

FILED

JAN 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30836-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

TOMMY J. VILLANUEVA, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE

BRIEF OF RESPONDENT

Timothy S. Note
WSBA #34929
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Spokane, WA 99201
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I.

ASSIGNMENT OF ERROR

1. The trial court correctly awarded compensation to Mr. Villanueva for wages lost due to his being terminated from his job after his arrest, because these damages were a direct result of the State's continued prosecution of him through a jury trial for lawfully defending himself in accordance with RCW 9A.16.110(2).

II.

ISSUES PRESENTED

1. Was the Superior Court correct in awarding Mr. Villanueva damages after finding by a preponderance of the evidence that Mr. Villanueva's job loss was caused by his arrest, and that the arrest was part of his entire prosecution?
2. Is Mr. Villanueva entitled to recover post acquittal fees and costs reasonably incurred in the trial and appellate courts?

III.

STATEMENT OF THE CASE

On Sunday June 20, 2010, the Respondent, Tommy Villanueva, attended a party with his some of his fiancée's co-workers at the

residence of Robert Amicarella and Conal Blanchard, who were co-workers as well as roommates. Both Mr. Amicarella, age 45, and Mr. Blanchard, age 33, drank heavily that night, registering Blood Ethanol levels of at least .272 and .264 respectively. Both men also admitted to smoking marijuana that evening. In the early morning of June 20, 2010, Mr. Amicarella and Mr. Blanchard assaulted Mr. Villanueva because they believed he was a “wife beater.” In the midst of the assault, Mr. Villanueva was able to retrieve a small pocket knife from his front pants pocket and lawfully defended himself. In the ensuing struggle, both Mr. Amicarella and Mr. Blanchard were injured by Mr. Villanueva’s lawful defense. Spokane Police Officers responded to the scene and arrested Mr. Villanueva for two counts of First Degree Assault with a Deadly Weapon. CP 67-68.

Mr. Villanueva was held in the Spokane County Jail pending his first-appearance bail hearing, which occurred on January 21, 2010. Mr. Villanueva missed his scheduled work that day. At the first-appearance hearing, the court set bond at \$10,000, and scheduled an arraignment for July 6, 2010. CP 69-70. Mr. Villanueva’s family posted bond the evening of June 21, 2010, and Mr. Villanueva was released in the late evening of June 21, 2010. CP 71-72.

Mr. Villanueva contacted his employer on June 22, 2010 to explain his situation and was informed he had been terminated. Prior to his termination, Mr. Villanueva was working full time and attending school to become a radiology technician. On June 25, 2010, the Spokane County Prosecutor's Office filed formal charging documents with charges identical to those Mr. Villanueva had been arrested for on June 20, 2010. Mr. Villanueva was arraigned as scheduled on July 6, 2010. Mr. Villanueva was represented by the Spokane County Public Defender's office until February 11, 2011, when he retained Timothy Note as private counsel. On July 11, 2011, Mr. Villanueva filed a "Notice Of Intent To Seek The Affirmative Defense Of Self-Defense and Notice Of Intent To Seek Self-Defense Reimbursement" in accordance with RCW 9A.16.110(2), thus putting the State on notice of its potential financial liability if it chose to proceed to trial against Mr. Villanueva.

The case was brought to trial on January 17, 2012. Mr. Villanueva presented testimony and evidence throughout the trial that he had acted in self-defense. After a two-week trial, the jury acquitted Mr. Villanueva of all charges. After the verdict, a special proceeding was held regarding the issue of self-defense and self-defense reimbursement. Both the State and the defense made arguments to the

jury regarding whether or not Mr. Villanueva was entitled to reimbursement under the law. After a brief deliberation, the jury returned with a special verdict that found that Mr. Villanueva acted within the law when he defended himself and was therefore entitled to reimbursement in accordance with RCW 9A.16.110(2) CP 1-6.

Mr. Villanueva moved the court for reimbursement for costs, fees, and lost time as specified by RCW 9A.16.110(2). CP 8-55. As part of his statutorily allowed reimbursement, Mr. Villanueva sought \$10,200 in lost wages. *Id.* Mr. Villanueva was terminated summarily upon informing his employer of his arrest. Mr. Villanueva applied for and received unemployment benefits after his termination, but was unable to find employment while the accusations were pending against him. CP 23-34. Mr. Villanueva only sought the difference in wages between what he had been earning prior to his arrest and the unemployment benefits that he received afterward. Further, Mr. Villanueva did not seek any lost time beyond September 16, 2011, when he began his residency as a radiology technician at the Bremerton Naval Hospital, when he terminated his unemployment because he could no longer seek outside work while completing his residency. Mr. Villanueva received unemployment benefits for 64 weeks, while this case was pending. CP 23-25.

Mr. Villanueva's motion for reimbursement was argued on April 18, 2012 before Judge Tompkins. There was no dispute that Mr. Villanueva was entitled to reimbursement for his travel expenses, legal fees, and miscellaneous costs associated with his successful litigation. The State objected solely to the Loss of Time claim for \$10,200. The state argued unsuccessfully that Mr. Villanueva was in no legal jeopardy at the time of his arrest on June 20, 2010. The State argued that Mr. Villanueva was not defending himself against these charges until the Spokane County Prosecutor's Office formally filed charges on June 25, 2010 and that this two-day delay in the filing of formal charges¹ broke the causal link between the arrest, Mr. Villanueva's termination, and Mr. Villanueva's statutory right to Loss of Time reimbursement under RCW 9A.16.110(2). RP 7-9.

Judge Tompkins found a factual nexus existed between Mr. Villanueva's arrest and his termination from his employer, Kim Hotstart Manufacturing Co., and that his arrest and termination were direct consequences of Mr. Villanueva lawfully defending himself from an assault and the ongoing criminal prosecution that flowed from Mr. Villanueva's lawful use of force.

¹ Mr. Villanueva's June 21, 2010 Release Conditions indicated that IF NO CHARGES ARE FILED BY 06/23/2010 AT 11:59 PM, THE DEFENDANT SHALL BE RELEASED ON THIS CAUSE AND THE BOND SHALL BE EXONORATED. CP 5.

It does appear just [sic] the fact of the absence from the employment was in fact, the event that caused the termination but for the arrest [sic]. Counsel, I am sorry. I am struggling with that from a public policy standpoint as well. We have so many defendants that are employed, and I know it is rare, but from time to time there is a successful self-defense defense triggering this statute; but to reach back all the way to the date of the arrest is problematic unless there is a clear nexus and here given the employment documents, that he failed to go to work that started this whole ball rolling, I have to find that that is a preponderance of the evidence that his loss of job was based on the arrest, and the necessity for a defense from that time forward. RP15-16.

After issuing judgment, Judge Tompkins in dicta, expressed a final affirmation of her decision:

Counsel, I think you can probably tell I am not particularly happy with this ruling. It does appear to go a ways beyond what would be intended ordinarily in this type of requirement for a defense, ***but I cannot ignore the direct linkage between the firing, him losing his job for not showing up based on the arrest*** so with that I will sign the order. RP 17-18. ***Emphasis Added.***

At the conclusion of the hearing, Judge Tomkins awarded Mr. Villanueva \$49,910.54 in reimbursement for reasonable costs and legal fees associated with his successful self-defense claim, including \$10,200 in lost wages. CP 59-61.

IV.

ARGUMENT

- A. THE PROPER STANDARD OF REVIEW WHEN REVIEWING A TRAIL JUDGE'S REIMBURSEMENT AWARD UNDER RCW 9A.16.110(2) IS ABUSE OF DISCRETION.

RCW 9A.16.110(2):

When a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. ***If the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award. (emphasis added)***

If a statute is clear on its face, the court must use the plain language of the law to identify the legislative purpose and intent. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). According to the plain language of RCW 9A.16.110(2), the Legislature clearly grants the trial judge the exclusive purview of determining the amount of the reimbursement awarded. Where statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. Each provision of the statute should be read in relation to the other

provisions, and the statute should be construed as a whole. A literal reading of a statute is to be avoided if it would result in unlikely, absurd or strained consequences. The interpretation which is adopted should be the one that best advances the legislative purpose. *Key Bank of Puget Sound v. City of Everett*, 67 Wash.App. 914, 917, 841 P.2d 800 (1992) *review denied*. 121 Wash.2d 1025, 854 P.2d 1085 (1993) .

Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, it cannot be said the trial court abused its discretion. *Rehak v. Rehak*, 1 Wash.App. 963, 65 P.2d 687 (1970).

In the case at bar, the trial judge held a lengthy evidentiary hearing regarding the proposed reimbursement award. Before ruling, the judge reviewed the documentation supplied in support of Mr. Villanueva's reimbursement claim and listened to argument from both parties. Judge Tompkins then made the following finding:

I have to find that that is a preponderance of the evidence that his loss of job was based on the arrest, and the necessity for a defense from that time forward. RP 16.

Judge Tompkins, further exercised judicial discretion *sua sponte* by disallowing reimbursement for two suits and shirts that Mr. Villanueva

purchased to wear during the trial as well the cleaning bill for getting his trial clothes cleaned once during a two week trial. The State did not object orally or in writing to reimbursement to those expenses. RP 17.

It is an exercise of a trial courts 'sound discretion' when determining what amounts are reasonable and necessary pertaining to a successful self-defense claim. *State v. Jones*, 92 Wash.App. 555, 567, 964 P.2d 389 (1998).

The State incorrectly asserts that the issue at bar is one of statutory interpretation and therefore must be reviewed *de novo*.

The issue of when the meter starts running regarding costs, fees, and loss of time has been dealt before at the appellate level. The case law is clear that reasonable fees and costs awarded relate back to the time of the arrest and encompass the entire prosecution process, including preliminary proceedings such as bail hearings and 1st appearances. *See Discussion Below*.

B. THE STATE'S ASSERTION THAT THE RIGHT TO RECOVER REASONABLE COSTS, INCLUDING LOSS OF TIME, LEGAL FEES, AND OTHER EXPENSES INVOLVED IN A SUCCESSFUL SELF DEFENSE ONLY ACCRUES AFTER A DEFENDANT IS FORMALLY CHARGED IS ILLOGICAL AND CONTRARY TO ESTABLISHED CASE LAW.

The State has repeatedly argued that Mr. Villanueva had no need to defend against his pending criminal accusations until charges were

formally filed on June 25, 2010, and therefore his post arrest incarceration and subsequent termination from employment for missing work on June 21, 2010 are unrelated to any loss of time claim allowed under RCW 9A.16.110(2). When the Legislature enacted RCW 9A.16.110(2) it expressly commanded the State to “reimburse the defendant for all reasonable costs... involved in his or her defense.” The italicized word² connotes the defendant’s participation in the entire prosecution process; it is not limited to participation in a specific portion of the process. *State v. Jones*, at 561-62.

The *Jones* court specifically indicted that the initial bail hearing or “first appearance” is part of the prosecution process.

”This result is buttressed by examining the consequences of adopting the State’s argument. The premise underlying that argument is that the prosecution process would be parsed into its separate component parts, and that fees would be denied for any specific part (i.e., a trial with a hung jury) that did not end in an acquittal. If we were to take that premise to its logical conclusion, we would deny fees for a ***bail hearing***, and arraignment, a pre-trial motion to suppress, a pre-trial motion to sever, and a host of other events not ending in an acquittal. Not only would this nullify much of what the Legislature manifestly intended to do, it would produce results that we consider absurd.” *Id.* at 562. (***emphasis added***)

² The copy of the *Jones* opinion read by counsel on Westlaw does not contain corresponding italicized word. However this author believes the opinion was referring to the phrase “reimburse the defendant for all reasonable costs... involved in his or her defense” which was bracketed in quotations within the opinion.

RCW 9A.16.110(1) specifically states:

No person in the State ***shall be placed in legal jeopardy of any kind whatsoever*** for protecting by any reasonable means necessary himself...***(emphasis added)***.

State v. Fontinilla has already explored how “legal jeopardy” should be liberally construed under RCW 9A.16.110(1).

“Moreover, in RCW 9A.16.110(1), the phrase “legal jeopardy” is expansively modified to include “legal jeopardy of any kind *whatsoever*.” (Emphasis added). Although the phrase “of any kind whatsoever” is not defined, we cannot accept the State’s and City’s interpretation, which essentially ignores these words and gives them no meaning. Such an interpretation would violate the precept we noted above, that we must give meaning to every word in a statute. With that principle in mind, we are satisfied that the Legislature intended this language to enlarge upon, rather than restrict, the meaning of “legal jeopardy.”
State v. Fontinilla, 128 Wn.2d 492, 500, 909 P.2d 1294 (1996).

The moment Mr. Villanueva was arrested for using lawful force to defend himself, he was placed in “legal jeopardy.” His freedom was restricted; he was forced either to stay in jail or post a \$10,000 bond; Judge Clark set restrictions on his geographic movements and other personal liberties. Additionally, the Court set a future court date that required his attendance. These restrictions were imposed on Mr. Villanueva on June 21, 2010. Even if Mr. Villanueva had not been summarily terminated on June 21, 2010 for missing work, he would have

been terminated on July 6, 2010 for missing work when he attended his arraignment. According to Mr. Villanueva's former employer's testimony at the Unemployment Hearing, "any absence from work would result in termination regardless of the reason as they did not care to know anything about it." CP 30.

When the State formally filed charges against Mr. Villanueva on June 25, 2010, it sought to send Mr. Villanueva to prison for a minimum of 288 consecutive months.³ To assert that Mr. Villanueva was not in legal jeopardy and had no need to begin preparations for his defense until charges were formally filed is ludicrous. According to the State, however:

"Again, given the fact that there weren't even charges filed at the time that the defendant was terminated is an indication that he wasn't defending himself against those charges or that they were applied to his defense." RP 8

Following the State's argument to its logical conclusion, the State would have an incentive to delay filing any charge potentially involving an allegation of self-defense in an effort to break the causal chain relating to economic damages that could be recovered. Simply put, that is bad public policy.

³ Minimum number of months was derived using the SRA and the General Deadly Weapon Enhancement –Form A. With no prior felonies Mr. Villanueva would score as a 3 for both counts with a standard range of 120-160 consecutive months per count and total of 4 consecutive years of deadly weapons enhancements.

The State incorrectly asserts that Mr. Villanueva is seeking \$10,200 in lost wages for spending a single night in jail. That is a mischaracterization of the loss-of time claim associated with this proceeding. Mr. Villanueva is seeking 64 weeks of diminished earnings. Those losses began when he was terminated for missing work while in custody awaiting his bail hearing and continued to accrue while his case proceeded to trial. With two First Degree Assault charges pending against him, Mr. Villanueva was unable to secure new employment. It is clear from the record and documentation supplied that Mr. Villanueva received unemployment benefits for 64 weeks immediately after his arrest. To comply with the State unemployment requirements, Mr. Villanueva was required to engage in weekly job searches to maintain unemployment benefits. There is nothing in the record to indicate that he did otherwise.

In *State v. Anderson*, a consolidated case, dealing in part with two unemployed defendants' loss-of time-claims, the court looked back to the defendant's employment status at the time of their *arrest* to determine if they were entitled to lost-time compensation. Both defendants sought fictional reimbursement based on theoretical earnings they would have received working 40 hours a week at minimum wage instead of being incarcerated awaiting their trial. Both defendants were chronically unemployed and without any employment prospects at the time of their

arrest. The court held that absent evidence sufficient to support a finding that the defendants would have received earnings but for being prosecuted, then they were not entitled to indemnification or reimbursement for “loss of time.” *State v. Anderson*, 72 Wn. App. 253, 262, 863 p.2d 1370 (1993), *review denied*, 125 Wn.2d 1010, 879 P.2d 292 (1994).

Mr. Villanueva, on the other hand, was employed at the time of his arrest for using lawful force, and but for that arrest and subsequent detention, would have been at work on June 21, 2010 and his job status would not have changed prior to June 25, 2010 when he was formally charged. *Anderson*, clearly shows that the proper inquiry for loss-of-time damages is to determine the defendant’s employment status at the time of arrest and changes in that employment status from that time forward.

The State was put on notice in July of 2011 that the defendant was asserting the affirmative defense of self-defense and if acquitted would be seeking full reimbursement as allowed by the statute. This notice gave the State approximately 7 months before the trial to reevaluate its case, yet the State chose to continue prosecuting Mr. Villanueva. In trial, as the evidence and testimony was submitted to the jury, the State had the opportunity to reevaluate its case. Up until the moment that the jury returned with a verdict, the State solely controlled its exposure to any

reimbursement liability. Had the State decided to dismiss its prosecution of Mr. Villanueva at any time prior to the jury returning with a verdict, this entire discussion of reimbursement would be moot. Mr. Villanueva suffered unemployment as a result of the State's continued gamble with his life and reasonable compensation for his loss of time is appropriate.

C. MR. VILANUEVA IS ENTITLED TO
REIMBURSEMENT FOR LEGAL COSTS
INCURRED POST ACQUITTAL

The case law is very clear on this issue. The "defense" of a case continues until all claims have been resolved. The State must compensate for post acquittal fees and costs reasonably incurred in the trial or appellate courts. *Jones* at 564.

"The purpose of Washington's self-defense reimbursement statute is to reimburse the citizen who is "placed in legal jeopardy of any kind whatsoever for protecting [himself] by any reasonable means necessary," and who is found not guilty by reason of self-defense. Where a defendant claiming reimbursement incurs significant expense to vindicate the claim, denying "fees for fees" would frustrate the statutory purpose." *Id.*

The trial court is the appropriate decision maker to determine reasonable fees incurred at trial and reasonable fees on appeal, so as to coordinate between the two levels of court. Proper process requires

remanded to the trial court for further proceedings concerning reasonable appellate fees. It is still an open question as to whether or not the defendant must prevail on appeal to recover additional reasonable appellate fees. *Id* at 567.

V.

CONCLUSION

Mr. Villanueva was placed in legal jeopardy by the State when he was initially arrested and subsequently charged and tried by a jury for using lawful force to defend himself. Mr. Villanueva received an acquittal and an affirmative self-defense special verdict. Under RCW 9A.16.110(2), he is entitled to all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his defense. The reasonable costs involved in the defense start accruing at the time of arrest and extend to every portion of the prosecution, including a bail hearing for the initial arrest. Mr. Villanueva suffered a verifiable economic loss totaling \$10,200 while his case was pending trial and the State is required to reimburse him for it. Additionally, Mr. Villanueva is entitled to reasonable post acquittal costs and fees associated with the appellate process. He respectfully asks that this case be remanded for further

proceedings regarding his reasonable costs and fees associated with
litigating this appeal.

Respectfully Submitted this 30th day of January, 2013.

A handwritten signature in black ink, appearing to read "Timothy S. Note", written over a horizontal line.

Timothy S. Note WSBA #34929
Attorney For Respondent