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COURT OF APPEALS #1
STATE OF WASHINGTON
2009 OCT 21 11 45 54

No. 63038-5-1

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

STATE OF WASHINGTON

Respondent,

v.

GORDON WILLIAMS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. STATEMENT OF THE CASE IN REPLY.

Mr. Williams was convicted of one count of felony violation of a court order pursuant to RCW 26.50.110(1), (5). In order to convict Mr. Williams of a felony violation of a court order, the State had the burden of proving beyond a reasonable doubt that:

- (1) That on or about August 2, 2008, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew the existence of that order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) *That the defendant has twice been convicted for violating the provisions of a court order,* and
- (5) That the defendant's acts occurred in the State of Washington.

RCW 26.50.110(1), (5) (emphasis added)

The State sought to prove Mr. Williams had been twice convicted for violating provisions of a court order by presenting certified copies of judgments and sentences from Bainbridge Municipal Court. Exhibit 5, 6. Defense counsel sought to strike the prior convictions based, in part, on the lack of "independent evidence that the person whose former conviction is proved is the defendant in the present action." CP 18, 1/14/08 RP 20. The State admitted it was not prepared to present evidence to prove Mr. Williams was the same person named in the prior convictions. The

court ruled the State was not required to present independent identification evidence at trial where the defense did not give prior notice of its challenge of the convictions. 1/14/08 RP 23-25. However, the trial court conceded the issue could be revisited if Mr. Williams was convicted. 1/14/08 RP 23-25.

In his appeal, Mr. Williams argues there was insufficient evidence to support his conviction of felony violation of a court order because the State failed to meet its burden of producing independent evidence that he was the same person named in the prior convictions entered into evidence. The State argues that identical names is sufficient proof of a prior conviction unless Mr. Williams had declared under oath he was not the same person. Respondent's Brief at 7. The State's argument, if accepted, violates Mr. Williams' constitutional rights to due process.

B. ARGUMENT IN REPLY.

**THERE WAS INSUFFICIENT EVIDENCE TO
CONVICT MR. WILLIAMS OF FELONY
VIOLATION OF A COURT ORDER.**

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The guarantees of due process of

law contained in article 1 § 3 of the Washington Constitution¹ and the 14th Amendment of the federal constitution demand before an accused is convicted of a crime the State must prove “beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged.” Sandstrom v. Montana, 442 U.S. 510, 523, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (citing In re Winship, 397 U.S. at 364); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

The State relies on State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986) to argue that identity of names is sufficient proof of a prior conviction that may be rebutted by the defendant’s declaration under oath that he is not the same person in the prior conviction. Respondent’s Brief at 7. The State’s reliance on Ammons is misplaced. First, as recognized by the State, Ammons dealt with challenges to prior convictions in a sentencing determination. Respondent’s Brief at 7-8. In Ammons, the Washington Supreme Court held that, for purposes of sentencing the State must prove prior convictions by a preponderance of the evidence. 105 Wn.2d at 185-86. Ammons does not stand for the proposition that the standard of proof is lower than beyond a

¹ Art. 1, § 3 provides, “No person shall be deprived of life, liberty or property without due process of law.”

reasonable doubt where prior convictions are an essential element of the charged offense.

The State does not explain why this Court should ignore Mr. Williams' constitutional right to require the State to prove every element of the charged crime beyond a reasonable doubt. Instead, the State argues this Court should apply the lower standard of proof declared in Ammons in determining whether the certified copies of the judgments and sentences was sufficient evidence Mr. Williams had two prior convictions of violating a court order. Respondent's Brief at 8-9. The State asserts the "analysis [of Ammons] was adopted recently by the Court of Appeals in Division 2 in the context of sufficiency of evidence produced at trial for a felony violation of a court order" citing State v. Wofford, 148 Wn.App. 870, 201 P.3d 389 (2009). Respondent's Brief at 8. The Court should disregard this argument as the State's sole authority is based upon an unpublished portion of the Wofford decision in violation of GR 14.1.²

² A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.

Mr. Williams is also filing a motion to strike a portion of the State's brief based on its citation to an unpublished decision.

Identity of names in a prior judgment and sentence alone is not sufficient proof of identity of the person charged. Where a prior conviction is an essential element of the charged crime:

The record of a former conviction is not sufficient alone to show that defendant in the present prosecution was formerly convicted. *It must be shown by evidence independent of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution.* The state has the burden of producing evidence to prove such identity.

State v. Harkness, 1 Wn.2d 530, 542-43, 96 P.2d 460 (1939) citing Underhill's Criminal Evidence (4th ed.) 1500, § 829. (emphasis added)

Harkness remains good law and as, Mr. Williams argued in his opening brief, is still cited as authority in cases where criminal liability depends on the accused's being the person to whom a document pertains. In State v. Huber, the defendant was convicted of bail jumping. 129 Wn.App. 499, 501, 119 P.3d 388 (2005). The State offered certified copies of an information charging the defendant with witness tampering and violating a protection order; an order for the defendant to appear in court; clerk's minutes indicating he failed to appear at the hearing; and a bench warrant for his arrest. Id. at 500-01. The conviction was

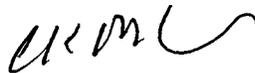
reversed because the documents were insufficient to support a finding that the Wayne Huber named in the State's exhibits is the same Wayne Huber on trial. Id. at 504. Citing Harkness, the court held that the State must show "by evidence independent of the record," that the person named therein is the defendant in the present action. Id. at 502 citing Harkness, 1 Wn.2d at 543. In its response, the State does not address Harkness or Huber.

Mr. Williams' right to due process of law under the state and federal constitution was violated because the evidence was insufficient to support his conviction.

C. CONCLUSION.

Based on the aforementioned reasons and his opening brief, Mr. Williams respectfully requests this Court to reverse his conviction.

Respectfully submitted this 21st day of October, 2009.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 63038-5-I
)	
GORDON WILLIAMS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **REPLY 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:

[X] RISA WOO, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF OCTOBER, 2009.

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