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No. 63947-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID LEE SMITH,

Appellant.

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

The Honorable Mary I. Yu

APPELLANT'S OPENING BRIEF

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2010 MAR 29 PM 4:55

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A. ASSIGNMENTS OF ERROR

1. In Mr. Smith's jury trial on four counts of personal and telephonic violation of a no-contact order, the trial court erred and violated the defendant's due process rights by entering judgment on a verdict not supported by sufficient evidence.

2. The State failed to prove the defendant's offender scores at sentencing.

3. The trial court erred in denying the defendant's pre-trial motion to dismiss his attorney.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred and violated the defendant's due process rights by entering judgment on a verdict not supported by sufficient evidence, where there was inadequate evidence that the defendant knew of the no-contact order supposedly restricting his contact with Christina Smith.

2. Whether the State failed to prove the defendant's offender scores when it failed to show the Washington felony comparability of a prior California conviction.

3. The trial court erred in denying the defendant's motion to dismiss his attorney without conducting an adequate inquiry into the defendant's factual contentions.

C. STATEMENT OF THE CASE

According to the State's allegations, Mr. Smith was subject to two different orders of protection prohibiting contact with his estranged wife Christina Smith, and had two prior convictions for violating court orders. CP 2, 26. One order was later deemed not in effect, but Smith was, however, present at her address on November 16, 2008, where he attempted to gain entry to the residence through the front door; Ms. Smith denied entry to him during several conversations. He protested to the arresting officer that there was "no order with Christina." 5/12/09RP at 86-87. He later telephoned Ms. Smith several times while in custody after being arrested. 5/13/09RP at 123-29.

At sentencing following a jury trial, the court imposed 60 months incarceration on each count, the terms to run concurrently. 6/26/09RP at 10. This was based on offender scores of 9. CP 101-09.

Mr. Smith appeals. CP 110.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT MR. SMITH KNEW OF THE EXISTENCE OF THE NO-CONTACT ORDER.

Evidence is sufficient as required by the 14th Amendment's Due Process Clause if, when viewed in the light most favorable to the State, any reasonable trier of fact could find guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); U.S. Const. amend. 14. When a criminal defendant challenges the sufficiency of the evidence, he admits the truth of the States evidence, and all reasonable inferences therefrom are drawn in favor of the State. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

The essential elements of violating a no-contact order include knowledge by the accused of the order in question. State v. Clowes, 104 Wn. App. 935, 934, 18 P.3d 596 (2001); RCW 26.50.110(1); see also State v. Phillips, 94 Wn. App. 829, 833, 874 P.2d 1245 (1999).

The State failed to prove this element. The State had a police officer testify about the contents of the order, including that it

stated it applied to one "David Smith." 5/12/09RP at 92. However, although the document entitled "Order Prohibiting Contact" was submitted as State's exhibit 3, this document was signed with the common name "David" or "Daniel" Smith, depending on how one views the handwriting. The document's caption has the typed name of the apparent defendant crossed out, and has "David Smith" written in by hand. Supp. CP ____, Sub # 71 (State's Exhibit 3).

The State produced no evidence linking this document of inadequate evidentiary weight to any proceeding in which the defendant was made aware of the order alleged to be violated in the present case. Furthermore, other evidence in the case, including the fact that the defendant told an arresting police officer that there was no order in place regarding Ms. Smith, left in fact increased uncertainty that this defendant knew of this particular order at all. These facts at a minimum fail to bolster any argument that there was evidence at trial that the defendant knew of this order.

Notably, the actual absence of knowledge of this order is further supported by the fact that it is clear there was some other

order of protection naming the complainant that the State also included in the original information, but later agreed was invalid and did not make a part of its trial evidence. See CP 2, 26, 5/13/09RP at 143.

Knowledge is an essential element of the crime charged against Mr. Smith. See also State v. Snapp, 119 Wn. App. 614, 82 P.3d 252, review denied, 152 Wn.2d 1028 (2004). The required knowledge of the court order is shown by evidence, for example, that the defendant was sent the order. State v. Van Tuyl, 132 Wn. App. 750, 133 P.3d 955 (2006). But where – as here – sufficient evidence of knowledge is not adduced at trial to support a charge of violation of a court order, the conviction must be reversed. State v. Arthur, 126 Wn. App. 243, 109 P.23d 169 (2004).

2. THE STATE FAILED TO PROVE THE DEFENDANT'S OFFENDER SCORE.

An offender score is derived from the defendant's criminal history using prior convictions and the seriousness level of the current offense. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The out-of-state convictions are classified according to the comparable Washington offense. Id. (citing RCW 9.94A.525(3)).

Federal convictions are similarly classified. Id. at 229 n. 2, 95 P.3d 1225. Generally, “the State bears the burden to prove by a preponderance of the evidence the existence and comparability of a defendant's prior out-of-state conviction.” Id. at 230, 95 P.3d 1225 (citing State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999)).

Here, the State failed to prove the comparability of a foreign conviction from California that is plainly under a broader foreign statute. The defendant's judgment and sentence lists a prior crime of “Transport/Sell/Narc/Cont Sub” which can only be California's Health and Safety Code § 11379, which is a portion of California's adoption of the Uniform Controlled Substances Act, defining offenses involving the "Transportation, sale, furnishing, etc." of certain substances. CP 101.

But the statute in question is on its face broader than any Washington felony drug offense, including as it does a wider definition of controlled substances and a wider scope of prohibited activity than any Washington felony crime. The mere citation to this offense in the judgment and sentence is inadequate to prove comparability. An out of state conviction may not be used as a

prior offense unless the State proves by a preponderance of the evidence that the conviction would be a felony offense in Washington, including by its actual conduct of commission, if the foreign statute is broader. See In re Pers. Restraint of Lavery, 154 Wn.2d 249, 252, 111 P.3d 837 (2005) (citing State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)).

The best evidence of a prior conviction is a certified copy of the judgment, but the State may also introduce other comparable documents. Ford, 137 Wn.2d at 480. Here, the State introduced nothing to show the existence of a comparable foreign conviction, requiring reversal of the defendant's sentence. State v. Gill, 103 Wn. App. 435, 13 P.3d 646 (2000).

3. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE HIS ATTORNEY.

Prior to trial, Mr. Smith sought new appointed counsel, specifically alleging that there had been inadequate performance, and a breakdown in communication with his current attorney. 3/5/09RP at 2. His counsel, Micheline Murphy, confirmed that Mr. Smith had been unwilling to speak with her since February 19.

3/5/09RP at 4. The court denied the motion for substitute counsel.

3/5/09RP at 4; CP 5.

It is true that as a rule, a defendant's wholly conclusory claim of ineffective assistance or breakdown in communications is insufficient to require the appointment of substitute criminal trial counsel. State v. Rosborough, 62 Wn. App. 341, 346-47, 814 P.2d 679 (1991).

However, the trial court is required to conduct a thorough examination of the circumstances raised by the defendant to determine whether new counsel should be appointed. State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982); Rosborough, 62 Wn. App. at 346-47.

This rule has been applied where defendants made factual allegations including: a breach of the attorney-client relationship by passing confidential information to the prosecutor, Dougherty, 33 Wn. App. at 467-68; failing to call certain witnesses, Rosborough, 62 Wn. App. at 347; State v. Allen, 57 Wn. App. 134, 141, 787 P.2d 566 (1990); or failing to investigate viable defenses. State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244 (1990).

The trial court in this case failed in its duty to conduct a thorough examination to determine whether substitute counsel should be appointed. In his complaints to the trial court, Mr. Smith noted that counsel had ignored a serious issue of possible interference with the defendant's mail and possibly with his relationship with his lawyer, and in general that there had been a serious breach of trust between himself and his lawyer. 3/5/09RP at 2.

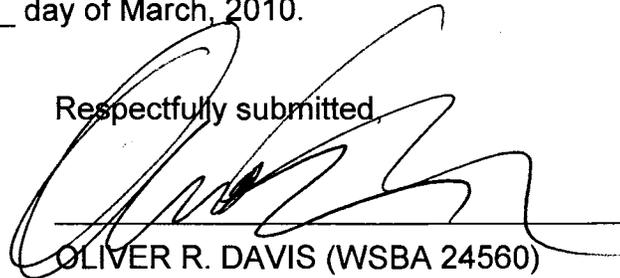
Plainly, genuine factual issues were raised by Mr. Smith's contentions. Where the record raises significant factual issues, as here, it was an abuse of discretion by the trial court to decline to appoint new counsel without conducting an even minimal examination into the defendant's concerns. State v. Young, 62 Wn. App. 895, 907-08, 802 P.2d 829 (1991). This Court should reverse the defendant's conviction. Young, 62 Wn. App. at 907-08.

E. CONCLUSION

For the reasons stated, Mr. Smith submits this Court must reverse his conviction and sentence.

DATED this 30 day of March, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "O. R. Davis", is written over a horizontal line.

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