

FILED
Jan 20, 2016
Court of Appeals
Division III
State of Washington

No. 32970-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JUDE J. ORTIZ, SR.,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. Mr. Ortiz was denied his constitutional right to effective assistance of counsel when his attorney failed to challenge the execution of the search warrant for noncompliance with the “knock and announce” rule.

2. The record does not support the finding Mr. Ortiz has the current or future ability to pay the imposed legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Ortiz denied his constitutional right to effective assistance of counsel when his attorney failed to challenge the execution of the search warrant for noncompliance with the “knock and announce” rule?

2. Since the directive to pay LFO’s was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

C. STATEMENT OF THE CASE

Police responded to a citizen complaint that the next-door neighbor had a marijuana plant growing in the back yard. After observing the plant, a local police officer notified Sergeant Hubbard of the drug task force who obtained a search warrant for the residence after observing two marijuana

plants in pots in the back yard. RP 220, 143-49. The owner of the residence was Mr. Ortiz' mother but Mr. Ortiz also resided there. RP 182, 186, 193-94, 254.

The drug task force executed the search warrant at 6:47 a.m. Sgt. Hubbard testified the reason for the early hour was to catch the occupants off guard, as they would probably still be in bed. RP 149-50. The search warrant team consisted of eleven officers, all armed and wearing bullet-proof vests. RP 195-96. The entry team knocked on the door, announced "police, search warrant," waited one to two seconds, and repeated the same process two more times with no response. The police did not hear any sounds coming from inside the house. RP 150-51. Sgt. Hubbard admitted anyone asleep would not have sufficient time to get up and answer the door within the timeframe of those three short announcements. RP 193. Police then breached the door with a battering ram. RP 150-51.

Upon entering the residence the police found five people—Mr. Ortiz' mother, two teenage boys, and two small children. All appeared to be just waking up. Some of these people were still in the bedrooms. RP 153-54, 193-94. One of the teenagers was still asleep on the living room couch. RP 195. Mr. Ortiz was not present in the house. RP 155-56, 193-94. The subsequent search of the premises revealed 41 marijuana plants in

various stages of growth and other evidence of a grow operation. RP 158-59, 199-201.

Mr. Ortiz was convicted of manufacturing marijuana and involving a minor in a controlled substance transaction, with enhancements for the crimes being committed within 1000 feet of a school bus route stop.¹ CP 62-65.

At sentencing the Court imposed discretionary costs of \$3210 and mandatory costs of \$800², for a total Legal Financial Obligation (LFO) of \$4010. CP 78. The Judgment and Sentence contained the following language:

¶ 2.7 Financial Ability. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 75.

Mr. Ortiz' attorney informed the court that Mr. Ortiz was on Social Security Disability. RP 439. The Court did not inquire further into Mr. Ortiz' financial resources or consider the burden payment of LFOs would

¹ The State ultimately did not request the enhancement on the second count because that offense is not subject to the enhancement. CP 69.

² \$500 Victim Assessment, \$200 criminal filing, and \$100 DNA fee. CP 78.

impose on him. RP 439-42. The Court ordered Mr. Ortiz to begin making payments pursuant to a payment schedule set by the Yakima County Clerk. CP 78.

This appeal followed. CP 82-83.

D. ARGUMENT

1. Mr. Ortiz was denied his constitutional right to effective assistance of counsel when his attorney failed to challenge the execution of the search warrant for noncompliance with the “knock and announce” rule.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In *Strickland*, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed

adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the

individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

Appellate review on this issue is de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

Absent exigent circumstances, RCW 10.31.040³ requires officers executing a search warrant to knock, announce their identity and purpose, demand admittance, and give the occupants a reasonable time to voluntarily admit them. *State v. Garcia-Hernandez*, 67 Wn. App. 492, 495, 837 P.2d 624 (1992). The knock and announce rule serves the constitutional requirement that search warrants be reasonably executed. *State v. Alldredge*, 73 Wn. App. 171, 175, 868 P.2d 183 (1994) (citing *State v. Myers*, 102 Wn.2d 548, 552, 689 P.2d 38 (1984)). The knock and announce rule serves three fundamental purposes: (1) to reduce the potential for violence to both police and occupants arising from an unannounced entry; (2) to prevent unnecessary property damage; and (3) to protect an occupant's right to privacy. *State v. Coyle*, 95 Wn.2d 1, 5, 621 P.2d 1256 (1980).

Failure to comply with the “knock and announce” rule renders the entry illegal, and any evidence seized during the search inadmissible. *Id.*

A police officer who identifies himself and announces he has a search warrant has implicitly demanded admission. *See State v. Lehman*, 40 Wn. App. 400, 404, 698 P.2d 606, *review denied*, 104 Wn.2d 1009 (1985).

The police need not wait for an actual refusal following their announcement; denial of admittance may be implied from the occupant's lack of response.” *Garcia–Hernandez*, 67 Wn. App. at 495, 837 P.2d 624 (citations omitted). The length of time that officers must wait before using force to enter a residence depends upon the circumstances of each case. *State v. Schmidt*, 48 Wn. App. 639, 644, 740 P.2d 351, *review denied*, 109 Wn.2d 1013 (1987) (*citing State v. Edwards*, 20 Wn. App. 648, 651, 581 P.2d 154 (1978)).

Exigent circumstances shorten the length of time that officers must wait. *Garcia–Hernandez*, 67 Wn. App. at 497–98 (holding that five second delay was reasonable when commotion may have alerted defendant to the officers' presence, and open door indicated that apartment was occupied and that it was unlikely occupants were asleep); *Schmidt*, 48 Wn. App. at 646 (holding that three second delay was reasonable when barking dog may have alerted occupants to officers' presence, occupants became quiet after announcement, police had reason to believe the defendant may

³ RCW 10.31.040 provides: “To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any

have been armed and that drug lab could have been destroyed, and size of structure indicated that response time should have been brief).

However the absence of exigent circumstances, as in the present case, requires a much longer waiting period. In *Spradley v. State*, an interval of approximately 15 seconds from police officers' knock and announcement until forced entry of defendant's home to execute a search warrant was held insufficient to satisfy knock-and-announce statute; time of day was such that occupants might have been preparing for bed, home had at least two stories, large team of officers descended on home and yelled at and detained people in yard within same 15-second period in which they expected occupants to respond, 15-second period included at least a few seconds when officers were using battering ram, and, most important, officers detonated an explosive "distraction device" during those 15 seconds. *Spradley v. State*, 933 So. 2d 51 (Fla. Dist. Ct. App. 2d Dist. 2006).

Similarly, in *Richardson v. State*, police officers executing a search warrant at 5:30 a.m. failed to provide defendant an appropriate amount of time to respond to the search warrant announcement prior to forcibly entering the residence, where officers knocked and announced their

other inclosure, if, after notice of his office and purpose, he be refused admittance.”

presence three times before using a battering ram to open the door, the knock and announce technique used took approximately nine to 10 seconds, and police officers had not been trained to provide an occupant time to respond to the search warrant announcement. *Richardson v. State*, 787 So. 2d 906 (Fla. Dist. Ct. App. 2d Dist. 2001), reh'g denied, (June 20, 2001).

Even more on point for the present case, in *State v. Ramos*, a ten-second delay between first knock and announce and police officers' forcible entry of defendant's residence was unreasonable, even though large quantity of marijuana was allegedly in residence, and officers approaching residence were exposed and could have been easily seen by any occupants looking out window; type and quantity of alleged drugs did not give rise to reasonable fear of evidence destruction within five seconds that officers waited after completing knock and announce, officers arrived at residence at time when many people would be asleep in their homes, and other than nature of alleged drugs, nothing reasonably indicated development of any exigency. *State v. Ramos*, 130 P.3d 1166 (Idaho Ct. App. 2005), review denied, (2006).

The facts herein are remarkably similar to the cases from other jurisdictions cited in the preceding three paragraphs. Here, the drug task

force executed the search warrant at 6:47 a.m. Sgt. Hubbard testified the reason for the early hour was to catch the occupants off guard, as they would probably still be in bed. RP 149-50. The search warrant team consisted of eleven officers, all armed and wearing bullet-proof vests after seeing two marijuana plants in the backyard. RP 195-96. The entry team knocked on the door, announced “police, search warrant,” waited one to two seconds, and repeated the same process two more times with no response. The police did not here any sounds coming from inside the house. RP 150-51. Sgt. Hubbard admitted anyone asleep would not have sufficient time to get up and answer the door within the timeframe of those three short announcements. RP 193. Police then broke down the door with a battering ram. RP 150-51.

The police found five people upon entering the residence, Mr. Ortiz’ mother, two teenage boys, and two small children. All appeared to just be waking up. Some of these people were still in the bedrooms. RP 153-54, 193-94. One of the teenagers was still asleep on the living room couch. RP 195.

Considering these circumstances and in light of the previously cited authority, the police failed to comply with the “knock and announce rule” by not waiting a reasonable amount of time to for the occupants time

to voluntarily open the door. Therefore, the entry was illegal, and any evidence seized during the search was inadmissible. *Coyle*, 95 Wn.2d at 5, 621 P.2d 1256.

The suppression of the marijuana plants and other evidence found in the house would leave the State with insufficient evidence to prove either of the underlying charges. As such, both prongs of the two-part test for ineffective assistance of counsel established in *Strickland* are easily met. Counsel's performance was deficient for not moving to suppress the evidence and there is no conceivable legitimate tactic explaining counsel's deficient performance. The prejudice prong is also satisfied because there is more than a reasonable probability that, but for counsel's errors, the result of the trial would have been different.

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review.*

Mr. Ortiz did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does

little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev’d in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the

thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Ortiz’s case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”)(citations omitted).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Ortiz respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument.*

There is insufficient evidence to support the trial court's finding that Mr. Ortiz has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by

the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty

guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Mr. Ortiz's present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App.

393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ”
Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.7 of the judgment and sentence, the record does not show the trial court took into account Mr. Ortiz's financial resources and the potential burden of imposing LFOs on him. RP 439-42. Moreover, the boilerplate language is inaccurate because Mr. Ortiz is on Social Security Disability. RP 439. Nevertheless, the Court ordered Mr. Ortiz to begin making payments pursuant to a payment schedule set by the Yakima County Clerk. CP 78.

The boilerplate finding that Mr. Ortiz has the present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an

individualized inquiry into Mr. Ortiz 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

E. CONCLUSION

For the reasons stated, the convictions should be reversed or, in the alternative, the case should be remanded to make an individualized inquiry into Mr. Ortiz's current and future ability to pay before imposing LFOs.

Respectfully submitted January 20, 2016,

s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on January 20, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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