

No. 35350-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SHAJUANDA SIMONE TATE,

Appellant.

FILED
BY [Signature]
DATE 11/14/07
COURT OF APPEALS
DIVISION II
SEATTLE, WASHINGTON

On Appeal from the Pierce County Superior Court
Cause No. 06-1-02151-9
The Honorable Waldo Stone, Judge Pro Tem

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Appellant intended to assault the arresting officer.
2. The trial court abused its discretion when, as a condition of Appellant's suspended sentence, it ordered that Appellant sell her truck.

B. Issues Pertaining to the Assignments of Error

1. Did the State fail to prove that Appellant intended that her foot contact the arresting officer's head, where the evidence establishes only that Appellant was flailing her legs and arms in an attempt to fight off the attacking police dog?
(Assignment of Error 1)
2. Did the trial court abuse its sentencing discretion when it ordered Appellant to sell her truck as a condition of a suspended sentence, where the order is intended to be a "symbolic" lesson and bears no relation to providing restitution to a victim nor to preventing future crimes?
(Assignment of Error 2)

II. STATEMENT OF THE CASE

A. Procedural History

The State charged Shajuanda Simone Tate by Information with one count of third degree assault (RCW 9A.36.031(1)(g)), attempting to elude a pursuing police vehicle (RCW 46.61.024(1)), and driving with a suspended or revoked license in the first degree (DWSL) (RCW 46.20.342(1)(a), a gross misdemeanor). (CP 1-2) The jury convicted as charged. (CP 5-7; 08/30/06 RP 2)¹ The trial court sentenced Tate to the high end of the standard range on the two felony convictions (assault and attempting to elude), to run concurrently. (09/08/06 RP 20; CP 33) The court sentenced Tate to 12 months on the DWSL misdemeanor conviction, to run consecutively to the felony sentence. (CP 33, 40, 42-43; 09/08/06 RP 20) The court suspended half of the misdemeanor sentence, and imposed financial conditions, as well as a condition that Tate sell her truck. (CP 43; 09/08/06 RP 21)

B. Substantive Facts

While on duty with his police dog in the early morning hours of May 10, 2006, Officer James Syler observed a dark truck

¹ Citations to the transcripts in this case will be to the date of the proceeding followed by the page number.

potentially speeding in the South Tacoma Way neighborhood. (08/29/06 RP 11, 28) He ran a record check on the truck, and learned that its registered owner, Shajuanda Tate, had a suspended license. (08/29/06 RP 11) Based on this information, Officer Syler activated his overhead lights and initiated a traffic stop. (08/29/06 RP 11-12) The driver identified herself as Shajuanda Tate, and told the officer that the vehicle belonged to her. (08/29/06 RP 12-13)

Officer Syler told Tate that she was under arrest, but Tate immediately turned on the ignition and sped away. (08/29/06 RP 14, 48) Officer Syler and a second unit began to pursue Tate; both units had their sirens and lights activated. (08/29/06 RP 15, 51) The pursuit continued for approximately 14 blocks, and reached speeds in excess of 80 miles-per-hour. (08/29/06 RP 15, 16) Eventually, Tate's truck slowed down, and Tate and her female passenger jumped out and began to run away on foot. (08/29/06 RP 16, 70-71) Officer Syler stopped and exited his patrol car, and yelled at Tate to stop or he would send his dog after her. (08/29/06 RP 18)

Tate kept running into a residential yard, so Officer Syler released his dog and it chased after Tate. (08/29/06 RP 18-19, 20)

Officer Syler followed, and when he rounded the corner he saw Tate trying to climb a fence and saw his dog bite her leg and pull her down. (08/29/06 RP 20) Officer Syler ordered Tate to show her hands, but Tate lay on the ground struggling with the dog. (08/29/06 RP 20)

Officer Syler grabbed the dog and ordered it to release Tate. (08/29/06 RP 20-21) After the dog released its grip, Tate rolled over, flailing her arms and legs. (RP08/29/06 RP 21, 38) Tate's right foot kicked Officer Syler in the head, so he released the dog and punched Tate in the mouth, while the dog bit Tate in the arm. (08/29/06 RP 21, 37) Officer Syler ordered Tate to stop struggling, and she did. (08/29/06 RP 22) Officer Syler did not suffer any injury, but said he felt a sharp pain when he was kicked. (08/29/06 RP 21, 23)

Tate testified on her own behalf at trial. She did not deny that she was driving with a suspended license and that she did attempt to elude Officer Syler. (08/29/06 RP 69, 70, 82, 86) However, she denied that she kicked or attempted to kick Officer Syler. (08/29/06 RP 75, 77, 80) She testified that she was struggling to get the dog off of her because she was scared and in serious pain from the dog bite. (08/29/06 RP 74, 75, 81) She

testified that Officer Syler punched her in the mouth two times, and that she suffered a swollen lip and dental injuries as a result. (08/29/06 RP 80, 86)

III. ARGUMENT & AUTHORITIES

A. The State failed to present sufficient evidence to establish that Tate intended to kick Officer Syler.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only 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. 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.

The State charged Tate with third degree assault under RCW 9A.36.031(1)(g), which states:

A person is guilty of assault in the third degree if he or she . . . [a]ssaults a law enforcement officer or other

employee of a law enforcement agency who was performing his or her official duties at the time of the assault[.]”

The court gave the following instruction defining assault:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. . . .

An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented....

(CP 17)

Accordingly, to convict Tate of third degree assault, the State had to establish that she intended to kick Officer Syler. “A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). The State’s evidence does not establish that Tate acted with the objective to kick Officer Syler.

Tate was lying on her side while the police dog had a hold of her leg with his teeth. (RP 20, 22) Officer Syler and Tate both testified that Tate was on the ground struggling to get away from the dog. (RP 20, 34, 74) When he ordered the dog to release Tate, she immediately rolled over and flailed her arms and legs.

Officer Syler testified that the kick happened immediately as she rolled over. (RP 21, 35, 38, 41)

This testimony does not establish beyond a reasonable doubt that, in the split-second after she rolled over after the dog released her leg, Tate formed the intent to kick Officer Syler. She was lying on her side and likely could not even see where Officer Syler was standing, and then rolled over while flailing her legs and arms. There is no evidence from which a reasonable juror could conclude that the flailing was an attempt to strike or injure the officer. Rather, at most the evidence establishes that, in her efforts to get free from the dog, Tate's foot accidentally contacted the officer's head. This is not sufficient to establish that Tate intentionally assaulted Officer Syler, and Tate's third degree assault conviction must be reversed.

B. The trial court erred when it ordered Tate to sell her truck as a condition of her suspended sentence.

The trial court entered the following condition regarding Tate's suspended sentence for DWSL: "Truck must be commercially sold (i.e., for fair value and not as a sham sale to family member/friend)." (CP 43) The court orally explained his reason for this condition:

I will order as a condition of the six-months suspended that the truck be commercially sold. And I realize when judges order vehicles to be sold they don't always say "commercially," but people can play games, they can sell it to a sister or brother-in-law or a cousin and then everyone knows it's really Shajuanda's truck. I'm ordering that that be – when I say "commercially sold," I mean not necessarily to a dealer but for whatever it's worth, a fair value, and that you have absolutely no vehicle and you learn to ride the bus or walk or ride a bicycle wherever you're going. . . .

(09/08/06 RP 21) When defense counsel asked the court to reconsider the condition, and pointed out that Tate may be able to reinstate her driving privileges within months of her release from prison (09/08/06 RP 23-24), the court states:

No. Absolutely the truck is ordered sold. I think it's something for real. It's also symbolic that we mean business, we're not simply playing games and going through the paperwork that we go through. We're in the real world. I appreciate your bringing that to my attention, but I've made my decision.

(09/08/06 RP 24)

Under RCW 9.92.060(1) the sentencing court may stay and suspend a misdemeanor sentence "upon such terms as the court

may determine.”² This statute authorizes a court to suspend a sentence upon conditions which bear a reasonable relation to the defendant's duty to make reparation, or as tend to prevent the future commission of crimes. *County of Spokane v. Farmer*, 5 Wn. App. 25, 486 P.2d 296 (1971); *State v. Summers*, 60 Wn.2d 702, 375 P.2d 143 (1962).

For example, in *Summers*, the court upheld a requirement that the defendant convicted of manslaughter pay the victim's funeral expenses, but not child support to the defendant's own children because this condition did not compensate the victims nor did it tend to prevent the future commission of crimes. 60 Wn.2d at 707. In so holding, the *Summers* Court quoted an Arizona Supreme Court case where support of a child beyond majority was held void as a condition of a suspended sentence:

“We are reluctant indeed to interfere with the discretion exercised by the trial court in imposing conditions on a suspension of a sentence, and shall uphold any such conditions which on any reasonable theory tend to cause a defendant to make reparation for any crime which he may have committed, or to restrain him or others from the commission in the

² RCW 9.92.060(1) provides, in relevant part:

Whenever any person is convicted of any crime . . . the superior court may, in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by the superior court . . . upon such terms as the superior court may determine.

future of other crimes; but where the condition has no bearing on either of these two matters, but relates only to a future moral and not legal obligation, we think it is an abuse of the discretion vested in the trial court to fix such condition in the first place, or to revoke the suspension of sentence theretofore granted for no other reason than a failure on the part of defendant to fulfill the illegal condition. . . ."

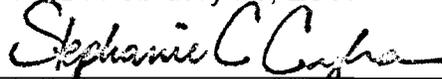
Summers, 60 Wn.2d at 707-08 (quoting *Redewill v. Superior Court of Maricopa Cy.*, 43 Ariz. 68, 29 P.2d 475, 480 (Ariz. 1934)) (emphasis added).

In this case, the purpose of the order to sell the truck is not to prevent future crimes because, as defense counsel pointed out, Tate may be able to reinstate her driver's license soon after release. (09/08/06 RP 23-24) As a result, driving the truck or any other vehicle would not be a crime. Instead, the purpose is "symbolic", and meant to teach Tate a "moral" lesson separate and apart from punishment, restitution or reparation. As such, the condition is unauthorized and improper, and an abuse of the trial court's discretion. The condition should be struck, and Tate should be resentenced on the DWSL charge. See *Summers*, 60 Wn.2d at 708 (remedy is to reverse judgment and remand to the Superior Court with direction that defendant be resentenced).

IV. CONCLUSION

The State did not establish beyond a reasonable doubt that Tate intended to strike Officer Syler when she was flailing and trying to ward off the attacking police dog. As a result, Tate's conviction for third degree assault should be reversed and dismissed with prejudice. In addition or in the alternative, the court's order that Tate sell her truck was improper and without statutory authority, and Tate should be resentenced.

DATED: February 20, 2007



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CERTIFICATE OF MAILING

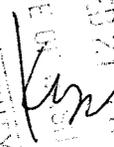
I certify that on 02/20/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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