

FILED
June 2, 2015
Court of Appeals
Division III
State of Washington

NO. 33098-2-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,
V.
ANDREW JACKSON GILBERT,
Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. Andrew Jackson Gilbert's conviction for attempting to elude a pursuing police vehicle is invalid.

2. Defense counsel was ineffective in his representation at Mr. Gilbert's sentencing hearing.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does *State v. Rooth*, 129 Wn. App. 761, 121 P.3d 755 (2005), require reversal and dismissal of Mr. Gilbert's felony eluding conviction?

2. Was defense counsel ineffective in failing to advise the trial court of the *Rooth* case?

STATEMENT OF CASE

Sergeant Sursely of the Moses Lake Police Department was on duty on the evening of August 26, 2014. There had been a report of a loud motorcycle with two (2) riders. One of the riders was wearing a backpack. (RP 104, ll. 9-10; RP 105, ll. 2-3; ll. 16-25)

The sergeant observed the motorcycle and began to follow it. As the motorcycle increased its speed he activated his lights and siren. (RP 107, ll. 16-23)

A pursuit ensued for two (2) minutes forty-nine (49) seconds. The motorcycle and patrol car were traveling at excessive speeds in residential areas. The motorcycle also failed to stop at an intersection. (RP 108, ll. 17-21; RP 109, ll. 6-13; RP 110, ll. 2-8; RP 112, ll. 20-21)

The only identifying information that the sergeant was able to confirm was that the two riders were wearing helmets and dressed in black clothes. (RP 159, ll. 10-20)

Sergeant Sursely ceased pursuit due to the excessive speeds. (RP 109, ll. 15-21)

After midnight, Officer McCain of the Moses Lake Police Department saw a motorcycle with two (2) people near a pickup. As he approached it it took off at a high rate of speed. It did not stop for his lights or siren. (RP 197, ll. 1-2; RP 205, ll. 6-11; RP 208, ll. 1-7; ll. 13-17)

Officer McCain did not know if this was the same motorcycle that Sergeant Sursely had heard. He had been hearing a motorcycle throughout the evening. (RP 199, ll. 14-15; RP 240, ll. 19-22)

As the pursuit continued the motorcycle failed to stop at an intersection. It later went up on a canal bank and became stuck in a ditch.

When it emerged from the ditch it slid and slightly impacted his patrol car. (RP 199, ll. 14-15; RP 215, ll. 20-23; RP 219, ll. 8-11; RP 219, l. 20 to RP 220, l. 13)

Officer McCain recognized the driver of the motorcycle as Mr. Gilbert. He was not wearing a helmet. (RP 221, ll. 5-20)

An Information was filed on August 27, 2014 charging Mr. Gilbert with one (1) count of attempting to elude a pursuing police vehicle with an enhancement and one (1) count of second degree vehicle prowling. (CP 1)

An Amended Information was filed on October 6, 2014 adding a second count of attempting to elude a pursuing police vehicle. It (Count I) referred to the events of August 26 involving Sergeant Sursely. Count II involved Officer McCain. It included the enhancement. Count III was the vehicle prowl. (CP 27)

A Second Amended Information was filed on October 22, 2014 adding accomplice liability to the second degree vehicle prowling count. (CP 35)

Defense counsel moved for a dismissal of Count I after the State rested. The trial court granted the motion. (RP 282, l. 10; RP 302, ll. 9-14)

Defense counsel's motion for dismissal of the enhancement on Count II was denied. (RP 302, ll. 2-6)

Prior to closing argument the trial court advised the jury that one (1) count had been dismissed. The Court stated: “You’ll see that reflected in the jury instructions.” (RP 309, ll. 19-23)

The prosecuting attorney, during his closing argument, referenced Count I as to both the verdict form and special verdict form. (RP 325, l. 4 to RP 339, l. 25)

Defense counsel conceded that Mr. Gilbert was guilty of attempting to elude a pursuing police vehicle on August 27, 2014. He only challenged the enhancement on Count II. (RP 340, ll. 10-21; CP 144)

The to-convict instruction on attempting to elude a pursuing police vehicle (Instruction 12) referred to Count I. Both the verdict form and special verdict form referred to Count I. (RP 317, l. 21 to RP 318, 22; RP 323, ll. 17-20; CP 112; CP 122; CP 124; Appendix “A”; Appendix “B”; Appendix “C”)

The jury found Mr. Gilbert guilty of Counts I and III. (CP 122; CP 123)

The jury was polled on both convictions as well as the special verdict form. The jury was unanimous in its decision. (RP 368, l. 16 to RP 370, 20; RP 372, l. 24 to RP 375, l. 9)

Judgment and Sentence was entered on January 20, 2015. It refers to the Count I conviction. Paragraph 2.3 deals with the enhancement. Mr.

Gilbert was sentenced to a term of forty-one (41) months in prison. During the sentencing hearing the trial court referred to Count I on two (2) occasions. (RP 380, ll. 17-19; RP 385, ll. 11-12)

Mr. Gilbert filed his Notice of Appeal on January 20, 2015. (CP 163)

SUMMARY OF ARGUMENT

State v. Rooth, supra, controls the issue presented. Due to instructional error the jury determined that Mr. Gilbert was guilty of an offense that had been dismissed.

Defense counsel was ineffective in not addressing the *Rooth* case at sentencing.

Mr. Gilbert's conviction for attempting to elude a pursuing police vehicle needs to be reversed and dismissed.

ARGUMENT

I. INVALID CONVICTION

The jury instructions reference Count I. Count I in the original Information involved the August 27, 2014 felony elude with the enhancement.

However, the Amended Information and the Second Amended Information moved Count I of the original Information to Count II.

The jury determined that Mr. Gilbert was guilty of Count I. Count I, which was dismissed, involved the felony elude on August 26, 2014.

“... [S]ince the jury was polled, there is no doubt that the verdict *was* unanimous and *was* the result of each juror’s individual determination.” *State v. Mickens*, 61 Wn.(2d) 83, 87, 377 P.(2d) 240 (1962).

State v. Rooth, supra, is a strikingly similar case. It involved two (2) counts of unlawful possession of a firearm. One (1) was a 9mm handgun. The other was a .22 caliber handgun.

In closing argument the State conceded that there was insufficient evidence to convict on the .22 caliber.

The *Rooth* court noted at 769-70:

The jury seemingly returned verdicts of acquitting Rooth of unlawful possession the .22 caliber in finding him guilty of possession of the 9mm in conformity with the instructions and the closing arguments. But the Count I verdict form stated: “We, the jury, find the defendant [n]ot [g]uilty of the crime of Unlawful Possession of a Firearm in the First Degree *as charged in Count One.*” ... The Count II verdict form stated: “We, the jury, find the defendant [g]uilty of the crime of Unlawful Possession of a Firearm in the First Degree *as charged*

in Count Two.” ... The jury verdicts addressed the information, not the “to-convict” instructions or the arguments. Thus, the verdicts do not correspond with either the erroneous closing arguments or the erroneous “to-convict” instructions that incorrectly stated the elements in the information.

Since the trial court, in this case, dismissed Count I of the Second Amended Information, the only remaining counts for the jury’s consideration were Counts II and III. Yet, the jury instructions referenced Count I, as did the verdict forms.

The State, in the *Rooth* case, argued that the error was clerical in nature and that the judgment and sentence could be corrected pursuant to CrR 7.8. The Court ruled at 770-71:

In *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996), the court set forth the review necessary to determine whether an error is clerical or judicial. The court looks at “whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial” to determine if the error is clerical. *Presidential*, 129 Wn.2d at 326. If it does, then the amended judgment merely corrects the language to reflect the court’s intention or adds the language the court inadvertently omitted. *Presidential*, 129 Wn.2d at 326. If it does not, then the error is judicial and the court cannot amend the judgment and sentence. *Presidential*, 129 Wn.2d at 326.

Here, the trial court's judgment followed a jury trial, not a bench trial. The trial court sentenced according to the jury's verdicts, which the State alleges were incorrect because of clerical error. Nothing in the record indicates that the trial court intended to sentence in accord with the information but, through some clerical error, it wrongfully sentenced Rooth. Perhaps if the verdict forms had identified the firearm, *i.e.*, the .22 caliber handgun or the 9mm handgun, there would be a basis to address clerical error. But that is not evident from the record. And "an intentional act of the court, even if in error, cannot be corrected under [CrR 7.8]." *Wilson v. Henkle*, 45 Wn. App. 162, 167, 724 P.2d 1069 (1986). The error in the instructions and the judgment and sentence were judicial errors, not clerical errors.

Mr. Rooth's convictions were reversed and the case dismissed.

Moreover, in *State v. Pharr*, 131 Wn. App. 119, 124, 126 P.3d 66

(2006), the Court ruled that a

... judge's sentencing authority is limited to "the facts reflected in the jury verdict." The jury is presumed to follow the instructions given. Thus, verdicts incorporate the instructions on which they are grounded and reflect the facts required to be found as a basis for decision.

The *Rooth* remedy should be applied in Mr. Gilbert's case.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Gilbert contends that his trial counsel was ineffective insofar

as closing argument and sentencing are concerned. Defense counsel conceded that Mr. Gilbert was guilty of attempting to elude a pursuing police vehicle on August 27, 2014.

Defense counsel appears to have been unaware of *State v. Rooth*, *supra*.

Defense counsel seemed to have been unaware of the mistakes in the jury instructions and verdict forms.

Mr. Gilbert has been convicted of a crime which the trial court dismissed upon defense counsel's motion.

To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). **We have held that failure to object to an instruction which incorrectly sets out the elements of the crime with which the defendant is charged was deficient performance where the failure to object permitted the defendant to be convicted of a crime he or she could not have committed under facts presented by the State.** *State v. Ermert*, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980).

State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). (Emphasis supplied.)

Defense counsel's failure in this case resulted in a conviction which is invalid. Mr. Gilbert could not be convicted of Count I due to its prior dismissal.

CONCLUSION

Conviction of an invalid crime requires reversal and dismissal of the conviction.

Alternatively, if Mr. Gilbert's conviction is not reversed and dismissed, he is entitled to a new trial due to defense counsel's ineffective representation of him under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

DATED this 2nd day of June, 2015.

Respectfully submitted,

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APPENDIX “A”

Instruction No. 12

To convict the defendant of attempting to elude a pursuing police vehicle as charged in count one, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 27, 2014, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his or her vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “B”

MARLA WEBB
FILED

OCT 24 2014

KIMBERLY A. ALLEN
GRANT COUNTY CLERK



07-775832

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ANDREW JACKSON GILBERT, JR.,

Defendant.

No. 14-1-00579-5

VERDICT FORM A

ORIGINAL

We, the jury, find the defendant, Andrew Jackson Gilbert, Jr.,

GUILTY of the crime of attempting to elude as charged in
(write in not guilty or guilty)

count one.

DATED: 10-24-14

James H. Meier
Presiding Juror

APPENDIX “C”

MARLA WEBB
FILED

OCT 24 2014

KIMBERLY A. ALLEN
GRANT COUNTY CLERK



07-775830

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ANDREW JACKSON GILBERT, JR.,

Defendant.

No. 14-1-00579-5

SPECIAL VERDICT FORM

ORIGINAL

We, the jury, answer the question submitted by the court as follows:

QUESTION: Was any person, other than Andrew Jackson Gilbert, Jr. or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Andrew Jackson Gilbert, Jr. during his commission of the crime of attempting to elude a police vehicle as charged in count one?

ANSWER: YES (Write "yes" or "no")

DATE: 10-24-14

James H. Mercer
Presiding Juror