

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DARRYL KOENEN,

Appellant.

No. 40276-9-II

UNPUBLISHED OPINION

Penoyar, J. — Darryl Koenen appeals from an order on costs following his successful self-defense claim against a second degree assault charge. He claims that the trial court erred in denying his claim for wages and bail bond costs. We affirm.

Facts

On January 21, 2009, the State charged Koenen with second degree assault for an event occurring two days earlier, and the trial court issued a bench warrant and set bail at \$100,000. On January 28, 2009, Koenen appeared in court and shortly thereafter paid a ten percent premium (\$10,000) to a bail bond company. Koenen was then released pending trial. At his omnibus hearing and again after the State filed an amended information, Koenen gave notice of his intent to make a self-defense claim along with asserting his right to reimbursement under RCW 9A.16.110(2).¹

¹ RCW 9A.16.110(2) provides:

When a person charged with a crime listed in subsection (1) of this section is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an independent cause of action. To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence. If the trier of fact makes a determination of self-

On April 30, 2009, a jury found him not guilty and, by special verdict, that he had proven self-defense by a preponderance of the evidence. Koenen then submitted a cost bill, seeking reimbursement for (1) the \$10,000 premium to the bail bond company, (2) \$22,775 in attorney fees and costs, (3) \$301 in expert and witness fees, (4) \$6,400 in lost wages (later amended to \$13,032), (5) \$6,906.80 for damage to his home incurred during the search warrant execution, and (6) \$483.64 in motel costs. The trial court granted his request as to the attorney fees and expert and witness fees but denied his other requests, granting judgment of \$23,076.50.

The trial court denied Koenen's claims for the bond premium, damage to his home, and the motel costs as unrelated to his defense. As to the bond premium, the court ruled:

5. The costs associated with the defendant's need to "be free to enjoy life" are not necessary to the defendant's defense. *Anderson, @ 261*^[2]. Accordingly, Mr. Koenen's costs to remain free pending trial, e.g. bail premium, are not allowed under [RCW 9A.16.110(2)].

Clerk's Papers (CP) at 53.

The trial court initially denied Koenen's claim for lost wages because Koenen provided no documentation. Koenen then amended his cost bill to substitute a contract he had to forfeit because he was in trial for his original wage claim. The trial court again denied his request, concluding:

6. Mr. Koenen estimated his lost wages based on the hours he could have worked but for having to be in court defending the charges. Court occurred during normal business hours, always concluding by 4:30 pm. Mr. Koenen would have been expected to spend some time with his attorney after court each day, but not for the full evening. He was self employed and showed no proof of actual lost wages other than estimates for his going rate. At the May 22 hearing, the court preliminarily ruled against Mr. Koenen subject to him providing proper proof of actual loss of wages.

defense, the judge shall determine the amount of the award.

² *State v. Anderson*, 72 Wn. App. 253, 863 P.2d 1370 (1993).

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9. Although Mr. Koenen's Amended Cost Bill and Declaration showed proof of an actual job lost because of having to go to trial. The total loss under this contract was for \$13,032.00. Yet, this job would have taken more time to complete than the time Mr. Koenen was in court. It was lost because Mr. Koenen had to go to court and couldn't finish it within the time set forth in the contract because of having to go to court for trial. Mr. Koenen should not have accepted the job knowing he was going to trial and would not be able to complete the job within the time allotted in the contract. The court therefore denies his request for lost wages because they were not mitigated and are not allowed under RCW 9A.16.110 (2). *Anderson*, @ 262.

CP at 53-55.

Koenen appeals, challenging the trial court's ruling denying reimbursement for the bail bond premium and lost earnings.

analysis

Initially, the State argues that we should not entertain this appeal because Koenen has provided an incomplete record despite it being his burden to do so. *See* RAP 9.2(b); *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993); *State v. Lough*, 70 Wn. App. 302, 335, 853 P.2d 920 (1993). While the verbatim report of proceedings would provide a more complete record for review, it does not appear that the trial court took testimony and it made its decision based on the cost bills, declarations, and trial briefs. As such, we will confine our review to the same.

In *State v. Anderson*, 72 Wn. App. 253, 863 P.2d 1370 (1993), and *State v. Jones*, 92 Wn. App. 555, 964 P.2d 398 (1998), we applied RCW 9A.16.110(2). In *Anderson*, we addressed whether the statute would reimburse defendants for loss of time and legal fees. As to the former, we held that the State must reimburse the defendant for "lawful earnings a defendant would have received but for being prosecuted." 72 Wn. App. at 261. We also held, though, that the State

need not reimburse for loss of “the opportunity to be free to enjoy life.” 72 Wn. App. at 261. While we assumed a defendant could pursue such a claim in a tort action, we held: “By no stretch of the imagination, however, is loss of opportunity to enjoy life a ‘cost’ or ‘expense,’ and it is not compensable under RCW 9A.16.110(2).” 72 Wn. App. 262. We then held that the defendants were not entitled to reimbursement for the time they were incarcerated before trial.³

In *Jones*, 92 Wn. App. 555, we held that the State must reimburse a defendant for all costs and attorney fees reasonably incurred in both pre- and post-trial proceedings as well as from the trial. 92 Wn. App. at 566-67.

Here, Koenen challenges the denial of his bail bond premium and his lost wages. As to the bail bond premium, he claims that the trial court made two errors. First, he argues, the court applied the wrong legal standard when it found that these expenses were not “necessary” to the defense when the statute asks whether it was a “reasonable . . . expense involved in his or her defense.” RCW 9A.16.110(2). Second, he argues that the record does not support the trial court’s finding that he posted bail to “be free to enjoy life.” CP at 53 (quoting *Anderson*, 72 Wn. App. at 262).

We agree with his first contention regarding the legal standard that applies but not that his bail bond premium is recompensable. In our view “involved in his or her defense” means that the expense must be directly related to defending against the charges. While being on bail may keep one employed or allow a defendant to assist counsel with his defense, those are not necessarily the case. We agree with the trial court that the money Koenen spent on his bond premium gave him

³ As to legal fees, we held that the statute was an indemnification-reimbursement statute and a defendant could only be reimbursed for actual legal fees he had personally incurred. 72 Wn. App. at 263-64. Legal fees are not at issue in this appeal.

the liberty to enjoy life. While such an expense might be reimbursable in a tort claim, like the *Anderson* defendants' claims, it is not an expense incurred in defending the charges.⁴ Here, Koenen has not shown that he needed to be out of jail in order to prepare for trial. While he may have spent time assisting in his defense, nothing in the record shows that that release itself made this time avoidable.

We also note that Koenen appears to have abandoned his claim for reimbursement of these expenses in that he did not list them on his amended cost bill. This appears consistent with the July 10, 2009, Clerk's Minutes which has this notation: "Mr. Longacre—Concedes to State, Found No Case Law, Only matter remaining is lost wages." CP at 71. While a complete record might have better explained whether Koenen abandoned this claim, Koenen has not provided that record and the claim is thus not reviewable.

As to his wage claim, the trial court denied Koenen reimbursement because he failed to document an actual wage loss and then, after Koenen amended his reimbursement claim, the trial court denied it because he entered into a contract days before trial, knowing that he would be in trial, and that the job would take more days than the length of trial. The trial court essentially held that because Koenen failed to mitigate, or at least adequately document his actual loss, it would not reimburse him.

Koenen relies on *Jones*, 92 Wn. App. 555, arguing that as an independent contractor, lost opportunity to earn wages is the same as lost wages. He argues that the trial court there awarded

⁴ Koenen argues that "the court ignored substantial evidence that in the record indicating that Mr. Koenen requested bail to avoid time loss so that he could continue working to avoid lost earnings and so that he could personally assist in his defense." Appellant's Br. at 8. The only evidence in the record provided is Koenen's own declaration in which he states: "I was arrested and put in jail for a day before I posted bail. I am self employed and was unable to work." CP at 5.

recompense for lost time and expenses yet Jones's livelihood was running a boat chartering business and a gift shop. But the *Jones* decision does not explain what evidence was presented at the hearing; it simply says that Jones requested over \$15,000 in various expenses, lost time, and lost profits. 92 Wn. App. at 560. It also indicates that the trial court awarded only \$2,839 for Jones's lost time and expenses for the second trial. *Jones*, 92 Wn. App. at 561. *Jones* did not discuss these expenses further and thus *Jones* does not support Koenen's assertions.

We agree with the trial court. The record shows that on April 17, 2009, American Excavating and Landscaping entered into an agreement with Greg Erickson for excavation services and garage construction. The agreement provided that all work was to be completed by May 1, 2009, and the total cost would be \$13,032. The record also contains a letter, dated June 3, 2009, from Greg Erickson asking to be released from his contract:

I'm sorry to hear of your difficulties, and to be adding to them, but I must seek release from our agreement dated April 17, 2009. With the delay due to your other obligations, the work will greatly delay the schedule for my attempt to refinance my home. As we had discussed I have included this letter to meet the obligation of a written release. I also agree to pay the amount of Seven-Hundred and Fifty dollars, for the work that you had begun. I hope everything works out in the future.

CP at 33. While the record shows that Koenen forfeited this contract, it does not show if he was able to find other work to make up for this lost contract. Neither does it show how much time this job would have taken had he been able to complete it and how much actual loss he had because he had to be in court. Further, the record does not show that he tried to negotiate with Erickson for additional time nor does the record explain why Erickson did not seek to get out of the contract until June 3, 2009. While we agree with Koenen that he was entitled to reimbursement for lost wages, his request was not sufficiently specific for the trial court to

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determine what the lost wages were.

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We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Worswick, J.