

NO. 37105-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

EZELL JACKSON,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR	1
ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....	1
B. STATEMENT OF THE CASE.....	1
1. PROCEDURAL HISTORY	1
2. SUBSTANTIVE FACTS.....	2
C. ARGUMENT.....	5
BECAUSE JACKSON’S CONTACT WITH HIS WIFE DID NOT CONSTITUTE A CRIME, HIS CONVICTION MUST BE REVERSED AND THE CHARGE DISMISSED.	5
D. CONCLUSION	8

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	5
<u>State v. Hogan</u> , 145 Wn. App. 210, ___ P.3d ___ (2008)	6, 7

Federal Cases

<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....	5
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Statutes

Former RCW 26.50.110.....	1, 5, 6
Laws of 2007, ch. 173, § 2.....	6
RCW 10.31.100(2)(a)	6

Constitutional Provisions

Const. art. 1, § 3.....	5
U.S. Const. amend. 14	5

custody actually served not exceed the statutory maximum of 60 months. CP 77-78. Jackson filed this timely appeal. CP 93.

2. Substantive Facts

On August 15, 2006, Tyson Sagiao, a law enforcement officer with the United States Department of Homeland Security, was conducting routine patrol at the Social Security Administration Office in Tacoma. 3(A)RP¹ 72-73. He noticed a van pull into the parking lot, and he ran a check on the license plate, looking for warrants and court orders. 3(A)RP 74-75. Sagiao discovered that the registered owner of the van, Ezell Jackson, was the respondent on a no contact order naming Patricia Jackson as the protected party. 3(A)RP 75. He also obtained a physical description of both parties. 3(A)RP 75.

The driver parked the van, and he and a female passenger walked into the building. 3(A)RP 76. Sagiao determined that they matched the physical descriptions of Ezell and Patricia Jackson. 3(B)RP 7. Sagiao followed them inside and saw the man and woman sitting next to each other in the lobby filling out paperwork. 3(A)RP 78. Sagiao stepped back outside to talk to a security guard, and the man and woman came outside shortly thereafter. 3(A)RP 79.

¹ The Verbatim Report of Proceedings is contained in six volumes designated as follows: 1RP—5/3/07; 2RP—5/7/07; 3(A)RP—5/8/07 (a.m.); 3(B)RP—5/8/07 (p.m.); 4RP—5/9/07; 5RP—12/7/07.

Sagiao asked the woman her name and date of birth, and she identified herself as Patricia Jackson, giving the same date of birth as the protected party on the no contact order. The driver then confirmed that he was Ezell Jackson. 3(A)RP 80. Jackson acknowledged that he was not supposed to be with Patricia Jackson, but he explained that they were not really together. 3(A)RP 81.

Sagiao placed Jackson in handcuffs and detained him while he confirmed that the no contact order was valid. 3(A)RP 81. After he was read his rights, Jackson told Sagiao that Patricia Jackson had called him earlier that day asking for a ride to the Social Security office. He also told Sagiao that he had been convicted twice previously for violating the no contact order. 3(A)RP 85. Jackson asked Sagiao to remove Patricia Jackson's identification card from his wallet and give it to her, along with some money and the keys to the van. 3(B)RP 14. Sagiao then took Jackson to jail. 3(A)RP 88.

Jackson was charged with felony violation of a court order, and the case proceeded to trial. Patricia Jackson testified that she is Jackson's wife, but due to the no contact order, he is very reluctant to come near her. 3(B) 36. On August 15, 2006, she was walking down the street when she saw Jackson's van stopped at a red light. Because she had not seen Jackson for months, she jumped into the van. 3(B)RP 36. Jackson told

her to get out of the van, but she refused. The light changed, and Jackson drove around the corner and pulled into the parking lot of the Social Security Administration. When Jackson again told his wife to get out of the van, she threatened to kill herself if he did not talk to her. She knew he would take the threat seriously, because she had attempted suicide in the past. 3(B)RP 37.

Jackson then got out of the van and went inside, and Patricia Jackson followed him. She sat next to him in the office as he filled out paperwork. 3(B)RP 38-39. Jackson did not talk to her, and when he left, she followed him out. 3(B)RP 39-40. When they were outside, an officer came up and asked her name, and Jackson was arrested. 3(B)RP 40.

A copy of the no contact order issued in 2004 was admitted into evidence. Exhibit 1. The state also presented certified copies of the Judgment and Sentence forms from Jackson's two previous convictions for violating the order. 3(B)RP 34. The state presented no evidence that Jackson committed any act or threat of violence, that he contacted his wife at her residence, workplace, school, or daycare, or that he knowingly came within a specified distance of a prohibited location.

C. ARGUMENT

BECAUSE JACKSON'S CONTACT WITH HIS WIFE DID NOT CONSTITUTE A CRIME, HIS CONVICTION MUST BE REVERSED AND THE CHARGE DISMISSED.

In every criminal prosecution, the state must prove beyond a reasonable doubt that the defendant committed the crime charged. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Even viewing all the evidence in this case in the light most favorable to the state, there is no evidence to support Jackson's conviction. Although Jackson was prohibited from having contact with his wife, the contact proved in this case did not constitute a crime.

Former RCW 26.50.110(1), in effect at the time of Jackson's contact with his wife, provided as follows:

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2) (a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

Under subsections (4) and (5), a criminal violation is a felony if it is an assault, if it is reckless and creates a substantial risk of death or serious physical injury, or if the offender has at least two previous convictions for violating a court order. Former RCW 26.50.110.

This Court recently held that the plain language of former RCW 26.50.110(1) criminalizes only contact “for which an arrest is required under RCW 10.31.100(2) (a) or (b).”² State v. Hogan, 145 Wn. App. 210, 218, ___ P.3d ___ (2008). That statute requires an arrest only if a person violates the terms of a protection order by committing acts or threats of violence; by entering a residence, workplace, school, or daycare; or by knowingly coming within a specified distance of a location. RCW 10.31.100(2)(a)³.

In Hogan, a domestic violence protection order prohibited Hogan from contacting Lisa Holloway. While Hogan was serving a jail sentence, however, Holloway visited him four times. Hogan, 145 Wn. App. at 213.

² The statute was amended in 2007, removing the cross-reference to RCW 10.31.100(2). See Laws of 2007, ch. 173, § 2.

³ RCW 10.31.100(2)(a) provides as follows:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person.

Because he had two previous convictions for violating a protection order, Hogan was charged with felony violation of a court order. He initially pleaded guilty, but the trial court granted his motion for arrest of judgment and dismissed the charges on the grounds that the statute criminalized only contact for which an arrest is required. Id. at 214.

This Court affirmed, finding that former RCW 26.50.110(1) was unambiguous, and holding that unless the prohibited contact involved acts or threats of violence or intrusion into a prohibited location, no crime had been committed. Id. at 218-19. Because Hogan did not commit any acts or threats of violence, and because he did not violate any prohibition from contacting Holloway at specific locations, his conduct did not constitute a crime. Id. at 219.

The same is true here. Jackson was seen with his wife in a van and at the Social Security Administration Office. While the evidence would support an inference that Jackson had prohibited contact with his wife, there was no evidence that he committed any act or threat of violence or that he entered or remained in any specific location prohibited by the no contact order. His conduct therefore did not constitute a crime. His conviction must be reversed and the charge against him dismissed. See Hogan, 145 Wn. App. at 220 (affirming dismissal of charge where prohibited contact did not constitute a crime).

D. CONCLUSION

Because the state failed to prove that Jackson committed a crime, his conviction must be reversed and the charge must be dismissed.

DATED this 3rd day of September, 2008.

Respectfully submitted,



CATHERINE E. GLINSKI

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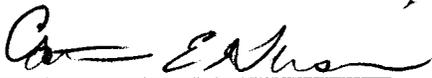
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Designation of Exhibits and Brief of Appellant in *State v. Ezell Jackson*, Cause No. 37105-7-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
September 3, 2008

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