

73919-1

FILED  
Jul 18, 2016  
Court of Appeals  
Division I  
State of Washington

73919-1

No. 73919-1-I

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

---

**STATE OF WASHINGTON, Respondent,**

**v.**

**TRAVIS GRANT, Appellant.**

---

**BRIEF OF RESPONDENT**

---

**DAVID S. McEACHRAN,  
Whatcom County Prosecuting Attorney  
By HILARY A. THOMAS  
Appellate Deputy Prosecutor  
Attorney for Respondent  
WSBA #22007 / ADMIN. #91075**

**Whatcom County Prosecutor's Office  
311 Grand Avenue, Second Floor  
Bellingham, WA 98225  
(360) 778-5710**

**TABLE OF CONTENTS**

<b>A.</b>	<b>ASSIGNMENTS OF ERROR</b>	<b>1</b>
<b>B.</b>	<b>ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</b>	<b>1</b>
<b>C.</b>	<b>FACTS</b>	<b>1</b>
	1. Procedural facts	1
	2. Substantive Facts	2
<b>D.</b>	<b>ARGUMENT</b>	<b>2</b>
	1. Defense counsel provided ineffective assistance of counsel in failing to object to imposition of some of the DUI costs because they were not authorized by statute and/or were not mandatory given Grant’s financial circumstances.	3
	2. Appellate costs should not be awarded.	8
<b>E.</b>	<b>CONCLUSION</b>	<b>8</b>

**TABLE OF AUTHORITIES**

**Washington State Court of Appeals**

State v. McGill,  
112 Wn. App. 95, 47 P.3d 173 (2002)..... 7

State v. Saunders,  
91 Wn. App. 575, 958 P.2d 364 (1998)..... 4

**Washington State Supreme Court**

State v. Lord,  
117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113  
S.Ct. 164, 121 L.Ed.2d 112 (1992)..... 3

State v. Mannering,  
150 Wn.2d 277, 75 P.3d 961 (2003)..... 4

State v. McFarland,  
127 Wn.2d 322, 899 P.2d 1251 (1995)..... 3

State v. West,  
139 Wn.2d 37, 983 P.2d 617 (1999)..... 4

**Statutes**

RCW 3.62.085 ..... 5

RCW 3.62.090 ..... 5

RCW 3.62.090 (1), (2) ..... 5

RCW 46.61.502(1)(c) ..... 1

RCW 46.61.5054 ..... 5

RCW 46.61.5055 ..... 5

RCW 46.61.5055(1)(a)(ii) ..... 5

RCW 46.64.055 ..... 5

RCW 46.64.055(1)..... 5

RCW 69.50.4013(1)..... 1

**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether defense counsel provided ineffective assistance of counsel when he failed to notify the court that some of the costs associated with the Driving Under the Influence conviction were contrary to statutory authority and others were not mandatory where the court imposed certain costs believing they were mandatory and authorized by statute.

**C. FACTS**

**1. Procedural facts**

On May 6, 2015 Appellant Grant was charged with three counts of Unlawful Possession of a Controlled Substance, in violation of RCW 69.50.4013(1), related to his possession of heroin, cocaine and buprenorphine on May 2<sup>nd</sup>, 2015. CP 1-3. The information was amended to remove count III related to the buprenorphine and replaced it and added a count regarding Driving While Under the Influence, in violation of RCW 46.61.502(1)(c), a gross misdemeanor. CP 6-7. Grant was tried by a jury and found guilty of the three counts. CP 94. He was sentenced to a standard range sentence on the felony counts, with the sentence on the gross misdemeanor running concurrently with the 20 months imposed on the felonies. CP 67-69.

## **2. Substantive Facts**

The State accepts the Statement of the Case as set forth in Appellant's brief for the purposes of this concession response.

### **D. ARGUMENT**

Grant asserts that the sentencing court erred in imposing some of the costs associated with the Driving While Under the Influence ("DUI") conviction because the court either considered the costs mandatory when they weren't or authorized by statute for imposition by a superior court when they weren't. He further asserts that his defense counsel was ineffective in failing to alert the sentencing court that some of the costs were subject to waiver upon a showing of indigency and that the statute only authorized imposition of some of the costs by Title 3 (district) or Title 35 (municipal) courts. The State concedes that defense counsel provided ineffective assistance of counsel in failing to object to imposition of some of the fees and for failing to inform the court that some of them weren't mandatory upon a showing of indigency. The matter should be remanded for a hearing regarding all legal financial obligations.

**1. Defense counsel provided ineffective assistance of counsel in failing to object to imposition of some of the DUI costs because they were not authorized by statute and/or were not mandatory given Grant's financial circumstances.**

Grant argues and the State concedes that defense counsel was ineffective for failing to request the trial court to exercise discretion in addressing some of the costs associated with the DUI conviction, and in failing to inform the court that others were contrary to statutory authority. The State concedes that if defense counsel had made such requests and objections, it is likely that the sentencing court would have imposed different fees with respect to the DUI conviction. This matter should be remanded for defense counsel to make such arguments to the sentencing court and for the sentencing court to reconsider its ruling regarding imposition of all legal financial obligations.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel was both ineffective and that such ineffectiveness prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that representation was effective. *Id.* at 335. If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121

L.Ed.2d 112 (1992). In order to prevail on an ineffective assistance of counsel claim based on counsel's failure to object, the appellant "must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct ...; (2) that an objection to the evidence would likely have been sustained ...; and (3) that the result of the trial would have been different had the evidence not been admitted ..." State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 46. Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

Grant asserts that defense counsel was ineffective in failing to inform the court that \$741 of the \$941<sup>1</sup> was not mandatory upon a

---

<sup>1</sup> The actual amount is \$940.50.

showing of indigency, but in fact subject to the court's discretion, or not subject to imposition in superior court. Grant specifically does not contest the court's imposition of the \$200 fee under RCW 46.61.5054. RCW 46.61.5055 provides that the \$350 fine may not be suspended unless the court finds the offender to be indigent. RCW 46.61.5055(1)(a)(ii). RCW 46.64.055 further provides that the \$50 Criminal Justice Funding Penalty may not be reduced unless the court finds the offender to be indigent. RCW 46.64.055(1). It also provides that if a community restitution program is available within the jurisdiction, the court can allow an offender to offset all or part of that penalty by participation in that restitution program. RCW 46.64.055(1). RCW 3.62.090 states that the Public Safety and Education Assessments provided for by that statute are to be assessed and collected by "all courts organized under Title 3 or 35 RCW." RCW 3.62.090 (1), (2). Similarly, RCW 3.62.085 provides that the \$43 Criminal Conviction fee is to be imposed upon conviction in a court organized under Title 3 or 35. Title 3 and Title 35 courts are district and municipal courts. Statutes related to superior courts are set forth under Chapter 2.08 RCW.

At sentencing, defense counsel addressed Grant's financial status, informing the court that Grant had been employed for a couple weeks at the time of his arrest, but due to his arrest, his employment had been

terminated, that he hadn't been able to continue the small business he had, and that his income at the time of sentencing was effectively zero. SRP 392. He further informed the court that Grant's ability to pay legal financial obligations would be limited in the near term and in the future because he had other, significant outstanding legal financial obligations. SRP 392-93. Grant informed the court that he was currently unemployed. SRP 393.

The judge was under the impression that she had no discretion to do anything regarding the fines and fees associated with the DUI and therefore imposed the \$941 on the DUI. SRP 395. She addressed the fines/fees related to the DUI before addressing the legal financial obligations regarding the felony convictions. SRP 395. She then stated:

I don't believe it's appropriate for the Court to impose the remaining discretionary legal financial obligations given Mr. Grant's financial circumstances. I think the criminal filing fee is an appropriate fee to assess but I'm going to waive the jury demand fee, which is \$250. I don't have discretion to reduce or change the \$500 victim assessment and that leaves me with the fees for court appointed attorney and I will reduce those fees. I think I'll impose \$100 for that amount simply in recognition of the fact that Mr. Grant received court appointed attorney services. ... But the category of obligations that I have discretion to reduce is limited and so that's why I've selected that one.

SRP 396. She further noted that she was waiving the jury demand fee and reducing the attorney's fees in part due to the fact that Grant was going to

be incarcerated and likely would find it difficult to find employment when released. SRP 396.

Had defense counsel objected to imposition of the Public Safety and Education Assessments, and informed the sentencing judge that those fees were only authorized to be imposed by a district or municipal court, it is reasonably probable that the judge would not have imposed those fees. *See, State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (“Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law.”) In addition, given the judge’s reduction of legal financial obligations on the felony convictions and her statements at sentencing, it is reasonably probable that she might have reduced some or all of the fine and/or criminal justice funding penalty associated with the DUI or permitted Grant to offset the \$50 criminal justice funding penalty with participation in a community restitution program, assuming one is available within Whatcom County. The judge, however, may have reduced the legal financial obligations on the felony convictions at sentencing because she had imposed what she mistakenly believed were authorized and mandatory fees on the DUI. Therefore, this matter should be remanded for the court to re-address the imposition of legal financial obligations on both the DUI and felony convictions.

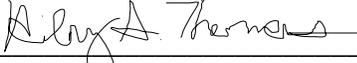
**2. Appellate costs should not be awarded.**

Given the State's concession regarding the fines and fees related to the DUI, the State agrees that appellate costs should not be awarded. The State will not be seeking them as it would not be asserting that it is the prevailing party in this case.

**E. CONCLUSION**

The State respectfully requests this Court to remand this matter for a hearing to address the imposition of legal financial obligations related to both the DUI as well as the felony convictions, to permit defense counsel to argue that some of the DUI fines and fees were not authorized to be imposed by a superior court and/or were discretionary, not mandatory, and therefore should not be imposed upon a showing that Grant is indigent.

Respectfully submitted this 19th day of July, 2016.

  
\_\_\_\_\_  
HILARY A. THOMAS, WSBA #22007  
Appellate Deputy Prosecutor  
Attorney for Respondent  
Admin. #91075  
Whatcom County Prosecuting Attorney  
311 Grand Avenue, 2<sup>nd</sup> Floor  
Bellingham, WA 98225-4079  
(360) 778-5710

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Jennifer Winkler  
Neilsen, Broman & Koch, PLLC  
1908 E. Madison Street  
Seattle, WA 98122  
[winklerj@northwestattorney.net](mailto:winklerj@northwestattorney.net)  
[sloanej@northwestattorney.net](mailto:sloanej@northwestattorney.net)



\_\_\_\_\_  
Legal Assistant

7/18/16

\_\_\_\_\_  
Date