

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 38540-0-III

On review from the Superior Court of Benton County, no. 21-1-00502-03

STATE OF WASHINGTON, Respondent,

v.

BARAKA ASABA, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

At his sentencing hearing for a second degree burglary conviction, the trial court described Baraka Asaba's choice to contest restitution as victimizing the victim. Because the comment raises an inference that the judge penalized him for exercising his constitutional rights, the case should be remanded for resentencing.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court's sentencing comments raise an inference that it improperly considered Mr. Asaba's exercise of constitutional rights in imposing punishment, requiring resentencing.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the trial court's characterization of Mr. Asaba's choice to hold the State to its burden of proof as "victimizing the victim" is improper.

ISSUE NO. 2: Whether the trial court's comments that Mr.

Asaba had the right to victimize the victim and that he failed to take responsibility for his actions before imposing a maximum length sentence gives rise to an inference that the judge penalized Mr. Asaba's exercise of constitutional rights.

IV. STATEMENT OF THE CASE

A jury convicted Baraka Asaba of second degree burglary against a retail store. CP 1, 72. A security guard saw a vehicle parked behind a building where it should not be, with all four doors and the trunk open and a white man walking around the car. RP 127, 129, 136-37. He told the man to leave and the man walked inside a women's clothing store, saying he had left his phone inside. RP 131-32. A black man in a hooded parka was inside the back of the store, appearing to sort through items. RP 132-34. The men drove away in the car shortly before police arrived, and the security guard was unable to identify the black man in a photo lineup with confidence,

ultimately selecting a photo that was not of Mr. Baraka. RP 133-34, 137-38, 219.

Police recovered an in-store surveillance video that showed a man in a furry hood going through a bag in the lost-and-found that was left by a customer. RP (King) 165, 168-69. By tracing the license plate of the vehicle, police were able to link it with a man who matched the description of the white man at the store. RP (King) 131. They located the vehicle in a park occupied by two men who matched the descriptions of the suspects, one of them wearing a hooded parka. RP (King) 177, 181. Several items of clothing and tags from the items were found in and around the car. RP (King) 189, 192, 193.

After initially giving a false name, the black man ultimately identified himself as Baraka Asaba. RP (King) 182, 185-86. He told police that he had woken up in the vehicle, saw that the other man was not inside and the door of the store was open, so he went inside to look around. RP (King) 185.

He did not admit to taking anything from the store. RP (King) 209. The store manager identified only a few items missing but noted that the lock had been pried off the exterior door, which had an attached alarm system and would cost about \$4,000 to repair. RP (King) 162, 169.

At sentencing, Mr. Asaba did not allocute and contested the State's restitution request. RP (Munoz) 10. The State argued that the victim was upset about the damage, was "perplexed by why this matter had to proceed to trial and why he's required to take time off again to come back and justify his restitution." RP (Munoz) 8. The trial court reserved restitution, but stated,

Mr. Asaba has a right to contest restitution, and while it does victimize the victim more, I appreciate [the State's] presentation. The law provides that Mr. Asaba gets to continue to . . . to victimize the victim, and the Court does not get to hold that against him.

RP (Munoz) 11. It then stated that Mr. Asaba had not accepted responsibility for the matter and imposed the maximum standard range sentence. RP (Munoz) 12.

Mr. Asaba now appeals and has been found indigent for that purpose. CP 103, 107.

V. ARGUMENT

The trial court's characterization of Mr. Asaba's choice to hold the State to its burden of proof as "victimizing" the victim before imposing the maximum sentence allowed gives rise to an inference that it improperly penalized him for exercising his constitutional rights to hold the State to its burden of proof. Because such comments can chill the exercise of the right to trial simply by appearing to penalize it, even if the court did not in fact elevate the penalty, resentencing should be required.

Although a defendant generally may not challenge a sentence within the standard range, he may do so when the

sentence does not comport with minimal constitutional requirements. RCW 9.94A.585(1); *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). “A fair trial in a fair tribunal is a basic requirement of due process” under the Fourteenth Amendment to the U.S. Constitution. *State v. Madry*, 8 Wn. App. 61, 68, 504 P.2d 1156 (1972).

“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). However, more than simply avoiding the improper practice of actually punishing defendants for exercising their rights, courts must avoid even the implication of doing so. “The ‘courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.’” *U.S. v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (*quoting U.S. v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973), *cert. denied*, 411 U.S. 948 (1973)). Indeed,

practices that suggest a greater penalty will result from exercising constitutional rights necessarily chills the exercise of those rights, thereby impairing them. *See Stockwell*, 472 F.2d at 1188; *Medina-Cervantes*, 690 F.2d at 717.

For these reasons, in multiple cases, courts have remanded for resentencing when there is merely an implication, even one that is not entirely clear, that the defendant's choice to stand trial has been considered in imposing punishment. *See, e.g., Hess v. U.S.*, 496 F.2d 936, 938 (8th Cir. 1974) (resentencing ordered when "the tenor of the court's observation is not entirely clear"); *Medina-Cervantes*, 690 F.2d at 716 (statements "clearly give rise to the inference" that the choice to stand trial resulted in more severe punishment); *Stockwell*, 472 F.2d at 1187 (record left unrebutted the inference drawn that more severe punishment was imposed for choosing to stand trial); *Galluci v. State*, 371 So.2d 148, 150 (Ct. App. Fla. 1979), *cert. denied*, 383 So.2d 1194 (Fla. 1980) (statement implied those who demanded trial would be treated

differently than those who did not); *State v. Hass*, 268 N.W.2d 456, 463-64 (N.D. 1978) (comments about defendant's failure to admit implicity and personally address the court suggested court may have substantially relied upon improper factors).

Here, the trial court's comments give rise to the implication that it improperly considered Mr. Asaba's choice to stand trial and to contest restitution in imposing a maximum range sentence. By negatively characterizing the choice as "continuing to . . . victimize the victim" and evidencing a failure to accept responsibility, the comments served to chastise Mr. Asaba for demanding to confront his accuser in a trial and for maintaining his innocence and right to silence, as he had the right to do. The simultaneous handing down of a maximum term sentence with no independent justification further suggests, to Mr. Asaba and all those present in the courtroom, that the exercise of constitutional rights is a harmful choice that will be harshly punished.

For the reasons discussed above, such comments impermissibly chill the constitutional rights of criminal defendants even if the trial court does not actually penalize the defendant more harshly. To avoid the risk of an improper inference that holding the State to its burden of proof constitutes an evasion of responsibility that will be harshly punished, the case should be remanded for resentencing.

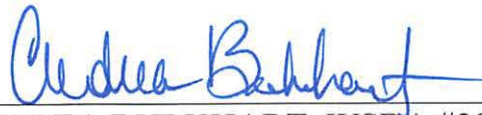
VI. CONCLUSION

For the foregoing reasons, Mr. Asaba respectfully requests that the court VACATE the sentence and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 31 day of May, 2022.

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of the document exempted from the word count by RAP 18.17.*

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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Signed and sworn this 31 day of May, 2022 in
Kennewick, Washington.



Andrea Burkhart