

COURT OF APPEALS  
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STATE OF WASHINGTON  
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No. 35606-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jesse Eichelberger,**

Appellant.

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Grays Harbor Superior Court

Cause No. 06-1-00392-9

The Honorable Judge James Sawyer

**Appellant's Reply Brief**

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## ARGUMENT

### **I. MR. EICHELBERGER'S CONVICTION WAS BASED ON AN ERROR OF LAW.**

A. Respondent's concessions require reversal for a new trial.

Respondent concedes that a common definition of the term "order" is "a written direction or command delivered by a court..." Brief of Respondent, p. 2. *quoting Black's Law Dictionary*, 7<sup>th</sup> Ed. 1999. Without citation to authority, Respondent suggests that if the legislature had intended this meaning it would have used the language "written order" instead of "order" when it defined "custody" in RCW 9A.76.010. Brief of Respondent, p. 2. Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001).

In fact, the constitutionally-based rule of lenity requires that penal statutes be interpreted in favor of the accused. *State v. Michielli*, 81 Wn.App. 773 at 778, 916 P.2d 458 (1996), *reversed on other grounds at* 132 Wn.2d 229, 937 P.2d 587 (1997). In this case, the correct interpretation requires a written order. As Respondent concedes, this is the "narrow[er] meaning," and thus favors the accused. Brief of Respondent, p. 2. Respondent's fear that judicial proceedings will

descend into chaos is unwarranted. *See* Brief of Respondent, p. 2. Oral pronouncements may be given effect within the courtroom and enforced through the court's contempt power. Courtroom decorum does not require this Court to broaden the reach of the escape statute by interpreting the statute broadly. Nor does a narrow interpretation of the word "order" provide incentive for a defendant to "race" to leave before an order is entered. *See* Brief of Respondent, p. 2. A defendant who violates an oral directive from the bench can expect to be punished through the court's contempt power. Indeed, the court in this case could have found Mr. Eichelberger in contempt when he refused to sit down, when he refused to stay quiet, and when he left the courtroom against the judge's instructions.

Nothing in RCW 10.64.025 requires a contrary result. That statute creates a presumption (that convicted felons will be held in custody pending sentencing) and exonerates bond upon conviction. It does not purport to create a court order placing each convicted defendant in custody pending sentencing. Respondent claims that the statute obviates the need for a written order; however, under Respondent's analysis, no oral order is required either. Brief of Respondent, p. 3. Such an interpretation of the statute would likely violate the constitutional separation of powers. *See, e.g., State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). Even if Respondent is correct (that no order is required to remand a convicted

felon to jail pending sentencing), Mr. Eichelberger would still not have been “restrain[ed] pursuant to a lawful arrest or an order of a court...” as required for a conviction. RCW 9A.76.010.

Without citation to authority, Respondent argues that the trial judge’s testimony that Mr. Eichelberger “was *going to be held*” was sufficient to sustain the conviction. Brief of Respondent, p. 3, *quoting* RP (9-18-06) 54, *emphasis added*. In fact, the judge’s use of the future tense (going to be held) established only that an order would be forthcoming. The testimony did not prove beyond a reasonable doubt that an order had already been issued.<sup>1</sup>

B. This Court should revisit *State v. Breshon*.

As noted in the Opening Brief, *State v. Breshon*, 115 Wn. App. 874, 63 P.3d 871 (2003) violates the rule of statutory interpretation that every word in a statute must be given effect. *Homeowners Association v. Ltd. Partnership*, 156 Wn.2d 696 at 699, 131 P.3d 905 (2006). This Court should revisit *Breshon* and determine whether or not the legislature included superfluous language in RCW 9A.76.110.

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<sup>1</sup> Again without citation to authority, Respondent criticizes Appellant’s summary of the judge’s testimony as “a far-fetched interpretation of the judge’s order [sic].” Brief of Respondent, pp. 3-4. In fact, the future tense is generally recognized to describe future events.

**II. THE EVIDENCE WAS INSUFFICIENT.**

In support of its argument that Mr. Eichelberger knew he was in custody, Respondent cites only circumstantial evidence suggesting that Mr. Eichelberger knew he was going to be restrained by a court order in the near future. Brief of Respondent, p. 6. None of the evidence establishes that Mr. Eichelberger was aware that he was already in custody at the time he left the courtroom. Indeed, even Respondent is only able to say that Mr. Eichelberger “knew he was supposed to remain in the courtroom” (and not that he knew he was ordered to remain in the courtroom.) Brief of Respondent, p. 6.

**CONCLUSION**

For the foregoing reasons, the escape conviction must be reversed and the case dismissed with prejudice.

Respectfully submitted on September 24, 2007.

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CERTIFICATE OF MAILING

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 24, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 24, 2007.

  
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