

FILED

Feb 10, 2014

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	Court of Appeals No. 31672-6-III
Plaintiff/Respondent,)	
vs.)	RESPONSE TO RESPONDENT'S
)	MOTION ON THE MERITS
DAVID P. BOLTON,)	
)	
<u>Defendant/Appellant.</u>)	

1. Identity of Moving Party.

The appellant, David P. Bolton, asks for the relief designated in Part 2

2. Statement of Relief Sought.

Denial of Respondent's Motion.

3. Statement of Facts.

The statement of facts is set forth in Appellant's initial brief and adopted herein.

4. Argument.

1. Mr. Bolton was denied his constitutional right to a unanimous jury verdict because the State relied on two criminal acts on a single count as a basis for conviction and a *Petrich* instruction on jury unanimity was not given.

In its motion, the State argues there is no requirement for a *Petrich*¹ instruction in this case because the incident was a brief encounter with acts comprising a continuing course of conduct. Respondent's Motion pp 6-8. What cannot be overlooked, however,

is the fact that the trial prosecutor did not present or argue his case to the jury in this manner. Instead, in closing argument the State argued:

I'd submit to you that Mr. Bolton assaulted Mr. Ford, not just once that day on July 18th, 2012, but he assaulted him twice. The first time was when Mr. Ford had him sit down in the office or rolled into the office and Mr. Bolton stood up and frightened Mr. Ford, thinking that this was going to be an assault where Mr. Bolton potentially would jump over his desk and start a fight. The second assault was when Mr. Bolton told Mr. Ford that, "Not giving you my ID," and told Mr. Ford to come get it. . . . as he tried to get it, he took a swing at Mr. Ford . . .

RP 71.

Mr. Ford's testimony was consistent with this closing argument. RP 34-38.

Clearly, the trial prosecutor viewed this incident as two separate assaults and argued the same to the jury. The State cannot now turn around on appeal and argue a continuing course of conduct. Since the State presented evidence of two different acts by Mr. Bolton that it argued constituted a custodial assault (RP 34-38, 71), and the jury was not given a *Petrich* instruction on jury unanimity (CP 20-35), there is no way to assure that all members of the jury were relying on the same act when voting to convict Mr. Bolton. Therefore, the verdict must be reversed.

2. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.

The State argues in its motion that the record supports the trial court's finding of present and future ability to pay legal financial obligations. Respondent's Motion pp 9-10. Appellant disagrees with this assertion. At sentencing Mr. Bolton asked the Court to consider waiving the discretionary costs. He stated he suffered from a medical condition,

¹ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

would be over 60 years old by his release date, and already owed over \$5000 in previously imposed LFO's. RP 92. The Court did not waive the costs and made no further inquiry into Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92. The court ordered Mr. Bolton to pay at least \$100 per month commencing immediately. CP 9.

The record, herein, speaks for itself. The record reveals no balancing by the court of Mr. Bolton' financial resources and the nature of the burden that payment of LFOs would impose on him. RP 91-92. Nor did the trial court take Mr. Bolton' particular financial resources and his ability (or not) to pay into account as required by RCW 10.01.160(3). Therefore, the finding of ability to pay is unsupported by the record and clearly erroneous and the imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay *and* the imposition of the discretionary costs.

5. Conclusion.

Respondent's motion should be denied for the reasons stated herein and in Appellant's initial brief.

Respectfully submitted, February 10, 2014,

s/David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 10, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the Response to Respondent's Motion on the Merits:

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February 10, 2014 - 10:37 AM

Transmittal Letter

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Court of Appeals Case Number: 31672-6

Party Represented: appellant

Is This a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

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Statement of Arrangements

Motion: ____

Response/Reply to Motion: Response

Brief

Statement of Additional Authorities

Affidavit of Attorney Fees

Cost Bill

Objection to Cost Bill

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Comments:

No Comments were entered.

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