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COURT OF APPEALS

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STATE OF WASHINGTON

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No.40276-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

DARRYL KOENEN,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
The Honorable Jeanette Dalton, Judge
Cause No. 09-2-00122-5

OPENING BRIEF OF APPELLANT

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Court Rules

RAP 18.1	19
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I. INTRODUCTION

This case involves an appeal contesting the denial of lost wages and bail costs pursuant to RCW 9A.16.110(2) which authorizes the reimbursement of costs and fees incurred by a defendant prosecuted for assault that is acquitted at trial based upon a claim of self-defense or the defense of others.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

- (1) The trial court erred in Finding of Fact #12 where it determined that “[B]ail costs were costs associated with the defendant’s need to ‘be free to enjoy life’ and were not necessary to the defendant’s defense”.
- (2) The trial court erred in Finding of Fact #13 when it stated that Mr. Koenen “showed no proof of actual lost wages other than estimates for his going rate for the hours spent in court.”
- (3) The trial court erred in Finding of Fact #13 when it held that “Mr. Koenen should not have accepted the job knowing he was going to trial and would not be able to complete the job within the time allotted in the contract.”
- (4) The trial court erred in its Conclusions of Law #2 with respect to that part of the conclusion where the Court court erred in its Conclusions of Law #3 where it held that “RCW 9A.16.110(2) and *State v. Anderson v. Sampson*, 72 Wash. App. 253, 863 P.2d 1370 (1993) do not allow the costs claimed by Koenen.”

- (6) The trial court erred in its Conclusions of Law #5 where it held that “The costs associated with the defendant’s need to ‘be free to enjoy life’ are not necessary to the defendant’s defense . . . Accordingly, Mr. Koenen’s costs to remain free pending trial, e.g. bail premium, are not allowed under RCW 9A.16.110(2).”
- (7) The trial court erred in its Conclusions of Law #6 when it found that Mr. Koenen initially showed “no proof of actual lost wages other than estimates for his going rate.”
- (8) The trial court erred in its Conclusions of Law #9 when it held that “Mr. Koenen should not have accepted the job knowing he was going to trial and would not be able to complete the job within the time allotted in the contract. The court therefore denies his request for lost wages because they were not mitigated and are not allowed under RCW 9A.16.110(2). *Anderson, @ 262.*”

B. Issues Pertaining to Assignments of Error

- (1) Did the trial court err when it failed to award the defendant bail premium costs?
 - (a) Was the trial court’s determination based upon an erroneous legal standard?
 - (b) Was the trial court’s determination supported by substantial evidence?
- (2) Did the trial court err when it failed to award the defendant lost wages?
 - (a) Did the defendant present sufficient evidence to support his claim of wage loss?
 - (b) Did the defendant fail to mitigate his wage loss?

II. STATEMENT OF THE CASE

On January 21, 2009, the State of Washington charged Darryl Koenen with Second Degree Assault regarding an incident that occurred on January 19, 2009. The court also issued an arrest warrant for Mr. Koenen with bail set at \$100,000.00. On January 28, 2009, Mr. Koenen, turned himself in and appeared in court with his attorney Nicholas George. Shortly thereafter, he paid a non-refundable ten percent premium of \$10,000 to a bail bond company to post his bail. [CP 48 - paragraph 2]

An omnibus hearing was held on March 10, 2009. Mr. Koenan gave notice at the hearing that he was acting in Self Defense and that he would assert his right to Reimbursement of Costs for Defense if he prevailed at trial pursuant to RCW 9A.16.110(2). [CP 49 - paragraph 2]

On April 20, 2009, the State amended its information adding Count II which contained a Special Allegation of Armed with a Deadly Weapon. Mr. Koenen again pled Self Defense and again gave notice of his intent to seek reimbursement. [CP 49 - paragraph 3]

On April 30, 2009, a jury returned a Not Guilty verdict regarding the alleged assault. The next day, on May 1, 2009, after hearing further

argument and receiving instruction from the court regarding the Reimbursement of Costs for Defense, the Jury submitted a special verdict form finding: (1) that by a preponderance of the evidence the use of force by Mr. Koenen was lawful, and (2) that the defendant was not “engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant was charged.” [CP 49 - paragraphs 4-5]

Mr. Koenen submitted a cost bill containing the following alleged trial costs:

Bail:	\$10,000.00	Affordable Bail Bond, Inc.
Attorney Fees:	\$ 945.00	Nicholas George WSBA #20490
	\$ 5,000.00	Clayton E. Longacre WSBA #21821 for Initial Flat Fee Retainer Up to Trial Call.
	\$16,830.00	Clayton E. Longacre: Attorney Fees for representation after trial Call.
Dog Trainer	\$ 271.50	Professional Witness Fees for Trial
Lost Wages	\$ 6,400.00	Mr. Koenen loss for 1 day in jail and 7 trial days.
House Damage:	\$ 6,906.80	Caused during Execution of Search Warrant Execution
Witness Fees:	\$ 30.00	Bret P. Edwards on 4/3/09
Motel:	\$ 483.64	4 nights in hotel by Mr. Koenen

[CP 50 - paragraph 6]

The State failed to file any written objections to defendant’s cost

bill, but at the May 22, 2009 hearing the State objected to the payment of bail costs, lost wages, damages to house and motel costs.

[CP 50 - paragraphs 7-9]

The Court orally held that Mr. Koenen was not entitled to bail costs because these costs were associated with his need to “be free to enjoy life” and were not necessary to the defendant’s defense.

[CP 51 - paragraphs 10-12]

Mr. Koenen is self employed and he estimated his lost wages based on the hours he could have worked but for being required to be in court to defend himself. This was based upon the hours he could not have worked during trial presuming he would have otherwise been paid at his general hourly rate for the lost time. The Court entered a preliminary opinion against Mr. Koenen regarding lost wages due to insufficient evidence, but gave him the opportunity to present proper proof of actual wage loss.

[CP 51 - paragraph 13]

After the incident that led to the assault charges, Mr. Koenen stayed at a motel because he did not want to be arrested and interrogated by the police before he could speak with an attorney. The Court held that the motel costs were not related to Mr. Koenen’s defense.

[CP 51 - paragraph 11]

The Court also held that the damages to his home that occurred

incident to the execution of the search warrant were unrelated to Koenen's defense and that those damages should be obtained by means of a civil suit rather than reimbursement under RCW 9A.110(2). [CP 52 - paragraph 12]

On June 5, 2009, Mr. Koenen submitted an Amended Cost Bill and Declaration in Support thereof in order to present proof of his claim for lost wages. In these documents Koenen submitted proof of a contract that he lost because of the trial. The contract was for \$13,032.00. Because of the trial, Mr. Koenen could not finish the work required by the contract on schedule and he lost the contract. Nevertheless, the court again denied his request on the grounds that they "were not mitigated and are not allowed under RCW 9A.16.110(2)." [CP 54 - paragraph 9]

On January 8, 2010, the trial court entered its Order on Findings of Fact and Conclusions of Law . The trial court held that Koenen was entitled to attorney fees, dog training expenses and civilian witness fees. The court held that he was not entitled to lost wages, motel expenses, damages to his house and bail expenses. [CP 53-54]

On February 1, 2010, M. Koenen, filed his Notice of Appeal limited to the issues of lost wages and bail expenses. Mr. Koenen did not appeal the judgment entered and seeks to supplement it with his claim of lost wages and bail expenses.

III. SUMMARY OF ARGUMENT

The trial court erred when it denied reimbursement for bail costs incurred by Mr. Koenen, because its determination relied upon an erroneous legal standard and because its determination was not supported by substantial evidence. The trial court also erred because it denied his request for lost wages because they allegedly were not mitigated and were not allowed under RCW 9A.16.110(2).

IV. ARGUMENT

A. The trial court erred when it failed to approve reimbursement to the defendant for bail premium costs on the grounds that the costs incurred enable him to be “free to enjoy life” and were not necessary to the defendant’s defense.

(1) There is insufficient evidence in the record to support the trial court’s finding that Mr. Koenen sought bail to “be free to enjoy life.”

The Court held that Mr. Koenen was not entitled to reimbursement for bail costs because they were “associated with the defendant’s need to ‘be free to enjoy life’ and were not necessary to the defendant’s defense.” [CP 51 - Paragraphs 10-12 (emphasis added)] This involved two errors. First, the trial court erred as a matter of law by basing its decision on whether the bail cost was “necessary” to the defense. Second, the trial court’s finding that defendant sought bail to “be free to enjoy life” was completely unsubstantiated by any evidence in the record.

There is insufficient evidence to support a finding that defendant sought release in order to “be free to enjoy life.” There is absolutely nothing contained in the motion for costs, the amended motion for costs or any of the declarations in support indicating that bail was obtained so that Mr. Koenen could be “free to enjoy life.” On the other hand, the court ignored substantial evidence that in the record indicating that Mr. Koenen requested bail to avoid time loss so that he could continue working to avoid lost earnings and so that he could personally assist in the defense of his case.

When a motion to reduce bail is denied, a defendant will often argue on appeal that he or she has been denied an opportunity to assist in his or her own defense. See: *Washington v. Reese*, 15 Wash. App. 619, 620, 550 P.2d 1179, 1180 (Div 3, 1976).

This argument logically occurs for many reasons. First, a person free on bail is available to interview and hire the best attorney for his defense. A person in jail is stuck with a phone book and the attorneys who might answer a collect call. Second, a released defendant is available to his or her attorney 24 hours a day to answer questions and otherwise be of assistance at counsel’s office. Whereas, if the defendant is in jail, his or her attorney must incur travel time plus a half an hour more getting into and out of the jail every time the attorney needs to confer with their

client. Third, an free and employed defendant is able to work in order raise funds to be used by his or her defense to pay legal fees, and to pay for investigators, expert witness, exhibits etc. Fourth, a defendant released on bail is able to assist in finding witnesses, gathering information and can be of assistance in preparing witness lists, subpoenas, freedom of information requests and other documents.

All four occurred in Mr. Koenen's case. After his release on bail Mr. Koenen's attorney advised him that he did not believe he could win the case. Fortunately, the fact that the defendant was out on release enabled him the opportunity to locate and interview an experienced criminal defense attorney in Port Orchard that was confident he could win the case and had a history of self defense acquittals for assault 2 charges. Moreover, because he was free to work, Mr. Koenen was able to make an initial retainer payment of \$2,500 on February 10, 2009 to the Longacre Law Office.¹ Mr. Koenen also assisted his defense on release by hiring a dog trainer to examine his dog and testify as an expert witness at Trial. [CP 4 at paragraph 3 and CP 35 at paragraph 3] Mr. Koenen also arranged for Brett Edwards to testify and paid Mr. Edwards' witness fees. [CP 5 - paragraph 7]

The standard of review regarding a motion to award costs or fees

¹ See the Declaration of Darryl Koenen [CP 4-20] exhibits 9-10.

is an abuse of discretion standard. *Park Hill Corp. v. Sharp*, 60 Wash. App. 283, 289, 803 P.2d 326, 332 (Div. 3, 1991) A final decision maker's denial or approval of a motion to reimburse is an abuse of discretion if it is not support by substantial evidence and results in harm. *State v. Kinneman*, 122 Wash.App. 850, 95 P.3d 1277 (Div.1 2004).

The trial court abused its discretion because there was not a shred of evidence in the record indicating that the defendant sought bail in order to "be free to enjoy life". Whereas, there was substantial evidence indicating that bail was an expense involved in Mr. Koenen's defense. Mr. Koenen was harmed because as a result of the fact finding error he was denied reimbursement for the \$10,000 bail premium that he paid

(2) The trial court's decision to deny Mr. Koenen reimbursement for his bail costs was based upon an error of law.

As stated above, abuse of discretion is the standard of review with respect to the approval or denial of a motion to award costs and fees. An error of law is considered an abuse of discretion with respect to an appeal concerning an award or denial of costs and fees. *Westerman v. Cary*, 125 Wash. 2d 277, 885 P.2d 827 (1994).

Citing RCW 9A.16.110(2) and *State v. Anderson v. Sampson*, 72 Wash.App. 253, 863 P.2d 1370 (1993) as authority, the trial court concluded that the defendant was not entitled to reimbursement for bail

expenses because his release was not “necessary to the defendant’s defense.” Whereas, RCW 9A.16.110(2) declares that the State shall “reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense.”

(Emphasis added.) The Appellate Court has held that:

[T]he State must indemnify or reimburse for lawful earnings a defendant would have received but for being prosecuted. RCW9A.16.110(2) requires the State to “indemnify or reimburse such defendant for all loss of time . . . involved in his or her defense”, and clearly this includes earnings the defendant would have received but for being prosecuted.

(Emphasis added.) *State v. Anderson v. Sampson*, 72 Wash.App. At 261.

The trial court based its decision on whether the defendant’s bail expenses were “necessary” to his or her defense. Whereas, the test set forth in RCW 9A.16.110(2) is whether the defendant’s expenses are “involved” in his or her defense. Therefore, the trial erred as a matter of law by applying the wrong legal standard to facts [not supported by substantial evidence].

Although the trial court cited *State v. Anderson* as authority, this case simply misses the mark because in *Anderson* both defendants were chronically unemployed and argued that they were entitled to recover for “loss of time” regardless of whether they would have received earnings

but for being prosecuted. They contended they were entitled to be paid for the value of every hour of every day during which they were incarcerated. They argued that time "is valuable for a number of reasons", including "the opportunity to be free to enjoy life" and "the opportunity to obtain employment". *State v. Anderson v. Sampson*, 72 Wash.App. at 260-261.

The question before the trial court regarding the defendant's bail cost was whether the bail cost was an expense "involved in his or her defense." RCW 9A.16.110(2). As noted above the loss of time involved one's defense "clearly includes earnings the defendant would have received but for being prosecuted." (Emphasis added.) *State v. Anderson v. Sampson*, 72 Wash.App. at 261. In order to avoid lost earnings, Mr. Koenen had to pay a \$10,000 premium in order to a bail bondsman to post the \$100,000 bail necessary to obtain his release. The \$10,000 bail premium was an expense required to avoid a lost of time involved in his defense.

Therefore, the error of law harmed Mr. Koenen because if the correct legal standard had been applied to the facts in his case, he would have been reimbursed for his \$10,000 bail premium.

B. The trial court erred when it failed to award the defendant lost earnings.

Initially Mr. Koenen based his claim for lost wages on the hours

he could have worked, but for having to be in court defending himself and the time he spent assisting his attorney each day for a few hours after trial. He was self employed and showed no proof of actual lost wages other than estimates of his current rate of pay. Initially, the trial court ruled against him due to lack of evidence, but granted him leave to provide proper proof of actual loss of wages. [CP 53 - paragraph 6]

Mr. Koenen's Amended Cost Bill and Declaration showed documentation of an actual job that he initially contracted for \$13,032.00, but lost because the trial schedule made it impossible for him to be able to complete the work by the deadline specified in the contract.² The trial court denied his claim for lost wages stating that:

Mr. Koenen should not have accepted the job knowing he was going to trial and would not be able to complete the job within the time allotted in the contract. The court therefore denies his request for lost wages because they were not mitigated and are not allowed under RCW 9A.16.110(2).

[CP 54-55 at paragraph 9]

(1) Mr. Koenen's claim for lost wages is allowed by RCW 9A.16.110(2).

It is hard to determine why the trial court held that Mr. Koenen's claim for lost wages is not allowed by RCW 9A.16.110(2) because the judge does not provide any explanation other than to refer to *State*

² See Mr. Koenen's "Amended Costs Bill at page 2 [CP 36] and exhibits 11-12 therewith.

v. Anderson, 272 Wash.App. at 262 as authority for his decision. On this page the Appellate Court held that:

The State is not required to indemnify or reimburse for a defendant's loss of earning capacity. Like loss of opportunity to enjoy life and loss of opportunity to look for employment, loss of earning capacity cannot be fairly characterized as a "cost" or "expense" within the meaning of RCW 9A.16.110. Moreover, loss of earning capacity is "the permanent diminution of the ability to earn money" that sometimes follows from personal injury.

Id. This case is totally off point because Mr. Koenen was not seeking reimbursement for the loss of the opportunity to enjoy life, the loss of opportunity to seek employment or the loss of earning capacity. The two defendants in *Anderson* sought reimbursement for loss of the foregoing opportunities because they were unemployed prior to trial, during trial and after the trial. One defendant had only worked seven weeks in the prior year earning a couple thousand dollars and the other had no proof he had ever worked at any time.

Mr. Koenen is a self employed land excavator that uses heavy construction equipment to clear and develop land. His declaration states that he had a contract for excavation work worth over \$13,000.00 that he lost because of the prosecution. The contract required the work to be completed by a specific date and time. Due to the trial Mr. Koenen was

not able to perform the contract on time, so he lost the contract. This is documented by exhibits 11 and 12 attached to his Declaration. [CP 4]

Self employed professionals and small business owners are entitled to reimbursement for earnings they would have received but for a prosecution. See: *State v. Jones*, 92 Wash.App. 555, 964 P.2d 398 (Div.2 1998). In the *Jones* case, the defendant sought reimbursement for expenses at a mistrial, a second trial and on appeal. He requested reimbursement for attorney fees, mileage, meals, costs expended for charts, phones and faxes; lost time from his gift shop business, lost time from his charter boat business, and attorney fees. The trial court denied any award of attorney fees. It also denied any award of costs or expenses incurred in the first trial, but granted \$2,839 for Jones' lost time and personal expenses incurred in the second trial.

On appeal, the Appellate Court held that the defendant was entitled to a award for attorney fees and other expenses involved with his defense during the mistrial and on appeal. The *Jones* case is significant because it establishes that a self- employed person is entitled to reimbursement for lost earnings pursuant to RCW 9A.16.110(2).

The only common link between the *Anderson* case and this case is whether a self employed independent contractor had work available at the time of trial. The defendants in *Anderson* were chronically unemployed.

Nevertheless, the dicta of the case indicates that even an unemployed person can obtain reimbursement for lost time if they present sufficient evidence to support a finding that they would have received earnings but for being prosecuted. In our case, Mr. Koenen met this burden of proof in his declaration where he explained that work was available, but lost due to the prosecution. He also attached as exhibits 11 and 12 his excavation invoice executed on April 17, 2009, and the letter terminating the agreement dated June 3, 2009. The letter terminating the excavation agreement indicated that the contract was being rescinded due to Mr. Koenen's inability to complete the project by the deadline date contained in the excavation agreement (due to his inability to work during trial).

(2) Mr. Koenen did not fail to mitigate his lost wage Earnings.

The trial court held that Mr. Koenen failed to mitigate his lost wages. The trial court's opinion stated:

Although Mr. Koenen's Amended Cost Bill and Declaration showed proof of an actual job lost because of having to go to trial. The total loss under this contract was for \$13,032.00. Yet, this job would have taken more time to complete than the time Mr. Koenen was in court. It was lost because Mr. Koenen had to go to court and couldn't finish it within the time set forth in the contract because of having to go to court for trial. Mr.Koenen should not have accepted the job knowing he was going to trial and would not be able to complete the job within the time allotted in the contract. The court therefore denies his request

for lost wages because they were not mitigated
and are not allowed under RCW 9A.16.110(2).
Anderson, @ 262.

[CP 54-55 at paragraph 9).

Refusing work because it will conflict with a trial date is not mitigation. As the trial judge admits, Koenen presented sufficient proof that he would have received earnings but for his prosecution. Refusing to accept work because it conflicts with trial is not mitigation.

If one of the defendants in *Anderson* had presented proof that they could have obtained work but for the trial, they would have presented sufficient proof of lost earnings. And if they were on probationary status and lost their jobs because of the time off, they would not have been accused of a failure to mitigate. Any worker must take work when they can get it. There is no guarantee another job will be available. To claim that persons facing trial calls cannot schedule work for the days they will be going to trial, or they have failed to mitigate, defeats the whole concept of reimbursement for lost wages.

A self employed person is in the same situation as a person employed by a business enterprise. One has only so many calendar days in the year to work. Even if Mr. Koenen had refused the foregoing contract and obtained another that did not conflict with his trial date, he still would have lost time when he could have worked during the trial.

An excavator, like anyone else, bids their work on an expectation of an hourly profit.

Every day spent in trial is a day that Mr. Koenen lost time that he could have used to perform excavation work. There is no failure to mitigate, only lost earnings due to the trial schedule.

If Mr. Koenen had refused the contract, the trial court could have held that Mr. Koenen failed to present sufficient evidence that he lost earnings but for his prosecution. If Mr. Koenen had no proof of available work, only then would his situation have been similar to that of the defendants in *Anderson*. *State v. Anderson* 72 Wash.App. @ 262.

Moreover, one never knows if a trial is going to start on time or possibly be delayed. There was a possibility that Mr. Koenen may have been able to complete the contract. And there is no guarantee that he would have been able to find another contract that did not conflict with the trial. In either case, he still would have lost earnings during the duration of the trial.

V. CONCLUSION

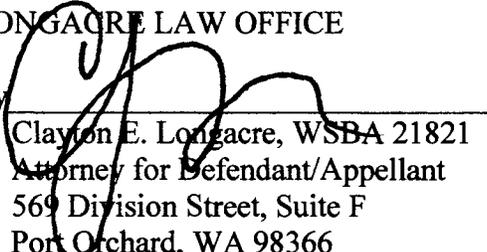
For all of the forgoing reasons set forth above, the Appellant requests that the Appellate Court reverse the decision of the trial court denying him reimbursement for bail costs and lost wages.

RCW 9A.16.110(2) permits an award of reasonable post-acquittal

attorney fees, including appellate work, subject to compliance with RAP 18.1. *State v. Lee*, 96 Wn. App. 336, 346, 979 P.2d 458 (1999); *State v. Jones*, 92 Wn. App. 555, 564, 567, 964 P.2d 398 (1998). The defense of a case continues until all claims are finally resolved. Accordingly, the State must compensate for post-acquittal fees and costs reasonably incurred in the trial or appellate courts. See: *State v. Jones*, 92 Wash.App. @ 564 (Div.2 1998). Therefore, Appellant also requests that on remand the trial court be instructed to reimburse appellant for the costs and attorney fees he incurred on appeal.

Respectfully submitted on this 4th day of June, 2010.

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I hereby declare under penalty of perjury pursuant to the laws of the state of Washington that on June 8, 2010, I placed a copy of Appellant's Opening Brief into the USPS mail system with the appropriate First Class postage affixed therewith. The package was address to:

Kitsap County Prosecutor's Office
614 Division Street
Port Orchard, WA 98366-4614
Atten: Kevin P. Kelly

Signed at Bremerton, Washington, on June 14th, 2010.

By *P. Thomas Adams*
Paul T. Adams