No. 96078-0



IN THE
WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

JIMMY NEWSOM,

Petitioner.

PETITION FOR REVIEW
From:
Washington Court of Appeals
Division II

No. 50256-9-II

JIMMY NEWSOM #
Stafford Creek Corr. Center
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Aberdeen, WA 98520

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A. Identity of Moving Party

Movant JIMMY NEWSOM, [hereinafter petitioner] requests this Honorable Court to review the Court of Appeals, Division II, decision designated in part B below.

B. Court of Appeals Decision

The Court of Appeals, Division II, affirmed the judgment of the trial court against petitioner in an unpublished decision. A copy of the decision is attached here as Appendix "A".

C. Issues Presented for Review

1. Whether the Court of Appeals Erred in Concluding That Sufficient Evidence Supported the Defendant's Conviction for First Degree Possession of a Firearm Where the State Failed to Meet its burden of Proving that the Jimmy Newsom With a Serious Offense Out of Oregon Was the Petitioner?

D. Statement of the Case

(a) Procedural & Substantive Facts

Petitioner was tried and convicted in Clark County Superior Court of second degree unlawful possession of a firearm, first degree unlawful possession of a firearm, and possession of heroin. RP 304-334, 336-341, CP 86-90.

The facts set out in the Statement of the Case in petitioner's Opening Brief are incorporated here by reference and other pertinent facts are developed in argument below.

E. Argument Why Review Should Be Accepted

I. THE COURT OF APPEALS HOLDING THAT SUFFICIENT EVIDENCE SUPPORTED THAT PETITIONER HAD BEEN PREVIOUSLY CONVICTED OF A SERIOUS OFFENSE CONFLICTS WITH DECISIONS OF OTHER COURT'S OF APPEALS AND RAISES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE REVIEWED. RAP 13.4(b)(2),(3)

The Constitutional test for determining the sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 1781 (1979). The Due Process Clause requires the government to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. In Re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 3668, 90 S.Ct. 1068 (1979).

The Winship reasonable doubt standard protects three Fundamental interests. First, it protects the defendant's interest in being free from unjustified loss of liberty. Second it protects the defendant from the stigmatization resulting from convictions. Third, it engenders community confidence in the criminal law by giving "concrete

substance" to the presumption of innocence. Id., at 363-64. In this regard, the Winship Court held:

> "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

In Re Winship, 397 U.S. at 364. Justice Harlan further noted in Winship that the standard is "bottomed on a Fundamental value determination of Our Society that it is far worse to convict an innocent man than let a guilty man go free." Id., at 372 (Harlan, J. concurring).

The Winship requirement applies to elements that distinguish a more serious crime from a less serious one, as well as those elements that distinguish criminal from non-criminal conduct.

A conviction based on evidence that fails to meet the Winship standard "is an independent constitutional violation". Herraro v. Collins, 506 U.S. 390, 402 (1993); Bunkley v. Florida, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1048 (2003).

In this case, the state charged the defendant in count IV with first degree unlawful possession of a firearm under RCW 9.41.040(1)(a). CP 36

The statute provides:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having been previously been convicted or found not guilty by reason of insanity in his state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a).

Thus, in count IV, the state had the burden of proving both that the defendant possessed a firearm and that he has a prior conviction for a "serious offense". Thus, in this case, the Court cannot sustain the defendant's conviction for first degree unlawful possession of a firearm if substantial evidence does not support the conclusion that the defendant has a prior conviction for a "serious offense."

In State v. Hunter, 29 Wn.App. 218, 627 P.2d 1339 (1981), the court addressed the issue of what constitutes substantial evidence on the issue of identity. In Hunter the state charged the defendant with attempted escape, alleging that he had tried to leave the jail where he was incarcerated pursuant to a felony conviction. In order to prove that

the defendant was being held "pursuant to a felony conviction," the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named "Dallas E. Hunter" as the defendant. On appeal defendant argued that the trial court erred when it admitted the judgments because the state failed to present evidence that defendant was the person identified therein.

The Hunter court noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant's name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. Hunter, Id., at 221.

The court of appeals here held:

> Although identity of names is not sufficient to prove that the Newsom was the "Jimmy Newsom" named in the Oregon conviction, identity of names was not the only evidence the State presented. The State also presented evidence showing that the birthdate of the "Jimmy Newsom" in the Oregon matter was identical to Newsom's birthdate. In addition, the State presented evidence through Shannon's testimony

> that the signatures on the Oregon documents were similar to the signatures on the Washington documents. And Shannon had first-hand knowledge that the defendant in the Washington matter was Newsom. This evidence, taken in the light most favorable to the State, was sufficient to allow the jury to conclude that Newsom was the person who had been convicted in Oregon. Accordingly, this argument fails.

COURT OF APPEALS UNPUBLISHED OPINION at 6-7. For the reasons which follow, the Court should reject the court of appeals decision and grant review. RAP 13.4(b)(2),(3).

First, the fact Shannon testified that the signatures on the Oregon documents were similar to the signatures on the Washington documents, and he had first-hand knowledge that the defendant in the Washington matter was petitioner, adds nothing to prove that petitioner was the defendant in the Oregon matter, Shannon had no first-hand knowledge that the defendant in the Oregon matter was petitioner, thus, identity was not proven by Shannon's testimony.[1]

Secondly, a lay person's testimony that a signature is similar is insufficient. It is well established that handwriting examinations by "experts" have error rates on average around 40% and sometimes approach 100%. See United States v. Starzecpyzel, 880 F.Supp. 1027, 1038

1 Shannon was the prosecutor in the Washington case in which petitioner plead guilty. He is not an expert in handwriting analysis, thus, his observation that the signatures were similar carries very little weight. See RP 221-233

(S.D.N.Y. 1995)(McKeena,J.)("the testimony at the Daubert hearing firmly established that forensic document examination, despite the existence of a certification program, professional journals, and other trappings of science, cannot, after Daubert, be regarded as scientific . . . knowledge"); United States v. Hines, 55 F.Supp.2d 62, 69-71 (ruling that a handwriting expert may not give an ultimate conclusion on the author of a robbery note, and remarking that "[t]here is no academic field known as handwriting analysis," as "[t]his is a 'field' that has little efficacy outside of a courtroom").

As Shannon's testimony did not prove petitioner was the defendant in the Oregon serious offense, and name alone is insufficient,[2] the state failed to meet its burden and petitioner's conviction on the first degree possession of a firearm charge must be dismissed with prejudice. State v. Huber, 129 Wn.App. 499, 502 (2005); Hunter, 29 Wn.App. at 221.

Finally, the court of appeals decision in this case is in conflict with both Huber and Hunter warranting review by this Court. RAP 13.4(b)(2), (3).

[2] The fact that the birthdates in the Oregon and Washington judgments and sentences are the same is not conclusive evidence of identity. As is well know in this day and age identity theft is common.

F. Conclusion

For the reasons stated herein, and in the previous submissions the Court should Grant Review and Reverse petitioner's conviction for first degree possession of a firearm.

DATED this 11th day of July, 2018.

Respectfully submitted,

Jimmy Newsom

JIMMY NEWSOM
Petitioner

Filed
Washington State
Court of Appeals
Division Two

June 19, 2018

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JIMMY NEWSOM,<br><br>Appellant. | No. 50256-9-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

SUTTON, J. — Jimmy Newsom appeals his jury trial conviction for first degree unlawful possession of a firearm,[1] his consecutive sentences, and a no contact order that was part of his judgment and sentence. He argues that (1) the evidence was insufficient to support the first degree unlawful possession of a firearm conviction because the State failed to prove that he was the person who committed the prior serious offense that the State relied on, (2) the trial court erred in running his sentences under this cause number consecutive to other sentences imposed the same day under two other cause numbers, and (3) the trial court exceeded its authority by imposing a no contact order when the protected party was not a victim of the convicted offense.

The State concedes that the trial court erred when it imposed consecutive sentences without entering a finding supporting an exceptional sentence. We accept the State's concession. We further hold that the evidence was sufficient to support the first degree unlawful possession of a

[1] Newsom was also convicted of unlawful possession of a controlled substance—heroin. That conviction is not at issue on appeal.

Appendix "A"

firearm conviction and that the trial court had the authority to restrain Newsom's contact with a witness. Accordingly, we affirm the conviction and the no contact order, but we vacate the sentence and remand for resentencing.

## FACTS

### I. BACKGROUND

On August 27, 2016, Vancouver Police Officer Ron Stevens was on patrol when he observed Tyler Lawhead chasing Newsom on foot. Officer Stevens attempted to follow them in his vehicle, but he lost sight of them. Eventually, Officer Stevens located the two men.

According to Officer Stevens, when he asked Lawhead what was going on, Lawhead stated that Newsom had a small gun that had appeared to be silver. Lawhead accused Newsom and another man of stealing his (Lawhead's) car and a backpack full of his possessions. Lawhead stated that he later located Newsom and started to chase Newsom. This was when Officer Stevens saw them.

Officers arrested Newsom when they learned that he had an outstanding arrest warrant. The arresting officers found heroin on Newsom's person when they searched him. After the officers put Newsom into Officer Stevens's vehicle, they noticed a small, silver pistol on the ground next to the curb. Newsom denied knowing anything about the gun.

## II. PROCEDURE

### A. TRIAL

The State charged Newsom with first degree robbery, unlawful possession of a controlled substance—heroin, second degree unlawful possession of a firearm, and first degree unlawful possession of firearm. The State's witnesses testified as described above.

In addition, at trial, Lawhead denied telling Officer Stevens that he (Lawhead) had seen Newsom with a gun. But Lawhead admitted that he told Officer Stevens that "there might be a gun" because Newsom had previously gestured towards his waistline as if he had a gun. 1 Report of Proceeding (RP) at 119; 2 RP at 275.

Clark County Deputy Prosecutor Robert Shannon testified in support of the unlawful possession of a firearm charges. Shannon testified that he knew Newsom from previous contacts. Shannon then identified exhibit 19, a July 22, 2016 information from Clark County. This information charged "Jimmy Newsom" with unlawful possession of a controlled substance—heroin, unlawful possession of a controlled substance—methamphetamine, two counts of second degree possession of stolen property, and one count of forgery. The information stated that Newsom's birthdate was September 12, 1981.

Shannon also identified exhibit 20, a statement of defendant on plea of guilty, in which "Jimmy Newsom" pleaded guilty to the charges in the July 22, 2016 Clark County information. Shannon testified that the July 22, 2016 Clark County plea statement included a statement of Newsom's criminal history and that this history included Oregon convictions. Shannon also testified that he was the prosecutor who had "handled" the July 22, 2016 Clark County plea. 2 RP

at 224-25. The July 22, 2016 plea statement also contained Newsom's signature, which Shannon stated, "[I]t looks like a 'JN' as a signature." 2 RP at 226.

Shannon then identified exhibit 16, which he described as a Multnomah County, Oregon indictment for unlawful delivery of cocaine and unlawful possession of cocaine naming "Jimmy Newsom," born September 12, 1981, as the defendant. 2 RP at 227-28. Shannon next identified exhibits 17 and 18, the guilty plea and judgment for the Oregon matter charged in exhibit 16. Exhibits 17 and 18 named "Jimmy Newsom" as the defendant. 2 RP at 229-30. And Shannon testified that the defendant's signature on exhibit 17 was a "'JN' signature . . . similar to the one" on the Clark County plea statement. 2 RP at 229.

The trial court admitted exhibits 16, 17, 18, and 19. The trial court later admitted a redacted version of exhibit 20, the July 22, 2016 Clark County plea statement of defendant, as exhibit 20A. It appears that the trial court had the references to Newsom's "drug court" contact, his criminal history, and his offender score redacted from Exhibit 20A.[2] 2 RP at 242-43.

In closing argument, the State argued that the first degree unlawful possession of a firearm charge was based on the underlying prior conviction from Oregon. It noted the defendant in the Oregon conviction had the same name and birth date as Newsom.

The jury found Newsom guilty of unlawful possession of a controlled substance—heroin, second degree unlawful possession of a firearm, and first degree unlawful possession of a firearm.[3] The parties later agreed to dismiss the second degree unlawful possession of a firearm conviction.

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[2] Exhibit 20A is not included in the appellate record.

[3] The jury found Newson not guilty of first degree robbery.

B. SENTENCING

During the sentencing hearing, the trial court sentenced Newsom on the current convictions and also under the two separate Clark County drug court cases. The trial court ran the sentences for the two drug court cases concurrent to each other and ran the sentences for Newsom's new convictions concurrent to each other. But the trial court ran the sentence for his new convictions consecutive to the sentences in the two drug court cases.

When imposing the consecutive sentences, the trial court stated, "[I]t's the only thing that makes any sense. I mean, they gave you drug court and you violated every condition of your drug court issue, and they had already entered the plea and you knew what the sentencing range was for that." 2 RP at 354. In the judgment and sentence for these offenses, the trial court did not state that it was imposing an exceptional sentence or that it found substantial and compelling reasons to justify an exceptional sentence. Nor did it give an oral ruling or enter any written findings supporting an exceptional sentence. The trial court also ordered that Newsom have no contact with Lawhead.

Newsom appeals his first degree unlawful possession of a firearm conviction, the consecutive sentences, and the no contact order.

## ANALYSIS

### I. SUFFICIENT EVIDENCE: FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM

Newsom first argues that the evidence was insufficient to support the first degree unlawful possession of firearm conviction because the State did not prove that he was the person named in the Oregon conviction. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

To prove that Newsom committed first degree unlawful possession of a firearm, the State had to prove that he had previously been convicted of a "serious offense." RCW 9.41.040(1)(a). Newsom does not dispute that the Oregon offense qualifies as a "serious offense as [defined] in" chapter 9.41 RCW. *See* Br. of Appellant at 15. Instead, he argues that there was insufficient evidence to prove that he was the person convicted of the Oregon offense.

As Newsom correctly argues, when a prior judgment is an element of the current crime charged, identity of names alone is not sufficient proof to establish that the person named in the prior judgment is the defendant. *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005); *see also State v. Hunter*, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981). But "[t]he State can meet [its] burden in a variety of specific ways," including the presence of "distinctive personal information." *Huber*, 129 Wn. App. at 502.

Although identity of names alone is not sufficient to prove that the Newsom was the "Jimmy Newsom" named in the Oregon conviction, identity of names was not the only evidence the State presented. The State also presented evidence showing that the birthdate of the "Jimmy Newsom" in the Oregon matter was identical to Newsom's birthdate. In addition, the State presented evidence through Shannon's testimony that the signatures on the Oregon documents

were similar to the signatures on the Washington documents.[4] And Shannon had first-hand knowledge that the defendant in the Washington matter was Newsom. This evidence, taken in the light most favorable to the State, was sufficient to allow the jury to conclude that Newsom was the person who had been convicted in Oregon. Accordingly, this argument fails.

## II. CONSECUTIVE SENTENCE

Newsom next argues that the trial court erred when it imposed a consecutive sentence without entering findings of fact supporting an exceptional sentence. The State concedes that this was error.

The trial court sentenced Newsom for these convictions and two additional sets of convictions on the same day. Because they were all sentenced on the same day, all of these convictions were considered current offenses. RCW 9.94A.525(1); *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 507-08, 301 P.3d 450 (2013). Under RCW 9.94A.589(1)(a), when a person is sentenced to multiple current offenses, the trial court must impose concurrent sentences unless it complies with the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a). Thus, if the trial court chooses to impose an exceptional sentence, the trial court must "'set forth the reasons for its decision in written findings of fact and conclusions of law.'" *State v. Shemesh*, 187 Wn. App. 136, 148, 347 P.3d 1096 (2015) (quoting RCW 9.94A.535).

[4] Although it is unclear whether the signature on exhibit 20 was redacted in exhibit 20A because 20A is not in our record, Shannon testified that the signature on exhibit 20 was similar to that on exhibit 17.

Here, it is unclear whether the trial court thought that (1) the drug court convictions were other current offenses and failed to enter findings of fact justifying an exceptional sentence or (2) whether the court thought that the drug court offenses were not other current offenses and, therefore, not subject to RCW 9.94.589(1)(a). Because the trial court's intent was unclear, we vacate the consecutive sentence and remand for resentencing. If the trial court intended to impose an exceptional sentence, it must enter written findings supporting the exceptional sentence. *See State v. Friedlund*, 182 Wn.2d 388, 394-95, 341 P.3d 280 (2015).

## III. No Contact Order Authorized

Finally, Newsom argues that the trial court exceeded its authority when it entered a no contact order prohibiting Newsom from contacting Lawhead. Newsom contends that this was not a crime-related prohibition because the jury acquitted him of the crime in which Lawhead was the victim. We disagree.

Trial courts have the authority to impose crime-related prohibitions and affirmative conditions, including no contact orders regarding witnesses. *State v. Armendariz*, 160 Wn.2d 106, 113, 156 P.3d 201 (2007); *State v. Navarro*, 188 Wn. App. 550, 556-57, 354 P.3d 22 (2015); RCW 9.94A.505(9). Lawhead provided testimony related to the unlawful possession of a firearm charges, not just the first degree robbery charge. Thus, Lawhead was a witness to the unlawful possession of a firearm charge and the no contact order was an authorized crime-related prohibition. Accordingly, this argument fails.

We affirm the convictions and no contact order, vacate the sentence, and remand for resentencing.

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 in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Johanson, J.

JOHANSON, P.J.

Bjorgen, J.

BJORGEN, J.

## Certificate of Service

I, Jimmy Newsom, declare, certify and state under penalty of perjury under the laws of the United States of America and of the State of Washington that on the 11th day of July, 2018 I deposited into the United States Mail (postage pre-paid) a copy of PETITIONER'S PETITION FOR REVIEW: addressed to: Clark County Prosecutor, Kelly M. Ryan, 1013 Franklin Street, Vancouver, WA 98666-5000

SIGNATURE OF PETITIONER

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