

PRP
2012/06/13

NO. 42546-7-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NICK TAYLOR ARQUETTE,

Appellant.

BRIEF OF RESPONDENT

MIKE NGUYEN
W.S.B.A # 31641
Deputy Prosecutor
for Respondent

Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080

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I. ISSUE

1. IS THERE SUFFICIENT EVIDENCE TO UPHOLD THE PETITIONER'S PERJURY IN THE SECOND DEGREE CONVICTION IN HIS FIRST CASE WHEN THERE ARE TWO CREDIBLE WITNESSES AND INDEPENDENT CIRCUMSTANTIAL EVIDENCE THAT CONTRADICTED AND OVERCAME THE OATH OF THE PETITIONER AND THE LEGAL PRESUMPTION OF THE PETITIONER'S INNOCENCE?

II. SHORT ANSWER

1. YES. THERE IS SUFFICIENT EVIDENCE TO UPHOLD THE PETITIONER'S PERJURY IN THE SECOND DEGREE CONVICTION IN HIS FIRST CASE BECAUSE THERE ARE TWO CREDIBLE WITNESSES AND INDEPENDENT CIRCUMSTANTIAL EVIDENCE THAT CONTRADICTED AND OVERCAME THE OATH OF THE PETITIONER AND THE LEGAL PRESUMPTION OF THE PETITIONER'S INNOCENCE.

III. FACTS

In March 2009, Gary McKee bought a 1970 Datsun pickup from an acquaintance named Robert Tribble. CP 52-55. When Mr. Tribble failed to deliver the truck, Gary McKee looked for Mr. Tribble at his residence on 25th Avenue. CP 55-56, 140, 143, and 155. Gary McKee went to Mr. Tribble's residence several times and met his roommate, the petitioner, on two or three occasions. Gary McKee did not know the petitioner and had several conversations with him about the pickup. CP 37-40 and 42. Gary McKee saw the pickup at the petitioner's residence

every time he went there, but never took it upon himself to take the pickup. CP 80.

Through the course of his conversations with the petitioner, Gary McKee informed the petitioner that he had bought the pickup from Mr. Tribble. The petitioner informed Gary McKee that he was the owner of the pickup and was willing to give Gary McKee the title to the pickup because Gary McKee paid for the pickup. In exchange for the title, the petitioner required that Gary McKee bring Mr. Tribble to him because the petitioner wanted to tell Mr. Tribble that he was no longer allowed to reside at their residence. The petitioner did not require Gary McKee pay for the pickup and indicated that he would deal with Mr. Tribble about the pickup. The contact between Gary McKee and the petitioner was cordial in nature. CP 57-59 and 76-77.

After a day or two, Gary McKee brought Mr. Tribble to the petitioner. The petitioner told Mr. Tribble that he was no longer allowed at their residence and proceeded to retrieve, sign, and give the title to Gary McKee. CP 60. Gary McKee obtained the title to the pickup without incident. CP 61-621. The title was for a 1970 Datsun pickup, listed the petitioner as the owner, and signed by the petitioner releasing all his interests in the pickup. CP 50, 65-66, 78, 108-110, and 142-143.

A couple of days later, Gary McKee returned to the petitioner's home to retrieve the pickup. The pickup was not in running condition and Gary McKee brought Doyle Ash to tow the pickup. The pickup was parked in the driveway behind the petitioner's other truck. The petitioner moved his other truck and allowed Mr. Ash to tow the pickup. Gary McKee retrieved the pickup without incident. CP 62-64, 72, 77-78, and 85-86. The pickup was towed to Larry McKee's residence. CP 67 and 87. Gary McKee possessed the pickup at all times since towing it from the petitioner's residence. CP 66 and 80-81.

On March 27, 2009, Officer Alan Buchholz of the Longview Police Department contacted the petitioner about his stolen vehicle report. CP 96-100. The petitioner reported that his 1970 Datsun pickup was stolen, indicated that Gary was the likely suspect, and signed the Longview Police Department Incident Report. CP 13-14 and 100-107. Officer Buchholz had no other contact with the petitioner about the pickup and had Officer Charles Meadows of the Longview Police Department take over the investigation. CP 111-112 and 130-131.

On March 29, 2009, Officer Meadows responded to the petitioner's call indicating that the pickup was located in the 200 block of Cypress Street. CP 131-132. Officer Meadows located the unoccupied pickup in a carport for the 269 Cypress Street complex. The manner in

which the pickup was parked was not indicative of it being stolen because the pickup was not covered by a tarp, had its original plates, was parked in a carport of the complex where the alleged suspect might be located, and was clearly visible and easily identified from the alleyway. CP 132-136 and 140. Officer Meadows asked the petitioner to retrieve the pickup and the petitioner asked Officer Meadows to leave the pickup unsecured in the carport. CP 137-138.

Shortly after leaving the pickup, Officer Meadows received a call from Larry McKee asking him why he was at his residence looking at the pickup. CP 139-140. Officer Meadows proceeded to contact Larry McKee at his residence at 269 Cypress Street. CP 140. Larry McKee was upset by the petitioner's vehicle theft allegation and showed Officer Meadows the original signed title to the pickup. CP 141-142. Officer Meadows made a copy of the title and noticed a signature that purported to be the petitioner's signature releasing his ownership of the pickup. CP 142-143.

On April 18, 2009, Officer Meadows contacted the petitioner at his residence in Cowlitz County, Washington State, about his vehicle theft complaint. CP 144 and 155. The petitioner wrote and signed a statement indicating, "That a person, Gary, came by two or three times. One of the times, I found out why he was coming by. He said that he bought a truck

off Rob, then I told him it was not Rob's to sell, it was my truck. Then he said he had already paid for it, and, in parentheses he says a hundred and forty dollars, and he was going to take the truck. Then I told him if you take the truck, I will report the truck stolen. Then, on Thursday night, after I got off work and came home, he was here to get another truck that was his. On Friday evening when I came home from work my truck was gone, and I filed a police report on my truck." CP 150-151. The petitioner made the statement under penalty of perjury and gave it to Officer Meadows during his investigation. CP 14, 149-151, 155, and 169.

Subsequently, Officer Meadows submitted the petitioner's signed Longview Police Department Incident Report to Officer Buchholz on March 27, 2009, the petitioner's signed written statement to Officer Meadows on April 18th, 2009, and the petitioner's signed pickup title to the crime laboratory for analysis. CP 13-16, 100-107, 49-151, 153-155, and 169. The crime laboratory determined and the petitioner subsequently admitted that he had signed the title to the pickup. CP 9, 13, and 169-170.

On October 7, 2009, the petitioner was charged with two counts of perjury in the second degree. CP 169-170. The first count was for the petitioner's signed Longview Police Department Incident Report to Officer Buchholz on March 27, 2009, CP 13-14 and 100-107, and the second count was for the petitioner's signed written statement under

penalty of perjury to Officer Meadows on April 18, 2009. CP 14, 149-151, 155, and 169. The trial court dismissed the first count and the second count was tried to a jury in the Cowlitz County Superior Court on May 5, 2010.

At the jury trial, the petitioner testified that Gary McKee came to his residence on a number of occasions looking for Robert Tribble concerning the petitioner's 1970 Datsun pickup. The petitioner told Mr. McKee that Mr. Tribble was not the owner of the pickup and did not have a right to sell the pickup. The petitioner informed Mr. McKee that he was the owner of the pickup and that the pickup was not for sale. CP 20-23. The petitioner neither sold the pickup nor gave the title of the pickup to Mr. McKee. CP 23 and 25. On or about March 27, 2009, the petitioner got up for work, discovered the pickup was missing, and reported the pickup being stolen. CP 12-14, 24-26, and 30. The petitioner testified that he had signed the title to the pickup and released all interest in the pickup on March 11, 2009, "because there was a gentleman over in Kelso [the petitioner] was talkin' to, and [the gentleman] was interested in it, and [the petitioner] thought it was a potential sell." CP 16.

The jury found the petitioner guilty of perjury in the second degree as charged in count two. The petitioner appealed his conviction and this court in an unpublished opinion, State v. Arquette, No. 40776-1-II, 162

Wash.App. 1025 (2011), affirmed the petitioner's perjury in the second degree conviction.

On December 10, 2010, the State filed an Information, Cowlitz County Superior Court Cause No. 10-1-01249-1, charging the petitioner with one count of perjury in the first degree. The Information alleges that on May 5, 2010, the petitioner falsely testified to (1) the petitioner not selling his vehicle, and/or (2) the petitioner having a replacement title to his vehicle, and/or (3) the petitioner's vehicle being stolen at his jury trial in State v. Arquette, 162 Wash.App. 1025 (2011). CP 1-2.

The petitioner opted for a bench trial in his second case. On August 11, 2011, the Honorable Stephen Warning presided over the petitioner's bench trial. 8/11 RP 10. Judge Warning watched videos of all the witnesses' testimonies in State v. Arquette, 162 Wash.App. 1025 (2011), and had transcripts of all their testimonies. Id. The State's evidence consisted of the signed truck title, Gary McKee's possession of the title, and video testimonies and transcripts of the petitioner, Gary McKee, Doyle Ash, Officer Charles Meadows, and Officer Alan Buchholz. 8/11 RP 10 and CP 8. The petitioner's evidence consisted of video testimonies and transcripts of Christopher Hawkins and Greg Rupert. CP 8. The evidence was stipulated by both parties and was not in dispute. 8/11 RP 11-13 and CP 7-10.

Judge Warning rejected the petitioner's insufficiency of the evidence argument and orally found the petitioner guilty of perjury in the first degree in light of the higher standard needed to convict the petitioner of perjury. 8/11 RP 22-27. However, the trial court did not enter written findings of fact and conclusions of law to reiterate its oral rulings. 8/11 RP 22-38. On August 17, 2011, Judge Warning imposed an exceptional sentence downward and sentenced petitioner to zero days in jail. 8/11 RP 37. The petitioner's standard range sentence for perjury in the first degree is twelve to fourteen months in prison. 8/11 RP 28.

Petitioner appealed Judge Warning's finding that he was guilty of perjury in the first degree in Appeal No. 42546-7-II. In Appeal No. 42546-7-II, the petitioner argued there was insufficient evidence to find him guilty of perjury in the first degree. Appeal No. 42546-7-II is pending because Judge Warning did not enter written findings of fact and conclusions of law; thus, the State asked the second case be remanded back to the trial court for entry of findings as required by CrR 6.1(d) before addressing the petitioner's sufficiency of the evidence argument for his second case.

On January 17, 2012, the petitioner filed a personal restraint petition challenging the sufficiency of the evidence in his first case and asked that his PRP be consolidated with his appeal in the second case.

IV. ARGUMENT

1. **THE PETITIONER'S CONVICTION FOR PERJURY IN THE SECOND DEGREE IN HIS FIRST CASE SHOULD BE AFFRIMED BECAUSE THERE ARE TWO CREDIBLE WITNESSES AND INDEPENDENT CIRCUMSTANTIAL EVIDENCE THAT CONTRADICTED AND OVERCAME THE OATH OF THE PETITIONER AND THE LEGAL PRESUMPTION OF THE PETITIONER'S INNOCENCE.**

“The standard for determining whether a conviction rests on insufficient evidence is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ In re Matter Martinez, 171 Wash.2d 354, 364, (2011). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. “This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury.” Id.

To convict the petitioner of perjury in the second degree, the State must prove beyond a reasonable doubt that (1) on April 18, 2009, the petitioner made a false statement; (2) the petitioner knew the statement was false; (3) the statement was material; (4) the statement was made with intent to mislead a public servant in the performance of his or her duty; (5) the statement was made under oath required or authorized by law; and (6) the acts occurred in the State of Washington. WPIC 118.06.

In addition to the above elements, “there must be either positive testimony of at least two credible witnesses that directly contradicts the [petitioner’s] statement made under oath or there must be one such direct witness along with independent direct or circumstantial evidence of supporting circumstances that clearly overcomes the oath of the [petitioner] and the legal presumption of [petitioner’s] innocence.” WPIC 118.12.

With regards to his first case, the petitioner did not challenge the sufficiency of the evidence in appeal No. 40776-1-II and is raising that issue for the first time in his PRP. The petitioner asks that his PRP be consolidated with his appeal in his second case, appeal No. 42546-7-II. The records submitted for appeal No. 42546-7-II do not include jury instructions read to the jury in the first case. Two of the jury instructions read to the jury in the first case were WPIC 118.06 and WPIC 118.12. The lack of records pertaining to the jury instructions is not material because the record submitted in the second case is sufficient to address the issue raised by the petitioner in his PRP.

Based on the petitioner’s PRP brief, it appears he is not challenging sufficiency of the evidence as it relates to elements 3, 4, 5, and 6 of WPIC 118.06. The only issue raised by the petitioner is whether there was sufficient evidence to prove that he knowingly made a false statement

relating to elements 1 and 2 of WPIC 118.06. The evidence presented to the jury in his first trial was sufficient to prove that the petitioner knowingly made a false statement and the jury correctly found the petitioner guilty of perjury in the second degree.

The evidence presented to the jury in the petitioner's first case met the requirements needed to convict the petitioner of the perjury in the second charge. Not only were there two credible witnesses who directly contradicted the petitioner's knowingly false statement of his pickup being stolen, but there was also independent direct or circumstantial evidence of supporting circumstances that clearly overcame the petitioner's false statement.

Gary McKee interacted with the petitioner, received the signed title from the petitioner, and was told by the petitioner that he could take the pickup. Doyle Ash went with Gary McKee to retrieve the pickup from the petitioner's residence. The petitioner voluntarily moved his other pickup to allow Mr. Ash to tow the pickup to Larry McKee's residence. Gary McKee obtained possession of both the signed title and the pickup without incident. Both Gary McKee and Doyle Ash are credible witnesses with direct evidence of circumstances that clearly contradicted the petitioner's knowingly false statement of the pickup being stolen.

In addition, circumstantial evidence uncovered by Officer Meadows during his investigation further supported Gary McKee's story of purchasing the pickup and clearly overcame the petitioner's knowingly false statement of the pickup being stolen. The petitioner signed the original title releasing all his interests in the pickup. Gary McKee possessed both the original signed title and the pickup at all times leading up to the jury trial.

The manner in which the pickup was stored indicated that the pickup was not stolen because the pickup had its original plates, was not concealed, was parked in a carport of Larry McKee's residence, and was easily identified and located within the alleyway. Larry McKee's action of calling Officer Meadows to inquire why Officer Meadows was at his residence looking at the pickup is not indicative of someone stealing the pickup and wishing to remain undetected to law enforcement officers. The petitioner's request that Officer Meadows leave the pickup unsecured in the location where the alleged thief had left the alleged stolen pickup is not indicative of a person who has had his vehicle stolen.

The evidence presented to the jury in the petitioner's first case met the requirements needed to convict the petitioner of the perjury in the second charge. There was evidence of two credible direct witnesses and independent circumstantial evidence supporting Gary McKee's story of

purchasing the pickup and contradicting the petitioner's knowingly false statement of the pickup being stolen. Therefore, the jury correctly found the petitioner guilty of perjury in the second degree in the petitioner's first trial.

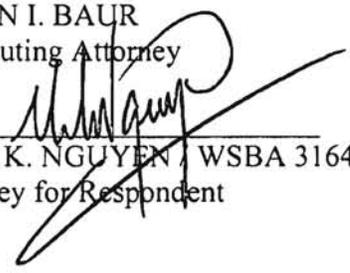
V. CONCLUSION

The petitioner's conviction for perjury in the second degree in his first case should be affirmed because there are two credible witnesses and independent circumstantial evidence that contradicted and overcame the oath of the petitioner and the legal presumption of the petitioner's innocence.

Respectfully submitted this 8 day of June, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By


MIKE K. NGUYEN / WSBA 31641
Attorney for Respondent

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DIVISION II

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STATE OF WASHINGTON

BY MS
DEPUTY

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
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 NICK TAYLOR ARQUETTE,)
)
 Appellant.)
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NO. 42546-7-II
Cowlitz County No.

CERTIFICATE OF
MAILING

I, Michelle Sasser, certify and declare:

That on the 11th day of June, 2012, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, containing Respondent's Brief addressed to the
following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Mr. Jordan Broome McCabe
McCabe Law Office
PO Box 46668
Seattle, WA 98146

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

Dated this 11th day of June, 2012.

Michelle Sasser
Michelle M. Sasser