FILED
October 24, 2016
Court of Appeals
Division I
State of Washington

74966-8

NO. 74966-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAWEL ORLINSKI,

Appellant.

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

The Honorable Andrea Darvas, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issue Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 1

1. Procedural Facts 1

2. Substantive Facts 2

C. ARGUMENT 5

1. THE COURT VIOLATED ORLINSKI'S RIGHT TO PRESENT A DEFENSE WHEN IT DENIED HIS REQUEST TO QUESTION BROWN ABOUT DISCIPLINARY ACTION RELEVANT TO HIS CREDIBILITY AND MOTIVE TO FABRICATE. 5

2. APPEAL COSTS SHOULD NOT BE IMPOSED. 11

D. CONCLUSION 13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Simonson v. Huff
124 Wash. 549, 215 P. 49 (1923) 9

Staats v. Brown
139 Wn.2d 757, 991 P.2d 615 (2000) 12

State v. Baird
83 Wn. App. 477, 922 P.2d 157 (1996). 6

State v. Blazina
182 Wn.2d 827, 344 P.3d 680 (2015) 12

State v. Clark
143 Wn.2d 731, 24 P.3d 1006 (2001) 8

State v. Darden
145 Wn.2d 612, 41 P.3d 1189 (2002) 5, 7

State v. Fluhart
123 Wn. 175, 212 P. 245 (1923) 9

State v. Foster
135 Wn.2d 441, 957 P.2d 712 (1998) 6

State v. Foxhoven
161 Wn.2d 168, 163 P.3d 786 (2007) 6

State v. Hudlow
99 Wn.2d 1, 659 P.2d 514 (1983) 7

State v. Iniguez
167 Wn.2d 273, 217 P.3d 768 (2009) 6

State v. Johnson
90 Wn. App. 54, 950 P.2d 981 (1998) 6, 11

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Jones
168 Wn.2d 713, 230 P.3d 576 (2010) 5, 7

State v. McSorley
128 Wn. App. 598, 116 P.3d 431 (2005) 7, 8

State v. Perez
137 Wn. App. 97, 151 P.3d 249 (2007) 6

State v. Robideau
70 Wn.2d 994, 425 P.2d 880 (1967) 9

State v. Wilder
4 Wn. App. 850, 486 P.2d 319 (1971) 6

State v. York
28 Wn. App. 33, 621 P.2d 784 (1980) 8, 9, 10, 11

FEDERAL CASES

Chambers v. Mississippi
410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 5

Davis v. Alaska
415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) 6, 11

Rock v. Arkansas
483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) 7

RULES, STATUTES AND OTHER AUTHORITIES

ER 608 ..... 7, 11

RCW 10.73.160 11

U.S. Const. amend. V 5

U.S. Const. amend. VI 1, 5

TABLE OF AUTHORITIES (CONT'D)

Page

U.S. Const. amend. XIV 5

Const. art. 1, § 22 5

A. ASSIGNMENTS OF ERROR

1. The court erred in limiting appellant's cross examination of the deputy who accused him of possessing methamphetamine.

2. Appellant's right to present a defense was violated when the court denied his request to cross-examine the deputy about matters relevant to his credibility.

Issue Pertaining to Assignments of Error

The Sixth Amendment and the rules of evidence guarantee wide latitude to accused persons when cross-examining state's witnesses on matters reflecting on credibility. A sheriff's deputy claimed he found a vial of methamphetamine when he searched appellant. Did the court err when it prohibited appellant from cross examining the deputy regarding an incident in which he was found to have engaged in improper contact with a confidential informant that compromised his credibility and that of the sheriff's office?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Pawel Orlinski with one count of possession of a controlled substance and one count of third-degree assault. CP 1-2. The court excluded Orlinski's statements to police

but denied a motion to suppress based on unlawful seizure. 1RP[1] 82-83, 113-18. The assault charge was dismissed for insufficient evidence at the close of the State's case. CP 152; 1RP 233-39. The jury found Orlinski guilty of possession of a controlled substance, and the court imposed a standard range sentence. CP 136, 155-57. Notice of appeal was timely filed. CP 170.

2. Substantive Facts

Orlinski began to walk across Airport Way South in Seattle without a crosswalk, thereby drawing the attention of Deputy Mark Brown. 1RP 139-40. It was around 10 p.m., and there were no other cars in the vicinity. 1RP 139-41. Brown agreed Orlinski had plenty of time to complete his crossing without impeding Brown's passage along the road. 1RP 140-41. However, Orlinski then stopped in Brown's lane, with his arms outstretched and his back to Brown's approaching car. 1RP 142. Brown flashed his high beams, slowed, and came to a stop a couple of car lengths from where Orlinski stood. 1RP 142. Brown noticed Orlinski make a throwing motion and yell at someone, though no one else was around. 1RP 143-44. Then Orlinski crossed back the way he had come and walked away. 1RP 144.

Brown followed him in his patrol car, shone his spotlight on him, and told him to stop. 1RP 146. Orlinski yelled, "No," and kept walking. 1RP

[1] There are three physical volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 15, 16, 17, 2016; 2RP – Mar. 25, 2016.

146. When Brown ordered him to stop a second time, Orlinski paused as if to comply, and then kept walking. 1RP 146.

Brown testified Orlinski did not appear to be fleeing; he was merely going about his business. 1RP 179. However, Brown decided he was concerned Orlinski might be impaired or suffering from a mental health episode and might be a danger to himself or others. 1RP 146. Initially, Brown drew his gun but then switched it for his taser after determining the item in Orlinski's hand was not dangerous. 1RP 147-49. Brown pointed the taser at Orlinski and ordered him to put his hands on the hood of the car. 1RP 149-50. When Orlinski did not comply, Brown ordered him to get on the ground. 1RP 149-50.

Around this time, Deputy Matt Tighe arrived as backup. 1RP 150-51. According to Tighe, he got out of the car, noticed Orlinski was non-compliant, and immediately ran over, grabbed Orlinski, and pulled him to the ground, injuring himself in the process. 1RP 209, 212. According to Brown, Tighe told Orlinski to get on the ground before enveloping him in a bear hug when Orlinski refused. 1RP 152-53. Both officers agreed Orlinski tried to evade their attempts to put handcuffs on him but was quickly subdued. 1RP 153-54, 210.

Tighe testified that, as he walked Orlinski to the patrol car, Orlinski spit in his face, but Tighe could not say whether he did so intentionally. 1RP

210-11. The two deputies arrested and searched Orlinski, finding a small clear plastic baggie containing a crystalline substance and a glass pipe with residue. 1RP 160-61. The field test gave a positive result for the presence of methamphetamine on both items. 1RP 164.

Forensic scientist Raymond Kusumi testified the baggie with the crystals in it did not appear tampered with and, pursuant to his testing, did contain methamphetamine. 1RP 229-31.

The defense sought to impeach the deputies with several disciplinary investigations in their history. CP 25-31. In a currently pending investigation, it was alleged that Brown engaged in a traffic stop without announcing it to dispatch. 1RP 174. He was accused of lying about the stop to avoid being caught out as late to work. 1RP 192. However, Brown dismissed the incident as a personal conflict with the sergeant and explained there had been no final determination yet. 1RP 174-75. The court allowed the jury to hear this information. 1RP 21.

But the court refused to let the jury hear about a written reprimand finding Brown had acted in a way that reflected poorly both on his credibility and that of the sheriff's department. 1RP 20; CP 50-51. The 2009-2010 incident involved a sustained finding that Brown had committed a willful violation of the sheriff's department rules, policies, and procedures or code of ethics. CP 50. He had engaged in a sexual relationship with a

confidential informant, during work hours and the incident "can reasonably be conceived to compromise the integrity or credibility of himself and the Sheriff's office." CP 51.

C. ARGUMENT

1. THE COURT VIOLATED ORLINSKI'S RIGHT TO PRESENT A DEFENSE WHEN IT DENIED HIS REQUEST TO QUESTION BROWN ABOUT DISCIPLINARY ACTION RELEVANT TO HIS CREDIBILITY AND MOTIVE TO FABRICATE.

It was essential to Orlinski's defense to impeach the credibility of the Deputy Brown, who claimed to have found the substance, later identified as methamphetamine, in his pocket. Brown had previously been reprimanded for a sexual relationship with a confidential informant. CP 50-51, 59-60, 88-89. This prior conduct both reflects on his character for untruthfulness and his motivation to fabricate a justification for his actions to avoid further disciplinary action. The court erred in denying Orlinski the ability to impeach Brown with this incident.

Criminal defendants have the constitutional right to present a defense and to confront their accusers. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); U.S. Const. amend. V, VI, XIV; Const. art. 1, § 22. Claimed violations of this right are reviewed de novo. Jones, 168 Wn.2d at 719.

While the decision to exclude evidence is generally discretionary, that standard only applies if the court has correctly interpreted the evidence rules. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Moreover, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

The primary and most important component of confrontation is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). This right also includes the right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). To secure this right, the Court of Appeals has explained, "[i]t is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility." State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971).

These important due process protections may not be restricted solely on the basis of procedural and evidentiary rules. State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157, 160 (1996). If the court believes defense evidence is barred by such rules, "the court must evaluate whether the interests served by

the rule justify the limitation." Id. (citing Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Baird, 83 Wn. App. at 482. So long as the evidence is relevant, the jury must be permitted to hear it unless the State can show "'the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.'" Jones, 168 Wn. 2d at 720 (quoting Darden, 145 Wn.2d at 622). Relevant defense evidence is admissible unless the State can show a compelling interest to exclude it. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); Darden, 145 Wn.2d at 621.

Here, the rules of evidence do not provide a basis for precluding cross-examination on Brown's disciplinary problems. A person accused of a crime must be permitted to cross-examine crucial State's witnesses on issues affecting their credibility. State v. McSorley, 128 Wn. App. 598, 613-14, 116 P.3d 431 (2005). ER 608(b) specifically permits that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility" may be inquired into on cross-examination so long as they are probative of truthfulness or untruthfulness. ER 608(b). Precluding such cross examination is an abuse of discretion when the witness is essential and the excluded incident is the only available impeachment.

McSorley, 128 Wn. App. at 611 (quoting State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001)).

"'It is well established that a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the State's case.'" McSorley, 128 Wn. App. at 612-13 (quoting State v. York, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980)). The defendant's right to cross-examine witnesses is "'fundamental'" and any "'diminution calls into question the integrity of the fact-finding process and requires the competing interests be closely examined.'" McSorley, 128 Wn. App. at 613 (quoting York, 28 Wn. App. at 36-37).

As in this case, the conviction in York rested primarily on the testimony of one man. 28 Wn. App. at 34. The undercover sheriff's investigator who claimed York had sold him marijuana testified on direct about his training and experience and his background in the military. Id. The defense was not permitted to cross-examine him about being fired from the Mineral County Sheriff's Office due to paperwork irregularities and general unsuitability for the job. Id. at 34-35. The defense theory was that this showed the investigator was not above fabricating or adjusting his testimony in order to earn the money he was being paid for the undercover drug buys. Id. at 35. The trial court excluded this information as a

"collateral matter." Id. at 34-35. In closing argument, the prosecutor argued there was no reason to doubt the investigator's testimony because he had "done a good job just like he's done in the past in his prior jobs." Id. at 35.

On appeal, this Court noted that, because the investigator was the only person who claimed to have seen York sell the marijuana, "The importance of [the investigator's] testimony cannot be overstated." Id. The court explained that the entire case came down to whether the jury believed the investigator or York, and that the investigator's apparently unsullied background "may have been the single factor which caused the jury to believe him." Id. at 35-36. This Court declared, "Credibility was not, therefore, collateral: it was the very essence of the defense." Id. at 36.

The court stated the standard of review, noting, "In a criminal case, to allow the defendant no cross-examination into an important area is an abuse of discretion." Id. (citing State v. Fluhart, 123 Wn. 175, 212 P. 245 (1923)). The court explained the "extra latitude" that should be given to criminal defendants in cross-examination regarding credibility and declared, "Any fact which goes to the truthworthiness of the witness may be elicited if it is germane to the issue." York, 28 Wn. App. at 36 (citing State v. Robideau, 70 Wn.2d 994, 998, 425 P.2d 880 (1967) and Simonson v. Huff, 124 Wash. 549, 553, 215 P. 49 (1923)). The court concluded that, "as a matter of fundamental fairness, the defense should have been allowed to

bring out the only negative characteristics of the one most important witness." York, 28 Wn. App. at 37.

The factual premises in this case are extremely similar. Like the investigator in York, Brown was the only witness who claimed to have seen Orlinski in possession of the methamphetamine. See 1RP 206-21 (testimony of other officers). Thus, the case rested entirely on Brown's credibility. The only negative fact that the court allowed to impeach Brown was a pending investigation, which Brown dismissed as a personality conflict and which led to no negative conclusion against Brown. 1RP 174-75. Thus, any negative inference from this incident was speculative at best.

The court refused to let the defense impeach Brown on a far more serious incident from several years earlier in which he was found to have a sexual relationship with a confidential informant and continued to have contact with her and offer her access to police information after being ordered to cease all contact. CP 50-51, 59-60. This incident goes directly to credibility because he was found to be in willful violation of the code of ethics or the sheriff's office rules, policies and procedures. CP 50. The official finding was that his conduct "can reasonably be conceived to compromise the integrity or credibility of himself and the Sheriff's office." CP 51. Unlike the one incident that the court did allow, this incident involved an actual sustained finding that explicitly referenced the negative

impact on Brown's credibility. CP 50-51. This incident goes directly to Brown's trustworthiness. Under ER 608, and his constitutional right to confront the witnesses against him, Orlinski should have been allowed to impeach Brown with the only fact that actually reflected negatively on his credibility. York, 28 Wn. App. at 37.

Violation of the right to confront witnesses is presumed prejudicial error unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. Johnson, 90 Wn. App. at 69 (citing Davis, 415 U.S. at 318). Without cross examination on this negative incident, as in York, the prosecutor could reasonably argue in closing that Brown had no reason to make anything up. 1RP 257; York, 28 Wn. App. at 35-36. Given the centrality of Brown's testimony to the charge, it is likely the verdict was affected by the denial of Orlinski's right to impeach the State's most essential witness. The conviction should be reversed.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Orlinski indigent and entitled to appointment of appellate counsel at public expense. CP 167. If Orlinski does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757,

789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Orlinski's ability to pay must be determined before discretionary costs are imposed. At the time of this offense, Orlinski appeared to be struggling with addiction. 2RP 4. His financial declaration listed no assents and no income. CP 164-65. The court waived all non-mandatory legal financial obligations and found him indigent for purposes of the appeal. 2RP 6; CP 167. The court found he could contribute nothing to the costs of this appeal. CP 167. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Orlinski has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

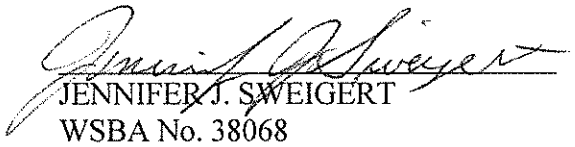
D. CONCLUSION

For the foregoing reasons, Orlinski's conviction should be reversed.

DATED this 27th day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant