

No. 40018-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jerald Hayter,

Appellant.

STATE OF WASHINGTON
BY  DEPUTY

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FILED
COURT OF APPEALS
DIVISION II

Grays Harbor County Superior Court Cause No. 09-1-00124-6

The Honorable Judge David L. Edwards

Appellant's Reply Brief

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ARGUMENT

I. THE PROSECUTION’S FAILURE TO PROVE A CONSTITUTIONALLY VALID PREDICATE CONVICTION REQUIRES REVERSAL AND DISMISSAL.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A conviction based on insufficient evidence raises a manifest error affecting a constitutional right, and so it may be argued for the first time on review. RAP 2.5(a)(3); *State v. Fleming*, 155 Wash.App. 489, 506, 228 P.3d 804 (2010).

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Id.* The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

The evidence submitted by the prosecution does not even *prima facie* establish a constitutionally valid predicate conviction as required for Mr. Hayter’s Failure to Register charge. The plea form introduced as Exhibit 2 (1) failed to notify Mr. Hayter of the direct consequences of his plea, (2) incorrectly advised Mr. Hayter that he was “presumed innocent

*until the charge(s) is (are) proven beyond a reasonable doubt....,” and (3) improperly warned of the possibility of an exceptional sentence, under procedures since invalidated by *Blakely*. Exhibit 2, CP. See Appellant’s Opening Brief (Corrected Copy) at 7-13 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).*

As with all manifest errors affecting a constitutional right, the state’s failure to prove a constitutionally valid predicate conviction may be raised for the first time on appeal because the error is apparent in the record. RAP 2.5(a)(3); *see also State v. Howe*, 151 Wash.App. 338, 345 n. 5, 350-352, 212 P.3d 565 (2009) (reversing and dismissing Failure to Register for absence of evidence establishing predicate conviction); *State v. Werneth*, 147 Wash.App. 549, 197 P.3d 1195 (2008) (same).

Respondent incorrectly contends that the issue is waived, but does not explain why review is unavailable under RAP 2.5(a)(3). Brief of Respondent, p. 1. Furthermore, the authority upon which Respondent relies does not support Respondent’s argument. Brief of Respondent, p. 1 (citing *State v. Prater*, 30 Wash.App. 512, 635 P.2d 1104 (1981)).

In *Prater*, two brothers challenged the constitutional validity of prior convictions on appeal from a Habitual Offender proceeding. One defendant had raised the issue and made an offer of proof in the trial court; the other had not. The defendant who made the offer of proof prevailed

on appeal; his brother was barred from raising the issue. In *Prater*, the constitutional invalidity of each brother's prior guilty plea was not evident from the record; accordingly, an objection and offer of proof were required to raise the issue.

Here, by contrast, Exhibit 2 affirmatively establishes the constitutional invalidity of Mr. Hayter's prior conviction. Accordingly, the error is manifest and may be reviewed for the first time on appeal. RAP 2.5(a)(3); *Fleming, supra*; see also *Howe, supra*; *Werneth, supra*.

In the absence of sufficient evidence Mr. Hayter's conviction must be reversed and the case dismissed with prejudice. *Howe, at 350-352*; *Smalis, supra*.

II. MR. HAYTER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant rests on the argument set forth in the Opening Brief.

III. MR. HAYTER'S CONVICTION WAS ENTERED IN VIOLATION OF HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Appellant rests on the argument set forth in the Opening Brief.

IV. THE SENTENCING PROCEEDING VIOLATED MR. HAYTER'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION.

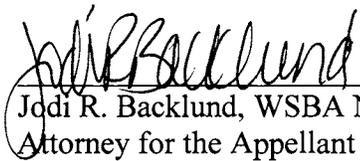
Appellant rests on the argument set forth in the Opening Brief.

CONCLUSION

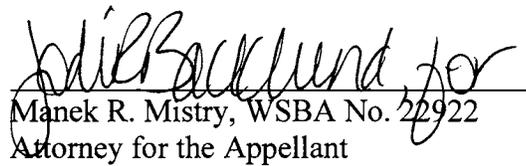
Mr. Hayter's conviction must be reversed. The case must either be dismissed with prejudice or remanded for a new trial. In the alternative, his sentence must be vacated, and the case remanded for resentencing.

Respectfully submitted on October 4, 2010.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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Post Office Box 1899
Airway Heights, WA 99001-1899

and to:

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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 October 4, 2010.

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 October 4, 2010.



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