

FILED
Dec 17, 2012
Court of Appeals
Division III
State of Washington

NO. 31180-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

HEATHER L. MERCADO,

Defendant/Appellant.

APPELLANT'S BRIEF

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STATUTES

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ASSIGNMENT OF ERROR

1. The trial court improperly imposed an HIV testing requirement in the Judgment and Sentence.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does the record contain any information that supports imposition of HIV testing under RCW 70.24.340?

STATEMENT OF CASE

An Information was filed on May 15, 2012 charging Heather L. J. Mercado with possession of methamphetamine under Count 1 and use of drug paraphernalia under Count 2. (CP 7)

Ms. Mercado pled guilty to possession of methamphetamine on July 16, 2012. The State dismissed Count 2. (CP 12)

Ms. Mercado's Guilty Plea Statement has a checkmark on Paragraph 6(s). The paragraph states: "**If this crime involves prostitution, or a drug offense associated with hypodermic needles**, I will be required to

undergo testing for human immunodeficiency (HIV/AIDS) virus.” (CP 16; emphasis supplied.)

The trial court conducted the necessary colloquy in connection with Ms. Mercado’s plea. The colloquy included a discussion on HIV testing. (RP 1, l. 19 to RP 7, l. 11)

Judgment and Sentence was entered on July 30, 2012. Ms. Mercado was granted a first time offender waiver. Paragraph 4.5 requires HIV testing. (CP 23)

Ms. Mercado did not file her Notice of Appeal until October 4, 2012. (CP 36)

On November 19, 2012 a Commissioner’s Ruling authorized Ms. Mercado to proceed with her appeal pursuant to *State v. Kells*, 134 Wn.2d 309, 313, 949 P.2d 818 (1998).

SUMMARY OF ARGUMENT

The trial court lacked statutory authority to impose HIV testing.

ARGUMENT

RCW 70.24.340(1) provides, in part:

Local health departments authorized under this chapter shall conduct or cause to be conducted pretest counseling, HIV testing, and posttest counseling of all persons:

- (a) ...;
- (b) ...; or
- (c) **Convicted of drug offenses under Chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.**

(Emphasis supplied.)

The trial court did not make any determination that there were hypodermic needles involved in Ms. Mercado's offense. The Certificate of Probable Cause does not contain any information that hypodermic needles were used. (CP 1)

Ms. Mercado contends that the HIV testing requirement is not supported by the record and was improperly imposed.

CONCLUSION

Ms. Mercado requests that the trial court be directed to remove the requirement for HIV testing. She also requests that she be reimbursed for any funds she may have expended in connection with HIV testing.

DATED this 16th day of December, 2012.

Respectfully submitted,

s/ Dennis W. Morgan

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	WALLA WALLA COUNTY
Plaintiff,)	NO. 12 1 00145 3
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
HEATHER L. MERCADO,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 17th day of December, 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

Court of Appeals, Division III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

CERTIFICATE OF SERVICE

