

FILED
February 29, 2016
Court of Appeals
Division I
State of Washington

No. 73063-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON M. RAMOS,

Appellant.

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

The Honorable Carol A. Schapira

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **There was no evidence presented that Mr. Ramos and Ibrahim were acting in concert.**

In its response brief, the State concedes, as it must, that Mr. Ramos was convicted as an accomplice to Ibrahim. The State's entire argument is based upon the timing of the two robberies; the fact they occurred at roughly the same time proved the two men were acting in concert. The evidence fails to establish this.

As noted, the State's entire argument rests on the timing of the robberies. Brief of Respondent at 8. The State erroneously argues the Mr. Ramos and Ibrahim "sized up their potential victims while speaking to each other in what appears to be Spanish." *Id.* Ibrahim made one comment in that Mr. Blum described as not in English. RP 1341. There was no testimony Mr. Ramos said anything to Ibrahim, let alone any evidence that this was a "command" by Ibrahim ordering Mr. Ramos to take Mr. Capucion's backpack. Further, it was not proven by the State that this statement by Ibrahim was directed towards Mr. Ramos and not some sort of exclamation directed towards Mr. Blum. Finally, this statement made by Ibrahim did not prove that Mr. Ramos and Ibrahim were "working as a team." Brief of Respondent at 9.

The State also argues without support that Mr. Ramos's act of robbing and stabbing Mr. Capucion was designed to create fear in Mr. Blum. Nothing in the record establishes Mr. Ramos and Ibrahim even knew each other let alone were working under some plan. The State's attempt to stretch the facts to fit its theory of the case is unavailing. The State failed to prove Mr. Ramos was acting as an accomplice to Ibrahim and is entitled to reversal of Count II with instructions to dismiss.

2. This Court should order that no costs be awarded on appeal.

- a. *Mr. Ramos may seek an order from the Court ordering that no costs be awarded prior to a decision by this Court.*

Should this Court reject Mr. Ramos's argument on appeal, he asks that this Court to issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency. Such as request is authorized under this Court's recent decision in *State v. Sinclair*, ___ Wn.App. ___, slip op. at 10-12 (72102-0-I, January 27, 2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails,

the appellate courts may “direct otherwise.” RAP 14.2; *Sinclair*, slip op. at 5, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to “compelling circumstances.” *Sinclair*, slip op. at 8, *quoting Nolan*, 141 Wn.2d at 628.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. Slip op. at 9-10. This Court must then engage in an “individualized inquiry.” Slip op. at 12, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

One factor this Court found persuasive in making its determination regarding costs on appeal in *Sinclair* was the trial court findings supporting its order of indigency for the purposes of the appeal pursuant to RAP 15.2. *Sinclair*, slip op. at 12-14. Here, the trial court entered the order of indigency and findings supporting its order. As in *Sinclair*, there is no evidence that Mr. Ramos’s financial situation will improve. Slip op. at 14

Mr. Ramos was sentenced to a sentence of 169 months. CP 479. In light of the decision in *Sinclair*, given Mr. Ramos’s lengthy sentence, continued indigency and the fact he has prior felony

convictions which can limit his ability to obtain gainful employment, “[t]here is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs.” Slip op. at 14.

Because of his current and continued indigency and likelihood that he will remain so while in prison and once he is released, Mr. Ramos asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, slip op. at 14.

- b. *Alternatively, this Court must remand to the trial court for a hearing where the court must determine whether Mr. Ramos has the current or future ability to pay.*

Should this Court determine that it cannot make a finding regarding ability to pay because the record is not complete, due process requires this Court to remand to the trial court for a hearing to determine Mr. Ramos’s present or future ability to pay these costs.

Any award of costs becomes part of the Judgment and Sentence, thus amending that document. RCW 10.73.160(3) states that: “An award of costs shall become part of the trial court judgment and sentence.” A defendant has due process rights where the State seeks to modify or amend a Judgment and Sentence, including:

(a) written notice (b) disclosure of evidence against him or her; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the court specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body; and (f) a written statement by the court as to the evidence relied on and reasons for the modification.

State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005),
citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33
L.Ed.2d 484 (1972).

Since adding any costs that might be requested by the State to Mr. Ramos’s Judgment and Sentence necessarily amends the judgment, due process requires that there be a hearing which complies with the dictates of *Abd-Rahmann* regarding his present or future ability to pay. As such, Mr. Ramos requests that, in the absence of a finding by this Court regarding his ability to pay, this Court remand to the trial court for a hearing on his ability to pay.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant and this reply brief, there was insufficient evidence presented to support Mr. Ramos's conviction as an accomplice in Count II. As a result, Mr. Ramos asks this Court to reverse Count II with instructions to dismiss. Alternatively, Mr. Ramos asks to rule that no costs be awarded as a result of this appeal.

DATED this 29th day of February 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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