

FILED  
Aug 25, 2015  
Court of Appeals  
Division I  
State of Washington  
No. 72746-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ISMAEL BUCIO,

Appellant.

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and deprived Ismael Bucio of due process when it entered a conviction in the absence of sufficient evidence

2. The trial court exceeded its statutory authority at sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment requires the State to prove each element of an offense beyond a reasonable doubt. A conviction for residential burglary requires the State prove a person entered a residence with the intent to commit a crime inside. It is insufficient for the State to prove merely a person possessed stolen property after the burglary was committed. Here, the State established only Mr. Bucio was found in possession of a stolen phone a short time after a burglary did the State prove the crime of residential burglary?

2. A trial court may only impose a sentence authorized by statute. Did the sentencing court err when it imposed a condition of community custody which is not authorized by statute?

C. STATEMENT OF THE CASE

Hwansik Kim is a student at Skagit Valley College living in college housing. 11/18/14 RP 53. Mr. Kim returned to his shared apartment and left his wallet and phone in the apartment's common area and went into his bedroom. *Id.* at 55. When he returned 10 minutes later, his phone was not where he had left it although his wallet remained. *Id.* at 56. A few minutes later he realized money had been taken from his wallet. *Id.*

At the urging of his roommate, Mr. Kim used a computer program to track his phone. *Id.* at 56. The program initially showed the phone's location a short distance away and then showed the phone moving to a location about a mile away. 11/17/14 RP 59, 11/18/14 RP at 57-58.

When a police officer arrived Mr. Kim showed him the location of the phone. 11/17/14 RP 58-60. The officer drove to that location and found Mr. Bucio in possession of the phone. *Id.* at 61.

Mr. Bucio was charged with residential burglary. CP 68-69. Mr. Bucio was charged with a two other counts of residential burglary for unrelated campus burglaries, and charged with third degree assault for a struggle that ensued during his arrest on one of those charges. *Id.*

At the close of the State's case, the trial court dismissed one of the burglary counts for the State's failure to prove anything more than that Mr. Bucio possessed stolen property after that burglary occurred. 11/19/14 RP 33. The court denied a motion to dismiss the charge involving Mr. Kim. *Id.* at 34-35.

A jury convicted Mr. Bucio of the two remaining burglary counts and the assault. CP 71-73.

D. ARGUMENT

***1. Because the State did not prove Mr. Bucio committed residential burglary as charged in Count 1 that conviction must be reversed.***

a. The State must prove each element of the charge beyond reasonable doubt.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process "indisputably entitle[s] a criminal defendant to

‘a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

b. The State did not prove that Mr. Bucio entered a dwelling with intent to commit a crime.

“A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025(1). Proof that a person possessed recently stolen property is insufficient to establish burglary. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Instead the State must offer some additional evidence to establish the person entered the place where the item was stolen. *Id* (quoting *State v. Portee*, 25 Wn.2d 246, 253–54, 170 P.2d 326 (1946)).

Here the State only proved Mr. Bucio was in possession of Mr. Kim’s phone sometime after Mr. Kim noticed it missing. Mr. Kim testified he used a program to track his phone. When he first started the program it indicated the phone was in the vicinity of the campus and then moved some distance away. Mr. Kim showed the responding officer the location of the phone as indicated by the program. Mr. Bucio was found at the location. However, this evidence only establishes Mr. Bucio came into

possession of the phone at some point near the apartment. The evidence does not establish Mr. Bucio ever entered Mr. Kim's apartment. Mr. Bucio's conviction should be reversed.

c. This Court should reverse Mr. Bucio's conviction on Count 1.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Green*, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove Mr. Bucio entered Mr. Kim's apartment the Court must reverse his conviction. *Mace*, 97 Wn.2d at 843

***2. The court exceeded its sentencing authority by imposing a condition of community custody that Mr. Bucio not possesses controlled substances without regard to whether it is pursuant to a lawful prescription.***

When a person is convicted of a felony, the sentencing court may impose punishment only as authorized by the statute. RCW 9.94A.505(1); *In re Postsentence Review of Leach*, 161 Wn.2d 180,



184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature).

RCW 9.94A.703 sets forth a number of conditions of community custody categorized as mandatory, waivable, and discretionary. The discretionary conditions include “crime-related prohibitions.” RCW 9.94A.703(3)(f). Among the waivable conditions, those that are imposed unless expressly waived by the court, is a condition that a person refrain from possessing controlled substances except with a lawful prescription. RCW 9.94A.703(2)(c). That condition was imposed in Mr. Bucio’s case. CP 54. Mr. Bucio does not challenge that condition.

Instead, in addition to the waivable condition, the court imposed a condition that provides “No use of controlled substances.” *Id.* This condition makes no exception for lawfully prescribed medication. Thus, Mr. Bucio would violate the condition by filling a needed prescription. Mr. Bucio could never undergo surgery unless he elected to relive the drug-free experience of 19<sup>th</sup> Century patients, with the corresponding pain and infection risk.

Beyond its breadth, the condition is not crime related. While there was evidence that Mr. Bucio was using illegal drugs, there was no evidence that prescribed medication played any role in his crimes.

Because it is not crime-related and is extraordinarily broad, the condition of “No use of controlled substance” should be stricken.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Bucio’s conviction on Count 1 and strike the improper condition of community custody.

Respectfully submitted this 25<sup>th</sup> day of August, 2014.

*s/ Gregory C. Link*

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v.	)	NO. 72746-0-I
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	)	
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING 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:

- |   |                            |  |
|---|----------------------------|--|
| <p>[X] ERIK PEDERSEN, DPA<br/>SKAGIT COUNTY PROSECUTOR'S OFFICE<br/>COURTHOUSE ANNEX<br/>605 S THIRD ST.<br/>MOUNT VERNON, WA 98273</p> | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |
| <p>[X] ISMAEL BUCIO<br/>361632<br/>AIRWAY HEIGHTS CORRECTIONS CENTER<br/>PO BOX 2049<br/>AIRWAY HEIGHTS, WA 99001</p>                   | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |

**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF AUGUST, 2015.

X \_\_\_\_\_  


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