irrelevant. Id.

On cross-examination, Officer O’Hara was asked whether Mr. Caver had asked to be taken to a “triage” facility for treatment. RP 150-51. Officer O’Hara acknowledged that Mr. Caver had requested this several times, and the officer described the triage system. Id. He also told the jury that a mentally ill person can be referred to triage, either by a hospital or by the police. Id. The officer testified that he decided to book Mr. Caver into jail instead. Id. at 152.

On re-direct examination of the officer, in violation of State’s own motion in limine, the deputy prosecutor elicited the fact that Snohomish County jail has mental health and drug treatment facilities. RP 152.⁷ Officer O’Hara testified that this was his reason for booking Mr. Caver,

⁷ Although Mr. Caver had initially opposed the State’s motion to exclude the treatment evidence, he apparently permitted the State to open the door to this evidence on re-direct for tactical reasons. RP 28, 152; see infra, RP 170.

since the county jail has its own physicians and substance abuse professionals to work with inmates. Id.

After permitting the State to open the door to this previously excluded evidence concerning treatment, Mr. Caver then attempted to walk through this door during his own testimony. RP 170. His counsel asked whether, once he got to Snohomish County Jail, he attempted to utilize any of those treatment options. He responded that there were many people in line, and he was still waiting for a bed – before he was abruptly cut off. RP 170. When defense counsel attempted to ask Mr. Caver a more specific question about the reality of obtaining in-jail treatment, the State’s relevance objection was sustained by the court. Id.

Thus, the court improperly limited Mr. Caver’s ability to testify and to introduce this evidence regarding the limited treatment options in the county jail, despite the fact that the State clearly opened the door to this relevant evidence. RP 152.

Applying the standard set forth in Jones, the court found the evidence relevant when it permitted the State to inquire on direct. 168 Wn.2d at 720. Thus, to preclude further inquiry on cross-examination, the State was required to prove the evidence was “so prejudicial as to disrupt the fairness of the fact-finding process at trial” and that this prejudice outweighed Mr. Caver’s need for the evidence. Id. The State did not meet

that burden. The State made no showing of prejudice at all, much less a showing that admission of this relevant evidence would upset the fairness of the proceeding. The trial court's erroneous ruling deprived Mr. Caver of his Sixth Amendment right to present a defense.

c. This Court must reverse Mr. Caver's conviction so that he may have a trial that satisfies his right to present a defense and his right to due process.

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict obtained." Chapman, 386 U.S. at 24; Neder, 527 U.S. at 9. As discussed above, to meet its burden here, the State must prove beyond a reasonable doubt the jury could not have entertained a doubt as to Mr. Caver's guilt after hearing evidence he had only been seeking treatment, and would never have called for help, had he known he was carrying drugs on his person. The fact that he was unable to secure treatment in jail supported his credibility, which was relevant to his defense of unwitting possession. Because the State cannot meet its burden on appeal, this Court should reverse Mr. Caver's conviction.

3. THE COURT SHOULD NOT IMPOSE
APPELLATE COSTS AGAINST MR. CAVER.

In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs, as Mr. Caver has already been found indigent and had all discretionary trial LFO's

waived. 2 RP 41; see RAP 14; see also RAP 1.2(a), (c); RAP 2.5. The imposition of costs on an indigent defendant is contrary to the Rules, the statutes, and the Constitution. Even if this Court disagrees, the Court should exercise its discretion not to impose appellate costs against Mr. Caver. RAP 1.2(a), (c); State v. Blazina, 182 Wn.2d 827, 835, 841, 344 P.3d 680 (2015) (Fairhurst, J., concurring).

E. CONCLUSION

For the above reasons, Mr. Caver's conviction should be reversed and the matter dismissed. In the alternative, due to the due process violations, the matter should be reversed and remanded for a new trial. Lastly, Mr. Caver asks the Court not to award appellate costs if his conviction is affirmed. RAP 14; RAP 1.2(a), (c); Blazina, 182 Wn.2d at 835; see RCW 10.01.160(3); GR 34(a).

Respectfully submitted this 30th day of December, 2015.

s/ Jan Trasen

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73761-9-I
)	
TERRY CAVER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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(NO CURRENT ADDRESS)
C/O COUNSEL FOR APPELLANT
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SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF DECEMBER, 2015.



X _____

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