

FILED

DEC 16, 2015

Court of Appeals
Division III
State of Washington

No. 32683-7-III

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

STATE OF WASHINGTON,
Respondent,

v.

RAY LENY BETANCOURTH,
Appellant.

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

APPELLANT'S REPLY BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

I. REPLY ARGUMENT	1
A. THE TRIAL COURT ERRED IN ORDERING BETANCOURTH TO PAY CERTAIN LEGAL FINANCIAL OBLIGATIONS WHEN THE COURT FOUND BETANCOURTH INDIGENT FOR PURPOSES OF APPEAL	1
B. THE TRIAL COURT ERRED IN CONCLUDING THAT A SEARCH WARRANT ISSUED IN WASHINGTON STATE IS ENTITLED TO “FULL FAITH AND CREDIT” IN ANY OTHER STATE.....	3
C. THE ONLY DOCUMENTS ADMITTED WERE THOSE OBTAINED PURUSANT TO THE DISTRICT COURT WARRANT	4
D. THE TRIAL COURT DID NOT FIND THAT THE RECORDS WERE ADMISSIBLE UNDER THE INDEPENDENT SOURCE RULE	5
E. THE PROSECUTOR’S IMPROPER CLOSING WAS PREJUDICIAL	5
II. CONCLUSION	6

TABLE OF AUTHORITIES

Cases

In re Estate of Tolson, 89 Wn. App. 21, 947 P.2d 1242 (1997) 3

State v. Berry, 141 Wn.2d 121, 5 P.3d 658 (2000)..... 3

State v. Clark, 32928-3-III, 2015 WL 7354717 (Wash. Ct. App. Nov. 19, 2015) 2

State v. Davidson, 26 Wn. App. 623, 613 P.2d 564, *review granted*, 94 Wn.2d 1020 (1980) 4

State v. Duncan, 180 Wn. App. 245, 327 P.3d 699 (2014), *review granted*, 183 Wn.2d 1013, 353 P.3d 641 (2015) 1

State v. Noah, 150 Wash. 187, 272 P. 729 (1928) 3

Statutes

18 U.S.C. § 2703..... 4

RCW 10.96.060 3

Constitutional Provisions

Const. art. IV, § 6..... 3

I.
REPLY ARGUMENT

In this reply, Betancourth will respond to only some of the State's arguments. His failure to respond on the remaining issues is not a concession that the State's arguments should prevail. Rather, it is simply a recognition that the controversy has been fully briefed.

A. THE TRIAL COURT ERRED IN ORDERING BETANCOURTH TO PAY CERTAIN LEGAL FINANCIAL OBLIGATIONS WHEN THE COURT FOUND BETANCOURTH INDIGENT FOR PURPOSES OF APPEAL

There will likely be significant new developments before this Court is called upon to decide this case. At the time of this writing, however, this Court's decision in *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014), *review granted*, 183 Wn.2d 1013, 353 P.3d 641 (2015), is pending review.

In this case, the trial court found Betancourth indigent for purposes of appeal. The court also knew that Betancourth was 20 years old and had only a GED. RP 1117. Further, Betancourth testified that, at the time of trial, he was working as a fruit picker. RP 1118. Prior to that he had worked for two weeks at the Dollar Store and for two months manufacturing moldings. RP 1118-19. He is now serving 28 years in prison.

Betancourth will likely have no employment for 28 years. Assuming that there is a job available in the Department of Corrections (DOC) for Betancourth, it appears that the maximum rate of pay is \$2.60 an hour. *See* Exhibit 1. After his release, his ability to find any job will be substantially impaired by his lack of employment history, lack of education and his felony conviction.

It is true that the State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one. But it is difficult to imagine that any court would find that Betancourth has the present or future ability to pay the LFO's imposed. Thus, this case presents a situation that calls for this Court to exercise its discretion to review the matter. *See, e.g., State v. Clark*, 32928-3-III, 2015 WL 7354717, at *4 (Wash. Ct. App. Nov. 19, 2015) (acknowledging that this Court has the power to review the imposition of costs even if no objection below).

Given the facts here, this Court should consider the issue and strike the discretionary costs imposed.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT A SEARCH WARRANT ISSUED IN WASHINGTON STATE IS ENTITLED TO “FULL FAITH AND CREDIT” IN ANY OTHER STATE

The Washington State Constitution limits the “process” of the Superior Court to “all parts of the state.” Const. art. IV, § 6. A search warrant is a form of process. *State v. Noah*, 150 Wash. 187, 272 P. 729 (1928). Moreover, the superior courts only have “jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” Const. art. IV, § 6. These two provisions clearly limit the power of the superior court and do not permit courts of this state to authorize searches and seizures in other states. To the extent RCW 10.96.060 conflicts with the state constitution, the constitution prevails.

Moreover, the trial court cited no authority for its conclusion that a Washington search warrant is entitled to full faith and credit throughout the United States. If the court was referring to the full faith and credit clause in the United States constitution, the trial court was incorrect.

The Full Faith and Credit Clause provides a means for ending litigation by putting to rest matters previously decided between adverse parties in any state or territory of the United States.

State v. Berry, 141 Wn.2d 121, 127, 5 P.3d 658, 662 (2000) (quoting *In re Estate of Tolson*, 89 Wn. App. 21, 29, 947 P.2d 1242 (1997)). But a

warrant is not a final judgment. Thus, the full faith and credit clause has no application.

The Stored Communications Act permits states and the federal government to obtain cell phone records.

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction.

18 U.S.C. § 2703. But a Washington superior court is only a “court of competent jurisdiction” in Washington. If the State wished to obtain cell phone records in New Jersey, it should have obtained a warrant from a “court of competent jurisdiction” in that state.

C. THE ONLY DOCUMENTS ADMITTED WERE THOSE
OBTAINED PURUSANT TO THE DISTRICT COURT
WARRANT

The trial court called the use of the district court warrant to seize the records a “technical error.” Thus, that court did not believe the phone records had to be suppressed. But that conclusion was incorrect.

A district court in one county cannot issue a search warrant for a house located in another county. *State v. Davidson*, 26 Wn. App. 623, 613 P.2d 564, *review granted*, 94 Wn.2d 1020 (1980). In *Davidson* a district

court judge in King County signed a warrant to search a house in Snohomish County. The court found that the lack of jurisdiction was more than a technical violation. It found that because there was “no statutory basis for the warrant issued in this case, the trial court was correct in suppressing the evidence.” *Id.* at 628. The remedy is applicable in this case.

D. THE TRIAL COURT DID NOT FIND THAT THE RECORDS WERE ADMISSIBLE UNDER THE INDEPENDENT SOURCE RULE

The trial court made no findings or conclusions regarding the independent source rule. It did not admit the phone records under that doctrine.

E. THE PROSECUTOR’S IMPROPER CLOSING WAS PREJUDICIAL

It is true that in order to prevail on the statutory defense, Betancourth had to show by a preponderance of the evidence that he did not aid the homicidal act. But the prosecutor misstated that principle. The prosecutor argued that Betancourth had to prove that he did not aid the second degree assault. CP 1493-94. The evidence showed that Betancourth clearly aided a second degree assault by encouraging his friends to assist him in beating up whoever stole his car. He did not,

however, aid Cardenas in the homicidal act. He did not even know that Cardenas had a gun, let alone that Cardenas would shoot the victim.

The prosecutor's statement was extraordinarily prejudicial. The evidence showed that Betancourth was precisely the type of defendant who the legislature thought should not be convicted of felony murder. But the prosecutor deprived Betancourth of a full and fair consideration of the defense by telling the jury that it did not apply in this case.

II. CONCLUSION

For the reasons stated above, this Court should reverse and remand Betancourth's convictions.

DATED this ^{4th} 16 day of December, 2015.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for Ray Betancourth

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where applicable and by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Mr. Ray L. Betancourth #376293
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362-8817

Tamara Hanlon
Yakima County Prosecutor's Office
128 North 2nd Street
Yakima County Courthouse, Room 329
Yakima, Washington 98901
Tamara.hanlon@co.yakima.wa.us

12 | 16 | 2015
Date

Peyush Soni
Peyush Soni



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

APPLICABILITY
PRISON
OFFENDER MANUAL

REVISION DATE
12/1/14

PAGE NUMBER
6 of 10

NUMBER
DOC 710.400

POLICY

TITLE
**CORRECTIONAL INDUSTRIES
CLASS II EMPLOYMENT**

1. Turnover rates,
2. Expected increases and decreases in workload,
3. Labor availability and population trends, and
4. Anticipated mission, product, and/or program changes that will have a significant impact on CI operations.

B. Classification

1. Positions will be established based on the most economical organizational structure to ensure efficiency. [4-4458]
2. Offenders with similar job assignments and skills will receive similar pay. Differences in compensation will be proportionate to differences in the difficulty, responsibility, and qualification requirements of the work.
3. The skills assigned to a position will be consistent as to type and level, with higher level skills concentrated in higher level positions.

C. Offender Pay Rates

1. The hourly compensation rates for Range 1 are as follows:

<u>Level</u>	<u>Compensation Rate</u>
4	1.30 - 1.60
3	1.00 - 1.20
2	.80 - .95
1	.60 - .75
Probation	.55

2. The hourly compensation rates for Range 2, limited to off-site crews, are as follows:

<u>Level</u>	<u>Compensation Rate</u>
4	2.60
3	2.00
2	1.75
1	1.25
Probation	1.00

3. New hires must serve at least one calendar month at the Probation rate.

D. Grading Offender Jobs

1. Position grading will be consistent throughout CI.