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JUL 13 2009

King County Prosecutor
Appellate Unit

NO. 62791-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AZIZUDDIN SALAHUD-DIN,
Appellant.

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2009 JUL 13 PM 3:46

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

The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The state violated the appellant's constitutional rights under article I, section 22 of the Washington Constitution¹ and the Sixth Amendment to the federal constitution² as well as his right under CrR 2.1(a)(1,³ by charging him with second degree burglary without alleging the essential element of the ownership or occupancy of the burglarized building.

Issue Pertaining to Assignment of Error

Did the state violate article I, section 22 of the Washington Constitution and the Sixth Amendment, as well as CrR 2.1(a)(1, by charging the appellant with second degree burglary without alleging the essential elements of the ownership or occupancy of the burglarized building?

¹ "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him[.]"

² "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation[.]"

³ The . . . information shall be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." *State v. Borrero*, 147 Wn.2d 353, 359, 58 P.3d 245 (2002).

B. STATEMENT OF THE CASE

Frank Graves entered his unlocked garage to access his car for his drive to work. 2RP 8-9.⁴ He opened the electric overhead door and turned the garage light on. 2RP 8-9. The passenger door to his car was open. He observed the appellant, Azizuddin Salahud-Din, passed out in the passenger seat. 2RP 8-10. Graves went back into his home and called police. 2RP 10-11.

Officer Larned and a colleague responded to Graves's residence. 2RP 18-21. Larned went directly to the open garage and observed Salahud-Din sleeping in a car. 2RP 22-23. He approached Salahud-Din and observed what appeared to be a used needle on the car's floor between Salahud-Din's feet. 2RP 23-26. Larned awakened Salahud-Din, walked him out to his patrol car, frisked him for weapons, and arrested him for trespass. 2RP 23-24.

During a search incident to arrest, Larned removed an iPod and sunglasses from one of Salahud-Din's pockets. 2RP 24-25. In another pocket Larned found three apparently unused needles. 2RP 25. Salahud-Din said the iPod and glasses were not his and must belong to the car's

⁴ The three-volume verbatim report of proceedings is referred to as follows: 1RP -- 11/4/2008; 2RP -- 11/5/2008; 3RP 12/10/2008.

owner. 2RP 25. At that point, Larned informed Salahud-Din he was arresting him for burglary. 2RP 26.

Salahud-Din was a heroin addict. 2RP 33-34. He did not know how he got to Graves's home and into his garage and car. 2RP 32-33, 40. He said he must have used too much heroin before being awakened by Larned. 2RP 34. Salahud-Din said he often overimbibed, which caused a kind of unconsciousness, "like borderline dying." 2RP 34-36. He did not know he put the iPod and glasses in his pocket. 2RP 37. He had no intent to take anything. 2RP 40-41.

The state charged Salahud-Din with second degree burglary in the following language:

[Salahud-Din] . . . did enter and remain unlawfully in a building, located at 4180 42nd Avenue NE, Seattle . . . with intent to commit a crime against a person or property therein . . .

CP 5.

Salahud-Din did not challenge the wording of the state's charge. His defense theory was diminished capacity caused by heroin intoxication. 2RP 68-72. The trial court instructed the jury it could consider evidence of intoxication in determining whether Salahud-Din acted intentionally. CP 23. The court also provided instructions for first degree criminal trespass as a lesser offense of second degree burglary. CP 25-28.

A King County jury found Salahud-Din guilty of second degree burglary. CP 7. The trial court imposed a standard range sentence. CP 39-46.

C. ARGUMENT

THE SECOND DEGREE BURGLARY CHARGE MUST BE DISMISSED BECAUSE THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF OWNERSHIP OR OCCUPANCY.

An information charging burglary must allege the ownership or occupancy of the premises broken into so as to negate the defendant's right to enter. The information charging Salahud-Din with burglary failed to allege either ownership or occupancy. Because even under a liberal reading of the information the element is missing, Salahud-Din's burglary conviction should be reversed.

An information is constitutional under article I, section 22 and the Sixth Amendment only if it includes all statutory and nonstatutory essential elements of the charged offense. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). The purpose of this rule is to properly notify the defendant of the charges against him and allow him to prepare and present a defense. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). A challenge to the constitutional sufficiency of an

information may be raised for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102-03, 812 P.2d 86 (1991).

In charging burglary, the ownership or occupancy of the premises allegedly broken into must be charged so as to negate the defendant's right to enter. State v. Klein, 195 Wash. 338, 341, 80 P.2d 825 (1938). The state charged the defendants in Klein with second degree burglary. Klein, 195 Wash. at 339. At the time, Rem. Rev. Stat., § 2579 [P.C. § 8772] defined second degree burglary as:

Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime [sic] therein, shall break out of, any building or part thereof, or a room or other structure [sic] wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years.

Klein, 195 Wash. at 340.⁵

In pertinent part, Klein and his co-defendant were charged as follows:

⁵ The statute at issue in Talley's case, RCW 9A.52.030(1), provides:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

[the defendants] . . . did wilfully, unlawfully and feloniously, and with the intent to commit some crime therein, to-wit: larceny, break and enter a building, to-wit: The Tradewell Store building. [sic] located at 2813 Colby avenue, . . . managed by one John Bird . . . said building being a building in which property was then and there kept for use, sale or deposit.

Klein, 195 Wash. at 339.

The Klein court, relying on authority holding occupancy and not ownership of the building was the essential element, as well as cases holding a person in direct management of a building is in law the occupant, found the information sufficient to charge burglary. Klein, 195 Wash. at 341-42.

What the Klein court essentially held was the information must provide notice that a person or entity has a possessory interest in the burglarized premises superior to that of the accused. Alleging someone other than the defendant owned or occupied the burglarized premises is a common way of articulating this superior interest.

Illustrative is State v. Schneider, 36 Wn. App. 237, 673 P.2d 200, 204 (1983). Schneider argued she could not be convicted of burglarizing her estranged husband's residence because it was community property. Schneider, 36 Wn. App. at 240. Citing Klein, this Court held it had long been Washington law that "burglary was designed to protect the dweller,

and, hence, the controlling question here is occupancy rather than ownership." Schneider, 36 Wn. App. at 241.

Other cases demonstrate this jurisprudential history as well. See State v. Knizek, 192 Wash. 351, 352, 73 P.2d 731 (1937) (information that alleged accused broke and entered warehouse "belonging to the Union Oil Company of California," was sufficient to show the warehouse belonged to someone other than defendant); State v. Burke, 124 Wash. 632, 633, 215 P. 31 (1923) (information alleging burglary committed breaking and entering in the nighttime "the First Bank of White Bluffs, in Benton county, Wash.," sufficient to charge burglary although owner of bank not named); State v. Franklin, 124 Wash. 620, 623, 215 P. 29 (1923) (information charging defendant with breaking and entering a bank, post office, railway express or railway mail car, provided sufficient notice despite failing to specify owner).

These cases establish an information charging burglary must include language that indicates someone or something held a possessory interest in the burglarized property superior to that of the defendant. The information charging Salahud-Din does not do that. It is, therefore, constitutionally insufficient.

This result obtains despite a change in the burglary statutes. See, e.g., State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144 (2007) (Just as courts did at common law, modern statutes treat burglary as an offense against habitation and occupancy rather than ownership of property).

An information must still charge ownership or occupancy of the burglarized premises. Unlike in Klein, where the state alleged John Bird managed, i.e., occupied, the building at issue, the information in Salahud-Din's case asserts Salahud-Din "did enter and remain unlawfully in a building, located at 4180 42nd Avenue NE, Seattle" No owner or occupant is mentioned. Therefore, the information fails to negate Salahud-Din's right to enter.

The state may claim the "did enter and remain unlawfully" language sufficiently apprised Salahud-Din he had no right to enter the premises. This argument would likely be based on RCW 9A.52.010(3), which provides, "A person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain."

When the Court decided Klein, there was no statutory counterpart to RCW 9A.52.010(3). Nevertheless, Rem. Rev. Stat. § 2063 provided terms not defined by law were to be construed according their common

usage. Klein's information stated Klein and a cohort "unlawfully . . . enter[ed] a building" Klein, 195 Wash. at 339. "Unlawful entry" is defined as "The crime of entering another's property, by fraud or other illegal means, without the owner's consent." Black's Law Dictionary 1536 (7th ed. 1999). Therefore, the combination of Rem. Rev. Stat. § 2063 and the common definition of "unlawful entry" is essentially the same as RCW 9A.52.010(3).

The Klein court nevertheless found use of the words "unlawfully . . . ent[ered]" did not obviate the need to allege an ownership or occupancy interest in the building entered. This reasoning has not changed and Salahud-Din's information was constitutionally deficient for failing to allege ownership or occupancy in the "building located at 12217 15th Avenue Court East [.]"

Salahud-Din did not challenge the language of the information before the verdict. When such is the case, the sufficiency of the information is to be construed liberally and will be found sufficient only if (1) the required elements appear in any form or can be found by fair construction of the face of the information; and, if so (2) the defendant can nevertheless show he was actually prejudiced by the language used. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If the missing

elements are not found or cannot fairly be implied, prejudice is assumed and dismissal without prejudice is the proper remedy. McCarty, 140 Wn.2d at 425-26, 428.

A liberal reading of Salahud-Din's information fails to reveal, by implication or otherwise, the essential elements of ownership or occupancy of 4180 42nd Avenue NE, Seattle. Dismissal without prejudice is therefore warranted.

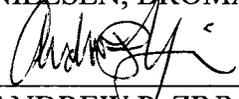
D. CONCLUSION

The state violated Salahud-Din's constitutional rights under article I, section 22 and the Sixth Amendment, as well as his right under CrR 2.1(a)(1), by charging him with second degree burglary without alleging the essential element of the ownership or occupancy of the burglarized building. Salahud-Din respectfully requests this Court to reverse and dismiss his conviction without prejudice.

DATED this 13 day of July, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62791-1-I
)	
AZIZUNDDIN SALAHUD-DIN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AZIZUNDDIN SALAHUD-DIN
 DOC NO. 631354
 WASHINGTON CORRECTIONS CENTER
 P.O. BOX 900
 SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JULY, 2009.

x Patrick Mayovsky

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